

PLANNING AND ECONOMIC DEVELOPMENT COMMITTEE

12-0017R

RESOLUTION AUTHORIZING THE EXECUTION OF A LICENSE AGREEMENT WITH THE MINNESOTA LAND TRUST FOR ACCESS TO RADIO TOWER BAY ON THE ST. LOUIS RIVER IN THE GARY-NEW DULUTH AREA

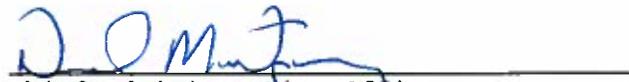
CITY PROPOSAL:

RESOLVED, that the proper city officers are hereby authorized to execute a license agreement substantially in the form as filed with the city clerk as Public Document No. _____ with the Minnesota Land Trust granting the Trust a license for access across city property to radio tower bay for removal of wood pilings and concrete structures located in the bay, at no cost to the city.

Approved:


Department Director

Approved for presentation to council:


Chief Administrative Officer

Approved as to form:


Attorney
BD TH:bel 1 /06/2012

Approved:


Auditor

STATEMENT OF PURPOSE: This resolution authorizes a license agreement between the City and the Minnesota Land Trust (MLT). This will allow access for MLT and their contractor across City property to Radio Tower Bay. The MLT has secured the necessary funds and will hire a contractor to remove approximately 500 log pilings and four (4) concrete radio tower foundations from Radio Tower Bay. The log pilings and concrete foundations will be removed and transported to nearby sites for further processing.

This is the first part of a fish habitat restoration and recreation access project. MLT is working in close cooperation with MnDNR and other state and federal regulatory agencies. There is no cost to the City.

LICENSE AGREEMENT

THIS LICENSE AGREEMENT entered into this ____ day of _____, 2012, by and between the CITY OF DULUTH, a municipal corporation created and existing under the Laws of the State of Minnesota ("CITY"), and the MINNESOTA LAND TRUST, a non-profit corporation organized and existing under the laws of the State of Minnesota ("Licensee").

WHEREAS, the Licensee, in cooperation with the Minnesota Department of Natural Resources ("DNR"), desires to utilize CITY property to access Radio Tower Bay which was the site of sawmilling operations from the late 1800's through the early 1900's for the purpose of restoring fish and wildlife habitat; and

WHEREAS, CITY desires to assist with these endeavors by allowing the use of CITY property for ingress and egress by Licensee or Licensee's agent or contractor to the Radio Tower Bay Site ("Site"); and

WHEREAS, The Minnesota Pollution Control Agency (MPCA), through their contractor Bay West Engineering in 2008, has conducted testing and found the Radio Tower Bay site free of harmful environmental contaminants; and

WHEREAS, in consideration of the mutual covenants contained herein, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. The License

Subject to the terms and conditions set forth herein, and to the extent of CITY's rights and interest therein, CITY grants to Licensee a non-exclusive license for the term set forth below to use certain property immediately adjacent to and within the Radio Tower Bay Site, the location of which is shown as Exhibit A (the "Licensed Premises") attached to this License Agreement and made a part hereof for the purposes set forth in Paragraph 2 below. The use of the Licensed Premises shall be subject to the use and terms set forth herein.

2. Use of the Licensed Premises

The Licensed Premises shall be used solely for the following purposes:

A. To provide ingress and egress to and from Radio Tower Bay for Licensee, Licensee's agents and construction contractor for contractor equipment including backhoes, dump trucks, dozers, and other heavy equipment as well as temporary equipment. All equipment shall arrive on and leave the Licensed Premises in a clean condition free of mud, dirt and debris to reduce the likelihood of spreading invasive species.

B. The selected placement of 20' x 50" timber mats used for equipment ingress and egress to the Site which aid in the protection of wetland resources.

C. The extraction and removal of approximately 500 log pilings and optionally four (4) concrete structures in Radio Tower Bay previously used as foundations for radio transmission towers.

D. No fueling or oiling of equipment shall occur on the Licensed Premises without a Spill Prevention Control and Containment Plan ("SPCCP") approved by the Property Manager or designee.

3. Term

The term of this License shall commence upon the date first shown on this agreement and continue through June 30, 2012, unless terminated earlier as provided for herein. Licensee agrees to surrender the Licensed Premises in substantially the same condition found prior to the commencement of this Agreement except for the optional removal of the concrete structures referred to in subparagraph C of Paragraph 2 above, or as agreed upon in writing at the conclusion of the work as performed above, all at no expense to CITY.

4. No CITY Warranty

CITY makes no representation that the Licensed Premises is suitable for specific uses and Licensee accepts use of the Licensed Premises in an "as is" condition without representations or warranties of any kind. The placement of all materials and equipment shall be at the sole risk of Licensee. CITY shall not be obligated to make any alterations or improvements on or to the Licensed Premises.

5. Utilities

There are no known utilities on the Licensed Premises.

6. Temporary Roads

Licensee may construct one or more temporary access roads within the Licensed Premises for ingress and egress to the Radio Tower Bay site. Such roads and their location shall be reviewed and approved by the Property Manager prior to construction. Such roads shall be constructed in a manner which to the greatest extent possible minimizes long term damage to the Licensed Premises. Licensee shall maintain all temporary roads (grading and snow removal) within the Licensed Premises at Licensee's expense. All temporary roads shall be deemed to be part of the Licensed Premises.

7. Brush Clearing

Licensee shall not remove or modify any brush or woody vegetation on the

Licensed Premises except as may be required for establishing the temporary road or roads above as may be approved by the Property Manager.

8. Portable Toilets

Licensee shall provide, at its expense, at least one portable toilet unit on the Licensed Premises when Licensee's contractors are active on the Licensed Premises to provide safe, minimum standards of sanitation.

9. City Access

City expressly reserves the right to the unlimited access to the Licensed Premises for City staff at any time while this Agreement is in force for any purpose.

10. Termination

Either party may terminate this Agreement for any violation of this Agreement's terms. Each party shall have 14 days to satisfactorily remedy violations. In the event of any violation by Licensee, and if said violation is not satisfactorily remedied within the time period specified, Licensee shall vacate the Licensed Premises immediately upon notification and this License Agreement shall then be immediately terminated. Notice to terminate this Agreement shall be by written notice to the other party as provided for in Paragraph 17.

11. Maintenance

Licensee agrees to exercise reasonable care in the maintenance of the Licensed Premises during the term of this License. Licensee shall not make any alterations or improvements to the Licensed Premises not described in this agreement unless approved in writing by the Property Manager or designee. Licensee agrees to restore any damage to the Licensed Premises at its cost including, but not limited to, the routine clean-up of garbage, or other refuse generated by Licensee's activities.

12. Access Control to Licensed Premises

Licensee agrees that at those times when Licensee or Licensee's agents or contractors are not using the Radio Tower Bay site for said salvage operations, that Licensee shall take those steps reasonably practical to prohibit vehicular or pedestrian access to the Site by third parties.

13. Indemnification

A. Generally

Licensee shall to the fullest extent permitted by law, protect, indemnify and save City and its officers, agents, servants, employees and any

person who controls City within the meaning of Securities Act of 1933, harmless from and against all liabilities, losses, damages, costs, expenses, including attorneys' fees and expenses, causes of action, suits, claims including claims for contribution or indemnity, demands and judgments of any nature arising from:

1. Any injury to or death of any person or damage to property in or upon the Licensed Premises, or growing out of or in connection with the use or non-use, condition or occupancy of the Licensed Premises or any part thereof. The foregoing indemnification shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for Licensee, its contractors or affiliated organizations under any Workers' Compensation Act, Disability Benefit Acts or any other Employee Benefit Acts.
2. Any violation by Licensee of any provision of this Agreement.
3. Any violation of any contract, agreement or restriction related to the activities occurring on the Licensed Premises which shall have existed at the commencement of the term of this Agreement or shall have been approved by Licensee; or
4. Any violation of any law, ordinance, court order or regulation affecting the Licensed Premises, or the occupancy or use thereof.

B. Environmental Indemnification

In addition to the generality of the above, Licensee hereby agrees that for itself, its successors and assigns that it will indemnify and save CITY and its officers, agents, servants and employees and any person who controls CITY within the meaning of the Securities Act of 1933 harmless from and against all liabilities, losses, damages, costs, expenses, including reasonable attorneys' fees and expenses, causes of action, suits, claims including claims for contribution or indemnity, demands and judgments arising out of any condition resulting from the use of the Licensed Premises after the commencement of the term of this Agreement which

constitutes a violation of any environmental law or laws with regard to pollutants or hazardous or dangerous substances promulgated by the government of the United States or of the State of Minnesota or of any such duly promulgated rules and regulations of the United States Environmental Protection Agency or the Minnesota Pollution Control Agency or the presence on the Licensed Premises, or the release or threatened release of any element, compound, pollutant, contaminant, or toxic or hazardous substance, material or waste, or any mixture thereof, which otherwise causes injury or death to persons or damage to property, and that indemnification granted hereby shall include all costs of clean-up and remediation and response costs, together with the costs incurred in proceedings before a court of law or administrative agency including attorneys' fees, expenses, the fees and expenses of persons providing technical expertise addressing such problems including expert witnesses, the costs of preparing and securing approval of Response Action Plans as may be necessary to meet the requirements of the aforesaid agencies and any other costs and expenses of any kind whatsoever arising out of such conditions existing on the Licensed Premises.

C. Indemnification Procedures

Promptly after receipt by CITY of notice of the commencement of any action with respect to which Licensee is required to indemnify CITY under this Article, CITY shall notify Licensee in writing of the commencement thereof, and, subject to the provisions as hereinafter stated, Licensee shall assume the defense of such action, including the employment of legal counsel satisfactory to CITY and the payment of expenses. In so far as such action shall relate to any alleged liability of CITY with respect to which indemnity may be sought against Licensee, CITY shall have the right to employ separate counsel in any such action and to participate in the defense thereof, and the fees and expenses of such separate counsel shall be at the expense of Licensee.

14. Insurance

Licensee shall provide for the purchase and maintenance and shall require all of its contractors to provide for the purchase and maintenance of such insurance as will protect Licensee and CITY against risk of loss or damage to the Licensed Premises and any other property permanently located or exclusively used at the Licensed Premises and against claims which may arise or result from the maintenance and use of the Licensed Premises during the term of the License. Licensee and its contractors shall procure and continuously maintain insurance covering all risks of injury to or death of persons or damage to property arising in any way out of or as a result of Licensee's occupancy of or use of the Licensed Premises, carried in the name of Licensee. During the term of this License, Licensee and its contractors shall procure and maintain continuously in force Public Liability Insurance written on an "occurrence" basis under a Comprehensive General Liability Form in limits of not less than \$2.0 Million aggregate per occurrence for personal bodily injury and death, and limits of \$2.0 Million for property damage liability and twice the limits when the claim arises out of the release or threatened release of a hazardous substance. If person limits are specified, they shall be for not less than \$2.0 Million per person and be for the same coverages. Insurance shall cover:

- a. Public liability, including premises and operations coverage;
- b. Independent contractors--protective contingent liability;
- c. Personal injury;
- d. Owned, non-owned and hired vehicles;
- e. Contractual liability covering the indemnity obligations set forth herein;
- f. Products--completed operations.

Additionally, Licensee and its contractors shall maintain Workers' Compensation Coverage in statutory amounts with "all states" endorsement unless qualified as a self-insurer under Minnesota Law.

All insurance required in this agreement shall be taken out and maintained in responsible insurance companies organized under the laws of the states of the United States and licensed to do business in the State of Minnesota.

Licensee shall provide to CITY Certificates of Insurance evidencing said coverages with 30-days notice of cancellation, non-renewal or material change provisions included. The Certificates of Insurance shall name the CITY as an additional insured. CITY does not represent or guarantee that these types or limits of coverage are adequate to protect the interests and liabilities of Licensee

or its contractors. If a certificate of insurance is provided, the form of the certificate shall contain an unconditional requirement that the insurer notify CITY without fail not less than 30 days prior to any cancellation, non-renewal or modification of the policy or coverages evidenced by said certificate and shall further provide that failure to give such notice to CITY will render any such change or changes in said policy or coverages ineffective as against CITY. The use of an "Accord" form as a certificate of insurance shall be accompanied by two forms - 1) ISO Additional Insured Endorsement (CG-2010 pre-2004) and 2) Notice of Cancellation Endorsement (IL 7002) - or equivalent, as approved by the Duluth City Attorney's Office.

15. Independent Contractor

It is agreed that nothing herein contained is intended or should be construed in any manner as creating or establishing a relationship of co-partners between the parties hereto or of constituting the Licensee or any of its officers, agents, servants and employees as an officer, agent, servant, representative or employee of CITY for any purpose or in any manner whatsoever. The Licensee's officers, agents, servants and employees shall not be considered employees of CITY, and any and all claims which may or might arise under the Workers' Compensation Act of the State of Minnesota on behalf of said officers, agents, servants and employees while engaged in performing any work under this Agreement, and any and all claims whatsoever on behalf of said officers, agents, servants and employees arising out of employment, including, without limitation, claims of discrimination, shall in no way be the responsibility of CITY. The Licensee's officers, agents, servants and employees shall not be entitled to any compensation or right or benefits of any kind whatsoever for leave or vacation pay, Workers' Compensation, Unemployment Insurance, disability pay or severance pay from CITY.

16. Assignment

Licensee shall not assign its interest under this License Agreement or any part hereof without the prior written consent of the Property Manager or designee.

17. Notices

Any notice to be given by either party shall be deemed to be properly served if deposited with the United States Postal Service, or other acceptable mailing service, postage prepaid, addressed to Licensor as follows: City of Duluth, Attn: Mark McShane, Property Manager, 411 West First Street, Room

402 City Hall, Duluth, MN 55802; and to Licensee as follows: Minnesota Land Trust, Attn: Daryl Peterson, 394 South Lake Avenue, Suite 404.

18. Compliance with Laws, Rules and Regulations

Licensee agrees to observe, comply and abide with all laws, ordinances, rules and regulations of the United States of America, the State of Minnesota and the CITY and their respective agencies which are applicable to its activities under this License Agreement. Licensee shall procure at its own expense all licenses, permits or other rights required for the activity contemplated by this License Agreement.

19. Choice of Law

All questions concerning the interpretation or application of provisions of this License shall be decided according to the laws of the State of Minnesota. The appropriate venue and jurisdiction for any litigation hereunder shall be those courts located in St. Louis County, Minnesota.

20. No Third Party Rights

This Agreement is to be construed and understood solely as an Agreement between CITY and the Licensee and shall not be deemed to create any rights in any other person. No person shall have the right to make claim that she or he is a third party beneficiary of this License Agreement or of any of the terms and conditions hereof, which, as between CITY and the Licensee, may be waived at any time by mutual agreement between CITY and the Licensee.

21. Authority to Execute Agreement

Licensee represents to CITY that the execution of this Agreement has been duly and fully authorized by its governing body or board, that the officers of Licensee who executed this Agreement on its behalf are fully authorized to do so, and that this Agreement when thus executed by said officers of Licensee on its behalf will constitute and be the binding obligation and agreement of the Corporation in accordance with the terms and conditions hereof.

22. Amendments

Any amendments to this License Agreement shall be in writing and shall be executed by the same parties who executed the original agreement or their successors in office.

23. Entire Agreement

This License Agreement, including Exhibit A, constitutes the entire agreement between parties and supersedes all prior written and oral agreements and negotiations between the parties relating to the subject matter.

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

CITY OF DULUTH

MINNESOTA LAND TRUST

By _____
Mayor

By _____
Its

Attest: _____
City Clerk

Countersigned:

City Auditor

Approved as to form:

Asst City Attorney

This instrument was drafted by:
Robert E. Asleson
Assistant City Attorney
Room 410 City Hall
Duluth, MN 55802
(218) 730-5490

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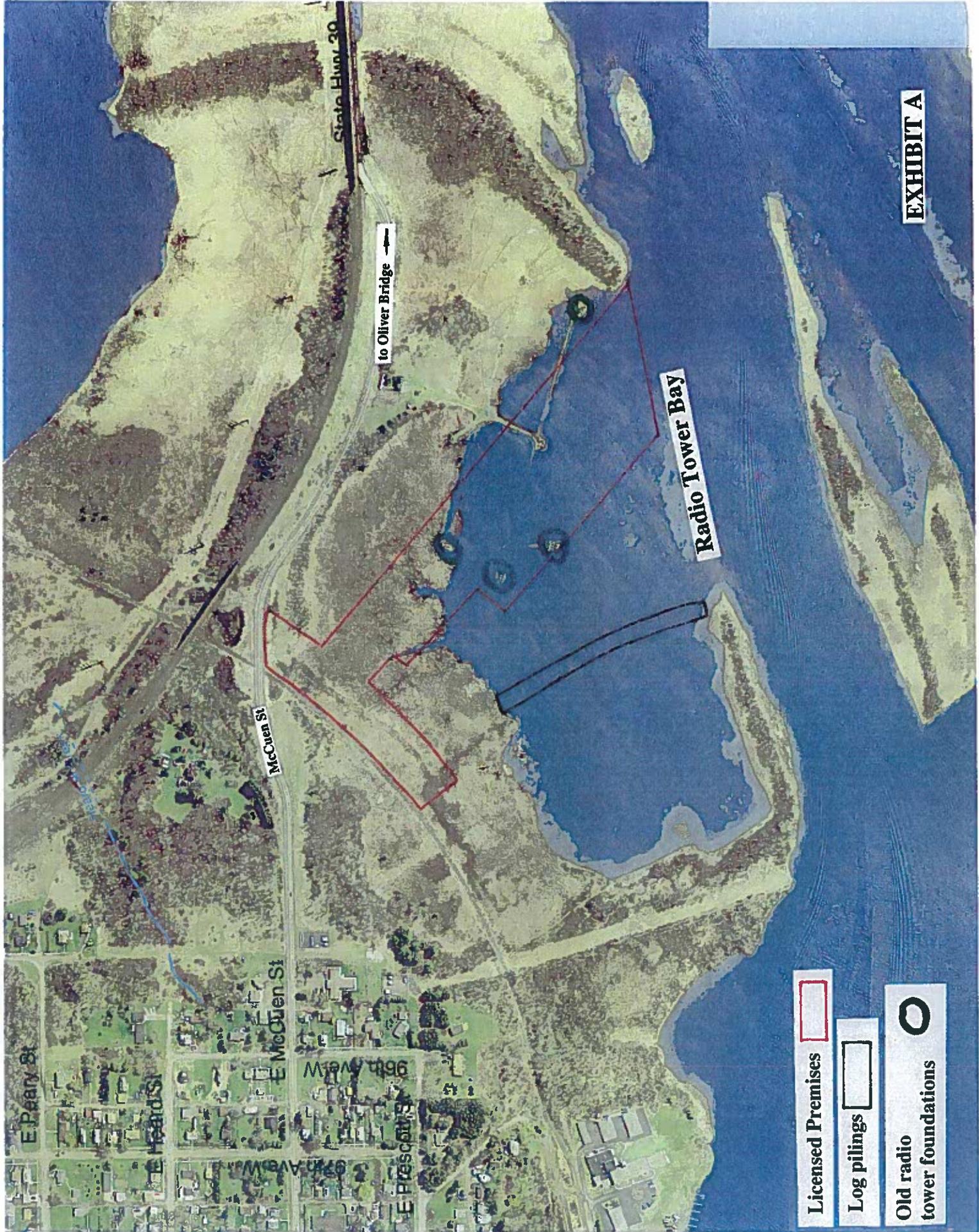


EXHIBIT A

Licensed Premises 

Log pilings 

Old radio tower foundations 