

**2018-2019 EXCLUSIVE USE PERMIT
FOR BAYFRONT FESTIVAL PARK
BETWEEN THE CITY OF DULUTH AND
BENTLEYVILLE TOUR OF LIGHTS, INC.**

ARTICLE 1 – PARTIES

1.1 This Exclusive Use Permit Agreement, hereinafter referred to as “PERMIT AGREEMENT,” is by and between the CITY OF DULUTH, a municipal corporation organized and existing under the laws of the State of Minnesota, hereinafter referred to as the “CITY,” and Bentleyville Tour of Lights, Inc., a Minnesota non-profit corporation, hereinafter referred to as “PROMOTER.” This PERMIT AGREEMENT supersedes any other agreement between the parties and all such earlier agreements shall be terminated upon approval of this PERMIT AGREEMENT.

ARTICLE 2 – PREMISES

2.1 In consideration of the mutual covenants as set forth herein, and except as otherwise provided in this PERMIT AGREEMENT, the CITY hereby issues its PERMIT to the PROMOTER for the exclusive use of the Bayfront Festival Park, including grounds and structures, but excluding, unless otherwise provided in this Agreement, the playground area commonly known as Playfront Park, the Ice Rink, and any First Amendment area established by the City (“VENUE”), for the sole purpose of conducting a holiday lighting display with related concession activities (“EVENT”). Said VENUE is generally illustrated in EXHIBIT A, attached hereto and incorporated by reference. Said VENUE is generally defined as located between 5th Avenue West and abandoned Slip No. 2 and between Railroad Street and the waterfront, but specifically excluding properties owned and controlled by the Lake Superior Aquarium, the Duluth Entertainment and Convention Center (“DECC”), and the Duluth Economic Development Authority (“DEDA”). This PERMIT includes permission to illuminate the walkways and trees located around the perimeter of Bayfront Festival Park. The CITY makes no representations that the VENUE is suitable for this specific use.

ARTICLE 3 – TERM OF OCCUPANCY

3.1. Except as provided in this PERMIT AGREEMENT, PROMOTER is permitted exclusive use of the VENUE for a period commencing at 6:00 a.m. on September 17, 2018, and concluding no later than 12:00 a.m., January 31, 2019 (“TERM”). The permission granted by this Agreement is for the sole purpose of conducting the EVENT. PROMOTER agrees that it shall conduct and complete the EVENT, including all set up, take down and site restoration, only during such period. The parties acknowledge that the ability to complete site restoration may be delayed by weather conditions, and in that event the parties agree that site restoration may be completed when weather conditions make restoration practicable.

3.2. The City reserves the right, in cooperation with PROMOTER, to permit other events utilizing the Park Entry and Entry Walkway, Entry Plaza, and Courtyard and Walkway at the VENUE prior to the opening night of the EVENT. The City shall provide at least seven (7) day's notice to PROMOTER of other events utilizing the Park Entry and Entry Walkway, Entry Plaza, and Courtyard and Walkway at the VENUE prior to the opening night of the EVENT.

3.3. The parties agree to conduct a walk-through inspection of the PREMISES prior to the beginning of the EVENT season at a mutually agreeable date and time to assess the condition of the VENUE. Following the conclusion of each EVENT season and removal of the lighting display and structures, the parties agree to again conduct a walk-through inspection of the PREMISES to assess whether any damage has occurred and what restoration is required.

3.4 PROMOTER shall enjoy non-exclusive use of the Family Center during the EVENT preparation period from September 17, 2018 through November 16, 2018 and December 27, 2018 through January 31, 2019. The PROMOTER shall have exclusive use of the Family Center from November 17, 2018 through December 26, 2018.

3.5. The Ice Rink outside the Family Center is not part of this PERMIT AGREEMENT. Supervision, maintenance and control of the Ice Rink shall remain exclusively with the CITY and the CITY shall indemnify, save and hold harmless PROMOTER from liability therefrom.

ARTICLE 4 – FEES

4.1 PROMOTER shall not be required to pay a permit fee for the use of this VENUE as specified herein. Instead, consideration shall be the public benefit and purpose provided by PROMOTER.

4.2. PROMOTER agrees to the payment of a restoration deposit of Two Thousand Dollars (\$2,000.00). Such deposit shall be payable to the CITY at the time of permit issuance. The deposit shall be returned to PROMOTER, once the VENUE has been restored to its original condition by PROMOTER, and accepted by the CITY, normal wear and tear excepted. If PROMOTER fails to return the VENUE to its original condition, the CITY shall retain the entire amount of said deposit. Notwithstanding the above, the City agrees to be responsible for the first Ten Thousand Dollars (\$10,000.00) in damages to the VENUE. All expenses over Ten Thousand Dollars (\$10,000.00) required to fully restore the VENUE shall be the responsibility of PROMOTER. CITY will provide PROMOTER, via regular United States mail, written notice of the complete list of all itemized damages with the estimated repair cost of each item. PROMOTER will have forty-five (45) days, weather permitting, to repair the damages that are PROMOTER'S responsibility hereunder. The PROMOTER is not responsible for any item of damage not included on the CITY'S itemized damage list. If PROMOTER does not make such repairs within the forty-five-day cure period, then CITY may make the repairs and invoice PROMOTER for all repair costs in excess of \$10,000. PROMOTER shall pay all such costs to

the CITY within 30 days of receipt of the CITY's invoice for all costs that are the PROMOTER'S responsibility and that exceed the amount of the restoration deposit.

4.3 CITY shall provide sufficient electrical services to the EVENT, including the parking lots used in conjunction with the EVENT. However, the CITY is not required to provide electrical services to the west entrance/exit to Parking Lot B.

4.4 CITY shall pay all electricity costs billed by Minnesota Power and incurred during the term of occupancy. CITY receives the lighting rebate from Minnesota Power for LED lights purchased by PROMOTER. The CITY acknowledges the rebate belongs to the PROMOTER as an incentive to convert to LED lighting and the CITY will return the entire rebate amount from Minnesota Power within fourteen (14) days of receiving such rebate, if any.

ARTICLE 5 – PARKING

5.1 The use of Parking Lots is subject to a license agreement between City and the Duluth Economic Development Authority (DEDA) (City Auditor Doc. No. 22551) and an agreement between the City and the Duluth Entertainment and Convention Center Authority (DECC) (City Auditor Doc. No. 22371). Promoter understands Parking Lots are not subject to this PERMIT AGREEMENT; the use of the parking lots shall be negotiated with the DECC.

ARTICLE 6 – PROMOTER RESPONSIBILITIES

6.1. PROMOTER is responsible for providing a sufficient quantity of portable toilet units, complete with ongoing cleaning and servicing throughout the EVENT to provide safe, minimum standards of sanitation and public convenience.

6.2. Vehicular access to the VENUE shall be limited to the "Vehicle Access" roadway from Railroad Street as designated and labeled on EXHIBIT A. At no time shall any vehicle of any kind be parked, operated, or permitted except upon those areas of the VENUE labeled "Vehicle Access" unless approved in writing by CITY. PROMOTER shall be responsible for the enforcement of this provision for all vehicles on the VENUE whether said vehicles are owned by PROMOTER, PROMOTER's employees, volunteers, subletees, contractors, agents of PROMOTER, or its patrons. The CITY reserves the right to order the immediate removal of any vehicle used or parked in violation of this provision.

6.3. PROMOTER agrees that it shall be responsible for any and all damage to the VENUE caused by and arising out of the occurrence of the EVENT, provided such damage was the result of the actions or omissions of PROMOTER, its agents or assigns. Such responsibility for damages includes, but is not limited to, set up and take down activities. Such responsibility does not include criminal acts of third-parties over whom Promoter does not exercise supervision or control.

6.4. PROMOTER, its agents, or assigns shall not store hazardous waste, transfer hazardous waste, or participate in refueling operations at VENUE (other than equipment owned or controlled by it) and all of Bayfront Festival Park. For purposes of this Section, hazardous waste is defined as waste that poses substantial or potential threats to public health or the environment and generally exhibits one or more of these characteristics: ignitable, reactive, corrosive, or toxic.

6.5. During periods of exclusive use, CITY shall provide at its expense trash collection receptacles and attendant services in sufficient quantity to maintain the VENUE in a reasonable state of cleanliness during any period of exclusive use. Such cleanup area shall include all of Bayfront Festival Park and shall not be limited to the VENUE area. If required by the St. Louis County Health Department, CITY shall provide specialized disposal receptacles and related pick up services through a competent vendor, for the handling of liquid, oil, fatty, or other materials disposed of and requiring special and/or separate handling before, during, or after its event. CITY shall provide, at its expense, for the separation of recyclables plastic bottles, aluminum cans and cardboard boxes that is created at the EVENT and for its removal from the site to the appropriate collection site.

6.6. PROMOTER shall be responsible for all snow removal on all VENUE pathways and shall apply salt or sand on VENUE pathways during any period of exclusive use, or within any area of exclusive use. However, CITY agrees to provide the salt and/or sand to PROMOTER for these purposes. PROMOTER shall be responsible for snow removal on LOT B at the sole cost of PROMOTER.

6.7. PROMOTER shall provide traffic control personnel, barricades, and cones for traffic control at the EVENT site as determined necessary by the City of Duluth Police Department. City of Duluth Police personnel required by the City shall be reimbursed by PROMOTER pursuant to the City's extra-duty policy.

6.8. PROMOTER is responsible to organize, contract for, and pay for any fireworks display or show during the Term of this Agreement.

6.9. PROMOTER agrees that no person on the grounds of race, color, creed, religion, national origin, ancestry, age, sex, marital status, status with respect to public assistance, sexual orientation and/or disability shall be excluded from any participation in, denied any benefits of or otherwise subjected to discrimination with regard to its operations pursuant to this Agreement.

6.10. PROMOTER shall observe and comply with all laws, ordinances, rules and regulations of the United States of America, the State of Minnesota and City of Duluth and their respective agencies which are applicable to its activities under this Agreement.

6.11. PROMOTER shall comply with the terms of the Consent Decree and Judgment rendered and filed September 16, 2013, City of Duluth Resolution No. 11-3392, a copy of which is attached hereto to as Exhibit B and incorporated herein.

ARTICLE 7 – CITY RESPONSIBILITIES

- 7.1. CITY shall maintain and provide appropriate cleaning services to the Bayfront Family Center.
- 7.2. CITY shall provide and maintain the heated public restroom at Playfront during the term of PROMOTER's occupancy.
- 7.3. CITY shall provide water access between the Bayfront Family Center and the Bentleyville Cookie House.
- 7.4. CITY shall provide salt and/or sand for EVENT pathways. City shall be responsible for snow removal on City Lot A.
- 7.5. CITY shall comply with the terms of the Consent Decree and Judgment rendered and filed September 16, 2013, City of Duluth Resolution No. 11-3392, a copy of which is attached hereto to as Exhibit B and incorporated herein.

ARTICLE 8 – COMMERCIAL ACTIVITIES

- 8.1. PROMOTER and all third-party vendors or contractors hired or permitted by PROMOTER shall not advertise, sell, or offer alcoholic beverages whether intoxicating or nonintoxicating, during EVENT or at VENUE.
- 8.2. PROMOTER agrees to defend, indemnify, and save harmless the CITY and its officers, agents, employees and servants, from any and all liens, claims, suits, demands, liability, judgments, costs, damages and expenses, including attorney's fees, which may accrue against or be charged to or may be recovered from the CITY by reason of or account of or in any way related to the goods sold by PROMOTER or any of its third-party vendors during EVENT. Upon ten (10) days written notice, PROMOTER will appear and defend all claims and lawsuits against the CITY growing out of any action with respect to goods sold by PROMOTER or third-party vendors during EVENT.

ARTICLE 9 – ALTERATIONS OR IMPROVEMENTS

- 9.1. PROMOTER shall not proceed with any underground actions without first securing approval from the CITY and further having all underground utilities properly located by One Call or identified by the CITY prior to proceeding with said underground actions.
- 9.2. PROMOTER shall limit the on-ground use of wires, hoses, etc. to only those areas which are not accessible to normal pedestrian traffic. PROMOTER shall ensure that any installation of on-ground utilities shall comply with all applicable codes and laws pertaining to said installations.

9.3. PROMOTER may make temporary improvements to the grounds such as the erection of fencing, scaffolding, special platforms, water tanks, rigging, or other apparatus necessary to ensure the success of the EVENT or the safety of staff, performers, and the general public. PROMOTER shall submit plans to the CITY showing the proposed location of all such apparatus upon the grounds at least ten (10) days in advance of said EVENT for the CITY's review and approval. No construction, alteration, or improvement shall begin until approved by the CITY and all building permits required by law are secured. All construction or apparatus installed on said premises shall conform to any and all applicable laws or building codes governing such installations.

9.4. PROMOTER agrees that prior to commencing any construction, erection, alteration, or improvement on said premises that PROMOTER will provide the CITY with a Certificate of Insurance evidencing that all persons, whether in the direct employ of PROMOTER or agents hired by PROMOTER, are covered by Worker's Compensation Insurance as required by Minnesota Statutes. PROMOTER shall submit such Certificate of Insurance at least ten (10) days prior to the EVENT. No construction, erection, alteration, or improvement shall be commenced until such time as said Certificate of Insurance is reviewed and approved by the CITY's attorney.

ARTICLE 10 – FACILITY LIAISON

10.1 CITY designates the Property Services Supervisor as the CITY employee to serve as staff liaison and primary contact between PROMOTER and CITY.

ARTICLE 11 – INSURANCE

11.1. PROMOTER shall provide Public Liability and Automobile Liability Insurance with limits not less than \$1,500,000 Single Limit and shall provide for the following: Commercial General Liability, Liability for Premises, Operations, Completed Operations, Independent Contractors, and Contractual Liability. The CITY does not represent or guarantee that these types or limits of coverage are adequate to protect PROMOTER's interests and liabilities.

11.2. The CITY shall be named as an Additional Insured under the Public Liability Policy, or as an alternate, PROMOTER may provide Owners-Contractors Protective policy, naming itself, and the CITY. PROMOTER shall also provide evidence of Statutory Minnesota Workers' Compensation Insurance. PROMOTER shall provide Certificates of Insurance evidencing the required insurance coverage. The certificates shall provide 30 days' notice of cancellation, non-renewal or material change provisions, and shall further provide that failure to give such notice to CITY will render any such change or changes in said policy or coverage ineffective as against the CITY.

ARTICLE 12 – INDEMNIFICATION

12.1 To the fullest extent permitted by law, PROMOTER agrees to defend and indemnify CITY, and its officers, employees, and volunteers, from and against all claims, damages, losses, and expenses, including attorney fees, arising out of or resulting from the EVENT; but only to the extent caused in whole or in part by the negligent acts, errors or omissions of PROMOTER, PROMOTER’S employees, volunteers, subletees, contractors, agents, or anyone for whose acts PROMOTER may be liable. PROMOTER agrees this indemnity obligation shall survive the completion or termination of this PERMIT AGREEMENT. This Indemnification shall not extend to third-party claims against the City for death or injury arising out of the CITY’s negligence. Further, this indemnification shall not extend to or apply to other events authorized by the City pursuant to Section 3.2 of this Agreement.

ARTICLE 13 – INDEPENDENT RELATIONSHIP

13.1 It is agreed that this PERMIT is not intended nor should it be construed in any manner as creating or establishing the relationship of partners or joint ventures between the parties hereto, or creating a joint enterprise, or as constituting PROMOTER as an agent, representative, employee, or independent contractor of the CITY for any purpose. PROMOTER and its agents, volunteers, and employees shall not be considered employees of the CITY and any and all claims that may or might arise under the Workers’ Compensation Act of the State of Minnesota on behalf of PROMOTER’s employees or agents and arising out of employment shall in no way be the responsibility of the CITY. PROMOTER’s employees shall not be entitled to any compensation or rights or benefits of any kind whatsoever from the CITY including without limitation, tenure rights, medical and hospital care, sick and vacation leave, Workers’ Compensation, Unemployment Insurance, disability or severance pay and PERA.

ARTICLE 14 – TERMINATION OF AGREEMENT

14. This PERMIT AGREEMENT may be terminated by either party upon breach of any of the terms and conditions of this PERMIT AGREEMENT by another party and the failure to rectify or correct any such breach within one hundred twenty (120) days of the transmission of written notice of the breach, or by mutual consent of the parties.

ARTICLE 15 – FORCE MAJEURE

Under the terms of this Agreement, neither the CITY nor PROMOTER shall be considered in default or in breach of any of the terms with respect to the performance of their respective obligations under this Agreement in the event of enforced delay in the performance of its obligations due to unforeseeable causes beyond its control and without its fault or negligence, including but not limited to acts of God, acts of a public enemy, acts of the federal government, acts of another party, fire, floods, epidemics, strikes or embargoes, or for delays of contractors or

subcontractors due to such causes. In the event of any such delay, any time for completion or delivery under this Agreement shall be extended for the period of any such delay upon written notice from the party seeking the extension to the other party.

ARTICLE 16 - GENERAL PROVISIONS

18.1 The rights of PROMOTER to occupy, use, and maintain the VENUE shall continue only so long as all of the undertakings, provisions, covenants, and conditions herein contained are on its part complied with strictly and promptly.

18.2 PROMOTER agrees that the VENUE shall only be used for the EVENT and related support services and for no other purpose.

18.3 PROMOTER agrees to operate the EVENT and all activities conducted at the VENUE in strict compliance with the laws, rules and regulations of the United States, State of Minnesota, St. Louis County, and the City of Duluth. PROMOTER agrees to procure, at its expense, all licenses and permits necessary for carrying out the provisions of this PERMIT AGREEMENT.

18.4 Upon termination of occupancy, PROMOTER agrees to surrender possession of said premises to the CITY in as good condition and state of repair as said premises were in at the time PROMOTER took possession, normal wear and tear excepted.

18.5 The CITY reserves the right to the unlimited access at all times to the VENUE for authorized personnel and for the purposes of inspection and ensuring that the provisions of this PERMIT are complied with. The CITY shall provide its employees or authorized agents, Bayfront Festival Park all-event access passes, as needed, for access by authorized personnel. All on-duty law enforcement personnel, acting in their official capacity, shall be authorized to enter the VENUE without regard to this paragraph.

18.6 The waiver by the CITY or PROMOTER of any breach of any term, covenant, or condition herein contained, shall not be deemed to be a waiver of any subsequent breach of same or any other term, covenant, or condition herein contained.

18.7 Except as provided for in this PERMIT AGREEMENT, PROMOTER shall not assign or transfer any of its rights or interests under this PERMIT AGREEMENT in any way whatsoever.

18.9 This PERMIT AGREEMENT is to be construed and understood solely as an agreement between the parties hereto and shall not be deemed to create any rights in any other person, except to the extent PROMOTER is obligated to perform terms and conditions that benefit a third-party venue and/or entertainment management company. No person, other than a third-party venue and/or entertainment management company shall have the right to make claim that she or he is a third party beneficiary of this PERMIT AGREEMENT or of any of its terms and conditions.

18.10. Any amendment to this PERMIT AGREEMENT shall be in writing, approved with the same legal formalities as required by the original PERMIT AGREEMENT, and shall be executed by the same parties who executed the original PERMIT AGREEMENT or their successors in office.

18.11. This PERMIT AGREEMENT, together with all of its paragraphs, terms and provisions is made in the State of Minnesota and shall be construed and interpreted in accordance with the laws of the State of Minnesota.

18.12. Notice to the parties provided for herein shall be sufficient if sent by the regular United States mail, postage prepaid, addressed to:

CITY:

City of Duluth
Property and Facilities Management
1532 W. Michigan Street
Duluth, Minnesota 55806

PROMOTER:

Nathan Bentley
Bentleyville Tour of Lights, Inc.
4313 Haines Road
Duluth, Minnesota 55811

or to such other respective persons or addresses as the parties may designate to each other in writing from time to time.

18.13. This PERMIT AGREEMENT may be executed in separate counterparts with the same effect as if all signatures were on the same PERMIT AGREEMENT.

18.14. For purposes of this PERMIT AGREEMENT a telecopy or facsimile document and signature shall be deemed as, and shall serve as, an original PERMIT AGREEMENT and signature.

18.15. This PERMIT AGREEMENT, along with the attached exhibits, embodies the entire understanding of the parties and there are no further or other agreements, permits, or understandings, written or oral, in effect between the parties relating to the subject matter hereof. This understanding shall also extend to any uncommunicated expectations PROMOTER may have of the CITY and not specifically mentioned in this Agreement. Any PROMOTER expectations of the CITY for the provision of any CITY materials, supplies, or services which are over and above those specifically mentioned in this PERMIT AGREEMENT will not be honored by the CITY except by written authorization from the CITY.

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IN WITNESS WHEREOF, the parties have set their hands the day and date first shown below.

CITY OF DULUTH

BENTLEYVILLE TOUR OF LIGHTS, INC.

By: _____
Mayor


Board Chairperson of Board of Directors

Attest: _____
City Clerk

Legal Committee Representative

Dated: _____

Countersigned:

City Auditor

Approved as to form:

City Attorney

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

STEVE JANKOWSKI and PETER
SCOTT,

File No.: 11-3392 MJD/LIB

Plaintiffs,

vs.

**CONSENT DECREE
AND JUDGMENT**

CITY OF DULUTH,

Defendant.

WHEREAS, the parties now wish to settle all issues involved in the above-captioned matter in accordance with the terms of the Consent Decree set forth herein:

NOW THEREFORE, on the joint motion of Plaintiffs and Defendant, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. During Bentleyville, Plaintiffs Jankowski and Scott will be allowed to engage in their desired First Amendment activity (via signs, literature and speech in compliance with all applicable state laws and city codes) in a portion of the Bentleyville event as agreed upon by the parties during their April 26, 2013 mediated settlement conference in the above-captioned matter, which is outlined on the map attached hereto and made a part hereof as **Exhibit A** in bold blue marker, and generally described as follows:

The sidewalks and public right-of-ways surrounding Bayfront Festival Park, and the walkways leading into Bayfront and up to, but not including, the steel structure (archway) and gate marking the entrance to "Area 1" indicated on Exhibit A.

referred to hereinafter as the “Free Speech Zone”;

2. While engaged in First Amendment activity in the area identified as “Area 2” on Exhibit A, Plaintiffs may not yell or shout and shall limit any oral/verbal communications to a conversational volume.

3. The “Free Speech Zone” does not extend into or inside Area 1, the steel structure and gate marking the entrance to Area 1, or any of the fences surrounding Area 1.

4. Plaintiffs Jankowski and Scott do not enjoy exclusive use of the Free Speech Zone;

5. While engaging in expressive activities within the Free Speech Zone, Plaintiffs Jankowski and Scott may not engage in conduct that violates other city ordinances or state laws;

6. While Plaintiffs’ First Amendment activities are confined to the Free Speech Zone, Plaintiffs are allowed to attend the Bentleyville event (assuming satisfaction of all event organizer requirements for admission) when they are not engaging in said activities;

7. The Free Speech Zone agreed to by the parties applies only to the Bentleyville event;

8. Plaintiffs are allowed to engage in First Amendment activities in the Free Speech Zone at the Bentleyville event regardless of whether Bentleyville subsequently becomes a ticketed event;

9. In full, final and complete satisfaction of any and all claim for attorneys' fees in the above-captioned matter now and in the future, the city agrees to a one-time payment in the amount of \$177,500. The city agrees to make best efforts to issue payment within 30 days after entry of this Decree and receipt from Plaintiffs' counsel of instructions for preparation of the payee section of the draft.

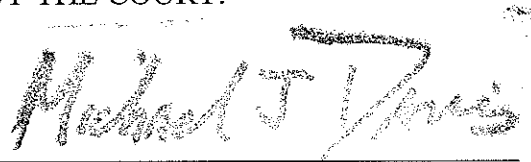
10. This Consent Decree and Judgment is a settlement and compromise between the parties and shall not be construed as an admission of liability on the part of the City of Duluth, its agents, officers, or employees, all of whom expressly deny liability.

11. This Consent Decree And Judgment, along with the attached exhibit, embodies the entire understanding of the parties and there are no further or other agreements, permits, or understandings, written or oral, in effect between the parties relating to the subject matter hereof.

NOW, THEREFORE, LET JUDGMENT BE ENTERED pursuant to all the terms and conditions above.

SO ORDERED this 16th day of September, 2013.

BY THE COURT:



Michael J. Davis
Chief Judge
United States District Court

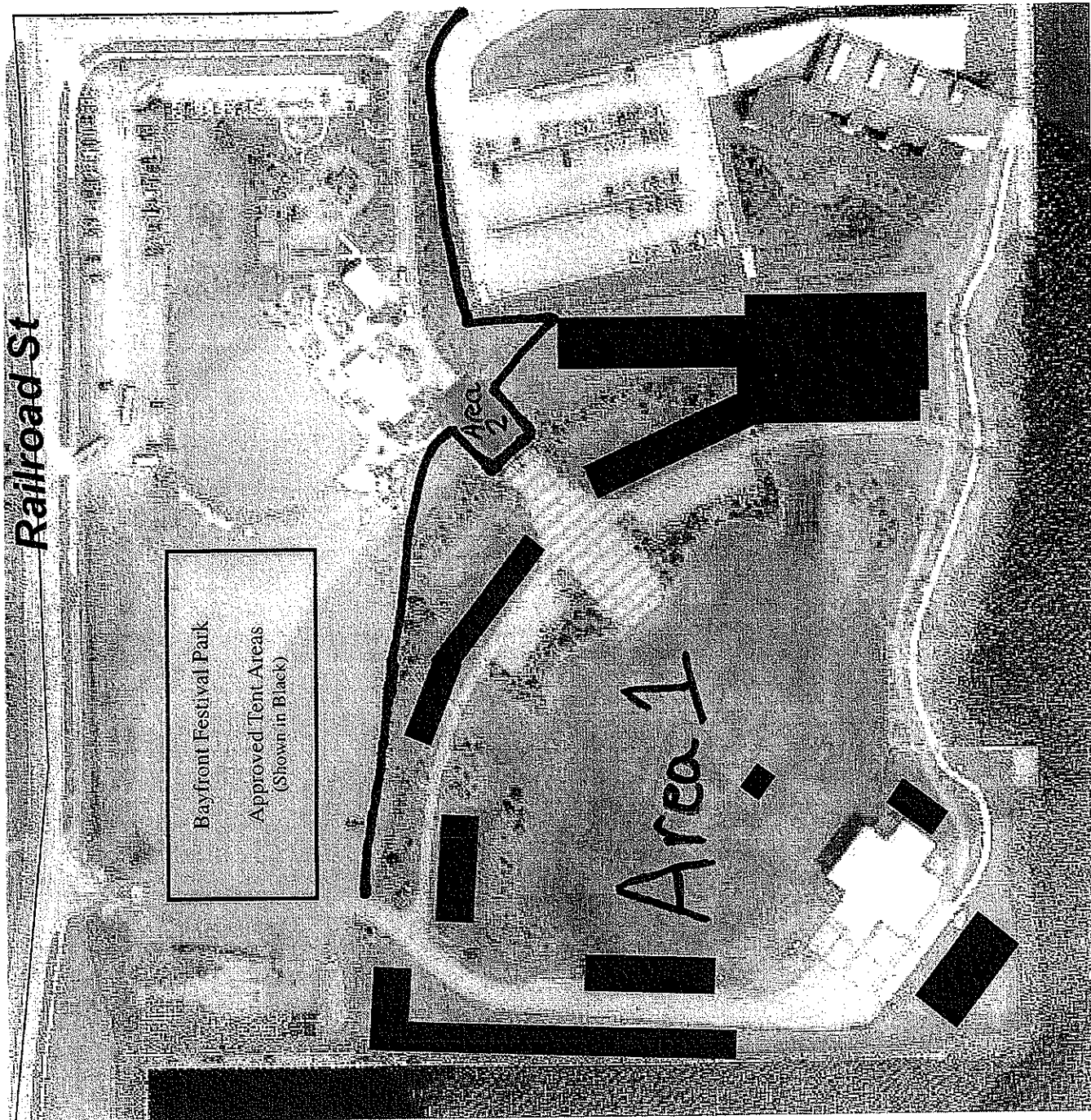


EXHIBIT A