

**CITY OF PORTSMOUTH**

**LEGAL DEPARTMENT**

**MEMORANDUM**

DATE: July 27, 2023  
TO: KELLI BARNABY, CITY CLERK  
FROM: JANE M. FERRINI, ASSISTANT CITY ATTORNEY *JMF*  
RE: LICENSE AGREEMENT  
PRESCOTT PARK FOR PRESCOTT PARK ARTS FESTIVAL, INC.

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Attached for permanent filing please find the original Prescott Park License Agreement for Prescott Park Arts Festival, Inc. (PPAF), between the City of Portsmouth and PPAF with respect to its use of Prescott Park for a period of five (5) years commencing May 15, 2023.

Attachment

cc: Judie Belanger, Finance Director  
Peter Rice, Public Works Director  
Judith Renaud, City Controller  
Rosann Maurice-Lentz, Assessor

**PRESCOTT PARK LICENSE AGREEMENT  
FOR  
Prescott Park Arts Festival, Inc.**

**PARTIES.** This license agreement (“**Agreement**”) is by and between the City of Portsmouth, a municipal corporation organized and existing under the laws of the State of New Hampshire, with a principal place of business at 1 Junkins Avenue, Portsmouth, New Hampshire 03801 (the “**City**”), and

**Licensee,** Prescott Park Arts Festival, Inc., (“**PPAF**”) a non-profit corporation, organized and existing under the laws of the State of New Hampshire with a mailing address of P.O. Box 4370 Portsmouth, NH 03802.

This Agreement is dated (date of acceptance by City Council): May 15, 2023.

**RECITALS.** This License sets forth the rights, obligations and conditions of Licensee’s use of property and buildings on City property known as Prescott Park and bounded by State Street, Marcy Street and Mechanic Street (the “**Park**”)

- The City owns Prescott Park and is responsible for preserving its historic resources and operating Prescott Park consistent with its fiduciary and charitable obligations.
- The 2017 Prescott Park Master Plan (adopted by the City Council February 6, 2017) is a foundational policy statement guiding the operations and programming authorized in Prescott Park. Further, the recommendations of the Prescott Park Policy Advisory Committee (Final Report December 2017) provide additional guidance in development of park policies and agreements.
- Prescott Park is first and foremost a waterfront open space for the people of Portsmouth. The “Park First” approach of the 2017 Prescott Park Master Plan is a framework for decision-making, which prioritizes the Park space as a City park and place for respite and quiet enjoyment.
- Ensuring a presence for theater, dance, music and visual arts in the Park is a tenet of the Prescott Park Master Plan.
- Prescott Park’s Shaw Warehouse, Marine Railway Building, and Sheafe Warehouse are invaluable historic and cultural resources, whose value in showcasing and interpreting the historic development of Portsmouth is inestimable.
- A Prescott Park Master Plan Implementation Committee was formed in 2020 to make recommendations on how to implement the Master Plan in phases. Additional environmental and engineering studies were performed and on July 11, 2022, the City Council approved the recommendations of the Prescott Park Master Plan Implementation Committee to move forward with Phase 1A Master Plan Improvements. Master Plan Improvements will be constructed during the term of this Agreement. The City will regularly communicate with PPAF to provide advance notice of Master Plan Improvements in order for the parties to address potential impacts on operations and programming.

**NOW THEREFORE:** For the public benefit and consideration set forth, the City grants a non-exclusive license to Licensee to use the licensed area defined in this Agreement for limited authorized activities subject to the following terms and conditions.

### **GENERAL**

1. **PUBLIC BENEFIT.** The City Council has determined that granting this License to the Licensee is in the public benefit. Specifically, the benefit is the provision of arts and arts education programming and family entertainment as well as cultural events in Prescott Park. The public benefit is further described in Paragraph 5 relative to Consideration and Schedule D.
  
2. **LICENSED AREA.** The City and Licensee agree that it is not the intention of the parties to create a public forum within the Licensed Area, the Park currently has a public forum designated area and there is no intention by this Agreement to expand or alter it. The Licensed Area for the Authorized Activities is as described in Schedule A. The Licensee shall have exclusive programming rights and use of the stage subject to entering into good faith negotiations with the City for some limited use by the City.
  
3. **AUTHORIZED ACTIVITIES.** Licensee is permitted to use the Licensed Area for those activities identified in Schedule B and for no other purpose. Licensee shall conduct no other business, enterprise, program or activity in, on or around the Park other than specifically authorized by this Agreement.
  
4. **SCHEDULE OF PROGRAMMING.** Schedule C of this agreement outlines the annual submittal timeline for a proposed schedule for each season by the Licensee as well as standards for approval of a schedule by the City Manager. Schedule Parameters listed in Schedule C establish the standards that shall be the basis for approval of the Licensee's schedule. In addition, Licensee recognizes the parameters represent an "up to" amount of programming eligible to be approved annually in the Park and is not an amount of programming to be allowed "by right" annually. Adjustments to these parameters may be made annually by the City Manager based on Licensee's performance under this Agreement.

The schedule, when approved annually in writing by the City Manager, shall become a part of this Agreement as Schedule C, Addendum 1. Licensee shall conduct its operations in accord with Schedule C. Licensee shall not schedule, stage or promote any program, act or performance in which pyrotechnics, explosives or display of open flames are involved or used without prior and separate written approval.

5. **PUBLIC BENEFIT & CONSIDERATION.** In recognition of the value of the Licensee's programming to the City and the role the Park has in enabling the Licensee's programming, Licensee agrees to share in the City's expenses associated with the overall administration, maintenance and operations in accordance with Schedule D. Licensee and the City recognize the consideration outlined in Schedule D reflects a balance of the

following factors: the public benefit of Licensee programming to the residents and to the vitality of the City (cultural, social and economic); the value of the Park's assets to Licensee operations (including non-realized occupancy costs for office and storage uses to Licensee); administrative, maintenance and operational costs to the City; impacts of Phase 1A Master Plan Improvements or other Master Plan Improvements on operations and programming, if any; and impacts to the Park and the surrounding area in terms of the wear and tear, transportation and parking, and off-site sound exposure.

6. **TERM.** The term of this Agreement shall be five years commencing on the date of this Agreement and ending five years from that date unless terminated earlier due to default or by agreement.
  
7. **EXTENSION OF TERM.** Licensee may at the conclusion of year 4 of the term request an extension of the license for up to an additional five-year term. The City shall negotiate in good faith an extension provided: (1) Licensee is not in violation or default of any material term of this Agreement; (2) Licensee has not received more than six (6) notices of default during the term; (3) Licensee has not received more than six (6) notices of infractions per season; and (4) the City has not been obligated to make any financial contributions to maintain the Licensed Area other than those obligations contemplated by this Agreement.
  
8. **EARLY TERMINATION.** Licensee may terminate this Agreement without penalty by written notice to the City upon the following conditions: (1) Licensee is not in default of any obligation; and (2) the City is provided notice no later than December 31 of the completed season.
  
9. **FINANCIAL INFORMATION.** In order to promote transparency and public confidence in financial transactions involving the use of the Park, Licensee shall provide timely financial information, including the following (the timing of the submittals below may be modified by the City Manager for good cause upon request of the Licensee presented in writing prior to the dates shown below):
  - A. Financial Profits and Loss Summary for the season immediately preceding shall be submitted annually no later than February 15<sup>th</sup>. The Licensee's fiscal year is a calendar year – January 1 to December 31<sup>st</sup>.
  - B. Audited financial statements and management letter shall be submitted on an annual basis at a reasonable time following completion and review with the Licensee's Board.
  - C. Other financial information (e.g., policies for cash handling, etc.) and books open for inspection as may be requested by the City.
  
10. **AS IS CONDITION.** Licensee accepts the Licensed Area "as is" and as fit for the Licensee's intended purposes. City is under no obligation to improve, fit-up or make ready the Licensed Area for Licensee's Authorized Activities.

11. **RESPONSIBILITY FOR COSTS OF OPERATIONS.** Unless otherwise stated in this Agreement, Licensee is responsible for all costs and expenses incurred by Licensee for performing its obligations under this Agreement and carrying out its mission and programming. Those costs may include but are not limited to administration, scheduling, security and crowd management, staging and production, maintenance of equipment, assets, and temporary facilities; permitting and licensing fees; waste and clean up as set forth in paragraph 14 and 15; as well as all subcontracted services and other costs of carrying out this Agreement.
12. **PUBLIC ACCESS TO OTHER PROGRAMMING.** Licensee recognizes the City schedules use of the Park for weddings, dock reservations, public forum area events and Four Tree Island Events. Licensee agrees to cooperate and make reasonable accommodations to facilitate these uses.

### **PROPERTY REQUIREMENTS**

13. **UTILITIES AND TAXES.** All utilities (water and sewer, fire alarm monitoring, and natural gas) associated with the use of the Licensed Area in Schedule A shall be the responsibility of the City. For the purposes of this section neither telephone nor other telecommunications utilities such as fiber-optics, cable, internet service or the like are utilities. PPAF will pay the electricity associated with their use of the Licensed Area in Schedule A. The parties acknowledge and agree that there are several power sources in the Park which receive separate invoices. The parties further acknowledge that PPAF will pay the invoice for electricity that includes power associated with the use of Licensed Area in Schedule A, except the sound booth, and the electricity for the seasonal bathrooms located in the Concession Stand. The City will pay the invoice for the electricity associated with the sound booth.

During the term of this Agreement, PPAF may apply for an exemption provided under RSA 72:23. Provided that PPAF meets the test for charitable use set forth in RSA 72:23 (i), no taxes shall be due. PPAF shall provide documentation to the City's assessor annually by April 15<sup>th</sup> of each year and any further documentation as may be reasonably requested to establish charitable use.

In the event the PPAF does not meet the test for charitable use set forth in RSA 72:23 (I) for any given year in during the term of this Agreement, and taxes are assessed, then PPAF shall have the right, but not the obligation, to terminate the Agreement after providing two (2) months written notice to the City. The taxes due shall be pro-rated to the date of the termination of the Agreement. If PPAF does not meet the test for charitable use and does not terminate this Agreement, failure to pay duly assessed property taxes when due shall be cause to terminate this Agreement by the City

14. **MAINTENANCE.** Licensee shall be responsible at its own cost for maintaining any of its temporary structures, staging or exhibits and for ensuring that any of its equipment is in good and sanitary condition and repair. City shall be responsible for all maintenance of

its structures including the licensed areas in the Shaw Building. Licensee shall notify the City as soon as possible in writing if Licensee identifies any areas that are in need of maintenance to preserve and protect the structural integrity and historic value of any building or to protect public health and safety.

15. **WASTE AND CLEAN-UP.** The Licensee shall not allow any waste, rubbish or other objectionable materials to accumulate within the Licensed Area or upon the surrounding Park grounds. The Licensee shall arrange and pay for proper solid waste receptacles, the location of which shall be approved by the City Manager. Licensee shall be expressly responsible for cleaning up debris, emptying trash bins and otherwise returning and restoring any exterior Licensed Area to a park-like condition after each use for an event or activity. To the extent the Licensed Area includes building space, the building shall be kept clean, free of debris and tidy. If the City sponsors or adopts any evaluation or pilot of an alternative waste collection system, Licensee will participate in such evaluation or pilot program.
16. **MASTER PLAN CAPITAL IMPROVEMENTS.** Licensee understands the 2017 Prescott Park Master Plan and the approved recommendations for Phase 1A Master Plan Improvements are the City's plans for all future renovations, modifications, and reconstruction in the Park. The design, timing of implementation, order of improvements, and the type of modifications, improvements, and related construction efforts above and below ground for the Park will be directed by the City. Licensee recognizes that planning, design, and construction of Master Plan improvements will likely move forward during the License term. In particular, construction may cause disruption to Licensee programming and activities. All construction impacts and disruptions associated with execution of the Master Plan improvements will be carried out in close coordination with the Licensees through the creation of detailed Construction Management Plans for each phase.
17. **MODIFICATIONS.** No modifications of any kind to the Licensed Area, including structures within a Licensed Area, are permitted without prior written agreement of the City. It is anticipated that the parties may amend Schedules A, B, C and D if construction related to Phase 1A Master Plan Improvements or other Master Plan Improvements disrupt operations and programming.
18. **EQUIPMENT/INSTALLATION OF ADDITIONAL EQUIPMENT.** With the prior written approval of the City, Licensee may install additional machinery, equipment or other personal property; if attached or affixed to the Licensed Area, such machinery, equipment or other personal property shall become the property of the City unless the City otherwise agrees in writing. With advance written consent of the City, Licensee may remove such machinery, equipment and other personal property from the Licensed Area, provided that any removal of machinery, equipment or other personal property does not adversely affect the structural integrity of any structure. If any damage is occasioned by such removal, Licensee agrees to promptly repair such damage at its own expense.

19. **RIGHT OF ENTRY.** The City shall have the right to enter into and upon the Licensed Area including all land and buildings at all times to inspect, make repairs or improvements to City-owned structures and land, to construct improvements related to Phase 1A Master Plan Improvements or other Master Plan Improvements, to remove items from the Licensed Area that are in violation of the this Agreement, and to protect the health, safety and welfare of users, employees and visitors or for any purpose; including for administering sound monitoring protocol described elsewhere in this agreement.
20. **INSURANCE.** Throughout the License Term, Licensee shall, at its sole cost and expense, maintain insurance against such risks and for such amounts as are customarily insured against by entities engaged in the types of activities in which Licensee will be engaged.
- A. Types of insurance shall include:
- i. Commercial General Liability coverage protecting Licensee against loss from liability imposed by law or assumed in any written contract or arising from personal injury, including bodily injury or death, or damage to the property of others, caused by an accident or other occurrence, with a limit of liability of not less than \$1,000,000 per occurrence and \$2,000,000 aggregate.
  - ii. Automobile Liability coverage protecting Licensee against loss arising from personal injury, including bodily injury or death, or damage to the property of others, caused by all automobiles with a limit of liability of not less than \$300,000 per occurrence. If Licensee does not own, lease or engage for hire vehicles, the Licensee may so affirmatively represent as such in writing, in which case coverage is not required.
  - iii. Licensee shall maintain such coverage necessary to insure its exhibits, equipment and other personal property placed in any municipal building or on any municipal property. Licensee shall also provide property coverage for any of its temporary structures and betterments.
  - iv. Workers' compensation insurance to the extent required by the laws of the State of New Hampshire.
  - v. Marine insurance/endorsement of at least \$1,000,000 is required if Licensee's Authorized Activities include use of any docking structure or marine activities.
- B. The parties acknowledge and agree that insurance coverages may need to be adjusted over the course of the term of this lease due to changes in the City's Member Agreement, due to inflation or changes in Licensee's Authorized Activities. The parties agree to make good faith efforts to mutually agree upon such updates and adjustments to insurance coverage so as to maintain commercially reasonable amounts and to apportion equitably such costs and risks.
- C. All insurance required by this Agreement shall be procured and maintained in financially sound and generally recognized responsible insurance companies authorized to write insurance in the State. Such insurance may be written with

deductible amounts comparable to those on similar policies carried by entities engaged in the types of activities in which Licensee will be engaged.

- D. The City shall be identified as an additional insured party on a primary and non-contributory basis on all liability policies.
  - E. Licensee shall provide proof of insurance coverage satisfactory to the City which may include certificates of insurance or policy documents.
  - F. The City shall maintain existing property and liability coverage on the buildings and property of Prescott Park. If the loss or claim arises in whole or in part from the activities of Licensee, the liability insurance of Licensee shall be primary and the City's secondary.
21. **INDEMNIFICATION.** Licensee agrees to defend, hold harmless and indemnify the City and its officers, agents and employees against any and all liability for bodily injury, death, and property damage arising from the existence of this Agreement or any activity conducted hereunder or any person or entity operating under Licensee's authority. This provision shall survive termination or expiration of the Agreement.

#### **RESTRICTIONS**

22. **NON-DISCRIMINATION.** Licensee shall not discriminate on the basis of race, color, religion, gender, gender expression, age, national origin, disability, marital status, sexual orientation or military status.
23. **NO ALCOHOL, MARIJUANA OR ILLEGAL SUBSTANCES.** No alcohol, marijuana or illegal substances are permitted in the Park. Licensee shall communicate this restriction to all employees, volunteers and contractors and shall take steps to communicate this restriction to all invitees as instructed by the City Manager.
24. **PARKING.** Licensee understands the North Parking and Water Street Parking lots in the Park are public, off-street parking lots and the City may establish rules and terms of use for these parking lots in accordance with City ordinances which may without limitation include: elimination or reduction in parking within the Park at any time (consistent with the Park Master Plan); metering one or both lots; and changing the 2017 pilot permit parking program. Licensee is expressly not authorized to lease, sub-license, award, or otherwise designate or reserve any parking spot in any area of the Park. The parties agree there is no obligation on behalf of the City to provide parking to the Licensee, paid or unpaid, within or outside the Park. Parking for tour buses (up to three spaces) may be reserved by PPAF in the area designated by the City in 2017. No idling of tour buses will be permitted.
25. **COMMERCIAL ACTIVITY IN PARK.** As stated in Paragraph 3 above Licensee shall conduct no other business, enterprise, program or activity in, on or around the Park

other than specifically authorized by this Agreement. There shall further be no selling of merchandise or concessions (authorized through separate agreement), solicitations, monetization of Park grounds, or charging of any fees unless specifically allowed under Authorized Activities.

26. **SIGNAGE.** Licensee shall not display, erect or permit any signage in the Licensed Area or Park which has not been approved by the City and described in Schedule E.
27. **NO AMPLIFICATION.** Licensee shall not employ any sound amplification unless such amplification is allowed under Authorized Activities and Licensee has met all setup, equipment and training conditions prior to commencement of use.

### **OPERATIONS AND RECOURSE FOR INFRACTIONS**

28. **POINT OF CONTACT.** Licensee shall designate in writing a person as a point of contact for City officials. In addition, Licensee shall further identify and publish on its website and other materials a protocol for Licensee to receive and review complaints and concerns from the public. Licensee will track the receipt of such complaints and concerns and Licensee's response and produce such information for inspection upon the City's request.
29. **REVIEW OF PERFORMANCE.** Up to three times per year, the City may request the Licensee to make a representative from its Board as well as administrative leadership available to participate in a public meeting to hear public comment and to respond to questions and concerns. The timing, format and schedule of these public meetings shall be at the discretion and direction of the City Manager.
30. **APPROVAL OF TEMPORARY FACILITIES.** The process for City approval of the Licensee's temporary facilities (authorized facilities erected and disassembled on a seasonal basis) is outlined in Schedule B, Authorized Activities. The purpose of this approval is to ensure: (1) compliance with this Agreement as well as with life safety and building codes and the Americans with Disabilities Act; and (2) incorporation of public safety recommendations and risk management practices into the layout.
31. **RECOURSE FOR INFRACTIONS.** An infraction shall mean an event of non-compliance with this Agreement which the City has elected to treat as less than a Default under paragraph 33. Such infractions may include but are not limited to the following:
  - placement of unauthorized signage
  - engaging in other business or activities that are not authorized
  - exceedance of sound system limitation
  - failure to maintain clear sidewalks or aisles
  - failure to follow any health and safety directive of an authorized City official

In the event of infraction, the City may at the discretion of the City Manager exercise its right of entry as set forth in paragraph 19 to correct the infraction. In addition, the City may provide written notice to the Licensee of the infraction and assess a penalty of \$250 for each infraction. In the event that the City issues more than three notices of infraction in a thirty-day period, subsequent violations for the remainder of the calendar year may be increased at the City's discretion to \$400 per infraction. The City shall also have the right to demand assurances from Licensee and a plan of action for avoiding further infractions. Penalties shall be paid within 30 days of assessment.

32. **RESTORATION AND DAMAGES.** Licensee shall restore, replace and remedy promptly any damage caused to the Park by Licensee's activities. If the damage is not remedied promptly, the City - after written notice to Licensee - may, through its own forces or a contractor, restore, replace and remedy the damage in which case Licensee will be charged for that work.
33. **PUBLIC SAFETY AND PUBLIC HEALTH.** The City Manager, Chief of Police, Fire Chief and Public Works Director may, at their sole discretion, order additional measures beyond those described in this Agreement to protect the health and safety of Park visitors. Such additional measures may include without limitation the assignment of additional personnel or the erection of barriers. If such additional measures are ordered, Licensee shall pay for the cost of such additional measures. Current billing rates (for representation purposes as they are adjusted annually) are as follows:
- A. Portsmouth Police officer: \$85.90/hour minimum four hours. Cruiser rate: \$14.00/per hour.
  - B. Portsmouth Fire Department: Firefighter/Paramedic: \$65.00 /hour – minimum of two hours. No charge for vehicles.
  - C. Department of Public Works (minimum of four hours):
    - Laborer: \$42.99/hour
    - Utility Mechanic: \$47.35/hour
    - Park Foreman 1: \$62.27/hour
    - Vehicles: Pickup Truck: \$15.00/hour; Dump Truck: \$65.00/hour; Backhoe: \$60.00/hour

#### **DEFAULT AND CURE**

34. **DEFAULT.** The following shall be an "Event of Default" under this Agreement:
- A. The failure by Licensee to follow any public health or public safety directive;
  - B. The failure to observe or perform any obligation or covenant of the Agreement; if such failure is unrelated to public health or safety, Licensee shall have a fourteen (14)

day period to cure the performance following written notice, unless otherwise indicated below;

- C. More than six infractions by Licensee in a thirty (30) day period;
- D. Any false or misleading material statement or representation by Licensee related to this Agreement and performance under it;
- E. The dissolution or liquidation of Licensee; the failure by Licensee generally to pay its debts as they become due; an assignment by Licensee for the benefit of creditors (excepting such security interests entered into during the normal course of business); the commencement by Licensee (as the debtor) of a case in bankruptcy or any proceeding under any other insolvency law; the commencement of a case in bankruptcy or any proceeding under any other insolvency law against Licensee (as the debtor) or Licensee consents to or admits the material allegations against it in any such case or proceeding; or a trustee, receiver or agent (however named) is appointed or authorized to take charge of substantially all of the property of Licensee for the purpose of enforcing a lien against such property or for the purpose of general administration of such property for the benefit of creditors;
- F. Licensee's loss of 501(c)(3) tax exempt status subject to a sixty (60) day period to cure;
- G. The failure of Licensee to comply with the terms or conditions of any federal, state or local funding sources for monies received subject to a sixty (60) day period to cure.

If by reason of force majeure a party is unable in whole or in part to carry out its obligations under this Agreement, that party shall give written notice of such force majeure event within a reasonable time of its inability to perform. Performance shall be suspended during continuance of the force majeure and for a reasonable time thereafter. The term "force majeure" shall include, without limitation, acts of God, strikes, lockouts or other industrial disturbances, acts of public enemies, insurrections, riots, epidemics, natural disasters, partial or entire failure of utilities, shortage of energy or any other cause or event not reasonably within the control of the party claiming such inability and not due to its fault.

35. **REMEDIES ON DEFAULT.** Whenever Licensee shall commit any Event of Default, the City may with written notice take, to the extent permitted by law, any one or more of the following remedial steps:

- A. Assess to the Licensee any cost incurred by the City to correct, cure or remedy the Event of Default;
- B. Amend or limit the number of Authorized Activities;
- C. Take possession of and/or secure the Licensed Area;
- D. Declare any and all other payments due under this Agreement immediately due and payable;

- E. Take any action as it shall deem necessary to cure any such Event of Default, such action shall not be deemed to constitute a waiver of such Event of Default; and/or
- F. Terminate this Agreement; and take any other action at law or in equity which it deems necessary or desirable to collect the payments or other obligations then due or thereafter to become due hereunder, to secure possession of the Licensed Area, and to enforce the obligations, agreements or covenants of Licensee under this Agreement.

No action taken by the City pursuant to this paragraph (including repossession of the Licensed Area) shall relieve Licensee from its obligations required by this Agreement. After an Event of Default, Licensee shall have the right upon notice to the City to enter the Licensed Area with agents or representatives of the City to remove any Equipment or personal property owned by Licensee if such Equipment or personal property is not part of the Licensed Area.

- 36. **REMEDIES CUMULATIVE.** No remedy is intended to be exclusive of any other available remedy. Each remedy shall be cumulative and in addition to other remedies now or hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient.
- 37. **NO ADDITIONAL WAIVER IMPLIED BY ONE WAIVER.** In the event any obligation contained in this Agreement is breached by any party and thereafter waived by the other party, such waiver shall be limited to the particular breach waived and shall not be deemed to waive any other breach hereunder.
- 38. **NON-RECOURSE.** Notwithstanding any provision hereof to the contrary, or any other express or implied agreement between the parties, or any act or course of conduct hereunder, the obligations of the parties set forth herein shall solely be those of the entities named in the first paragraph of this Agreement. No Councilor, employee or agent of the City shall have any personal liability whatsoever under this Agreement, nor shall any officer, director, shareholder, general or limited partner, employee or agent of Licensee have any personal liability whatsoever under this Agreement, it being understood and agreed that the City shall look solely to the assets of Licensee for recourse hereunder.
- 39. **TERMINATION OR SURRENDER OF LICENSE.** Upon termination of this Agreement, or mutual cancellation thereof, the Licensee shall immediately surrender the Licensed Area.

### **MISCELLANEOUS PROVISIONS**

- 40. **COMPLIANCE WITH LAWS.** The Licensee shall comply with all Federal, State and Municipal laws, ordinances and regulations affecting the Park and Licensed Area, the improvements thereon, or any activity or condition on or in the Licensed Area.
- 41. **FREE OF LIENS.** Licensee shall keep Park property free and clear of all liens arising out of the Licensee's occupancy and use of the Licensed Area and at all times promptly and fully pay or discharge any claims on which any lien could be based.
- 42. **NOTICES.** Any notice required under this License or other writing which may be given by either party to the other shall be deemed to have been given when made in writing and delivered in hand or delivered by U.S. Mail or a courier service with proof of delivery and addressed as follows:

To the City:                   Karen Conard, City Manager  
   City Hall  
   1 Junkins Avenue  
   Portsmouth, NH 03801

With a copy to:               Susan Morrell, City Attorney  
   City Hall  
   1 Junkins Avenue  
   Portsmouth, NH 03801

To the Licensee:             John Tabor, Board Chair  
   Prescott Park Arts Festival, Inc.  
   P.O. Box 4370  
   Portsmouth, NH 03802

With a copy to:               Courtney Perkins, Executive Director  
   Prescott Park Arts Festival, Inc.  
   P.O. Box 4370  
   Portsmouth, NH 03802

- 43. **SEVERABILITY.** In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision.
- 44. **AMENDMENTS, CHANGES AND MODIFICATIONS.** This Agreement may not be amended, changed, modified, altered or terminated except in a writing executed by the parties.
- 45. **APPLICABLE LAW.** This Agreement shall be governed by the laws of the State of New Hampshire without regard or reference to its conflict of laws principles.


46. **COMPLETE AGREEMENT.** This Agreement and the Schedules A - E appended hereto constitutes the entire agreement between the parties and may be modified only be a writing agreed to by both parties.
  
47. **ASSIGNMENT AND SUBLETTING PROHIBITED.** Licensee shall not assign this Agreement or sublet any portion of the Licensed Area.

IN WITNESS WHEREOF, the parties have executed this License on  
July 27, 2023.

WITNESS:

  
\_\_\_\_\_


**THE CITY OF PORTSMOUTH**

  
\_\_\_\_\_  
Karen Conard, City Manager  
Pursuant to vote by the City Council on  
May 15, 2023.

WITNESS:

\_\_\_\_\_

**PRESCOTT PARK ARTS FESTIVAL, INC.**

  
\_\_\_\_\_  
Printed Name of Duly Authorized Agent

  
\_\_\_\_\_  
Signature of Duly Authorized Agent

**SCHEDULE A: LICENSED AREA**

A. The areas licensed to the Licensee are listed below and depicted on the map figure in this Schedule. In the event of discrepancy between the two, the words below shall govern.

Licensed Area	Authorized Uses As Limited by this Agreement	Square Feet
*Shaw Warehouse Building	The parties anticipate that this schedule will be amended when the Shaw Warehouse becomes unavailable due to construction of Phase 1A Master Plan Improvements	
Section A, Floor 2	Office Use	826
Section A, Floor 3	Storage	1140
Section C, Floor 1	Storage and Backstage support uses	920
Stage	Staging of performances as authorized under this Agreement	2320
Seasonal Back Stage Area	Operational and Storage area in Support of Stage Programming	6768
Wooden Deck Structure	Tables and Chairs	456
Permitted Table and Chair Area		
Section A.	Tables and Chairs	
Section B.	Tables and Chairs	
Merchandise/Sound Booth Building	Technical Support of Productions/Storage/Sale of Items	430
Outdoor Merchandise area	Display of Authorized For Sale Items	605
"Old" Sound Booth Building	Storage	168
Lighting Poles in Stage area	Hosting Lighting Equipment	4

## SCHEDULE B: AUTHORIZED ACTIVITIES

1. **General Authority.** The Licensee is authorized to carry out the following listed Activities in the Licensed Areas.

**A. The staging, promotion, and production of musical concerts, theater performances, dance performances, theatre classes, youth camps, community showcases (stage performances featuring local performers, acts and organizations), up to three food festivals located within the Park, outdoor movies subject to the following:**

1. A schedule of programming shall be approved annually in accordance with Schedule C.
2. There shall be a variety of programming with a musical theater production core to the Festival Season; and
3. All programming shall be appropriate for all ages and include a mix of opportunities for local performers as well as local workforce.

**B. Maintain office space and store materials and equipment required for the operation of the Licensee's programming.**

1. Licensee is authorized to use the following licensed areas (Shaw Building) for the purposes described and as limited below until the Phase 1A Master Plan Improvements prohibit its use:
  - a. Utilize the second floor of Section A of the Shaw Building (see map in Schedule A, Licensed Areas) for office use.
  - b. Utilize the third floor of Section A of the Shaw Building for storage of costumes and other non-bulky items.
  - c. Utilize Section C of the Shaw building for storage of materials and equipment directly related to the seasonal operation of the Licensee.
  - d. There shall be no storage of hazardous materials and no smoking in the Licensed buildings.
  - e. Licensee recognizes the restroom facility on the second floor of Shaw is a shared bathroom space for use by the City personnel assigned to the Park when other restrooms are winterized.

**C. Solicitation of Donations within the Park subject to the following:**

1. Donations must be collected in a manner, by signage or otherwise, which clearly informs donors their contribution is voluntary;
2. Donation booths permitted only where designated on the License Area Map; and
3. Donations within the Park may be sought beginning two hours prior to the scheduled start of an authorized program and end no later than the end of the program.

**D. Erection of Temporary Facilities within the park subject to the following:**

1. All temporary facilities placed in or erected in the Park on a seasonal basis shall be in substantial conformance with the number, type and layout as deployed during the 2017 season and comply with all life safety and building codes as determined by the City's Chief Building Inspector.
2. Temporary facilities may be placed in the Park no earlier than May 1<sup>st</sup>.
3. All temporary facilities will be removed from the Park by October 1<sup>st</sup>.
4. All "back stage" temporary facilities shall be located within an authorized footprint not to exceed 94 feet by 72 feet inclusive of all fencing.
5. Licensee shall be responsible for all costs of the temporary facilities and obtaining all necessary electrical, building and other permits.
6. No installation, construction or erection of temporary facilities shall take place until all appropriate building permits have been issued.

**E. Reservation of space (monetization of Park grounds) in exchange for payment in authorized spaces (this means restricting access to the use of a portion of the Park on the basis of payment) and is subject to the following:**

1. May only be done during programming authorized under this agreement;
2. Reservation of tables and chairs is limited to the Licensed Area Tables and Chairs A and B; and
3. The number of tables and chairs on the Table and Chairs Areas A and B must not exceed occupancy limits established in the Life Safety Code (15 feet per square foot per person with table and chair).

**F. Merchandizing is permitted subject to Additional Conditions set forth in Section 2.**

**2. Additional Conditions for Authorized Uses.** The authorized activities are conditioned upon the following:

**A. Public Safety & Crowd Management.** Licensee and City agree the responsibility for ensuring the safety of attendees at events first lies with the Licensee. In furtherance of the goal to ensure public safety and crowd management the preparations and the Licensee agrees to the following:

- a. **Event Classification.** For the purposes of planning for site security and crowd management the following event labeling system will be used, which matches audience size targets addressed in the Schedule Parameters in Schedule C. Events will be described in accordance with the anticipated audience size; Type 1 (up to 1,500 people), Type 2 (between 1,500 and 3,400), and Type 3 (events where attendance swells beyond authorized level of 3,400).
- b. **Public Safety & Crowd Management Planning Meeting.** At the call of the City Manager and prior to the approval of the season schedule, a meeting will

be held to plan for site security and crowd management in the Park for the upcoming season, including projection of events by type for the purposes of ensuring adherence to the terms in this section and planning out staff requirements. This planning shall be inclusive of all necessary traffic safety and parking mitigation strategies required.

- c. **Event Coordinator.** Licensee shall identify an Event Coordinator for each scheduled event. Name and contact information shall be provided to the City Manager’s office, Fire Department, Police Department and Department of Public Works. The coordinator shall be certified in Crowd Management and be directly responsible for supervising crowd managers on site.
- d. **Crowd Managers.** Licensee is required to use crowd managers as set forth in this section. The use of crowd managers is critical to ensuring aisle ways are kept clear at all times and to assist in any emergency. The use of crowd managers avoids the use barricades or other barriers that could become a tripping or other hazard.
  - i. A crowd manager shall have crowd manager training. Training is available at Fire Marshal Support Services, LLC (<https://www.crowdmanagers.com/training>). An equivalent training program may be approved in advance by the Fire Chief.
  - ii. Names of all trained staff persons or volunteers who may serve as crowd managers shall be provided to the City Manager’s office.
  - iii. Crowd managers for each event shall: wear bright/distinctive shirt tops, all the same color; have flashlights for evening events; and perform no other role during the event other than crowd management.
  - iv. Crowd managers shall be present and actively working to enforce clearing aisle ways, the number of crowd managers for each event shall be determined in accordance with the following chart and reviewed in advance as part of the planning meeting discussed above. Coverage for crowd manager shall be a factor of the audience size divided by 250 (per NFPA 1 Fire Code).

Event Identifier	Event Type Requiring Crowd Managers	Audience Size Anticipated	Aisle ways Kept Clear	Estimate #/Year	Crowd Managers
Type 1 (up to 1,500 people)	Movies	300	Yes	10	1
	Plays	900	Yes	36	4
	Regular Concerts (incl. music festivals)	850	Yes	22	6

Type 2 (1,500 > 3,400)	Large concerts	up to 3,500	All events	Up to 3	6-14
Type 3 (3,400>)		>3,500	All events	Zero	14

- e. **Required Details of Public Safety Personnel.** The Licensee agrees to schedule and pay for all costs associated with the following police, fire and public works detail requirements:

Type	Police	Fire	DPW
Type 1 (Concert only) (up to 1,500 people)	1 detail officer	None Required	Discretion of Director
Type 2 Event (1,500 > 3,400)	2 detail officers	Discretion of on-call Chief	Discretion of Director
Type 3 Event (3,400>)	Discretion of Shift Commander	Discretion of on-call Chief	Discretion of Director

- f. **Notice Required for Event Relocation and Cancellation.** If an event is relocated due to weather – the Licensee is obligated to advise the City as well as the on-call Fire Chief and the Police Department.
- g. **Stage Announcement.** At the beginning of each event, Licensee shall make an announcement from the stage which will cover, at a minimum, the following information:
- i. Possession or consumption of alcohol in Prescott Park or any City Park is prohibited;
  - ii. Smoking is not permitted;
  - iii. Aisle ways and paths must be kept clear at all times;
  - iv. Introduce and identify one or more crowd managers and make clear that the directions of crowd managers must be followed; and
  - v. Identify the exits.

**B. Parking and Traffic Mitigation.**

1. Licensee recognizes programming in the Park increases parking and traffic-related issues in the vicinity of the neighborhood. In addition to cooperating on mitigation and planning from a safety perspective as part of Crowd Management and Site Security below, the Licensee will take the following affirmative actions to assist in mitigating impacts related to Licensee programming:

- a. List available parking assets for patrons on its website and related materials. Due to construction, Peirce Island shall not be listed as a parking resource until such time as notified by the City.
- b. Promote the use of public transportation buses and shuttles.
- c. Continue efforts for off-site drop-off of students attending camps with supervised crossing in to Park.

**C. Merchandising.** The Master Plan governance recommendations recognize the value and purpose of open green spaces and urban parks as places of respite, recreation and enjoyment. According to the Plan “maintaining this special status includes limiting commercialization, which, unchecked, can disrupt the Park atmosphere”. Consistent with this orientation, the following is agreed to when it comes to selling merchandise in the Licensed Area.

- a. **Authorized Points of Sale and Times.** Points of sale for merchandise authorized under this section are the Merchandise/Sound Booth and Outdoor Merchandize Area and no other location.
- b. **Appearance and Configuration.** At all times this area shall be kept in a neat and orderly manner and configured in accordance with public safety and crowd management guidance issued by the City.
- c. **Authorized Items for sale.** No merchandise may be sold to the public which is not expressly authorized. Items expressly authorized for sale include.

- Apparel including T-shirts, hats, flip-flops, and sweatshirts.
- Items to Support Attendees enjoyment of productions including blankets, chairs, sunscreen, sunglasses, bug repellent, water canteens, wrapped candy, chocolate and bottled water.
- Fairy House Tour items including wings, wands, fairy halo, and tiaras.
- Kites
- Season memberships
- Toys and miscellaneous items with a relationship to a production including stuffed toys, tote bags, pins, posters and stickers.
- Light-up items including fiber wand and light saber.
- Park type toys such as Frisbees and play swords.
- Books, Posters and vinyl Records/CDs/Cassettes

**D. Blanket and Chair Policy.** The Licensee is responsible for administering and enforcing a policy on blankets and chairs as outlined below.

- a. Licensee and the City shall identify and agree upon prior to the commencement of the season an area in front of the stage to be reserved for blankets.
- b. Neither unattended blankets nor lawn chairs shall be placed on the lawn earlier than 3:00 p.m. or four hours prior to a performance. No plastic or other tarps shall be permitted.

- c. The Licensee's blanket reservations will be limited to six per event; reserve blanket placements shall be subject to the same terms in this section.
- d. Licensee shall discourage the use of rocks from the Park and its shoreline as anchor weights for blankets placed in the audience area. Licensee shall be responsible for the removal of remaining anchor weights following the conclusion of Licensee-sponsored events consistent with section 14 and 15 of this agreement.
- e. This provision will not prevent blankets or lawn chairs from being placed in the lawn area in front of the stage prior to the restricted time of day if they are attended.
- f. The Licensee shall clearly communicate this Blanket and Chair Policy on materials advertising its programming, and on its website as well as signage in the audience area.

**E. Off-Site Sound Mitigation and Sound System Design and Setup.** Licensee and the City agree that management of impacts of programming in the Park with and outside of the Park is key to success of Park programming. The following action will be carried out by the Licensee prior to and during the authorized schedule of activities for each year during the License term:

- a. **Sound Monitoring Requirements.** Licensee will cooperate with a sound monitoring, recording, and reporting system to be utilized to confirm adherence to agree upon sound level standards established in this section.
  1. The Licensee will reimburse the City \$2,500 each season (an amount equal to one-half of the City's expense). This amount will be due July 1<sup>st</sup> each year.
  2. Licensee agrees to limit sound levels in accordance with standards utilized during the 2017 season; limit of 90 dBA as measured at the Sound Booth.
  3. The same monitoring and alert systems will be used (lighting system), which was used in 2017, which is geared to the limit above:

*Green* – neither condition below is true (target sound level range)

*Yellow* – 10-second Leq exceeds 90 dBA

*Red* – 1-second Leq exceeds 95 dBA

Sound engineers are instructed to respond as follows:

*Yellow* – Gradually reduce overall level until green illuminates.

*Red* – Immediately reduce overall level by at least 5 dB until green illuminates.

4. Continuous data monitoring and recording of sound levels in the Park, will be kept and a bi-weekly report on the results will be provided to the City, the Licensee and the public. Draft copies of the reports will first be made available to the Licensee prior to finalization.

## SCHEDULE C: SCHEDULE OF PROGRAMMING

**1. Timing of Submittal Approval Process.** Prior to May 1st each year, the PPAF shall submit a schedule to the City Manager for her consideration and approval. The scheduling parameters below will be the basis for approval of the schedule submittal by the City Manager.

Approval of the schedule from the City Manager shall be issued no later than May 15<sup>th</sup> of each season. The proposed schedule submittal shall show all events (all types) for the Festival Season. The events shall be shown in calendar form by month with start times for each event/performance. The names of all acts/artists/performers are not required to be submitted at time of submittal, however each date will be identified and labeled “Type 1” or “Type 2” in keeping with the typology in the section on Crowd Management and Public Safety Schedule B.

The parties agree some events are not known, committed or confirmed as of the schedule submittal date above. Changes and additions from the approved schedule shall be permissible so long as the overall schedule conforms with the schedule parameters for the season.

**2. Recognition of Overall Purpose of Scheduling Parameters.** The Licensee and City recognize the establishment of these scheduling parameters have two goals, listed below. In addition, Licensee recognizes the parameters below represent an “up to” amount of programming eligible to be approved annually in the Park and is not an amount of programming to be allowed “by right” annually. Adjustments to these parameters may be made annually by the City Manager based on Licensee’s performance under this agreement.

- A. The City’s desire to seek a balance between the park programming and impacts on the condition of the Park itself; on transportation & parking in the vicinity of the Park; off-site sound exposure; and limited times on days and evenings when the Park is available as a place of respite and for quiet enjoyment.
- B. Provide clarity and predictability from year-to-year about the amount, type, and frequency scheduled programming eligible to be approved in advance of creation of the schedule and commitment to artists and performers.

**3. Establishment of Parameters.** The scheduling parameters below will be the basis for approval of the schedule submittal by the City Manager as outlined below.

**A. Program Type and Mix:**

- a. There shall be a variety of programming to be offered in the Park with a musical theater production core to the Festival Season. In addition, programming in the Park shall be appropriate for all ages and include a mix of opportunities for local performers as well as local workforce.

**B. Festival Season Start and End dates:**

- a. Season bookends shall be established for the regular festival season.

- b. The start of the season **shall be no sooner than the Friday of the week school year concludes** (using the Portsmouth School Board first adopted school year calendar).
- c. The end of season **shall be no later than the Sunday night of Labor Day weekend**. However, no events which end after 7:00 p.m. on a night before a school day will be permitted.
- d. The establishment of the season bookends above does not preclude separate approval of “Special Events” (ex. Chowder Festival, Road Race), which have traditionally fallen outside of the regular season schedule. All special events outside of the season **bookends shall end by 7:00 p.m. on Sunday through Thursday and by 10:30 p.m. on Friday and Saturday**.

**C. Program Times:**

- a. All programming Sunday through Thursday **shall end at 10:00 p.m.** Exception: one weekly Movie offering shall end no later than 10:45 p.m.
- b. All programming on Friday and Saturday **shall end at 10:30 p.m.** Exception: Play offerings on Fridays and Saturdays shall end no later than 10:45 p.m. In recognition that unusual circumstances may cause the end time of plays or movies offered on Fridays or Saturdays to extend beyond the 10:45 p.m. termination time, the City Manager will be notified (via text message or phone call) when an event may extend past 10:45 p.m. but no later than 11:00 p.m.
- c. For the purposes of this section all programming includes rehearsals, sound checks and the like.
- d. These are hard stop requirements and inclusive of intermission and delays of any kind to the program start, including inclement weather.

**D. Weekly Schedule**

- a. There shall be one “Non-Performance” day (versus two “Non-Performance” days) and one “Low-Impact” day per week. The PPAF recognizes the agreement to move to one “non-performance” day versus two “Non-Performance” day, is made based on the assumption that the recommendations made as part of the 2017 Sound System Review by Reuter Associates (and any other recommendations) to concentrate sound in the Park and lessen off-site sound migration that has been in place since the 2018 Festival Season.
- b. There shall be **at least one** day per week where there is no performance or event on the stage or in the Park (Non-Performance Day). This prohibition includes rehearsals, sound checks and the like as well events not requiring or utilizing amplified sound or music. Exception for daytime camp activities.
- c. There shall be **at least one** day (in addition to the Tuesday, Non-Performance Day) where the event held (and anytime during the day) is “Low-Impact” programming. For the purposes of this provision, “low-impact” is defined as programming reasonably expected to attract attendance levels consistent with those of “movie nights” and create sound impacts lesser than concert or musical theater programming. For the purposes of this section, a “movie night” is an example of low-impact programming.

- d. The Non-Performance Day in a week, shall be on **“Tuesday” for each week of the Festival season.**
- e. There shall be no more than two (2) music concerts per week. There shall be **no more than 25** concerts during a Festival season, which includes all music concerts, including music festivals. Any week (up to three per year) within the season bookends PPAF can have a total of three concerts, so long as one is a festival and the other two concerts are demonstrated by PPAF to be lower impact/attendance. The approvals for these concert/festival weeks would be special exceptions sought by the PPAF and approved separately at the time the full schedule is approved.
- f. Programming (all types, including rehearsals, sound checks, performances, meet and greets etc.) on weekend days (Saturday and Sundays) will not begin before 12:00 p.m. Exceptions shall include cast **“Meet and Greets”** and **“Camp Shows”** (events traditionally held on weekend mornings) commencing **no earlier than 10:00 a.m.** which shall be permitted to take place on up to 6 weekend days.
- g. There will be more musical theater performances than any other performance type.

**E. Intensity (audience size):**

- a. The PPAF may schedule up to 3 Type 2 events where the attendance will not exceed 3,400 persons, so long as City public safety officials determine events with this attendance can be safely held in the Park. For all other events: No event shall be scheduled where its attendance is reasonably anticipated to exceed 1,500 persons.
- b. Compliance with paragraph a. above (as well as other agreement terms to be determined), will be a factor in annual reviews of the schedule parameters.
- c. No events or performances in Prescott Park shall be held, which cannot be safely accommodated in the Park.

## SCHEDULE D: PUBLIC BENEFIT & CONSIDERATION

**General Purpose.** In acknowledgement of the City's costs in operating Prescott Park and in balance with the benefits to the public of the Licensee programming, the Licensee and the City agree to the following consideration paid to the City in order to reduce the required annual operational subsidy for the Park.

The amounts shown below are due on July 1<sup>st</sup> (one-half of total amount due) and September 1<sup>st</sup> (one-half of total amount due)

**Year 1: 23,107**

**The amounts due for Years 2 – 5 shall increase from the amount paid the prior year by the Boston Cambridge Nov-Nov CPI.**

The City recognizes that exigent circumstances (such as extraordinary wet weather conditions or other emergency causing prolonged disruption to operations) may occur, which significantly impact the Licensee's ability to pay the amount listed above. Accordingly, the City Manager is authorized to negotiate a lower figure for the affected year.

**SCHEDULE E- SIGNAGE**

In accordance with the License provision, no signage is authorized to be erected in the Park or in the Licensed Premises without the express authorization. The following inventory of signs is authorized:

<b>Sign</b>	<b>Permanent</b>	<b>Seasonal</b>	<b>Nightly</b>	<b>Location</b>
Bathrooms Arrow	1			Support Building
"Employees only"	2			Pavilion
"Private"	2			Support Building
Concert series poster	1			Support Building
Family Friendly directional	2			Pavilion
Federal Savings bank VIP Seating	1			VIP Deck
Handicap accessible/family friendly	1			Pavilion
Main entrance and accessible ramp this way	2			Garden Gate
Men's (restroom sign)	1			Pavilion
Menu board	1			Pavilion
Movie poster	1			Support Building
Musical poster	1			Support Building
PPAF Est. 1974	1			Marcy Street Lamp Post
Prop logo sign	1			Pavilion
Rent chairs/blankets here	2			Support Building
Welcome signs	2			Pavilion
Women's (restroom sign)	2			Pavilion
"Fog/Strobe in use"		4		Gates
Annual fund donor list		1		Support Building
Bagged ice available at the Pavilion		1		Dock gate
Bowls and baskets here pizza below		2		Pizza Recycling Holders
Chairs for rent		1		Support Building
Do not climb		4		Light Poles
Donation Thank You		4		Gates
For the record poster		1		Support Building
Lobster poster		1		Sound Booth
Mainstage Signs		2		Stage
Marcy Street Sign				Marcy/State Street
No alcohol, No dogs signs		1		Fence
No Smoking Sign		9		Gates
		2		Light Poles

PPAF Banner	2	Park Lamp Post
Quote signs	5	Support Building
Ride your bike	1	Support Building
Road race/chili/do good poster	1	Support Building
We recycle pizza boxes	4	Pizza Recycling Holders
Blanket and table chalk board	1	Support Building
Chairs for rent Adirondack	1	Chairs/Support Building
Concessions chalk boards	2	Pavilion
For the record sign on box	1	Support Building
Keep Off Stage sign	1	Stage
Play, but don't keep	2	Lego Table
No Unattended blankets/chairs signs	4	Lawn
Sponsor banners	4	Gates
Treasure bar	1	Support Building
Trash and Compost	2	In Park
Win this bike	1	Display Bike