

CONSENT TO USE OF LAND

This Consent to Use of Land (“Consent”) is entered into as of _____, 2018, by and between SAN DIEGO GAS & ELECTRIC COMPANY, a California corporation (“SDG&E”) and SAN DIEGO UNIFIED PORT DISTRICT (“PORT”), a public corporation. SDG&E and PORT are sometimes referred to herein as the “Party” or collectively as the “Parties”.

WHEREAS, SDG&E is the fee owner of property in the City of Chula Vista, County of San Diego, as more particularly shown on Exhibit “A” and incorporated herein, the “Property”; and

WHEREAS, PORT desires to provide the PORT INVITEES with a non-motorized biking and pedestrian path which will traverse the Property as a portion of the Chula Vista Bayfront Master Plan and Sweetwater Bicycle Path and Pedestrian Promenade Project; and

WHEREAS, the funds by the PORT to develop/construct the Sweetwater Bicycle Path and Pedestrian Promenade shall be provided in part from that certain State of California Natural Resources Agency Urban Greening Grant (“Grant”) in consideration for the receipt of funds from the Grant, the District entered into a Grant Agreement with the California Natural Resources Agency (Agreement No. U29130-0) on file in the Office of the District Clerk as Document No. 68461.

WHEREAS, PORT requests that SDG&E permit PORT and PORT INVITEES to traverse the Property: and

WHEREAS, SDG&E is willing to permit PORT and the PORT INVITEES to traverse the Property provided that PORT assumes all liability for any damage or injury to the Property, and/or persons which result from PORT’s use of the Property, including keeping the Property free from weeds, waste and the accumulation of flammable materials; and

WHEREAS, California Civil Code section 846 provides certain protection to owners of real property from civil liability for the negligence towards those who have entered their land for

recreational purposes and in reliance on that Civil Code section, SDG&E is willing to enter into this Consent.

NOW, THEREFORE, for mutual and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1.0 PROPERTIES DESCRIPTION

The Property is undeveloped land upon which the Facilities exist. The access road is unpaved, in a natural dirt condition and is periodically regraded on an annual basis by SDG&E to enable access to its facilities by its maintenance and construction equipment only. SDG&E vehicle access shall be provided at all times (24 Hours a day) to the Property.

2.0 CONSENT TO ENTER THE PROPERTIES

2.1 Consent. SDG&E hereby grants permission to PORT, and its INVITEES by and through PORT ("PORT INVITEES") to enter upon the Property shown on the drawing marked Exhibit "A" attached hereto and by reference made a part hereof, for the sole purpose of utilizing existing dirt access road and trail as a bicycling/pedestrian path trails. No other purpose whatsoever is permitted under the terms of this Consent.

2.2 Term. The term of this Consent shall be for a period of twenty-five (25) years commencing on _____, 2018 ("Commencement Date") and ending on _____, 2043 ("Expiration Date"), unless sooner terminated as herein provided. SDG&E shall use good faith efforts to deliver written notice of the pending expiration of the Consent to PORT no less than six (6) months prior to the Expiration Date.

2.3 Revocable at Will. This consent may be withdrawn in whole or in part by SDG&E for the following reasons:

At any time, SDG&E exercises the right to utilize SDG&E's fee property in accordance with California Public Utilities Commission General Order 69-C, which gives SDG&E the right to revoke any use granted on its property in whole or in part whenever in the interest of its patrons or

consumers it shall appear necessary or desirable to do so. In the event permission is withdrawn, SDG&E agrees to use reasonable efforts to minimize, so far as practicable, any relocation or restoration expenses to be incurred by PORT; however, PORT agrees that any such decision made by SDG&E shall be at SDG&E's sole and exclusive discretion, especially if such decision is based upon or involves matters of a technical nature, particularly within SDG&E's expertise.

At any time PORT fails or refuses to comply with the terms herein, if PORT constructs improvement other than those described herein as shown on Exhibit "A", or if PORT's Improvements or the method used by PORT in the construction and installation of said improvement is determined to be in violation of any federal, state, city, county or other governmental entities, laws, ordinances, or regulations, including regulations of the Public Utilities Commission for the State of California.

2.4 No Interest Conferred. PORT hereby agrees not to challenge SDG&E's title to the Property and further agrees that PORT acquires no interest in the Property as a result of PORT making certain improvements to the Property such as bike path markers.

3.0 **"AS IS" CONDITION OF PROPERTIES**

3.1 "As Is" Condition. PORT understands and agrees that the Property is being made available to PORT and PORT's INVITEES "as is," "where is" and "with all faults" without any representation or warranty whatsoever by SDG&E. PORT hereby acknowledges and assumes the risk that certain conditions, including Hazardous Materials, may exist on the Property and PORT hereby releases SDG&E of and from any and all claims, actions, demands, rights, damages, costs or expenses which might arise out of or in connection with Port or Port's Invitees use of the Property unless such claims, actions, rights, damages, costs or expenses arise out of any preexisting condition, including without limitation, preexisting Hazardous Materials.

3.2 Disclaimer of Warranties. PORT hereby further acknowledges and agrees that warranties of merchantability and fitness for a particular purpose are excluded from this Consent and that SDG&E has not warranted, and does not hereby warrant, that the Property now or in the future will meet or comply with the requirements of any safety code or regulation of any applicable Governmental Agency or jurisdiction or that the Property are suitable for the purposes contemplated herein. Without limiting the generality of the foregoing, PORT hereby assumes all

risk and liability (and agrees that SDG&E shall not be liable for any special, direct or indirect, consequential, or other damages) resulting or arising from or relating to its use, maintenance or repair of the Property. Except as specifically set forth in this Consent, no person acting on behalf of SDG&E is authorized to make, and by the execution hereof, PORT hereby acknowledges that no person has made any representation, agreement, statement, warranty, guaranty or promise regarding the Property, or the transaction contemplated herein, or the physical condition or other status of the Property, and no representation, warranty, agreement, statement, guaranty or promise, if any, made by any person acting on behalf of SDG&E which is not contained herein shall be valid or binding upon SDG&E.

4.0 **INSURANCE; DEFENSE AND INDEMNIFICATION**

4.1 Liability Insurance. PORT shall, at its sole cost and expense, carry commercial general liability insurance (or self-insurance for the same) covering the insured against claims of bodily injury, personal injury and property damage arising out of its use of the Property, in an amount not less than \$5,000,000.00 each occurrence, annual aggregate, subject to a mutually agreed upon deductible. Said limits may be met by excess or umbrella liability insurance. SDG&E shall be named as an additional insured on the commercial general liability and excess or umbrella insurance policy(s).

4.2 Workers' Compensation Insurance. PORT shall, at its sole cost and expense, keep and maintain at all times, workers' compensation insurance (or self insurance for the same) covering all persons employed in connection with its work and/or operations in compliance with any applicable state or local labor codes, acts, laws or statutes, and employer's liability insurance with a minimum limit of \$1,000,000.

4.3 Automobile Liability Insurance. PORT shall, at its sole cost and expense, keep and maintain automobile bodily injury and property damage liability insurance (or self-insurance for the same) covering automobiles owned or hired by PORT, with a minimum limit of \$1,000,000 per occurrence, subject to a mutually agreed upon deductible.

4.4 Evidence of Insurance. PORT shall, on the written request of SDG&E, promptly

furnish SDG&E with a certificate evidencing its compliance with the insurance coverage requirements of this Section 4.0.

4.5 Defense. PORT shall, at its sole cost and expense, defend any claim or cause of action brought against SDG&E based upon a claim of physical damage to tangible property or injury or death to person(s) arising out of the use of the Property by PORT or PORT's INVITEES, provided that SDG&E promptly notifies PORT of the institution of such claim or cause of action. PORT, together with SDG&E, shall have control of the defense (including the right to select and control counsel and control of any and all appeals) of any such claim and of all negotiations, including the right to affect the settlement or compromise thereof.

4.6 Indemnification. PORT shall indemnify, defend and hold harmless SDG&E, together with its affiliates, officers, directors, employees, agents, contractors, shareholders and partners ("Indemnitees") from and against any and all claims, liabilities, damages, causes of action, losses, costs and expenses, including reasonable attorneys' fees and reasonable in-house counsel costs (collectively, "Claims") which the Indemnitees may sustain or suffer, or to which the Indemnitees may become subject, as a result of (i) the death of, or bodily injury to, any person, or damage to the property of others (including SDG&E), which occurs in or about the Property or which occurs in connection with the use by PORT or PORT's INVITEES during the term of this Consent, in each case to the extent such Claims arise from the negligent act, tortious act or omission or willful misconduct of PORT or any third person or persons entering the Property, or (ii) the nonperformance or breach of any covenant or Consent made or undertaken by PORT under this Consent (iii) any damage to Protected Environmental Resources caused by PORT or PORT INVITEES, or (iv) would be covered for an owner of land pursuant to Trail Defense and Indemnification Ordinance (San Diego County Ordinance 9233). The Indemnitees shall give PORT prompt notice of any potential Claim entitling the Indemnitees to indemnification pursuant to the provisions of this Section 4.5 and PORT shall defend the Indemnitees with respect to any such Claim with counsel reasonably satisfactory to the Indemnitees. The indemnities set forth in this Section 4.5 shall include any and all losses or damages incurred by the Indemnitees in the nature of consequential damages, lost profits, diminution in value, or damage to reputation or the like.

4.7 Exclusions. PORT shall have no liability nor obligation to defend or indemnify SDG&E to the extent any liability or obligation is caused by gross negligence by SDG&E, its contractors, subcontractors, officers, agents, representatives, invitees, licensees, and/or employees.

5.0 MISCELLANEOUS PROVISIONS

5.1 Assignment. This Consent shall not be assigned by PORT without the prior written consent of SDG&E.

5.2 Notices. All notices to be given under this Consent shall be deemed effective when received, shall be in writing and shall be delivered by hand, overnight courier or by facsimile transmission promptly confirmed by overnight courier, addressed to:

Notice to SDG&E:

San Diego Gas & Electric Company
Attn: Real Estate Portfolio Manager
8335 Century Park Court, CP12A
San Diego, CA 92123
Telephone: (858) 637-3789
Email: asmith@semprautilities.com

Notice to San Diego Unified Port:

San Diego Unified Port
Attn: Director, Real Estate
3165 Pacific Highway
San Diego, CA 92101
Telephone: (619) 686-6287
Email: agordon@portofsandiego.org

These addresses may be changed by written notice to the other Party provided that no notice of a change of address shall be effective until actual receipt by the Parties of the notice.

5.3 Attorneys' Fees. If either Party files any action or brings any proceeding against the other arising from or related to this Consent, the prevailing party shall be entitled to recover from the other party as an element of its costs of suit and not as damages, reasonable attorneys' fees, costs and expenses incurred in the action or proceeding, including any appeal thereof. The "prevailing party" within the meaning of this section shall be the party to the action or proceeding whom is entitled to recover its costs of suit for the proceeding, whether or not the same proceeds to final judgment. A Party not entitled to recover its costs shall not recover attorneys' fees.

5.4 Entire Consent. This Consent and the attached exhibit constitute the entire Consent between the Parties relating to the Property. Any prior Consents, promises, negotiations or representations not expressly set forth herein are of no force and affect.

5.5 Time of the Essence. Time is of the essence for each condition, term and provision of this Consent.

5.6 Counterparts. This Consent may be executed in one or more counterparts. Each counterpart shall be deemed an original and all taken together shall constitute one and the same instrument.

5.7 Severability. If any term or provision of this Consent shall, to any extent, be held invalid or unenforceable, the remainder of this Consent shall not be affected and shall remain in full force and effect.

5.8 Waivers and Amendments. A waiver of a breach of a covenant or provision in this Consent shall not be deemed a waiver of any other covenant or provision in this Consent, and no waiver shall be valid unless in writing and executed by the waiving Party. An extension of time for performance of any obligation or act shall not be deemed an extension of the time for performance of any other obligation or act. Any amendment to this Consent shall be of no force and effect unless it is in writing and signed by both Parties.

5.9 Construction. Headings at the beginning of each section and subsection are

solely for the convenience of the Parties and are not a part of and shall not be used to interpret this Consent. The singular form shall include plural and vice versa.

5.10 Governing Law. This Consent shall be governed and construed in accordance with the laws of the State of California without giving effect to the principles of conflicts of law thereof. THE PARTIES IRREVOCABLY AGREE THAT ANY LEGAL ACTION OR PROCEEDING ARISING OUT OF THIS CONSENT SHALL BE BROUGHT IN A STATE COURT OF COMPETENT JURISDICTION IN THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA. BY EXECUTION AND DELIVERY OF THIS CONSENT, EACH OF THE PARTIES HEREBY IRREVOCABLY ACCEPTS AND SUBMITS TO THE JURISDICTION OF SAID COURTS IN PERSON, GENERALLY AND UNCONDITIONALLY IN CONNECTION WITH ANY SUCH ACTION OR PROCEEDING.

5.11 Execution in Counterparts. This Consent may be executed in counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement. Further, this Consent Agreement (i) may be executed by electronic means and delivered by facsimile or other electronic device and (ii) need not be under corporate seal.

5.12 Drafting Party. The provisions of this Consent, and the documents and instruments referred to herein, have been prepared, examined, negotiated and revised by each Party hereto and their respective lawyers, and no implication shall be drawn, and no provision shall be construed against any Party hereto by virtue of the purported identity of the drafter of this Consent, or any portion thereof.

IN WITNESS WHEREOF, the Parties have executed this Consent, and intend to be bound by the terms hereof as of the date first written above.

SAN DIEGO GAS & ELECTRIC COMPANY

SAN DIEGO UNIFIED PORT DISTRICT

By: _____
Adam C. Smith
Real Estate Portfolio Manager

By: _____
Tony Gordon
Director, Real Estate

Approved as to form: _____
SDG&E Legal

Approved as to form: _____
Port General Counsel

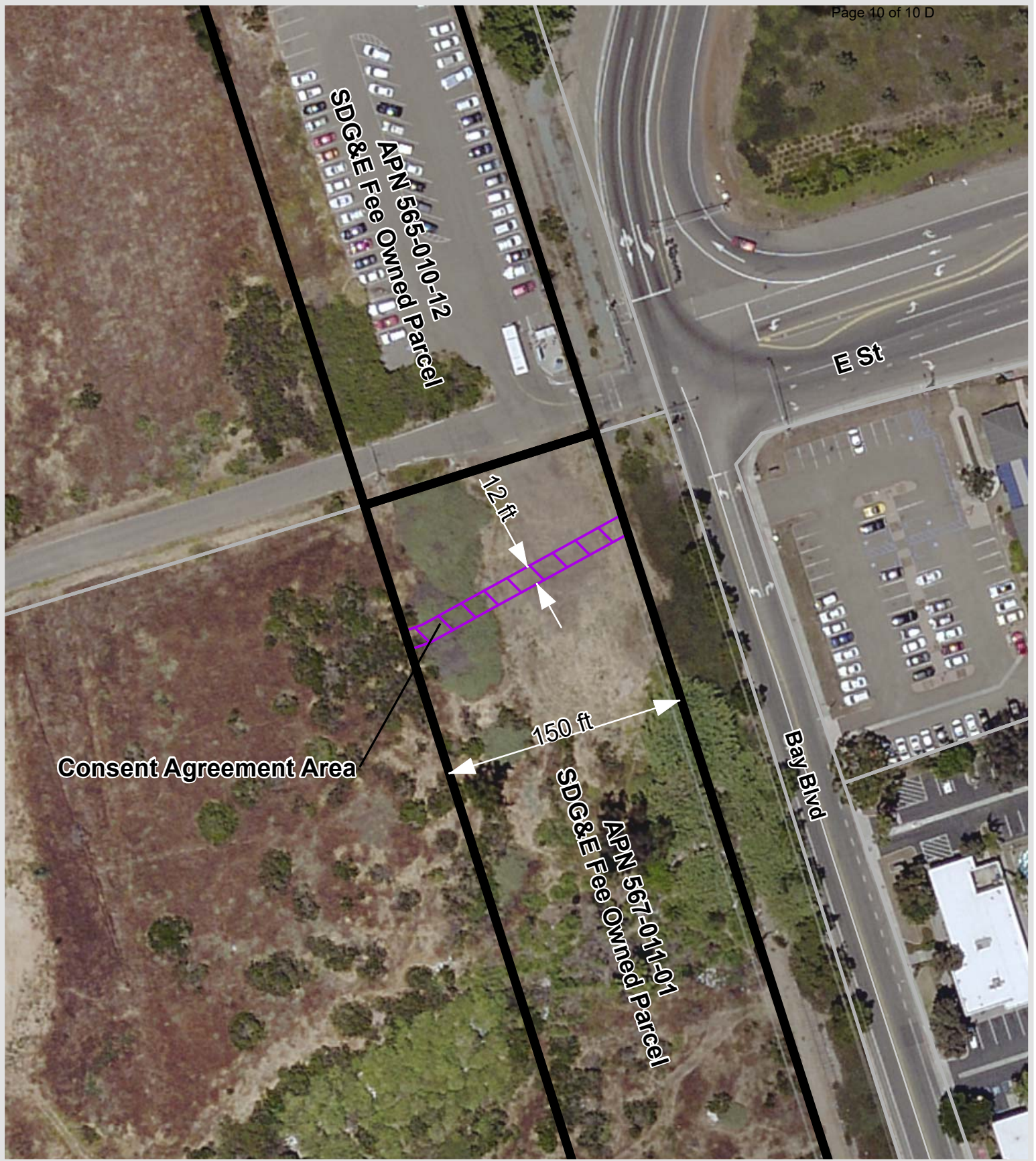




Exhibit A **Sweetwater Bicycle Path** **and Pedestrian Promenade**

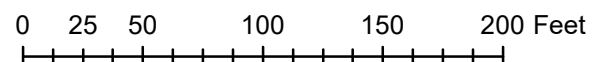
Version Date: 10/18/2018



Service Layer Credits: SANDAG & SanGIS
 Aerial Imagery: 2017

Legend

-  SDG&E Fee Owned Parcel
-  Consent Agreement Area
-  Parcel Boundary (Source: SanGIS)



SDG&E is providing this map with the understanding that the map is not survey grade.
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