

MEETING DATE: 02/14/2011

AGENDA ITEM: Approval of an Encroachment Permit Agreement with Andersen Environmental for Use of the Public Right-of-Way Along Ocean Avenue (Adjacent to 5000 Overland Avenue).

ATTACHMENTS

		<u>Pages</u>
1	Proposed Encroachment Permit Agreement	1-7

ENCROACHMENT PERMIT AGREEMENT

PARTIES:

City of Culver City, a California municipal corporation
9770 Culver Boulevard
Culver City, California 90232
ATTN: PUBLIC WORKS DIRECTOR/CITY ENGINEER
("City")

Andersen Environmental
And/or its assigns
9937 Jefferson Boulevard, Suite 200
Culver City, CA 90232
ATTN: _____
("Property Owner")

RECITALS:

- A. WHEREAS**, Property Owner is in escrow on the purchase of that certain real property located at 5000 Overland Avenue, Culver City, California (the "Overland Property");
- B. WHEREAS**, a small section of City-owned dedicated street right-of-way along Ocean Avenue and adjacent to the Overland Property (the "Subject Property"), which is illustrated on Exhibit A, has been used as a parking lot by Property Owner for many years;
- C. WHEREAS**, the Subject Property is not currently being used for public right-of-way purposes and terminates at the Subject Property driveway entrance and the City has no use for it at this time; and
- D. WHEREAS**, continuance of the use of the Subject Property as a parking lot will serve the public benefit.

NOW, THEREFORE, in consideration of the mutual promises and agreements hereinafter contained, the parties hereto agree as follows:

1. The City hereby grants Property Owner this Encroachment Permit Agreement (the "Agreement") to use the Subject Property as a parking lot (the "Parking Lot") to serve the businesses located on the Overland Property and the general public.

2. Property Owner shall not limit parking in the Parking Lot to tenants and visitors of the Overland Property. Property Owner shall not exclude the general public from using the Parking Lot for parking purposes. City agrees that, without a written modification of this Agreement, it shall not place signs on the Subject Property indicating public parking nor advertise or otherwise suggest that the Parking Lot is available for public parking.

3. The rights granted by this Agreement are granted based upon the above-referenced representations. If Property Owner uses the Subject Property for purposes other than public parking, the City may immediately terminate this Agreement after providing Property Owner written notice and an opportunity to cure its non-permitted use within 10 days of receipt of such notice.

4. City reserves the right to charge Property Owner reasonable compensation consistent with applicable law for the use of City's rights-of-way. By entering into this Agreement, City does not waive any rights, either legal or equitable, to which it may otherwise be entitled.

5. Property Owner, at its sole cost and expense, shall be responsible for the maintenance of the Subject Property and any and all damage to the Subject Property shall be repaired by Property Owner at no cost or expense to City and to the reasonable satisfaction of City's Public Works Director. In the event Property Owner declines to make repairs reasonably deemed necessary, the City may immediately terminate this Agreement without prior notice.

6. The permission granted under this Agreement shall not in any event constitute an easement on or an encumbrance against the public rights-of-way. No right, title or interest in the public rights-of-way, or any part thereof, shall vest or accrue to Property Owner or any other entity or person by reason of this Agreement, the issuance of an encroachment permit or the exercise of the privileges given thereby.

7. Except as otherwise provided herein, this Agreement may be terminated by the City upon 180-days written notice, if the City determines the termination of the Agreement is necessary to protect the public health, safety or welfare, or when made necessary by either the installation, abandonment, change of grade, alignment or width of any street, sidewalk or other public facility or the construction, maintenance or operation of any other City or other public agency underground or aboveground facilities (including, by way of example and not limitation, any sewer, storm drain, conduits, gas, water, electric or other utility system or pipes), provided that City or other public agency is acting in its governmental capacity. In the event all or any portion of the Subject Property is needed by City or other public agency for a governmental purpose or in the event the use of the Subject Property by Property Owner shall be considered detrimental to the public health, safety or welfare or to governmental activities including, but not limited to, interference with

City or other public agency construction projects, or is in conflict vertically and/or horizontally with any proposed City or other public agency installation, Property Owner shall cease use of the Subject Property or the involved part of it, without cost or expense to City.

Upon receipt of the notice of termination, Property Owner shall have 180 days to cease use of the Subject Property. In the event of termination of this Agreement, Property Owner hereby waives and releases any and all rights or claims for cost reimbursement, inverse condemnation, relocation benefits or any other legal or equitable action the Property Owner may otherwise have against City. Should termination occur, if requested by City's Public Works Director, Property Owner shall repair and restore the Subject Property to a condition satisfactory to City's Public Works Director within 30 days of such request.

In the event of an emergency, as reasonably determined by City's Public Works Director or other public agency, City may require Property Owner to immediately cease use of the Subject Property without prior notice, provided that Property Owner is provided with written notice within a reasonable period thereafter.

8. Without limiting any other obligation set forth in this Agreement, Property Owner shall provide City with a Certificate of Insurance in the amount of Two Million Dollars (\$2,000,000) for General Liability (the "Policy") (see insurance requirements attached as Exhibit B to this Agreement). That amount may be provided by two separate One Million Dollar (\$1,000,000) policies provided the aggregate limits are \$2,000,000. The Policy(ies) shall provide, or be endorsed, with an endorsement approved by the City Attorney's Office, which shows City and its officers and employees are additional insureds under the Policy, the Policy is primary, the Policy has a severability provision and any other City-policy is non-contributing.

9. Property Owner and its successors and assigns shall and do hereby indemnify, hold harmless and defend City, its elected and appointed officials, officers, employees, agents and representatives ("Indemnitees") from any and all suits and causes of action, claims, charges, damages, judgments, demands, civil fines, penalties or losses of any kind or nature whatsoever, including attorney fees and court costs, which may arise against any or all Indemnitees by reason of any real or personal property damage, personal injury or death arising or resulting directly or indirectly from Property Owner's use of the Subject Property. This indemnity and obligation to hold harmless shall apply regardless of whether or not City prepared, supplied, or approved plans or specifications or inspected any work, repairs or improvements installed or constructed on the Subject Property.

10. In the event Property Owner's purchase of the Overland Property falls through, this Agreement shall become null and void.

11. If litigation arises out of this Agreement for the performance thereof, then the court shall award costs and expenses, including attorney's fees, to the prevailing party. In awarding attorney's fees, the court shall not be bound by any court fee schedule, but shall award the full amount of costs, expenses and attorney's fees paid or incurred in good faith.

12. The terms of this Agreement shall be interpreted according to the laws of the State of California. If litigation occurs, then venue shall be in the Superior Court of Los Angeles County.

13. All notices required or provided for under this Agreement shall be in writing, delivered in person or by certified mail, return receipt requested, or by a nationally recognized overnight delivery service addressed to the parties as indicated on the first page of this Agreement. Any notice so delivered shall be effective upon the date of personal delivery or, in the case of mailing, upon delivery. Any party may change its address for notice by giving 10-days notice of such change in the manner provided for in this Paragraph.

14. Property Owner shall not transfer or assign this Agreement without the prior written consent of City.

15. A waiver by either party of any breach of any term, covenant, or condition contained in this Agreement shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant, or condition contained in this Agreement whether of the same or different character.

16. As set forth in Paragraph 6, the parties agree that no possessory interest is created by this Agreement. However, to the extent that a possessory interest is deemed created, Property Owner acknowledges that notice is and was hereby given to Property Owner, pursuant to California Revenue and Taxation Code Section 107.6, that use or occupancy of any public property pursuant to the authorization herein set forth may create a possessory interest which may be subject to the payment of property taxes levied upon such interest. Property Owner shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interest taxes or other taxes levied against Property Owner's right to possession, occupancy, or use of any public property pursuant to any right of possession, occupancy or use created by this Agreement.

17. Property Owner shall comply with all applicable federal, state and local laws, rules and regulations.

18. If any part of this agreement is held invalid, the remaining terms and conditions shall not be affected unless their enforcement under the circumstances would be unreasonable, inequitable, or otherwise frustrate the purposes of this agreement.

19. This agreement, including the exhibits attached hereto, constitutes the entire agreement between the parties and supersedes any previous oral or written agreements with respect to the subject of this Agreement.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed by their respective duly authorized representatives as of the dates indicated below.

"City"

**CITY OF CULVER CITY, a
Municipal Corporation**

By: _____
John Nachbar
City Manager

Date: _____

"Property Owner"

Andersen Environmental

By: _____
Name (Print): _____

Title: _____

Date: _____

Approved as to Form and Legal Content
Carol A. Schwab, City Attorney

By: _____
Heather Baker, Assistant City Attorney

Date: _____

EXHIBIT B

ENCROACHMENT PERMIT AGREEMENT BETWEEN CITY OF CULVER CITY AND ANDERSEN ENVIRONMENTAL

INSURANCE REQUIREMENTS

A. Policy Requirements.

Property Owner shall submit duly executed certificates of insurance for the following:

1. An occurrence based Comprehensive General Liability ("CGL") policy, at least as broad as ISO Form CG 0001, in the minimum amount of One Million Dollars (\$1,000,000) each occurrence, with not less than Two Million Dollars (\$2,000,000) in annual aggregate coverage.

The CGL Policy shall have the following requirements:

- a. The policy shall provide coverage for personal injury, bodily injury, death, accident and property damage and advertising injury, as those terms are understood in the context of a CGL policy. The coverage shall not be excess or contributing with respect to City's self-insurance or any pooled risk arrangements;
 - b. The policy shall provide \$1,000,000 combined single limit coverage for owned, hired and non-owned automobile liability;
 - c. The policy shall include coverage for liability undertaken by contract covering, to the maximum extent permitted by law. Property Owner's obligation to indemnify the Indemnitees as required under Paragraph 9 of this Agreement;
 - d. The Policy shall not exclude coverage for Completed Operations Hazards; and
 - e. The City of Culver City, members of its City Council, its boards and commissions, officers, agents, and employees will be named as an additional insured in an endorsement to the policy, which shall be provided to the City and approved by the City Attorney.
2. Workers' Compensation limits as required by the Labor Code of the

State of California with Employers' Liability limits of One Million Dollars (\$1,000,000.00) per accident, if the Agreement will have Property Owner employees using the Subject Property.

B. Waiver by City.

City may waive one or more of the coverages listed in Section A, above. This waiver must be express and in writing, and will only be made upon a showing by the Property Owner that its operations in and with respect to City are not such as to impose liability within the scope of that particular coverage.

C. Additional Insurance Requirements.

1. All insurance listed in Paragraph A shall be issued by companies licensed to do business in the State of California, with a claims paying ability rating of "BBB" or better by S&P (and the equivalent by any other Rating Agency) and a rating of A:VII or better in the current Best's Insurance Reports;
2. Property Owner shall provide City with at least thirty (30) days prior written notice of any modification, reduction or cancellation of any of the Policies required in Paragraph A, or a minimum of ten (10) days notice for cancellation due to non-payment.
3. City may increase the scope or dollar amount of coverage required under any of the policies described above, or may require different or additional coverages, upon prior written notice Property Owner.