

RECREATION, LIBRARIES AND AUTHORITIES COMMITTEE

12-0493R

RESOLUTION AUTHORIZING THE PROPER CITY OFFICIALS TO ENTER INTO AN AGREEMENT WITH BENTLEYVILLE TOUR OF LIGHTS, INC., A MINNESOTA NON-PROFIT CORPORATION, FOR THE PRODUCTION, PROMOTION, AND MANAGEMENT OF THE BENTLEYVILLE TOUR OF LIGHTS IN 2012.

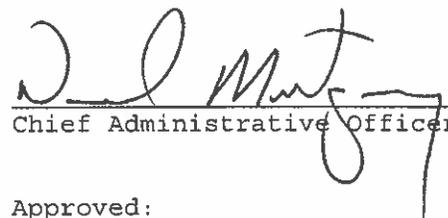
CITY PROPOSAL:

RESOLVED, that the proper city officials are hereby authorized to execute an agreement substantially the same as that on file in the office of the city clerk as Public Document No. _____ between the city of Duluth and Bentleyville Tour of Lights, Inc., a Minnesota non-profit corporation, providing for the production, promotion and management of the 2012 Bentleyville Tour of Lights, fees to be deposited into the city's Fund No. 237-015-4623 (Bayfront Festival Park, Administrative Services).

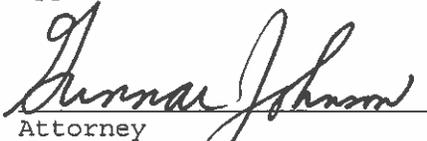
Approved:


Department Director

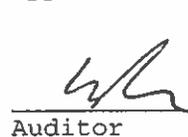
Approved for presentation to council:


Chief Administrative Officer

Approved as to form:


Attorney

Approved:


Auditor

PARKS/ATTY MAL:dma 09/21/2012

STATEMENT OF PURPOSE: This resolution authorizes an agreement with Bentleyville Tour of Lights, Inc. for the presentation of a holiday lighting display commonly referred to as Bentleyville Tour of Lights at Duluth's Bayfront Festival Park during the 2012 Christmas holiday season. This agreement replaces the previous agreement between the parties.

**CITY OF DULUTH - BENTLEYVILLE TOUR OF LIGHTS, INC.
2012 EXCLUSIVE USE PERMIT FOR BAYFRONT FESTIVAL PARK**

ARTICLE 1- PARTIES

1. THIS AGREEMENT, made and entered into this ____ day of _____, 2012 is by and between the CITY OF DULUTH, a municipal corporation of the County of St. Louis, 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 AGREEMENT supersedes any other agreement between the parties and all such earlier agreements shall be terminated upon approval of this AGREEMENT.

ARTICLE 2- PREMISES

2. In consideration of the mutual covenants as set forth herein, and except as otherwise provided in this PERMIT, 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 , any First Amendment Area established by the City and Lots A, B, C, and D, as delineated on Exhibit A attached hereto and made a part hereof ("VENUE"), for the sole purpose of conducting a holiday lighting display with related concession activities ("EVENT"). 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. Except as provided in this Permit, PROMOTER is permitted exclusive use of the VENUE for a period commencing at 6:00 a.m. on September 14, 2012 and concluding no later than 12:00 a.m., January 31, 2013. 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.

3.1. The City reserves the right to permit other events at the Venue on the dates or places indicated in this paragraph and PROMOTER's exclusive use does not include these areas or dates:

Event: American Heart Walk
Saturday, September 22, 2012
7:00 a.m. to 12:00 p.m.

Event: Warmer-by-the-Lake
December 26, 2012
2:00 p.m. to 5:00 p.m.

Location: Ice Rink; Playfront; First Amendment Permit Area

ARTICLE 4 – FEES

4. Except as otherwise provided in this Agreement, PROMOTER shall pay \$3500.00 for its use of the venue. Promoter shall pay \$875.00 within ten (10) days after final approval of this Agreement. Promoter shall pay \$875.00 per month for November and December 2012 and January of 2013. All monthly payments are due and payable on or before the 10th day of the month.

4.1. 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. All expenses incurred by the CITY in restoring the VENUE shall be the responsibility of PROMOTER. PROMOTER shall pay all such costs to the CITY within 30 days of receipt of the CITY'S invoice for all costs that exceed the amount of the restoration deposit.

4.2. CITY shall pay any electricity costs billed by Minnesota Power and incurred during the term of occupancy exceeding five-thousand dollars (\$5,000.00). PROMOTER shall be responsible for all electricity costs billed by Minnesota Power and incurred during the term of occupancy up to but not exceeding five-thousand dollars (\$5,000.00).

ARTICLE 5- PARKING

5. Parking will be pursuant to the terms and conditions set forth in that certain Agreement between the City of Duluth and the DECC dated March 5, 2012 [City Auditor Doc. No. 21566].

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, 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, whether such damage was the result of the actions or omissions of PROMOTER, its agents or assigns, or any other person or entity. Such responsibility for damages includes, but is not limited to, set up and take down activities.
- 6.4. PROMOTER, its agents, or assigns shall not store hazardous waste, transfer hazardous waste, or participate in refueling operations at VENUE 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, PROMOTER 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, PROMOTER 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. PROMOTER 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 provide salt or sand on VENUE pathways during any period of exclusive use, or within any area of exclusive use.

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

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 at its expense trash collection receptacles and attendant services in sufficient quantity to maintain the VENUE in a reasonable state of cleanliness.

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 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. PROMOTER shall not drive stakes, excavate, or otherwise install any other underground apparatus into any of the grounds of Bayfront Festival Park without first providing a detailed, precise map to the CITY of all proposed underground locations at least ten (10) days in advance of the EVENT. 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.

9.1. 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.

9.2. 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.

9.3. 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 SUPERVISION AND SECURITY

10. PROMOTER agrees that during EVENT normal hours of operation the VENUE will be supervised by an employee or agent of PROMOTER with sufficient empowerment and decision making authority to act on behalf of PROMOTER. No later than ten (10) days prior to the EVENT, PROMOTER shall provide the CITY with a list of employees or agents, properly identified by full name and cell phone contact information. The list shall also include a schedule when each individual will be on-duty before, during, or after the EVENT. In return, no later than

two (2) days before the EVENT the CITY will provide to PROMOTER a list of CITY employees or agents, properly identified; with sufficient empowerment and decision making authority, to act on behalf of the CITY, complete with dates, times, cell phone numbers, of who shall be on-duty before, during, or after the EVENT. PROMOTER acknowledges that some of this collected contact information is non-public and confidential in nature. PROMOTER agrees to not improperly or illegally disclose this information.

ARTICLE 11- INSURANCE

11. PROMOTER shall provide Public Liability and Automobile Liability Insurance with limits not less than \$1,000,000 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.

11.1. 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.

11.2. The use of an "ACORD" 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. Examples of such endorsements are available upon request.

ARTICLE 12- HOLD HARMLESS

12. PROMOTER agrees to defend, indemnify, and save harmless the CITY and their 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 use, development, maintenance, set up, take down, or occupancy of the VENUE by PROMOTER or its agents and/or assigns in connection with the EVENT including liability for copyright violation or infringement, by any person(s) including PROMOTER, its employees, agents, volunteers, invitees, or attendees under this agreement. 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 which PROMOTER is required to indemnify the CITY.

ARTICLE 13- LICENSEE

13. 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 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 Agreement may be terminated by either party upon breach of any of the terms and conditions of this Agreement by another party and the failure to rectify or correct any such breach within thirty (30) days of the transmission of written notice of the breach, or by mutual consent of the parties.

ARTICLE 15- GENERAL PROVISIONS

15. 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.

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

15.2. 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 Agreement.

15.3. 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.

15.4. 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.

15.5. 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.

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

15.7. 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, 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 Agreement or of any of its terms and conditions.

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

15.9. 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.

15.10. Notice to the CITY provided for herein shall be sufficient if sent by the regular United States mail, postage prepaid, addressed to Duluth Parks and Recreation Department, 411 W. First Street, Duluth, Minnesota, 55802_ ATTN: Kathleen Bergen, Parks and Recreation Division Manager. Notices to PROMOTER shall be sufficient if sent by the regular United States mail, postage prepaid, addressed to Nathan Bentley, Bentleyville Tour of Lights, 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.

15.11. This Agreement may be executed in separate counterparts with the same effect as if all signatures were on the same Agreement.

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

15.13. This 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 Agreement will not be honored by the CITY except by written authorization from the CITY.

CITY OF DULUTH

BENTLEYVILLE TOUR OF LIGHTS, INC.

Mayor

President

ATTEST:

COUNTERSIGNED:

City Clerk

City Auditor

APPROVED AS TO FORM:

City Attorney