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CITY OF NORTH TONAWANDA

Office of the Mayor

ROBERT G. ORTT

March 29, 2012

North Tonawanda, Common Council
City Hall, 216 Payne Ave.
North Tonawanda, NY 14120

Dear Honorable Body:

Attached is the proposed Concession agreement between the City of North Tonawanda and Lumberjack's Patio Grill, LLC.

I request that your Honorable Body receive and file the attached agreement.

Should you have any further questions please feel free to contact me.

Faithfully yours,

Robert G. Ortt
Mayor

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City Hall, 216 Payne Avenue, North Tonawanda, NY 14120 · 716-695-8540 · 716-695-8541 (Fax)
robertort@northtonawanda.org

RESTAURANT/MARINA CONCESSION AGREEMENT

1000 RIVER ROAD, NORTH TONAWANDA, NY

THIS CONCESSION AGREEMENT, made effective as of the 7th day of March 2012, by and between the **CITY OF NORTH TONAWANDA, NEW YORK**, a municipal corporation of the State of New York, with offices at 216 Payne Avenue, City Hall, North Tonawanda, New York 14120 (hereinafter called "CITY"), and **LUMBERJACK'S PATIO GRILL, LLC**, a New York limited liability company [to be formed] (hereinafter referred to as "CONCESSIONAIRE").

WITNESSETH:

WHEREAS, the City owns a building (formerly a clubhouse) and marina located at 1000 River Road, situated in the City of North Tonawanda, County of Niagara, State of New York, and

WHEREAS, the City desires to make available to the general public marina boat slips and a restaurant to serve food and beverages for the better accommodation, convenience and welfare of the general public and in fulfillment of the City's obligation to operate facilities for the use and benefit of the public, and

WHEREAS, the City has negotiated this Agreement in good faith to allow Concessionaire the exclusive right to operate the marina and restaurant concession at 1000 River Road, and the City has determined that through negotiations the parties have reached a satisfactory and advantageous agreement and Concessionaire has been awarded this concession, and

WHEREAS, by this Agreement, Concessionaire is hereby approved for the food and beverage service and marina concession per the terms and conditions hereof, and

WHEREAS, pursuant to the Common Council resolution of December 15, 2011, the City agreed to negotiate a concession agreement in good faith with Concessionaire to operate a restaurant with food and beverage service at the former clubhouse building and the marina located at 1000 River Road and, as a result of good faith negotiations between the City and Concessionaire, this Agreement has been entered into in accordance with the authority granted to the Mayor in such Common Council resolution, and

WHEREAS, Concessionaire and the City are in agreement as set forth herein,

NOW, THEREFORE, in consideration of the covenants and agreements herein contained, the parties mutually agree as follows:

ARTICLE 1 - *EXHIBITS AND DEFINITIONS*

1) *Exhibits and Definitions*

1.1 *Exhibits*. Attached hereto and made a part of this Agreement are the following Exhibits:

Exhibit A - Map showing the Premises

Exhibit B – City Improvements and Phasing Timeline

Exhibit C – Conceptual Site Plan of Restaurant Remodeling

1.2 *Certain Defined Terms*. As used herein, the following terms and phrases shall have the meanings indicated:

"Improvements" means all improvements, buildings, docks, structures and fixtures now or hereafter situated, placed, constructed or installed on the Premises, including but not limited to, all equipment, apparatus, machinery, fittings, docks, gangways and appliances and any additions to, substitutions for, changes in or replacements of, the whole or any parts thereof.

"Premises" means the approximately 2.3 acres of real property in the City of North Tonawanda specified in Exhibit A attached, together with all easements, rights-of-way and appurtenances belonging in any way appertaining to the same.

ARTICLE 2 - *EXCLUSIVE RIGHT OF OPERATION.*

The City of North Tonawanda, New York, hereby grants to Concessionaire the exclusive right and Concessionaire does hereby accept from the City the exclusive right and agrees to operate and manage the "Premises" shown on Exhibit A hereto, and all improvements now existing thereon or hereafter added thereto, for the operation of a boat marina and restaurant, for period and upon terms and conditions set forth in this Agreement. Concessionaire shall have the non-exclusive right to utilize the adjacent parking areas for its customers and the use of roadways and other means of access to the Premises.

ARTICLE 3 - *TERM*

2.1 *Initial Term*. The term of this Agreement shall commence on the first day of the month immediately following its full execution by the parties ("the Commencement Date" or "the Effective Date"). The initial term of this Lease shall continue until the date which is five (5) years from the date when the City completes the First Phase of the City Improvements (as defined in Article 8 below).

2.2 *Options to Extend Term*. Concessionaire shall have five (5) consecutive 5-year options to extend the term of this Agreement on the same terms and conditions, upon written notice by Concessionaire to the City given at least 90 days prior to the beginning of each such extension term.

ARTICLE 4 - *PAYMENTS*

4.1 *Percentage Rent*. From the Effective Date and throughout the term of this Agreement, Concessionaire shall pay to the City a sum equal to a percentage of Concessionaire's "Gross Sales" and "Boat Slip Fees" made from or upon the Premises during each month. The Percentage Rent shall be computed on a monthly basis ("Percentage Rent Period") beginning with the calendar month in which Concessionaire opens for business to the public and continuing throughout the term.

Percentage Rent shall be calculated as follows:

(1) Five percent (5%) of "Gross Sales" (defined below); plus

(2) Twenty-five percent (25%) of "Boat Slip Fees" (defined below).

4.2 *Payment Due*. On or before the 20th day of calendar month immediately following the close of each of Concessionaire's monthly Percentage Rent Period, Concessionaire shall pay to City the amount of the Percentage Rent due for such prior month.

4.3 *Statement of Gross Sales*. With each remittance of Percentage Rent, Concessionaire shall furnish to City a statement of Concessionaire's Gross Sales and Boat Slip Fees. Additionally, Concessionaire shall furnish an annual statement of Concessionaire's Gross Sales and Boat Slip Fees within thirty (30) days after the end of twelve consecutive monthly Percentage Rent Periods, to verify whether or not Concessionaire owes any additional Percentage Rent.

Each statement shall be signed and certified to be correct by an authorized representative of Concessionaire.

4.4 *Records and Inspections*. Concessionaire shall keep full and accurate books of account, records, cash receipts, and other pertinent data showing its Gross Sales and Boat Slip Fees

broken down into those two categories at a minimum. Concessionaire shall install and maintain accurate receipt-printing Point of Sale system(s) to record sales from the restaurant operations.

Such books of account, records, cash receipts, and other pertinent data shall be kept for a period of two years after the end of each year of the Agreement. The receipt by City of any statement, or any payment of Percentage Rent for any period, shall not bind City as to the correctness of the statement or the payment.

City shall be entitled during the term and within two (2) years after the end of any given concession year, to inspect and examine all Concessionaire's books of account, records, cash receipt, and other pertinent data, so City can ascertain Concessionaire's Gross Sales and Boat Slip Fees. Concessionaire shall cooperate fully with City in making the inspection. City shall also be entitled, once during each twelve months and once after expiration or termination of this Agreement, to an independent audit of Concessionaire's books of account, records, cash receipts, and other pertinent data to determine Concessionaire's Gross Sales and Boat Slip Fees, by a certified public accountant to be designated by City. The audit shall be limited to the determination of Gross Sales and Boat Slip Fees and shall be conducted during usual business hours at the Premises.

If the audit shows that there is a deficiency in the payment of any Percentage Rent, the deficiency shall become immediately due and payable. The costs of the audit shall be paid by City unless the audit shows that Concessionaire understated Gross Sales and Boat Slip Fees by more than 10%, in which case Concessionaire shall pay all City's costs for the audit.

4.5 *Gross Sales Defined*. "Gross Sales" of Concessionaire means the gross selling price of all merchandise or services sold, leased, licensed, or delivered in or from the Premises by Concessionaire from its restaurant or marina operations (other than " Boat Slip Fees"), whether for

cash or on credit (whether collected or not), including the gross amount received by reason of orders taken on the Premises although filled elsewhere, and whether made by its personnel or vending machines. Any transaction on an installment basis, including without limitation, any "lay-away" sale or like transaction, or otherwise involving the extension of credit, shall be treated as a sale for the full price at the time of the transaction, irrespective of the time of payment or when title passes. Gross Sales also shall include any sums that Concessionaire receives from all mechanical or other vending devices placed in or on Premises, including but not limited to: pay telephones, stamp machines, music machines, or amusement machines. Gross Sales in credit card transactions shall include only the actual amount received by Concessionaire from the credit card issuer.

Gross Sales shall not include, or if included there shall be deducted (but only to the extent they have been included), the following:

1. The selling price of all merchandise returned by customers and accepted for full credit, or the amount of discounts, refunds, and allowances made on such merchandise.

2. Merchandise returned to sources or transferred to another store or warehouse owned by or affiliated with Concessionaire.

3. Sums and credits received in the settlement of claims for loss of or damage to merchandise.

4. The price allowed on all merchandise traded in by customers for credit or the amount of credit for discounts and allowances made instead of acceptance of merchandise.

5. Any sums paid to third parties for the use or rental of pay telephones, stamp machines, music machines, amusement machines, or public toilet locks.

6. Gift certificates, or similar vouchers, until such time as they shall have been converted into a sale by redemption.

7. Sales and use taxes, so-called luxury taxes, consumers' excise taxes, gross receipts taxes, and other similar taxes now or in the future imposed on the sale of merchandise or services, but only if such taxes are added to the selling price, separately stated, collected separately from the selling price of merchandise or services, and collected from customers.

8. Receipts from the sale of waste or scrap materials resulting from Concessionaire's operations on Premises.

9. The costs or value of meals or discounts given to employees; for which no payment is received, payroll deduction made and no other consideration is received by Concessionaire.

10. The cost or value of food and beverages used for entertainment and promotion purposes.

11. The amount of gratuities given by patrons to employees of Concessionaire.

4.6 *Boat Slip Fees Defined*. "Boat Slip Fees" means the gross payment received by Concessionaire from third parties for the renting or use of boat slips in the marina. Boat Slip Fees shall not include, or if included there shall be deducted (but only to the extent they have been included), the following: Sales and use taxes, so-called luxury taxes, consumers' excise taxes, gross receipts taxes, and other similar taxes now or in the future imposed on the sale of merchandise or services, but only if such taxes are added to the selling price, separately stated, collected separately from the selling price of merchandise or services, and collected from customers.

ARTICLE 5 – *USE*

The Premises are intended to serve as a restaurant and marina, and uses and services incidental thereto, primarily for the service of the public.

ARTICLE 6 – *SEASONAL OPERATION*

After the improvements to the restaurant building and patio deck are completed and appropriate licenses are obtained to operate the restaurant, Concessionaire will open the restaurant to the public for business. Concessionaire will thereafter during the term of this Agreement operate the restaurant on a seasonal basis up to six months per calendar year, weather permitting, beginning each year in late spring. The hours of operation of the restaurant will be at least from 11:00 AM to 8:00 PM daily (with morning breakfast hours optional at Concessionaire's discretion) unless agreed otherwise by the parties. Concessioinaire shall staff with a sufficient number of personnel to efficiently run the restaurant and marina.

ARTICLE 7 – *CITY BOAT SLIP*

Upon completion of all City Improvements to the marina for which the City is responsible under Article 8 below, the City shall have the right to use one (1) boat slip in an area designated by Concessionaire, without payment of rental fee therefore upon ten (10) days written notice from the Director of Youth, Recreation and Parks of the exercise of this privilege, provided that the boat slip has not been previously booked for hire by Concessionaire. Use of such boat slip shall be limited to city-owned boats. In addition, other governmental and civic groups such as the Niagara County Sheriff's Department and groups associated with the City of North Tonawanda shall also have the right to use said boat slip without payment of rental fee on no less than ten (10) days but at the discretion of Concessionaire. If City exercises said privilege, it shall be subject to all other charges, including without limitation payment for all food and beverages from the restaurant which shall be provided by Concessionaire at their standard menu prices. Other than the City's exercise of its privilege hereunder, Concessionaire shall have the right to rent said boat slip at its discretion.

ARTICLE 8 – *CITY IMPROVEMENTS TO PREMISES*

The City shall, at its sole cost and expense, install (and thereafter make necessary repairs to) the following improvements to the Premises (the "City Improvements") in accordance with the agreed phasing (First Phase and Future Phase) and timeline set forth in Exhibit B and B1 hereto:

(i) The sewer and utilities (electric, gas, water and cable service) to appropriate locations along the marina and to the restaurant building;

(ii) A metal roof for the existing building and the public restroom (conversion of the existing garage building); and

(iii) The marina improvements as depicted on the conceptual site plan attached as Exhibit B1 hereto. Said improvements include landscaping, boat docks and other related boating facilities, fishing stations, public restrooms (outside of the restaurant), pedestrian trails and ramps, trail lights and other outside lighting, boardwalks, iconic element, fire pit, trash receptacles, benches, parking lots and drives, entrance and roof signs and any other elements agreed to in writing by the parties.

Concessionaire shall have the right to approve all signage and the metal roof material, which approval shall not be unreasonably withheld. All plans for the City Improvements will be submitted to Concessionaire for comments and input prior to finalizing the plans. Concessionaire shall have the right to design and install the metal roof and sign on the restaurant building, install a new billboard sign and facings at the entrance from River Road (or restore and use the existing billboard sign if it is not removed by the sign company Lamar), and install a gas line and gas fire pit on the marina point (as shown on the conceptual plans in Exhibit C), and once these items are completed, the City shall promptly reimburse Concessionaire for the entire documented cost paid by Concessionaire relating to these items.

ARTICLE 9 – *CONCESSIONAIRE REPAIRS/ALTERATIONS TO BUILDING*

Within the same timeline for completion of the First Phase of the City Improvements to be done by the City as set forth and described in Exhibit B (i.e., July 15, 2012), Concessionaire shall, at its sole cost and expense, remodel (and subsequently maintain) the interior and exterior of the existing building in a manner generally consistent with the conceptual plan shown in Exhibit C hereto ("Conceptual Plan of Concessionaire's Remodeling"). These improvements by Concessionaire shall include, but not be limited to adding new patio decking extending from the rear of the existing building to the river's edge, and altering the interior of the building by installing commercial kitchen equipment, fixtures and new décor, and replacing and enlarging windows and doors to maximize views, as well as repainting throughout and adding indoor and outdoor furniture and umbrellas. Approval and permits for such work shall not be unreasonably withheld, delayed or conditioned by the City.

ARTICLE 10 – *MAINTENANCE*

10.1 *City Maintenance Responsibilities*. During the term of this Agreement, the City shall be responsible and pay for maintaining, cleaning and repairing all areas and improvements within the Premises outside of the restaurant building and the restaurant patio deck. The City shall be responsible for all repairs to the roof, heating/cooling system and structural components of the restaurant building. The City shall make all attempts to ensure that the heating and cooling systems function properly by making regular maintenance inspections and needed repairs. City will be responsible for snow removal in the parking lot and driveways. The City, and not the Concessionaire, shall be responsible for maintenance and cleanliness of all areas outside of the restaurant building and restaurant patio deck (excluding exterior grease traps from the restaurant) including rubbish pick-up and removal from all trash bins and receptacles,. The City shall be

responsible to regularly clean and keep in a well maintained condition all landscaping areas, parking lots, walkways, docks, public restrooms, trash containers and grounds outside of the restaurant building and the restaurant patio deck.

10.2 *Concessionaire Maintenance Responsibilities*. During the term of this Agreement, Concessionaire shall be responsible and pay for cleaning, repairing and maintaining in good condition all areas and improvements within the interior of the restaurant building and the outside restaurant patio deck. Concessionaire shall also be responsible for winterizing the restaurant building if closed at any time during off season. All routine repairs and maintenance to all permanent interior fixtures (other than the roof, heating/cooling system and structural components of the restaurant building) will be the responsibility of the Concessionaire during the term of this Agreement. Concessionaire shall surrender to City at the expiration or other termination of this Agreement the interior of the restaurant building and patio deck, and permanently attached accessories and fixtures, in good order, broom clean, reasonable wear and tear and damage by the elements excepted; provided however, Concessionaire shall have the right to remove from the Premises all tangible personal property and restaurant equipment and trade fixtures installed by Concessionaire (other than fixtures that have been permanently attached to the real property).

ARTICLE 11 – *INSPECTION*

It is agreed that the Premises may be inspected at any reasonable time by an authorized representative of the City upon reasonable prior notice to Concessionaire.

ARTICLE 12 – *FURNITURE, TRADE FIXTURES AND EQUIPMENT*

Concessionaire shall supply all furniture, trade fixtures and equipment and other items of interior decor needed to operate the building and patio deck as a restaurant.

ARTICLE 13 – *UTILITIES AND OPERATING COSTS OF RESTAURANT*

Concessionaire shall pay for all water, gas, heat, power, telephone service, and all other service required to operate the restaurant.

Concessionaire shall be responsible for any and all costs of operation of restaurant. Such costs shall include by way of illustration and not of limitation: All kitchen equipment, supplies and smallwares necessary to operate the restaurant; all food, beverages and other items necessary for operation of the restaurant; and liquor license. Concessionaire shall not be responsible or liable for payment of any real estate taxes or assessments or other taxes of whatever character that may be levied or charged upon the Premises or any part thereof, or any improvements, fixtures, equipment or other property on the Premises, or upon the rights or possessory interest of Concessionaire to use, manage or operate the Premises under this Agreement.

ARTICLE 14 – *QUALITY*

All goods and services sold to the public will be of good quality. Concessionaire shall operate under this Agreement in a good and businesslike manner and will charge prices as shall be reasonable and standard to similar businesses in the area.

ARTICLE 15 – *HEALTH REGULATIONS*

Concessionaire shall comply with all ordinances, statutes, rules and regulations of general application of all governmental bodies, including but not limited to the local police, fire, City and the Niagara County Health Department pertaining to the Premises. Concessionaire shall not use, or suffer or permit any person to use the Premises for any illegal purposes, or for any purpose in violation of any federal, state or municipal law, ordinance, rule, order or regulation or of any ordinance, rule or regulation of general application, and will protect, indemnify and forever save harmless the City of North Tonawanda and its agents, officers and employees from and against any

damage, penalty, fine, judgment, expense or charge suffered, imposed, assessed or incurred for any violation or breach of any law, ordinance, rule, order or regulation occasioned by any act, neglect or omission of Concessionaire or its employees or agents (but not for any act, neglect or omission by the City or its employees or agents for the City responsibilities under this Agreement).

ARTICLE 16 – *EMPLOYER TAXES*

Concessionaire shall comply with all Federal and State Labor and Worker's Compensation Laws and must pay all employer's taxes for Social Security and Unemployment Insurance, and all other taxes which are measured by the wages, salaries or other remuneration paid to persons employed by Concessionaire; and shall comply with sales tax requirements and income tax or other withholding requirements; and shall indemnify and save harmless City from any liability for the payment of such taxes or charges. Concessionaire shall promptly furnish the City, upon request, duplicate receipts or other satisfactory evidence showing the payment of the social security, unemployment compensation and all taxes and fees above referred to and showing that Worker's Compensation insurance and all required licenses are in good standing.

ARTICLE 17 – *PROCESS FOR DISAGREEMENT*

In the event of any unresolved dispute between the City and Concessionaire regarding any matter other than payment of rent, the parties shall submit the dispute to mediation and, if mediation is unsuccessful, then to arbitration, conducted by the American Arbitration Association in accordance with the Commercial Arbitration Rules of the American Arbitration Association as then in effect. Any such mediation shall be held and conducted in Niagara Falls, NY before a mediator who shall be selected by mutual agreement of the parties. Likewise, any such arbitration shall be held and conducted in Niagara Falls, NY before an arbitrator (who shall not have served as the mediator) who shall also be selected by mutual agreement of the parties. The provisions of the Commercial

Arbitration Rules of the American Arbitration Association shall apply to and govern such arbitration, with the exception that the decision of the arbitrator shall be final, and judgment may be entered on it in accordance with applicable law in any court having jurisdiction over the matter. In all cases, the arbitration decision shall provide a reasonable opportunity and time for Concessionaire after the arbitration to first cure any default on its part under this Agreement before any termination of Concessionaire's rights or interests under this Agreement would become effective.

ARTICLE 18 – *DEFAULT*

Each of the following events shall be an event of default under this Agreement:

i) Failure of Concessionaire to pay any installment of Rent or any other payment of money, costs or expenses herein agreed to be paid by Concessionaire, when due, and the continuance of such failure for a period of twenty (20) days after written notice from the City specifying such failure;

ii) Failure of Concessionaire to observe or perform one or more of the other material terms, conditions, covenants or agreements of this Agreement and the continuance of such failure for a period of thirty (30) days after written notice by the City specifying such failure or where such default is not capable of cure within such thirty (30) days, where the Concessionaire has in good faith commenced to remedy such default within such thirty (30) day period;

iii) Concessionaire files a petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency act of any state, or admits the material allegations of any such petition by answer or otherwise, or is dissolved or makes an assignment for the benefit of creditors.

iv) Involuntary proceedings under any such bankruptcy law or insolvency act or for the dissolution of Concessionaire are instituted against Concessionaire, or a receiver or trustee is

appointed for all or substantially all of the property of Concessionaire, and such proceeding is not dismissed or such receivership or trusteeship vacated within sixty (60) days after such institution or appointment.

ARTICLES 19 - INSURANCE AND INDEMNITY

19.1 *Concessionaire's Insurance*. At all times throughout the term of this Agreement and any extensions thereof, Concessionaire shall secure and maintain, at its cost, the following insurance against claims for injuries to persons or damage to property on or about the Premises (which may arise from or in connection with the use or operation of the restaurant and restaurant patio deck by the Concessionaire, its agents, representatives, employees or subcontractors):

(a) Comprehensive General Liability Insurance in an amount not less than One Million Dollars ($1,000,000) combined single limit each occurrence for bodily injury, personal injury or death, and property damage, and not less than Two Million Dollars ($2,000,000) general aggregate limit. Such insurance shall include liquor liability.

(b) Insurance covering fire, extended coverage, vandalism and malicious mischief insurance for the restaurant building and patio deck, including all fixtures therein, in an amount sufficient to cover the full replacement value of Concessionaire's personal property, furniture, trade fixtures and equipment.

(c) Worker's compensation coverage of Concessionaire's employees as required by law.

19.2 *City Insurance*. At all times throughout the term of this Agreement and any extensions thereof, the City shall secure and maintain, at its cost, the following insurance against claims for injuries to persons or damage to property which may arise from or in connection with the Premises by the City, its agents, representatives, employees or subcontractors, and by the public:

(a) Comprehensive General Liability Insurance in an amount not less than One Million Dollars ($1,000,000) combined single limit each occurrence for bodily injury, personal injury or death, and property damage, and not less than Two Million Dollars ($2,000,000) general aggregate limit.

(b) Insurance covering fire, extended coverage, vandalism and malicious mischief insurance for all improvements to Premises, including without limitation the docks and all buildings and improvements in an amount sufficient to cover the full replacement value thereof.

19.3 *All Policies Requirements*.

(a) Each insurance policy (other than workers compensation coverage) shall be endorsed to state that coverage shall not be canceled by either party, reduced in coverage or in limits, except after thirty (30) days prior written notice has been given to the both the City and Concessionaire and shall be primary and not contributing to any other insurance or self-insurance maintained by City or Concessionaire.

(b) Acceptable insurance coverage shall be placed with carriers admitted to write insurance in the state of New York, or carriers with a rating of or equivalent not less than B:VI by A.A. Best & Company.

19.4 *Obligations to Provide Annual Certificates of Insurance*.

Upon execution of this Agreement, each party shall deliver to the other, appropriate certificates for each policy of insurance required by this Agreement. Each party further agrees to deliver to the other party sufficient evidence of each future policy not later than thirty (30) days after the commencement date for each such policy.

19.5 *Indemnity and Hold Harmless*. Unless due to the negligent, intentional or willful misconduct of the City, its employees, officers and/or agents, or breach of this Agreement by the City, the City shall not be liable for death, injury, or damage of any kind to persons or property from any cause whatsoever by reason of the use and occupancy of the restaurant building or patio deck by Concessionaire, its agents, servants, employees, or invitees, and Concessionaire hereby waives all claims and causes of actions against the City for any such injury or damage as well as for consequential damages, loss of profits, and business interruptions. The City shall not be liable to Concessionaire, its agents, servants, employees, or invitees for any damage, loss, or injury caused by the condition or design of, or any defect in, the restaurant building or patio deck, unless the loss, damage, or injury is the result of the negligence, intentional or willful misconduct of the City or its duly authorized employees, officers, or agents.

Concessionaire agrees to defend and indemnify the City and hold it harmless and free from and against any and all liability, loss, cost, expense, or obligation (including without limitation, reasonable attorneys' fees, court costs, and other expenses incurred by City) on account of or arising out of the use of the restaurant building and patio deck by Concessionaire unless such liability, loss, cost, expense or obligation is due to the breach of this Agreement by the City or to negligence, intentional or willful misconduct of the City, its officers, employees or agents.

19.6 *Waiver of Subrogation*. Each insurance policy under this Article shall include a waiver of subrogation against the other party, no coinsurance or contribution clause, and with respect to the property damage insurance, a replacement cost endorsement.

ARTICLE 20 - *FORCE MAJEURE*

In the event that Concessionaire's ability to perform under this Agreement is rendered impossible or impractical by Acts of God (including fire, flood, winds, storm and/or earthquake), war, civil unrest or strife, terrorist acts or threats, or labor unrest or stoppages or other cause beyond the reasonable control of Concessionaire ("Force Majeure"), Concessionaire's obligations to keep the restaurant in operation shall be suspended for such time until such Force Majeure condition ceases.

ARTICLE 21 – NO LEASE OR JOINT VENTURE

It is understood and agreed that Concessionaire is a licensee ,and not a lessee, under this Agreement and that no real or personal property is leased to Concessionaire hereunder. Further, nothing herein contained shall create or be construed as creating a co-partnership or joint venture between the City and Concessionaire or to constitute Concessionaire as agent or employee of the City. The provisions of this Agreement relating to percentage rent are provided solely for the purpose of providing a method whereby the rent which is payable hereunder is to be measured and ascertained.

ARTICLE 22 – *CITY IN OFFICIAL CAPACITY*

It is expressly understood and agreed by and between the parties that the employees and their officers and agents of City are acting in a representative capacity and not for their own benefit, and that Concessionaire shall have any claim against them or any of them as individuals in any event whatsoever.

ARTICLE 23 – *FUNDS FOR IMPROVEMENTS*

As to the obligations of the City with respect to the agreed upon City Improvements after and beyond the First Phase shown on Exhibit B and B1, such City Improvements in the Future Phase may be completed in segments, and shall be subject to availability and timing of municipal funding sources, which City agrees to diligently pursue.

ARTICLE 24 – *NOTICES*

Any notices to be given hereunder shall be by certified or registered mail, returned receipt requested, postage prepaid and addressed to the parties hereto as follows, and shall be effective three (3) business days from mailing:

To Concessionaire:

Lumberjack's Patio Grill, LLC

1000 River Road

North Tonawanda, NY 14120

With copy to:

Lumberjack's Patio Grill, LLC

8191 E. Kaiser Blvd.

Anaheim, CA 92808

Attention: Carol Tallichet

To the City:

Director of Youth, Recreation and Parks

216 Payne Avenue, City Hall

North Tonawanda, NY 14120

ARTICLE 25 – *NON-COLLUSION*

Concessionaire agrees to comply with the provisions of Section 103-a and 103-b of the General Municipal Law and Sections 220 and 220-c of the Labor Law.

ARTICLE 26 – *AMENDMENTS*

Any amendments to this Agreement must be mutually agreed upon and evidenced by a written memorandum signed by both parties. It is expressly represented that this written agreement constitutes the entire agreement between City and Concessionaire and that there are no other representations other than those set forth herein.

ARTICLE 27 - *ATTORNEYS' FEES AND COSTS*

In the event of the bringing of any legal action, arbitration, proceeding or suit by a party hereto against the other party hereto, by reason any breach of any of the covenants, conditions or provisions on the part of the other party hereto arising out of this Agreement, then and in that event the party in whose favor final judgment shall be entered shall be entitled to have and recover from the other party all costs and expenses of suit, including reasonable attorneys' fees.

ARTICLE 28 - *QUIET ENJOYMENT*

The City covenants that, if and so long as Concessionaire shall faithfully perform the agreements, terms, covenants and conditions hereof, Concessionaire shall and may peaceably and quietly have, hold, use, operate and enjoy the Premises for the term hereby granted without molestation or disturbance by or from the City.

ARTICLE 29 - *INVALIDITY OF CERTAIN PROVISIONS*

If any term or provision of this Agreement or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Agreement,

or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

ARTICLE 30 - *SUCCESSION OF INTEREST*

All of the agreements, terms, provisions, and conditions of this Agreement shall be binding upon and inure to the benefits of the parties hereto and their respective successors and assigns.

Concessionaire shall not in whole or in part sublet or sublicense the Premises (other than the boat slip spaces within the marina) or transfer or assign this Agreement or its rights, interests and privileges hereunder to a third party, unless such sublease, sublicense, transfer or assignment is first approved in writing by the City, which approval shall not be unreasonably withheld, delayed or conditioned.

ARTICLE 31 - *COVENANT OF GOOD FAITH*

The parties mutually agree that each shall be bound by the covenant of good faith and fair dealing. The City, when its consent is required, shall not unreasonably withhold, delay or condition same.

ARTICLE 32 - *COUNTERPART EXECUTION*

This Agreement may be executed in counterparts, and when so executed, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

ARTICLE 33 – *DAMAGE OR DESTRUCTION*

If the restaurant building is partially damaged by fire, elements or other casualty, the same shall be repaired with due diligence by the City at its own cost and expense (whether or not

insured for loss by the City) and the operation of the restaurant may be suspended by Concessionaire until the repairs are completed. If the damage shall be so extensive as to render such building untenable, the same shall be promptly restored and rebuilt by the City at its own cost and expense (whether or not insured for loss by the City), however if within six months after the time of such damage the restaurant building has not been fully restored or rebuilt by the City, then Concessionaire may elect to terminate this Agreement by written notice to the City.

IN WITNESS WHEREOF, the City of North Tonawanda has caused its corporation seal to be hereunto affixed and these presents to be duly signed by its authorized officer, and Lumberjack's Patio Grill, LLC, as Concessionaire, by its authorized manager, and they hereunto set their hands and seal on behalf of themselves as of the day and year below indicated.

CITY OF NORTH TONAWANDA, NY

Robert G. Ortt, Mayor
STATE OF NEW YORK)
COUNTY OF NIAGARA) ss.
CITY OF NORTH TONAWANDA)

LUMBERJACK'S PATIO GRILL, LLC

By:
Carol Tallichet, Manager

STATE OF NEW YORK)
COUNTY OF NIAGARA) ss.
CITY OF NORTH TONAWANDA)

On this 15th day of ~~February~~ March 2012, before me personally came ROBERT G. ORTT, to me personally known, who being by me duly sworn, did depose and say that he is the Mayor of the City of North Tonawanda, New York, the corporation described in and which executed the above Instrument; that he knows the corporate seal of said corporation; that the seal affixed to said Instrument is such corporate seal; that it was so affixed by order of the Common Council of the City of North Tonawanda, New York, and that he signed his name thereto by like order.

Robert W. Welch
Notary Public

ROBERT W. WELCH
Notary Public, State of New York
No. 01WE5071879
Qualified in Erie County
My Commission Expires January 21, 2015

STATE OF California)
COUNTY OF Orange) ss.
CITY OF Anaheim)

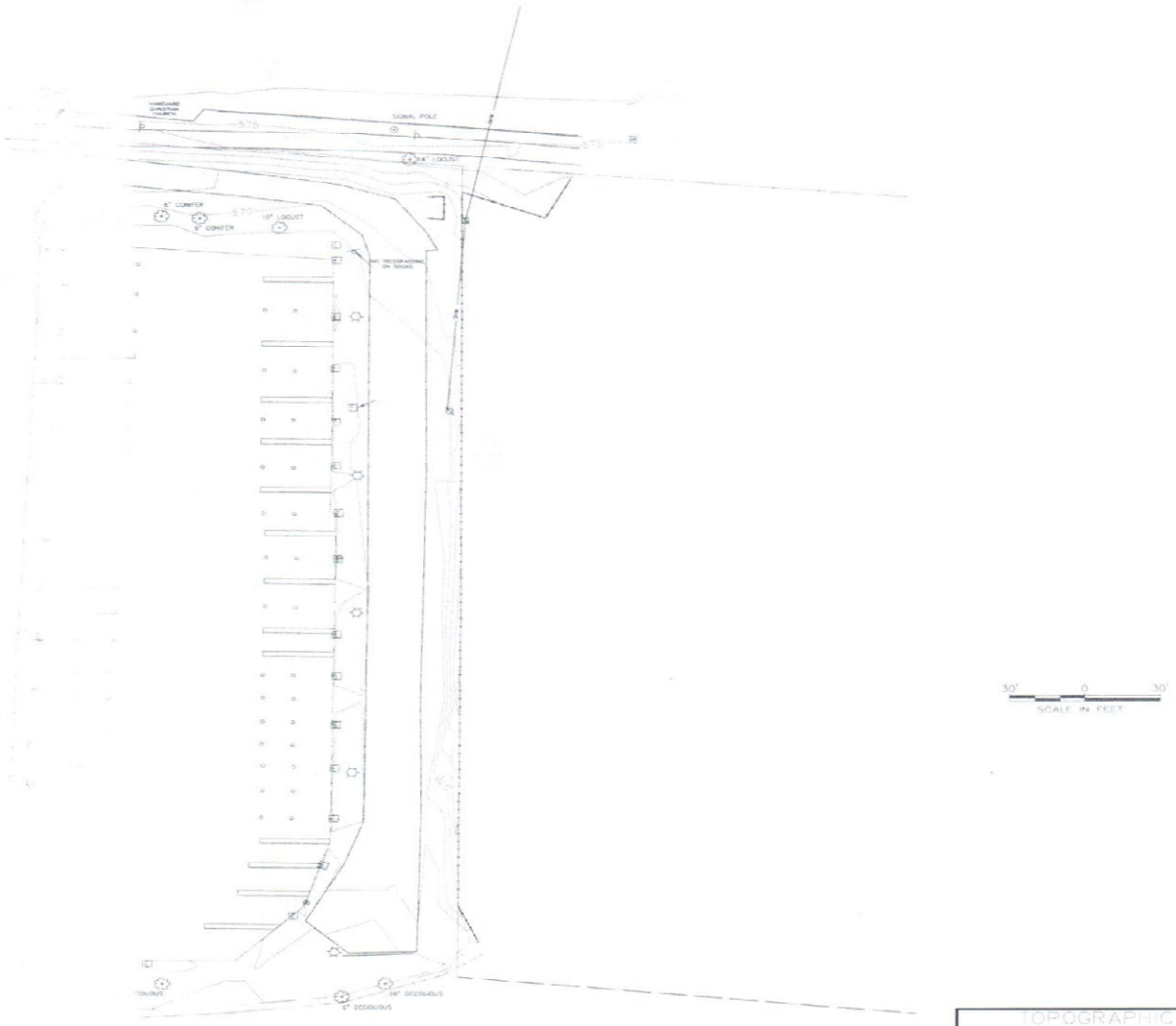
On this 22nd day of February 2012, before me personally came CAROL TALLICHET, to me personally known, who being by me duly sworn, did depose and say that she resides in the City of Niagara Falls, NY; that she is the Manager of the limited liability company described in and which executed the above Instrument; that she knows the seal of said company; that the seal affixed to said instrument is such company seal; that it was so affixed by order of the Members of such company, that she signed his name thereto by like order.

LYNETTE M. KELLUM
Commission # 1883166
Notary Public - California
Orange County
My Comm. Expires Mar 21, 2014

Lynette M. Kellum
Notary Public

EXHIBIT A
Map of Premises

TERIAL ROUTE



NO IRONS SET OR FOUND AT PROPERTY CORNERS UNLESS NOTED HEREON

NOTE: THIS SURVEY WAS PREPARED WITHOUT THE BENEFIT OF AN ABSTRACT OF TITLE AND IS SUBJECT TO ANY STATE OF FACTS THAT MAY BE REVEALED BY AN EXAMINATION OF SAME.

NOTE: UNAUTHORIZED ALTERATIONS OR ADDITIONS TO ANY SURVEY DRAWING, DESIGN, SPECIFICATION, PLAN, OR REPORT IS A VIOLATION OF SECTION 7209, PROVISION 2 OF THE NEW YORK STATE EDUCATION LAW.

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TOPOGRAPHIC SURVEY

GRATWICK PARK MARINA

Nussbaumer & Clarke, Inc.

3556 Lake Shore Road
Buffalo, New York 14219-1494
(716) 827-8000
www.nussclarke.com

DRAWN BY:	REV.	SHEET NO.
DATE:	JOB NO.	OF
SCALE:	DWG. NO.	

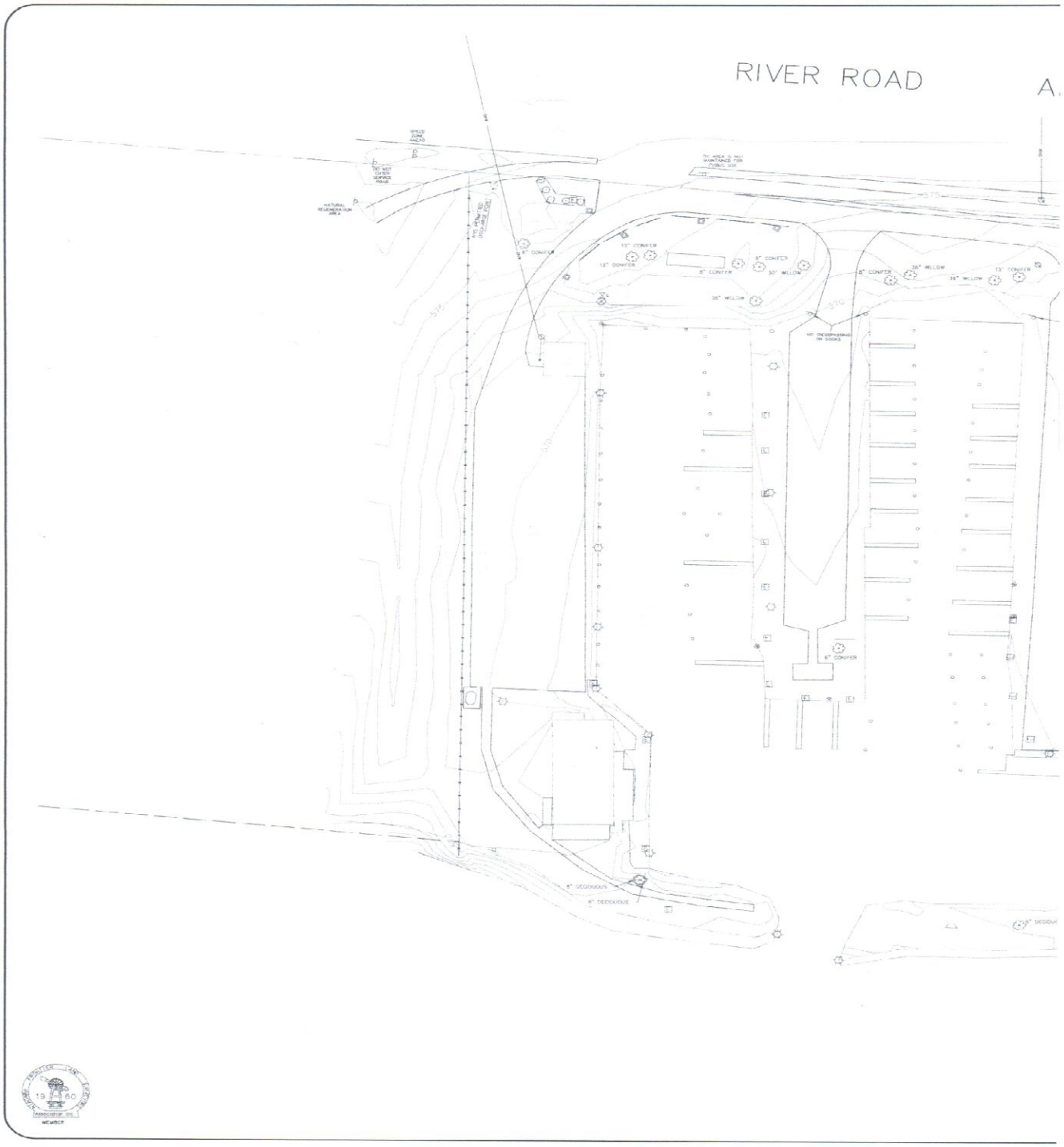

RIVER ROAD
A.
SPEED ZONE AHEAD
DO NOT ENTER SERVICE ROAD
NATURAL REGENERATION AREA
THIS AREA IS NOT MAINTAINED FOR PUBLIC USE
6" CONIFER
12" CONIFER
12" CONIFER
8" CONIFER
8" CONIFER
30" WILLOW
36" WILLOW
6" CONIFER
36" WILLOW
36" WILLOW
13" CONIFER
NO TRESPASSING ON DOCKS
6" CONIFER
6" DECIDUOUS
6" DECIDUOUS
19 60
Association Inc
MEMBER

EXHIBIT B
City Improvements

SCOPE OF CITY IMPROVEMENTS FOR "FIRST PHASE" TO BE COMPLETED BY JULY 15, 2012:

- Design and install sanitary sewer for restaurant operation including grinder pump station with capacity to service restroom facility where the existing garage is located.

- Design and install an additional parking lot, driveway and pathways on the adjacent parkland connecting to the existing parking lot located on the Premises, with appropriate asphalt pavement to match existing parking lot, and related drainage improvements.

- Perform a bathymetric of the first inlet (the inlet adjacent to the existing building and parking lot) and entrance waterway of the marina. The City shall review (and adopt and complete, if feasible, in the First Phase), the consultant's recommendations regarding potential dredge volumes, safe boating depths, permit requirements and costs associated with removing and disposing of dredged materials. In the event this work is not feasible to be performed in the First Phase, the City is committed to complete this work in the "Future Phase."

- Restore/replace the bulkhead from the fire pit point extending along the entire water perimeter of the first inlet (inlet nearest to the restaurant) of the marina (both sides) as shown on Exhibit B1 (to be performed in the First Phase or Future Phase when the federal grant funds are available for use by the City under the Boating Infrastructure Grant (BIGP) Program).

- Design and install the pedestrian boardwalk with protective railing and lighting from the fire pit point extending along the entire perimeter of the first inlet of the marina (both sides) as shown on Exhibit B1.

- Resurface (with at least a 1" asphalt lift) and restripe the existing parking lot and driveways.

- Design and install landscaping, parking and trail lights and other outside lighting for the First Phase area shown on Exhibit B1.

- Concessionaire shall design and install the metal roof and sign on the restaurant building and the matching roof on the public restroom facility, install a new billboard sign, facings and electrical lighting (or restore, if usable, the existing billboard sign if it is not removed by the sign company Lamar upon termination of its lease), and install a gas line and gas fire pit on the marina point (as shown on the conceptual plans in Exhibit C), and once these items are completed, the City shall reimburse Concessionaire for the entire documented cost paid by Concessionaire relating to these items.

- Design and install the circular drive and trash enclosure and receptacles adjacent to the restaurant building, and trash receptacles in appropriate areas within the parking lot, walks and landscaped areas of the First Phase.

- Repaint the lighthouse.

- Design and improve traffic access, flow and safety off River Road to the Premises.

- Trim trees located along River Road on the Premises.

***SCOPE OF CITY IMPROVEMENTS FOR "FUTURE PHASE" TO BE COMPLETED AS FUNDING BECOMES AVAILABLE*:**

- Dredge and restore the second and third inlets of the marina, and restore/replace the bulkhead along the entire perimeter of marina as shown on Exhibit B1.

- Install a floating dock (8' x 64') with gangway to provide side tie and safe access to the pedestrian boardwalk for visiting boaters (along the boardwalk segment nearest to the restaurant).

- Design, install/restore at least 50 boat slips (docks) and related boating facilities.

- Design and convert the existing garage to a public restroom facility or demolish the existing garage and design and build a new public restroom facility in its place.

- Design and install pedestrian walkways, trails, trail lights, benches, and paved drive access and parking for the Future Phase as depicted on Exhibit B1.

- Design and install (or restore) iconic element.

- Install landscaping, lighting and trash receptacles.

EXHIBIT B1
PHASING SITE PLAN

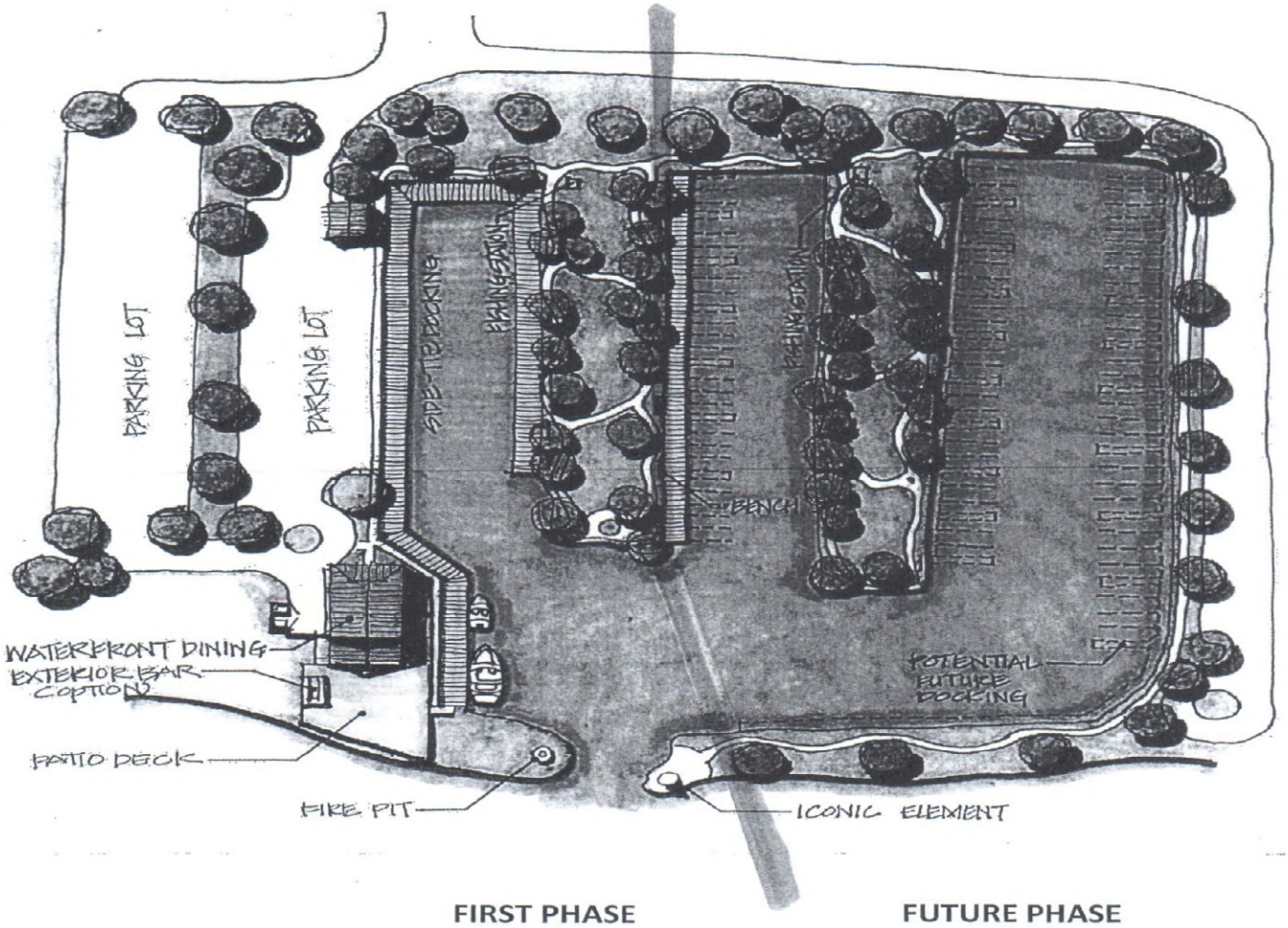
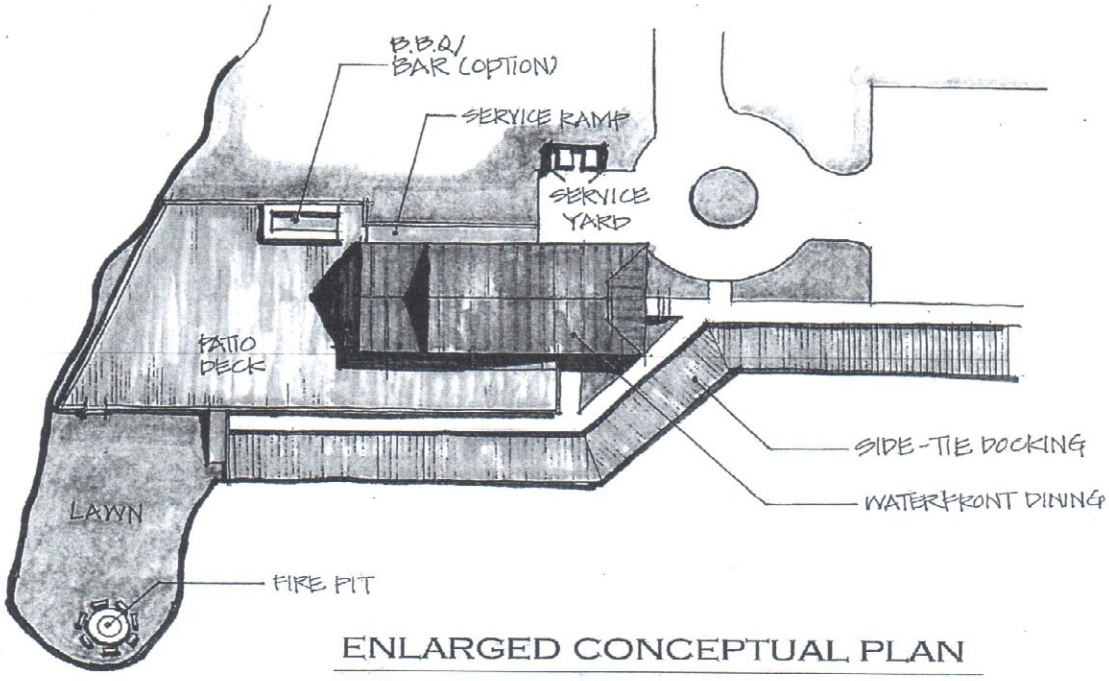

PARKING LOT
PARKING LOT
SIDEWALK
PARKING STALL
PARKING STALL
BENCH
WATERFRONT DINING
EXTERIOR BAR
(OPTION)
PATIO DECK
FIRE PIT
ICONIC ELEMENT
POTENTIAL
FUTURE
DOCKING
FIRST PHASE
FUTURE PHASE

EXHIBIT B1

EXHIBIT C
Conceptual Site Plan of Restaurant Remodeling

CONCEPTUAL SITE PLAN



ENLARGED CONCEPTUAL PLAN

EXHIBIT C