

**CITY OF SAN DIEGO
M E M O R A N D U M**

**RECEIVED
CITY COUNCIL OFFICES
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DATE: May 22, 2006

TO: Honorable Mayor and City Council

FROM: Michael C. Tussey, Acting Deputy Director, Airports Division
via Richard F. Haas, Deputy Chief of Public Works *DAJ*

SUBJECT: Short-term Lease for Property in Council District 8

Pursuant to Council Policy 700-10, Section D.5, a lease with a term of three years or less is a short-term lease which may be transacted by the City Manager without Council approval.

An agreement has been executed with Southwest Express Carriers, Inc., a California corporation, on the date indicated below, for 134,900 square feet of vacant land located on the north side of Brown Field Airport, which is described as follows:

1. Agreement Type: Right of Entry Permit
2. Purpose: Storage of Vehicles, Auto Parts and Construction Materials
3. Term: Fourteen months (either party may terminate upon 60 days written notice)
4. Rent: \$5,656/month with annual CPI adjustments
5. Common Area Maintenance Fee: \$100/month
6. Inducement Fee: \$4,600 (\$1,000 upon signing, \$327.27/month for 11 months)
7. Property Size: 134,900 square feet
8. Improvements: Improvements installed at permittee's expense


Michael C. Tussey

cc: County Assessor
Carol L. Young

May 15, 2006
DATE OF LEASE EXECUTION

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CITY OF SAN DIEGO

RIGHT OF ENTRY PERMIT

THIS RIGHT OF ENTRY PERMIT ("PERMIT") is executed by and between the CITY OF SAN DIEGO, a municipal corporation ("CITY"), and Southwest Express Carriers, Inc. a CA. corporation ("PERMITTEE").

1. Right to Enter: CITY hereby grants permission to PERMITTEE to enter upon the "PERMIT AREA" upon the terms set forth below.
2. Permit Area: The "PERMIT AREA" is hereby defined to be two parcels of land, which have not been surveyed, measuring approximately 134,900 square feet in size. The land is raw and improved with only a perimeter chain link fence and gates. The land located North of Pogo Row street, within the Brown Field Airport is known as B-7. The land located South of Pogo Row in Parcel 2 is known as C-3. The land in C-3 has drainage issues and about one half acre is unusable in the rainy season in the North and Western edges. Additionally the lot is full of trash and the permittee will clean it up. For these reasons the usable land is estimated to be only 113,120 square feet in total for both lots. The approximate layout of the parcel is shown on Exhibit A, attached to this PERMIT and incorporated by this reference. The parties hereby agree that all of the descriptions given for the parcel size are approximate and that all measurements and descriptions are only approximations and the parties expressly waive any further determination of the exact metes and bounds or area of the property since neither party wishes to expend funds to accurately determine the exact boundaries. The parties agree to be bound by the approximations given herein.
3. Use of Permit Area: PERMITTEE's non-exclusive use of the PERMIT AREA shall be limited to passive storage such as tractor trailer parking, auto storage, parts storage and clean construction materials storage. No auto wrecking, painting or dismantling is to be done. No vehicles which are leaking oil fluid, transmission fluid, brake fluid, antifreeze or any other hazardous fluid or materials are to be brought onto the PERMIT AREA nor kept on the PERMIT AREA. All vehicles are to have current registration or appropriate transit documentation. No residential use of the PERMIT AREA is permitted.

The PERMIT AREA shall have a minimum of two inches of gravel spread throughout. The areas shall be enclosed by six foot chain link fencing maintained in good condition and must include sight obscuring materials. All fencing shall observe a thirty foot setback from canyon rims and roads. These enclosures are to be paid for by the Permittee and shall be considered fixtures that belong to the CITY at the conclusion of the term. These improvements shall be completed within 45 days from the signing of this permit.

PERMITTEE shall not use the PERMIT AREA for any other use without the prior written approval of the Mayor or his designee.

4. Permit Fees.

- a. PERMITTEE shall pay to the CITY of San Diego the sum of six hundred dollars (\$600.00) as a processing fee for the consideration of the application to be granted a right of entry PERMIT.
- b. Upon notice from the CITY of San Diego that the application for a right of entry PERMIT will be approved, PERMITTEE shall, as an inducement to the granting of the PERMIT, pay the sum of four thousand, six hundred dollars (\$4,600.00). Said funds are given solely as an inducement to CITY to grant this PERMIT and neither the giving of said funds nor the acceptance of said funds shall be deemed to create any obligation, express or implied, beyond those described in this PERMIT. The inducement fee shall be paid as follows:
 - a. One thousand dollars (\$1,000.00) upon signature of this permit.
 - b. The balance of three thousand, six hundred dollars shall be divided into 11 equal monthly payments of three hundred and twenty seven dollars and twenty-seven cents each which shall be paid each month with the permit fee described in section c below.
- c. PERMITTEE shall pay CITY a monthly PERMIT fee in the sum of .05 cents per square foot per month commencing on June 1, 2006. The PERMIT AREA consists of 113,120 square feet. Therefore, the monthly PERMIT fee shall be FIVE THOUSAND, SIX HUNDRED AND FIFTY SIX DOLLARS (\$5,656.00).
- d. PERMITTEE shall pay CITY monthly common area maintenance fee for the upkeep and maintenance of Pogo Row, common areas and the area surrounding the PERMIT AREA in the sum of one hundred dollars (\$100.00).
- e. PERMIT fees shall be paid by check, payable to the CITY Treasurer, and mailed to:

Office of the CITY Treasurer
P.O. Box 122289
San Diego, CA 92112-4165

or,

Delivered in person to:

Office of the CITY Treasurer
Civic Center Plaza, First floor
1200 Third Avenue
San Diego, CA 92101

Payments shall be made on or before the first day of each month. The first and last month PERMIT fee will be prorated as necessary to achieve payment on the first of the month. To compensate CITY for the loss of interest income and staff time associated with monitoring and follow-up on late payments, payments postmarked or paid in person after the first of the month will be subject to a late fee of ten percent (10%) of the monthly

PERMIT fee if one (1) to fifteen (15) days past due, and to an additional ten percent (10%) [for a total of twenty percent (20%)] late fee if sixteen (16) or more days past due.

5. Term. This PERMIT shall be in effect April 24, 2006 through June 24, 2007, and may be terminated on sixty (60) days prior written notice of either party to the other.

PERMITTEE acknowledges that this PERMIT is temporary. PERMITTEE also acknowledges that PERMITTEE's use of the PERMIT AREA is subject to the written approval of this PERMIT by the Federal Aviation Administration (FAA) prior to commencement of the PERMIT term and each and every year prior to any period of extension, if any. Further, the parties agree that the PERMIT AREA to which the PERMIT pertains is subject to the control, oversight and regulation of the FAA and that the FAA must also approve this PERMIT as to the uses to which the PERMIT AREA will be subject. This PERMIT may be revoked upon sixty days written notice in the CITY's sole discretion and PERMITTEE understands and agrees that PERMITTEE shall not be entitled to any relocation payment whatsoever by CITY upon termination of this PERMIT.

6. Insurance. Prior to approval of this PERMIT by CITY, PERMITTEE shall deliver to CITY a certificate of insurance and a separate endorsement to cover the following:

- a. 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. This policy shall cover all injury or damage, including death, suffered by any party or parties from acts or failures to act by CITY or PERMITTEE or by authorized representatives of CITY or PERMITTEE on or in connection with the use or activities conducted on the PERMIT AREA.

- b. Additional Insured. All insurance policies will name "CITY of San Diego, its elected officials, officers, representatives, agents and employees" as an additional insured on a separate endorsement, and shall protect CITY against any legal costs in defending claims. 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 PERMIT. A copy of each policy will remain on file with CITY during the entire term of the PERMIT. At least thirty (30) days prior to the expiration of each policy, PERMITTEE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the terms of this PERMIT.

7. Accident Reports. PERMITTEE will report to CITY any accident resulting in injury or death to a person or persons on the PERMIT AREA within twenty-four (24) hours of each occurrence, or sooner if reasonably possible. This report will contain the name(s) and address(es) of the party(ies) involved, a statement of the circumstances, the date and hour, the name(s) and address(es) of any witness(es) and other pertinent information, as legally permissible.

8. Hold Harmless. PERMITTEE agrees to defend, indemnify, protect, and hold CITY, its elected officials, officers, representatives, agents and employees, 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 employees, invitees, guests, agents, or officers, which arise out of or are in any manner directly or indirectly connected with the grant of this PERMIT to the PERMITTEE, the development or operation of the PERMIT AREA or the work and operations to be performed under this PERMIT, and all expenses of investigating and defending against same. However, 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, its elected officials, officers, representatives, agents and employees.
9. No Discrimination. PERMITTEE shall not discriminate in any manner against any person or persons 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 but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.
10. Permittee's Risk. All risks in connection with PERMITTEE's use of the PERMIT AREA and any damages to the improvements thereon, thereunder, or in the vicinity thereof shall be borne in full by PERMITTEE. CITY shall not be liable for any loss or damage or vandalism to PERMITTEE's inventory, personal property or trade fixtures located in the PERMIT AREA.
11. Nuisance. PERMITTEE shall not use the PERMIT AREA in any manner which, in the opinion of the Mayor or his designee, creates a nuisance or disturbs the quiet enjoyment of persons in the surrounding area.
12. Hazardous/Toxic Waste:
 - a. PERMITTEE shall not allow the release of hazardous substances in, on, under, or from the PERMIT AREA nor any surrounding area within the Brown Field Airport. 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, leeching, 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'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 Lease.
 - b. If any release of a hazardous substance occurs, PERMITTEE shall be responsible for all costs of remediation and removal of the substances in accordance with all applicable rules and regulations of governmental authorities.

c. PERMITTEE shall defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from PERMITTEE's operations on the PERMIT AREA, 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.

d. If PERMITTEE knows or has reasonable cause to believe that any hazardous substance has been released on or beneath the PERMIT AREA, PERMITTEE shall give written notice to the CITY within three (3) days of receipt of the knowledge or cause for belief. Provided, however, if PERMITTEE knows or has reasonable cause to believe that the substance is an imminent and substantial danger to public health and safety, PERMITTEE shall notify the CITY Manager immediately upon receipt of this knowledge or belief and shall take all actions necessary to alleviate the danger. PERMITTEE shall notify the CITY Manager immediately of any notice of violation received or initiation of environmental actions or private suits relative to the PERMIT AREA. Neither PERMITTEE nor PERMITTEE's invitees or sublessees, if any, shall utilize or sell any hazardous substance on the PERMIT AREA without the prior written consent of CITY.

e. At any time before the expiration or earlier termination of this PERMIT, PERMITTEE, at CITY'S sole option, shall cause an environmental assessment of the PERMIT AREA to be completed 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 the sole cost and expense of PERMITTEE and shall establish what, if any, hazardous substances exist on, in, or under the PERMIT AREA, and in what quantities. If any hazardous substances exist in quantities greater than that allowed by CITY, county, state, or federal laws, statutes, ordinances, or regulations, then the environmental assessment shall include a discussion of these substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes and estimates of the cost of the remediation or removal. PERMITTEE shall perform or cause to be performed the remediation and/or removal recommended in the environmental assessment so that compliance with environmental law is achieved and shall be solely responsible for all costs and expenses incurred.

13. Trash and Refuse. PERMITTEE will maintain the PERMIT AREA in a clean, orderly and sanitary condition throughout the term of this PERMIT, and PERMITTEE will promptly remove all trash and debris from the PERMIT AREA and dispose of it in a legal disposal site. PERMITTEE shall maintain trash containers in the PERMIT AREA at all times throughout the term of this PERMIT.
14. Permit. This PERMIT is not a lease. It is a license to use CITY property. It is mutually agreed that CITY shall not be obligated for any loss, financial or otherwise, which may be incurred by PERMITTEE as a result of termination of this PERMIT, and, further, that PERMITTEE expressly waives any claim for expense or loss which PERMITTEE might incur as a result of termination of this PERMIT. CITY shall have and maintain the right at

all times to enter upon the PERMIT AREA in CITY's sole discretion.

15. Possessory Interest Tax. PERMITTEE recognizes and understands that this PERMIT may create a possessory interest subject to property taxation and that PERMITTEE may be subject to the payment of property taxes levied on such interest. Such tax payment shall not reduce any fee paid CITY under this PERMIT. PERMITTEE shall pay any tax or assessment before it becomes delinquent.
16. Compliance with Laws. PERMITTEE shall at its sole cost and expense comply with all the requirements of all municipal, state, and federal laws, ordinances and regulations now in effect or which may hereafter be in effect, which pertain to the PERMIT AREA. PERMITTEE shall operate in compliance with all rules and regulations of the Franchise Tax Board.
17. No Assignment or Subletting. PERMITTEE shall not assign any rights granted by this PERMIT or any interest therein. Any assignment by operation of law shall automatically terminate this PERMIT. Further, no subletting is permitted without prior written consent from the CITY which shall not be unreasonably withheld. PERMITTEE shall not allow any other person, except employees, agents and guests of PERMITTEE to use or occupy the PERMIT AREA or any part of the PERMIT AREA.
18. Signs. No signs shall be displayed on the PERMIT AREA without the prior written consent of the Mayor or his designee.
19. Encumbrances. PERMITTEE shall keep the PERMIT AREA free from all encumbrances and liens of any nature during the term of this PERMIT. PERMITTEE shall defend, hold harmless and indemnify CITY from and against any and all such encumbrances and/or liens and from and against any claim, liability, cost or expense (including all costs and attorneys' fees), which may be filed or instituted 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.
20. Maintenance of the Permit Area. PERMITTEE shall be solely responsible for maintaining the PERMIT AREA in a decent, safe, healthy and sanitary condition at all times during the entire term of this PERMIT to the satisfaction of the Mayor or his designee. PERMITTEE shall maintain at least one portable toilet on the PERMIT AREA at all times throughout the term of this PERMIT.
21. Waiver. The failure of CITY to insist upon strict performance by PERMITTEE of any condition of this PERMIT, in one or more instances, shall not be construed as a waiver of any such condition, and the same shall remain in full force and effect.
22. Oral Representations. This PERMIT contains the complete expression of the agreement

between the parties, and there are no promises, representations, agreements, warranties or inducements, either expressed orally or implied, except as set forth herein. The conditions hereof cannot be changed in any respect except by written agreement between the parties.

23. Inspection. CITY may enter and inspect the operations and PERMIT AREA at any time.
24. Legal Proceedings. Should it become necessary for CITY to commence legal proceedings to collect any payments due hereunder or to enforce any other condition of this PERMIT, PERMITTEE agrees to pay all legal costs in connection therewith, including reasonable attorneys' fees.
25. Permit Fee Increases. Any PERMIT fee increases shall be determined by the following:

- a. CPI Adjustments. The PERMIT fee shall be adjusted annually on March 1 to reflect the percentage increase in the Consumer Price Index ("CPI"). The index used will be the CPI for "All Urban Consumers" for Los Angeles/Riverside/Orange Counties, California. If this index is no longer published, the index for adjustment will be the U.S. Department of Labor's "Comprehensive Official Index" most comparable to the aforesaid index. If a rental adjustment is calculated using an index from a different base year than 1982-84, which equaled a base figure of 100 for the CPI, the base figure used will first be converted under a formula supplied by the Bureau of Labor Statistics or its successor.

If the Department of Labor indices are no longer published, another index generally recognized as authoritative will be substituted by agreement of CITY and PERMITTEE. If the parties cannot agree within sixty (60) days after demand by either party, a substitute index will be selected by the Chief Officer of the Regional Office of the Bureau of Labor Statistics or its successor, notwithstanding continued reference herein to "CPI" in any event.

Regardless of the index publication dates, the effective date of the rent adjustment is as specified in this Subsection a., CPI Adjustments. Until the rent adjustment can be reasonably determined by the index method, PERMITTEE shall continue to make payments at the existing rental rate. When the adjustment is determined, the balance of rents due at the adjusted rate will be paid to CITY within thirty (30) days. In no event shall the adjusted rent as established by the CPI be less than the rent in existence immediately prior to the adjustment dates.

- b. CPI Adjustment Computation. The rent for each rental period following the adjustment until the next adjustment or other rental determination, as provided herein, shall be determined prior to the date of adjustment by multiplying the rent which is effective immediately prior to said adjustment by the "adjustment figure" established as follows:

The "adjustment figure" shall be established by dividing the "current index" by the "base figure," both as defined herein:

The "base figure" for the first such adjustment shall be a three-month average of index figures published by the CPI using the fourth, fifth, and sixth full months preceding the effective date of this PERMIT.

To illustrate, if this PERMIT begins in May, the CPI figures for November (sixth month), December (fifth month), and January (fourth month) preceding May would be averaged to establish the base figure (Example 1).

The "current index" shall be a three-month average of index figures published by the CPI. The three months to be used to establish the average shall be the fourth, fifth, and sixth full months preceding the adjustment date.

The "base figure" for each successive adjustment shall be the "current index" figure used in the last preceding adjustment period (Example 2).

Example 1

Current Index 121
Base Figure $110 = 1.10$ (Adjustment Figure)

Effective Fee $\times 1.10 =$ Adjusted Fee

Example 2

Current Index 138
Base Figure $121 = 1.14$ (Adjustment Figure)

Effective Fee $\times 1.14 =$ Adjusted Fee

The adjustment figure is then multiplied by the PERMIT fee from the preceding adjustment period to determine the new fee. Using the foregoing examples, if the fee is now \$200 per month, after the first adjustment it will be \$220 per month ($\200×1.10). In the second adjustment it will be \$228 per month ($\200×1.14).

26. Utilities. All utilities shall be provided and paid by PERMITTEE.
27. Notices. 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 PERMITTEE at the address listed below or to such other address designated in writing by PERMITTEE; and to CITY as follows:

Notices to CITY shall be mailed to:

CITY of San Diego
General Services Department
Attention: Deputy Director, Airports Division

3750 John J. Montgomery Drive
San Diego, CA 92123

Notices to PERMITTEE shall be mailed to:

Southwest Express Carriers Inc.
2498 Roll Drive, #807
San Diego, CA. 92154
619-817-8189 (Eduardo Vasquez)
619-520-1299 (Primitivo Vasquez)

or to any address designated in writing by the respective party to the other party.

Throughout the duration of this PERMIT the PERMITTEE shall maintain and keep current a contact telephone number with the City of San Diego. The number shall be provided concurrent with the execution of this lease. CITY shall be notified of any changes of telephone number immediately.

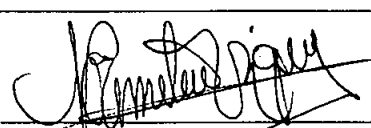
IN WITNESS WHEREOF, this Right of Entry Permit is executed by CITY, acting by and through its Mayor or Mayor's designee, and by PERMITTEE.

CITY OF SAN DIEGO

Date: 5-4-06

By: 
Richard Haas, Deputy Chief of Public Works

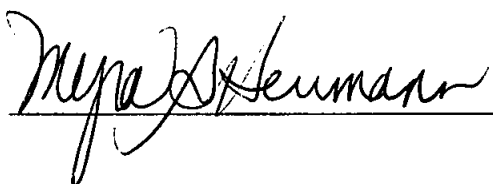
Date: 4-24-06

By: 
Name: Primitivo Vasquez, Secretary, Authorized by
Corporation
Title: PERMITTEE

This activity is categorically exempt from CEQA pursuant to State CEQA Guidelines, Section 15301.

ENVIRONMENTAL ANALYSIS SECTION

Date: 5/9/06

By: 

APPROVED AS TO FORM AND LEGALITY:

MICHAEL J. AGUIRRE, CITY Attorney

Date: 5-15-06

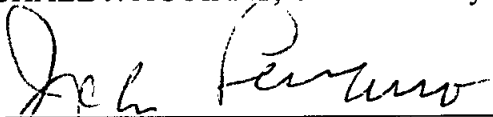
By: 
Name: John H. Serrano
Deputy CITY Attorney

EXHIBIT "A"

B-7



C-3

