RECREATION, LIBRARIES AND AUTHORITIES COMMITTEE

13-0427R

RESOLUTION AUTHORIZING EXCLUSIVE USE PERMIT 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 THE YEARS 2013, 2014 AND 2015.

CITY PROPOSAL:

RESOLVED, that the proper city officers are authorized and directed to execute the agreement filed in the office of the city clerk as Public Document No. _____ between the city of Duluth and Bentleyville Tours of Lights, Inc., a Minnesota non-profit corporation, providing a permit to Bentleyville Tour of Lights, Inc., the exclusive use of the Bayfront Festival Park for production, promotion and management of the 2013, 2014 and 2015 Bentleyville Tour of Lights, fees to be deposited into the city's Fund 0237, Agency 015, Revenue Source 4623 (Bayfront Festival Park Fund, Public Administration Department, Rent of Land).

Approved:

Department Director

Approved for presentation to council:

Chief Administrative Officer

Approved as to form:

Attorney

Approved:

Auditor

PARKS/ATTY SBH:de 08/05/2013

STATEMENT OF PURPOSE: This resolution authorizes an agreement that provides for the presentation of a holiday lighting display commonly referred to as Bentleyville Tour of Lights at Duluth's Bayfront Festival Park during the 2013, 2014 and 2015 Christmas holiday season.

CITY OF DULUTH - BENTLEYVILLE TOUR OF LIGHTS, INC.
2013-2015 EXCLUSIVE USE PERMIT FOR BAYFRONT FESTIVAL PARK

ARTICLE 1- PARTIES

1. This Exclusive Use Permit Agreement, hereinafter referred to as "PERMIT AGREEMENT", made and entered into this_____ day of August, 2013 is by and between the CITY OF DULUTH, a Minnesota municipal corporation, 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. 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 and B, 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 28, 2013, September 20, 2014, and September 19, 2015, and concluding no later than 12:00 a.m., January 31, in each succeeding year ("TERM") until January 31, 2016. 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. PROMOTER shall enjoy non-exclusive use of the Family Center during the TERM.

3.4. 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.

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. 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.

4.3 CITY shall provide sufficient electrical services to the EVENT, including the parking lots used in conjunction with the EVENT.

4.4 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).

4.5 CITY shall provide electrical services at its sole expense to the west entrance/exit to Parking Lot B.

ARTICLE 5 - PARKING

5. The use of Parking Lots is subject to an agreement between the City and the Duluth Entertainment and Convention Center Authority (DECC) dated March 5, 2012 (City Auditor Doc. No. 21566). 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. CITY 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. PROMOTER shall immediately notify the City of any condition that requires maintenance pursuant to this paragraph.

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 salt and/or sand on EVENT pathways and parking lots during the TERM.

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. CITY will designate a 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 day 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. 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.

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 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- GENERAL PROVISIONS

15.1. 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.

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

15.3. 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.

15.4. 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.

15.5. 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.

15.6. 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.

15.7. 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.

15.8. 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.

15.9. 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.

15.10. 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.

15.11. 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. 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.

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

15.13. 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.

15.14. 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.

CITY OF DULUTH	**BENTLEYVILLE TOUR OF LIGHTS, INC.**
_____	_____
Mayor	Board Chairperson of Board of Directors
APPROVED AS TO FORM:	
_____	_____
Assistant City Attorney	Legal Committee Representative

ATTEST:

_____

City Clerk

COUNTERSIGNED:

_____

City Auditor

THE CITY OF DULUTH MINNESOTA

BAYFRONT FESTIVAL PARK

BAYFRONT PARK and BAYFRONT FAMILY CENTER

EXHIBIT A