

CITY OF BATAVIA
100 N. Island Avenue, Batavia, IL 60510
(630) 454-2000 <http://cityofbatavia.net>

Committee of the Whole Agenda
Tuesday, June 7, 2016
7:30 PM Council Chambers 1st Floor

1. Roll Call
2. Approve Minutes For May 10, 2016
Documents: [COW 16-05-10M.PDF](#)
3. Items Removed/Added/Changed
4. Matters From The Public (For Items NOT On Agenda)
5. Electric Division Succession Planning (Gary Holm 6/2/16) PU
Documents: [ELECTRIC DIVISION SUCCESSION PLANNING.PDF](#)
6. Resolution 16-53-R: Approving Written Lease For 2 East Wilson Street (The Thomle Building) (Chris Aiston 6/2/16) GS
Documents: [RES 16-53-R FAWNLEASE-THOMLE BLDG.PDF](#)
7. TIF Status Update
8. Discussion/Recommendation Of "Science" Bridge Sculpture (WRM 6/3/16)
Documents: [BRIDGE SCULPTURE SCIENCE.PDF](#)
9. Approval: Call For "Art" Bridge Sculpture (WRM 6/3/16)
Documents: [BRIDGE SCULPTURE ART.PDF](#)
10. Resolution 16-54-R: Authorize Execution Of Franchise Agreement For Cable Television With Comcast Of California, Colorado, Illinois, Indiana, And Michigan LP (WRM 6/3/16)
Documents: [16-06-03 COMCAST FRANCHISE.PDF](#)
11. Project Status
12. Other
13. Adjournment

MINUTES
May 10, 2016
Committee of the Whole
City of Batavia

Please **NOTE:** These minutes are not a word-for-word transcription of the statements made at the meeting, nor intended to be a comprehensive review of all discussions. They are intended to make an official record of the actions taken by the Committee/City Council, and to include some description of discussion points as understood by the minute-taker. They may not reference some of the individual attendee's comments, nor the complete comments if referenced.

Chair Brown called the meeting to order at 7:30pm.

1. Roll Call

Members Present: Chair Brown; Ald. Atac, Stark, Chanzit, Wolff, Fischer, Callahan, Hohmann, Mueller (entered at 8:20pm) Botterman, Cerone, and McFadden

Members Absent: Aldermen Russotto and O'Brien

Also Present: Mayor Schielke (entered at 7:34pm); Bill McGrath; Kevin Drendel, Legal Counsel (entered at 8:02pm); Scott Buening, Director of Community Development; Gary Holm, Director of Public Works; Chris Aiston, Economic Development Consultant; Drew Rackow, Planner; Joel Strassman, Planning and Zoning Officer; Jeff Albertson, Building Commissioner; Peggy Colby, Finance Director (entered at 7:35pm); and Jennifer Austin-Smith, Recording Secretary

2. Approve Minutes for April 12, 2016

Motion: To approve the minutes for April 12, 2016

Maker: McFadden

Second: Hohmann

Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.

3. Items to be Removed/Added/Changed

Brown stated that the Closed Session discussion of personnel would be removed unless the Director of Human Resources is able to attend the meeting. There will be closed session for property acquisition.

4. Matters From The Public (For Items NOT on Agenda)

There were no matters from the public for items not on the agenda at this time.

5. Consent Agenda

(The Consent Agenda is made up of items recommended by city staff that requires recommendation to the full City Council by the COW. This agenda is placed as a separate item on the COW agenda. The items on the Consent Agenda are usually minor items, already budgeted, standard non-policy activities or outgrowths of earlier

meetings and are voted on as a “package” in the interest of saving time on non-controversial issues. However, any council member may, by simple request, have an item removed and placed on the “regular” agenda.)

- a. **Ordinance 16-26: Declaring Certain Transformers, Switchgears and Capacitors to be Surplus and Authorizing the Sale/Disposal Thereof (Brian Bettin 4-25-16) CS**
- b. **January, February, and March 2016 Financial Reports GS**
- c. **Resolution 16-46-R: Approving ISO Risk Management Policy (Gary Holm 4/29/16) PU**
- d. **Ordinance 16-29: Annexing Sections of Main Street Right-of-Way (Scott Buening 4/28/16) CD**
- e. **Resolution 16-49-R: Authorizing Execution of a Contract with SKC Construction, Inc of West Dundee, Illinois for the 2016 Crack-filling Program in the amount of \$122,380.00 (Tim Grimm 5/2/16) CS**
- f. **Ordinance 16-30: An Ordinance Rescinding Ordinance 15-50 and Thereby Voiding a Tax Increment Financing Redevelopment Agreement Concerning the Property at 27 N. River Street, Batavia, Illinois**

Motion: To recommend approval of the consent agenda as presented

Maker: Atac

Second: Russotto

Voice Vote: 13 Ayes, 0 Nays, 1 Absent
Motion carried.

6. Ordinance 16-31: An Ordinance Authorizing Execution of a TIF Redevelopment Agreement with River Street Buildings, LLC and Relating to the Building Improvements at 27-29 N. River Street (Chris Aiston 5/5/16) GS

The applicant distributed the PowerPoint presentation handouts to the Committee. The document was titled “River Street Buildings, 27-29 N River Street – Atrium Construction.” Aiston noted that in the consent agenda the Council rescinded the prior ordinance that awarded a grant to the building corporation for a \$25,000 matching grant. The applicant is now here to request a grant for \$25,000 along with requesting a loan in the amount of \$58,500. The loan would be a low interest loan to be paid back on a monthly basis over the next five years at a 2.75% interest rate. The project is growing, which now includes 27-29 North River Street. Aiston reviewed the PowerPoint presentation with the Committee.

Stark asked about the knee wall. John Hamel, owner of Pal Joeys, answered that the knee wall was created for safety and extra security while serving alcoholic beverages. Stark asked about the estimated completion date. Hamel stated that demolition starts as soon as they could move forward. He is thinking mid or late June at the latest. Cerone asked about the loan payback. Harrison noted that he had a loan from the City before for a sprinkler system and paid it back. Chanzit noted that the interest rate is below market right now. Aiston stated that we are below market and that is to incentivize the project. The applicant would save \$5,000 in interest over a five-year note.

Motion: To recommend to Council approval of Ordinance 16-31: An Ordinance

Authorizing Execution of a TIF Redevelopment Agreement with River Street Buildings, LLC and Relating to the Building Improvements at 27-29 N. River Street

Maker: Cerone
Second: Fischer
Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.

Brown invited the applicant to attend the City Council meeting on Monday night.

7. Ordinance 16-23: A Comprehensive Plan Land Use Map Amendment for 21 North Water Street, Batavia United Methodist Church, Applicant (Rackow 5/5/16) CD

Stark reported ordinances 16-23, 16-24, and 16-25 should be considered together. The Batavia United Methodist Church is seeking changes that would amend the Comprehensive Plan Land Use Map designation for the 21 North Water Street property. The plan would be changed from Downtown Mixed Use (DMU) to Public Facilities and Institutional. The designation would be aligned with the rest of their buildings. The third action is for variances to address the existing parking, existing setbacks and perimeter. The changes would be used to utilize 21 North Water Street as a teen and youth ministries and bible study building.

Rackow explained the three ordinances to the Committee. He reported that the Plan Commission (PC) and Zoning Board of Appeals (ZBA) were supportive of the changes and recommended Design Review approval for minor modifications to the exterior to the 21 North Water Street building. Rackow continued that changing the district would align the property for that particular use. The ZBA recommended the condition recommending the installation of a sidewalk when the church makes any significant improvements or after five years. The PC and ZBA recommends approval and staff recommends approval as well.

Motion: To recommend to Council approval of Ordinance 16-23: A Comprehensive Plan Land Use Map Amendment for 21 North Water Street, Batavia united Methodist Church, Applicant

Maker: Atac
Second: Wolff
Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.
CONSENT AGENDA

8. Ordinance 16-24: Amending the Official Zoning Map – Batavia United Methodist Church (Rackow 5/5/16) GS

Motion: To recommend to Council approval of Ordinance 16-24: Amending the Official Zoning Map – Batavia United Methodist Church

Maker: Atac
Second: Chanzit
Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.

CONSENT AGENDA

**9. Ordinance 16-25: Variances for Batavia United Methodist Church (Rackow 5/5/16)
CD**

Motion: To recommend to Council approval of Ordinance 16-25: Variances for Batavia United Methodist Church

Maker: Atac

Second: Hohmann

Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.

CONSENT AGENDA

10. Ordinance 16-27: Authorizing Execution of Annexation Agreement 2S668 Raddant Road (Joel Strassman 5/5/16) CD

Stark noted that ordinances 16-27, 16-28, and resolution 16-48-R are all to be considered together. Stark stated that a resident submitted a recommendation to annex property owned by TMS Holdings. The property would be zoned R0, single family. The property is now zoned as Farming with a single-family residence on site. Stark stated that the County will not allow for a replacement septic system to replace the current failed one. Stark stated that if the City denies this ordinance, the residence would be considered inhabitable because it would not have the necessary sanitary sewer or septic system. As part of the Annexation Agreement, the applicant is requesting to delay the required connection to the City's electric utility and the installation of a sidewalk for up to fifteen years and not require public works and fire capital fund payments. The applicant has allowed for utility and drainage easements rights along all property lines and will reimburse the City for its cost for sidewalk installation, if the City installs a sidewalk, before the end of the fifteen year period.

Brown asked what happens if the current owner sells the home. Strassman stated that the new owner would be obligated. The agreement with obligations would appear as part of the title commitment. Hohmann asked about the capital fund payments and if they were waived in the past. Brown stated that they have been waived in the past and the City currently provides police and fire protection to that property.

Motion: To recommend to Council approval of Ordinance 16-27: Authorizing Execution of Annexation Agreement 2S668 Raddant Road

Maker: Cerone

Second: Fischer

Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.

CONSENT AGENDA

**11. Ordinance 16-28: Annexing and Zoning 2S668 Raddant Road (Joel Strassman 5/5/16)
CD**

Motion: To recommend to Council approval of Ordinance 16-28: Annexing and Zoning 2S668 Raddant Road
Maker: Cerone
Second: McFadden
Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.
CONSENT AGENDA

12. Resolution 16-48-R: Accepting Grant of Utility and Drainage Easement 2S668 Raddant Road (Joel Strassman 5/5/16) CD

Motion: To recommend to Council approval of Resolution 16-48-R: Accepting Grant of Utility and Drainage Easement 2S668 Raddant Road
Maker: Cerone
Second: Fischer
Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.
CONSENT AGENDA

13. Ordinance 16-32: Variance for 514 Main Street 2nd Story Addition (Drew Rackow 5/5/16) CD

Stark reported that the ZBA approved the variance request for the addition of a second story to allow for a second story bathroom addition. The variance requests would provide relief from Table 2.104 to allow a second story bathroom addition to be constructed with a setback of 2.87 feet rather than the required five feet, allow the roof overhangs to project into a required setback to approximately 1.625 feet rather than the maximum encroachment of 3 feet. Lastly, they considered a variance for the residence's existing west setback to allow a setback of approximately seven feet rather than the required ten feet.

The proposed variances would not change the footprint of the existing residence. The applicant indicated that the variances would allow for the most appropriate location for a proposed bathroom. The location of the existing residence proximate to property lines limits opportunities for expansion. The consensus of the ZBA was for a positive recommendation for the requested setback variances.

Motion: To recommend to Council approval of Ordinance 16-32: Variance for 514 Main Street 2nd Story Addition
Maker: Wolff
Second: Chanzit
Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.

14. Resolution 16-33-R: Authorizing Execution of the Contract for the 2016 Street Resurfacing Program with Geneva Construction Company in the amount of \$1,500,636.90 (Rahat Bari 5/2/16) CS

Holm reported that this is for our annual roadway resurfacing program. There is a complete list of streets to be done this year included in the memo. The City received bids from four different contractors and Geneva Construction was the lowest bid. Staff is recommending approval and the value includes a 5% contingency over the bid. Brown noted that this is under budget. Callahan asked if this project would help with stormwater runoff. Holm stated that they would be correcting minor drainage issues, such as puddles forming at the curb. However, the way the stormwater drains would not be changed because they are not changing the roadway profiles.

Motion: To recommend to Council approval of Resolution 16-33-R: Authorizing Execution of the Contract for the 2016 Street Resurfacing Program with Geneva Construction Company in the amount of \$1,500,636.90

Maker: McFadden

Second: Hohmann

Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.

15. Resolution 16-47-R: Authorizing Execution of the Master Services Agreement (MSA) with Engineering Resource Associates (Rahat Bari 5/2/16) CS

Wolff stated that this is for the riverbank stabilization project. The City has identified unstable areas adjacent to the Fox River that have affected the appearance of the river and are contributing towards the instability of the west banks located 300 feet north of Wilson Street (PEACE Bridge) to 1600 feet south of Wilson Street (Clark Island). The west bank of the river north of Wilson Street has experienced significant scour and bank erosion due to water level fluctuations, wave action, ice shear, and vegetation loss. Similar bank erosion is present on west side of river bank south of the bridge. In some areas, the exposed riverbank actually exhibits an overhang where the roots of large trees have been completely undermined by the river flow.

Motion: To recommend to Council approval of Resolution 16-47-R: Authorizing Execution of the Master Services Agreement (MSA) with Engineering Resource Associates

Maker: Stark

Second: McFadden

Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.

16. Resolution 16-50-R: Authorizing Execution of Task Order #1 for Fox River Stabilization with Engineering Resource Associates (ERA) for an amount not-to-exceed \$37,740 (Rahat Bari 5/2/16) CS

Wolff stated that this resolution is for the contract for the riverbank stabilization project.

Motion: To recommend to Council approval of Resolution 16-50-R: Authorizing Execution of Task Order #1 for Fox River Stabilization with Engineering Resource Associates (ERA) for an amount not-to-exceed \$37,740

Maker: McFadden

Second: Hohmann

Voice Vote: 11 Ayes, 0 Nays, 3 Absent

Motion carried.

17. Project Status – Streetscape TIF CD

Callahan asked if there was a new owner of Gem Spot. McGrath stated that staff does not know but if there is they are not required to reapply for a conditional use.

Brown asked if there is any updates on Storehenge and McGrath answered that there is none at this time. Staff is currently working on Suncast negotiations.

18. Other

There were no others at this time.

19. Closed Session

- a. Property Acquisition**
- b. Personnel**

Motion: To enter into closed session for the purpose of property acquisition
Maker: Stark
Second: Cerone
Voice Vote: 11 Ayes, 0 Nays, 3 Absent
Motion carried.

The Commission entered into closed session at 8:14pm and exited at 9:39pm.

20. Adjournment

There being no other business to discuss, Brown asked for a motion to adjourn the meeting at 9:39pm; Made by Hohmann; Seconded by Callahan. Motion carried.

Minutes respectfully submitted by Jennifer Austin-Smith

CITY OF BATAVIA

DATE: June 2, 2016
TO: Committee of the Whole - PU
FROM: Gary Holm
SUBJECT: Electric Division Succession Planning

Earlier this year Human Resources developed a survey to gather information from all Public Works employees concerning their career goals and anticipated remaining years of service. I previously discussed with you the ongoing changes within the Water/Sewer Division and the related impacts to metering and building maintenance. The purpose of this memo is to discuss potential changes within the Electric Division.

The survey results from HR suggest that there could be multiple retirements within the Electric Division, specifically amongst the linemen, over the next couple of years. The lineman position is somewhat unique in that it takes 4+ years for an apprentice to gain experience and pass the required tests to become a journeyman. While it is possible for the City to hire a journeyman directly, we've historically found it to be very difficult. A majority of journeymen work for private contractors or larger investor owned utilities. Most journeymen are not interested in working for a small municipal utility. The City has had better luck in the past by hiring apprentice linemen and working to develop them through the training process.

The HR succession planning survey was conceived, in part, from conversations I had with the City of Geneva. Geneva is facing a similar circumstance of multiple retirements in the next few years. The City of Geneva elected to hire apprentice linemen and begin the training process now in anticipation of the pending retirements. Before making any such recommendation for Batavia, I felt it was vital to first gather all of the facts. The survey from HR, and subsequent individual conversations, has confirmed the potential for multiple retirements.

It was anticipated that I would bring a recommendation to hire apprentice linemen as part of the 2017 budget process. Unfortunately, the Electric Division has experienced some medical issues over the past several months which have resulted in the temporary reduction of personnel. As a result of these issues it has become clear that we are currently at a critical staffing level. Any additional loss of personnel will directly impact our ability to provide the level of service that our customers demand.

Therefore, I am recommending that we proceed immediately with the hiring of two electric linemen. I recommend that we advertise for both an apprentice and journeyman position. This will enable us to evaluate all candidates and determine the best course of action moving forward. The 2016 budget does not include funds for additional personnel. Following my recommendation will result in increased expenses in 2016 and potentially in 2017 (depending on the timing of any retirements). The long-term budget impacts will be negligible as the proposed positions will be utilized to fill anticipated future vacancies created through retirements.

CITY OF BATAVIA

DATE: June 2, 2016

TO: Mayor and City Council's Committee of the Whole

FROM: Chris Aiston, Economic Development Consultant

SUBJECT: Proposed Lease – Retail/Community Gathering Use for 2 E. Wilson Street
FAWN Gifts, Brea Hayes, Proprietor

I. Background

The Building Space. Recently, West DuPage Cabinets and Granite vacated the City-owned Thomle Building, relocating to 143 South Batavia Avenue (former Robbins Flowers space). West DuPage Cabinets and Granite rented this space from the City from November, 2014 to May, 2016. The Lease period was established for twelve months but allowed the business to remain in the Thomle Building on a month-to-month basis. In relocating and expanding the business, and of equal importance to the City, relocating to another, larger Batavia downtown commercial building, the City having made the Thomle Building available for this business essentially allowed this building to serve the community as a textbook incubator building.

In April, through a connection facilitated by Jamie Saam at Main Street, I met Ms. Brea Hayes, who with her partner, James Cardis, had recently moved to Batavia (Mr. Cardis will be serving as marketing consultant for the proposed business) and was inquiring into a possible downtown space to open a new boutique retail store, with additional space to accommodate various small group gatherings. When Ms. Hayes and I met, knowing that WDC&G was vacating the Thomle Building and thinking that the start-up business Ms. Hayes was envisioning might be a great fit for the building, I showed Brea the space and she immediately saw the perfectly timed opportunity for her to realize her business plan. After considering terms and ultimately trading lease draft documents, she and I are prepared to recommend a formal lease for the Thomle Building between FAWN Gifts and the City of Batavia.

The Proposed Tenant. Brea Hayes is the President of FAWN Gifts, an Illinois corporation. According to Ms. Hayes request for leasing consideration:

“FAWN Gifts works to foster a community of support and comfort through empathy and self-care. We seek your approval to debut with a retail location in the Thomle Building on Wilson Street in mid-August. We are eager to play an active role in supporting our city and engaging its citizens. Our conversations with local community members and business owners have confirmed that we offer a unique perspective that will complement future downtown business development.”

As proposed, the building will be used as follows:

1. Wilson Street-level storefront space will function as a retail shop, offering for purchase unique lines of greeting cards, bath products, candles, journals, books, plants and accessories. These items can purchased either a la carte, or as components within well-rounded gift boxes.

2. The Second floor (above street-level) will have two business functions, with the separate, northeast corner space serving as an office to meet with private clients in addressing specific gift box needs for special events, holidays, or employee and client appreciation. The main floor area space on the second floor will be used to host an array of community gatherings, focusing on emotional intelligence and creativity, from book clubs to craft nights. Naturally, by hosting such gatherings, Ms. Hayes will also create opportunities for bringing prospective consumers through her retail shop.
3. In accordance with the proposed Lease, the City is making a third floor area available to the tenant FAWN Gifts. This floor is one grade below Wilson Street (access is from the east side, exterior stair case) and will serve the business as additional space for storage.
4. Other terms of the Lease are shown in the attached “Summary of Lease Terms” sheet.

II. Analysis

As to the appropriateness of the City entering into a lease, acting in the capacity as Lessor or Landlord, staff would offer the following information for the COW’s consideration:

1. The subject building is a strategically located storefront within the City’s historic downtown business district and its continued occupancy will offer storefront stability and further promote consumer foot traffic along this first block of East Wilson Street.
2. Specifically, as a new, multiple use destination business, FAWN Gifts may address a unique market demand otherwise unfulfilled in the area.
3. The City will receive \$600 per month (7,200 per year) in rent revenue from leasing the subject building space.
4. The tenant will be responsible for all utility costs (including city electric, sewer and water fees), and leasing the space therefore brings another utility customer to the City.
5. It is hoped that the space will serve to further “incubate” FAWN Gifts and that once the lease expires, Ms. Hayes would relocate this business to another, larger space within the City’s commercial building inventory.

III. Recommendation

Staff recommends the Committee of the Whole forward to City Council with a positive recommendation for its approval the attached Lease between the City of Batavia (Landlord) and FAWN Gifts (Tenant).

Attachments:

Summary of Lease Terms

RES. 16-53-R APPROVING WRITTEN LEASE FOR 2 EAST WILSON STREET (THOMLE BUILDING)
Lease with FAWN Gifts for 2 East Wilson Street

cc: City Administrator; City Attorney; Press; File

**LEASE FOR 2 E. WILSON STREET, BATAVIA, ILLINOIS
SUMMARY OF LEASE TERMS (RES. 16-53-R)**

Lessor: City of Batavia

Lessee: FAWN Gifts (Brea Hayes)

Leased Premises:

2. East Wilson Street, Batavia Illinois 60510
 - a. Premises shall be available to Lessee in “as is” condition.
 - b. Lessee shall have the exclusive use of the First Floor (Wilson Street-level), Second Floor (one level above street level) and Floor immediately beneath Wilson Street-Level Floor.

Lease Price: Rent shall be \$600.00 per month.

Lease Term: The lease shall be for a period of one (1) year. At the expiration of the one-year lease period, Lessor agrees to allow the Lessee to remain on the premises, provided Lessee’s principal business activity remains in place. Lessor has the option to offer the Premises for lease on a “month-to-month” basis, with current lease price held constant. Thereafter, Lessee and Lessor agree to provide the other party with no less than thirty (30) days’ notice of its intent to terminate lease. Termination and vacation of the premises shall occur in 30 days or at the end of the following month, whichever is later.

Utility Costs: All Utilities shall be paid by lessee. Utilities include, but not be limited to heat, hot water, electricity, cable and internet.

Taxes: Real Estate. City will make every attempt to keep the subject real estate in a property tax exempt status during the lease term. However, if Batavia Township or the County of Kane requires that the property be subject to real estate taxes, any property taxes due on real estate shall be paid by Lessor.

Retail Sales. Lessee shall file necessary paperwork with the Illinois Department of Revenue, declaring its retail business activity and obtaining an Illinois Business Tax identification number. During the lease period, Lessee shall ensure that all taxes due from retail sales at the subject property are collected and paid to the state in full.

Other Uses. Restricted to those listed as permitted in the Downtown Mixed Use Zoning District, City of Batavia Zoning Ordinance.

Signage: Lessee shall have the right to place signage advertising tenant business, subject to the Municipal Code, and shall explore opportunities with Lessor to place such signage on the building’s west exterior building wall (facing Fox River).

Parking: Lessee shall have no exclusive rights of use of existing public parking spaces on or off the premises.

**CITY OF BATAVIA, ILLINOIS
RESOLUTION 16-53-R**

**APPROVING WRITTEN LEASE FOR 2 EAST WILSON STREET
(THE THOMLE BUILDING)**

WHEREAS, the City of Batavia owns the property at 2 East Wilson Street (the “Thomle Building” or “Building”) and has used the Building for City purposes, including as an incubator space for new business in the downtown area, to spur economic growth downtown and other City purposes; and

WHEREAS, the City of Batavia staff have negotiated lease terms with FAWN Gifts, Incorporated and Brea Hayes for the aforesaid Building owned by the City; and

WHEREAS, the lease terms are consistent with the City’s policy of providing incubator space in the downtown area to attract businesses to the downtown and spur other economic growth in the downtown; and

WHEREAS, the City shall continue to use the Building, and unused portions of the Building, for the purposes stated in this Resolution and for other City purposes as needed; and

WHEREAS, it is in the best interests of the City of Batavia to enter into a lease on the terms that have been negotiated.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Batavia, Kane and DuPage Counties, Illinois, as follows:

SECTION 1: The recitals set forth above are incorporated herein as material provisions of this Resolution.

SECTION 2: The Lease Agreement in the form attached hereto and incorporated herein by reference as Exhibit 1 is hereby approved.

CITY OF BATAVIA, ILLINOIS RESOLUTION 16-53-R

SECTION 3: The City Administrator or his designee is hereby authorized to execute the Lease Agreement attached as Exhibit 1 and to take any and all actions necessary to carry out the Lease terms on behalf of the City.

PRESENTED to and **PASSED** by the City Council of the City of Batavia, Illinois, this 13th day of June, 2016.

APPROVED by me as Mayor of said City of Batavia, Illinois, this 13th day of June, 2016.

Jeffery D. Schielke, Mayor

Ward	Aldermen	Ayes	Nays	Absent	Abstain	Aldermen	Ayes	Nays	Absent	Abstain
1	O'Brien					Fischer				
2	Callahan					Wolff				
3	Hohmann					Chanzit				
4	Mueller					Clark				
5	Botterman					Theelin Atac				
6	Cerone					Russotto				
7	McFadden					Brown				
Mayor Schielke										
VOTE: __ Ayes __ Nays __ Absent __ Abstentions Total holding office: Mayor and 14 aldermen										

ATTEST:

Heidi Wetzel, City Clerk

LEASE AGREEMENT

THIS LEASE AGREEMENT (the “Lease”), is made as of the ____ day of June, 2016, by and between The City of Batavia, an municipal corporation, with its principal place of business at 100 N. Island Ave, Batavia, Illinois (hereinafter referred to as “Landlord”), and FAWN Gifts, an Illinois corporation, with its principal place of business at 2 E. Wilson Street, Batavia, Illinois and Brea Hayes, an individual, (hereinafter referred collectively as “Tenant”);

WITNESSETH:

1. PREMISES AND TERM.

A. In consideration of the mutual obligations of Landlord and Tenant set forth herein, Landlord leases to Tenant, and Tenant hereby rents and accepts from Landlord those certain premises located at 2 East Wilson Street, Batavia Illinois 60510 consisting of the entire building, excepting the lowest level floor (two floors beneath Wilson Street level) (the “Premises”). The Premises is commonly describe by its address, 2 East Wilson Street, Batavia Illinois, but will hereafter be alternatively called the “Thomle Building” or “Building”, which Building contains approximately Two Thousand, Two Hundred and Twenty-Two (2,222) rentable square feet of space. The Thomle Building with all improvements located thereon (collectively the “Property”) is more particularly described on Exhibit “A” attached hereto and incorporated herein by reference.

B. This Lease shall become effective on July 1, 2016 and shall commence on August 1, 2016 (the “Commencement Date”). The term of this Lease shall be for a period of one (1) year after the Commencement Date to July 31, 2017 (the “Expiration Date”), unless extended as provided herein below. The term “Term” as utilized herein shall mean the initial term of this Lease and any renewals or extensions thereof.

C. Notwithstanding the foregoing, Landlord, at its sole option, may extend the Lease term one time for a period of one (1) year, with rent payable on a monthly basis in an amount to be determined and agreed between the parties (“Extension Option”). Tenant’s right to exercise the Extension Option is subject to the following conditions:

- (i) Tenant is not in default under any of its obligations under this Lease at the time the Extension Option is exercised; and
- (ii) This Lease or Tenant’s possession of the Premises has not been terminated.

In order to exercise the aforementioned Extension Option, Tenant must notify Landlord in writing of Tenant’s intention to exercise the Extension Option at least ninety (90) days prior to the Expiration Date. If Tenant fails to timely exercise the Extension Option, Tenant shall be deemed to have waived its rights to the Extension Option and, thereafter, the Extension Option shall be null and void and of no further effect.

D. In the alternate to or in addition to the extension option, the Tenant may continue on a month-to-month basis after the Term or extended Term ends, providing that either party may terminate the Lease by providing thirty (30) day notice in writing of the intention to terminate the lease, and the Lease shall terminate on the thirtieth (30th) day or the end of the month following the month in which notice is given, whichever is later.

2. BASE RENT, ADDITIONAL RENT AND SECURITY DEPOSIT.

A. Rent. Tenant agrees to pay to Landlord rent in the amount of Six Hundred and 00/100's Dollars (\$600.00) per month. The first month's rent shall be paid at the time the Lease is executed and will serve as a deposit in securing the Premises and shall be applied as the first month's rent. Additionally, Tenant shall pay Six Hundred and 00/100's Dollar (\$600.00) security deposit ("Security Deposit"). Said Security Deposit shall be paid to Landlord in three installment payments of Two Hundred and 00/100's Dollar (\$200.00) each and due on September 1, 2016, October 1, 2016 and November 1, 2016, respectively. Tenant shall have from the date the Lease is signed forty-five (45) days or until August 1, 2016, whichever is greater, to build out the Premises, furnish and stock it, without charge. Tenant shall be open to the general public for business on or before September 1, 2016, subject to force majeure.

The first month rent shall apply to the period of August 1, 2016 to August 31, 2016. Each additional monthly installment shall be due and payable in advance beginning on September 1, 2016, and continuing on the first day of each month thereafter to the Expiration Date as follows: Landlord shall send an invoice to Tenant on or about the fifth (5th) day of each and every month during the Term and Tenant shall provide rent payment in full to Landlord no later than the twentieth (20th) day of each month and to be applied as rent for the following month.

B. Security Deposit. Tenant shall be required to deposit a security deposit in an amount equal to one (1) month's Rent, as provided above, to be held by Landlord to guarantee faithful performance of this Lease. The entire security deposit shall be returned at the end of the Lease term provided Tenant shall not be in default hereunder and the Premises are surrendered in substantially the same condition as delivered, normal wear and tear expected. If Tenant fails to perform any of its obligations under this Lease or if the Premises are not delivered in such condition, Landlord may apply part or all of the Security Deposit toward the cost of remedying such failure. In the event the Security Deposit is not sufficient to complete the necessary repairs, Tenant will agree to pay Landlord upon billing, the balance of funds required. Said Security Deposit shall never constitute prepaid rent or the last month's rental payment.

3. POSSESSION/IMPROVEMENTS.

A. Improvements to be Constructed. Tenant, at its sole cost and expense, shall perform any build out the Tenant desires, excepting those costs incurred by completing the minimum improvements to the floor immediately below Wilson Street level space, as required and inspected by the City and for the exclusive use as storage/warehouse, where such costs shall be paid by the City.

B. Improvement Plans. Plans for any improvements to be made must be submitted to the City and approved ahead of time, and any fixtures to be installed, any penetration of the walls or ceilings and any flooring to be installed must be approved by the Landlord prior to installation and construction of the same. Any fixtures or permanent improvements installed or constructed by Tenant shall become the Landlord's improvements on termination of the Lease unless the Landlord has agreed otherwise in writing prior to the installation or construction of same.

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B. Condition of Premises. Except as otherwise agreed to in writing at the time this Lease is signed and appended hereto, Tenant's taking possession of the Premises shall be conclusive evidence against Tenant that the Premises were in good order and satisfactory condition when Tenant took possession, excluding latent defects. Landlord has made no representation respecting the condition of the Premises, the Building or the Property. At the termination of this Lease, by lapse of time or otherwise, Tenant shall remove all Tenant's property, including but not limited to, trade fixtures, from the Premises, and shall return the Premises broom-clean and in as good a condition as when Tenant took possession or as same may thereafter have been put by Landlord, except for ordinary wear, loss by fire or other casualty, and repairs that Landlord is required to make under this Lease. If Tenant fails to remove any or all of its property by the Expiration Date or upon the effective termination of this Lease if terminated prior to the Expiration Date, such property shall be deemed to be abandoned and shall become the property of Landlord.

C. Overload. To coordinate orderly move-ins and move-outs, no furniture, freight or equipment of any kind exceeding three hundred (300) pounds shall be brought into the Building without prior notice to Landlord, and Landlord shall designate the time and manner of moving of the same. Landlord shall have the right to prescribe the weight, size and position of all safes and other heavy equipment brought into the Building and also the times and manner of moving the same in and out of the Building. Safes or other heavy objects shall, if considered necessary by Landlord, stand on supports of such thickness as is necessary to properly distribute the weight. Landlord will not be responsible for loss of or damage to any such safe or property from any cause, and all damage done to the Building by moving or maintaining any such safe or other property shall be repaired at Tenant's expense.

4. **USE OF THE PREMISES.**

A. Use; Retail Sales Tax. The Premises shall be used only for those uses permitted in the Downtown Mixed Use Zoning District with the stipulation that, unless otherwise permitted in writing by the City and where such permission shall not be unreasonably denied or delayed, Tenant must establish and maintain during the term of the lease a retail use in the Wilson Street level space. As a condition of the Lease, Tenant shall file the necessary paperwork with the Illinois Department of Revenue, declaring its retail business activity and obtaining an Illinois Business Tax identification number. During the Term of the Lease, Tenant shall ensure that all taxes due from retail sales generated at the Premises are collected and paid to the State in full.

B. Prohibitions on Use. The Tenant shall not permit any objectionable or unpleasant odors to emanate from the Premises, nor place or permit any radio, television, loud-speaker or amplifier on the roof or outside the Premises or where the same can be seen or heard from outside the building; nor take any other action which, in the exclusive judgment of Landlord, would constitute a nuisance or would disturb or endanger other tenants of the Building, adjacent property owners or the public or unreasonably interfere with their use of their respective premises.

C. Permits. The Tenant shall procure, at its sole expenses, any permits and licenses required for the transaction of business in the Premises and otherwise comply with all applicable laws, ordinances

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and governmental regulations and hold the landlord harmless and indemnify and defend the Landlord from and against any claims, enforcement efforts, fines and liabilities in respect thereto.

D. Landlord Access. In addition to the right of the second floor tenant, its employees and invitees to use the restrooms in the Premises and to use the Premises for ingress and egress to get to and from the second floor, the Landlord shall have the right of ingress and egress to and from the Premises so show the second floor space to prospective tenants provided that the Landlord shall give twenty four (24) hour prior notice to the Tenant.

5. **MAINTENANCE AND REPAIR OBLIGATIONS.** Landlord shall not be obligated to incur any expense for the maintenance or repair of any improvements upon the Premises or Property or connected therewith, except as specifically provided in this Lease. Tenant, at its own cost and expense, shall keep the Premises and all improvements connected therewith in good repair and working order (damage by fire, or other causes beyond Tenant's control excepted) as well as in good leaseable and wholesome condition; Tenant shall be responsible for its share of the Operating Expenses related to the Property as provided in Section 2 above; and Tenant shall comply with all local or general regulations, laws and ordinances applicable thereto, as well as lawful requirements of all competent authorities in that behalf. If Tenant does not make repairs or maintain the Premises as required hereunder within thirty (30) days after receipt of written notice of any failure in connection therewith, Landlord may but need not make such repairs or provide such maintenance and pay the costs thereof, and such costs incurred by Landlord shall be considered to be additional rent immediately due from and payable by Tenant. Landlord shall be responsible, at Landlord's sole cost and expense, for any and all structural repairs, capital improvements, foundation repairs, and repairs to roof, floor, exterior walls, systems and facilities or any latent defects of the Building and Premises. The Landlord shall be responsible for any and all replacement cost of the HVAC system if said system is deemed irreparable and provided the system failure is not caused by a specific tenant's negligence.

6. **ALTERATIONS.** Tenant shall not make any alterations, additions or improvements to the Premises without the prior written consent of Landlord which consent shall not be unreasonably withheld, conditioned or delayed. Tenant, at its own cost and expense, may erect such shelves, bins, machinery and trade fixtures as it desires provided that (a) such items do not alter the basic character of the Premises or the Building; (b) such items do not overload or damage same; (c) such items may be removed without damage to the Premises; (d) the construction, erection or installation thereof complies with all applicable governmental laws, ordinances, regulations and with Landlord's specifications and requirements and (e) Landlord has consented in writing prior to the alterations. All installations, removals and restoration shall be performed in a good and workmanlike manner so as not to damage or alter the primary structure or structural qualities of the Building or the Premises.

7. **SIGNS, ETC.** With the exception of the items currently in place at the Premises, Tenant shall not place, install or attach any signage, decorations, advertising media, blinds, draperies, window treatments, bars or security installations to the Premises or the Building without Landlord's prior written approval. Tenant shall be allowed to place signage advertising Tenant's business, subject to the Batavia Municipal Code, and may explore opportunities with Landlord to place signage on the building's west exterior building wall (facing the Fox River). Tenant shall repair, paint, and/or replace any portion of the

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Premises or the Building damaged or altered as a result of placement or removal of its signage upon the earlier of vacation of the Premises by Tenant or the removal or alteration of its signage, all of which shall be accomplished at Tenant's sole cost and expense. Tenant shall not, (i) make any changes to the exterior of the Premises or the Building, (ii) install any exterior lights, decorations, balloons, flags, pennants, banners or painting, or (iii) erect or install any signs, windows or door lettering, decals, window and storefront stickers, placards, decorations or advertising media of any type that can be viewed from the exterior of the Premises, without Landlord's prior written consent, and Landlord's determination whether to allow such things shall be final.

8. **UTILITIES; MAINTENANCE; AND TAXES.** Tenant shall obtain, in its own name, and pay at its sole cost and expense, the utilities for the Premises including water, gas, heat, electric, telephone, sewer, cable, DSL, sprinkler charges and any other utilities and services used on or at the Premises, together with any taxes, penalties, surcharges or the like pertaining to the Tenant's use of the Premises, and any maintenance charges for utilities. Tenant shall indemnify and hold harmless the Landlord from and against any and all charges, liabilities and claims for utilities and services used on or at and pertaining to the Premises. If the Tenant fails to pay any charge, cost or claim for said utilities and services, the Landlord may, in its own discretion, pay those expenses, and the those expenses so paid shall immediately become additional rent payable to the Landlord upon the Landlord's payment and notice to Tenant thereof.

Tenant shall pay for the cost of operation and maintenance of the Premises and Property, which costs shall include, without limitation, snow removal, trash collection and security systems, if any. If the Landlord secures a second floor tenant, the responsibilities for the operation and maintenance costs for the Building may be split between the tenants as they agree.

Landlord will pay any real estate taxes that become due on real estate.

9. **INSURANCE.**

A. Landlord agrees to purchase and keep in force and effect during the term hereof, comprehensive general liability insurance and insurance on the Building against fire or other casualty at commercially reasonable rates and with coverage and in amounts customarily carried from time to time by owners of similar commercial buildings in the Kane County, Illinois area.

B. Tenant agrees to be responsible for any damage to the Premises, Building and Property that results or arises from any use of or in connection with the Premises or any act or omission of Tenant or its agents, employees, patrons, invitees or contractors; and Tenant will also hold harmless and indemnify Landlord from and against any liability to any person for person or property injury or property damage resulting from any such causes. Tenant, at its sole cost and expense, shall insure the risk herein assumed by obtaining and paying for a policy of public liability insurance in the amount of One Million Dollars (\$1,000,000.00) for injuries suffered by any person and One Million Dollars (\$1,000,000.00) for injuries suffered by any one occurrence. Tenant shall also maintain, at its sole cost and expense, a policy for property damage insurance, insuring such risk in the amount of One Million Dollars (\$1,000,000.00). Tenant shall also maintain, at its sole cost and expense, a loss of rent policy and loss of business policy in the face amounts of One Hundred Thousand Dollars (\$100,000.00). Tenant shall deliver certificates of

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all insurance to Landlord prior to the Commencement Date. Tenant shall also name Landlord as an additional named insured party on all policies required by this Section 9. Fire and Extended Coverage Insurance (contents in broad form) on Tenant's property shall be in amounts deemed reasonably adequate by Tenant to insure such personal property.

All such policies shall be issued by an insurance company that is reasonably acceptable to Landlord and shall provide that the policies shall not be cancelled except on no less than thirty (30) days' prior written notice to Landlord. Tenant shall maintain the required insurance coverage throughout the term of the Lease. From time to time during the term of this Lease, Landlord shall have the right to demand proof of the existence of any insurance required herein. Failure to produce proof of insurance shall constitute a default of this Lease. In the event that Tenant shall fail to procure and maintain in force at any time during the term of this Lease any of the insurance which Tenant is obligated to procure and maintain, then Landlord may, at its option, procure the same and collect the cost thereof as additional rent from Tenant at the next ensuing rental payment date, and the same shall become a part of the rent due and payable by Tenant. Tenant agrees not to carry on any activity or store any flammable materials in a manner, which would increase the current fire insurance premium to the Building. Moreover, if there should be a change in the nature of Tenant's business such as to cause an increase in the premiums of any insurance coverage for the Building, Tenant agrees to pay the increase upon presentation of the increased billing by Landlord.

10. FIRE AND CASUALTY DAMAGE.

A. Tenant shall give written notice to Landlord immediately if the Premises or the Building, or any portion thereof, are damaged or destroyed. In case the Premises shall be rendered untenable during the Term or extended Term of this Lease by fire or other casualty, Landlord at its option may terminate the Lease or repair the Premises within one hundred twenty (120) days thereafter. If Landlord elects to repair, this Lease shall remain in effect provided such repairs are completed within said time. If Landlord shall not have repaired the Premises within said time, then at the end of such time, the Tenant may terminate this Lease at its option, and neither party shall have any further liabilities to the other party accept for liabilities accruing prior to the damage or destruction that have not been satisfied. If this Lease is terminated by reason of fire or casualty as herein specified, rent shall be abated during the period of time required by the Landlord to perform the repairs.

B. Notwithstanding anything herein to the contrary, to the extent of a recovery of loss proceeds under the policies of insurance described in this Lease, Landlord and Tenant hereby waive and release each other and any of their respective related parties and affiliates of and from any and all rights of recovery, claim, action or cause of action, against each other, their agents, officers and employees, for any loss or damage that may occur to the Premises, the Building, or personal property within the Building and/or Premises arising from or caused by fire or other casualty or hazard covered or required to be covered by hazard insurance under this Lease. Upon execution of this Lease, Landlord and Tenant shall notify their respective insurance companies of the mutual waivers contained herein and, if available, shall cause each policy described in this Lease to be so endorsed.

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11. LIABILITY AND INDEMNIFICATION.

A. Tenant shall assume the risk and responsibility for and indemnify Landlord, its successors, assigns, agents, employees, contractors, partners, directors, officers and affiliates (collectively, the "Indemnified Parties") and hold the Indemnified Parties harmless from any and all liability for any loss of or damage or injury to any person (including death resulting therefrom) or property occurring in or on the Premises, regardless of cause, except for any loss or damage caused by the negligence or willful misconduct of Landlord, and its employees and agents, and Tenant hereby releases the Indemnified Parties from any and all liability for same. Tenant's obligation to indemnify Landlord hereunder shall include the duty to defend against any claims asserted by reason of such loss, damage or injury and to pay any judgments, settlements, costs, fees and expenses, including attorneys' fees, incurred in connection therewith.

B. The provisions of this Paragraph shall survive the expiration or termination of this Lease with respect to any claims or liability occurring prior to or stemming from events or conditions occurring or existing prior to such expiration or termination.

C. Notwithstanding the foregoing, Tenant shall not be required to defend, save harmless or indemnify Landlord from any liability for injury, loss, accidents or damage to any person or property resulting from Landlord's negligence or willful acts or omissions, or those of Landlord's officers, agents, contractors or employees.

12. RESTRICTIONS ON USE. Tenant shall not use the Premises for the receipt, storage or handling of any Hazardous Substance, unless such use is approved in writing by Landlord and is in conformance in all respects with Section 24 of this Lease. Tenant shall comply with all federal, state, and local governmental laws, ordinances and regulations applicable to the use of the Premises including, without limit, all licensing and permitting requirements and Environmental Laws, and promptly shall comply with all governmental orders and directives for the correction, prevention and abatement of nuisances and Environmental Conditions in or upon, or connected with, the Premises, all at Tenant's sole expense. Tenant shall not cause any objectionable or unpleasant odors, smoke, dust, gas, light, noise or vibrations to emanate from the Premises, nor take any other action that would constitute a nuisance or create an Environmental Condition, or would disturb, unreasonably interfere with, or endanger Landlord or any other Tenants of the Building.

13. INSPECTION. Landlord and Landlord's agents and representatives shall have the right to enter the Premises at any reasonable time during business hours following reasonable advance notice to Tenant (except in the case of an emergency) to inspect the Premises and to make such repairs as may be required or permitted pursuant to this Lease. At any time during the Lease term following reasonable advance notice to Tenant, Landlord and Landlord's representatives may enter the Premises during business hours for the purpose of showing the Premises. In addition, Landlord shall have the right to erect a suitable sign on the Premises indicating that the Premises are available. Tenant shall notify Landlord in writing at least thirty (90) days prior to vacating the Premises and shall arrange to meet with Landlord for a joint inspection. Landlord's inspection of the Premises shall be deemed correct for the purposes of determining Tenant's responsibility for repairs and restoration of the Premises.

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14. **ASSIGNMENT AND SUBLETTING.**

A. Tenant shall not have the right to sublet all or part of the Premises or to assign, transfer or encumber this Lease, or any interest therein, without the prior written consent of Landlord, which consent shall not be unreasonably withheld. Any attempted assignment, subletting, transfer or encumbrance by Tenant in violation of the terms and covenants of this Paragraph shall be void.

B. If This Lease is assigned to any person or entity pursuant to the provision of the Bankruptcy Code, 11 US C. § 101 et. seq. (the “Bankruptcy Code”), any and all monies or other consideration payable or otherwise to be delivered in connection with such assignment shall be paid or delivered to Landlord, shall be and remain the exclusive property of Landlord and shall not constitute property of Tenant or of the estate of Tenant within the meaning of the Bankruptcy Code. Any and all monies or other considerations constituting Landlord’s property under the preceding sentence not paid or delivered to Landlord shall be held in trust for the benefit of Landlord and be promptly paid or delivered to Landlord.

C. Any person or entity to which this Lease is assigned pursuant to the provisions of the Bankruptcy Code shall be deemed, without further act or deed, to have assumed all of the obligations arising under this Lease on and after the date of such assignment. Any such assignee shall upon demand execute and deliver to Landlord an instrument confirming such assumption.

15. **CONDEMNATION.** If more than fifty percent (50%) of the Premises are taken for any public or quasi-public use under governmental law, ordinance or regulation, or by right of eminent domain, or by private purchase in lieu thereof, and the taking prevents or materially interferes with the use of the remainder of the Premises for the purpose for which they were leased to Tenant, this Lease shall terminate and the rent shall be abated during the unexpired portion of this Lease, effective on the date of such taking. If (i) less than fifty percent (50%) of the Premises are taken for any a public or quasi-public use under any governmental law, ordinance or regulation, or by right of eminent domain, or by private purchase in lieu thereof; or (ii) more than fifty percent (50%) of the Premises are taken for any public or quasi-public use under governmental law, ordinance or regulation, or by right of eminent domain, or by private purchase in lieu thereof, but the taking does not prevent or materially interfere with the use of the remainder of the Premises for the purpose for which they were leased to Tenant, this Lease shall not terminate, but the rent payable hereunder during the unexpired portion of this Lease shall be reduced to such extent as may be fair and reasonable under all of the circumstances. All compensation awarded in connection with or as a result of any of the foregoing proceedings shall be the property of Landlord and Tenant hereby assigns any interest in any such award to Landlord.

16. **SURRENDER OF PREMISES; HOLDING OVER**

A. At the termination of this Lease, whether caused by lapse of time or otherwise, Tenant shall at once surrender possession of the Premises and deliver them to Landlord in as good repair and condition as existed at the Commencement Date, reasonable wear and tear excepted, and shall deliver to Landlord all keys (or other access control devices) for the Premises; and, if such possession is not immediately surrendered, Landlord may forthwith enter upon and take possession of the Premises and

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expel or remove Tenant and any other person who may be occupying them, or any part thereof, without having any civil or criminal liability therefore.

B. All alterations, additions or improvements (whether temporary or permanent in character)

made to or fixtures installed in or upon the Premises, either by Landlord or Tenant, shall be Landlord's property on termination of this Lease and shall remain on the Premises, unless the Landlord consents in writing or directs the removal of same. Provided that all sums owed by Tenant hereunder have been paid, all movable office furniture and equipment not attached to the Building may be removed by Tenant at the termination of this Lease. All such removals shall be accomplished in a good workmanlike manner so as not to damage the Premises or the structural components of the Building or the plumbing, electrical lines or other utilities, and any damage resulting from such removals shall be promptly repaired at Tenant's expense.

C. All alterations, additions, and improvements directed by Landlord to be removed and all movable office furniture and equipment not attached to the Building not promptly removed after such termination shall thereupon be conclusively presumed to have been abandoned by Tenant, and Landlord may, at its option, take over possession of such property and either (a) declare same to be the property of Landlord by written notice thereof to Tenant or (b) at the sole costs and expense of Tenant remove and store the same or any part thereof in any manner that Landlord shall choose without incurring liability to Tenant or any other person (any such removal and storage costs and expenses being payable by Tenant upon demand).

D. Should Tenant continue to hold the Premises after the termination of this Lease (including the expiration of any Extension Options exercised by Tenant), whether the termination occurs by lapse of time or otherwise, such holding over shall, unless otherwise agreed by Landlord in writing, constitute and be construed as a month-to-month tenancy at a daily rental equal to one-thirtieth of an amount equal to two hundred percent (200%) of the amount of the monthly rental payable during the last month prior to the termination of this Lease, and upon and subject to all of the other terms, provisions, covenants and agreements set forth herein except any right to renew this Lease. No payments of money by Tenant to Landlord after the termination of this Lease shall reinstate, continue or extend the term of this Lease and no extension of this Lease after the termination hereof shall be valid unless and until the same shall be reduced to writing and signed by both Landlord and Tenant. Tenant shall be liable to Landlord for all damage which Landlord shall suffer by reason of any holding over by Tenant and Tenant shall indemnify Landlord against all claims made by any other Tenant or prospective Tenant against Landlord resulting from delay by Landlord in delivering possession of the Premises to such other Tenant or prospective Tenant.

17. **INTENTIONALLY DELETED.**

18. **EVENTS OF DEFAULT.** The occurrence of any one or more of the following events shall constitute an "event of default" on the part of Tenant under this Lease;

A. Tenant's failure to pay any rental or other payment or reimbursement payable by Tenant hereunder when due and such failure continues for a period of five (5) days following written notice.

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B. Tenant's failure to pay any amounts owed to contractors or subcontractors for work or services performed in connection with the operation, construction, management or maintenance of the Premises as provided herein, and such failure continues for a period of five (5) days from the date such payment was due.

C. Tenant or any guarantor of the Tenant's obligations hereunder (i) becomes insolvent; (ii) admits in writing its inability to pay its debts; (iii) makes a general assignment for the benefit of creditors; (iv) commences any case, proceeding or other action seeking to have an order for relief entered on its behalf as a debtor or to adjudicate it a bankrupt or insolvent, or seeking reorganizations, arrangement, adjustment, liquidation, dissolution or composition of it or its debts under any law relating to bankruptcy, insolvency, reorganization or relief of debtors or seeking appointment of a receiver, trustee, custodian or other similar official for it or for all or any substantial part of its property; or (v) takes any action to authorize or in contemplation of any of the actions set forth above in this subparagraph C.

D. The initiation of any case, proceeding or other action against the Tenant or any guarantor of Tenant's obligations hereunder is commenced seeking (i) to have an order for relief entered against it as debtor or to adjudicate it a bankrupt or insolvent; (ii) reorganization, arrangement, adjustment, liquidation, dissolution or composition of it or its debts under any law relating to bankruptcy, insolvency, reorganization or relief of debtors (iii) appointment of a receiver, trustee, custodian or other similar official for it or for all or any substantial part of its property, and such case, proceeding or other action (a) results in the entry of an order for relief against it which it is not fully stayed within seven (7) business days after the entry thereof or (b) shall remain undismissed for a period of forty-five (45) days.

E. Tenant's failure to discharge any lien placed upon the Premises in violation of Section 21 hereof within fifteen (15) days after any such lien or encumbrance is filed against the Premises.

F. Tenant's failure to comply with any term, provision or covenant of this Lease (other than those listed in this Section 18) and to cure such failure within fifteen (15) days after written notice thereof to Tenant.

19. **REMEDIES.**

A. Upon each occurrence of an event of default, and in addition to and not in limitation of any other remedy permitted by law or equity or by this Lease, Landlord shall have the option to pursue any one or more of the following remedies without any notice or demand:

- (i) Terminate this Lease; and/or
- (ii) Enter upon and take possession of the Premises without terminating this Lease; and/or
- (iii) Alter all locks and other security devices at the Premises with or without terminating this Lease, deny access to Tenant, and pursue, at Landlord's option, one or more remedies pursuant to this Lease, Tenant hereby specifically waiving any state or federal law to the contrary.

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B. Upon the occurrence of any event of default Tenant, immediately shall surrender the Premises to Landlord; and if Tenant fails so to do, Landlord, without waiving any other remedy it may have, may enter upon and take possession of the Premises and expel or remove Tenant and any other person who may be occupying such Premises or any part thereof, without being liable for prosecution or any claim of damages therefore.

C. If Landlord repossesses the Premises with or without terminating the Lease, Tenant, at Landlord's option, shall be liable for and shall pay Landlord on demand all rental and other payments owed to Landlord hereunder accrued to the date of such repossession, plus all amounts required to be paid by Tenant to Landlord until the date of expiration of the Term of the Lease as stated in Section 1. Actions to collect amounts due by Tenant to Landlord under this subparagraph may be brought from time to time, on one or more occasions, without the necessity of Landlord's waiting until expiration of the Lease term. Landlord may relet the whole or any portion of the Premises for any period, to any Tenant and for any use and purpose.

D. Upon an event of default, in addition to any sum provided to be paid herein, Tenant also shall be liable for and shall pay to Landlord any (i) brokers' fees incurred by Landlord in connection with any reletting of the whole or any part of the Premises; (ii) the costs of removing and/or storing Tenant's or other occupant's property; (iii) the costs of repairing, altering, remodeling or otherwise putting the Premises into condition acceptable to a new Tenant or Tenants; and (iv) all reasonable expenses incurred by Landlord in enforcing or defending Landlord's rights and/or remedies, including reasonable attorneys fees, court costs and other expenses incurred in those efforts.

E. Exercise by Landlord of any one or more remedies hereunder granted or otherwise available, including without limitation, the institution by Landlord, its agents or attorneys of a forcible detainer or ejectment action to re-enter the Premises shall not be construed to be an election to terminate this Lease or relieve Tenant of its obligation to pay rent hereunder and shall not be deemed to be an acceptance of surrender of the Premises by Landlord, whether by agreement or by operation of law, it being understood that such surrender can be effected only by the written agreement of Landlord and Tenant. Tenant and Landlord further agree that forbearance by Landlord to enforce its rights pursuant to the Lease at law or in equity shall not be a waiver of Landlord's right to enforce one or more of its rights in connection with any subsequent default.

F. In the event Tenant fails to make any payment due hereunder when payment is due, to help defray the additional cost to Landlord for processing such late payments, Tenant shall pay to Landlord a late charge in an amount equal to five percent (5%) of such installment; and the failure to pay such amount within ten (10) days after the due date therefore shall be an additional event of default hereunder. The provision for such late charge shall be in addition to all of Landlord's other rights and remedies hereunder or at law and shall not be construed as liquidated damages or as limiting Landlord's remedies in any manner.

20. **MORTGAGES.** Tenant accepts this Lease subject and subordinate to any mortgages and/or deeds of trust now or at any time hereafter constituting a lien or charge upon the Premises, the improvements situated thereon, the Building or the Land, and to any and all increases, renewals,

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modifications, consolidations, replacements and extensions of such mortgages and deeds of trust; provided, however, that if the mortgagee, trustee, or holder of any such mortgage or deed of trust elects to have Tenant's interest in this Lease superior to any such instrument, then by notice to Tenant from such mortgagee, trustee or holder, this Lease shall be deemed superior to such lien, whether this Lease was executed before or after said mortgage or deed of trust. The provisions of this Section 20 shall be self-operative, and no further instrument shall be required to effect such subordination of this Lease. Tenant shall however, at any time hereafter, within ten (10) days after demand, execute any instruments, releases or other documents that may be required by any mortgagee for the purpose of subjecting and subordinating this Lease to the lien of any such mortgage. Tenant agrees to attorn upon demand to any mortgagee, trustee under a deed of trust or purchaser at a foreclosure sale or trustee's sale as Landlord under this Lease. The agreement of Tenant to attorn upon demand contained in the immediately preceding sentence shall survive any such foreclosure sale or trustee's sale. Tenant shall upon demand at any time or times, before or after any such foreclosure sale or trustee's sale, execute, acknowledge and deliver to any mortgagee, trustee under a deed of trust or purchaser at a foreclosure sale or trustee's sale any and all instruments and certificates that in the judgment of such party may be necessary or proper to confirm or evidence such attornment.

21. **MECHANIC'S LIENS.** Tenant has no authority, express or implied, to create or place any lien or encumbrance of any kind or nature whatsoever upon, or in any manner to bind the interest of Landlord or Tenant in the Premises or to charge the rentals payable hereunder for any claim in favor of any person dealing with Tenant, including those who may furnish materials or perform labor for any construction or repairs. Tenant covenants and agrees that it will pay or cause to be paid all sums legally due and payable by it on account of any labor performed or materials furnished in connection with any work performed on the Premises and that it will save and hold Landlord harmless from any and all loss, cost or expense based on or arising out of asserted claims or liens against the leasehold estate or against the right, title and interest of the Landlord in the Premises or under the terms of this Lease. Tenant agrees to give Landlord immediate written notice of the placing of any lien or encumbrance against the Premises.

22. **MISCELLANEOUS.**

A. [Reserved]

B. The terms, provisions and covenants and conditions contained in this Lease shall run with the land and shall apply to, inure to the benefit of, and be binding upon, the parties hereto and upon their respective heirs, executors, personal representatives, legal representatives, successors and assigns, except as otherwise herein expressly provided. Landlord shall have the right to transfer and assign, in whole or in part, its rights and obligations in the Building and property that are the subject of this Lease. Each party agrees to furnish to the other, promptly upon demand, a corporate resolution, proof of due authorization by partners, or other appropriate documentation evidencing the due authorization of such party to enter into this Lease.

C. Neither Landlord nor Tenant shall be held responsible for delays in the performance of their obligations hereunder when caused by strikes, riots, acts of God, shortages of labor or materials,

Landlord
Tenant

war, governmental laws, regulations or restrictions or any other cause of any kind whatsoever which are beyond the control of that party.

D. This Lease constitutes the entire understanding and agreement of the Landlord and Tenant with respect to the subject matter of this Lease, and contains all of the covenants and agreement of Landlord and Tenant with respect thereto. Landlord and Tenant each acknowledge that no representations, inducements, promises or agreements, oral or written, have been made by Landlord or Tenant, or anyone acting on behalf of Landlord or Tenant, which are not contained herein, and any prior agreements, promises, negotiations, or representations not expressly set forth in this Lease are of no force or effect. This Lease may not be altered, changed or amended except by an instrument in writing signed by both parties hereto.

E. All obligations of Tenant hereunder not fully performed as of the expiration or earlier termination of the term of this Lease shall survive the expiration or earlier termination of the term hereof, including without limitation, all payment obligations with respect to taxes and insurance and all obligations concerning the condition and repair of the Premises.

F. If any clause or provision of this Lease is illegal, invalid or unenforceable under present or future laws effective during the term of this Lease, then and in that event, it is the intention of the parties hereto that the remainder of this Lease shall not be affected thereby, and it is also the intention of the parties to this Lease that in lieu of each clause or provision of this Lease that is illegal, invalid or unenforceable, there be added, as a part of this Lease, a clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible and be legal, valid and enforceable.

G. Tenant represents and warrants that it has dealt with no broker, agent or other person in connection with this transaction or that no broker, agent or other person brought about this transaction, other than as may be referenced in a separate written agreement executed by Tenant, and delivered to Landlord prior to execution of this Lease, and Tenant agrees to indemnify and hold Landlord harmless from and against any claims by and other by any other broker, agent or other persons claiming a commission or other form of compensation by virtue of having dealt with Tenant with regard to this leasing transaction.

H. EXCEPT AS OTHERWISE NOTED IN THIS LEASE AND EXCEPT FOR LATENT DEFECTS, TENANT ACKNOWLEDGES THAT (1) IT HAS INSPECTED AND ACCEPTS THE PREMISES IN AN "AS IS, WHERE IS" CONDITION, (2) THE BUILDING AND IMPROVEMENTS COMPRISING THE SAME ARE SUITABLE FOR THE PURPOSE FOR WHICH THE PREMISES ARE LEASED AND LANDLORD HAS MADE NO WARRANTY, REPRESENTATION, COVENANT, OR AGREEMENT WITH RESPECT TO THE MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF THE PREMISES, (3) THE PREMISES ARE IN GOOD AND SATISFACTORY CONDITION, (4) NO REPRESENTATIONS AS TO THE REPAIR OF THE PREMISES, NOR PROMISES TO ALTER, REMODEL OR IMPROVE THE PREMISES HAVE BEEN MADE BY LANDLORD, AND (5) THERE ARE NO REPRESENTATIONS OR

Landlord
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WARRANTIES, EXPRESSED, IMPLIED OR STATUTORY, THAT EXTEND BEYOND THE DESCRIPTION OF THE PREMISES.

I. Notwithstanding anything in this Lease to the contrary, all amounts payable by Tenant to or on behalf of Landlord under this Lease, whether or not expressly denominated as rent, shall constitute rent.

J. Interpretation of this Lease shall be governed by the laws of the State of Illinois.

K. This Lease may be executed in two or more counterparts, each of which shall be deemed an original but all of which shall together constitute one and the same instrument.

L. Tenant shall be entitled to the use of on-site parking, provided the use of such parking is directly related to Tenant's business.

23. **NOTICES.** Each provision of this instrument or of any applicable governmental laws, ordinances, regulations and other requirements with reference to the sending, mailing or delivering of notice or making of any payment by Landlord to Tenant or with reference to the sending, mailing or delivering of any notice or the making of any payment by Tenant to Landlord shall be deemed to be complied with when and if the following steps are taken:

A. All rent and other payments required to be made by Tenant to Landlord hereunder shall be payable to Landlord at the address for Landlord set forth below or at such other address as Landlord may specify from time to time by written notice delivered in accordance herewith. Tenant's obligation to pay rent and any other amounts to Landlord under the terms of this Lease shall not be deemed satisfied until such rent and other amounts have been actually received by Landlord.

B. All payments required to be made by Landlord to Tenant hereunder shall be payable to Tenant at the address set forth below, or at such other address within the continental United States as Tenant may specify from time to time by written notice delivered in accordance herewith.

C. All notices and demands to be given by one party to the other party under this Lease shall be given in writing, mailed or delivered to Landlord or Tenant, as the case may be, at the following addresses:

If to Tenant:

Brea Hayes
400 N. Batavia Ave.
Batavia, Illinois 60510

Landlord
Tenant

If to Landlord:

City Administrator
THE CITY OF BATAVIA
100 N. Island Avenue
Batavia, Illinois 60510

With copy to:

Attorney Kevin G. Drendel
Drendel & Jansons Law Group
111 Flinn Street
Batavia, Illinois 60510

Notices shall be delivered by hand, by. Notices shall be considered to have been given upon 1) receipt when delivered by hand or by facsimile or email with proof of transmittal; or 2) two (2) business days after posting in the United States certified or registered mail, postage prepaid, return receipt requested, or by a nationally recognized overnight air courier service.

24. HAZARDOUS SUBSTANCES.

A. The term "Hazardous Substances" shall mean any chemical, substance, product, merchandise, material, controlled substance, object, condition, waste, living organism or combination thereof that is or may be hazardous to human health or safety or to the environment due to its radioactivity, ignitability, corrosivity, reactivity, explosivity, toxicity, carcinogenicity, mutagenicity, phytotoxicity, infectiousness or other harmful or potentially harmful properties or effects, including, without limitation, petroleum and petroleum products, asbestos, polychlorinated biphenyls (PCBs) and all of those chemicals, substances, products, merchandise, materials, controlled substances, objects, conditions, wastes, living organisms or combinations thereof that are now or hereafter become listed, defined or regulated in any manner by any Environmental Law. The term "Environmental Law" shall mean any applicable federal, state or local law, rule, regulation, ordinance, court decision, decree, order, directive, guideline, permit or permit condition relating to pollution or protection of the environment or other health and safety concern and whether now in existence or hereafter enacted. The term "Environmental Condition" shall mean any condition, circumstance, situation, or obligation created by or related to the violation or suspected violation of any Environmental Law or the presence or suspected presence of Hazardous Substances on, about, or under the Building or Premises.

B. Tenant hereby agrees that (i) no activity will be conducted by Tenant on the premises that will generate any Hazardous Substance; (ii) the Premises will not be used by Tenant in any manner for the storage of any Hazardous Substances except for the temporary storage in strict compliance with all

Landlord
Tenant

Environmental Laws of such materials as are used in the ordinary course of Tenant's business (the "Permitted Materials"), provided such Permitted Materials are properly managed, used, transported, disposed of, released, and stored in a manner and location complying with all Environmental Laws and approved in advance in writing by Landlord; (iii) no portion of the Premises will be used by Tenant as or for a landfill, dump or any other on-site disposal of solid waste or Hazardous Substances; (iv) Tenant will not install any underground tanks of any type on or under the Premises; (v) Tenant will not cause any surface or subsurface conditions to exist or come into existence that constitute, or with the passage of time may constitute, a public or private nuisance or a violation of Environmental Law; (vi) Tenant will not permit any Hazardous Substances to be brought onto the premises, except for the Permitted Materials, and if so brought or found located thereon, the same shall be immediately removed, with proper packaging, labeling, transportation, and disposal, and all required cleanup and remediation procedures shall be diligently undertaken, by Tenant and at Tenant's sole expense pursuant to all Environmental Laws. If Tenant fails to comply with any of the covenants in this provision, or fails to comply with any Environmental Law, Landlord, at Tenant's sole expense, immediately may commence remedial action to restore the property to an environmentally sound position. Tenant agrees to notify Landlord immediately of (i) any significant known release of Hazardous Substances, or other chemicals or substances (including without limitation, any release required to be reported to a governmental authority pursuant to any Environmental Law) and (ii) the receipt of any pertinent notices or communications from any governmental authority. Landlord reserves the right, but not the obligation, and without in any way limiting the obligations of the Tenant, to enter and inspect the Premises and conduct any testing, sampling, borings, and analyses as Landlord, in its sole discretion, may deem necessary or desirable. If such inspection or testing discloses the presence of Hazardous Materials or other environmental conditions on the Premises in violation of this subparagraph, Tenant shall reimburse Landlord for the cost of conducting the inspection and testing. Tenant agrees to cooperate fully with Landlord during the course of Landlord's inspection and testing activities. Tenant agrees to indemnify, defend (by counsel acceptable to Landlord) and hold Landlord and its partners, directors, officers, employees, shareholders, lenders, agents, contractors and each of their respective successors and assigns harmless from and against any and all claims, demands, actions, liabilities, costs, expenses, damages, penalties and obligations of any nature arising from or as a result, either direct or indirect, of (x) the breach of any of the covenants contained in this subparagraph, (y) the presence of Hazardous Substances on, under or about the premises or other properties as the direct or indirect result of Tenant's occupancy of the Premises, or (z) the use of the Premises or surrounding area by Tenant, Tenant's agents, or Tenant's assigns. The foregoing indemnification shall survive the termination or expiration of this Lease. Any costs or expenses incurred by Landlord for which Tenant is responsible under this provision shall be deemed Additional Rent that is due and payable on notice from Landlord to Tenant.

C. Notwithstanding anything contained herein to the contrary, Landlord shall remain responsible for, and shall indemnify and save Tenant harmless from and against any and all liability, damages, losses, claims, suits and other costs (including reasonable attorney's fees) arising out of, or connected with the presence on, in or under the Building, Premises, of any asbestos, PCBs, mold, mildew or other hazardous substance or hazardous waste existing prior to the commencement of the this Lease or which was not caused by Tenant.

Landlord
Tenant

25. CONSENT. Regardless of any reference in this Lease to sole and absolute discretion or words to that affect, at any time the consent of the Landlord or Tenant is required, such consent shall not be unreasonably withheld, conditioned or delayed.

26. QUIET ENJOYMENT. Provided Tenant performs and observes all of the terms, conditions and agreements herein contained, Tenant shall have the quiet possession of the Premises during the full term of this Lease, including any extension thereof.

27. JURY WAIVER. THE PARTIES HERETO AGREE TO WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY ANY PARTY HERETO AGAINST ANY OTHER PARTY HERETO IN ANY MANNERS WHATSOEVER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE RELATIONSHIP OF THE PARTIES AND/OR ANY CLAIM OF INJURY OR DAMAGE AND ANY STATUTORY REMEDY RELATED THERETO OR TO THIS AGREEMENT.

28. GUARANTY. This Lease shall include the personal guaranty of Catherine A. Sanzeri, which guaranty is attached hereto as Exhibit "B" and incorporated by reference herein.

IN WITNESS WHEREOF, the parties hereto have executed this Lease in manner sufficient to bind them as of the day and year first above written.

LANDLORD:

THE CITY OF BATAVIA

By: _____
Name: Bill McGrath
Title: City Administrator

TENANT:

FAWN Gifts

By: _____
Name: Brea Hayes
Title: President

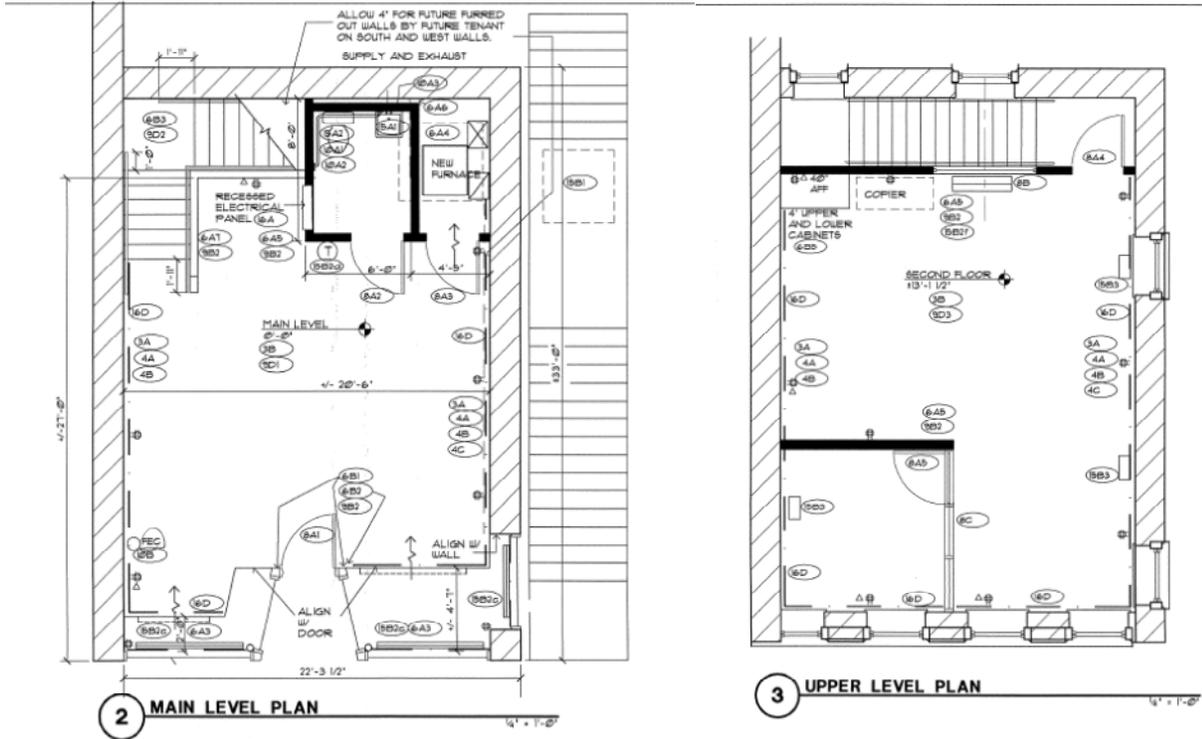
Brea Hayes

Individually

Landlord
Tenant

EXHIBIT "A"
("The Premises")

2 E. Wilson St. Main Level ("First Floor") and Upper Level ("Second Floor") Floor Plans Only



NOTE: "THE PREMISES" INCLUDES AND TENANT IS PERMITTED OCCUPANCY AND USE OF BUILDING FLOOR LEVEL IMMEDIATELY BENEATH "MAIN LEVEL"

Landlord
Tenant

EXHIBIT "B"
Personal Guaranty

Guaranty made this _____ day of _____, 2016, by Brea Hayes of Batavia, Kane County, Illinois, here referred to as Guarantor, to THE CITY OF BATAVIA, 100 N. Island Ave. Batavia, Kane County, Illinois, here referred to as Obligee.

In consideration of THE CITY OF BATAVIA, here referred to as the Landlord, executing and entering into a lease or other obligation with _____, Incorporated. an Illinois corporation, here referred to as the Tenant, the undersigned Guarantor irrevocably and unconditionally guarantees payment when due, whether by acceleration or otherwise, of the lease, and of all schedules or leases now or hereafter entered into with Tenant and all the obligations and liabilities due and to become due to Landlord, together with all interest hereon and all attorney fees, costs, and expenses of collection incurred by the Landlord in enforcing any such obligations and liabilities.

No invalidity, irregularity, or unenforceability of all or any part of the obligations and liabilities hereby guaranteed or of any security therefore shall affect, impair, or be a defense to this guaranty. This guaranty is a primary obligation of the undersigned guarantor.

This guaranty shall be deemed to have been made in the County of Kane, State of Illinois and shall be interpreted in accordance with the laws of the State of Illinois.

As part of the consideration for the Landlord's execution of the lease, the undersigned guarantor agrees that any and all actions or proceedings arising directly or indirectly from this guaranty shall be litigated in courts having a situs within the State of Illinois.

The undersigned Guarantor consents to the jurisdiction of any local, state, or federal court located within the State of Illinois, and waives personal service of any and all process, and consents

Landlord
Tenant

that all such service of process may be made by certified or registered mail, return receipt requested, directed to the undersigned at the address indicated below.

This Guaranty shall bind he respective heirs, executors, administrators, successors, and assigns of the undersigned Guarantor.

In witness whereof, Guarantor has executed this Guaranty at Geneva, Illinois the day and year first above written.

Brea Hayes

400 N. Batavia Ave,
Batavia, Illinois 60510

Landlord
Tenant

CITY OF BATAVIA

DATE: June 3, 2016
TO: Mayor & City Council
FROM: Bill McGrath, City Administrator
SUBJECT: Bridge Sculpture- “Science” and Call for entries- “Art”

Much of this memo is repetitive of the memo sent out before the March 1, 2016 meeting at which, because of the time of night was delayed along with a request that the options be posted on the city website again, which was done.

Consistent with the plan and design for the rebuilt William J. Donovan Bridge, the Council issued calls for both the Science and Art sculptures to add to the “Nature” and “History” pieces already in place on the Donovan Bridge. Each bridge sculpture carries with it a \$30,000 commission (which includes all fabrication and installation). This is not unreasonable for pieces that need to last for at least 50-80 years and the desire to attract high quality works done by known artists.

The use of sculpture or relief art on institutional buildings has a long history. It was one of the elements used to show the importance, respect for and long-lasting qualities of the institution. Similar to the use of steps leading up to important palaces, churches, courts or even post offices, the inclusion of sculpture has allowed communities to visually “speak” about values they hold.

Lane Allen, the local architect involved in the bridge project and designer of the “above the road” area, suggested the bridge as a platform for the community to talk about some elements important to it, namely its relationships with Nature, History, Science and Art.

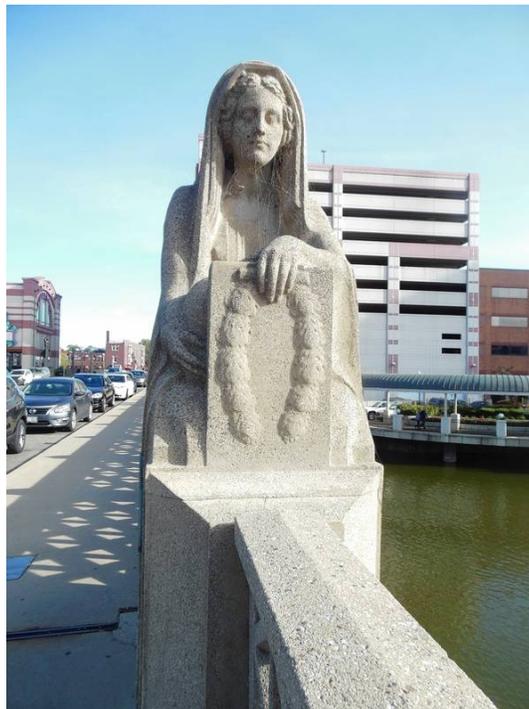
I don’t know whether or not Lane was aware of the Vauxhall Bridge over the Thames in London and built in 1906, but it has a similar design. The piers are decorated by larger than life-sized bronze statues representing the Arts and Sciences, including Agriculture, Architecture, Engineering, Pottery, Local Government, Education, the Fine Arts and Astronomy.



Our area has other examples, such as the Michigan Avenue Bridge, and the New York Street



Memorial Bridge in Aurora built in 1931 to honor the soldiers of WWI with its sculptures entitled “Memory”.



The choice of public art is a very difficult issue, as evidenced by the strong emotions raised by the arch at River Street. It is less an actual piece of art as opposed to being an architectural piece

with the purpose of identifying an area, closing in the street to create a “room” and an acknowledgement of Batavia’s historical building materials. The actual idea came from noting the construction of the Government Center as exposed in the Council chambers.

A great part of public art is its ability to make people react, and with the addition of an actual theme for the bridge pieces, there is an attendant meaning which we hope will actually strengthen the understanding of the community by those who see them, beyond their purely aesthetic forms.

Much has been written about these choices, the main issue being just how democratic a process this can be. The choices range from having a vote by anyone interested (such as visitors to a shopping mall which wants to erect a sculpture) to commissioning an artist chosen by consultants according to reputation for quality, etc. and trusting that what they come up with will be pleasing. Thus far what has worked is inviting the community to give some input, getting the advice of a professional (since there levels of quality and reputation known to people who are close to the process), and getting input from the staff regarding maintenance, safety, etc. The Council discusses all of this, and tries to blend all of the considerations, a task which it is used to doing in many other different contexts. We suggested the same process at the start of this process.

We accepted submittals for 3 ½ months and then the applications and blowups were shown in the Fox Valley Conference Room for several weeks. We received 24 proposals. Some were rough concept sketches, some were photographs of existing pieces and some were models (maquettes) of the concepts. Basically, and perhaps surprisingly but also perhaps because of the theme, no one cared for the “art” and the Council went with the recommendation to wait on that and continue with Science.

We then brought in Howard Russo, a sculptor who resides in St. Charles and is a long-term regional sculptor and professor of Visual Arts at Elgin Community College to review all of the submissions. You may have seen one of his pieces in front of the Methodist Church on East Rt. 64 in St. Charles (below). He has also been exhibited in the annual Mt. St. Mary’s Park show on Rt. 31 in St. Charles several times. Howard is well known in the area and as a professor has knowledge of different artist’s reputations, abilities, uniqueness, etc.



The city website (<http://www.cityofbatavia.net/653/4005/Sculpture?activeLiveTab=widgets>) contains not only the PowerPoint which describes the individual submittals but also other work

by each of the artists. In the PowerPoint, Each piece is followed by the artist's explanation of what they are trying to communicate. Please don't be influenced by the level of finish detail on them. Unless already completed they are conceptual and one must see what is trying to be expressed. The artist's other pieces need to be reviewed to see what he or she has done before in terms of quality or similarity to the process or materials proposed for the piece. These may or not be helpful, and one has to remember that there won't be anyone there to explain the piece to a passerby aside from the Title and Theme.

Below are the comments/recommendations from Howard Russo, Gary Holm and myself about the pieces. These comments include several facets including safety, materials and ease of maintenance, propensity to collect leaves, paper etc, overall size, conformance to the theme, sense of ability to create the piece and impact of the piece on the City's collection and its reputation in terms of helping attract other art later.

Depending upon whether a piece is in existence it could take 3-4 months for fabrication.

The City has already been recognized throughout the area for its vision in adding art to the bridge. While the bridge structural design is modern, the top is classic, and the practice of including art into institutional buildings has a rich history. Please call or write with any questions. The expenditure for one is budgeted in the TIF Fund this year and I'm assuming you'll move forward on the Art piece ASAP.

Here are Howard Russo's comments:

I have looked at all the artists that you sent me. I feel that there many good applications in the group. I find myself drawn to two artists out of the group. I tried to put a balance between conceptual ideas and quality of craftsmanship.

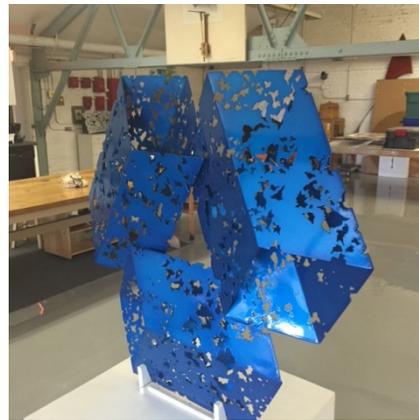
Also I would like to add that I was also trying to find an artist that was capable of completing the project too. I am giving you three names that I feel that would give the city a good piece in which to choose.

In my reflection of what the city has chosen in the past seems to lean toward the representational subject matter. I feel that a good balance between representational and abstract would be a good Idea for the bridge.

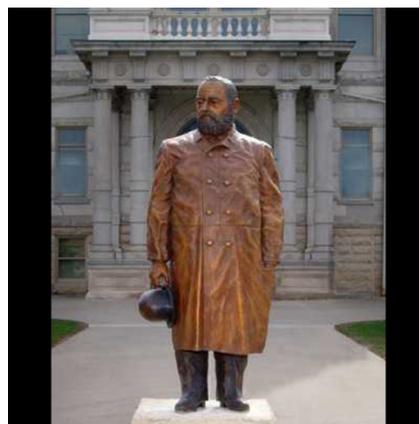
My first choice would be **Bruce White**. He clearly has the craftsmanship to produce a quality piece of art for your city. I like the way he has tied the circle into his piece. Also I like that his work is closely related to science. He clearly is an established artist in the Art world. Michael Dunbar (Art-in Architecture program for the State Capital Development Board) once told me you want to have art that would make people want to come visit your institution. So with that being said it is important to have high quality, well established artists in your collection. Bruce has long been a part of the Chicago sculptors movement. He has many works throughout the Midwest. His work closely relates to the ties of science in your community.



(Bill's note: The above are shape concepts. Bruce White would have them pierced with the "fractal-like" shapes", like below, but painted and lit from within. A fractal is mathematical concept to describe the observation that random events like the development of snowflakes, coastlines or leaves appear to have some type of order to them, though they cannot be predicted.)



The second choice would be **Chris Bennett** as this person has the ability to craft a quality piece of art. I like that the subject matter was site specific. Fermi Lab is a big influence on Batavia's community and it would be appropriate to have a sculpture that highlights this part of your community. I feel that both of these sculptures would accomplish this. Chris Bennett also shows the ability to produce a high quality piece of art worthy of displaying in your community.



The last one I would include in this selection would be **Bobbie Carlyle's** work. Bobbie clearly has the ability to produce work of quality. Although the work is

not site-specific it does touch on the science aspect of the criteria. I feel that any one of these artists I have mentioned above would make a great addition to the Donovan bridge project.



Thank you

Howard Russo
Professor of Visual Art
Elgin Community College

My comments including Gary Holm's from the PW perspective are as follows:

I also think that **Bruce White's** piece, either the circle or pyramids (note there would not be legs) would be a great addition to the collection. Painted stainless steel or aluminum would differentiate it from any material we have yet, the lighting would be dramatic and the fractal theme is one currently explored by science as part of the study of randomness and chaos theory. Lastly, his reputation would strengthen the collections reputation for visitors and ability to attract proposals from other sculptors in the future, even aside from the bridge. He just had a piece installed for the City of Chattanooga, TN. There is no question of ability to perform. The simple shapes would not have elements subject to vandalism or hanging, etc. Comments from citizens favored the circular shape, and noted both the points that the circle is a commonly used shape and also that it bears a natural beauty and peace.

I also like **Chris Bennett's** piece, though I am concerned that it might dwarf the Pottawatomi in History, and would be yet another human figure there instead of adding to the variety of materials and shapes and styles. There is no doubt about a nice tie to science, and though there is some concern from PW about it being attractive to kids to hang from the atom "orbits" I think it would not be a big issue and we would work with Chris to make sure the stainless steel is not weak. No question of work ability. Citizen comments noted that the flask looked more like a bottle (perhaps cured by the plaque) and that we shouldn't associate an individual with Batavia's connection to science.

Though I agree with the quality of **Bobbie Carlyle's** work, I don't think we should acquire a second piece by Bobbie Carlyle at this time. We already have a major piece here in the Self-Made Man on River Street. I think diversity in the City's collection at this stage is very

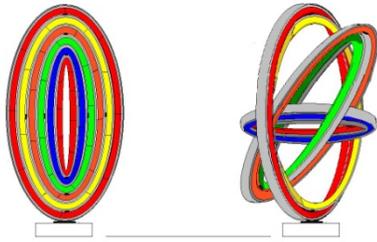
important. Though an existing piece and a nice general tie in to Science it certainly isn't site specific at all. It's clearly good work and would be long-lasting and not subject to easy vandalism. Citizen comments questioned the connection to science.

My second choice is the piece from **Fisher Stolz**, well-known regional sculptor and a professor at Bradley with studio in Chicago.



I find it exudes energy and movement, with an allusion to DNA, the atom and proton rays spewing forth. It leads upward and outward which I find positive. He does high quality work and as seen from another public piece on exhibition can deftly work with stainless steel. The tubing is of large enough diameter that I don't believe vandalism is a large worry, and there really aren't places that attract hanging. No movement thus no pinch points and no trash catching features. If this piece were selected I would place it across the street from History so it wouldn't be right across the street from Kai Schulte's piece, also stainless. When we had all of the pieces available for viewing at City Hall for several months, this piece received the most positive all around comments.

I really like **Guy Bellaver's** Luce in Movimento. Colors are great; the fact that it can be repositioned is neat. However I am apprehensive about its attractiveness to people to play with it (it doesn't move in the wind) and that would present the possibility of pinching, I also think that unless it is "open" its reference to an atom might be lost on people. Most likely most people would leave it alone and not understand it could move. Guy is a high quality fabricator, as shown in a similar piece on a college campus. He is from St. Charles, and has a fine regional reputation. There don't seem to be attractions for trash. This piece evoked strong responses from citizens equally on both sides.



While not recommended by Howard Russo, the piece by **David Zahn** received several nice comments from citizens. They liked the humanness of the piece and the obvious reference to the atom. David does nice work and was a finalist for the history piece. Negatives were that it was only the atom that related this piece to Science. It could be flowers for a Nature piece as well. He certainly can do it; the size is nice and is not a specific person or moment in time. His pieces have a nice sense of movement and energy. This is also conceptual and as you can tell from the other piece below there would be more detail in the finished piece.



All of the above I believe would fit very nicely onto the pedestals and complement, not overpower the existing pieces.

The rest of the pieces submitted are all fascinating in their own ways, but my opinion is that they do not rise to the level of those discussed above. In some instances I think the connection with Science is very vague if there is one. There is a piece that is 2-sided plate stainless (**Eageny**) and that can present difficult in viewing depending upon your vantage point. Some are very, very busy and certainly could invite vandalism, playing with smaller elements or hanging on them. One looks too much like windmill blades, while very sturdy. These had few champions among the citizens.

We have not received any comments from the web site as of this writing

What an interesting choice you have to make.

This will be on the Tuesday June 7, 2016. With all the information you've been given, I am not expecting a long presentation. I will have a PPT of the pieces themselves. In the event the conversation seems to hit any kind of impasse, or you believe it easier or more comfortable I will have some "ballots" for you.

Thank you

C: Department Heads

CITY OF BATAVIA

DATE: June 3, 2016
TO: Mayor & City Council
FROM: Bill McGrath, City Administrator
SUBJECT: Call for “Art” Bridge Sculpture

Attached is a Call for entries to the Art Bridge Sculpture. It is similar to the past calls. This will be for discussion at the June 7, 2016 Committee of the Whole meeting.

Staff recommends authorizing staff to issue that call for entries.

Thanks

C: Department Heads

Sculpture Competition

Call for Sculpture Proposals

June 20, 2016

The City of Batavia, Illinois, a city of approximately 25,000 located 40 miles west of Chicago (www.cityofbatavia.net), announces a sculpture design competition for a work of public art. The City rebuilt its William J. Donovan Bridge across the Fox River in the heart of the City in 2010. The original bridge was built in 1911 of native Batavia limestone, while the new bridge is post-tensioned, concrete slab bridge. The bridge was designed with 4 sculpture pedestals to host the results of 4 separate competitions, with pieces representing the themes of Nature, History, Science and Art.



Nature: "Nature's Sounds of Harmony"

Kai Schulte



History: "A Look Back"

Oscar Leon
Jessica LoPresti

The Nature and History pieces have been chosen and installed. The Science competition has been completed and a final decision is expected during June of 2016. As the most visible and important piece of public infrastructure in the City, the bridge and the associated sculptures make a statement for current and future Batavians and others as to the importance the community places upon these themes, as well as the unique ability of sculpture in particular, to convey thoughts, ideals and values, to stimulate questions, and to evoke wonder or mystery.

Purpose/Theme: The theme of this sculpture is Art. The sculpture created in response to this Call will reflect the theme of Art. Batavia is a community that values self-expression in many forms, whether it fit into conventional definitions of art, or other

endeavors such as robotics, sports, hobbies and the like. The Sculpture should reflect an affirmative statement of the power that art has to allow man to express himself and his observations, both to himself and to others. As a piece of community art, the piece is also a statement of the importance that self-expression in the arts has for the community. The City would like a design which is thematically accessible to its residents and visitors, yet which artistically interprets and seriously deals with art as a basic form of expression.

Location of Project: The Sculpture will be located on a pedestals located on the lookouts of the newly constructed bridge (see attached diagram of bridge and details of pedestals). The work should be designed for viewing by both people passing in vehicles and by pedestrians, who will look up at the sculpture from ground level. Wilson Street carries approximately 24,000 vehicles per day and is the main thoroughfare of the City.

Project Specifications: The sculpture is to sit on a 4'-4" high x 2'-4" wide x 2'-4" deep limestone pedestal integrated into the seating/planting structure. It is connected to the pedestal with a stainless steel sleeve connector and bolts (see attached connection detail), but depending on the piece the City will make changes to accommodate a face-to-face plate on top of the pedestal. The piece should be approximately 8 ft high with a maximum width of 4 ft. Small appendages outside that limit may be allowed. Kinetic sculptures are encouraged so long as artist understands that the pedestals are approximately 15 feet from traffic and that therefore, sudden movements may create a driving hazard. Flashing lighting as an integral part of a kinetic sculpture will not be allowed for this very reason. Certainly the piece needs to be designed and fabricated with an awareness of its Midwest, urban location, thus the potential for vandalism, the elements or being a receptacle for leaves, trash, etc. Electricity has been piped into each pedestal and may be available for lighting or movement under certain circumstances.

Who may submit Proposals: Open to artists 21 year of age or older residing within the United States of America.

Important Note: Work done as class projects will not be considered.

Awards:

First Prize: Commission and Award of \$30,000 for the completed and installed sculpture. Award distribution will be scheduled with the artist prior to the commission grant.

What type of artwork will be considered:

- Sculptures must withstand severe outdoor winter weather including sub-zero temperatures, intense heat and sunlight, high humidity, as well as high winds across the bridge (Kinetic sculptors take note)
- Materials used should be low maintenance with excellent sustainability.
- Delivery, site preparation, assembly, and installation costs are the artist's responsibilities.

- Either existing works or newly created works will be considered, as long as they are reflective of the theme. Existing works must not be currently installed within 50 miles of Batavia, and the artist must sign a statement to the effect that the piece will not be replicated and/or installed within 150 miles of Batavia.
- The final work(s) will be chosen on the artwork's own merit. However, consideration will be given to the artist's background and demonstrated ability to complete the project on time and within budget.

The first step is the submission of Proposals to include:

- 1. Concept Statement and Description of Proposed Work.** The artist is required to submit a one- to- three page written description (double-spaced/legible) of the work and enough simple drawings of the concept to give an accurate visual impression of the finished work. Drawings/ description should include basic dimensions and proposed materials.

If Proposing Existing Work: Artist should submit multiple slides showing all possible views and description of materials. Works that change due to movement resulting from electrical or mechanical manipulation should be accompanied by slides showing all visual effects. Artist should furnish a list of locations where the piece is currently installed/exhibited (and note the difference.)

An Artist's resume and artist's statement. If applicable, submit information regarding any other public art installations. Resume must legibly state the artist's current mailing address, e-mail address, and daytime and evening phone numbers.

- 2. Slides/CD's/ Digital Images:** limit of 8-10 slides/CD's or images of recent work (within the past five years). Please make sure that your submission materials are clearly labeled with your name and phone number on each page submitted. All images should have accompanying descriptions or explanatory notes. All slides should be labeled with the artist's name, project titles, media, year, size (height x width x depth) and weight.

3. Entry and check list forms. Each Proposal submitted must be complete with its own forms. **Incomplete Proposals will not be considered.**

4. NO E-MAIL SUBMISSIONS WILL BE ACCEPTED.

5. All material will become property of the City of Batavia and will only be returned if special arrangements are (1) made at the time of submission; and (2) confirmed by the City of Batavia.

The selection process: All Proposals will be viewed and considered by a jury of art professionals. Following review of proposals, and a public "open house", five (5) to ten (10) candidates will be asked (by the City Council in consultation with the judges) and given 30 days to provide a maquette/scale model that will provide an accurate depiction of the work. Each candidate will be provided a stipend of \$100 toward material costs at the time of maquette/model submission. Maquette/models of the winning piece will become property of the City of Batavia. Another open house will be held, and the City Council, again in consultation with the judges shall make a final award. Artists selected will be required to sign a contract with the City of Batavia for this project.

Questions about the project: Any questions about project process must be asked before July 29, 2016. We will not answer inquiries regarding the theme. Anyone interested in receiving a set of the questions and answers must request them by e-mail to artsculpture@cityofbatavia.net. Q & A will be sent out as soon as possible after August 8, 2016

PROJECT CALENDAR

- June 20, 2016 - Contest Announcement
- July 29, 2016 Last day for process questions regarding the project
- September 19 - Final Date City of Batavia will accept concepts/proposals
- September 29- October 10- Public Open House and Comment Solicitation
- October 11, 2016 Committee of the Whole hears presentation of submittals and comments
- October 17, 2016 City Council names finalists for models if desired
If the City Council is desirous of models/maquettes, artists chosen to do so will have 30 days to do so. Following that submission, there will be a 14 day period for review by the community and jurors. Following that, the Committee of the Whole will meet followed by the City Council which will make a final determination to award the commission conditioned on success in working out a contract which will include time for fabrication and installation. The date for completion will be dependent upon the nature of the piece, the artist's schedule and the City's preference.

Proposals and related materials should be sent to:

Donovan Bridge Sculpture Competition
City of Batavia
100 N. Island Ave.
Batavia, Il 60510



CITY OF BATAVIA

DATE: June 3, 2016
TO: Mayor & City Council
FROM: Bill McGrath, City Administrator
SUBJECT: Franchise Agreement between City and Comcast of California/Colorado/
Illinois/Indiana/Michigan, LP Res 16-54-R

Attached is a Franchise Agreement proposed to be entered into between the City and Comcast. There are no startling changes in the agreement except as is reflected in the PEG area, one in which the City has always been a strong advocate. The result of that is that BATV is one of the strongest and comprehensive operations in the area.

Since the last renewal, cable companies have gotten the ability to single out the support for PEG activities which they give. Originally they gave this to the City but it was lumped into the general charges the customers received. Now it will be shown. This is totally separate from franchise fees which have always been shown and which will remain at 5%.

In trying to assess what the level of PEG support should be, and knowing it would be a straight pass through, we looked at the legislation which requires ATT, which is NOT a cable company but which competes for all intents and purposes in the video arena. It is required to give (and thus pass through) 1% of its gross for PEG. After reviewing the BATV Capital program for the next 3-5 years and estimating the gross revenues, we determined that 1% would in fact be needed to reasonably cover BATV's capital costs, and that this amounted to \$0.82 per customer per month.

Since the agreement extends over 10 years, we have inserted \$0.90 as a ceiling, but by separate communication will advise them that the City chooses to set the current PEG assessment (if you will) at \$0.82 per customer per month, and this would begin a few months on individual's bills.

Note that the agreement subjects the activity to the pole attachment agreement which we are wrapping up and should be bringing to you shortly. The agreement has been reviewed by both Stu Chapman our consultant and Kevin Drendel, and though there are, as always a few issues we don't care for, none of them are fatal. The fact is that our regulatory power in terms of quality control and customer service regulation has been largely taken away by the State and Federal governments.

This matter will be on the June 7, 2016 Committee of the Whole agenda for discussion. We would appreciate your thoughts and insights.

Thank you

Attachment

C: Department Heads

**CABLE TELEVISION FRANCHISE AGREEMENT
BY AND BETWEEN
The
CITY OF BATAVIA
And
COMCAST OF CALIFORNIA/COLORADO/
ILLINOIS/INDIANA/MICHIGAN, LP**

This Franchise Agreement (hereinafter, the "Agreement" or "Franchise Agreement") is made between the City of Batavia, Illinois (hereinafter, the "City") and Comcast of California/ Colorado/Illinois/Indiana/Michigan, LP, (hereinafter, "Grantee") this _____ day of _____, 2016 (the "Effective Date").

The City, having determined that the financial, legal, and technical abilities of the Grantee are reasonably sufficient to provide the services, facilities, and equipment necessary to meet the future cable-related needs of the community, desires to enter into this Franchise Agreement with the Grantee for the construction, operation and maintenance of a Cable System on the terms and conditions set forth herein.

This Agreement is entered into by and between the parties under the authority of and shall be governed by the Cable Act, and the Illinois Municipal Code, as amended from time to time; provided that any provisions of the Illinois Municipal Code that are inconsistent with the Cable Act shall be deemed to be preempted and superseded.

SECTION 1: Definition of Terms

For the purpose of this Franchise Agreement, capitalized terms, phrases, words, and abbreviations shall have the meanings ascribed to them in the Cable Act, unless otherwise defined herein.

"Cable Act" or "Act" means the Cable Communications Policy Act of 1984, as amended by the Cable Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996, 47 U.S.C. §§ 521 et seq., as the same may be amended from time to time.

"Cable Operator" means any Person or group of Persons who provides Cable Service over a Cable System and directly or through one or more affiliates owns a significant interest in such Cable System; or who otherwise controls or is responsible for, through any arrangement, the management and operation of such a Cable System.

"Cable Service" or "Service" means the one-way transmission to Subscribers of Video Programming or Other Programming Service and Subscriber interaction, if any, which is required for the selection or use of such Video Programming or Other Programming Service.

"Cable System" or "System," has the meaning set forth in 47 U.S.C. § 522 of the Cable Act, and means Grantee's facilities, consisting of a set of closed transmission

paths and associated signal generation, reception and control equipment, that is designed to provide Cable Service which includes Video Programming and which is provided to multiple Subscribers within the Franchise Area, but such term does not include (i) a facility that serves only to re-transmit the television signals of one or more television broadcast stations; (ii) a facility that serves Subscribers without using any public right-of-way, (iii) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, as amended, except that such a facility shall be considered a Cable System (other than for purposes of section 621(c) of the Cable Act) to the extent such facility is used in the transmission of Video Programming directly to Subscribers, unless the extent of such use is solely to provide Interactive On-Demand Services; (iv) an open video system that complies with section 653 of the Cable Act; or (v) any facilities of any electric utility used solely for operating its electric utility systems.

“Channel” or “Cable Channel” means a portion of the electromagnetic frequency spectrum which is used in a Cable System and which is capable of delivering a television channel as a television channel is defined by the Federal Communications Commission by regulation.

“City” means the City of Batavia, Illinois or the lawful successor, transferee, designee, or assignee thereof.

“Customer” or “Subscriber” means a Person who lawfully receives and pays for Cable Service with the Grantee’s express permission.

“FCC” means the Federal Communications Commission or successor governmental entity thereto.

“Franchise” means the initial authorization, or renewal thereof, issued by the City, whether such authorization is designated as a franchise, agreement, permit, license, resolution, contract, certificate, ordinance or otherwise, which authorizes the construction or operation of the Cable System.

“Franchise Agreement” or “Agreement” shall mean this Agreement and any amendments or modifications hereto.

“Franchise Area” means the present legal boundaries of the City as of the Effective Date, and shall also include any additions thereto, by annexation or other legal means as provided in this Agreement.

“Grantee” shall mean Comcast of California/Colorado/Illinois/Indiana/Michigan, LP.

“Gross Revenue” means the Cable Service revenue received by the Grantee from the operation of the Cable System in the Franchise Area to provide Cable Services, calculated in accordance with generally accepted accounting principles. Cable Service revenue includes monthly Basic Cable Service, cable programming service regardless of Service Tier, premium and pay-per-view video fees, advertising and home

shopping revenue, installation fees and equipment rental fees. Gross revenues shall also include such other revenue sources from Cable Service delivered over the Cable System as may now exist or hereafter develop, provided that such revenues, fees, receipts, or charges may be lawfully included in the gross revenue base for purposes of computing the City's permissible franchise fee under the Cable Act, as amended from time to time. Gross Revenue shall not include refundable deposits, bad debt, investment income, programming launch support payments, third party advertising sales commissions and agency fees, nor any taxes, fees or assessments imposed or assessed by any governmental authority. Gross Revenues shall include amounts collected from Subscribers for Franchise Fees pursuant to *City of Dallas, Texas v. F.C.C.*, 118 F. D 393 (5th Cir. 1997), and amounts collected from non-Subscriber revenues in accordance with the Court of Appeals decision resolving the case commonly known as the "Pasadena Decision," *City of Pasadena, California et. al., Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues*, CSR 5282-R, *Memorandum Opinion and Order*, 16 FCC Rcd. 18192 (2001), and *In re: Texas Coalition of Cities for Utility Issues v. F.C.C.*, 324 F.3d 802 (5th Cir. 2003).

"Initial Franchise Service Area" means that portion of the Franchise Area served by the Grantee's Cable System as of the Effective Date of this Franchise Agreement.

"Person" means any natural person or any association, firm, partnership, joint venture, corporation, or other legally recognized entity, whether for-profit or not-for profit, but shall not mean the City.

"Public, Educational and Governmental (PEG) Access Channel" shall mean a video Channel designated for non-commercial use by the City, the public, and/or educational institutions such as public or private schools, but not "home schools," community colleges, and universities.

"Public, Educational and Government (PEG) Access Programming" shall mean non-commercial programming produced by any City residents or organizations, schools and government entities and the use of designated facilities, equipment and/or Channels of the Cable System in accordance with 47 U.S.C. 531 and this Agreement.

"Public Way" shall mean, pursuant and in addition to the City's Right of Way Ordinance (Title 7, Chapter 4 of the Batavia Code of Ordinances of 1986, as amended), the surface of, and the space above and below, any street, alley, other land or waterway, dedicated or commonly used for pedestrian or vehicular traffic or other similar purposes, including, but not limited to, public utility easements and other easements dedicated for compatible uses, now or hereafter held by the City in the Franchise Area, to the extent that the City has the right and authority to authorize, regulate, or permit the location of facilities other than those of the City. Public Way shall not include any real or personal City property that is not specifically described in this definition and shall not include City buildings, fixtures, and other structures and improvements, regardless of whether they are situated in the Public Way.

“Standard Installation” means those installations to Subscribers that are located up to one hundred twenty-five (125) feet from the existing distribution system (Cable System).

“Video Programming” or “Programming” means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

SECTION 2: Grant of Authority

2.1. Pursuant to Section 621(a) of the Cable Act, 47 U.S.C. § 541 (a), and 65 ILCS 5/11-42-11(a) of the Illinois Municipal Code, and Resolution No. 16-106-R approving and authorizing the execution of this Agreement, the City hereby grants to the Grantee a nonexclusive Franchise authorizing the Grantee the right to construct and operate a Cable System in the Public Ways within the Franchise Area, and for that purpose to erect, install, construct, repair, replace, reconstruct, maintain, or retain in any Public Way such poles, wires, cables, conductors, ducts, conduits, vaults, manholes, pedestals, amplifiers, appliances, attachments, and other related property or equipment as may be necessary or appurtenant to the Cable System, and to provide such services over the Cable System as may be lawfully allowed,

2.2. Term of Franchise. The term of the Franchise granted hereunder shall be ten (10) years from the Effective Date, unless the Franchise is renewed or is lawfully terminated in accordance with the terms of this Franchise Agreement and/or applicable law. From and after the Effective Date of this Franchise Agreement, the Parties acknowledge that this Franchise Agreement is intended to be the sole and exclusive Franchise Agreement between the Parties pertaining to the Grantee’s Franchise for the provision of Cable Service. In the event this Franchise expires without being renewed or terminated, the terms and conditions described herein shall continue to apply on a month-to-month basis, as long as negotiations continue in good faith and until such time when the franchise is renewed.

2.3. Renewal. Any renewal of this Franchise shall be governed by and comply with the provisions of Section 626 of the Cable Act, as amended, and any applicable State law which may exist at the time of renewal and which is not superseded by the Cable Act.

2.4. Police Powers. Nothing in this Franchise Agreement shall be construed as an abrogation by the City of any of its police powers to adopt and enforce generally applicable ordinances deemed necessary for the health, safety, and welfare of the public, and the Grantee shall comply with all generally applicable laws and ordinances enacted by the City pursuant to such police power.

2.5. Reservation of Authority. Nothing in this Franchise Agreement shall (A) abrogate the right of the City to perform any public works or public improvements of any description, (B) be construed as a waiver of any codes or ordinances of general applicability promulgated by the City, including the Grantee’s obligation to secure a Pole

Attachment Agreement with the City through its Municipal Electric Utility, or (C) be construed as a waiver or release of the rights of the City in and to the Public Ways.

2.6 Competitive Equity.

2.6.1. In the event the City grants an additional Franchise to use and occupy any Public Way for the purposes of operating a Cable System, the additional Franchise shall only be granted in accordance with the Illinois Level Playing Field Statute, 65 ILCS 5/11-42-11.

2.6.2. In the event an application for a new cable television franchise or other similar authorization is filed with the City proposing to serve the Franchise Area, in whole or in part, the City shall to the extent permitted by law promptly notify the Grantee, or require the Grantee to be notified, and include a copy of such application.

2.6.3. During the term of this Franchise Agreement and any extension or renewal thereof, no application fee or security fund shall be required of the Grantee for any permit required by the Village, provided that Grantee shall have timely made all payments to the City pursuant to Section 5.1 of this Franchise Agreement.

2.6.4. Provided that appropriate vehicle safety markings have been deployed, Grantee's vehicles shall be exempt from parking restrictions of the City while used in the course of installation, repair and maintenance work on the Cable System. This exemption shall not apply to fire lanes and designated handicapped parking locations.

SECTION 3: Construction and Maintenance of the Cable System

3.1. Except as may be otherwise provided in this Franchise Agreement, Grantee shall comply with all generally applicable provisions of Title 7, Chapter 4, entitled "Construction of Utility Facilities in Rights of Way," of the Batavia Code of Ordinances of 1986, as amended.

3.2. Aerial and Underground Construction. At the time of Cable System construction, if all of the transmission and distribution facilities of all of the respective public or municipal utilities in any area of the Franchise Area are underground, the Grantee shall place its Cable Systems' transmission and distribution facilities underground, provided that such underground locations are actually capable of accommodating the Grantee's cable and other equipment without technical degradation of the Cable System's signal quality. In any region(s) of the Franchise Area where the transmission or distribution facilities of the respective public or municipal utilities are both aerial and underground, the Grantee shall have the discretion to construct, operate, and maintain all of its transmission and distribution facilities or any part thereof, aerially or underground. Nothing in this Section shall be construed to require the Grantee to construct, operate or maintain underground any ground-mounted appurtenances such as customer taps, line extenders, system passive devices, amplifiers, power supplies, pedestals or other related equipment.

3.3. Undergrounding and Beautification Projects.

3.3.1. In the event the City requires users of the Public Way who operate aerial facilities to relocate such aerial facilities underground, Grantee shall participate in the planning for relocation of its aerial facilities, if any, contemporaneously with such users. Grantee shall be reimbursed its relocation costs from public or private funds allocated for the project to the same extent as such funds are made available to other users of the Public Way, if any, provided that any utility's exercise of authority granted under its tariff to charge consumers for the said utility's cost of the project that are not reimbursed by the City shall not be considered to be public or private funds.

3.3.2. The Grantee shall not be required to relocate its facilities unless it has been afforded at least sixty (60) days' notice of the necessity to relocate its facilities. Upon adequate notice the Grantee shall provide a written estimate of the cost associated with the work necessary to relocate its facilities. In instances where a third party is seeking the relocation of the Grantee's facilities or where the Grantee is entitled to reimbursement pursuant to the preceding Section, the Grantee shall not be required to perform the relocation work until it has received payment for the relocation work.

SECTION 4: Service Obligations

4.1. Initial Service Obligations. As of the Effective Date of this Agreement, Grantee's Cable System has been designed to provide, and is capable of providing, Cable Service to residential Customers throughout the Initial Franchise Service Area. The Grantee shall continue to make Cable Service available in the Initial Service Area throughout the term of this Agreement and Grantee shall extend its Cable System and provide service consistent with the provisions of this Franchise Agreement.

4.2. General Service Obligation. The Grantee shall make Cable Service available beyond the Initial Franchise Service Area to every residential dwelling unit within the Franchise Area where the minimum density is at least thirty (30) dwelling units per linear Cable System network mile as measured from the existing Cable System's technically feasible connection point. Subject to the density requirement, Grantee shall offer Cable Service to all new homes or previously un-served homes located within one hundred twenty-five (125) feet of the Grantee's distribution cable (e.g., a Standard Installation).

4.2.1. The Grantee may elect to provide Cable Service to areas not meeting the above density and distance standards. The Grantee may impose an additional charge in excess of its regular installation charge for any service installation requiring a drop or line extension in excess of a Standard Installation. Any such additional charge shall be computed on a time plus materials basis plus a reasonable rate of return.

4.3. Programming. The Grantee agrees to provide cable programming services in the following broad categories:

Children
Ethnic/Minority
Educational

General Entertainment
Sports
Arts, Culture and Performing Arts
Family Oriented
Weather
News & Information

Pursuant and subject to federal law, all Video Programming decisions, excluding PEG Access Programming, are at the sole discretion of the Grantee.

4.4. Technical Standards. The Grantee shall comply with all applicable technical standards of the FCC as published in 47 C.F.R., Part 76, Subpart K, as amended from time to time. The Grantee shall cooperate with the City in conducting inspections related to these standards upon reasonable prior written request from the City based on a significant number of Subscriber complaints.

4.5. Annexations and New/Planned Developments. In cases of annexation the City shall provide the Grantee written notice of such annexation. In cases of new construction, planned developments or property development where undergrounding or extension of the Cable System is required, the City shall provide or cause the developer or property owner to provide notice of the same. Such notices shall be provided at the time of notice to all utilities or other like occupants of the City's Public Way. If advance notice of such annexation, new construction, planned development or property development is not provided, the Grantee shall be allowed an adequate time to prepare, plan and provide a detailed report as to the timeframe for it to construct its facilities and provide the services required under this Franchise Agreement.

4.6. Service to School Buildings and Governmental Facilities.

4.6.1. The City and the Grantee acknowledge the provisions of 220 ILCS 5/22-501(f), whereby the Grantee shall provide complimentary Basic Cable Service and a free Standard Installation at one outlet to all eligible buildings as defined in said state statute. Eligible buildings shall not include buildings leased to non-governmental third parties or buildings such as storage facilities at which government employees are not regularly stationed.

4.6.2. Long Drops. The Grantee may impose an additional charge in excess of its regular installation charge for any service installation requiring a drop or line extension in excess of a Standard Installation. Any such additional charge shall be computed on a time plus materials basis to be calculated on that portion of the installation that exceeds a Standard Installation.

4.7. Emergency Alerts. At all times during the term of this Franchise Agreement, the Grantee shall provide and maintain an "Emergency Alert System" ("EAS") consistent with applicable Federal law and regulation – including 47 C.F.R., Part 11 and the "State of Illinois Emergency Alert System State Plan" – as may be amended from time to time. Should the City become qualified and authorized to activate the EAS, the Grantee shall provide instructions on the access and use of the EAS by the City to the City on an annual basis. The City agrees to indemnify and hold

the Grantee harmless from any damages or penalties arising out of the negligence of the City, its employees or agents in using such system.

4.8. Customer Service Obligations. The City and Grantee acknowledge that the customer service standards and customer privacy protections are set forth in the Cable and Video Customer Protection Law, 220 ILCS 5/22-501 *et seq.*, and enforcement of such requirements and standards and the penalties for non-compliance with such standards shall be consistent with the Cable and Video Customer Protection Law, 220 ILCS 5/22-501 *et seq.* as amended from time to time.

SECTION 5: Oversight and Regulation by City

5.1. Franchise Fees. The Grantee shall pay to the City a Franchise Fee in an amount equal to five percent (5%) of annual Gross Revenues received from the operation of the Cable System to provide Cable Service in the Franchise Area; provided, however, that Grantee shall not be compelled to pay any higher percentage of fees than any other video service provider, under state authorization or otherwise, providing service in the Franchise Area. The payment of Franchise Fees shall be made on a quarterly basis and shall be due forty-five (45) days after the close of each calendar quarter. If mailed, the Franchise Fee shall be considered paid on the date it is postmarked. Each Franchise Fee payment shall be accompanied by a report prepared by a representative of the Grantee showing the basis for the computation of the franchise fees paid during that period. Any undisputed Franchise Fee payment which remains unpaid in whole or in part, after the date specified herein shall be delinquent. For any delinquent Franchise Fee payments, Grantee shall make such payments including interest at the prime lending rate as quoted by JP Morgan Chase & Company or its successor, computed from time due until paid. Any undisputed overpayments made by the Grantee to the City shall be credited upon discovery of such overpayment until such time when the full value of such credit has been applied to the Franchise Fee liability otherwise accruing under this Section.

5.1.1. The Parties acknowledge that, at present, the Cable Act limits the City to collection of a maximum permissible Franchise Fee of five percent (5%) of Gross Revenues. In the event that a change in the Cable Act would allow the City to increase the Franchise Fee above five percent (5%), the City shall hold a public hearing and determine if the City should collect the additional amount. Following the determination, the City shall notify the Grantee of its intent to collect the increased Franchise Fee and Grantee shall have a reasonable time (not to be less than ninety (90) days from receipt of notice from the City) to effectuate any changes necessary to begin the collection of such increased Franchise Fee or notify the Grantee of its intent to not collect the increased fee. In the event that the City increases said Franchise Fee, the Grantee shall notify its Subscribers of the City's decision to increase said fee prior to the implementation of the collection of said fee from Subscribers as required by law.

5.1.2. In the event a change in state or federal law requires the City to reduce the franchise fee percentage that may be collected, the parties agree the Grantee shall reduce the percentage of franchise fees collected to the lower of: i) the

maximum permissible franchise fee percentage; or ii) the lowest franchise fee percentage paid by any other Cable Operator granted a Cable Franchise by the City pursuant to the Cable Act, and Section 11-42-11 of the Illinois Municipal Code; provided that: (a) such amendment is in compliance with the change in state or federal law; (b) the City approves the amendment by ordinance; and (c) the City notifies Grantee at least ninety (90) days prior to the effective date of such an amendment.

5.1.3. Taxes Not Included. The Grantee acknowledges and agrees that the term “Franchise Fee” does not include any tax, fee or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and Cable Operators on their services but not including a tax, fee, or assessment which is unduly discriminatory against Cable Operators or Cable Subscribers).

5.2. Franchise Fees Subject to Audit. The City and Grantee acknowledge that the audit standards are set forth in the Illinois Municipal Code at 65 ILCS 5/11-42-11.05 (Municipal Franchise Fee Review; Requests For Information). Any audit shall be conducted in accordance with generally applicable auditing standards. Grantee agrees to maintain its books in accordance with GAAP.

5.3. Proprietary Information. Notwithstanding anything to the contrary set forth in this Agreement, the Grantee shall not be required to disclose information which it reasonably deems to be proprietary or confidential in nature, with the exception of the information directly related to an audit of Franchise Fees as set forth in Section 5.2. The City agrees to treat any information disclosed by the Grantee as confidential and only to disclose it to those employees, representatives, and agents of the City that have a need to know in order to enforce this Franchise Agreement and who agree to maintain the confidentiality of all such information. For purposes of this Section, the terms “proprietary or confidential” include, but are not limited to, information relating to the Cable System design, customer lists, marketing plans, financial information unrelated to the calculation of Franchise Fees or rates pursuant to FCC rules, or other information that is reasonably determined by the Grantee to be competitively sensitive. Grantee may make proprietary or confidential information available for inspection but not copying or removal by the Franchise Authority’s representative. In the event that the City has in its possession and receives a request under the Illinois Freedom of Information Act (5 ILCS 140/1 *et seq.*), or similar law for the disclosure of information the Grantee has designated as confidential, trade secret or proprietary, the City shall notify Grantee of such request and cooperate with Grantee in opposing such request. Grantee shall indemnify and defend the City from and against any claims arising from the City’s opposition to disclosure of any information Grantee designates as proprietary or confidential. Compliance by the City with an opinion or directive from the Illinois Public Access Counselor or the Illinois Attorney General under the Illinois Freedom of Information Act, 5 ILCS 140/1 *et seq.*, or with a decision or order of a court with jurisdiction over the City, shall not be a violation of this Section.

SECTION 6: Transfer of Cable System or Franchise or Control of Grantee

6.1. Neither the Grantee nor any other Person may transfer the Cable System or the Franchise without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed.

6.2. No transfer of control of the Grantee, defined as an acquisition of fifty-one percent (51%) or greater ownership interest in Grantee, shall take place without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed.

6.3. No consent shall be required, however, for (i) a transfer in trust, by mortgage, hypothecation, or by assignment of any rights, title or interest of the Grantee in the Franchise or in the Cable System in order to secure indebtedness, or (ii) a transfer to an entity directly or indirectly owned or controlled by Comcast Corporation.

6.4. The Grantee, and any proposed transferee under this Section 6, shall submit a written application to the City containing or accompanied by such information as is required in accordance with applicable law and FCC regulations, specifically including a completed Form 394 or its successor, and in compliance with the processes established for transfers under FCC rules and regulations, including Section 617 of the Cable Act, 47 U.S.C. §537. Within thirty (30) days after receiving a request for consent, the City shall, in accordance with FCC rules and regulations, notify the Grantee in writing of the additional information, if any, it requires to determine the legal, financial and technical qualifications of the transferee or new controlling party. If the City has not taken final action on the Grantee's request for consent within one hundred twenty (120) days after receiving such request, consent shall be deemed granted. As a condition to granting of any consent, the City may require the transferee to agree in writing to assume the obligations of the Grantee under this Franchise Agreement.

6.5. Any transfer of control resulting from or after the appointment of a receiver or receivers or trustee or trustees, however denominated, designated to take over and conduct the business of the grantee, whether in a receivership, reorganization, bankruptcy or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of a one hundred twenty (120) day period, shall be treated as a transfer of control pursuant to 47 U.S.C. §537 and require the City's consent thereto in the manner described in Section 6 above.

SECTION 7: Insurance and Indemnity

7.1. Insurance. Throughout the term of this Franchise Agreement, the Grantee shall, at its own cost and expense, maintain such insurance and provide the City certificates of insurance in accordance with Title 7, Chapter 4 of the Batavia Code of Ordinances of 1986, as amended.

7.2. Indemnification. The Grantee shall indemnify, defend and hold harmless the City, its officers, employees, and agents (the "Indemnitees") from and against any

injuries, claims, demands, judgments, damages, losses and expenses, including reasonable attorney's fees and costs of suit or defense (the "Indemnification Events"), arising in the course of the Grantee constructing and operating its Cable System within the City. The Grantee's obligation with respect to the Indemnitees shall apply to Indemnification Events which may occur during the term of this Agreement, provided that the claim or action is initiated within the applicable statute of limitations, notwithstanding that the claim may be made or action filed subsequent to the termination or expiration of this Agreement. The City shall give the Grantee timely written notice of its obligation to indemnify and defend the City after the City's receipt of a claim or action pursuant to this Section. For purposes of this Section, the word "timely" shall mean within a time period that does not cause prejudice to the respective positions of the Grantee and/or the City. If the City elects in its own discretion to employ additional counsel, the costs for such additional counsel for the City shall be the responsibility of the City.

7.2.1. The Grantee shall not indemnify the City for any liabilities, damages, costs or expense resulting from any conduct for which the City, its officers, employees and agents may be liable under the laws of the State of Illinois.

7.2.2. Nothing herein shall be construed to limit the Grantee's duty to indemnify the City by reference to the limits of insurance coverage described in this Agreement.

SECTION 8: Public, Educational and Governmental (PEG) Access

8.1. PEG Capacity. The Grantee shall provide capacity for the City's noncommercial Public, Educational and Governmental Access ("PEG") Programming through two (2) Channels (the "Channels") on the Grantee's Cable System. Unless otherwise agreed to by the City and the Grantee to the extent required by applicable law, the Channels shall be carried on the Grantee's basic digital service tier. The City's PEG Access Programming shall be provided consistent with Section 611 of the Cable Act, as amended from time to time. The City may request, and Grantee shall provide, a third PEG Channel upon one hundred eighty (180) days advance written notice by the City and sufficient proof that the current Channels are inadequate for all programming offered. "Sufficient proof" shall include a verified program log of all original, non-repeat, first-run, non-character generated, locally produced programs that are carried on the existing Channels for the prior six month period during the times of noon to midnight. In the event that eighty percent (80%) of the programming on the Channels meets the criteria of being original, non-repeat, first-run, non-character generated, locally produced programming, Grantee shall provide a third Channel. Any cost for the activation of the third Channel shall be paid for by the City. The Grantee agrees to submit a cost estimate to activate the third channel within a reasonable period of time following the City's request. After an agreement to reimburse the Grantee for its expenditure, the Grantee will implement any necessary system changes within a reasonable period of time. In the event no agreement is reached, the Grantee shall not be obligated to activate the third Channel.

8.2. Rules and Procedures for Use of the PEG Access Channels. The City shall be responsible for establishing, and thereafter enforcing, rules for the non-commercial use of the PEG Access Channels and to promote the use and viewership of the Channels.

8.3. Allocation and Use of the PEG Access Channel. The Grantee does not relinquish its ownership of a Channel by designating it for PEG use. However, the PEG Access Channels are, and shall be, operated by the City. The City shall adopt rules and procedures under which Grantee may use the PEG Access Channel for the provision of Video Programming if a PEG Access Channel is not being used for its designated purpose(s) pursuant to Section 611(d) of the Cable Act, 47 U.S.C. §531.

8.4. Editorial Control. Grantee shall not exercise any editorial control over any use of the PEG Access Channels except as permitted by 47 U.S.C. §531(e).

8.5. Origination Point. At such time that the City determines that it wants to establish capacity to allow its residents who subscribe to Grantee's Cable Service to receive PEG Access Programming originated from Schools and/or City facilities (other than those having a signal point of origination at the time of the execution of this Agreement); or at such time that the City determines that it wants to change or upgrade a location from which PEG Access Programming is originated; the City will give the Grantee written notice detailing the point of origination and the capability sought by the City. The Grantee agrees to submit a cost estimate to implement the City's plan within a reasonable period of time. After an agreement to reimburse the Grantee for its expenditure within a reasonable period of time, the Grantee will implement any necessary system changes within a reasonable period of time.

8.6. PEG Signal Quality. Provided the PEG signal feed is delivered by the City to the designated signal input point without material degradation, the PEG Channel delivery system from the designated signal input point shall meet the same FCC technical standards as the remainder of the Cable System set forth in this Agreement.

8.7. PEG Capital Support. At its sole discretion, the City may designate PEG access capital projects to be funded by the City as set forth herein. The City shall send written notice to Grantee of the City's desire for Grantee to collect as an external charge a PEG Capital Fee of up to ninety cents (\$0.90) per customer per month charge to be passed on to each Subscriber pursuant Section 622(g)(2)(C) of the Cable Act (47 U.S.C. §542(g)(2)(C)). The Grantee shall collect the external charge monthly over the term of this Agreement, and the charge will remain the same unless changed pursuant to written notice by the City given one-hundred twenty (120) days before such change is effective, unless some other period is mutually agreed upon in writing. Grantee shall make the PEG capital payments from such sums at the same time and in the same manner as Franchise Fee payments. (The notice for changes to the PEG Capital Fee shall include a detailed and itemized description of the intended utilization of the PEG Capital Fee for PEG Access Channel facilities and/or equipment and the Grantee shall have the opportunity to review and make recommendations upon the City's plan prior to agreeing to collect and pay to the City the requested amount. The capital payments

shall be expended for capital costs associated with PEG access. Consistent with the description of the intended utilization of the PEG Capital Fee, the City shall be permitted to hold all or a portion of the PEG Capital Fee from year to year as a designated fund to permit the City to make large capital expenditures, if necessary, as long as any finds remaining at the end of the term of this Agreement shall be credited to PEG Capital obligations in the subsequent Franchise. Further, if the City chooses to borrow – from itself or a financial institution – funds for large PEG capital purchases or capital expenditures, the City shall be permitted to make periodic repayments using the PEG Capital Fee. Said PEG Capital Fee shall be imposed within one-hundred twenty (120) (90) of the City’s written request.

8.7.1. For any payments owed by Grantee in accordance with this Section 8.7 which are not made on or before the due dates, Grantee shall make such payments including interest at an annual rate of the prime lending rate as quoted by JP Morgan Chase & Company or its successor, computed from time due until paid. Any undisputed overpayments made by the Grantee to the City shall be credited upon discovery of such overpayment until such time when the full value of such credit has been applied to the PEG Capital Fee liability otherwise accruing under this section.

8.7.2. Grantee and City agree that the capital obligations set forth in this Section are not “Franchise Fees” within the meaning of 47 U.S.C. § 542.

8.8. Grantee Use of Unused Time. Because the City and Grantee agree that a blank or underutilized PEG Access Channel is not in the public interest, in the event the City does not completely program a Channel, Grantee may utilize the Channel for its own purposes. Grantee may program unused time on the Channel subject to reclamation by the City upon no less than sixty (60) days’ notice. Except as otherwise provided herein, the programming of the PEG Access Channel with text messaging, or playback of previously aired programming shall not constitute unused time. Text messaging containing out of date or expired information for a period of thirty (30) days shall be considered unused time. A programming schedule that contains playback of previously aired programming that has not been updated for a period of ninety (90) days shall be considered unused time. Unused time shall be considered to be a period of time, in excess of six (6) hours, where no community produced programming of any kind can be viewed on a PEG Access Channel. Unused time shall not include periods of time where programming cannot be viewed that are caused by technical difficulties, transition of broadcast media, signal testing, replacement or repair of equipment, or installation or relocation of facilities.

SECTION 9: Enforcement of Franchise

9.1. Notice of Violation or Default. In the event the City believes that the Grantee has not complied with a material term of the Franchise, it shall notify the Grantee in writing with specific details regarding the exact nature of the alleged noncompliance or default.

9.2. Grantee's Right to Cure or Respond. The Grantee shall have thirty (30) days from the receipt of the City's written notice: (A) to respond to the City, contesting the assertion of noncompliance or default; or (B) to cure such default; or (C) in the event that, by nature of the default, such default cannot be cured within the thirty (30) day period, initiate reasonable steps to remedy such default and notify the City of the steps being taken and the projected date that the cure will be completed.

9.3. Enforcement. Subject to applicable federal and state law, and following notice and an opportunity to cure and respond pursuant to the provisions of Section 9.2 above, in the event the City determines that the Grantee is in default of any material provision of the Franchise, the City may:

9.3.1. seek specific performance of any provision that reasonably lends itself to such remedy or seek other relief available at law, including declaratory or injunctive relief; or

9.3.2. in the case of a substantial or frequent default of a material provision of the Franchise, declare the Franchise Agreement to be revoked in accordance with the following:

(i) The City shall give written notice to the Grantee of its intent to revoke the Franchise on the basis of a pattern of noncompliance by the Grantee. The notice shall set forth with specificity the exact nature of the noncompliance. The Grantee shall have ninety (90) days from the receipt of such notice to object in writing and to state its reasons for such objection. In the event the City has not received a response from the Grantee or upon receipt of the response does not agree with the Grantee's proposed remedy or in the event that the Grantee has not taken action to cure the default, it may then seek termination of the Franchise at a public hearing. The City shall cause to be served upon the Grantee, at least ten (10) days prior to such public hearing, a written notice specifying the time and place of such hearing and stating its intent to request termination of the Franchise.

(ii) At the designated hearing, the City shall give the Grantee an opportunity to state its position on the matter, present evidence and question witnesses, after which the City shall determine whether or not the Franchise shall be terminated. The public hearing shall be on the record. A copy of the transcript shall be made available to the Grantee at its sole expense. The decision of the City shall be in writing and shall be delivered to the Grantee in a manner authorized by Section 10.2. The Grantee may appeal such determination to any court with jurisdiction within thirty (30) days after receipt of the City's decision.

9.4. Remedies Not Exclusive. In addition to the remedies set forth in this Section 9, the Grantee acknowledges the City's ability pursuant to Section 3.1 of this Franchise Agreement and Title 7, Chapter 4 of the Batavia Code of Ordinances of 1986, as amended, to enforce the Grantee's compliance with the City's requirements regarding "Construction of Utility Facilities in Rights Of Way." Notwithstanding the foregoing, nothing in this Agreement shall be interpreted to permit the City to exercise

such rights and remedies in a manner that permits duplicative recovery from, or payments by, the Grantee. Such remedies may be exercised from time to time and as often and in such order as may be deemed expedient by the City.

SECTION 10: Miscellaneous Provisions

10.1. Force Majeure. The Grantee shall not be held in default under, or in noncompliance with, the provisions of the Franchise, nor suffer any enforcement or penalty relating to noncompliance or default (including termination, cancellation or revocation of the Franchise), where such noncompliance or alleged defaults occurred or were caused by strike, riot, war, earthquake, flood, tidal wave, unusually severe rain or snow storm, hurricane, tornado or other catastrophic act of nature, labor disputes, failure of utility service necessary to operate the Cable System, governmental, administrative or judicial order or regulation or other event that is reasonably beyond the Grantee’s ability to anticipate or control. This provision also covers work delays caused by waiting for utility providers to service or monitor their own utility poles on which the Grantee’s cable or equipment is attached, as well as unavailability of materials or qualified labor to perform the work necessary. Non-compliance or default shall be corrected within a reasonable amount of time after force majeure has ceased.

10.2. Notice. Any notification that requires a response or action from a party to this franchise within a specific time-frame, or that would trigger a timeline that would affect one or both parties’ rights under this franchise, shall be in writing and shall be sufficiently given and served upon the other party by hand delivery, first class mail, registered or certified, return receipt requested, postage prepaid, or by reputable overnight courier service and addressed as follows:

To the City:

City of Batavia
100 North Island Avenue
Batavia, Illinois 60510
ATTN: City Administrator

To the Grantee:

Comcast
155 Industrial Drive
Elmhurst, Illinois 60126
ATTN: Director of Government Affairs

Recognizing the widespread usage and acceptance of electronic forms of communication, emails and faxes will be acceptable as formal notification related to the conduct of general business amongst the parties to this contract, including but not limited to programming and price adjustment communications. Such communication should be addressed and directed to the person of record as specified above. Either party may change its address and addressee for notice by notice to the other party under this Section.

10.3. Entire Agreement. This Franchise Agreement embodies the entire understanding and agreement of the City and the Grantee with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements, understandings, negotiations and communications, whether written or oral. Except for ordinances adopted pursuant to Sections 2.4 and 2.5 of this Agreement, all ordinances

or parts of ordinances related to the provision of Cable Service that are in conflict with or otherwise impose obligations different from the provisions of this Franchise Agreement are superseded by this Franchise Agreement.

10.3.1. The City may adopt a cable television/video service provider regulatory ordinance that complies with applicable law, provided the provisions of any such ordinance adopted subsequent to the Effective Date of this Franchise Agreement shall not apply to the Grantee during the term of this Franchise Agreement.

10.4. Severability. If any section, subsection, sentence, clause, phrase, or other portion of this Franchise Agreement is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body, or other authority of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent portion. Such declaration shall not affect the validity of the remaining portions hereof, which other portions shall continue in full force and effect. If any material provision of this Agreement is made or found to be unenforceable by such a binding and final decision, either party may notify the other in writing that the Franchise has been materially altered by the change and of the election to begin negotiations to amend the Franchise in a manner consistent with said proceeding or enactment; provided, however, that any such negotiated modification shall be competitively neutral, and the parties shall be given sufficient time to implement any changes necessitated by the agreed-upon modification.

10.5. Governing Law. This Franchise Agreement shall be deemed to be executed in the State of Illinois, and shall be governed in all respects, including validity, interpretation and effect, and construed in accordance with, the laws of the State of Illinois and/or Federal law, as applicable.

10.6. Venue. Except as to any matter within the jurisdiction of the federal courts or the FCC, all judicial actions relating to any interpretation, enforcement, dispute resolution or any other aspect of this Agreement shall be brought in the Circuit Court of the State of Illinois, Kane County, Illinois. Any matter brought pursuant to the jurisdiction of the federal court shall be brought in the United States District Court of the Northern District of Illinois.

10.7. Modification. Except as provided in Sections 5.1.1 and 5.1.2, no provision of this Franchise Agreement shall be amended or otherwise modified, in whole or in part, except by an instrument, in writing, duly executed by the City and the Grantee, which amendment shall be authorized on behalf of the City through the adoption of an appropriate ordinance or resolution by the City, as required by applicable law.

10.8. No Third-Party Beneficiaries. Nothing in this Franchise Agreement is intended to confer third-party beneficiary status on any person, individual, corporation or member of the public to enforce the terms of this Franchise Agreement.

10.9. No Waiver of Rights. Nothing in this Franchise Agreement shall be construed as a waiver of any rights, substantive or procedural, Grantee may have under Federal or state law unless such waiver is expressly stated herein.

10.10. Validity of Franchise Agreement. The parties acknowledge and agree in good faith on the validity of the provisions, terms and conditions of this Franchise Agreement, in their entirety, and that the Parties have the power and authority to enter into the provisions, terms, and conditions of this Agreement.

10.11. Authority to Sign Agreement. Grantee warrants to the City that it is authorized to execute, deliver and perform this Franchise Agreement. The individual signing this Franchise Agreement on behalf of the Grantee warrants to the City that s/he is authorized to execute this Franchise Agreement in the name of the Grantee.

IN WITNESS WHEREOF, this Franchise Agreement has been executed by the duly authorized representatives of the parties as set forth below, as of the date set forth below:

For the City of Batavia:

**For Comcast of
California/Colorado/
Illinois/Indiana/Michigan, LP:**

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____