

COUNCIL COPY

PLANNING AND ECONOMIC DEVELOPMENT COMMITTEE

12-0047R

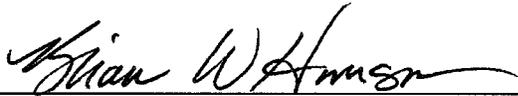
RESOLUTION AUTHORIZING A LICENSE AGREEMENT WITH THE DULUTH ECONOMIC DEVELOPMENT AUTHORITY (DEDA) FOR PARKING ON LOTS B, C AND D IN BAYFRONT AND USE OF DEDA PROPERTY ADJACENT THERETO.

CITY PROPOSAL:

RESOLVED, that the proper city officials are hereby authorized to execute a three-year license agreement, substantially in the form of that on file in the office of the city clerk as Public Document No. _____, with the Duluth economic development authority (DEDA), to allow the city to operate DEDA Lots B, C and D in Bayfront for vehicular parking and to allow the city use of DEDA-owned property adjacent to Lot B for Bayfront Festival Park-related purposes, the annual license fee for 2013 and 2014 in the amount of \$62,000 and the annual license fee for 2012 in the amount of the difference between \$62,000 and the sum DEDA receives under its agreement with Bentleyville Tour of Lights, Inc. ("Bentleyville"), all payable from Fund 505 (Parking Fund), Agency 015 (Administrative Services), Organization 1481 (Meters & Municipal Lots), Object 5447 (Payments to Other Government Agencies), with any amounts to be paid by DEDA to the city relating to amounts over \$62,000 paid to DEDA by Bentleyville 2012 for the event, payable into Fund 505 (Parking Fund), Agency 015 (Administrative Services), Organization 1481 (Meters & Municipal Lots), Object

4654 (Other Reimbursements).

Approved:



Department Director

Approved for presentation to council:



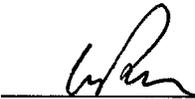
Chief Administrative Officer

Approved as to form:



Attorney

Approved:



Auditor

ATTY/DEDA JC:bel 01/20/2012

STATEMENT OF PURPOSE: The purpose of this Resolution is to approve a License Agreement (Agreement) with the City which allows the City to operate DEDA Lots B, C and D in Bayfront for vehicular parking and other uses approved by DEDA's Executive Director and to further allow the City use of DEDA-owned property adjacent to Lot B located in Bayfront Festival Park for Bayfront Festival Park-related purposes. It is envisioned that Bayfront Park operations will be enhanced by common management of the park and the parking lots. The annual license fee is based on a normalized average of revenues from the three previous years. The Agreement calls for the completion of a non-motorized trail outside of the park fence to facilitate safe movement around the park during park events when the existing trail is not accessible.

LICENSE AGREEMENT

THIS LICENSE AGREEMENT is entered into by and between the DULUTH ECONOMIC DEVELOPMENT AUTHORITY, an economic development authority created and existing under the laws of the State of Minnesota, ("DEDA"), and the CITY OF DULUTH, a municipal corporation created and existing under the laws of the State of Minnesota, ("City").

The parties acknowledge the following:

A. The City owns certain property located in the Bayfront area of the City of Duluth known as Bayfront Festival Park upon which various festivals and activities occur ("Bayfront Festival Park").

B. DEDA owns certain property located in the Bayfront area of the City of Duluth indicated as Lots B, C and D (Lots B, C and D hereinafter jointly referred to as the "DEDA Lots") and certain property adjacent to Lot B ("Adjacent Property") as shown on Exhibit A.

C. Pursuant to DEDA Resolution 11D-55, DEDA entered into an agreement with Bentleyville Tour of Lights, Inc. ("Bentleyville") for the purpose of operation and management of parking in Lots B and C including the period of November 10, 2012 through December 31, 2012 (the "Bentleyville Management Agreement"). Under the Bentleyville Management Agreement, DEDA will receive a portion of parking fees related to Lots B and C from Bentleyville.

D. Pursuant to DEDA Resolution 11D-50 and City Council Resolution No. 11-0568, DEDA entered into a license agreement with the City which allows the City to dispose of snow from street plowing operations on a portion of Lot D (the "Snow Disposal Area") for the period of October 26, 2011 through May 1, 2012 (the "Current Snow Disposal License").

E. DEDA anticipates it will enter into an annual license agreement with Bentleyville on property adjacent to Lot D as shown on Exhibit A for the purpose of storing the Bentleyville tree (the "Tree Storage Area"). Bentleyville will require access over Lot D for purposes of its license agreement.

F. DEDA will also require access to its Storage Building abutting the Licensed Premises on Lot D during the term of this Agreement.

G. DEDA and the City desire to enter into this License Agreement to allow the City to operate the DEDA Lots for vehicular parking and, upon the approval of DEDA's Executive Director or designee (the "Executive Director") for other uses, and to allow the City use of the Adjacent Property for Bayfront Festival Park-related purposes.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained in this Agreement, 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, DEDA grants to the City an exclusive license for the use and during the term set forth below in the DEDA Lots and the Adjacent Property as shown on Exhibit A (the "Licensed Premises"). Notwithstanding the above, with respect to Lot D, the City or any third party contractor shall be allowed ingress and egress to the Snow Disposal Area during the term of the Current Snow Disposal License and any future snow disposal license that DEDA may enter into with the City during the term of this Agreement. Additionally, with respect to Lot D, Bentleyville shall be allowed access to the Tree Storage Area, during the term of any future license agreement with Bentleyville for tree storage. Finally, DEDA shall be allowed access to its storage building at any time while this Agreement is in force.

2. USE OF THE LICENSED PREMISES. The DEDA Lots shall be used for the purpose of vehicular parking and as a pleasure skating rink. Notwithstanding the above, in addition to the use of the DEDA Lots for vehicular parking and pleasure skating, at the sole discretion and upon the prior written approval of the Executive Director, the City may use the DEDA Lots for other approved uses. The Adjacent Property shall be used solely for purposes consistent with the use of the remainder of Bayfront Festival Park.

3. THIRD PARTY AGREEMENTS. If the City enters into third party agreements for vehicular parking or other approved uses with respect to the DEDA Lots or for purposes consistent with the use of the remainder of Bayfront Festival Park with respect to the Adjacent Property, such third party agreements shall require that the third party indemnify DEDA and name DEDA as an additional insured on its commercial general liability insurance and, if appropriate, its automobile insurance policies, and, unless otherwise agreed to in writing by the Executive Director, shall further require insurance limits of not less than \$1.5 million and twice the limits provided when a claim arises out of the release or threatened release of a hazardous substance or such increased liability limits as set forth in Minnesota Statutes Section 466.04. Upon request, an executed copy of each agreement, along with evidence of insurance, shall be promptly provided to the Executive Director.

4. TERM OF THE AGREEMENT. Notwithstanding the date of execution of this Agreement, this Agreement shall be deemed to commence on January 1, 2012, and shall continue until December 31, 2014. Notwithstanding the above and with respect to Lots B and C only, the term of this Agreement shall exclude the period of November 10, 2012 through December 31, 2012. Use of Lots B and C during this period is addressed separately in the Bentleyville Management Agreement. It is anticipated by the parties that the City will enter into an agreement with Bentleyville for parking for the years 2013 and 2014.

5. LICENSE FEE. The City agrees that for the use of the Licensed Premises, it shall pay \$62,000 to DEDA each year during the term of the Agreement, said payment to be made on or before January 31 for the preceding year, payable from City Fund 505-015-1481-5447 (Parking Fund, Administrative Services, Meters & Municipal Lots, Payment to other Govt. Agencies) into DEDA Fund 860. Notwithstanding the above, in the event that DEDA receives parking fees under the Bentleyville Management Agreement of \$62,000 or less, then the City shall only be required to pay to DEDA the difference between \$62,000 and the amount paid to DEDA under the Bentleyville Management Agreement. However, in the event that DEDA receives more than \$62,000 under the Bentleyville Management Agreement in 2012, then DEDA shall pay to the City the difference between such amount and \$62,000, said payment to be made on or before January 31, 2013, payable from DEDA Fund 860 into City Fund 505-015-1481-4654 (Parking Fund, Administrative Services, Meters & Municipal Lots, Other Reimbursements). If DEDA fails to timely pay to the City those fees in excess of \$62,000 received by DEDA under the Bentleyville Management Agreement in 2012 as set forth herein, then the City shall have the right to off-set the full amount of the unpaid fees against any future fees owed to DEDA by the City under the terms of this Agreement.

6. TERMINATION. Either party may terminate this Agreement without cause upon one hundred thirty (130) days' written notice to the other party as provided for in Paragraph 22. Upon termination, the City shall be responsible for payment of a prorated portion of the annual license fee as follows. If terminated during:

January through April	0%
May through June	5%
July	15%
August	30%
September through November	45%
December	100%

7. DEDA WARRANTY. DEDA makes no representation that the Licensed Premises are suitable for any specific uses and the City accepts the Licensed Premises in an "as is" condition without representations or warranties of any kind. The operation of parking and all other activities on the Licensed Premises shall be at the sole risk of the City. DEDA shall not be obligated to make any alterations or improvements on or to the Licensed Premises.

8. MAINTENANCE. The City agrees to exercise reasonable care in the maintenance of the Licensed Premises during the term of this Agreement. The City shall not make any alterations or improvements to the Licensed Premises without the prior written consent of the Executive Director and upon the terms and conditions which may be imposed by the Executive Director in his/her sole discretion. The City shall plow snow from the DEDA Lots and shall provide for litter clean up and trash removal

on the Licensed Premises. Except for the construction of capital improvements as provided for in Paragraph 10 below, the City shall surrender the Licensed Premises at the termination of this Agreement in the condition found prior to the commencement of this Agreement at no expense to DEDA, reasonable wear and tear excepted. The City agrees to pay upon demand any damage done to the Licensed Premises by the City, its employees, servants, agents, contractors, invitees and licensees during the term of this Agreement.

9. UTILITIES. The City shall be responsible for the cost of all utilities to the Licensed Premises.

10. CAPITAL IMPROVEMENTS. It is anticipated that the City may, at its expense, desire to make certain capital improvements to the Licensed Premises which may include paving Lot B. Additionally, the City has agreed to construct a non-motorized trail at its expense as shown on Exhibit A on or before September 30, 2012. The trail shall consist of a sixteen-foot wide trail corridor including a ten-foot wide paved trail with a two-foot wide shoulder on each side. The City shall not make any capital improvements to the Licensed Premises without the prior written consent of the Executive Director and upon the terms and conditions which may be imposed by the Executive Director in his/her sole discretion. The City shall be responsible for securing all necessary permits and approvals required by the City and all other regulatory agencies having jurisdictional authority over any of the work to be performed.

Prior to any work being performed, the City shall provide to the Executive Director for written approval complete contract drawings and specifications on all work to occur on the Licensed Premises. All such work shall conform to all applicable regulations, building codes and health standards and shall be done by competent contractors in the time and manner approved by the Executive Director. The City shall require all contractors to obtain construction bonds as well as public liability and property insurance in such amounts that will protect DEDA's interest in the Licensed Premises, and DEDA shall be named as an additional insured on all such insurance policies. The City shall pay for all costs in connection with improvements to the Licensed Premises including but not limited to permit fees, engineering fees and construction costs.

Upon termination of this Agreement, all such capital improvements to the Licensed Premises shall become the property of DEDA.

11. ACCESS. DEDA expressly reserves the right to the unlimited access to the Licensed Premises for authorized personnel at any time while this Agreement is in force for the purposes of inspection and ensuring that the provisions of this Agreement are complied with by the City.

~~12. SALE OR DEVELOPMENT OF LOT C AND/OR LOT D. DEDA contemplates and the City understands and agrees that DEDA may sell or develop Lot C and/or Lot D during the term of this Agreement. DEDA agrees to give the City seventy five (75) days' written notice of such sale as provided for in Paragraph 22. In the event of such sale(s) or development, Lot C or Lot D or both, as applicable, shall cease to be part of the Licensed Premises and the license fee shall be reduced on a prorated basis using an annual base rate of \$3,500 per lot.~~

132. HOLD HARMLESS. DEDA shall not in any way be liable or responsible for any accident or damage that may occur in the City's use of the Licensed Premises during the term of this Agreement. The City agrees to defend, indemnify, and save harmless DEDA, and its officers, agents, servants, and employees from any and all liens, judgments, claims including those for contribution and indemnity, suits, demands, liability, costs, damages, and expenses asserted by any person or persons including agents or employees of DEDA or the City by reason of death or injury to person or persons or the loss or damage to property or any cause of action arising out of or in connection with or relating to the City's use or occupancy of the Licensed Premises except those claims, causes of action, liabilities or damages relating to or arising from or based upon the negligence, willful acts or omissions of DEDA and its officers, agents, servants or employees. On ten days' written notice from DEDA, the City will appear and defend all lawsuits against DEDA growing out of such injuries or damages.

143. INSURANCE. During the term of this Agreement, the City, at its own cost and expense, shall self insure comprehensive liability and property damage insurance applicable to the Licensed Premises and the City's employees, servants, agents, contractors, invitees and licensees, sufficient to protect the interests of DEDA with a combined single limit of at least \$1,500,000; for each occurrence \$500,000; and twice the limits provided when a claim arises out of the release or threatened release of a hazardous substance. DEDA shall be considered an additional insured.

154. INDEPENDENT CONTRACTOR. It is agreed that nothing herein contained is intended or should be construed in any manner as creating or establishing the relationship of co-partners between the parties hereto or as constituting the City as an agent, representative, or employee of DEDA for any purpose or in any manner whatsoever. The City and its employees shall not be considered employees of DEDA and any and all claims that may or might arise under the Workers' Compensation Act of the State of Minnesota on behalf of the City's employees or agents while so engaged, and any and all claims whatsoever on behalf of the City's employees and agents arising out of employment shall in no way be the responsibility of DEDA. The City's employees shall not be entitled to any compensation or rights or benefits of any kind whatsoever from DEDA, including without limitation, tenure rights, medical and hospital care, sick and vacation leave, Workers' Compensation, Unemployment Insurance, disability or severance pay, and PERA.

165. REPORTING. The City agrees that, as provided in Minnesota Statutes 16C.05, Subdivision 5, all the City's books, records, documents, and accounting procedures and practices related to this Agreement are subject to examination by DEDA and the State Auditor for six (6) years from the date of execution of this Agreement. Upon ten (10) days' advanced notice by DEDA, the City shall provide all requested financial information. DEDA agrees that the City may examine DEDA's books, records and related documents for the purpose of determining the license fee due DEDA and/or the payment to be made by DEDA to the City for the calendar year 2012 (depending on the parking fees received by DEDA under the Bentleyville Management Agreement in 2012) payable on or before January 31, 2013, pursuant to Paragraph 5 of this Agreement.

176. ASSIGNMENT. The City shall not in any way assign or transfer its rights or interests under this Agreement or subcontract with any other party without the prior written consent of the Executive Director. Notwithstanding the above, the parties contemplate that the City will enter into an Agreement with the DECC to undertake some or all of the City's rights and interests hereunder. The terms of any such Agreement are subject to the approval of the Executive Director, which approval shall not be unreasonably withheld.

187. LAWS, RULES AND REGULATIONS. During the term of this Agreement, the City, agrees to operate the Licensed Premises and all activities conducted on the Licensed Premises in strict compliance with the United States Constitution and with the laws, rules, and regulations of the United States, State of Minnesota, St. Louis County, City of Duluth, and DEDA, including, but not limited to, all laws, rules, and regulations relating to accessibility standards under the Americans with Disabilities Act. The City shall not unlawfully discriminate and shall comply with all applicable federal and state laws regarding non-discrimination. The City agrees to procure, at the City's expense, all licenses and permits necessary for carrying out the provisions of this Agreement.

198. WAIVER. The waiver by DEDA or the City 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.

2019. NO THIRD PARTY RIGHTS. This 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. No person shall have the right to make claim that they are a third party beneficiary of this Agreement or of any of the terms and conditions hereof, which, as between the parties hereto, may be waived at any time by mutual agreement between the parties hereto.

240. DEFAULT. If the City fails to make any payment due under this Agreement, or if the City becomes bankrupt or insolvent, or if the City fails in keeping and performing any term or condition of this Agreement and such a default continues for thirty (30) days after DEDA has given written notice to the City of said default, or, in the event that such default shall be incapable of cure during said thirty-day period, shall have failed to commence to cure said default within thirty (30) days of the date of said notice and to diligently pursue the same to completion, DEDA may terminate this Agreement by written notice to the City setting forth the date of termination. In such event, DEDA may seek and be entitled to monetary damages from the City, may seek and be entitled to injunctive and declaratory relief, and may seek other legal or equitable relief.

221. NOTICES. Notices shall be sufficient if sent by regular United States mail, postage prepaid, addressed to DEDA, 402 City Hall, 411 West First Street, Duluth, Minnesota 55802, ATTN: Executive Director; and addressed to City of Duluth, 402 City Hall, 411 West First Street, Duluth, MN 55802, ATTN: Chief Administrative Officer or to such other persons or addresses as the parties may designate to each other in writing from time to time.

232. COMPLIANCE WITH AGREEMENT. The rights of the City to use the Licensed Premises shall continue only so long as all of the undertakings, provisions, covenants, and conditions herein contained are complied with promptly by the City.

243. APPLICABLE LAW. This 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.

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

265. AUTHORITY TO EXECUTE AGREEMENT. The parties represent to each other that the execution of this Agreement has been duly and fully authorized by their governing bodies or boards, that the officers of the parties who executed this Agreement on their behalf are fully authorized to do so, and that this Agreement when thus executed by said officers of said parties on their behalf will constitute and be the binding obligation and agreement of the parties in accordance with the terms and conditions hereof.

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

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

DULUTH ECONOMIC DEVELOPMENT
AUTHORITY

CITY OF DULUTH

By: _____
Its President

By: _____
Its Mayor

Date: _____

Date: _____

By: _____
Its Secretary

Attest: _____
City Clerk

Date: _____

Date: _____

Countersigned:

City Auditor

Date: _____

Approved as to form:

City Attorney

Licensed Premises

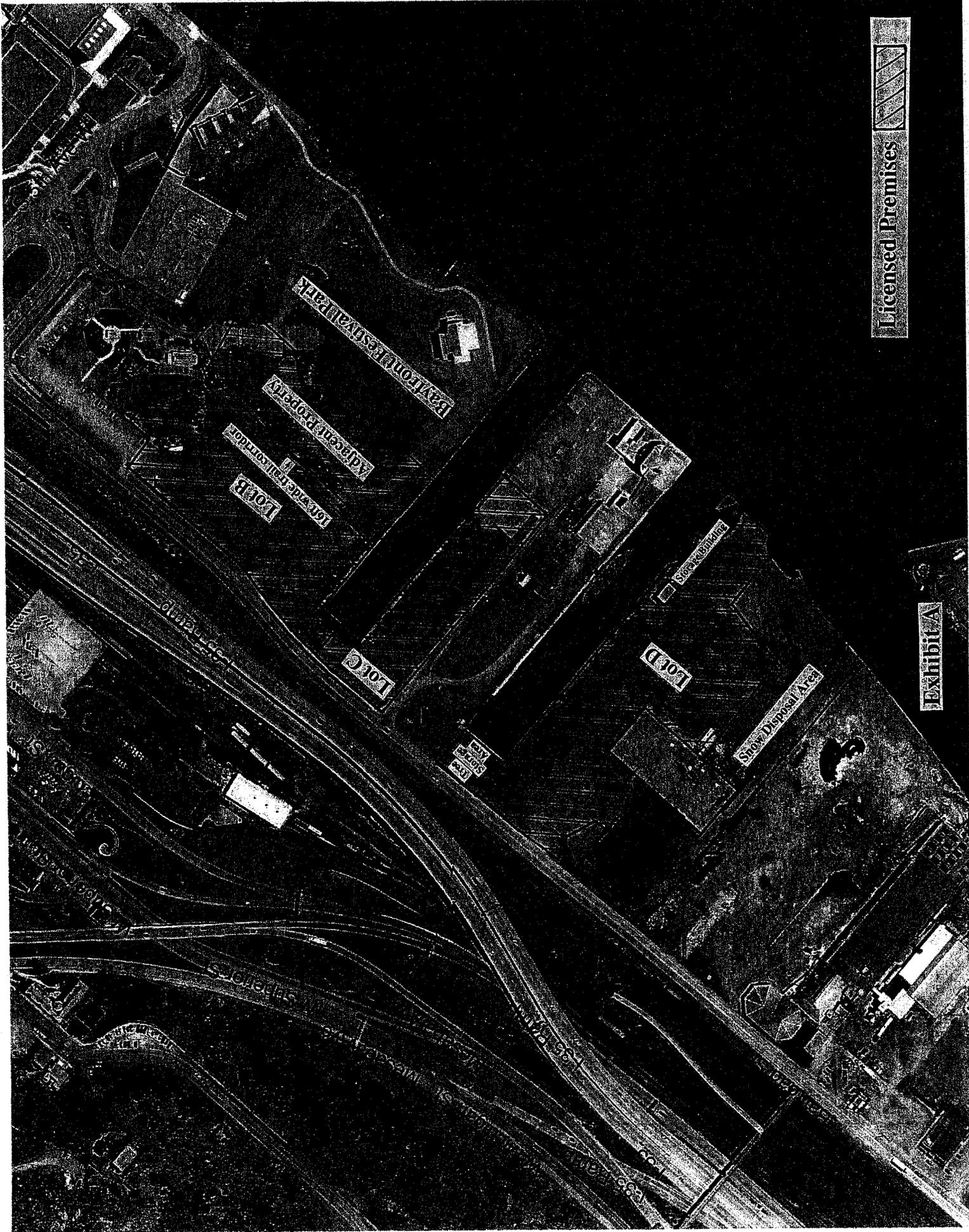


EXHIBIT A