

CITY OF SAN DIEGO USE AND OCCUPANCY PERMIT

THIS CITY OF SAN DIEGO USE AND OCCUPANCY PERMIT ("Permit") is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY"), and Orion Construction Corporation, a California corporation ("PERMITTEE"), to be effective as of December 1, 2008 (the "Effective Date") when signed by the parties and approved by the San Diego City Attorney, as follows:

DEFINITIONS

As used in this Permit, the following terms shall be defined as follows:

- A. "Permit Area" shall mean all or part of that certain CITY-owned real property commonly known as the Central Avenue Mini-Park Site (APN: 454-161-31) and located on Central Avenue between Dwight & Landis Streets, and more particularly described in Exhibit A: Permit Area, attached hereto.
- B. "Permit Fee" shall mean a one-time, non-refundable permit processing fee in the amount of six hundred dollars (\$600.00).
- C. "Permit Use" shall mean the exclusive use of the Permit Area for temporary construction material lay down for a City sewer & water project.
- D. "PERMITTEE'S Address for Notices" shall be: 1232 Keystone Way, Vista, CA 92081
- E. "Monthly Rent" shall be \$1,800.00 per month.
- F. "Security Deposit" shall mean an amount equal to five thousand dollars (\$5,000.00).
- G. "Term" shall mean one (1) year & one (1) month (until December 31, 2009); any partial month at the beginning of the Term shall be counted as a full month.

FOR VALUABLE CONSIDERATION, the sufficiency of which is acknowledged, the parties agree as follows:

- 1. Occupancy. Subject to the terms and conditions of this Permit, CITY hereby grants permission to PERMITTEE, its officers, employees, agents and contractors to enter upon and occupy the Permit Area solely for the purpose of the Permit Use.
- 2. Use of Permit Area. PERMITTEE may use the Permit Area solely for the Permit Use and for no other purpose whatsoever without CITY'S prior written consent in each instance.
- 3. Governmental Approvals. By entering into this Permit, neither CITY nor CITY'S City Council is obligating itself to any governmental agent, board, commission, or agency with regard to any other discretionary action relating to PERMITTEE'S occupancy, use,

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development, maintenance or restoration of the Permit Area. Discretionary action includes without limitation re-zonings, variances, environmental clearances, and all other required governmental approvals.

4. **CITY'S Consent, Discretion.** Whenever required under this Permit, CITY'S consent or approval shall mean the written consent or approval of the San Diego City Manager, or his or her designee ("City Manager"), unless otherwise expressly provided, without need for further resolution by the City Council. CITY'S discretionary acts hereunder shall be made in the City Manager's discretion, unless otherwise expressly provided. All references to "City Manager" herein shall be deemed to refer to the Mayor of San Diego or his or her designee for the duration CITY operates under the mayor-council (commonly referred to as "strong mayor") form of governance pursuant to Article XV of The City Charter of the City of San Diego, California.
5. **Term.** The Term shall commence on the Effective Date. If the Effective Date is not the first day of a calendar month, the first, partial month shall be counted as a full month for purposes of determining the expiration date of this Permit, so that the Term shall expire on the last day of a calendar month, and not to exceed three (3) years.
6. **Revocable License.** This Permit is not a lease. It is a license to use CITY-owned property, and may be revoked at will by CITY, in its sole discretion. CITY shall not be obligated for any loss, financial or otherwise, which may be incurred by PERMITTEE as a result of such revocation or the termination of this Permit. PERMITTEE expressly waives any claim for expense or loss which PERMITTEE might incur as a result of CITY'S revocation or termination of this Permit.
7. **No Holdover.** If PERMITTEE continues to occupy the Permit Area after the expiration or earlier termination of this Permit, such occupancy shall neither constitute a renewal or extension of this Permit, nor give PERMITTEE any rights in or to the Permit Area. If PERMITTEE continues to occupy the Permit Area after the expiration or earlier termination of this Permit, PERMITTEE shall pay to CITY rent calculated on a per diem basis using three (3) times the rental rate in effect just prior to such expiration or earlier termination. CITY'S acceptance of such rent shall neither constitute a renewal or extension of this Permit, nor give PERMITTEE any rights in or to the Permit Area.
8. **Termination.** PERMITTEE may terminate this Permit for any reason upon thirty (30) days prior written notice.
9. **Restore and Vacate.** Prior to the expiration or PERMITTEE'S earlier termination of this Permit, PERMITTEE shall restore the Permit Area to its condition on the Effective Date, normal wear and tear excepted, and upon such expiration or earlier termination immediately vacate the Permit Area. Upon CITY'S termination of this Permit, PERMITTEE shall immediately cease all operations on the Permit Area and as soon as practicable thereafter restore the Permit Area to its condition on the Effective Date, normal wear and tear excepted, and vacate the Permit Area.

10. Superior Interests. This Permit is subject to all liens, encumbrances, covenants, conditions, restrictions, reservations, contracts, permits and licenses, easements, and rights-of-way pertaining to the Permit Area, whether or not of record. PERMITTEE shall obtain all licenses, permits, and agreements from such third parties as may be or become necessary or reasonably advisable to allow its use of the Permit Area, relative to any such superior interest. If PERMITTEE'S use of the Permit Area is or becomes inconsistent or incompatible with a preexisting, superior interest, PERMITTEE shall take such actions and pay all costs and expenses necessary to remove such inconsistency or incompatibility to the satisfaction of the holder of the superior interest.
11. Permit Fee. PERMITTEE shall pay the Permit Fee to CITY upon execution of this Permit.
12. Rent. PERMITTEE shall pay the Monthly Rent in advance on the first day of each month during the Term. If the Effective Date is not the first day of a calendar month, then the Monthly Rent payable for the partial month at the beginning of the Term shall be prorated on a per diem basis.
13. Place of Payment. Monthly Rent checks shall be made payable to "City Treasurer" and delivered to the Office of the City Treasurer, Civic Center Plaza Building, 1200 Third Avenue, First Floor, San Diego, CA 92101, or mailed with an invoice to:

THE CITY OF SAN DIEGO
Office of the City Treasurer
P.O. Box 122289
San Diego, CA 92112-4165
14. Delinquent Monthly Rent. If PERMITTEE fails to pay Monthly Rent when due, PERMITTEE shall pay, in addition to the unpaid Monthly Rent, five percent (5%) of the delinquent Monthly Rent. If the Monthly Rent is still unpaid after fifteen (15) days past due, PERMITTEE shall pay an additional five percent (5%) [being a total of ten percent (10%)], which is agreed by the parties to be appropriate to compensate CITY for loss resulting from fee delinquency, including lost interest, opportunities, legal costs, and the cost of servicing the delinquent account. In no event shall the charge for late payments of Monthly Rent be less than Twenty Five Dollars (\$25). Acceptance of late charges and any portion of the late payment by CITY shall neither constitute a waiver of PERMITTEE'S default with respect to late payment nor prevent CITY from exercising any other rights and remedies available at law or in equity.
15. Security Deposit. Upon execution of this Permit, PERMITTEE shall deliver the Security Deposit to CITY as security for the performance of PERMITTEE'S obligations under this Permit. CITY shall not be liable to PERMITTEE for any interest thereon. Any interest earned from such deposit or redeposit shall not become part of the security deposit, but shall be and remain the property of CITY. All or any portion of the security deposit shall be available unconditionally to CITY to cure, in whole or in part, any breach or default of this Permit by PERMITTEE, or for expenses incurred by CITY as a result of PERMITTEE'S breach or default of this Permit. PERMITTEE shall maintain the security

deposit throughout the Term. Notwithstanding any other provision of this Permit to the contrary, if PERMITTEE fails or refuses to deposit or maintain the Security Deposit as required by this Permit, CITY may terminate this Permit immediately upon such breach. Upon such termination, PERMITTEE shall immediately cease its use of the Permit Area and commence and diligently pursue the removal of its property from the Permit Area.

- 15.1. Utilization. If CITY utilizes all or any portion of the Security Deposit, then upon 10 days prior written notice, PERMITTEE shall reimburse the Security Deposit to the full required amount.
- 15.2. Increase. Upon thirty (30) days prior written notice by CITY, PERMITTEE shall deliver to CITY such additional funds as CITY may reasonably require to adequately secure PERMITTEE'S obligations under this Permit.
- 15.3. Return. Provided PERMITTEE is not in breach or default of this Permit, CITY shall return the Security Deposit, or any balance thereof, to PERMITTEE within sixty (60) days after the expiration or termination of this Permit.
16. Maintenance of the Permit Area. PERMITTEE shall, at PERMITTEE'S sole cost and expense and to CITY'S satisfaction, maintain the Permit Area in good order and repair and in a safe, healthy and sanitary condition at all times during the Term, subject to normal and ordinary wear and tear resulting from the use of the Permit Use. CITY shall at no time during the Term of this Permit be required to make any improvements or repairs to the Permit Area. PERMITTEE shall keep the Permit Area free and clear of rubbish, debris and litter at all times.
17. Inspection. CITY may at all times enter and inspect the Permit Area.
18. Utilities. PERMITTEE shall order, obtain, and pay for all utilities and service and installation charges in connection with its use of the Permit Area.
19. Improvements/Alterations. PERMITTEE shall not construct any improvements, structures, or installations on the Permit Area, and shall not alter the Permit Area without the express written consent of CITY. Except as required by law, CITY shall not be obligated to make any repair or assume any expense for any improvements or alterations to the Permit Area.
20. Ownership of Improvements and Personal Property.
 - 20.1. Improvements. Upon expiration or termination of this Permit, any and all improvements, trade fixtures, structures, and installations or additions to the Permit Area now existing or constructed on the Permit Area by PERMITTEE shall be deemed to be part of the Permit Area and shall become CITY'S property free of all liens and claims. Notwithstanding the foregoing, CITY may, upon notice to PERMITTEE at termination or at any time prior to the expiration of the Term, elect not to assume ownership of all or any PERMITTEE-installed improvements, trade fixtures, structures, and installations. In that case, PERMITTEE shall, at

PERMITTEE'S sole cost and expense, remove all PERMITTEE-installed improvements, trade fixtures, structures, and installations as soon as practicable, but in no event later than sixty (60) days after the expiration or earlier termination of this Permit. If any removal of such PERMITTEE-installed improvements, trade fixtures, structures, and installations by PERMITTEE results in damage to the Permit Area, PERMITTEE shall repair all such damage at its sole cost and expense. If PERMITTEE fails to remove any improvements, structures, and installations as required by this Permit, CITY may, at its option, remove them at PERMITTEE'S sole cost and expense.

- 20.2. Personal Property. PERMITTEE shall remove PERMITTEE-owned machines, appliances, equipment (other than trade fixtures), and other items of personal property upon the expiration of the Term, or as soon as practicable after termination, but in no event later than sixty (60) days after the expiration or earlier termination of this Permit. Any such items which PERMITTEE fails to remove shall be deemed abandoned and become CITY'S property free of all claims and liens, or CITY may, at its option, remove such items at PERMITTEE'S sole cost and expense. If any removal of such personal property by PERMITTEE results in damage to the Permit Area, PERMITTEE shall repair all such damage at its sole cost and expense.
- 20.3. Late Removal. PERMITTEE shall pay to CITY rent calculated on a per diem basis using the rental rate in effect just prior to the expiration or earlier termination for any period of time needed to remove any improvements or personal property, whether by CITY or PERMITTEE, after the expiration or termination of this Permit.
- 20.4. CITY'S Right to Acquire. Notwithstanding the foregoing, if PERMITTEE elects to dispose of any of its personal property used in its operations on the Permit Area, upon expiration or termination of this Permit, CITY shall have the first right to acquire or purchase such personal property.
21. Insurance. PERMITTEE shall deliver to CITY a current certificate of insurance for:
 - 1) Commercial General Liability Insurance, providing coverage for bodily injury, including death, personal injury, and property damage with limits of at least One Million Dollars (\$1,000,000) per occurrence, subject to an annual aggregate of at least Two Million Dollars (\$2,000,000);
 - 2) Automobile Liability Insurance, providing coverage for all bodily injury and property damage, with a limit of at least One Million Dollars (\$1,000,000) per occurrence. Such insurance shall cover liability arising out of any vehicle (including owned, hired, and non-owned vehicles) operated on the Permit Area. Coverage shall be written on *ISO form CA 00 01 12 90*, or a substitute form providing equivalent liability coverage; and
 - 3) Workers' Compensation Insurance, as required by the laws of the State of California for all of PERMITTEE'S employees who are subject to this Permit, with Employers' Liability coverage with a limit of at least One Million Dollars (\$1,000,000).

- 21.1. **Additional Insureds.** Pursuant to a separate endorsement [CG2010 (11/85) or equivalent form], "The City of San Diego, its elected officials, officers, employees, representatives, and agents" shall be named as additional insureds in all policies.
- 21.2. **Primary & Non-Contributory.** Insurance policies shall be endorsed such that the coverage is primary and non-contributory to any coverage carried or maintained by CITY. The policies shall be kept in force for the duration of the Term and any extended use. The certificate(s) of insurance shall be filed with CITY'S Real Estate Assets Department.
- 21.3. **Qualified Insurer(s).** All insurance required by the terms of this Permit must be provided by insurers licensed to do business in the State of California which are rated at least "A-, VI" by the current AM Best Ratings Guide and which are acceptable to CITY. Non-admitted surplus lines insurers may be accepted provided they are included on the most recent list of California eligible surplus lines insurers (LESLI list) and otherwise meet CITY requirements.
- 21.4. **Deductibles/Retentions.** All deductibles and self-insured retentions on any insurance policy are the sole responsibility of PERMITTEE and must be disclosed and acceptable to CITY at the time evidence of insurance is provided.
- 21.5. **Continuity of Coverage.** All policies shall be in effect on or before the first day of the Term, except "course of construction fire insurance" shall be in force on commencement of all authorized construction, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. At least thirty (30) days prior to the expiration of each insurance policy, PERMITTEE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Permit.
- 21.6. **Modification.** To assure protection from and against the kind and extent of risk existing on the Permit Area, CITY, at its discretion, may require the revision of amounts and coverage at any time during the Term by giving PERMITTEE thirty (30) days prior written notice. PERMITTEE shall also obtain any additional insurance required by CITY for new improvements, changed circumstances, or CITY'S reasonable re-evaluation of risk levels related to PERMITTEE'S use of the Permit Area.
- 21.7. **Accident Reports.** PERMITTEE shall immediately report to CITY any accident causing property damage or injury to persons on the Permit Area. Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.
- 21.8. **Causes of Loss - Special Form Property Insurance.** PERMITTEE shall obtain and maintain, at its sole cost, Causes of Loss - Special Form Property Insurance on all of

PERMITTEE'S insurable property on the Permit Area in an amount to cover 100 percent (100%) of the replacement cost. PERMITTEE shall deliver to CITY a certificate of such insurance.

22. **Indemnification.** PERMITTEE 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 PERMITTEE'S officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with this Permit or PERMITTEE'S occupancy, use, development, maintenance or restoration of the Permit Area, and all expenses of investigating and defending against same, including without limitation attorney fees and costs; provided, however, that PERMITTEE'S duty to indemnify and hold harmless shall not include any claims or liability arising from the established active negligence, sole negligence, or sole willful misconduct of CITY and its elected officials, officers, employees, representatives, and agents. 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, PERMITTEE shall pay all of the costs related thereto, including without limitation reasonable attorney fees and costs.
23. **No Discrimination.** PERMITTEE shall not discriminate in any manner against any person on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in PERMITTEE'S use of the Permit Area, including without limitation the provision of goods, services, facilities, privileges, advantages, and accommodations, and the hiring of employees and contractors.
24. **Local Business and Employment.** PERMITTEE acknowledges that CITY seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. For work associated with this Permit and to the extent legally possible, PERMITTEE shall use its best efforts to solicit applications for employment and bids and proposals for contracts from local residents and firms as opportunities occur. PERMITTEE shall use its best efforts to hire qualified local residents and firms whenever practicable.
25. **Drug-free Workplace.** PERMITTEE shall 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:
 - 25.1. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances are prohibited on the Permit Area and specifying the actions that will be taken against employees for violations of the prohibition; and
 - 25.2. Establish a drug-free awareness program to inform employees about all of the following:

- a) The dangers of drug abuse in the workplace;
- b) PERMITTEE'S policy of maintaining a drug-free workplace;
- c) Any available drug counseling, rehabilitation, and employee assistance programs; and
- d) The penalties that may be imposed upon employees for drug abuse violations.

- 25.3. PERMITTEE shall include in each of its sublicenses and contracts related to this Permit language obligating each sub-licensee and contractor to comply with the provisions of this section to maintain a drug-free workplace. PERMITTEE, and each of its sub-licensees and contractors, shall be individually responsible for their own drug-free workplace program.
26. Disabled Access Compliance. PERMITTEE shall comply with the 1990 Americans with Disabilities Act ("ADA") and Title 24 of the California Code of Regulations (commonly known as the "building code") as defined in Section 18910 of the California Health and Safety Code and any other applicable federal, state, or local regulations hereafter enacted protecting the rights of people with disabilities.
27. PERMITTEE'S Risk. PERMITTEE shall bear all risks and liability arising out of or in any manner directly or indirectly connected with PERMITTEE'S occupancy, use, development maintenance and restoration of the Permit Area and any damages to the improvements on, under, or in the vicinity of the Permit Area resulting directly or indirectly thereby.
28. No Nuisance. PERMITTEE shall not use the Permit Area in any manner which creates a nuisance or unreasonably disturbs the quiet enjoyment of persons in and to the surrounding area.
29. Assignment and Sublease. PERMITTEE shall not assign or sublicense any rights granted by this Permit or any interest in this Permit without CITY'S prior written consent, which may be unreasonably withheld or delayed in CITY'S sole and absolute discretion. Any assignment by operation of law shall automatically terminate this Permit.
30. Signs. PERMITTEE shall not erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings or similar devices or advertising without CITY'S prior written consent. If any such unauthorized item is found on the Permit Area, PERMITTEE shall remove the item at its expense within 24 hours after notice by CITY, or CITY may thereafter remove the item at PERMITTEE'S cost.
31. Encumbrances. PERMITTEE shall keep the Permit Area and any CITY-owned property of which the Permit Area is a part free from all encumbrances and liens of any nature which arise out of or are in any manner directly or indirectly connected with this Permit or PERMITTEE'S occupancy, use, development, maintenance or restoration of the Permit Area. PERMITTEE shall protect, defend, indemnify, and hold CITY harmless from and

against any and all such encumbrances and/or liens, and from and against any claim, liability, cost or expense, including without limitation all attorney fees and costs, relating to or charged against the Permit Area, including without limitation PERMITTEE'S failure or the failure of any contractor or subcontractor hired by PERMITTEE to pay any person or persons referred to in Section 3181 of the California Civil Code or other applicable sections thereof.

32. Compliance with Laws. PERMITTEE shall, at its sole cost and expense, comply with all the requirements of all rules, regulations, ordinances, laws and direction of governing authorities now in effect or which may hereafter be in effect, which pertain to PERMITTEE'S occupancy, use, development, maintenance and restoration of the Permit Area.
33. Taxes. PERMITTEE shall pay, before delinquency, all taxes, assessments, and fees assessed or levied upon PERMITTEE or the Permit Area, including the land, any buildings, structures, machinery, equipment, appliances, or other improvements or property of any nature whatsoever erected, installed, or maintained by PERMITTEE, or levied by reason of PERMITTEE'S occupancy, use, development, maintenance or restoration of the Permit Area, including any licenses or permits. PERMITTEE acknowledges that this Permit may create a possessory interest subject to property taxation, and that PERMITTEE may be subject to the payment of taxes levied on that interest. PERMITTEE shall pay all such possessory interest taxes. PERMITTEE'S payment for such taxes, fees, and assessments shall not reduce any payment due CITY.
34. Hazardous Substances. PERMITTEE shall not allow the installation or release of hazardous substances in, on, under, or from the Permit Area by PERMITTEE, its officers, employees, invitees, guests, agents, or contractors ("PERMITTEE Parties"). PERMITTEE Parties shall not store, utilize, or sell any hazardous substance on the Permit Area without CITY'S prior written consent. For the purposes of this provision, a release shall include but not be limited to any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean those hazardous substances listed by the Environmental Protection Agency in regularly released reports and any other substances incorporated into the State of California's list of hazardous substances. A copy of the presently effective EPA and the State lists is on file in the Office of the City Clerk as Document 769704 and by this reference is incorporated into this Permit.
 - 34.1. Remediation. If any release of a hazardous substance occurs as a result of PERMITTEE'S use, development, or maintenance of the Permit Area ("PERMITTEE'S Operations"), PERMITTEE shall pay all costs of remediation and removal of the hazardous substance in accordance with all applicable laws and rules and regulations of governmental authorities.
 - 34.2. Indemnity. PERMITTEE shall protect, defend, indemnify, and hold CITY harmless from and against any and all claims, costs, and expenses related to environmental liabilities resulting from PERMITTEE'S Operations, including but not limited to

costs of environmental assessments, costs of remediation and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.

34.3. Notice of Release. If PERMITTEE knows or has reasonable cause to believe that any hazardous substance has been released on or within the Permit Area, PERMITTEE shall give written notice to CITY within three (3) business days after receipt of such knowledge or cause for belief. If PERMITTEE knows or has reasonable cause to believe that such substance is an imminent and substantial danger to public health and safety, PERMITTEE shall notify CITY by the most immediate means available and immediately upon receipt of such knowledge or belief and shall take all actions necessary to minimize the danger. PERMITTEE shall notify CITY immediately of any notice of violation received or initiation of environmental actions or private lawsuits related to the Permit Area.

34.4. Environmental Assessment. Upon reasonable cause to believe that PERMITTEE'S use, development, or maintenance of the Permit Area ("PERMITTEE'S Operations"), resulted in a hazardous substance being released on or from the Permit Area, CITY may cause an environmental assessment of the Permit Area to be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. The environmental assessment shall be obtained at PERMITTEE'S sole cost and expense, and shall establish what, if any, hazardous substances have more likely than not been caused by PERMITTEE'S Operations and in what quantities. If any such hazardous substances exist in quantities greater than allowed by municipal, county, state, or federal laws, statutes, ordinances, or regulations, then the environmental assessment shall include a discussion of such substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes, and estimates of the cost of such remediation or removal. PERMITTEE shall cause, or if PERMITTEE fails to do so within a reasonable period of time, CITY may cause, the remediation and/or removal recommended in the environmental assessment such that compliance with environmental law is achieved, and PERMITTEE shall pay all costs and expenses therefor. If the environmental assessment conclusively establishes that PERMITTEE'S Operations did not result in a hazardous substance being released on or from the Permit Area, CITY shall reimburse PERMITTEE for the cost of the assessment.

35. Underground Storage Tanks.

35.1. Monitoring. PERMITTEE shall monitor each underground storage tank located within the Permit Area during the Term (individually and collectively, "Underground Tanks") as required by the County of San Diego Hazardous Material Management Division ("HMMD") or its successor agency.

35.2. Reporting. PERMITTEE shall report to CITY and HMMD any and all unauthorized releases from the Underground Tanks within twenty-four (24) hours of each such

release.

- 35.3. **Fees and Costs.** PERMITTEE shall pay all fees and costs related to unauthorized releases of hazardous substances from the Underground Tanks, including without limitation investigative, surface, groundwater cleanup, and expert and agency fees. PERMITTEE shall maintain insurance or other financial means to ensure the fulfillment of its obligations hereunder to pay such fees and costs, including without limitation the costs of corrective actions, compensating third parties for personal injuries or property damage, and compensating CITY for damages to the Permit Area, directly or indirectly caused by any and all releases from Underground Tanks. PERMITTEE shall deliver to CITY and maintain evidence, satisfactory to CITY, of such financial responsibility. PERMITTEE shall pay all costs and expenses related to the Underground Tanks, including without limitation costs and expenses to comply with PERMITTEE'S obligations under this Permit.
- 35.4. **Development, Maintenance and Repair.** When developing, maintaining, repairing and closing Underground Tanks, PERMITTEE shall obtain all required permits, and produce and deliver such business plans and other documents as HMMD and all other responsible governmental agencies may require therefor.
- 35.5. **Records and Inspection.** PERMITTEE shall produce and maintain complete and accurate records related to the Underground Tanks, including without limitation permit applications, monitoring, inspections and testing data and results, equipment installation, repairing and closure of Underground Tanks, and all unauthorized releases of hazardous substances from Underground Tanks. PERMITTEE shall keep such records in a format and location readily accessible by CITY and HMMD and all other responsible governmental agencies for a period of not less than thirty-six (36) months after PERMITTEE vacates the Permit Area. PERMITTEE shall make all such records available for inspection by CITY, HMMD and all other responsible governmental agencies upon reasonable notice.
- 35.6. **Operator Agreements.** PERMITTEE shall include a copy of California Health and Safety Code, Chapter 6.7, Section 25299, as part of each agreement between PERMITTEE and each operator of an Underground Tank.
- 35.7. **Legal Compliance.** PERMITTEE shall comply with all laws, rules and regulations presently existing or hereafter enacted applicable to the Underground Tanks.
36. **Aboveground Storage Tanks.**
- 36.1. **Monitoring.** PERMITTEE shall monitor each aboveground storage tank located within the Permit Area during the Term (individually and collectively, "Aboveground Tanks") in compliance with this Permit and all applicable laws, rules and regulations. PERMITTEE shall conduct daily visual inspections of all Aboveground Tanks and shall permit the San Diego Regional Water Quality Control Board (the "Water Quality Board"), CITY, and all responsible governmental

agencies, to conduct periodic inspections of all Aboveground Tanks.

- 36.2. Reporting. PERMITTEE shall report to CITY any and all unauthorized releases from Aboveground Tanks within twenty-four (24) hours of each such release.
- 36.3. Fees and Costs. PERMITTEE shall pay all fees and costs related to unauthorized releases of hazardous substances from Aboveground Tanks, including without limitation investigative, surface, groundwater cleanup, and expert and agency fees. PERMITTEE shall maintain insurance or other financial means to ensure the fulfillment of its obligations hereunder to pay such fees and costs, including without limitation the costs of corrective actions, compensating third parties for personal injuries or property damage, and compensating CITY for damages to the Permit Area, directly or indirectly caused by any and all releases from Aboveground Tanks. PERMITTEE shall deliver to CITY and maintain evidence, satisfactory to CITY, of such financial responsibility. PERMITTEE shall pay all costs and expenses related to Aboveground Tanks, including without limitation costs and expenses to comply with PERMITTEE'S obligations under this Permit.
- 36.4. Development, Maintenance and Repair. PERMITTEE shall develop, maintain and repair all Aboveground Tanks in compliance with all applicable laws, rules and regulations for aboveground storage tanks, including without limitation all of the requirements of California Health & Safety Code, Sections 25270 through 25170.13 as presently existing or as amended (the "Health & Safety Code"). PERMITTEE shall obtain all required permits and produce and deliver such documents as any and all responsible governmental agencies may require. PERMITTEE shall: (a) comply with all valid orders of the Water Quality Board; (b) file all required aboveground storage tank statements; (c) establish and maintain all required monitoring programs and systems; (d) report all spills as required; and (e) pay all lawfully imposed penalties and fines.
- 36.5. Records and Inspection. PERMITTEE shall produce and maintain complete and accurate records related to Aboveground Tanks, including without limitation permit applications, monitoring, inspections and testing data and results, equipment installation, repairing and removal of Aboveground Tanks, and all unauthorized releases of hazardous substances from Aboveground Tanks. PERMITTEE shall keep such records in a format and location readily accessible by CITY and all other responsible governmental agencies for a period of not less than thirty-six (36) months after PERMITTEE permanently vacates the Permit Area. PERMITTEE shall make all such records available for inspection by CITY and all responsible governmental agencies upon reasonable notice.
- 36.6. Spill Prevention. PERMITTEE shall prepare and implement a spill prevention control countermeasure plan as required by the Health & Safety Code, and conduct periodic inspections to ensure compliance therewith.
- 36.7. Operator Agreements. PERMITTEE shall require each operator of an Aboveground

Tank to comply with the Health and Safety Code as part of each agreement between PERMITTEE and each operator of an Aboveground Tank.

- 36.8. Legal Compliance. PERMITTEE shall comply with all laws, rules and regulations presently existing or hereafter enacted applicable to Aboveground Tanks.
37. Water Quality Assurances. PERMITTEE shall comply with San Diego Municipal Code Article 3, Division 3: Stormwater Management and Discharge Control (the "Stormwater Code"), and employ "Best Management Practices" including a "Storm Water Pollution Prevention Plan" as those terms are defined by the Stormwater Code (collectively, "Prevention Plan") and as approved by CITY under its Stormwater Management Program. Within the first thirty (30) days of the Term, PERMITTEE shall submit a Prevention Plan satisfactory to CITY that will control erosion and reduce the amount of "Pollutants," as defined by the Stormwater Code, and other sediments discharged from the Premises. CITY may review the Prevention Plan periodically. Within thirty (30) days after written notice from CITY requesting an update of the Prevention Plan, PERMITTEE shall submit an updated Prevention Plan to CITY'S satisfaction. PERMITTEE shall implement all changes to the Prevention Plan as required by CITY and to ensure compliance with all applicable laws, ordinances, and regulations. PERMITTEE shall inform its employees, contractors, subcontractors, agents and vendors of the Prevention Plan and ensure their compliance therewith.
38. Waiver. The property constituting the Permit Area is publicly owned and held in trust for the benefit of CITY'S citizens. CITY'S failure to insist upon the strict performance of any of PERMITTEE'S obligations under this Permit, in one or more instance, shall not be construed as a waiver of any such obligation, and the same shall remain in full force and effect. CITY'S waiver of a default shall not be a waiver of any other default. Any waiver of a default must be in a writing executed by CITY to constitute a valid and binding waiver. CITY'S delay or failure to exercise a right or seek a remedy shall not be deemed a waiver of that or any other right or remedy under this Permit, at law or in equity. The exercise of any particular right or the use of any particular remedy for any default shall not waive the use of any other right or remedy for the same default or for another or later default. CITY'S acceptance of any rents shall not be a waiver of any default preceding the rent payment. CITY'S failure to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but CITY may at any and all times require the cure of the default.
39. Cumulative Remedies. CITY'S rights and remedies under this Permit are cumulative and shall not limit or otherwise waive or deny any of CITY'S rights or remedies at law or in equity.
40. Survival. Any obligation which accrues under this Permit prior to its expiration or termination shall survive such expiration or termination.
41. Joint and Several Liability. If PERMITTEE is comprised of more than one person or legal entity, such persons and entities, and each of them, shall be jointly and severally liable for

the performance of each and every obligation of PERMITTEE under this Permit.

42. No Affiliation. Nothing contained in this Permit shall be deemed or construed to create a partnership, joint venture or other affiliation between CITY and PERMITTEE or between CITY and any other entity or party, or cause CITY to be responsible in any way for the debts or obligations of PERMITTEE or any other party or entity.
43. Entire Agreement. This Permit constitutes the entire agreement between the parties and supersedes any and all prior understandings, representations, warranties and agreements between them pertaining to this Permit and PERMITTEE'S occupancy, use, development, maintenance and restoration of the Permit Area. Any modification, alteration, or amendment of this Permit shall be in writing and signed by all the parties hereto.
44. Legal Proceedings. If any party brings an action or proceeding against another party under this Permit, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs and expenses thereof, including without limitation reasonable attorney fees and costs. The "prevailing party" shall be that party who obtains substantially the result sought, whether by settlement, dismissal, or judgment. If, as a result of an action brought by or against PERMITTEE in connection with this Permit, CITY intervenes therein, becomes a party, or is made a party thereto, PERMITTEE shall pay all of CITY'S costs and expenses thereof, including without limitation reasonable attorney fees and costs.
45. Notices. Any notice required or permitted to be given under this Permit shall be in writing and may be served personally or delivered by United States mail, postage prepaid, and addressed to PERMITTEE at PERMITTEE'S Address for Notices, and to CITY as follows:

THE CITY OF SAN DIEGO
Attention: Director, Real Estate Assets Department
1200 Third Avenue, Suite 1700 (MS 51A)
San Diego, California 92101
(619) 236-6020

With a copy by First Class Mail to: SAN DIEGO CITY ATTORNEY
Attn: Real Property Section
1200 Third Avenue, Suite 1100
San Diego, California 92101-4106

46. Joint and Several Responsibility. If PERMITTEE includes more than one person or legal entity, each such person and legal entity shall be jointly and severally responsible for the performance of each and every obligation of PERMITTEE under this Permit.
47. Authority to Contract. Each individual executing this Permit on behalf of another person or legal entity represents and warrants that he/she is authorized to execute and deliver this Permit on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing agreement, and that

this Permit is binding upon such person or entity in accordance with its terms. Each person executing this Permit on behalf of another person or legal entity shall provide CITY with evidence, satisfactory to CITY, that such authority is valid and that such entity is a valid, qualified corporation, limited liability company, partnership, or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

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48. Acceptance of Permit Area. By signing this Permit, PERMITTEE represents and warrants that it has independently inspected the Permit Area and made all tests, investigations, and observations necessary to satisfy itself as to the condition of the Permit Area and its suitability for the Permit Use. PERMITTEE further represents and warrants that it is not relying on any representation by CITY as to the condition of the Permit Area or its suitability for the Permit Use, and that PERMITTEE is relying solely on its own and independent inspections, tests, investigations and observations of the Permit Area in entering into this Permit. PERMITTEE accepts the Permit Area in its current condition, and acknowledges and agrees that CITY has fulfilled all obligations it may have had to improve, modify, repair, replace, alter, or otherwise develop the Permit Area prior to the Effective Date. PERMITTEE shall not hold CITY responsible for any defects in the Permit Area. PERMITTEE accepts and assumes all risk of harm to all persons and property, including without limitation PERMITTEE'S employees, from any defects in the Permit Area, and shall be solely responsible therefor.

IN WITNESS WHEREOF, this Permit is executed to be effective as of the Effective Date.

Date: 11/20/08

Orion Construction Corporation, a California corporation

BY: [Signature]
Name: JOHN V. BRITO
Title: Project Manager

Date: 12/13/08

THE CITY OF SAN DIEGO, a California municipal corporation

BY: [Signature]
Name: JAMES F. BARWICK, CCIM
Title: Director, Real Estate Assets

ENVIRONMENTAL ANALYSIS SECTION ENVIRONMENTAL CLEARANCE:

This activity (Right of Entry) is Categorically Exempt from CEQA pursuant to Section 15301. The activity (Use of land for backyard) is Categorically Exempt from CEQA pursuant to Section 15304(e).

Date: 12/2/08

BY: [Signature]
Name: Mym Herrmann
Title: Senior Planner

APPROVED AS TO FORM AND LEGALITY:

Date: 11/12/08

JAN I. GOLDSMITH
MICHAEL J. AGUIRRE, City Attorney

BY: [Signature]
Name: BRUCE LASEWICZ
Title: DEPUTY CITY ATTORNEY

Exhibit A: Permit Area

