



City Council Memorandum

To: Mayor Hicks & City Council Members
From: Nick Egger – Public Works Director
Date: September 15, 2016
Item: Authorize Completion of Agreement Process and Application of Signatures – License to Encroach – Vista Rio Patio Expansion

COUNCIL ACTION REQUESTED

Council is requested to authorize staff to complete agreement negotiations and to authorize the signatures of the Mayor and City Clerk granting a license to encroach to the (Bella) Vista Rio Restaurant for their proposed patio expansion project.

BACKGROUND INFORMATION

The City has been working with MnDOT and the owners of the Vista Rio Restaurant since 2015 to make arrangements for the restaurant to install a patio within some of the space currently occupied by a planting bed adjacent to the Bridge plaza and trail connecting 2nd Street with the Riverfront. MnDOT released this space to the City in late 2015 and the City has certain authority to regulate uses of the Bridge plaza and adjacent spaces for public event activities and private business operations. Since then, the City has facilitated follow up conversations with members of the Bridge project Visual Quality Team and with MnDOT to gain consensus on the final scope and aesthetics of what will be allowed for the proposed patio project.

The restaurant intends to install pavers that would match those within the existing Bridge plaza, to install a black decorative metal fence to help enclose the area (as required under the Sidewalk Café ordinance, and to retain/reposition many of the existing plants around the perimeter of the patio to retain a softened edge and congruence with the Bridge project landscaping. Plants removed from the site are intended to be provided to the City for reuse elsewhere nearby or at a City public/park space as determined by staff. A copy of the approved concept plan has been attached for reference.

One of the last steps before construction can occur is to enter into an agreement to allow for the restaurant to perform construction work to modify the space to turn it into a patio, and to occupy the space for business purposes thereafter. The attached agreement was drafted by the City Attorney and is currently in the hands of the restaurant owners for their review and feedback. This agreement outlines the conditions under which the applicant is allowed to modify and use the space, all of which must be lawful City ordinances. The agreement contains several provisions allowing for the termination of the license if the City determines there is a higher public purpose for the space and/or a developing public safety concern, for circumstances under which the restaurant ceases to exist due to relocation or financial insolvency, as well as for an event that constitutes violations of the Sidewalk Café ordinance. The City also reserves the authority to require restoration of the space to its pre-construction conditions if the license should be terminated.

Although we have not yet received feedback from the restaurant on the agreement language, we are not anticipating substantive requests for changes to the document, and are recommending that staff be provided with the ability to administratively complete the agreement process. Once completed, the Mayor and City Clerk, along with the owner of the restaurant, would apply their signatures.

FINANCIAL IMPACTS

Outside of staff time investment in working through this process and forthcoming construction, the City will not

have any out-of-pocket expenses towards this project. Vista Rio will be responsible for all construction costs and cleanup work. Vista Rio will also be required to pay applicable SAC/WAC charges to MetCouncil and to the City corresponding with the requirements of the Sidewalk Café ordinance. Administrative Services will process an amended application for the changes to the amount of patio space and the Building Department will collect the SAC/WAC fees.

STAFF RECOMMENDATION

Staff recommends that the Council grant for staff to finish the agreement process with Vista Rio, and that the Mayor and City Clerk are granted authorization to apply their signatures once the agreement document reaches its final state.

ATTACHMENTS

A copy of the patio layout/construction plan, along with the license agreement (draft), and pertinent site exhibits are attached for reference.

LICENSE TO ENCROACH UPON RIGHT-OF-WAY

This License Agreement (“Agreement”) is made on September ____, 2016, by and between the City of Hastings, a Minnesota Municipal Corporation with a business address of 101 East 4th Street, Hastings, MN 55033 (“City” or “Licensor”), and Due Olives, LLC, a Minnesota limited liability company, doing business as Vista Rio, having a registered office address of 101 2nd Street East, Hastings, MN 55033 (“Licensee”).

IN CONSIDERATION of the mutual promises contained in this Agreement, the parties agree as follows:

RECITALS

- A. The City is a municipality owner of the platted and improved street and sidewalk right-of-way for Vermillion Street, also known as Trunk Highway 61, as the same is depicted on the plat of the Town of Hastings on file and of record in the Office of the County Recorder, Dakota County, Minnesota and on the Department of Transportation-Commissioner’s Order Map for Commissioner’s Order No. 94959 dated July 6, 2015 (“Commissioner’s Order No. 94959”). The portion of said right-of-way which is subject to this Agreement includes that portion of the Vermillion Street right-of-way used for public sidewalk purposes as shown on the plat of the Town of Hastings and lying immediately adjacent to and westerly of the Subject Property (as defined below) together with that portion of said right-of-way called out as the Area of Impact on the attached Exhibit A, being a marked up copy of Commissioner’s Order No. 94959. All of the foregoing identified right-of-way which is subject to this Agreement is collectively hereinafter referred to as “the Subject Right-of-Way”.

- B. The City has authority to regulate public access, parking and vending and commercial uses of the areas defined as the Parking and Plaza Area (“Parking and Plaza Area”) under Amendment #5 to MnDOT Cooperative Construction agreement #95243. The Subject Right-of-Way is contained within a portion of the Parking and Plaza Area.

- C. Licensee is the lessee of real property in Dakota County, Minnesota located generally at 101 East 2nd Street, Hastings, MN 55033 and legally described as the West 1/3rd of Lot 5, Block 4, Town of Hastings, according to the recorded plat thereof, Dakota County, Minnesota (hereinafter referred to as “the Subject Property”).
- D. Licensee has been granted a license under City of Hastings Ordinance Section 90.16 to operate a Sidewalk Café within the Subject Right-of-Way immediately adjacent to the Subject Property (“Sidewalk Café License”).
- E. Licensee proposes to construct, at its cost, improvements for the purpose of operating a Sidewalk Café within the Subject Right-of-Way (said improvements being hereinafter referred to as the “Sidewalk Café Improvements”) which, as proposed, will include patio pavers, fencing, and landscape features, which Licensee will use together with movable personal property including tables, chairs, patio lounge furniture and a portable fire pit as described and depicted on the site plan attached hereto as Exhibit B.
- F. The parties desire to enter into an agreement whereby Licensor will grant to Licensee permission to install the Sidewalk Café Improvements and to operate a Sidewalk Café within the Subject Right-of-Way, subject to certain restrictions and conditions including but not limited to those set forth in the Sidewalk Café License and those applying to the Parking and Plaza Area.

NOW, THEREFORE, in consideration of the mutual promises contained in this Agreement, the parties agree as follows:

Section 1. Grant of Licensee; Description of Premises.

Licensor grants to Licensee a license to occupy and use, through the construction and lawful use of the Sidewalk Café Improvements as a Sidewalk Café, subject to all of the terms and conditions of this Agreement, the Sidewalk Café License and all requirements and restrictions applicable to the Parking and Plaza Area, the property located within the Subject Right-of-Way in the City of Hastings, County of Dakota, State of Minnesota, being that portion of the Vermillion Street right-of-way shown on the plat of the Town of Hastings and lying immediately adjacent to and westerly of the Subject Property together with that area depicted and called out as the Area of Impact on the attached Exhibit A (hereinafter collectively referred to as “the Encroachment Area”). Licensee shall not improve or expand the Sidewalk Café Improvements within the Encroachment Area in any manner that would increase the scope of the encroachment within the Subject Right-of-Way. Licensor shall retain the right to temporarily remove or cause to be removed any tables, chairs, furnishings, planters, fences or other obstructions from the Encroachment Area as necessary to access public utilities and facilities, during community civic festivals, celebrations and other events, or if the City reasonably determines any such item or items create an unreasonable risk to public health or safety. The City shall endeavor to give reasonable advance notice to the Licensee that

items need to be removed or relocated.

Section 2. Limitation to Described Purpose.

The Encroachment Area may be occupied and used by Licensee through the construction and continued use of the Sidewalk Café Improvements as a Sidewalk Café, and for incidental purposes relating to such purposes, during the period beginning on the date of this Agreement, and continuing in perpetuity or until this Agreement is terminated as provided in this Agreement.

Section 3. Conditions Precedent to Notice to Proceed; Sureties and Fees.

Before Licensee commences any work within the Encroachment Area, Licensee shall post with the City an irrevocable letter of credit or cash escrow in the amount of 125% of the estimated costs required for the proposed work and improvements within the Encroachment Area. In addition, Licensee shall post a cash escrow in an amount determined by the City's Public Works Director to reimburse the City for inspection fees the City may incur for inspections of the Sidewalk Café Improvements. Licensee's engineer shall submit to the City a thorough, line-item style construction cost estimate based on complete, City-approved plan documents and contracted construction unit costs to determine (1) the value of the required letter of credit or cash escrow amount; and (2) the cash escrow amounts for inspection fees. The letter of credit required by this Agreement shall be in a form reasonably acceptable to the City and issued by a company or bank licensed to do business in Minnesota. The Licensee may not place any personal property or equipment, undertake any work, excavation or grading, or construct any improvements within the Encroachment Area until all of the following conditions precedent have been satisfied: (1) this Agreement has been executed by the Licensee and the City and been recorded with Dakota County; (2) all required escrows and letters of credit have been received by the City from or on behalf of the Licensee; (3) all required erosion control measures are in place; and (4) the City has issued a notice that all conditions precedent have been satisfied and that the Licensee is authorized to proceed with the work. No license payments shall be required of Licensee during the term of this Agreement.

Section 4. Condition of Premises Not Warranted.

Licenser does not warrant or represent that the Encroachment Area is safe, healthful, or suitable for the purposes for which it is permitted to be used under the terms of this Agreement.

Section 5. Insurance and Indemnification of Licenser.

Licensee shall at all times maintain commercial liability insurance covering the premises licensed under the Sidewalk Café License and the Encroachment Area and all areas within the Subject Right-of-Way used by Licensee as a sidewalk café with minimum policy limits for bodily injury or death of not less than \$1,000,000 per occurrence and \$1,000,000 annual aggregate and for property damage of not less than \$50,000. Proof of the required liability insurance shall be in the

form of a certificate of insurance or some other form reasonably acceptable to the City. All liability insurance policies required herein shall name the City as an additional insured and shall provide that there shall be no cancellation of the policy for any cause, by the insured or by the insurance company, without first giving 10-days' written notice to the City, addressed to the City Clerk. Operation of a sidewalk café or liquor sales by the Licensee without required liability insurance coverage shall be grounds for immediate suspension or revocation of the license granted pursuant to this Agreement. Licensee shall indemnify and hold the City, the City's public officials, employees and agents harmless from and against any and all liability, claims, demands, actions, and causes of action, including expenses and reasonable attorneys' fees, for personal injuries, property damage, or for loss of life or property resulting from, or in any way connected with, Licensee's use of the Encroachment Area and any portion of the Subject Right-of-Way occupied or used by Licensee, including any area used for means of ingress or egress from such premises, except liability for personal injuries, property damages, or loss of life or property caused solely by the negligence or willful misconduct of the City. Licensee shall implement and enforce strict procedures to ensure no alcohol is sold or provided to minors or allowed outside of the area subject to the Sidewalk Café License.

Section 6. Licensee Has No Interest or Estate.

Licensee agrees that Licensee does not and shall not claim at any time any interest or estate of any kind or extent whatsoever in the Encroachment Area or any other portion of the Subject Right-of-Way property by virtue of the rights granted under this Agreement or Licensee's occupancy or use of the above-described property of Licensor under this Agreement.

Section 7. Termination.

- A. Licensee may terminate the License granted under this Agreement at any time, by giving written notice to Licensor, specifying the date of termination, such notice to be given not less than ten days prior to the date specified in such notice for the date of termination, and subject to the requirements of Licensee for restoration set forth below.
- B. Licensor may terminate the License granted under this Agreement at any time by written notice to Licensee if Licensee ceases to use the Encroachment Area and the Sidewalk Café Improvements as a Sidewalk Café for a period of more than ninety (90) consecutive days. Inactivity due to seasonal restrictions imposed by the Sidewalk Café License shall not constitute a cessation of use by Licensee under this section unless Licensee otherwise manifests an intent to cease operations of a Sidewalk Café.
- C. Should the Sidewalk Café Improvements on the Subject Property be destroyed by any means to an extent of more than 50% of its replacement cost at the time of destruction, this Agreement shall automatically terminate ninety (90) days after the date such destruction occurs, unless the parties agree in writing to continue the term of the Agreement and

provided that Licensee shall be obligated to perform the requirements and obligations for restoration following termination as set forth in this Agreement.

- D. Licensors may terminate this Agreement for cause at any time, by giving written notice to Licensee, specifying the date of termination, and subject to the requirements of Licensee for restoration set forth below. Termination for cause shall include but not be limited to a material violation by Licensee of any requirement or condition of the Sidewalk Café License, a violation of any liquor license issued to Licensee, a violation of any Minnesota Statute or City Ordinance applicable to Licensee, or a reasonable determination by Licensors that the use of the Encroachment Area creates a substantial danger or hazard to the public, or that the City must reasonably make use of the Encroachment Area for a different public purpose.
- E. If Licensee, its successors or assigns shall make an assignment of its interests under this Agreement for the benefit of creditors, or be placed in receivership or adjudicated a bankrupt, or take advantage of any bankruptcy or insolvency law, Licensors may terminate this Agreement by giving written notice to the Licensee, specifying the date of termination, such notice to be given not less than ten days prior to the date specified in such notice for the date of termination.

Section 8. Restoration.

Upon termination of the license rights granted under this Agreement, Licensee must, at Licensee's sole expense, restore that portion of the Encroachment Area and the Subject Right-of-Way subject to this License to a condition that existed prior to installation and construction of the Sidewalk Café Improvements, reasonably approved by the Public Works Director for the City of Hastings, which shall include, but not be limited to, removal of all debris and foundation material, removal of all patio pavers, filling with appropriate material all excavated areas, reasonable grading of the resulting surface, repair and restoration of all sidewalk areas, seeding to prevent erosion, and installation of aesthetically pleasing plants and landscape materials. All such work must be completed in a good and workman like manner to Licensors's reasonable satisfaction.

Section 9. Assignment by Licensee.

This Agreement is personal to Licensee and Licensee may not assign, without Licensors's consent, Licensee's rights hereunder. Upon any attempt by Licensee to assign its interest to an individual or entity without the consent of Licensors, this Licensee shall automatically terminate provided that Licensee shall be obligated to perform all indemnification and restoration obligations of Licensee under this Agreement.

Section 10. Governing Law.

This Agreement shall be governed by, construed, and enforced in accordance with the laws of

the State of Minnesota. Any action to enforce or interpret this Agreement shall be venued in the Dakota County District Court in Minnesota.

Section 11. Entire Agreement.

This Agreement constitutes the entire Agreement between the parties and any prior understanding where representation of any kind proceeding the date of this Agreement shall not be binding on either party except to the extent incorporated in this Agreement.

Section 12. Modification of Agreement.

Any modification of this Agreement or additional obligation assumed by either party in connection with this Agreement shall be binding only if evidenced in writing signed by each party or an authorized representative of each party.

Section 13. Notices.

Any notice provided for or concerning this Agreement shall be in writing and shall be deemed sufficiently given when sent by certified or registered mail if sent to the respective address of each party as set forth at the beginning of this Agreement or, in the case of assignment, to an address provided by the assigning party, by certified or registered mail, to the opposite party, at least ten days prior to the date of such notice.

Section 14. Attorney Fees.

If any lawsuit is filed in relation to this Agreement, the unsuccessful party in the action shall pay to the successful party, in addition to all these sums that either party may be called on to pay, a reasonable sum for the successful party's reasonable attorney's fees.

Dated this __ day of _____, 2016.

LICENSOR

**CITY OF HASTINGS, A MINNESOTA
MUNICIPAL CORPORATION**

By: _____
Paul J. Hicks, Mayor

FLUEGEL LAW FIRM P.A.

Daniel J. Fluegel, Attorney
999 Westview Drive, Suite #1
Hastings, MN 55033
651-438-9777

DRAFT

**EXHIBIT A
ENCROACHMENT AREA**

See Attached Depiction

DRAFT

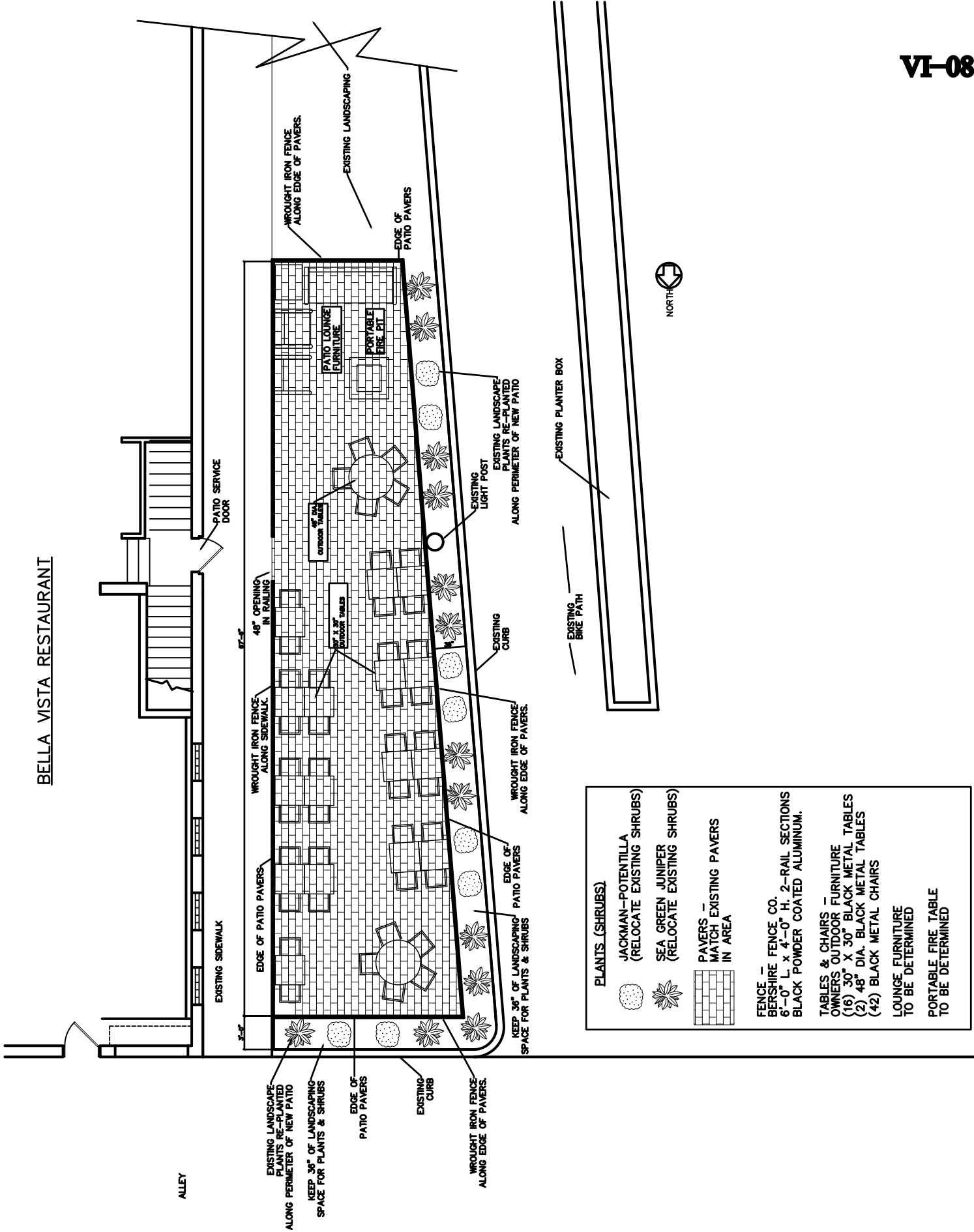
**EXHIBIT B
SITE PLAN**

See Attached Depiction



DRAFT




BELLA VISTA RESTAURANT



PLANTS (SHRUBS)

-  JACKMAN-POTENTILLA (RELOCATE EXISTING SHRUBS)
-  SEA GREEN JUNIPER (RELOCATE EXISTING SHRUBS)

PAVERS - MATCH EXISTING PAVERS IN AREA

 FENCE - BERSHIRE FENCE CO. 6'-0" L. x 4'-0" H. 2-RAIL SECTIONS BLACK POWDER COATED ALUMINUM.

TABLES & CHAIRS - OWNERS OUTDOOR FURNITURE

- (16) 30" X 30" BLACK METAL TABLES
- (2) 48" DIA. BLACK METAL TABLES
- (42) BLACK METAL CHAIRS

LOUNGE FURNITURE TO BE DETERMINED

PORTABLE FIRE TABLE TO BE DETERMINED

