



THE CITY OF SAN DIEGO

LEASE AND OPERATING AGREEMENT

Between

THE CITY OF SAN DIEGO

and

FIT ATHLETIC - CMR, LLC

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CITY OF SAN DIEGO LEASE AND OPERATING AGREEMENT

THIS LEASE AND OPERATING AGREEMENT (Agreement) is between the CITY OF SAN DIEGO, a California municipal corporation, hereinafter called "CITY," and FIT ATHLETIC - CMR, LLC, hereinafter called "OPERATOR."

SECTION 1: PREMISES/USES

1.1 Premises. CITY hereby leases and conditionally transfers to OPERATOR, and OPERATOR accepts from CITY, that certain real property and operation rights to the improvements on the leasehold situated in the City of San Diego, County of San Diego, State of California; said real property is described on **EXHIBIT A**, and is generally depicted by way of an aerial photo on **EXHIBIT B**. Both EXHIBITS are attached hereto and by this reference made part of this Agreement. Said real property, and all improvements currently located on the real property, is hereinafter called the "premises."

1.2 Uses. It is expressly agreed that the premises are to be used by OPERATOR solely and exclusively for the purposes of operating and maintaining a public swimming pool, and for such other related or incidental purposes as may be first approved in writing by the Mayor, or his/her designee, and for no other purpose whatsoever.

The use of the premises for any unauthorized purpose shall constitute a substantial default and subject this Agreement to termination at the sole option of the CITY.

OPERATOR covenants and agrees to use the premises throughout the term hereof for the above-specified purposes and to diligently conduct the business thereon. Failure to continuously use the premises for said purposes, or the use thereof for purposes not expressly authorized herein, shall be grounds for termination by CITY.

1.3 Related Council Actions. By the granting of this Agreement, neither CITY nor the Council of CITY is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to development or operation of the premises. Discretionary action includes but not limited to rezoning, variances, environmental clearances, or any other governmental agency approvals which may be required for the development and operation of the premises.

1.4 Quiet Possession. OPERATOR, paying the rent and performing the covenants and agreements herein, shall at all times during the term peaceably and quietly have, hold, and enjoy the premises. If during the Agreement term OPERATOR is temporarily dispossessed through action or claim of a title superior to CITY'S, then and in either of such events, this Agreement shall not be voidable nor shall

CITY be liable to OPERATOR for any loss or damage resulting therefrom, but there shall be determined and stated in writing by the Mayor, or his/her designee, a proportionate reduction of the minimum or flat rate rent for the period of periods during which OPERATOR is prevented from having the quiet possession of all or a portion of the premises.

1.5 Easements and Reservations.

- a. CITY hereby reserves all rights, title, and interest in any and all subsurface natural gas, oil, minerals, and water on or within the premises.
- b. CITY reserves the right to grant and use easements or to establish and use rights-of-way over, under, along, and across the premises for utilities, thoroughfares, or access as it deems advisable for the public good.
- c. CITY has the right to enter the premises for the purpose of making repairs to or developing municipal resources and services.

However, CITY shall not unreasonably or substantially interfere with OPERATOR'S use of the premises and will reimburse OPERATOR for physical damages, if any, to the permanent improvements located on the premises resulting from CITY exercising the rights reserved in this section. Such reimbursement may include a reduction in the rent proportionate to the amount of physical damage as determined by CITY. CITY will pay the costs of maintenance and repair of all CITY installations made pursuant to these reserved rights.

1.6 Competent Management. Throughout the term of this Agreement, OPERATOR shall provide competent management of the premises to the satisfaction of the Mayor, or his/her designee. For the purposes of this paragraph, "competent management" shall mean demonstrated ability in the management and operation of a public swimming pool and related activities in a fiscally responsible manner.

1.7 Operation of Facilities. A regular schedule of days and hours of operation shall be established to best serve the public. OPERATOR agrees that the pool shall be open to public use twelve (12) months per year (except for New Year's Day, Thanksgiving Day, Christmas Day, Easter Day, Memorial Day, Independence Day, Labor Day, and regularly scheduled maintenance closure). The following minimum hours shall be observed by OPERATOR: Monday through Friday 6:00 a.m. - 8:00 a.m. and 3:30 p.m. - 8:00 p.m.; Saturday and Sunday 8:00 a.m. - 4:00 p.m.; operating hours for Saturdays during the period from Memorial Day through Labor Day will be 8:00 a.m. - 6:00 p.m. OPERATOR and CITY shall review the minimum established hours of operation annually and mutually agree upon revised hours of operation, if necessary.

1.8 Lifeguard Services. OPERATOR shall provide Lifeguard Services during all of the above-scheduled days and hours of operation of the public swimming pool.

“Lifeguard Services”, as used in this Agreement, shall mean the provision of one or more lifeguards during all scheduled days and hours of Operation of Facilities. All lifeguards shall possess, as minimum qualifications, current certificates from an American Red Cross or YMCA of the U.S.A. lifeguard training program, or have equivalent qualifications, as determined by the California Department of Health Services, and who are trained to administer first aid, including, but not limited to, cardiopulmonary resuscitation in conformance with Section 123725 of California Health and Safety Code and the regulations adopted thereunder, and who have no duties to perform other than to supervise the safety of participants in water-contact activities. “Lifeguard Services” shall also include the supervision of the safety of participants in water-contact activities by lifeguards who are providing swimming lessons, coaching or overseeing water-contact sports, or providing water safety instructions to participants when no other persons are using the Premises unless those persons are supervised by separate lifeguard services.

- 1.9 Rates and Charges. OPERATOR agrees that the rate charge for “pool use” public access shall not exceed Four Dollars (\$4.00) per adult, and Three Dollars (\$3.00) per child 17 years of age and under and senior citizens 60 years and over. Upon obtaining the written consent of the Mayor, or his/her designee, or his authorized representative, which consent shall not be unreasonably withheld, OPERATOR shall be permitted to increase such rates in increments of twenty five cents (.25) to compensate for any increases in the Bureau of Labor Statistics, Consumer Price Index, “All Urban consumers” as published by the United States Department of Labor for Los Angeles/Anaheim/Riverside, CA.

SECTION 2: TERM

- 2.1 Commencement. The term of this Agreement shall be three (3) years commencing on the first day of the calendar month following execution by the Mayor, or his/her designee, and approval by City Attorney (Effective Date).

“Agreement year” as used in this Agreement shall mean the 12-month period following commencement of the Agreement.

- 2.2 Holdover. Any holding over by OPERATOR after expiration or termination shall not be considered as a renewal or extension of this Agreement. The occupancy of the premises after the expiration or termination of this Agreement constitutes a month-to-month tenancy, and all other terms and conditions of this Agreement shall continue in full force and effect; provided, however, CITY shall have the right to apply an increase in rent to bring the rent to fair market value and to terminate the holdover tenancy at will.
- 2.3 Surrender of Premises. At termination of this Agreement for any reason, OPERATOR shall execute and deliver to CITY, within five (5) days after written CITY demand, a valid and recordable quitclaim deed covering all of the premises.

The premises shall be delivered free and clear of all liens and encumbrances and in a decent, safe, and sanitary condition.

If OPERATOR fails or refuses to deliver the required deed, CITY may prepare and record a notice reciting OPERATOR'S failure to execute this Agreement provision, and the notice will be conclusive evidence of the termination of this Agreement and all OPERATOR'S rights to the premises.

SECTION 3: RENT

- 3.1 Time and Place of Payment. All rents required herein must be made payable to the City Treasurer and mailed to the Office of the City Treasurer, City of San Diego, P.O. Box 129030, San Diego, California, 92112-9030, or delivered to the Office of the City Treasurer, Civic Center Plaza, 1200 Third Avenue, First Floor, San Diego, California.

The place of payment may be changed at any time by CITY upon thirty (30) days' written notice to OPERATOR. Mailed rental payments shall be deemed paid upon the date such payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed paid upon actual receipt by the City Treasurer. OPERATOR assumes all risk of loss and responsibility for late payment charges if payments are made by mail.

- 3.2 Rent.

- a. Monthly Rent shall be payable monthly, in advance to CITY, on or before the first day of each month. The Monthly Rent for each month during the Term of this Agreement shall be One Hundred Dollars (\$100).
- b. Monthly Reimbursement – Lifeguard Services. As consideration for the Lifeguard Services provided by OPERATOR, CITY shall reimburse OPERATOR in the amount of Seventy Three Hundred Dollars (\$7,300) per month during the Term ("Lifeguard Services Reimbursement"). No late fees, interest charges or adjustments based on financing shall be applied to any of the Lifeguard Services Reimbursement.
- c. Monthly Reimbursement Time and Place Payment. All payments of Monthly Reimbursement to be paid by CITY under this Agreement shall be made payable on or before the last day of each calendar month during the Term and shall be mailed to:

Fit Carmel Mountain Ranch

P.O. Box 129030

San Diego, California 92112-9030

3.3 Inspection of Records.

- a. Records. OPERATOR shall, at all times during the Agreement term, keep or cause to be kept true and complete books, records, and accounts of all financial transactions in the operation of all business activities conducted upon the financial transactions resulting from the use of the premises. The records shall be supported by source documents such as sales slips, daily cash register tapes, purchase invoices, or other documents as necessary to allow CITY to easily determine the total gross income.

Any retail sales or charges will be recorded by means of cash registers or other comparable devices which display to the customer the amount of the transaction and automatically issue a sequentially numbered receipt. Totals registered shall be read and recorded at the beginning and end of each business day.

In the event of admission charges or rentals, OPERATOR shall issue serially numbered tickets or receipts for each such admission or rental and shall keep an adequate record of such tickets or receipts, as well as a record of unissued tickets or receipts.

All retail sales and charges may be recorded by a system other than cash registers or other comparable devices provided such system is approved by CITY.

- b. Financial Statements. Within sixty (60) days after the end of each Agreement year as previously established herein, OPERATOR will, at its expense, submit to CITY a statement in which the total gross receipts for any business conducted on or from the premises. Said statement shall be signed by OPERATOR or its authorized agent attesting to the accuracy thereof, which shall be legally binding upon OPERATOR.
- c. Right to Inspect. All OPERATOR'S books of account, records, and supporting documentation, as described under Section 3.5a. above, will be kept for at least five (5) years and made available to CITY in one location within the City of San Diego. Said books and records shall be maintained separate from all other accounts not relating to the premises. The CITY, at its discretion, shall have the right to inspect and audit the business of OPERATOR, its agents, subs, concessionaires, and licensees operating on and in connection with the premises as necessary and appropriate for CITY to determine the amounts of rent due CITY in compliance with the requirements of this Agreement.

At CITY'S request, OPERATOR shall promptly provide, at OPERATOR'S expense, any necessary data to enable CITY to fully comply with all

requirements of the state or federal government for operating Agreement information or reports concerning the premises. Such data will include, if required, a detailed breakdown of OPERATOR'S receipts and expenses.

- d. Audit Cost. The full cost of CITY'S audit(s) will be borne by CITY unless OPERATOR has failed to maintain complete and true books, records, accounts, and supporting source documents in strict accordance with this section, in which case OPERATOR hereby agrees to pay CITY'S cost of audit(s).
- e. Default. OPERATOR'S failure to keep complete and accurate records by means of double entry bookkeeping and make them available for CITY inspection is, like all other failures to comply with covenants of this Agreement, a breach of this Agreement and cause for termination.

3.4 Delinquent Rent and Audit Fees. If OPERATOR fails to pay the rent when due, OPERATOR will pay, in addition to the unpaid rents, five percent (5%) of the delinquent rent. If the rent is still unpaid at the end of fifteen (15) days, OPERATOR shall pay an additional five percent (5%) [being a total of ten percent (10%)], which is hereby mutually agreed by the parties hereto to be appropriate to compensate, CITY for loss resulting from rental delinquency, including lost interest, opportunities, legal costs, and the cost of servicing the delinquent account. Notwithstanding the foregoing, in no event shall the charge for late payments of rent be less than Twenty-five Dollars (\$25).

3.5 Unauthorized Use Charge. OPERATOR shall pay CITY one hundred percent (100%) for the gross receipts for any service or use that is not permitted by this Agreement. This payment is subject to the due date provided in this Agreement for rental payments and the provision for delinquent rent. The existence of one hundred percent (100%) charge in this clause and the payment of this charge or any part of it, does not constitute an authorization for a particular service or use, and does not waive any CITY rights to terminate a service or use to default OPERATOR for participating in or allowing any unauthorized use of the premises.

SECTION 4: ASSIGNMENT/DEFAULTS AND REMEDIES/EMINENT DOMAIN

4.1 Time is of Essence; Provisions Binding and Successors. Time is of the essence of all of the terms, covenants, and conditions of this Agreement, and, except as otherwise provided herein, all of the terms, covenants, and conditions of this Agreement shall apply to, benefit, and bind the successors and assigns of the respective parties, jointly and individually.

4.2 Assignment and Subletting. OPERATOR shall not assign this Agreement or any interest therein and shall not sublet the premises or any part thereof, or any right or privilege appurtenant thereto, of any right or privilege appurtenant thereto, or

suffer any other person, except employees, agents, and guests of OPERATOR, to use or occupy the premises or any part thereof, without the prior written consent of the Mayor, or his/her designee, in each instance. Consent to assignment, subletting, occupation, or use by any other person shall not be deemed to be a consent to any subsequent assignment, subletting, occupation, or use by another person. Any such assignment or subletting without such consent shall be void and shall, at the option of CITY, terminate this Agreement. This Agreement shall not, nor shall any interest therein, be assignable as to the interest of OPERATOR by operation of law, without the written consent of the Mayor, or his/her designee.

“Assignment” for the purposes of this Agreement shall mean any transfer of any ownership interest by OPERATOR or by any partners, principals, or stockholders, as the case may be, from the original OPERATOR, its general partners, or principals.

Approval of any assignment or sublease shall be conditioned upon the assignee or sublessee agreeing in writing that it will assume the rights and obligations thereby assigned or subleased and that it will keep and perform all covenants, conditions, and provisions of this Agreement which are applicable to the rights acquired. The Mayor, or his/her designee, shall require, as a condition to approval of any sublease of the majority portion of the leasehold or any assignment, that the OPERATOR pay additional consideration to CITY, as set forth in Section 4.4, Additional Consideration to CITY, hereof, shall commence on the effective date of such proposed sublease of the majority portion of the leasehold, or the effective date of an assignment, and may further require that this Agreement or the requested sublease otherwise be revised to comply with standard CITY Agreement requirements that are there current and that the rent be increased (but never decreased) to the then market value. Pursuant to City Charter Section 225, the Mayor, or his/her designee, may review and approve every person or entity which will have an interest in this Agreement as a sub or assignee. The Mayor’s, or his/her designee’s, approval will not be unreasonably withheld, provided all such persons and entities are of good character and reputation in the community.

- 4.3 Encumbrance. OPERATOR may not encumber this Agreement, its leasehold estate, and its improvements thereon by deed of trust, mortgage, chattel mortgage, or other security instrument.
- 4.4 Additional Consideration to CITY. OPERATOR acknowledges that operation of the premises enhances the value of OPERATOR’S business adjacent to the premises. OPERATOR and CITY agree that the exact amount of such enhancement is impossible to ascertain. However, CITY desires to be reimbursed to a reasonable extent in consideration for granting operation of the premises to OPERATOR. Therefore, OPERATOR and CITY agree that in the event of an assignment, or in the event of a subletting of the majority portion of the premises, OPERATOR shall pay to CITY two percent (2%) of the gross amount paid for OPERATOR’S interest in the premises in connection with an approved

assignment of the Agreement and/or, two percent (2%) of the amount paid OPERATOR in consideration of a sublease of all or a majority portion of the premises. The amount upon which the two percent (2%) shall be based shall be the total consideration resulting from the transaction including total cash payments and the market value of noncash consideration, including but not limited to stocks, bonds, deferred payments, secured and unsecured notes, and forbearance regarding claims and judgments. Prior to CITY'S consent to any assignment or majority subletting, OPERATOR shall deliver to CITY a written statement of all sums due and owing to CITY from OPERATOR pursuant to the provisions of this section, together with an acknowledgment from the proposed assignee or sub, as to the amount due CITY. The sum due CITY shall be payable in full to CITY concurrent with the completion of the transaction, be it an assignment or a sublease. Any assignment, or subletting, in violation of the terms and conditions of this section shall be void. The provisions of this section shall not apply to:

- a. an assignment or transfer of a beneficial interest in the premises resulting from devise, bequest, intestate succession, or by operation of law for the benefit of the spouse or descendants (i) of OPERATOR (if an individual) or (ii) of OPERATOR'S principal owner or chief executive officer (if OPERATOR is other than an individual);
- b. such other assignment for which the Mayor, or his/her designee, determines that the legal and equitable ownership interests in the premises have remained unchanged, such as a change in the legal or fictitious name of the OPERATOR without any other change in the equity in beneficial use of, or legal title to, the premises as an asset or the income produced thereby; or
- c. an assignment, or subletting of OPERATOR'S interest at any other location not a part of the premises.

4.5 Defaults and Remedies.

- a. Default. In the event that:
 - (1) OPERATOR shall fail to cure said default within three (3) days following written notice thereof from CITY if the default involves the payment of rent;
 - (2) OPERATOR shall fail to cure said default within thirty (30) days following written notice thereof from CITY if the default involves any covenant or condition of this Agreement other than the payment of rent, or if any such default is not curable within thirty (30) days, and OPERATOR shall fail to commence to cure the default(s) within said thirty-day period and diligently pursue such cure to completion; or

(3) OPERATOR shall voluntarily file or have involuntarily filed against it any petition under any bankruptcy or insolvency act or law; or

(4) OPERATOR shall be adjudicated a bankrupt; or

(5) OPERATOR shall make a general assignment for the benefit of creditors;

then CITY may, at its option, without further notice or demand upon OPERATOR or upon any person claiming rights through OPERATOR, immediately terminate the Agreement and all rights of OPERATOR and of all persons claiming rights through OPERATOR to the premises or to possession thereof; and CITY may enter and take possession of the premises. Provided, however, in the event that any default described in Section 4.5a.(2), hereinabove is not curable within thirty (30) days after notice to OPERATOR, CITY shall not terminate this Agreement pursuant to the default if OPERATOR immediately commences to cure the default and diligently pursues such cure to completion.

b. Abandonment by OPERATOR. Even though OPERATOR has breached the Agreement and abandoned the premises, this Agreement shall continue in effect for so long as CITY does not terminate this Agreement, and CITY may enforce all its rights and remedies hereunder, including but not limited to the right to recover the rent as it becomes due, plus damages.

c. Waiver. Any CITY waiver of a default is not a waiver of any other default. Any waiver of a default must be in writing and be executed by the Mayor, or his/her designee, in order to constitute a valid and binding waiver. CITY delay or failure to exercise a remedy or right is not a waiver of that or any other remedy or right under this Agreement. The use of one remedy or right for any default does not waive the use of another remedy or right for the same default or for another or later default. CITY'S acceptance of any rents is not a waiver of any default preceding the rent payment. CITY and OPERATOR specifically agree that the property constituting the premises is CITY-owned and held in trust for the benefit of the citizens of the City of San Diego and that any failure by the Mayor, or his/her designee, or CITY staff to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but CITY shall at all times, have the legal right to require the cure of any default when and as such defaults are discovered or when and as the City Council directs the Mayor, or his/her designee, to take action or require the cure of any default after such default is brought to the attention of the City Council by the Mayor, or his/her designee, or by any concerned citizen.

4.6 Eminent Domain. If all or part of the premises are taken through condemnation proceedings or under threat of condemnation by any public authority with the

power of eminent domain, the interests of CITY and OPERATOR (or beneficiary or mortgagee) will be as follows:

- a. In the event the entire premises are taken, this Agreement shall terminate on the date of the transfer of title or possession to the condemning authority, whoever first occurs.
- b. In the event of a partial taking, if, in the opinion of CITY, the remaining part of the premises is unsuitable for operation, this Agreement shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- c. In the event of a partial taking, if, in the opinion of CITY, the remaining part of the premises is suitable for continued Agreement operation, this Agreement shall terminate in regard to the portion taken on the date of the transfer of title or possession to the condemning authority, whichever first occurs, but shall continue for the portion not taken. The minimum rent shall be equitably reduced to reflect the portion of the premises taken.
- d. Award. All monies awarded in any such taking shall belong to CITY, whether such taking results in diminution in value of the leasehold or the fee or both; provided, however, OPERATOR shall be entitled to any award attributable to the taking of, or damages to OPERATOR'S then remaining leasehold interest in installations or improvements of OPERATOR. CITY shall have no liability to OPERATOR for any award not provided by the condemning authority.
- e. Transfer. CITY has the right to transfer CITY'S interests in the premises in lieu of condemnation to any authority entitled to exercise the power of eminent domain. If a transfer occurs, OPERATOR shall retain whatever interest it may have in the fair market value of any improvements placed by it on the premises in accordance with this Agreement.
- f. No Inverse Condemnation. The exercise of any CITY right under this Agreement shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon CITY for inverse condemnation.

SECTION 5: INSURANCE RISKS/SECURITY

- 5.1 Indemnification & Hold Harmless. OPERATOR shall protect, defend, indemnify, and hold CITY and its elected officials, officers, employees, representatives, and agents harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to OPERATOR's officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with

OPERATOR acts or omissions in the performance of its obligations under this Agreement, and all expenses of investigating and defending against same, including without limitation attorney fees costs; provided, however, that OPERATOR's duty to indemnify and hold CITY harmless shall not include any claims or liability arising from the sole negligence, or intentional misconduct of CITY and its elected officials, officers, employees, representatives, and agents.

5.2 Insurance.

a. OPERATOR shall take out and maintain at all times during the term of this Agreement the following insurance at its sole expense:

- (1) Public liability and property damage insurance in the amount of not less than Two Million Dollars (\$2,000,000) Combined Single Limit Liability with an occurrence claims form and a minimum of Four Million Dollars (\$4,000,000) general aggregate. This policy (ies) shall cover all injury or damage, including death, suffered by any party or parties from acts or failures to act by CITY or OPERATOR or by authorized representatives of CITY or OPERATOR on or in connection with the use or operation of the premises.
- (2) Fire, extended coverage, and vandalism insurance on all insurable property on the premises in an amount to cover 100 percent of the replacement cost. Any proceeds from a loss shall be payable jointly to CITY and OPERATOR. The proceeds shall be placed in a trust fund to be reinvested in rebuilding or repairing the damaged property. If there is a mortgage or trust deed on the leasehold in accordance with Section 4.3, Encumbrance, hereof, the proceeds may be paid to the approved mortgagee or beneficiary so long as adequate provision reasonably satisfactory to CITY has been made in each case for the use of all proceeds for repair and restoration of damaged or destroyed improvements on the premises.

b. OPERATOR'S responsibility to maintain said insurance also includes the following:

- (1) Additional Insured. All insurance policies will name CITY, its elected officials, officers, employees, representatives and agents as additional insureds, will protect CITY against any legal costs in defending claims, and will not terminate without sixty (60) days' prior written notice to CITY. All insurance companies must be satisfactory to CITY and licensed to do business in California. All policies will be in effect on or before the first day of the Agreement, except "course of construction fire insurance" shall be in force on commencement of all authorized construction on the premises, and full applicable fire insurance improvement. A copy of the insurance policy will remain on file with

CITY during the entire term of the Agreement. At least thirty (30) days prior to the expiration of each policy, OPERATOR shall furnish a copy of the policy(ies) showing that a new or extended policy has been obtained which meets the terms of this Agreement.

- (2) Modification. CITY, at its discretion, may require the revision of amounts and coverages at a time during the term by giving OPERATOR sixty (60) days' prior written notice. CITY'S requirements shall be designed to assure protection from and against the kind and extent of risk existing on the premises. OPERATOR also agrees to obtain any additional insurance required by CITY for new improvements, in order to meet the requirements of this Agreement.
- (3) Accident Reports. OPERATOR shall immediately (in no case longer than 24 hours) report all incidents involving injury to and/or the death of any persons, as well as all incidents causing property damage to the premises. All such reports shall contain the names and addresses of the parties involved, a statement of the circumstances, the date and hour, the names and addresses of any witnesses, and all other pertinent information.
- (4) Failure to Comply. If OPERATOR fails or refuses to take out and maintain the required insurance or fails to provide the proof of coverage, CITY has the right to obtain the insurance. OPERATOR shall reimburse CITY for the premiums paid, plus interest at the maximum allowable legal rate then in effect in California. CITY shall give notice of the payment of premiums within thirty (30) days of payment stating the amount paid, names of the insurer(s), and rate of interest. Said reimbursement and interest shall be paid by OPERATOR on the first (1st) day of the month following the notice of payment by CITY.

Notwithstanding the preceding provisions of this Subsection (4), if OPERATOR fails or refuses to take out or maintain insurance as required in this Agreement or fails to provide the proof of insurance, CITY has the right to declare this Agreement in default without further notice to OPERATOR, and CITY shall be entitled to exercise all legal remedies in the event of such default.

- 5.3 Waste, Damage, or Destruction. OPERATOR agrees to give notice to CITY of any fire or other damage that may occur on the premises within twenty four (24) hours of such fire or damage. OPERATOR agrees not to commit or suffer to be committed any waste or injury or any public or private nuisance, to keep the premises clean and clear of refuse and obstructions, and to dispose of all garbage, trash, and rubbish in the manner satisfactory to CITY. If the premises shall be damaged by any cause which puts the premises into a condition which is not decent, safe, healthy, and sanitary, OPERATOR agrees to make or cause to be made full repair of said damage and to restore the premises to the condition which existed prior to said damage; or, at CITY'S option, OPERATOR agrees to clear

and remove from the premises all debris resulting from said damage and rebuild the premises in accordance with plans and specifications previously submitted to CITY and approved in writing in order to replace in kind and scope the operation which existed prior to such damage, using for either purpose the insurance proceeds as set forth in Section 5.2, Insurance.

OPERATOR agrees that preliminary steps toward performing repairs, restoration, or replacement of the premises shall be commenced by OPERATOR within thirty (30) days, and the required repairs, restoration, or replacement shall be completed within a reasonable time thereafter. CITY may, at its sole discretion, if applicable, determine an equitable deduction in the minimum annual rent requirement for such period or periods that said premises are untenable by reason of such damage.

SECTION 6: IMPROVEMENTS/ALTERATIONS/REPAIRS

- 6.1 Acceptance of Premises. By signing this Agreement, OPERATOR represents and warrants that it has independently inspected the premises. OPERATOR will not hold CITY responsible for any defects whether apparent or latent, in the premises, including the presence of any hazardous waste.
- 6.2 Entry and Inspection. CITY reserves and shall always have the right, but not the obligation, to enter said premises for the purpose of viewing and ascertaining the condition of the same, or to protect its interests in the premises, or to inspect the operations conducted thereon. Except in the event of an emergency, such entry shall be limited to normal business hours. In the event that such entry or inspection by CITY discloses that said premises are not in a decent, safe, healthy, and sanitary condition, CITY shall have the right, after ten (10) days' written notice to OPERATOR, to have any necessary maintenance work done at the expense of OPERATOR, and OPERATOR hereby agrees to pay promptly any and all costs incurred by CITY in having such necessary maintenance work done, in order to keep said premises in a decent, safe, healthy, and sanitary condition. Further, if at any time CITY determines that such maintenance work is necessary, it may at its sole option, without additional notice, require OPERATOR to file with CITY a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy, and sanitary. Said bond shall be in an amount adequate in the opinion of CITY to correct the said unsatisfactory condition. OPERATOR shall pay the cost of said bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this Agreement imposed on CITY.
- 6.3 Maintenance. OPERATOR agrees to assume full responsibility and cost for the operation and maintenance of the premises throughout the term of this Agreement. OPERATOR will make all repairs and replacements necessary to

maintain and preserve the premises in a decent, safe, healthy, and sanitary condition satisfactory to CITY and in compliance with all applicable laws.

- 6.4 Improvements/Alterations. No improvements, structures, or installations shall be constructed on the premises with the exception of normal maintenance, repairs and/or replacements. The premises may not be altered by OPERATOR without prior written approval by the Mayor, or his/her designee. Further, OPERATOR agrees that major structural or architectural design alterations to approved improvements, structures, or installations may not be made on the premises without prior written approval by the Mayor, or his/her designee, and that such approval shall not be unreasonably withheld. This provision shall not relieve OPERATOR of any obligation under this Agreement to maintain the premises in a decent, safe, healthy, and sanitary condition, including structural repair and restoration of damaged or worn improvements. CITY shall not be obligated by this Agreement to make or assume any expense for any improvements or alterations.
- 6.5 Utilities. OPERATOR agrees to order, obtain, and pay for all utilities and service and installation charges in connection with the operation of the premises. Operator further agrees that if any additional utilities are installed after the date of commencement of this Agreement, OPERATOR will pay the cost of any such installations and insure that they are placed underground.
- 6.6 Construction Bond. Whenever there is any approved construction to be performed on the premises in excess of Five Thousand Dollars (\$5,000.00), OPERATOR shall deposit with CITY, prior to commencement of said construction, a faithful performance bond in the amount of 100 percent of the estimated construction cost of the work to be performed. The bond may be in cash or maybe a corporate surety bond or other security satisfactory to CITY. The bond shall insure that the construction plans approved by CITY are completed or, at the option of CITY, that the uncompleted construction shall be removed and the premises restored to a condition satisfactory to CITY. The bond or cash will be held in trust by CITY for the purpose specified above or at CITY'S option it may be placed in an escrow or other trust approved by CITY.
- 6.7 Liens. OPERATOR shall at all times save CITY free and harmless and indemnify CITY against all claims for labor or materials in connection with operations, improvements, alterations, or repairs on or to the premises and the costs of defending against such claims, including reasonable attorney's fees.

If improvements, alterations, or repairs are made to the premises by OPERATOR or by any party other than CITY, and a lien or notice of lien is filed, OPERATOR shall within five (5) days of such filing either:

- a. take all actions necessary to record a valid release of lien, or

- b. file with CITY a bond, cash, or other security acceptable to CITY sufficient to pay in full all claims of all persons seeking relief under the lien.

6.8 Taxes. OPERATOR agrees to pay, before delinquency, all taxes, assessments, and fees assessed or levied upon OPERATOR or the premises, including the land, any building, structures, machines, equipment, appliances, or other improvements or property of any nature whatsoever erected, installed, or maintained by OPERATOR or levied by reason of the business or other OPERATOR activities related to the premises, including any licenses or permits. OPERATOR recognizes and agrees that this Agreement may create a possessory interest subject to property taxation, and that OPERATOR may be subject to the payment of taxes levied on such interest, that OPERATOR shall pay all such possessory interest taxes, and that CITY shall have no liability therefor. OPERATOR further agrees that payment for such taxes, fees and assessments will not reduce any rent due CITY.

6.9 Signs. OPERATOR agrees not to erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings, or similar devices or advertising without the prior written consent of CITY. If any such unauthorized item is found on the premises, OPERATOR agrees to remove the item at its expense within twenty four (24) hours notice thereof by CITY, or CITY may thereupon remove the item at OPERATOR'S cost. However, normal pool operational and/or directional and/or event-related signs are deemed acceptable provided said signs are not visible from outside the premises.

6.10 Ownership of Improvements and Personal Property.

- a. Any and all improvements, trade fixtures, structures, and installations or additions to the premises constructed on the premises by OPERATOR shall at Agreement expiration or termination be deemed to be part of the premises and shall become, at CITY'S option, CITY'S property free of all liens and claims, except as otherwise provided in this Agreement.
- b. If CITY elects not to assume ownership of all or any improvements, trade fixtures, structures, and installations, CITY shall so notify OPERATOR thirty (30) days prior to the expiration or earlier termination of this Agreement and OPERATOR shall remove all such improvements, structures and installations as directed by CITY at OPERATOR'S sole cost. If OPERATOR fails to remove any improvements, structures, and installations as directed, OPERATOR agrees to pay CITY the full cost of any removal.
- c. OPERATOR-owned machines, appliances, equipment (other than trade fixtures), and other items of personal property shall be removed by OPERATOR by the date of the expiration or earlier termination of this Agreement. Any said items which OPERATOR fails to remove will be considered abandoned and become CITY'S property free of all claims and

liens, or CITY may, at its option, remove said items at OPERATOR'S expense.

- d. If any removal of such personal property by OPERATOR results in damage to the remaining improvements on the premises, OPERATOR agrees to repair all such damage.
- e. Any necessary removal by either CITY or OPERATOR which takes place beyond said expiration or termination hereof shall require OPERATOR to pay rent to CITY at the rate in effect immediately prior to said expiration or earlier termination of this Agreement.

6.11 Unavoidable Delay. If the performance of any act required of CITY or OPERATOR is directly prevented or delayed by reason of strikes, lockouts, labor Disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes, or other causes beyond the reasonable control of the party required to perform an act, said party shall be excused from performing that act for the period equal to the period of the prevention or delay. Provided, however, this provision shall not apply to obligations to pay rental as required pursuant to this Agreement. In the event OPERATOR or CITY claims the existence of such a delay, the party claiming the delay shall notify the other party in writing of such fact within ten (10) days after the beginning of any such claimed delay.

6.12 Hazardous Substances. OPERATOR shall not allow the illegal installation, storage, utilization, generation, sale or release of any Hazardous Substance or otherwise regulated substances in, on, under or from the Premises. OPERATOR and OPERATOR's agents and contractors shall not install, store, utilize, generate or sell any hazardous substance on the Premises without CITY's prior written consent. OPERATOR shall, prior to initiating any operations that involve Hazardous Substances, obtain all required permits from applicable regulatory agencies, including without limitation the San Diego County Department of Environmental Health, local fire agencies, the San Diego County Department of Weights and Measures, the San Diego County Air Pollution Control District, and the San Diego Regional Water Quality Control Board. Installing, utilizing, storing, or any other presence of a Hazardous Substance includes boxes, bags, bottles, drums, cylinders, above or below ground tanks, equipment with tanks, or any other type of container, equipment or device which holds or incorporates a Hazardous Substance or hazardous waste.

6.12.1 Release. For purposes of this Lease, a "release" shall include without limitation any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or otherwise disposing of a Hazardous Substance.

6.12.2 Hazardous Substance. For purposes of this Lease, "Hazardous Substance" shall mean any substance listed by the Environmental

Protection Agency or the State of California as a hazardous substance, and all types of petroleum-related substances and their chemical constituents.

- 6.12.3 Remediation. If OPERATOR's occupancy, use, development, maintenance or restoration of the Premises results in a release of a Hazardous Substance, OPERATOR shall pay all costs of remediation and removal to the CITY's satisfaction for unrestricted reuse of the Premises, and in accordance with all applicable laws, rules, regulations and directives of competent governmental authorities.
- 6.12.4 Removal. If OPERATOR or OPERATOR's contractor or agent has received approval and permits to store, utilize, generate or install, or otherwise bring Hazardous Substances to the Premises, OPERATOR and/or OPERATOR's contractor or agent shall remove all Hazardous Substances in any type of container, equipment or device from the Premises immediately upon or prior to the expiration or earlier termination of this Lease. CITY reserves the right to conduct inspections of the Premises and/or request documentation demonstrating the legal removal and/or disposal of the hazardous materials, wastes or other containers, equipment or devices from the Premises. OPERATOR shall be responsible for any and all costs incurred by CITY to remove any container, equipment or device requiring disposal or removal as required by this provision.
- 6.12.5 Indemnity. OPERATOR shall protect, defend, indemnify and hold CITY harmless from any and all claims, costs and expenses related to environmental liabilities resulting from OPERATOR's occupancy, use, development, maintenance or restoration of the Premises, including without limitation: (i) costs of environmental assessments; (ii) costs of regulatory remediation oversight; (iii) costs of remediation and removal; (iv) any necessary CITY response costs; (v) all fines, penalties or fees assessed by any regulatory agency; (vi) damages for injury to natural resources, OPERATOR's officers, employees, invitees, guests, agents or contractors, or the public; and (vii) all costs of any health assessments or health effect studies.
- 6.12.6 Notice of Release. If OPERATOR knows or has reasonable cause to believe that a Hazardous Substance has been released on, from or beneath the Premises, OPERATOR shall immediately notify CITY and any appropriate regulatory or reporting agency pursuant to California Code of Regulations Title 19 and any other applicable laws or regulations. OPERATOR shall deliver a written report thereof to CITY within three (3) days after receipt of the knowledge or cause for belief and submit any required written reports to regulatory or reporting agencies as required by regulation or law. If OPERATOR knows or has

reasonable cause to believe that such substance is an imminent release or is an imminent substantial danger to public health and safety, OPERATOR shall take all actions necessary to alleviate the danger. OPERATOR shall immediately notify CITY in writing of any violation, notice to comply, or notice of violation received or the initiation of environmental actions or private suits related to the Premises.

- 6.12.7 Environmental Assessment. Upon reasonable cause to believe that OPERATOR's occupancy, use, development, maintenance or restoration of the Premises ("OPERATOR's Operations"), resulted in any Hazardous Substance being released on, from or beneath the Premises, CITY shall notify OPERATOR of such belief and allow OPERATOR up to fifteen (15) days after such notice to commence the performance of an environmental assessment under regulatory oversight of the suspect area by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist or Registered Civil Engineer. If OPERATOR fails to cause such an environmental assessment to be commenced with the noticed time period, CITY may cause the assessment to be performed. The environmental assessment shall be obtained at OPERATOR's sole cost and expense, and shall establish what, if any, Hazardous Substances have more likely than not been caused by OPERATOR's Operations on, in, from or under the Premises, and in what quantities. If any such Hazardous Substances exist in quantities greater than allowed by city, county, state or federal laws, statutes, ordinances or regulations, or require future restricted re-use of the Premises, then the environmental assessment shall include a discussion of such substances with recommendations for remediation and removal necessary to effect unrestricted re-use and in compliance with those laws or statutes, and estimates of the cost of such remediation or removal. OPERATOR shall cause, or if OPERATOR fails to do so within a reasonable period of time, as determined by CITY in its sole discretion, CITY may cause, the remediation and/or removal recommended in the environmental assessment such that unrestricted re-use of the Premises and compliance with environmental law and regulations are achieved, and OPERATOR shall pay all costs and expenses therefor.

6.13 Water Quality Assurance and Water Usage Restrictions

- 6.13.1 San Diego Regional Water Quality Control Board Compliance. OPERATOR shall, at its sole cost and expense, comply with all applicable laws, rules, regulations and directives of competent governmental authorities (such as the San Diego Regional Water Quality Control Board) relating to water quality assurance and storm water management in connection with its possession, use and occupancy of the Premises. OPERATOR acknowledges and agrees that such legal

requirements may change at any time and from time to time.

- 6.13.2 NPDES. OPERATOR shall comply with all applicable requirements of the National Pollutant Discharge Elimination System ("NPDES") permit in force on the Effective Date of this Lease (i.e., Permit No. R9-2013-0001), and any and all amendments thereto and all applicable succeeding NPDES permits.
- 6.13.3 Stormwater Management. OPERATOR shall comply with all applicable requirements of the San Diego Municipal Code Chapter 4, Article 3, Division 3: Stormwater Management and Discharge Control (the "Stormwater Code"), and employ "Best Management Practices," as that term is defined by the Stormwater Code, and as approved by CITY, in its governmental capacity, under its Stormwater Management Program.
- 6.13.4. Water Usage. OPERATOR shall, at its sole cost and expense, comply with all applicable laws, rules, regulations and directives of competent governmental authorities (such as the San Diego County Water Authority) or and CITY relating to limitation of water usage at the Premises.
- 6.14 Prevailing Wage. Pursuant to San Diego Municipal Code section 22.3019, construction, alteration, demolition, repair and maintenance work performed under this Lease is subject to State prevailing wage laws. For construction work performed under this Lease cumulatively exceeding \$25,000 and for alteration, demolition, repair and maintenance work performed under this Lease cumulatively exceeding \$15,000, OPERATOR, its contractors and its subcontractors shall comply with State prevailing wage laws including, but not limited to, the requirements listed below.
- 6.15 Compliance with Prevailing Wage Requirements. Pursuant to sections 1720 through 1861 of the California Labor Code, OPERATOR, its contractors and subcontractors shall ensure that all workers who perform work under this Lease are paid not less than the prevailing rate of per diem wages as determined by the Director of the California Department of Industrial Relations (DIR). This includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.
- 6.15.1 Inspections. Copies of such prevailing rate of per diem wages are on file at the CITY and are available for inspection to any interested party on request. Copies of the prevailing rate of per diem wages also may be found at <http://www.dir.ca.gov/OPRL/DPreWageDetermination.htm>. OPERATOR, its contractors and its subcontractors shall post a copy of the prevailing rate of per diem wages determination at each job site and shall make them available to any interested party upon request.

- 6.15.2 Rates. The wage rates determined by the DIR refer to expiration dates. If the published wage rate does not refer to a predetermined wage rate to be paid after the expiration date, then the published rate of wage shall be in effect for the life of this Lease. If the published wage rate refers to a predetermined wage rate to become effective upon expiration of the published wage rate and the predetermined wage rate is on file with the DIR, such predetermined wage rate shall become effective on the date following the expiration date and shall apply to this Lease in the same manner as if it had been published in said publication. If the predetermined wage rate refers to one or more additional expiration dates with additional predetermined wage rates, which expiration dates occur during the life of this Lease, each successive predetermined wage rate shall apply to this Lease on the date following the expiration date of the previous wage rate. If the last of such predetermined wage rates expires during the life of this Lease, such wage rate shall apply to the balance of the Lease.
- 6.15.3 Penalties for Violations. OPERATOR, its contractors and subcontractors shall comply with California Labor Code section 1775 in the event a worker is paid less than the prevailing wage rate for the work or craft in which the worker is employed
- 6.15.4 Payroll Records. OPERATOR, its contractors and its subcontractors shall comply with California Labor Code section 1776, which generally requires keeping accurate payroll records, verifying and certifying payroll records, and making them available for inspection. OPERATOR shall require its contractors and subcontractors to also comply with section 1776. OPERATOR and its contractors and subcontractors shall submit weekly certified payroll records online via the City's web-based Labor Compliance Program. OPERATOR is responsible for ensuring its contractors and subcontractors submit certified payroll records to the City.
- 6.15.5 Apprentices. OPERATOR and its contractors and subcontractors shall comply with California Labor Code sections 1777.5, 1777.6 and 1777.7 concerning the employment and wages of apprentices. OPERATOR shall be held responsible for the compliance of their contractors and subcontractors with sections 1777.5, 1777.6 and 1777.7.
- 6.15.6 Working Hours. OPERATOR and subcontractors shall comply with California Labor Code sections 1810 through 1815, including but not limited to: (i) restrict working hours on public works contracts to eight hours a day and forty hours a week, unless all hours worked in excess of 8 hours per day are compensated at not less than 1½ times the basic rate of pay; and (ii) specify penalties to be imposed on design professionals and subcontractors of \$25 per worker per day for each day the worker works more than 8 hours per day and 40 hours per week in violation of California

Labor Code sections 1810 through 1815.

- 6.15.7 Required Provisions for Subcontracts. OPERATOR shall include at a minimum a copy of the following provisions in any contract they enter into with a contractor and subcontractor: California Labor Code sections 1771, 1775, 1776, 1777.5, 1810, 1813, 1815, 1860 and 1861.
- 6.15.8 Labor Code Section 1861 Certification. OPERATOR in accordance with California Labor Code section 3700 is required to secure the payment of compensation of its employees and by signing this Lease, OPERATOR certifies that "I am aware of the provisions of Section 3700 of the California Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this Lease."
- 6.15.9 Labor Compliance Program. CITY has its own Labor Compliance Program as authorized by the DIR. CITY will withhold contract payments when payroll records are delinquent or deemed inadequate by CITY or other governmental entity, or it has been established after an investigation by CITY or other governmental entity that underpayment(s) have occurred.
- 6.15.10 Controlling Law/Venue. This Lease and all Lease documents shall be deemed to be made under, and shall be construed in accordance with and governed by the laws of the State of California without regard to the conflicts or choice of law provisions thereof. The venue for any suit or proceeding concerning this Lease, including the interpretation or application of any of its terms or any related disputes, shall be in the County of San Diego, State of California.

SECTION 7: GENERAL PROVISIONS

7.1 Notices

- a. Any notice required or permitted to be given hereunder shall be in writing and may be served personally or by United States mail, postage prepaid, addressed to OPERATOR and to CITY as follows:

CITY:
Real Estate Assets Director
Civic Center Plaza
1200 Third Avenue, Suite 1700
San Diego, CA 92101-4155

OPERATOR:
General Manager
350 10th Avenue
San Diego, CA 92101

- b. Any party entitled or required to receive notice under this Agreement may by like notice designate a different address to which notices shall be sent.
- 7.2 Compliance with Law. OPERATOR shall at all times in the construction, maintenance, occupancy, and operation of the premises comply with all applicable laws, statutes, ordinances, and regulations of CITY, county (including, but not limited to the county's Department of Environmental Health Services' requirements for the safe operation of a public swimming pool), state, and federal governments at OPERATOR'S sole cost and expense. In addition, OPERATOR shall comply with any and all notices issued by the Mayor, or his/her designee, under the authority of any such law, statute, ordinance, or regulation.
- 7.3 Equal Benefits. OPERATOR shall comply with San Diego Municipal Code sections 22.4301-22.4308, which requires that all parties who enter into contracts with CITY for the provision of goods, services, consultant services, grants from CITY, leases of CITY property, or construction of public works offer the same employment benefits to employees with spouses and employees with domestic partners. OPERATOR shall certify that it will maintain such equal benefits throughout the term of this Agreement.
- 7.4 California Public Records Act. CITY shall determine, in its sole discretion, whether information provided to CITY by OPERATOR is or is not a public record subject to disclosure under the CPRA. If OPERATOR notifies CITY that it objects to the disclosure of certain information to a third party, OPERATOR shall deliver to CITY with such notice specific and detailed legal grounds, including any applicable case law, upon which CITY may rely for withholding any information requested pursuant to the CPRA. If CITY withholds disclosure of information in reliance on such legal analysis provided by OPERATOR, OPERATOR shall protect, defend, indemnify and hold CITY and its elected officials, officers, employees, representatives and agents harmless for and from legal actions or challenges seeking to obtain the information from CITY and all costs incurred by CITY associated therewith, and shall defend, at OPERATOR's sole expense, any action brought against CITY resulting from CITY's nondisclosure of the information. CITY may, at its election, conduct the defense or participate in the defense of any claim related in any way to this indemnification. If CITY chooses at its own election to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, OPERATOR shall pay all of the costs related thereto, including without limitation reasonable attorney fees and costs.
- 7.5 CITY Approval. The approval or consent of CITY, wherever required in this Agreement, shall mean the written approval or consent of the Mayor, or his/her designee, unless otherwise specified, without need for further resolution by the City Council.

7.6 Nondiscrimination. OPERATOR agrees not to discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, gender identity, medical status, national origin, age, marital status, or physical disability in OPERATOR'S use of the premises, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.

7.7 Compliance with CITY'S Equal Opportunity Contracting Program.

- a. Equal Opportunity Contracting. OPERATOR shall submit to the Project Manager statistical information as requested in the City of San Diego Contract Activity Report indicating the amount of subcontracting provided by firms during the period covered by the report. This information should be accompanied by an invoice from each subconsultant/subcontractor/vendor/service provider listed in the report.
- b. Equal Employment Opportunity. OPERATOR will comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086; The California Fair Employment Practices Act; and any other applicable federal and state laws and regulations hereafter enacted. OPERATOR will not discriminate against any employee or applicant for employment based on race, religion, color, ancestry, age, gender sexual orientation, disability, medical condition, or place of birth.

Upon request by the City of San Diego, OPERATOR will submit a current Work Force Report and, if required, an Equal Employment Opportunity Plan which sets forth the actions that OPERATOR will take to achieve the CITY's goals for the employment of African Americans, American Indians, Asians, Filipinos, Latinos, women, and people with disabilities.

Further, OPERATOR will cause the foregoing provisions to be inserted in all subcontracts for any work covered by this Agreement so that such provisions will be binding upon each subcontractor.

- c. Local Business and Employment. OPERATOR acknowledges that the City of San Diego seeks to promote employment and business opportunities for local residents and firms on all CITY contracts. OPERATOR will, to the extent legally possible, solicit applications for employment, and bids and proposals for subcontracts, for work associated with this Agreement from local residents and firms as opportunities occur. OPERATOR agrees to hire qualified local residents and firms whenever feasible.

OPERATOR understands that failure to comply with the above requirements and/or submitting false information in response to these requirements may result in termination of this Agreement and debarment from participating in CITY contracts for a period of not less than one (1) year.

- 7.8 Partial Invalidity. If any term, covenant, condition, or provision of this Agreement is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect.
- 7.9 Number and Gender. Words of any gender used in this Agreement shall include any other gender, and words in the singular number shall include the plural, when the tense requires.
- 7.10 Captions. The Agreement outline, section headings, and captions for various articles and paragraphs shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this Agreement. The numbers of the paragraphs and pages of this Agreement may not be consecutive. Such lack of consecutive numbers is intentional and shall have no effect on the enforceability of this Agreement.
- 7.11 CITY Employee Participation Policy. It is the policy of CITY that all CITY contracts, Agreements, or Agreements with s, consultants, vendors, or OPERATORS shall include a condition that the contract, Agreement, or lease may, at the sole option of CITY, be unilaterally and immediately terminated by CITY if the contractor or OPERATOR employs an individual who, within the twelve months immediately preceding such employment, did in his/her capacity as a CITY officer or employee participate in negotiations with or otherwise have an influence on the recommendation made to the City Council in connection with the selection of the contractor or OPERATOR. It is not the intent of this policy that these provisions apply to members of the City Council.
- 7.12 Drug-free Workplace. OPERATOR shall be required to abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:
- a. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances are prohibited on the premises and specifying the actions that will be taken against employees for violations of the prohibition.
 - b. Establishing a drug-free awareness program to inform employees about all of the following:
 - (1) The dangers of drug abuse in the workplace.
 - (2) The OPERATOR'S policy of maintaining a drug-free workplace.
 - (3) Any available drug counseling, rehabilitation, and employees assistance programs.

(4) The penalties that may be imposed upon employees' for drug abuse violations.

- c. OPERATOR shall include in each sublease Agreement language which indicates the sub's Agreement to abide by the provisions of a drug-free workplace. OPERATOR and subs shall be individually responsible for their own drug-free workplace programs.

7.13 Disabled Access Compliance. OPERATOR agrees to comply with the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 (ADA); and any other applicable state and federal laws and regulation hereafter enacted protecting the rights of people with disabilities. OPERATOR'S compliance shall include but not necessarily limited to the following:

- a. OPERATOR shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs, and termination of employment.
- b. No qualified individual with a disability may be excluded on the basis of disability from participation in, or be denied the benefits of, services, programs, or activities of OPERATOR.
- c. OPERATOR shall post a statement addressing the requirements of the ADA in a prominent place at the work site.
- d. Where required by law, OPERATOR shall comply with CITY'S disabled access requirements by bringing up to code and making accessible any areas of the premises which deny access to disabled persons. All such improvements and alterations shall be at the sole cost of OPERATOR.
- e. OPERATOR shall include language in each sublease Agreement which indicates the sub's Agreement to abide by the foregoing provisions. OPERATOR and sublessees shall be individually responsible for their own ADA employment programs.
- f. OPERATOR understands that failure to comply with the above requirements and/or submitting false information in response to these requirements shall constitute a default under this Agreement.

7.14 Accessibility Assessment. In accordance with California Civil Code Section 1938, CITY hereby states that the premises have not been inspected by a Certified Access Specialist (CASP.), and makes no representation whether the Premises

meet the construction-related accessibility standards of California Civil Code Section 55.53.

- 7.15 Standard of Employees. OPERATOR and its employees shall at all times conduct themselves and the operations on the premises in a creditable manner.
- 7.16 Entire Understanding. This Agreement contains the entire understanding of the parties. OPERATOR, by signing this Agreement, agrees that there is no other written or oral understanding between the parties with respect to the premises. Each party has relied on its own examination of the premise, advice from its own attorneys, and the warranties, representations, and covenants of the Agreement itself. Each of the parties in this Agreement agrees that no other party, agent, or attorney of any other party has made any promise, representation, or warranty whatsoever which is not contained in this Agreement. The failure or refusal of any party to read the Agreement or other documents, inspect the premises, and obtain legal or other advice relevant to this transaction constitutes a waiver of any objection, contention, or claim that might have been based on these actions. No modification, amendment, or alteration of this Agreement will be valid unless it is in writing and signed by all parties.
- 7.17 Corporate Authority. Each individual executing this Agreement on behalf of OPERATOR represents and warrants that he/she is duly authorized to execute and deliver this Agreement on behalf of said corporation, in accordance with a duly adopted resolution of the Board of Directors of the corporation or in accordance with the bylaws of the corporation, and that this Agreement is binding upon the corporation in accordance with its terms, and that OPERATOR is a duly qualified corporation and all steps have been taken prior to the date hereof to qualify OPERATOR to do business in the state where the premises are situated.

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IN WITNESS WHEREOF, this Agreement is executed by CITY, acting by and through its Mayor, and by OPERATOR, acting by and through its lawfully authorized officer(s).

THE CITY OF SAN DIEGO

Date: 1/13/17

By: [Signature]
Cybele Thompson
Director, Real Estate Assets

FIT ATHLETIC - CMR, LLC

Date: 1/4/17

By: [Signature]
Name: Scott Lutwak
Title: CEO

Environmental Analysis Section Environmental Clearance:

This activity (Fit Athletic- Carmel Mountain Ranch, LLC Lease and Operating Agreement) is exempt pursuant to CEQA Sections 15301 (Existing Facilities)

Date: 1/9/17

By: [Signature]
Name: Alyssa Muto
Title: Deputy Director

Approved as to form this 19th day
of January, 2017

MARA W. ELLIOTT, City Attorney

By: [Signature]
Name: Debra J. Boyler
Title: Deputy City Attorney

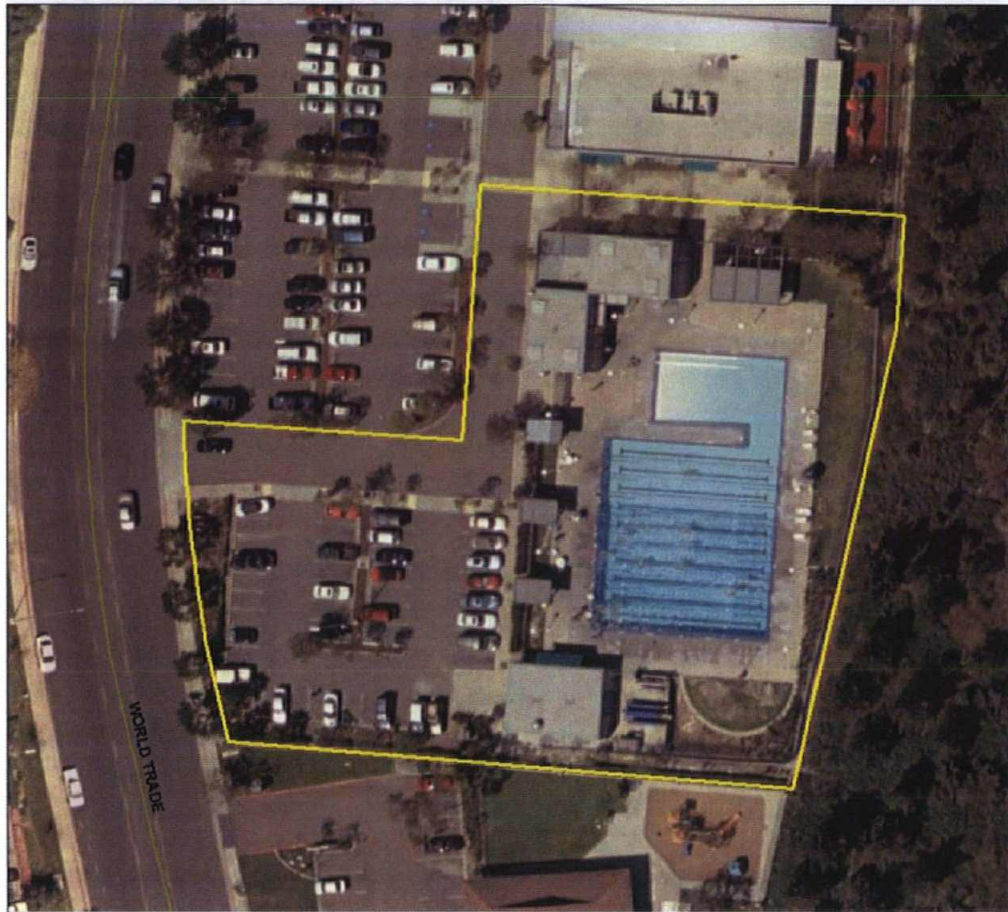
EXHIBIT A

Legal Description of Premises

Being the southerly portion of Parcel 4 of Parcel Map No. 14678, located in the City of San Diego, County of San Diego, State of California, said parcel map being recorded by the County of said county on February 12, 1987 as File No.87-079344 of Official Records. Said Parcel consists of 1.3 acres, more or less.

EXHIBIT B

Parcel View



SanGIS
San Diego Geographic Information System

MapData 10/2010
© 2010 SanGIS
RedOne





Date of Notice: December 2, 2016

NOTICE OF RIGHT TO APPEAL

ENVIRONMENTAL DETERMINATION

PLANNING DEPARTMENT

PROJECT NAME/NUMBER: Fit Athletic- Carmel Mountain Ranch, LLC Lease and Operating Agreement

COMMUNITY PLAN AREA: Carmel Mountain Ranch

COUNCIL DISTRICT: 5

LOCATION: 12159 World Trade Drive, San Diego, CA 92128

PROJECT DESCRIPTION: Authorize the Mayor or his designee to execute a three year Lease and Operating Agreement allowing the lessee to operate and maintain an existing public swimming pool and adjacent parking lot on approximately 1.3 acres of City-owned property at 12159 World Trade Drive, in San Diego.

ENTITY CONSIDERING PROJECT APPROVAL: City of San Diego Mayor-Appointed Designee

ENVIRONMENTAL DETERMINATION: CEQA Exemption Section 15301- Existing facilities

ENTITY MAKING ENVIRONMENTAL DETERMINATION: City of San Diego Mayor-Appointed Designee, Environment & Policy Analysis, Planning Department

STATEMENT SUPPORTING REASON FOR ENVIRONMENTAL DETERMINATION: This activity has been determined to be exempt from CEQA pursuant to CEQA Section 15301 (Existing Facilities) which allows for the operation, repair, maintenance, permitting, leasing, licensing or minor alterations of existing public or private structures or facilities involving negligible or no expansion of use; and where the exceptions listed in CEQA Section 15300.2 would not apply in that no cumulative impacts were identified; no significant effect on the environment were identified; the project is not adjacent to a scenic highway; no historical resources would be affected by the action, and the project was not identified on a list of hazardous waste sites pursuant to Section 65962.5 of the Government Code.

PROJECT MANAGER: Vladimir Balotsky, Supervising Property Agent
Real Estate Assets Department

MAILING ADDRESS: 1200 Third Avenue, Suite 1700, MS 51A
San Diego, CA 92101

PHONE NUMBER: (619) 235-5248

On December 2, 2016, the City of San Diego made the above-referenced environmental determination pursuant to the California Environmental Quality Act (CEQA). This determination is appealable to the City Council. If you have any questions about this determination, contact the City Project Manager listed above.

Applications to appeal CEQA determination made by staff (including the City Manager) to the City Council must be filed in the office of the City Clerk within 10 business days from the date of the posting of this Notice (**December 16, 2016**). The appeal application can be obtained from the City Clerk, 202 'C' Street, Second Floor, San Diego, CA 92101.

This information will be made available in alternative formats upon request.

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POSTED: --12/2/16

REMOVED: 12/19/16

POSTED: M. Hermann