**ORDINANCE NO. 20-12**

**AN UNCODIFIED ORDINANCE OF THE CITY OF KEY WEST, FLORIDA, TO MANDATE THAT CERTAIN BUSINESS ESTABLISHMENTS WHO WISH TO ALLOW SEATING AT BAR COUNTERS FOR THEIR PATRONS ADHERE TO SOCIAL DISTANCING REQUIREMENTS; DECLARING THIS ORDINANCE TO BE AN EMERGENCY MEASURE; PROVIDING FOR PENALTIES; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF INCONSISTENT PROVISIONS; PROVIDING FOR AN EFFECTIVE AND SUNSET DATE.**

WHEREAS, the City of Key West finds that Coronavirus Disease 2019 (COVID-19) presents a danger to the health, safety, and welfare of the public; and

WHEREAS, the Centers for Disease Control (CDC) issued updated Guidance titled "Deciding to Go Out" where the CDC stated "[b]eing in a group with people who aren't social distancing or wearing masks increases your risk" of contracting COVID-19 and recommends keeping on hand "a mask, tissues, and a hand sanitizer with at least 60% alcohol" when venturing outside the home; and

WHEREAS, the Centers for Disease Control (CDC) has since issued guidance encouraging social distancing and maintaining a 6-foot separation between residents to slow the spread of infection and for individuals to cover their mouths and noses with a cloth face cover when around others, including when they have to go out in public, stating that "COVID-19 spreads mainly among people who are in close contact (within about 6 feet) for a prolonged period" and "[t]he more people an individual interacts with at a gathering

and the longer that interaction lasts, the higher the potential risk of becoming infected with COVID-19 and COVID-19 spreading"; and

WHEREAS, the CDC advises that a significant portion of individuals with coronavirus lack symptoms ("asymptomatic") and that even those who eventually develop symptoms ("pre-symptomatic") can transmit the virus to others before showing symptoms. This means that the virus can spread between people interacting in close proximity—for example, speaking, coughing, or sneezing—even if those people are not exhibiting symptoms; and

WHEREAS, the CDC strongly advises that every community fully observe social distancing, wear facial coverings, and fully adhere to the sanitation requirements stated in the CDC Guidelines in order to minimize the risk of a dramatic increase in infections that might overwhelm the available public health resources and require closure of amenities and businesses; and

WHEREAS, the State Health Officer and Surgeon General has issued a Declaration of Public Health Emergency, stating that COVID-19 is a threat to public health in Florida; and

WHEREAS, the State Health Officer and Surgeon General has issued a Public Health Advisory stating "[a]ll individuals should wear face coverings in any setting where social distancing is not possible", and that "face coverings are not a substitute for social distancing, washing your hands, and staying home when you are ill.

All of these mitigation measures should be carefully followed together to reduce the spread of COVID-19"; and

WHEREAS, on June 3, 2020, the Governor of Florida issued Executive Order Number 20-139, to take effect at 12:01 a.m. on June 5, 2020, extending and modifying Executive Orders 20-112, 20-120 and 20-139, implementing Phase 2 of his Safe. Smart. Step-by-Step. Plan for Florida's Recovery allowing certain types of businesses to re-open under certain conditions, allowing certain types of businesses currently allowed to operate to expand their services and allowing local government to implement additional restrictions and measures; and

WHEREAS, Wednesday, July 1, 2020, the Florida Department of Business and Professional Regulation (DBPR) issued an Amendment to Emergency Order 2020-09, directing certain types of vendors licensed to sell alcohol beverages to suspend such sales for consumption on the premises stating that "during the month of June 2020, the number of individuals testing positive for COVID-19 increased significantly in the State of Florida… and some of these cases… are suspected to have originated from visits to bars, pubs, or nightclubs who have disregarded the restrictions…"; and

WHEREAS, DBPR premised that order on the statement that bars serve as venues for the spread of the virus as persons tend not to engage in social distancing and tend to mix with persons with whom they do not reside; and

WHEREAS, the local effect of DBPR's order is that persons who used to gather at bars shifted to restaurants as the preferred spot for congregating without engaging in social distancing, particularly as it pertains to the bar countertops and bar service in restaurants and several restaurants themselves disregarded the requirements for social distancing; and

WHEREAS, as a result, on July 9, 2020, the City of Key West issued Emergency Directive 20-17, Amendment 3, disallowing bar service and seating at bar counters for consumption of food and beverage pursuant to § 252.46, Fla. Stat., in which violations are enforceable as misdemeanors by law enforcement though F.S. 252.47 and F.S. 252.50; and

WHEREAS, several restaurant and food service owners have requested that the City of Key West reconsider and allow bar service and seating at bar counters for consumption of food and beverage by patrons due to the economic impact of COVID-19; and

WHEREAS, the City of Key West finds that it is in the best interest of public health, safety and welfare of the residents, visitors and employees within the City of Key West to allow bar service and seating at bar counters for consumption of food and beverage by patrons due to the economic impact of COVID-19 with restrictions to slow the spread of COVID-19;

WHEREAS, the City of Key West finds the inconvenience of an ordinance restricting bar service and seating at bar counters for

consumption of food and beverage by patrons is minimal compared to the risk to the health, safety, and welfare of the community were no such rules imposed; and

WHEREAS, the City of Key West finds implementation of this ordinance is necessary for the preservation of the health, safety, and welfare of the community; and

WHEREAS, it is necessary and appropriate to take action to ensure that COVID-19 remains controlled, and that the residents, workers, and visitors in the City of Key West remain safe and secure and that this ordinance promotes business operation and economic recovery while maintaining focus on core safety principals and slowing the spread of COVID-19; and

WHEREAS, the State of Florida has not preempted local governments from regulating in the field of minimum health requirements with respect to COVID-19; and

WHEREAS, the City of Key West remains under a State of Local Emergency, adopting regulations via ordinance would permit additional enforcement options and impose additional requirements for establishments within the City of Key West that fail to comply with the established guidelines; and

WHEREAS, 28 C.F.R. 36.208, the implementing regulations for the Americans with Disabilities Act states that the ADA does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities,

privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others; and customers with disabilities who may be unable, due to their disability, to wear a face mask may access the goods and services of the businesses through the provisions of curbside service or home delivery; and

WHEREAS, the Third District Court of Appeal has defined the term business establishment for purposes of tort liability to mean "a location where business is conducted, goods are made or stored or processed or where services are rendered." *Publix Supermarkets, Inc. v. Santos*, 118 So.3d 317 (Fla. 3d DCA 2013); and

WHEREAS, the City of Key West desires to incorporate these new requirements into its ordinance so as to authorize additional enforcement mechanisms unavailable for enforcing an emergency directive; and

WHEREAS, the Florida Legislatures has stated that "[s]afeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state" such as Monroe County and its five municipalities; F.S. 252.38.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF KEY WEST, FLORIDA, THAT SECTION A.3.iv. OF EMERGENCY DIRECTIVE 20-17, AMENDMENT 3, IS HEREBY SUPERSEDED AS FOLLOWS:

**Section 1:** **Findings.** The above recitals are adopted by the City Commission as legislative findings.

**Section 2:** **Restaurants and Food Establishments.** All restaurants and food establishments licensed under Chapters 500 or 509, Florida Statutes, may continue to allow on-premises consumption of food and beverage provided said businesses implement measures to mitigate the exposure and spread of COVID-19 as dictated by the State of Florida and its agencies and the City of Key West. In addition to the requirements in the City of Key West's Ordinances and Emergency Directives and any and all Orders from the State of Florida and/or its agencies, as applicable, restaurants and food establishments permitted to operate may allow seating at bar counters for consumption of food and beverages by patrons provided the following:

(A) All parties seated at bar counters cannot be comprised of more than ~~four (4)~~ six (6) individuals per party.
(B) All parties seated at bar counters must be separated by a minimum of six (6) feet.
(C) Any beverages purchased at bar counters must be consumed at the bar counters while seated.
(D) The restaurant and/or food establishment consents to entry of City of Key West personnel onto the establishment's property for the sole purpose of inspection for compliance with this emergency ordinance.

**Section 3:** **Noncompliance.** In addition to being subject to the penalties set forth in section 4 of this ordinance, effective

immediately, any business establishment that is cited by code compliance or law enforcement authority for a violation for operating in a manner inconsistent with or otherwise in violation of this emergency ordinance shall immediately close its bar seating and bar counters to seating and consumption ("Closure").

(A) Upon issuance of a citation for a violation of this emergency ordinance and upon written request to the city manager or his designee, the city manager shall conduct a hearing, as applicable. The establishment shall be afforded due process. The city manager may impose a suspension disallowing the establishment's use of seating at bar counters as follows:
    (1) First violation: Up to 10 days' suspension.
    (2) Second or subsequent violation: Up to 30 days' suspension.

(B) Before reaching any decision under subsection (A) of this section, the city manager shall:
    (1) Afford the establishment a reasonable opportunity to be heard.
    (2) Consider the establishment's past record of compliance with this ordinance, the City of Key West's Emergency Directives and Ordinances and any and all Orders from the State of Florida and/or its agencies, as applicable and with the entire Code.
    (3) Consider the seriousness of the violation.

(C) The city manager's decision to suspend the establishment's use of bar counters for its patrons shall be submitted in writing to the representative of the establishment.

(D) The establishment has a right to appeal the city manager's decision to the city commission by filing a written appeal with the city clerk within ten days of receipt of the notice. No establishment shall continue the use of bar countertops for its patrons while this use is suspended. The city manager or his designee may post the exterior of the property notifying the public of the violation hereunder. An appeal to the city commission shall be in accordance with the procedural elements set out in Sec. 90-431(1)-(6),

Code of Ordinances, City of Key West.

(E) Before reopening after a closure pursuant to section 3., the owner or authorized agent/operator or Chief Executive Officer (CEO) must comply with all of the following conditions:

(1) Thoroughly review the City of Key West's applicable Emergency Directives and ordinances and the State of Florida's and its agencies' applicable Orders, and all attachments thereto, and take all necessary measures to bring the establishment into compliance with the requirements in the Emergency Directives, ordinances and/or Orders;

(2) Submit a fully executed attestation under penalty of perjury by the owner, agent/operator, or CEO of the establishment, in the form provided by the City Manager and/or his or her agent, to the City of Key West by email to sdsmith@cityofkeywest-fl.gov, attesting that the review has been completed and the required measures have been taken;

(3) Receipt of the City of Key West's acknowledgment of a valid executed attestation form;

(4) The business establishment shall, within (5) calendar days after reopening, submit to inspection and be inspected by local code enforcement or law enforcement authorities for the sole purpose of confirming the violation(s) have been corrected; and

(5) The business establishment shall keep a copy of the executed attestation readily available on its premises and shall exhibit same upon request by City of Key West personnel.

(F) In addition to being subject to the penalties set forth in section 4 of this ordinance, any repeat violation of this ordinance by the business establishment cited by the applicable code enforcement or law enforcement authority shall be presumed a knowing violation subject to a fine of two thousand five hundred dollars ($2,500.00) for each suspension.

(G) Any use of an establishment's bar countertops by patrons in violation of section 3., including

prior to the City's written acknowledgement of a valid executed attestation, shall be a separate violation for each day of operation.

**Section 4**: **Penalties and Enforcement.** The Key West Police Department, code enforcement officers, and any other personnel as provided for in the Florida Statutes or the City of Key West Code of Ordinances and/or Emergency Directive may enforce this Emergency Ordinance against any person, business establishment or entity violating any provision of such Emergency Ordinances. All such enforcing authorities are authorized to enforce the provisions of this Emergency Ordinance, unless otherwise stated, as a civil citation, administrative notice of violation and/or as a criminal violation as hereby authorized by the City of Key West. Violations may be prosecuted as criminal violations in the same manner as misdemeanors are prosecuted, including fines not to exceed $500 per violation, imprisonment not to exceed 60 days, or both, and/or as an administrative notice of violation pursuant to Chapter 162, Florida Statutes, and/or as a civil citation to appear in county court not to exceed $500 per violation.

**Section 5**: **Declaration of Emergency.** This Ordinance is hereby declared to be an emergency measure and necessary for the immediate preservation of the general welfare, health, and safety of the general public of the City of Key West, Florida, said emergency arising from the fact that Novel Coronavirus Disease 2019 (COVID-

19) is a severe acute respiratory illness that can spread among humans through respiratory transmission and causes symptoms similar to those of influenza and, in some cases, cause death, and the immediate need to allow restaurants and food service establishments to use bar countertops for seating for patrons to minimize the negative economic impact of COVID-19, the difficulty the City of Key West has had so far in enforcing its social distancing directives and that the City Commission is not scheduled to meet for a second regular meeting until September 16, 2020, which would mean that an ordinance by conventional means would not be able to be passed prior to that time while taking into account the immediate need to minimize the risk of a dramatic increase in infections that might overwhelm the available public health resources and require closure of amenities and businesses.

**Section 6**: **Severability**. If any section, provision, clause, phrase, or application of this Ordinance is held invalid or unconstitutional for any reason by any court of competent jurisdiction, the remaining provisions of this Ordinance shall be deemed severable therefrom and shall be construed as reasonable and necessary to achieve the lawful purposes of this Ordinance.

**Section 7**: **Conflict**. All Ordinances or parts of Ordinances of said City in conflict with the provisions of this Ordinance are hereby superseded to the extent of such conflict. This emergency ordinance is intended to replace section A.3.iv. of

Emergency Directive 20-17, Amendment 3, issued on July 10, 2020.

**Section 8: Effective Date.** This Ordinance shall go into effect immediately upon its passage and adoption and authentication by the signature of the presiding officer and the Clerk of the Commission.

**Section 9: Sunset Date.** Unless repealed or re-enacted pursuant to Ordinance 7.02, City of Key West, this emergency ordinance shall automatically stand repealed as of the sixty-first (61st) day following the date on which it was adopted.

**Section 10: Codification.** Due to the temporary nature of this ordinance, the City of Key West directs the Clerk to send the ordinance to the Municipal Code for publication on its website but with instructions to not codify the ordinance within the Code of the City of Key West.

PASSED AND ADOPTED as an amended emergency ordinance at a special meeting this 1st day of September, 2020.

Authenticated by the presiding officer and Clerk of the Commission on 2nd day of September, 2020.

Filed with the Clerk September 2, 2020.

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| Mayor Teri Johnston | Yes |
| Vice Mayor Sam Kaufman | Yes |
| Commissioner Gregory Davila | Yes |
| Commissioner Mary Lou Hoover | Yes |
| Commissioner Clayton Lopez | Yes |
| Commissioner Billy Wardlow | Yes |
| Commissioner Jimmy Weekley | Yes |

TERI JOHNSTON, MAYOR

ATTEST:

CHERYL SMITH, CITY CLERK