ORDINANCE NO. 11-02

AN ORDINANCE GRANTING A FRANCHISE TO DUCK TOURS SEAFARI INC. TO OPERATE A NON-EXCLUSIVE CITY-WIDE AMPHIBIOUS SIGHTSEEING OPERATION; PROVIDING TERMS AND CONDITIONS, INCLUDING THE FOLLOWING: PROVIDING THAT ORDINANCE DOES NOT PROHIBIT CITY FROM OPERATING A SHUTTLE SERVICE; DEFINING THE TERRITORY TO BE SERVED; AUTHORIZING CITY INSPECTION OF SIGHTSEEING VEHICLES; PROVIDING FOR THE OBSERVANCE OF CURRENT AND FUTURE RULES AND REGULATIONS, INSURANCE REQUIREMENTS AND INDEMNIFICATION; LIMITING ASSIGNMENT OF THE FRANCHISE; PROVIDING CONSIDERATION FOR GRANT OF THE FRANCHISE AND CONTINGENT RELIEF; DIRECTING THE PROCEDURE FOR DESIGNATION OF STOPS AND OPERATIONAL REQUIREMENTS OF FRANCHISEE; PROVIDING FOR INSPECTION OF BOOKS AND RECORDS; AUTHORIZING THE ISSUANCE OF PERMITS; ESTABLISHING THE DURATION OF THE FRANCHISE; PROVIDING FOR THE ESTABLISHMENT OF RATES, FEES AND ROUTES; SPECIFYING DEFAULT PROVISIONS AND PROCEDURE FOR NOTICE, SUSPENSION AND/OR TERMINATION UPON DEFAULT, INCLUDING APPEAL PROVISIONS; PROVIDING REMEDIES UPON BANKRUPTCY OF FRANCHISEE; INDICATING FRANCHISE IS NOT A WAIVER OF OTHER CITY REQUIREMENTS; CLARIFYING THAT NO JOINT VENTURE IS CREATED; PROHIBITING DISCRIMINATION; PROVIDING FOR CONSTRUCTION AND INTERPRETATION OF PROVISIONS; INDICATING TIME IS OF THE ESSENCE; PROVIDING FOR ATTORNEYS FEES, WAIVER OF JURY TRIAL AND SPECIFYING VENUE IN THE EVENT OF LITIGATION; PROVIDING FOR NOTICE, ACKNOWLEDGEMENT, ACCEPTANCE AND CUMULATIVE PROVISIONS; SPECIFYING THE FRANCHISE CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES AND MAY ONLY BE AMENDED BY SUBSEQUENT ORDINANCE OF THE CITY COMMISSION; PROVIDING FOR ELIMINATION OF PERMANENT INJUNCTION UPON INSTITUTION AND COMPLIANCE WITH THE FRANCHISE AGREEMENT; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF INCONSISTENT PROVISIONS; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, municipalities in the State of Florida are authorized to regulate commercial traffic upon municipal streets. *Pennington v. Quigg*, 114 So. 859 (Fla. 1927); *Jarrell v. Orlando Transit Co.*, 167 So. 664 (Fla. 1936); *City of Coral Gables v. City of Miami*, 190 So. 427 (Fla. 1939); *City of Miami v. South Miami Coach Lines, Inc.*, 59 So. 2d 52 (Fla. 1952); *Pratt v. City of Hollywood*, 78 So. 2d 697 (Fla. 1955).

WHEREAS, Duck Tours Seafari, Inc. ("Duck Tours") and the City of Key West ("City") were parties to a lawsuit in the 16th Judicial Circuit Court, Case No. 95-941-CA-18; and

WHEREAS, the suit was resolved by virtue of a settlement between the parties referenced in the Order dated May 7, 2009 by Judge Howard Harrison closing the case and retaining jurisdiction to enforce portions of its Order; and

WHEREAS, said settlement agreement specifically notes that Sec. II of the "Final Judgment entered in this action . . . shall remain in full force and effect"; and

WHEREAS, section II of the Final Judgment of the 16th Judicial Circuit Court dated July 27, 2005 includes a Permanent Injunction regulating certain conduct of the City, including "preventing or disallowing Plaintiff [ Ducks] from effectively operating an amphibious sightseeing tour in Key West"; and

WHEREAS, the City of Key West and Duck ~~t~~Tours Seafari, Inc. desire to enter into a franchise agreement for amphibious sightseeing operations and ultimately terminate the permanent injunction by implementing its terms as specified in this ordinance/agreement; and

WHEREAS, Key West City Charter section 7.01(4) requires that the grant of a franchise must be done by ordinance.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF KEY WEST FLORIDA:

**Section 1. GRANT**

For the purpose of providing a non-exclusive citywide amphibious sightseeing service, there is hereby granted to Duck Tours Seafari Inc., a Florida Corporation (hereinafter referred to as "Duck Tours", "Grantee", or "Franchisee"), a franchise to operate a citywide amphibious sightseeing service which shall include the right, privilege, and franchise to use all public streets, avenues, sidewalks, public easements and other public highways, within the corporate limits of the City of Key West insofar as said operation does not unreasonably interfere with public transportation or block traffic, and in doing so employ and exercise the right hereby granted, subject at all times to the provisions, terms and conditions of this ordinance. The parties agree that the above licenses, permits and

operations pursuant to same shall be subject to the State of Florida vehicle and vessel regulations and United States Coast Guard Certifications and all other applicable state and federal regulations.

**Section 2.TERRITORY TO BE SERVED.**

The rights granted hereby shall be exercisable in and applicable to all sections of the City within the present or future corporate limits thereof.

**Section 3.CITY INSPECTION OF SIGHTSEEING VEHICLES**

All sightseeing vehicles hereunder shall be maintained in good repair in order that they are suitable and safe at all times for operation in public service. The Grantee shall permit the City to make such inspections of such vehicles as the City shall deem necessary in the public interests, and shall comply in every respect with the provisions of all Ordinances relating to the inspection of vehicles by the City. The City shall have the right to conduct such inspections, but not the obligation to do so.

**Section 4.INSPECTION OF SIGHTSEEING SERVICE**

The City shall have the right to designate from time to time a municipal department, or one or more duly authorized

representatives of the City, to exercise appropriate control, supervision, inspection and regulation by the City of the sightseeing service provided for herein.

**Section 5.OBSERVANCE OF TRAFFIC RULES AND REGULATIONS**

The Grantee shall observe, obey and fully comply with all present and future laws and ordinances affecting the operation of vehicles and watercraft, and shall also observe and carry into effect any rules, orders or regulations which may be promulgated by the City for the purpose of safeguarding public health, comfort, safety or property. Such regulation specifically includes the possible future city-wide licensing of tour guides regarding their knowledge of local history and similar aspects relevant to a sightseeing operation utilizing the public right of way.

**Section 6.LIMITATION ON ASSIGNMENT OF FRANCHISE**

This franchise shall not be leased, assigned or otherwise alienated except with the consent of the City Commission as expressed by Ordinance, which consent shall not be unreasonably withheld. Without in any way limiting the foregoing, the sale, transfer or disposition by any other means of twenty-five (25) percent or more of the stock or assets of a Grantee shall be deemed an assignment.

Notwithstanding the above, any transfer between and among individuals or entities that are stockholders of the corporation on the effective date of this ordinance shall not violate this provision. The Grantee shall furnish prior written notice to the City of any proposed assignment, along with the names, addresses and relevant financial information of the persons or entities offering to acquire such stock or assets, in addition to any other information requested by the City Manager.

**Section 7.PUBLIC LIABILITY INSURANCE.**

The Grantee shall keep in full force and effect at all times during the effective period of this ordinance, liability insurance to provide insurance for the City and for all persons suffering injury, loss or damage to their persons or to property by reason of the negligent operation of each sightseeing vehicle operating by authority of this ordinance. The Grantee shall, at all times, maintain liability insurance in an amount of not less than ten million dollars ($10,000,000.00) per occurrence. Such insurance shall comply with the laws and regulations of the State of Florida. All insurance policies insuring said sightseeing vehicles shall be issued by an insurance company registered to do business in the State of Florida, subject

to the laws and regulations of the State of Florida. Insurers issuing the above referenced policies must maintain an A.M. Best rating of no less than "A". The City of Key West shall be named as an additional insured on all liability policies. The Policies shall contain a waiver of subrogation provision whereas the Grantee's insurer waives any claim against the City of Key West. Certificates of insurance shall be filed and maintained with the City Clerk evidencing the minimum limits of insurance cited above. All policies shall provide they may not be terminated or modified without the insurer providing the City at least thirty (30) days advance notice. The Grantee shall immediately notify the City of any cancellation of such insurance.

At the request of the City Manager, the Grantee shall meet with the Grantor's representatives to review the extent and amount of insurance coverage provided hereunder. Should the City Manager believe that the coverage provided is not sufficient to protect its interest, it may specify the increased level of insurance required. If Grantee objects to the level of coverage, Grantor and Grantee shall enter into a binding arbitration within fifteen (15) days of the date of the dispute to resolve the issue. If Grantor and Grantee are unable to agree on a neutral arbitrator, each

party shall select an arbitrator who will then appoint a third arbitrator to resolve the matter. If an arbitrator is not selected through no fault of the Grantor, the coverage required by the Grantor shall be placed.

The City hereby expressly assumes no responsibility for injury or damage done or caused to persons or property by reason of the operation of said sightseeing operation and no third party benefit is intended to be conferred by any provision of this franchise. Nothing herein is intended to waive the sovereign immunity accorded to Grantor pursuant to Florida Statutes, including Section 768.28.

**Section 8.INDEMNIFICATION**

Grantor shall not be liable for injury or damage caused to any person or property by reason of the failure of Grantee, its' employees or agents to perform any of its obligations hereunder or in the operation of the activities authorized herein. Grantee shall indemnify, hold harmless and defend Grantor, its employees, officials, officers and agents against all loss, damage, claim, demand, liability or expense, including attorneys' fees, by reason of any damage or injury to persons (including loss of life) or property which may arise or be claimed to have arisen as a result of, in connection with, or in any way related to Grantee's operations. Nothing herein is intended to waive the

sovereign immunity accorded to Grantor pursuant to Florida Statutes, including Section 768.28.

**Section 9.CONSIDERATION FOR GRANT AND AUTHORIZED NUMBER OF VEHICLES**

During the period of time in which the Grantee is operating under this ordinance, the Grantee shall pay to the City five percent (5%) of the gross revenues it receives from all sources it realizes from the operation of the sightseeing service or the sum of seven thousand five hundred dollars ($7,500) per vehicle, per year, whichever is greater. The City claims no interest to any revenues generated by the sale of merchandise.

Operations shall be deemed to have commenced upon the first transport of ticketed passengers. Duck Tours agrees to provide written notice to the City prior to placing any permitted vehicle in service. Minimum fees on any permitted vehicle shall not accrue until said vehicle is placed in service.

The seven thousand five hundred dollars ($7,500) per vehicle fee shall be increased yearly on the date of the enactment of this ordinance in an amount equal to the increase in the United States consumer price index (CPI-U) as published by the Bureau of Labor Statistics. Said five percent (5%) shall be paid at the end of each calendar month

with a 15-day grace period. The yearly guaranteed minimum payment shall be payable at the end of each 12-month period with a 30-day grace period.

Failure to pay any sum due shall result in imposition of interest at the rate of eighteen percent (18%) per annum of the delinquent amount per month, or such maximum amount permitted by law, until paid in full.

Grantor is hereby authorized to operate up to ten (10) amphibious sightseeing vehicles under the provisions of this franchise. In the event that the Grantee can document through the use of a professional traffic impact or related study acceptable to the City that no adverse effects would be permitted upon the allowance of additional vehicles, the City Commission shall agenda an item for consideration of an amendment to this ordinance to permit additional vehicles.

True and accurate representative color photographs of the type of vehicles authorized to be used in the operation are attached hereto as Exhibit "A".

**Section 10. OBLIGATION TO OPEN FOR BUSINESS**

Upon commencement of operations, Grantee shall conduct the business authorized by this franchise agreement in a fully functioning manner on a continuous year round basis.

**Section 11. STANDS, STOPS AND OPERATIONAL REQUIREMENTS**

The City Manager, with the input of the Grantee, shall designate stops for the loading and unloading of the Grantee's patrons. The City Manager shall have the authority to disapprove any stop, which in the City Manager's opinion disrupts traffic, City operations, or is otherwise unreasonably injurious to the public welfare. Should Grantee or any affected party or entity disagree with the decision of the City Manger, it shall, by filing written notice with the City Clerk appeal the decision to the City Commission. A copy of the route and stops approved by the City Manager is attached hereto as exhibit "B".

Should Grantee disagree with the decision of the City Manger, it shall, by filing written notice with the City Clerk within three (3) days of the City Manager's written determination, appeal the decision to the City Commission.

Given the unique boarding configuration of franchisee's vehicles and fixed tour without a multiple "on and off" trolley style operation, City agrees to designate specific on-street areas for exclusive use by Duck Tours. City agrees

to provide one stop on Whitehead Street at or near the triangle at Clinton Square, generally as shown on the attached exhibit "C". A stop is for loading and unloading of passengers only. In light of the nature of Franchisee's operation, for purposes of Duck Tours, an approved vehicle may not be at the "stop" more than 15 minutes on either side of a scheduled departure for a total allotment of thirty (30) minutes per individual tour. The Grantee shall not solicit persons or transact ticket sales on the City streets or sidewalks. City acknowledges that tickets may be sold on the Ducks themselves, but in no event shall individuals be solicited from the vehicles while on adjacent public or private areas.

Upon the establishment of any proposed stop, the City Manager shall mail notice to all property owners and franchisees located within three-hundred (300) feet of the proposed stop. Such property owners and franchisees shall have twenty days from the mailing of the notice to appeal the decision of the City Manager to the City Commission in accordance with the provisions of this chapter. The City Manager shall also cause notice to be mailed to all property owners and franchisees located within three-hundred (300) feet of any location that the City Manger has denied the

Grantee an opportunity to establish a stop, and for which the Grantee has appealed, informing them of the City Commission meeting at which such appeal will be considered.

The City Commission shall set the matter for hearing with appropriate public notice for the next regularly scheduled Commission meeting. By majority vote, the Commission may affirm, reverse or modify the decision of the City Manager based upon the factors considered by the City manager and those contained in City of Key West Code of Ordinances section 78-252(b).

In addition to the stop designated above, City agrees to provide "stands": one at Greene and Elizabeth Streets, generally as shown on Exhibit "D" attached, and one at Caroline and Margaret Streets, generally as shown on Exhibit "E" attached. Stands for Duck Tours are intended for waiting, loading or unloading, and are not time restricted except as limited to permitted hours of operation.

The City Manager shall have the authority to move stands and stops and to reasonably regulate their use by the Grantee, including requiring of the sharing any additional stops with other franchisees. The location of stands and stops may be marked on City Streets in accordance with the City Code of Ordinances by the City for the benefit of the Grantee. The Grantee, with the consent of the City Manager,

may install signage at such stands or stops subject to any applicable City regulations. If the City should lawfully decide to alter or change the grade of any street or to make any other public improvements which, in the City Manager's sole discretion, requires the Grantee to relocate, modify, or otherwise alter its operations under this Franchise, the City shall give the Grantee at least forty-eight (48) hours notice of such decision and may require the Grantee to remove its signs, vehicles, or other property in order to facilitate such City project. City agrees to provide a temporary location which as nearly as possible is commercially comparable. The Grantee acknowledges and agrees to release the City from any losses, injuries, or damages it may suffer as a result of such decision by the City. The movement or relocation of any stops on public property shall be applied equally to all operators under City franchises. The City shall not require Grantee to relocate, temporarily or otherwise, unless the same request is made to a similarly situated franchisee.

The Grantee shall not utilize loudspeakers in the operation of its business other than in the confines of its own sightseeing vehicles for the benefit of its patrons within such vehicles.

All vehicles operating under this agreement shall utilize an environmentally sensitive alternative fuel, such as bio-fuel, in order to reduce carbon emissions. If Grantee's vehicles do not utilize such fuel, it must submit a plan for city approval to do so, and implement such measures within one year from the effective date of this ordinance.

Prior to implementation of routes, the Grantee shall provide the City a plan to minimize noise and traffic impacts on the residents and guests of the City of Key West.

**Section 12. BOOKS AND RECORDS**

Grantee further agrees to have its gross revenues and payments to the City audited at least every three years by a Certified Public Accounting firm pursuant to generally accepted accounting principles, and the results of said audit shall be promptly transmitted to the City. Grantor shall also retain the right to have gross receipts and payments to the City audited at its own expense by a Certified Public Accounting firm selected by City upon fourteen (14) days written notice to Grantee and further provided that the results of such audit be immediately transmitted to Grantee promptly upon completion. Upon fourteen (14) days written notice to Grantee, Grantor shall

be permitted to inspect Grantee's books, records and other pertinent financial information to ensure compliance with the provisions of section 9 above.

**Section 13. PERMITS**

As a franchisee and an exception to Article IV of Chapter 78 of the Key West Code of Ordinances, the appropriate officers of the City are authorized and directed to issue such written permits and business tax receipts as the Grantee may need and apply for in the operation of its sightseeing service. In all other respects, except as specifically agreed to in this franchise agreement, said Article remains in full force and effect.

**Section 14. CITY BOAT RAMPS AND LEASEHOLD PROPERTIES**

**A. Boat Ramps**

~~In accordance with applicable statutes and ordinances, the City agrees to lease to Duck Tours for boat ramp purposes an appropriate access parcel located between the Grinnell Street ferry terminal and the existing Trumbo Road ramp. The maximum term of such lease shall be in accordance with the City's charter, Code of Ordinances and applicable statutes, and in no event longer than the period lessee operates an amphibious sightseeing operation in Key West.~~

~~Such lease agreement will provide for options exercisable by Grantee in order that a lease may remain in effect for the period of time lessee operates an amphibious sightseeing operation in Key West. Lessee's consideration for the lease shall be the construction of a boat ramp at its sole expense at the said location. The boat ramp shall be subject to normal City building permit approval and inspection and shall be for the exclusive use of lessee. Lessee shall be solely responsible for all maintenance and commercially appropriate insurance for said boat ramp. Grantee shall apply for all required permits to construct such ramp within six months of the effective date of such lease agreement and pursue its construction as expeditiously as possible.~~

Duck Tours and City acknowledge that Duck Tours would like to construct a ramp adjacent to Trumbo Road for use in its amphibious sightseeing operation. The parties further recognize that the ramp would extend into the water and over bay bottom the City of Key West currently leases from the State of Florida. The present and future uses specified by the bay bottom lease agreement do not include such a new ramp. Duck Tours and the City agree to work together to accomplish necessary amendments or authorizations for such use, subject to City Commission/CRA approval.

If such an acceptable amendment or authorization is obtained, the parties will engage in good faith negotiations for a sublease or use agreement for such ramp improvements. Any such agreement will include provisions:

- that specify a term with options commensurate with Duck Tour's franchise agreement;
- that the minimum consideration for the agreement will be Duck Tours construction, maintenance and insurance of the ramp;
- that in the event that Duck Tours ceases to operate, other than for reasons beyond its control, the ramp and all associated improvements thereon shall be the property of the City and Ducks shall have no interest or rights in such property;
- that another amphibious vehicle operator authorized pursuant to a City franchise may utilize the ramp upon payment of a reasonable specified fee conditioned upon the inability of such franchisee to obtain a similarly situated ramp after diligent effort;
- that the ramp be located either directly north or south of the existing Trumbo Road boat ramp;

- that the area shall be large enough to accommodate a boat ramp at least 20' wide;
- that in the event of a conflict in usage or scheduling between franchisees, the City Manager shall have sole responsibility to reconcile the conflict, subject to appeal to the City Commission.

Any sublease or use approval shall be in accordance with the City's Charter, Code of Ordinances, applicable statutes and dependent upon the satisfaction of any conditions imposed upon the City by the current bay bottom lease agreement with the State of Florida (including any amendments, extensions or alterations thereto) and the Easement agreement(s) with the United States Navy. Additionally, upon approval of any sublease or use agreement, the City Commission/CRA will consider a license pursuant to City Code of Ordinances section 2-939 for the portion of ramp extending onto the adjoining upland parcel.

City agrees that until the boat ramp specified ~~in (1)~~ above is operational and available for use by Duck Tours, Duck Tours may use the City's existing boat ramp on Trumbo Road on a non-exclusive basis subject to the existing easement approved by the City per Resolution 93-406.

City agrees that at the existing Truman Annex boat ramp, the ramp shall be divided into two lanes with one lane designated for the use of amphibious vehicles but subject to Navy use and public events use, which use shall take priority over use by Duck Tours. Should the City decide to appoint a Dock Master with authority to resolve conflicting uses, then Duck Tours shall be subject to the Dock Master's determinations. Recognizing that Duck Tours' operations are subject to a schedule and advance planning, City agrees to use its best efforts to provide at least five day prior notice of anticipated conflicts.

City agrees that Duck Tours may use the existing boat ramp on Simonton Street on a non-exclusive basis without any priority and without impacting the public's health, safety and welfare.

Duck Tours may access the public boat ramp at Garrison Bight, as would any other vessel, upon payment of the standard ramp fee in effect at the time of each such use.

**B. Leasehold Interests**

City acknowledges that Duck Tours may sublet depot space, i.e., space for ticketing and operations, from other City tenants subject to the City's prior approval, which consent shall not be unreasonably withheld. Additionally, should Duck Tours seek to lease or otherwise occupy depot

space in other property owned by the City, City agrees to ~~support~~ evaluate that occupancy ~~consistent~~ in accordance with applicable statutes and ordinances.

**Section 15. PERIOD OF GRANT AND ADHERENCE TO CITY'S FRANCHISE ORDAINCE**

This franchise hereby granted to Duck Tours Seafari Inc., a Florida Corporation, shall be effective following final adoption by the City Commission and upon acceptance by Grantee as specified in section 28 below. Unless earlier terminated as specified herein, the initial term of this franchise shall remain in place until February 10, 2015. It is recognized that February 10, 2015 is the date upon which all sightseeing tour operators become subject to the City's Franchise Ordinance (Chapter 78 Key West Florida Code of Ordinances), as may be amended from time to time. Thereafter, if not in default of any provision herein or of such ordinances, Duck Tours shall have three successive five year renewal options to be exercised by written notice to the City at least six months prior to the termination of the then existing term.

Duck Tours agrees to abide by all terms and conditions of the City's Franchise Ordinance, 09-23, as amended from time to time, not inconsistent with this Agreement and excluding the payment of an application fee. Provided,

however, that said Franchise Ordinance shall not impair the rights granted to Duck Tours in Sections 1, 14 and 15 of this Agreement/Ordinance. At the time when said Franchise Ordinance (as may be amended from time to time) is applied to all sightseeing tour companies, including Historic Tours of America, which time is envisioned to be February 10, 2015, the parties agree that Duck Tours will come under the jurisdiction of said Franchise Ordinance. At such point in time, Duck Tours agrees to comply with the terms and conditions of such ordinance. However, City agrees that Duck Tours, as the operator of an amphibious sightseeing operation, will not be subject to requirements that prohibit its operation, such as a requirement to use propane fuel which the U.S. Coast Guard will not permit on federal waterways.

## 16. RATES, FEES, AND ROUTE PROVISIONS

The Grantee shall have the power to establish, increase or decrease rates, fares and charges to users of its services. However, prior to permanently increasing or decreasing rates, fares or charges, the Grantee shall notify the City and the City Commission may schedule a public hearing.

Prior to commencing operations, the Grantee shall provide the Grantor with a proposed script of the sightseeing tour to be given to passengers. Material alterations to such script shall be forwarded to the City Clerk.

The Grantee shall also have the power to establish its own routes, and schedules, stops and hours of operation, subject to review by the City Manager as specified herein. At least ten (10) days prior to the implementation of any route or schedule, the Grantee shall provide the City Manager with a copy of the route and/or schedule specified on a City map. The City Manager shall have the authority to disapprove any route or schedule, which in the City Manager's opinion disrupts traffic, City operations, or is otherwise unreasonably injurious to the public welfare. Should Grantee disagree with the decision of the City Manger, it shall, by filing written notice with the City Clerk within three (3) days, appeal the decision to the City Commission. The City Commission shall set the matter for hearing with appropriate public notice for the next regularly scheduled Commission meeting. By majority vote, the Commission may affirm, reverse or modify the decision of the City Manager based upon the factors considered by the

City manager and those contained City of Key West Code of Ordinances section 78-252(b).

**Section 17. DEFAULT BY THE FRANCHISEE**

Franchisee/Grantee shall be in default of this Agreement in the event of any of the following

(A) Failure to comply with any federal, state or local law, ordinance, rule, or regulation governing any part of the operations of activities authorized herein; or

(B) Failure to comply with any provision of this Franchise; or

(C) Voluntarily or involuntarily becomes bankrupt; or

(D) Voluntarily or involuntarily has a receiver appointed; or

(E) Has assets sold at sheriff's sale or any other judicial sale; or

(F) Involuntarily assigns, transfers, or encumbers any rights or privileges contained in the franchise; or

(G) Voluntarily assigns, transfers, or encumbers any rights or privileges contained in the franchise without first obtaining the written consent of the City commission; or

(H) Knowingly files false financial statements with the city; or

(I) Willfully fails to file the required financial information with the city.

While in default, Grantee and City agree that City may accept any payment, whether full or partial, without waiving or relinquishing any right to continue default proceedings.

**Section 18. NOTICE; SUSPENSION, TERMINATION UPON DEFAULT**

If the City Manager determines that the Grantee has defaulted in its performance under this Franchise, the City Manager shall provide written notice of such default and give the Grantee a reasonable time, but not less than seven (7) days, to cure such default. If default by the Grantee continues longer than the period of time specified in said notice, the City Manager shall provide the Grantee a second written notice, that the Grantee's right to operate a Sightseeing service under this Franchise may be suspended or terminated and that an administrative hearing shall be held not less than fourteen (14) days after the date of said notice for the purpose of hearing evidence from the Grantee and to determine an appropriate remedy. The Grantee shall have the right to call and cross-examine witnesses and be represented by counsel at such hearing. Following the

hearing, the City Manger shall have the right to suspend or terminate this Franchise or to take other appropriate remedies to ensure compliance with its terms.

The foregoing reasons for forfeiture, suspension, termination, cancellation or other action by the city manager are cumulative and not exclusive, and a franchise agreement may be forfeited, suspended, terminated, cancelled or other such measures taken by the City Manager for any other reason authorized by the law of the State of Florida.

**Section 19. APPEAL UPON FINDING OF DEFAULT**

The Grantee shall have the right to appeal the decision of the City Manager issued pursuant to Section 18 to the City Commission provided such appeal is filed in writing with the City Clerk within three (3) days following the City Manager's decision. The City Commission shall have the right to affirm, modify, or reverse the City Manager's decision.

**Section 20. BANKRUPTCY OF GRANTEE**

**IN THE EVENT GRANTEE FILES ANY FORM OF BANKRUPTCY, GRANTOR SHALL BE ENTITLED TO IMMEDIATE TERMINATION OF THE AUTOMATIC STAY PROVISIONS OF 11 U.S.C. §352, GRANTING THE GRANTOR COMPLETE RELIEF AND ALLOWING THE GRANTOR TO EXERCISE ALL OF HIS LEGAL AND EQUITABLE RIGHTS AND REMEDIES, INCLUDING,**

**WITHOUT LIMITATION, THE RIGHT TO TERMINATE THIS FRANCHISE. ADDITIONALLY, GRANTEE AGREES NOT TO DIRECTLY OR INDIRECTLY OPPOSE OR OTHERWISE DEFEND AGAINST THE GRANTOR'S EFFORT TO GAIN RELIEF FROM THE AUTOMATIC STAY. THE GRANTOR SHALL BE ENTITLED AS AFORESAID TO THE LIFTING OF THE AUTOMATIC STAY WITHOUT THE NECESSITY OF AN EVIDENTIARY HEARING. GRANTEE SPECIFICALLY AGREES AND ACKNOWLEDGES THAT THE LIFTING OF THE AUTOMATIC STAY HEREUNDER BY THE APPROPRIATE BANKRUPTCY COURT SHALL BE DEEMED TO BE "FOR CAUSE" PURSUANT TO SECTION 362(D)(1). SHOULD A COURT DETERMINE THAT THE FRANCHISE IS NOT TERMINATED IN ACCORDANCE WITH THE PROVISIONS OUTLINED HEREIN, THE DEBTOR SHALL MAKE AN ELECTION OF WHETHER TO ACCEPT OR REJECT THE FRANCHISE WITHIN FOURTEEN (14) DAYS OF FILING FOR BANKRUPTCY.**

**THIS CLAUSE WAS A MATERIAL CONSIDERATION TO THE GRANTOR IN GRANTING THIS FRANCHISE.**

Section 21. PROVISIONS CUMULATIVE

The rights and remedies reserved to the City by this Franchise are cumulative and shall be in addition to and not in derogation of any other rights or remedies which the City may have with respect to the subject matter of this Franchise.

Section 22. NO JOINT VENTURE

Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties. Neither party is authorized to act toward third persons or

the public in any manner which would indicate any such relationship with the other.

**Section 23. NO WAIVER OF OTHER CITY REQUIREMENTS**

Except as specifically provided herein, this franchise is not intended to waive any requirement of the Key West City Code of Ordinances or City Charter. The failure of a party to insist, in any one or more instances, upon strict performance of any covenants or conditions of this Franchise or to exercise any option of such party herein contained, shall not be construed as a waiver or relinquishment of that or any other right or remedy of such party hereunder and shall not be deemed a waiver of any subsequent breach or default by the other party of the covenants or conditions herein. No waiver by a party of any provision hereof shall be deemed to have been made unless expressed in writing and signed by such party. With respect to Grantor, such written expression of waiver may only occur by resolution of the Key West City Commission.

**Section 24. DISCRIMINATION**

The Franchisee shall not deny service, access or otherwise discriminate against any person, including customers, on the basis of race, color, religion, national origin, age, sex or sexual orientation. The Franchisee

shall comply at all times with all other applicable federal, state and local laws and regulations.

**Section 25. CONSTRUCTION; TIME IS OF THE ESSENCE**

The provisions of this Franchise shall be liberally construed in order to effectuate its purposes and objectives consistent with the public interest. In construing any and all terms of this franchise agreement, time is of the essence.

**Section 26. ATTORNEY'S FEES, WAIVER OF JURY TRIAL AND VENUE**

In the event of any dispute affecting the rights of either party under this Franchise, the losing party shall pay the prevailing party's costs, expenses, and Attorney's Fees incurred in the enforcement of the prevailing party's rights hereunder upon a final determination on the merits.

As consideration for this agreement, the parties hereby waive the right to trial by jury in any action or proceeding brought by any party against any other party pertaining to any matter whatsoever arising out of or in any way connected with this agreement.

This agreement has been executed and delivered in the State of Florida and shall be construed in accordance with

the laws of Florida. Any action in connection herewith, in law or equity, shall be brought in Monroe County, Florida.

**Section 27. NOTICES**

All notices, requests, demands, and other communications which are required or may be given under this franchise shall be in writing and shall be served on the parties at the addresses indicated below:

To Grantee: Duck Tours Seafari, Inc.
C/o John Murphy
925 Seminary Street
Key West, Florida 33040

To Grantor: City Manager
City Hall
Key West, FL 333040

Any such notices shall be delivered by one of the following methods: (a) sent by certified mail, return receipt requested, in which case notice shall be deemed delivered three (3) business days after deposit, postage prepaid in the U.S. Mail, (b) sent by overnight delivery using a nationally recognized overnight courier, in which case notice shall be deemed delivered one business day after deposit with such courier, (c) sent by telephone facsimile transmission, in which case notice shall be

deemed delivered on the day of transmission of such notice and confirmation of such transmission, or (d) sent by personal delivery, in which case notice shall be deemed delivered on the day of actual delivery. The above addresses may be changed by written notice to the other party; provided, however, that no notice of a change of address shall be effective until actual receipt of such notice.

**Section 28. ACCEPTANCE**

Within ten (10) days of the passage and adoption hereof, the Grantee shall file with the City Clerk written notice of its acceptance of all terms and conditions of this Ordinance, and both the City and Grantee shall thereafter be bound thereby. By its execution of the Franchise Agreement, Grantee acknowledges and accepts the City's legal right and authority to issue this Franchise and impose the requirements set forth herein.

**Section 29. ACKNOWLEDGMENT AND INTERPRETATION**

The parties hereto acknowledge that they have read, understand and have had the opportunity to be advised by legal counsel as to each and every one of the terms, conditions, restrictions and effect of all of the provisions of this Agreement, and each agrees to the enforcement of any

and all of these provisions and executes this Agreement with full knowledge of these provisions. Should any provision of this Agreement require judicial interpretation, it is agreed that the court interpreting or construing the provision shall not apply a presumption that the terms hereof shall be more strictly construed against one party by reason of the rule of construction that a document is to be construed more strictly against the party who itself or through its agent prepared the document.

**Section 30. ENTIRE AGREEMENT; AMENDMENTS**

This Franchise and any attachments hereto represent the entire understanding and agreement between the parties hereto, supersede all prior oral negotiations or written agreements between the parties, and can be amended, modified, or changed only by written instrument executed by both parties hereto.

**Section 31. REPEALING SECTION**

All ordinances or parts of ordinances of said City in conflict with the provisions of this Ordinance are hereby repealed to the extent of such conflict.

**Section 32. SAVING PROVISION**

If any section, part of section, paragraph, sentence or clause of this Ordinance shall be adjudged by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of any other portion hereof, but shall be restricted and limited in its operation and effect to that specific portion hereof involved in the controversy in which such decision shall have been rendered.

**Section 33. WHEN ORDINANCE SHALL GO INTO EFFECT**

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 34. PERSONAL GUARANTY**

The principals of the entity authorized to conduct the franchise granted pursuant to this ordinance shall execute personal guarantees consistent with the Guaranty the City customarily requires of its lessees, a copy of which is attached hereto as exhibit "~~C~~F" and incorporated herein as if fully set forth.

**Section 35. TERMINATION OF INJUNCTION**

The parties agree that upon execution and implementation of this Agreement, and during the term of this Agreement, compliance by the City of Key West with this

Agreement shall constitute compliance with the provisions of the Permanent Injunction Order dated July 27, 2005 in the 16th Judicial Circuit. So long as the City of Key West complies with this Agreement, it shall be deemed to be in compliance with the Permanent Injunction. The parties further agree that upon the conclusion of the term and renewal terms specified herein, or upon the failure of Duck Tours to exercise a renewal term referenced above, the parties shall jointly move to dissolve the said Permanent Injunction and Duck Tours, or its agent and assign as the case may be, shall consent to any such Order dissolving the Permanent Injunction.

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*(Coding: Language added at a reading held on January 4, 2011 to that contained in the original proposed ordinance is underlined; deleted language from January 4, 2011 reading is ~~struck through~~. Language added at final reading held on February 1, 2011 is double underlined. Language deleted at final reading is double ~~struck through~~.)

Read and passed on first reading at a meeting held this 5th day of October, 2010.

Read and passed on final reading at a meeting held this 1st day of February, 2011.

Authenticated by the presiding officer and Clerk of the Commission on the 8th day of February, 2011.

Filed with the Clerk February 8, 2011.

CRAIG CATES, MAYOR

Attest:

CHERYL SMITH, CITY CLERK

EXHIBIT

tabbies

A

EXHIBIT

B

ONLY STOP AT
Clinton Sq. Area

Image U.S. Geological Survey
24°33'30.44" N 81°48'22.85" W elev 3 ft
Image Date: Feb 1, 2006

EXHIBIT

C

EXHIBIT

tabbies

D

EXHIBIT
E

# GUARANTY

This Guaranty is made this 7th day of Feb, 2011 in accordance with Section 34 of the Franchise Agreement approved by Ordinance 11-02 for Duck Tours Seafari, Inc. (hereinafter "franchise") and is by and between the City of Key West (hereinafter "Franchisor") and Duck Tours Seafari, Inc. hereinafter "Franchisee") and John Murphy (hereinafter Guarantor).

In consideration of the franchise, and other good and valuable consideration, Guarantor does hereby covenant and agree that:

(a) The Guarantor does hereby absolutely, unconditionally and irrevocably guarantee to the Franchisor the full and complete performance of all of Franchisee's covenants and obligations under the Franchise and full payment by Franchisee of all fees, additional charges and other charges and amounts required to be paid thereunder during the entire term. Guarantor's obligations hereunder shall be primary and not secondary and are independent of the obligations of the Franchisee.

(b) A separate action or actions may be brought and prosecuted against Guarantor, whether or not action is brought against Franchisee or whether Franchisee shall be joined in any such action or actions. At the Franchisor's option, the Guarantor may be joined in any action or proceeding commenced by the Franchisor against Franchisee in connection with and based upon any covenants and obligations under the Franchise, and the Guarantor hereby waives any demand by Franchisor and/or prior action by Franchisor of any nature whatsoever against Franchisee.

(c) The Guarantor consents to forbearance, indulgences and extensions of time on the part of the Franchisor being afforded to Franchisee, the waiver from time to time by Franchisor of any right or remedy on its part as against Franchisee. The Guarantor hereby agrees that no act or omission on the part of the Franchisor shall affect or modify the obligation and liability of the Guarantor hereunder.

(d) This Guaranty shall remain and continue in full force and effect, notwithstanding (i) any alteration of the Franchise by parties thereto, whether prior or subsequent to the execution hereof, (ii) any renewal, extension, modification or amendment of the Franchise, (iii) any assignment of Franchisee's interest in the Franchise.

(e) The Guarantor's obligations hereunder shall remain fully binding although Franchisor may have waived one or more defaults by Franchisee, extended the time of performance by Franchisee, released, returned, or misapplied other collateral given later as additional security (including other guarantees) and released Franchisee from the performance of its obligations under the Franchise.

(f) In the event any action or proceeding be brought by Franchisor to enforce this Guaranty, or Franchisor appears in any action or proceeding in any way connected with or growing out of this Guaranty, then and in any such event, the Guarantor shall pay to

Franchisor reasonable attorney's fees, but only if Franchisor is the prevailing party. The Guarantor in any suit brought under this Guaranty does hereby submit to the jurisdiction of the courts of the State of Florida and to the venue in the circuit court of Monroe County, Florida.

(g) This Guaranty shall remain in full force and effect notwithstanding the institution by or against Franchisee or bankruptcy, reorganization, readjustment, receivership or insolvency proceedings of any nature, or in the disaffirmance of the Franchise an any such proceedings or otherwise.

(h) This Guaranty shall be applicable to and binding upon the heirs, representatives, successors and assigns of Franchisor, Franchisee and the Guarantor.

IN WITNESS WHEREOF, the Guarantor has caused the foregoing Guaranty to be executed on this 7th day of Feb 2011.

Witness:

By: Noemi Murphy
Name: Noemi Murphy

Date: 2-7-11

Guarantor:

By: John Murphy
Name: John Murphy

Date: 2/7/11

State of Florida }
County of Monroe }

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgements, John Murphy, to me personally known or who provided _____ as photo identification, and who executed the foregoing instrument and he/she acknowledged before me that he/she executed the same individually and for the purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State last aforesaid, this 7th day of February, 2011.

Notary Public, State of Florida

My Commission Expires:

ADELE BRAGHIERI
Notary Public - State of Florida
My Comm. Expires Jul 21, 2013
Commission # DD 895266
Bonded Through National Notary Assn.