

Order 294-07/08

Passage: 6/16/08 9-0

EDWARD J. SUSLOVIC (MAYOR)
KEVIN J. DONOGHUE (1)
DAVID A. MARSHALL (2)
DANIEL S. SKOLNIK (3)
CHERYL A. LEEMAN (4)

CITY OF PORTLAND
IN THE CITY COUNCIL

JAMES I. COHEN (5)
JOHN M. ANTON (A/L)
JILL C. DUSON (A/L)
NICHOLAS M. MAVODONES (A/L)

ORDER DECLARING “MACHIGONNE” (AS A FESTIVAL AND APPROVING CONTRACT AND PERMITS THEREFOR

ORDERED, that Friday August 22, 2008, Saturday August 23, 2008, and Sunday August 24, 2008, are hereby declared “The Machigonne Festival” and the City Manager is authorized to grant permits to MENSK the organizers of “Machigonne”, pursuant to Sec. 25-27 of the Portland City Code for the following activities:

Use of Lincoln Park from 7:30 pm on Friday, August 22, through 7:30 am on Sunday, August 24, with a concert to be held rain or shine from 5:30 p.m. Saturday, August 23, through 11:00 p.m. Saturday, August 23; any and all public announcement (PA) and other speakers or amplifiers used to amplify music or other sound shall be maintained at a reasonable level and be configured by MENSK’s contractor and the City to focus volume on the park and its immediate environment.

BE IT FURTHER ORDERED, that under no circumstances may alcoholic beverages be sold on the streets or public property, except the sale and consumption of alcoholic beverages will be permitted solely in the Beverage Services area of Lincon Park from 4:30 p.m. Saturday to 10:00 p.m. Saturday;

BE IT FURTHER ORDERED, that MENSK shall reimburse the City for all expenses incurred by City Departments in connection with the Festival;

BE IT FURTHER ORDERED, that MENSK shall defend, indemnify and hold harmless the

City of Portland, its officers and employees, from and against all claims arising out of or resulting from the Festival, its activities and/or use of City streets and property for said Festival, and shall procure and maintain commercial general liability, including contractual liability, insurance in the minimum amount of One Million Dollars (\$1,000,000) combined single limit for personal or bodily injury, death or property damage and covering the obligation of indemnification hereunder, and naming the City of Portland as an additional insured thereon; the Committee shall further provide liquor liability insurance covering the sale and consumption of alcoholic beverages;

BE IT FURTHER ORDERED, that the City Manager is authorized to enter into the Agreement attached hereto for the use of Lincoln Park on August 22-24th, and the provisions of said Agreement shall control the use of said Park;

BE IT FURTHER ORDERED, that Festival areas will be closed to street vendors pursuant to Section 19-17 of the Portland City Code and the City Manager is authorized to issue such other temporary licenses for the Festival, including licenses for food service establishments, as may be required by the Portland City Code, provided that all applicable requirements of the Code have been met.

OPERATING AGREEMENT FOR LINCON PARK

“MACHIGONNE” (FEATURING RAY LAMONTAGNE AND RUSTIC OVERTONES) FESTIVAL

THIS AGREEMENT made this day ____ of _____, 2008, by and between the **CITY OF PORTLAND**, a body politic and corporate situated in the County of Cumberland, State of Maine (hereinafter “**CITY**”) and **MENSK** a Maine non-profit corporation, having a place of business at Portland, Maine (hereinafter **MENSK**), for the use of Lincoln Park, all as more particularly described in the “Order Declaring “Machigonne” (featuring _____ Ray LaMontagne and Rustic Overtones) Festival and Approving Contract and Permits Therefor,” enacted by vote of the City Council of the City of Portland on _____ . A copy of the Order is attached hereto as Exhibit A.

In consideration of their mutual covenants, promises, and agreements, and other good and valuable consideration, receipt of which is hereby acknowledged, the aforesaid parties agree as follows:

DEFINITIONS

City Manager means and includes his designated representative(s).

Event means the activities described in Exhibit A, and which are also referred to herein as “Festival.”

Lincoln Park includes all areas of the park.

Premises means Lincoln Park (which shall be closed to the public that day) and the portion of Federal Street between Pearl Street and Franklin Arterial (access to that portion of Federal Street shall be restricted to public safety vehicles and access to Newbury Street garage and lot) and as described herein.

USE OF PREMISES

1. **Term.** **MENSK** may use the Premises only on the days and during the periods set forth herein:
 - a. **MENSK** will have use of Lincoln Park and limited use of the portion of Federal Street between Pearl Street and Franklin Arterial from 7:30 p.m. on Friday August 22, 2008 until 7:30 a.m. Sunday August 24, 2008 with a concert to be held from 5:30 p.m. Saturday August 23, 2008 until 11:00 p.m. Saturday August 23, 2008, with gates opening at 4:30 p.m.
 - b. Wheel chair access and sidewalk access shall be clear at all times. The adequacy of other walkways on the Premises shall be approved by the Police and Fire Departments.
 - c. **MENSK** shall secure a tent permit for each structure to be erected and shall only erect such structures in locations authorized by **CITY**.

- d. A Beer and Wine Services area for sales of beer and wine shall be permitted and shall be limited as depicted in Exhibit B. Beer and wine may not be removed from the defined Beer and Wine Services area and admission to the Beer and Wine Services area shall be restricted to individuals 21 and over. **CITY** staff shall check i.d.'s and provide wrist bands to individuals for access to the Beer and Wine Services area. **CITY** staff shall secure all sides of the Beer and Wine Services area, to prohibit both unauthorized access to and the removal of beer and wine from this area.
- e. Any other alterations to Lincoln Park must receive the prior written approval of the **CITY**.

2. **Parking.** No vendor or spectator vehicles shall be allowed to park on the grass. With the exception of load in and load out, no vehicles shall be allowed to drive on the grass.

3. **Portable Toilets.** **MENSK** shall be responsible for providing a minimum of twenty four (24) regular and two (2) handicap accessible portable toilets. All portable toilets shall be located in locations authorized by **CITY**.

4. **Restrictions on Use.** **MENSK** hereby agrees to observe the following restrictions on the use of Lincoln Park:

- a. Any and all public announcement (PA) and other speakers or amplifiers used to amplify music or other sound shall be maintained at a reasonable level. PA Speakers for the festival shall be placed facing northwest and be configured by **MENSK's** contractor and the City to focus volume in the park.
- b. **CITY** shall supply all required security at the level deemed required by the **CITY MANAGER**. The **CITY MANAGER** reserves the right to increase amounts for security at any time, i.e. City of Portland Police, Fire (Firefighters and Firefighter/Paramedics) personnel, if he/she deems it necessary to protect public safety. **MENSK** agrees to pay for the cost of any required coverage at Lincoln Park by PAF, Police or Fire staff at the **CITY's** applicable rates.
- c. **MENSK** shall not stage or promote any act or performance in which pyrotechnics, explosives or display of open flames are involved or used.
- d. **MENSK** agrees to maintain all aisles and exits at all times and to order that any item be moved from an aisle or an exit per request of the **CITY**. **MENSK** shall not render, or allow any of its exhibitors, contractors, agents, invitees or other persons it permits on the premises to render, Lincoln Park or any part thereof inaccessible to disabled persons. In the event that **MENSK** or any of its exhibitors, contractors, agents, invitees or other persons it permits on the premises render Lincoln Park or any part thereof inaccessible to disabled persons, **MENSK** shall immediately remove the cause and return the Lincoln Park to compliance. In the event that the **CITY** is requested to provide interpretive services, it shall be the responsibility of **MENSK** to provide and pay for such services. **MENSK** shall pay and save the **CITY** harmless from any and all damages, loss, or liability of any kind whatsoever resulting from its actions, or those of its exhibitors, contractors, agents, invitees or other persons it permits on the premises, in rendering Lincoln Park or any part thereof inaccessible to disabled persons. **CITY** staff reserves the right to enter all areas of Lincoln Park at any time for any reason.
- e. The **CITY** reserves the right to close any event to the public, including to ticket holders, at any time to protect public safety to address overcrowding in aisles, exits or entrances or turnstile/ticket counts in excess of the total number of tickets authorized prior to the event.

5. **Existing Conditions/Alterations.** Except as specifically provided below, **MENSK** agrees to accept Lincoln Park and the other Premises in their existing condition at the time of commencement for use and occupancy. It further agrees that no representations, statements, or warranties, express or implied, have been made by or on behalf of **CITY** in respect thereto, except as contained in the provisions of this Agreement. The **CITY** shall in no event be liable for any latent defects of Lincoln Park

or the other Premises, unless the **CITY** has actual knowledge of the defect and has failed to disclose such information to **MENSK**.

6. The **CITY** shall have no responsibility whatsoever for site preparation, modification, set-up, removal or security of event equipment at any time. **MENSK** shall be responsible for removal of all equipment and for site cleanup at the end of the Event. Any equipment or material left after 12:00 noon on the day following the Event (Monday August 25, 2008) will become the property of the **CITY**, and may be removed and disposed of at **CITY**'s discretion. In such an event, all costs of removal and/or disposition incurred by the **CITY** shall be added to the **CITY**'s clean up costs. Said costs shall be billed to **MENSK** following the Event.

6.1 No alcoholic beverages shall be sold or served on the streets or other public property. The sale and consumption of beer and wine will be permitted only in the Beer and Wine Services Area at the Park as depicted on Exhibit B.

6.2 The sale and consumption of beer and wine shall be limited to the hours 4:30 p.m. Saturday August 23, 2008 to 10:00 p.m. Saturday August 23, 2008.

6.3 Sales at the Festival shall be limited to clothing items, food and beverages, including beer and wine. The parties may mutually agree to expand the types of items that may be sold at the Festival. The **CITY** will charge a twenty percent (20%) (Non-profit rate) merchandising fee on gross sales for all goods sold specific to the artist and/or event, including, but not limited to: recordings, posters, t-shirts, banners, programs, pictures, etc. No merchandising fee shall be due on the sale of food and beverages, including beer and wine. If **MENSK** provides merchandising labor, the merchandising fee is reduced to ten percent (10%) (Non-profit rate) on gross sales, and the **CITY**, at any time, shall have the right to make such inspection of merchandise, accounts, records and reports of **MENSK** or its subcontractor responsible for merchandise sales, as **CITY** deems necessary. **MENSK** agrees to make all such information available. The permission to sell any such items must be granted by the **CITY**. The amounts assessed shall be due and payable prior to the end time of rental.

6.4 No person shall be denied admission to any of the Events on the basis of race, color, creed, national origin, sex, disability or sexual orientation.

6.5 **MENSK** agrees to comply with all applicable federal, state and local laws in its use of the Premises, including but not limited to, all applicable fire and life safety codes. **MENSK** agrees to consult with City's Fire Chief prior to any operations under this Agreement to determine fire safety requirements.

6.6 **MENSK** agrees to return all the Premises to the **CITY** in the same condition in which they were received; and, further, **MENSK** agrees it will remain responsible for all costs of clean up and park restoration associated with the Event, including any costs which may be incurred by the **CITY**.

7. **Concessions/Licenses.** **MENSK** shall be responsible for ensuring that all vendors at the Festival have complied with appropriate license requirements, including food service, street goods vendors, sale of beer and wine and concert licenses.

FEES, CHARGES AND OTHER FINANCIAL OBLIGATIONS

8. **Fees.** The rental fee for the use of Lincoln Park as provided herein shall be Six Hundred Seventy Five Dollars (\$675.00). **MENSK** shall be invoiced and make payment for, in advance of the event, both the Rental Fee and all **CITY** services, including but not limited to Recreation and Facilities Management, Public Services, Police, Fire, and Parking, based upon the **CITY**'s initial estimate for such services (_____ including the \$675.00 Rental Fee). Any deductions or additional charges will be adjusted within five (5) days of the event, with any additional payment required due within thirty (30) days of the event.

8.1 **MENSK** agrees to pay interest at the rate of one and one-half percent (1 ½%) per month on any payment which is not made within the time limits set forth in this Agreement.

8.2 **Noise control; deposit.** **MENSK** agrees to deposit with **CITY** by bank check the sum of One Thousand Dollars (\$1,000). In the event **CITY** receives 3 or more independent noise complaints from Portland residents based on loud music, and **MENSK** is so notified by the **CITY**'s Police Department and fails to reduce the volume of music, as evidenced by **CITY** receiving additional noise complaints, **MENSK** shall forfeit the One Thousand Dollar (\$1,000) check to the **CITY**. **CITY** shall return the One Thousand Dollar (\$1,000) check if it receives less than three (3) independent noise complaints based on loud music or, **MENSK** responds adequately to the complaints by reducing the music volume. **MENSK** further agrees that nothing in this paragraph relieves it of its obligation under paragraph 4 to reduce the volume of music on request of the Police Department regardless of the number of noise complaints received by the **CITY** and that nothing in this paragraph prevents the **CITY** from seeking additional penalties for violations of its noise ordinances.

9. **Insurance.** **MENSK** shall procure and maintain commercial general liability insurance, contractual and products liability insurance, insuring both itself and the **CITY** during the time that it has rights under this Agreement against liability for claims arising out of the activities hereunder, including One Million Dollars (\$1,000,000) combined single limit commercial general liability including contractual liability and Two Million Dollars (\$2,000,000) aggregate.

Establishments providing liquor shall provide liquor liability insurance, naming **CITY** as additional insured. A copy of the certificate of insurance shall be provided to **CITY**.

9.1. The **CITY** shall be named as an additional insured in all such policies and all insurance provided by **MENSK** shall be primary to any insurance the **CITY** may have.

9.2. **MENSK** will provide evidence of workers' compensation insurance, to the extent required by Maine Law, in the event that it will have any employees working on any of the Premises.

9.3. **MENSK** will furnish certificates of insurance indicating that it has provided the coverage required herein a minimum of seven (7) days prior to the start time of rental. **CITY** shall immediately refuse continued rental of Lincoln Park and cancel the event if **MENSK** does not purchase the required insurance or if the certificate of insurance is not received a minimum of seven (7) days prior to the start time of rental.

9.4. All certificates of insurance shall provide that they may not be canceled without thirty (30) days prior written notice to the **CITY**.

9.5. All insurance required by this Agreement shall be placed with insurers licensed to do business in the State of Maine and acceptable to the **CITY**, such acceptance not to be unreasonably withheld.

9.6. **MENSK** agrees to waive subrogation rights against **CITY**.

9.7. In the event **MENSK** provides the insurance required herein by means of a claims made, rather than an occurrence policy, the insurer shall provide the **CITY** with the retro date of the policy (which may not be later than the first day **MENSK** commences use of the Premises), as well as an "extended reporting period endorsement" which shall extend the time within which claims may be submitted to a period ending six years from the last date of use of the Premises by **MENSK**.

9.8. **MENSK** shall be responsible for all work performed by its subcontractors or anyone hired or employed by **MENSK** to perform services or provide supplies related to the event. All subcontractors of **MENSK** shall provide public liability insurance in an amount of not less than One Million Dollars (\$1,000,000) combined single limit for bodily injury and general liability and Four Hundred Thousand Dollars (\$400,000) property damage per incident, naming the City of Portland as an additional insured from such claims, and worker's compensation insurance. A copy of the certificate of

insurance must be on file at the **ADMINISTRATIVE OFFICES**. The certificate must provide thirty (30) days written notice to the **CITY** of termination of insurance from the insurance company or agent. The **DIRECTOR** shall prohibit the **MENSK** subcontractor access to the **FACILITY** if the certificate is not on file.

10. **Indemnification.** To the fullest extent permitted by law, **MENSK** shall, at its own expense, defend, indemnify, and hold harmless the **CITY**, its officers, and employees, from and against any and all claims, damages, penalties, losses, expenses or judgments, whether just or unjust, arising from injury or death to any person, property, or environmental damage, either arising out of or resulting from its activities under this Agreement or resulting from any act or omission of **MENSK**, its officers, agents, invitees, servants or employees, except to the extent that such injury, death, property or environmental damage results from the negligent act of the **CITY**, its officers, agents and employees. **MENSK** will, at its own costs and expense, defend any and all such suits, actions, or claims, whether just or unjust, which may be brought against the **CITY**, its officers, agents, and employees, or in which it or they may be impleaded with others. Such obligation of indemnity and defense shall not be construed to negate nor abridge any other right of indemnification or contribution which may benefit either **MENSK**, or the **CITY**.

11. **Other Financial Obligations.**

11.1. **MENSK** shall be responsible for payment of any State or Federal taxes, or any other governmental assessment which may be made in connection with the Event.

11.2. **MENSK** acknowledges and agrees that it will be solely responsible for all royalties or charges which are due or may become due on material used for or during the event. **MENSK** warrants to the **CITY** that such royalties or charges have been paid or will be paid promptly in accordance with law. **MENSK** further agrees to hold the **CITY** harmless and indemnify it for all its costs or losses, just or unjust, including attorney's fees in defense of claims, relating to payment of any royalty, charge or fee for the use of material by **MENSK** during the event.

12. **Reimbursement of Damages.** If the **CITY**, in its sole discretion, determines that there is damage to any of the venues as a result of the Event, the **CITY** will notify **MENSK** prior to its repairing said damage, and **MENSK** shall be solely responsible for all costs related to said repairs, restoration, and/or replacement. The **CITY** shall determine the nature and extent of any such damage, and shall have the sole discretion to determine the scope of the necessary repair, restoration, and/or replacement.

12.1. **Damage; deposit.** **MENSK** agrees to deposit with **CITY** by bank check the sum of Five Hundred Dollars (\$500). Any costs for repairs, restoration, and/or replacement of grass in the park shall be paid from this deposit. If there are no such additional costs, **CITY** shall return the Five Hundred Dollar (\$500) check. If such additional costs exceed Five Hundred Dollars (\$500), **CITY** will provide **MENSK** with a separate detailed invoice for repair costs upon their completion, which invoice shall be due and payable, in full, to the **CITY** within thirty (30) days of receipt thereof.

12.2. Prior to undertaking any repair work under paragraph 13, **CITY** will provide **MENSK** with an estimate of the cost of said work and will review the site and the work needed with **MENSK**. Only upon the **CITY**'s prior agreement, as to the scope, schedule and contractor to do the work, may **MENSK** have the repair work done by non-**CITY** sources at **MENSK**'s sole cost and expense. Said work shall be completed to **CITY**'s satisfaction. Otherwise, the **CITY** will provide **MENSK** with a separate detailed invoice for repair costs upon their completion, which invoice shall be due and payable, in full, to the **CITY** within thirty (30) days of receipt thereof.

TERMINATION

13. **Termination by City Manager.** The City Manager may terminate this Agreement, without prior notice to **MENSK**, under the following conditions:

- (a) A good faith determination by the City Manager that **MENSK** has failed to comply with any of the terms or conditions of this Agreement;

- (b) Failure of **MENSK** to respond appropriately to excessive and substantiated noise complaints about the Event as defined in §8.2, which complaints reflect significant public inconvenience or other breaches of the peace, as determined by the City Manager;
- (c) Upon determination by the City Manager that **MENSK** has made material misrepresentations to the **CITY** in connection with its use or occupancy of any of the Premises; or
- (d) The **CITY** is prevented from furnishing use of any of the Premises, or any portion thereof to **MENSK** on the date(s) scheduled, by events, actions, or occurrences, not within the complete control of the **CITY**, including, but not limited to any official order or proceeding which limits or prohibits the use of the Premises. In the event of such termination, the **CITY's** obligations hereunder shall be limited to the refunding of amounts previously paid by **MENSK** to the **CITY** in connection with this Agreement.

14. **Termination by MENSK.** **MENSK** may terminate this Agreement by written notice no later than Monday August 11, 2008. In the event **MENSK** terminates this Agreement, the **CITY** shall retain or collect from **MENSK** twenty-five percent (25%) of the **CITY's** initial estimate for such services and any actual costs directly incurred by **CITY** in preparation for the Event or any damage caused to the Premises by **MENSK**.

ADDITIONAL TERMS

15. **Waiver.** The failure of the **CITY** to insist upon a strict performance of any of the terms and conditions hereof shall be deemed a waiver of the rights or remedies that it may have regarding that specific instance only, and shall not be deemed to be a waiver of any subsequent breach or default in any terms and conditions.

16. **Assignment.** **MENSK** may not assign any right granted by this Agreement without the prior written consent of the City Manager; provided, however, that **MENSK** may engage subcontractors or hire individuals to perform services or provide supplies related to the Event.

17. **Attorney's Fees.** **MENSK** shall pay all reasonable attorney's fees and costs on behalf of **CITY** if: (i) **CITY** should institute litigation against it for breach of any term or condition of this Agreement; (ii) **CITY** should institute litigation against **MENSK** for an unlawful detainer of the Premises; (iii) **CITY** is made a party to litigation against **MENSK**, instituted by a third party related to use of the Premises under this Agreement; or (iv) (if the **CITY** is required to defend itself against any action or defense prosecuted by **MENSK** arising out of its use or occupancy of the Premises which does not result in a final judgment in favor of **MENSK**. Fees and costs of defense incurred by the **CITY** shall be reimbursed within thirty (30) days of invoice whether the litigation is prosecuted to judgment or not. Amounts advanced by **CITY**, not reimbursed within said thirty (30) days, shall bear interest at a rate of one and one half percent (1½%) per month.

18. **Complete Agreement.** This Agreement and its Exhibits constitute an entire and integrated agreement, and supersede all the terms and conditions of any prior agreement, negotiations, or representations, written or oral, between the parties. This Agreement may not be modified, except in writing, signed by the parties.

19. **Rights Acquired.** No rights will be acquired under this Agreement until the following have been provided to **CITY**, in forms acceptable to it:

- 19.1. An Original and Copy of this Agreement executed by **MENSK** .
- 19.2. Certificates of insurance and proof of security deposits.
- 19.3. Proof of payment of all fees which are required to be paid in advance.

IN WITNESS WHEREOF, the **CITY OF PORTLAND** has caused this Agreement to be signed by Joseph E. Gray, Jr., City Manager, and **EMG3**, has caused this Agreement to be signed by Eli Cayer, its Director thereunto duly authorized the day and year first above written.

WITNESS:

CITY OF PORTLAND

By: _____

Joseph E. Gray, Jr.
Its City Manager

WITNESS:

By: _____

Its: _____

Approved:

_____ Legal Office