ITEM 2

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Office of the City Attorney

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Memorandum

TO: Mayor & City Commissioners

FROM: Shawn D. Smith, City Attorney

RE: Franchise holder's suggested changes to template ordinance

DATE: 25 September 2015

Mayor & Commissioners

What follows is "Item 2" for reference material at second reading of the template franchise ordinance. It was previously provided under my memo of 22 January 2015. The document was prepared by City View, Conch Tour Train & Buggy Bus, which includes their comments to the ordinance approved at first reading. City View's comments are in red. Buggy Bus/ Conch Train's comments are in blue. The original ordinance provisions are in black in the typical format.

Take care

Shawn D. Smith

ORDINANCE NO. _____

Paragraphs Height: 14"

AN ORDINANCE OF THE CITY OF KEY WEST, FLORIDA, AMENDING CHAPTER 78 OF THE CODE OF ORDINANCES BY AMENDING ARTICLE V, ENTITLED "SIGHTSEEING VEHICLES PURSUANT TO FRANCHISE" TO INCLUDE ADDITIONS TO SECTION 78-251 ENTITLED "FRANCHISE APPLICATION PROCESS"; AND AMENDING SEC. 78-252 ENTITLED "CITY COMMISSION CONSIDERATION OF DULY-SUBMITTED APPLICATION" GOVERNING THE PROCESS AND REQUIREMENTS FOR APPLYING FOR, GRANTING AND RENEWING SIGHTSEEING VEHICLE FRANCHISES; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF INCONSISTENT PROVISIONS; PROVIDING FOR AN EFFECTIVE DATE

This copy is HTA's Draft in the white background with CityViews comments in the shaded margin.

CityView also speaks for Duck Tours Seafari

WHEREAS, the City Commission desires to revise the Vehicle For Hire Ordinance, chapter 78 of the Code of Ordinances, to make changes to its regulations to reflect current conditions in the vehicles for hire industry in Key West;

WHEREAS, the City Commission finds that a revision to Chapter 78 would promote the health, safety and welfare of the citizens of Key West; and

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).

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

Section 1: That Chapter 78, Article V of the Code of Ordinances is hereby amended as follows*:

Sec. 78-251. Franchise Application Process.

Should there be a window for applications? Should the process be different for Renewals?

(a) Any person or corporation desiring to obtain a new

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Sec. 78-251. Franchise Application Process.

Should there be a window for applications? Should the process be different for Renewals?

(a) Any person or corporation desiring to obtain a new

or renewal franchise to operate sightseeing motor vehicles pursuant to this article V shall file an application with the city manager, along with an application fee of $5,000.00 made payable to the City of Key West to subsidize the costs of processing applications.

(b) In order for a franchise application to be considered by the city commission, the application shall contain the following (all submitted in electronic and paper format) to the city manager:

(1) Proposed franchise ordinance meeting the requisites of section 78-252(a);

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*(Coding: Added language is underlined; deleted language is ~~struck through~~.)

(2) If the applicant is a corporation, a letter of good standing issued by the Florida Department of State, Division of Corporations, certifying that the applicant is either a Florida corporation, or a foreign corporation, which is duly registered with the Florida Division of Corporations;

(3) Proposed number of vehicles to be operated under the franchise, with true and accurate color photographs of the vehicles to be used in the operation, along with accurate dimensions, seating capacity, fully loaded weight and turning radius of such vehicles;

(4) Proposed fixed route, schedules, stops and hours of the operation delineated on a Key West city map and a plan to minimize noise and traffic impacts on the residents and guests of the City of Key West;

This may be the place to add maximum dimensions. Such as:
Height: 12'
Width: 8'6"
Length: 36'
Gross vehicle weight: 26,000 lbs.
Driver seat above ground: 80"
Also the question about trains and Cityview's ability to compete with this large capacity vehicle type to the extent the city wants to continue this long vehicle type.

and

(5) Proposed script of the sightseeing tour to be given to passengers.

(c) Upon receipt of ~~all of the items~~ an application meeting all the requirements listed in this Article ~~section~~, the city manager shall deem an application "duly-submitted". The applicant shall meet with the city manager and the city attorney within fourteen (14) days of receipt of a duly-submitted application to discuss contents of the application and any suggested modifications. ~~and~~ ~~t~~The city manager shall place the item as an ordinance for first reading to appear on the agenda for a regularly scheduled city commission meeting occurring within 60 days of the city manager's designation of the application as being duly-submitted.

Maybe extend to 21 or 30 days and the idea that applications be submitted at a certain time of year.

Sec. 78-252. - City commission consideration of duly-submitted application.

The Key West City Commission has plenary authority regarding any duly-submitted franchise application.

Consistent with the requirements specified in this chapter, the city commission may grant any application, deny any application, or grant any application with amendments, or conditions, upon any reason in which the city commission deems appropriate for the protection of health, safety and welfare and which advances the public convenience.

(a) Subject to the above plenary authority, the city commission shall not approve a proposed franchise ordinance hereunder unless such franchise ordinance includes:

(1) A provision requiring: that the franchisee shall, at all times, maintain liability insurance in an

amount of not less than $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/shuttle 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 franchisee'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 30 days' advance notice. The franchisee shall immediately notify the city of any cancellation of such insurance.

appropriate amount of insurance. Other cities require a $5 million dollar amount.

At the request of the city manager, the franchisee shall meet with the city'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 franchisee objects to the level of coverage, city and franchisee shall enter into a binding arbitration within 15 days of the date of the dispute to resolve the issue. If city and franchisee 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 city, the coverage

required by the city shall be placed.

(2) A provision requiring an annual franchise fee be paid to the City of Key West in an amount equal to the greater of (i) five percent of gross revenues it receives from all sources derived from operations pursuant to the franchise agreement (including ~~but not limited to vehicle advertising and~~ shuttle services)*, or (ii) $7,500.00 per vehicle authorized in the franchise agreement (this amount shall be referred to as the "minimum guarantee"). The $7,500.00 per vehicle fee shall be increased yearly 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 shall be paid at the end of each calendar month with a 15-day grace period. The yearly guaranteed minimum payment of $7,500.00 per vehicle shall be payable at the end of each 12-month period with a ten-day grace period. Failure to pay any sum when due shall result in imposition of interest at the rate of 18 percent per annum of the delinquent amount per month or such maximum amount permitted by law until paid in full.

Eliminate all third party advertising on the exterior or the vehicles. With cities limiting the outlets for advertising the industry is seeking the billboard advertising available on sightseeing vehicles. Eliminate the incentive to run empty vehicles to fulfill advertising contracts.

(3) A provision which includes, with detail and specificity, each and every location where vehicles operated pursuant to the franchise will pick up or drop off passengers (hereinafter referred to as "stop(s)").

Each franchise should also have a "Stand" to stage operations. This would be consistent with what exists and would assist in traffic reduction if a vehicle could park instead of being in the loop.

(4) A provision requiring that 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 franchisee or any affected party or entity disagree with the decision of the city manager, it

* there is no regulatory cost to City if advertising is placed on vehicles and no greater impact to City roadway if vehicles carry advertising

shall, by filing written notice with the city clerk appeal the decision to the city commission.

Should franchisee disagree with the decision of the city manager, it shall, by filing written notice with the city clerk within three days of the city manager's written determination, appeal the decision to the city commission.

Upon the establishment of any proposed stop, the city manager shall mail notice to all property owners and franchisees located within 300 feet of the proposed stop. Such property owners and franchisees shall have 20 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 300 feet of any location that the city manager has denied the franchisee an opportunity to establish a stop, and for which the franchisee 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 subsection (b) below.

Such authorized stops shall be for the loading and unloading of passengers only. The franchisee shall not solicit persons or transact ticket sales on the city streets or sidewalks. The city manager shall have the authority to move stops and to reasonably regulate their use by the franchisee, including requiring of the sharing

of stops with other franchisees. The location of stops may be marked on city streets in accordance with the City Code of Ordinances by the city for the benefit of the franchisee. The franchisee, with the consent of the city manager, may install signage at such 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 franchisee to relocate, modify, or otherwise alter its operations under this franchise, the city manager shall give the franchisee at least 48 hours notice of such decision and may require the franchisee to remove its signs, vehicles, or other property in order to facilitate such city project. The franchisee shall acknowledge and agree 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 a franchisee to relocate, temporarily or otherwise, unless the same request is made to all similarly situated franchisees.

(5) A provision which delineates, with detail and specificity, the fixed route of the operation along with an acknowledgment that no operator of a sightseeing vehicle authorized under the franchisee shall drive at such a slow speed as to ~~impede or~~ *block the normal and reasonable movement of traffic. The route should ~~avoid "congested main side streets" so as to~~ not unduly interfere with the peace and enjoyment of the citizens of Key West. ~~Should any~~

Perhaps incorporating the existing state traffic law that addresses this concept.

Consider a process for the routes and schedule similar to the existing approval of stops, where the City Manager approves during the term. City commission approves routes submitted with the application as it is now.

* side streets provide relief to congestion of main arteries and are also necessary to traverse from certain main roadways to other main roadways. The City's December 2011 traffic study identified the main roadways as constrained. This provision would exacerbate the problem.

~~[illegible] per hour on a particular residential side street. "Residential Side Streets" are those typically narrow streets (such as, by way of example but without limitation, Grinnell/William/Francis Streets) that run between larger through streets (such as, by way of example but without limitation, Eaton/Fleming/Duval). If a dispute develops between an applicant for a franchise and the City over the definition of a street, the City Manager shall make a final determination based upon the use, traffic flow, parking configuration and size of the street.~~ The City Manager shall have the authority to revise the authorized fixed route to address reasonable concerns regarding health, safety, and welfare of the public.

City view also believes this section should be omitted as the City would be able to address each situation individually based upon all factors. Add an appeal or to the City Commission for ultimate review

If any franchise applicant proposes to utilize amphibious vehicle(s) in their operation, the route shall be limited from the origin of the excursion directly to the point of entry into the water along the largest and safest streets possible and returning from the water directly to the point of disembarkation likewise along the most direct route using the largest and safest streets possible.

This paragraph should be removed as it is our opinion that this would violate the existing Duck Tours Seafari franchise and settlement agreement. By addressing maximum dimensions, the concern of oversized amphibious vehicles would be eliminated. Also routes should be addressed with the individual franchise agreements. See previous comment.

(6) If the franchise permits shuttle operations, a provision which requires all such shuttle operations to be subject to the franchise fee provisions;

(7) A provision including the duration and term of the franchise, which duration or term shall not exceed ten years. If a franchise is granted for ten (10) years, it shall be in the form of a five (5) year term, automatically renewed for a second five (5) year term subject to City Manager review of franchisee's ~~[illegible] extensions totaling a~~

We agree with HTA on clarifying the standard for renewal. Perhaps expand criteria if needed

~~maximum of five (5) additional years based upon demonstrated~~ adherence to the terms and conditions of the franchise agreement;

(8) A provision which, subject to due process considerations, authorizes the city, upon reasonable notice, to terminate the franchise ordinance upon a finding that the operator has defaulted under, or otherwise violated, the franchise agreement and has not corrected the default after reasonable notice;

(9) A provision requiring the franchisee to indemnify the City of Key West for any and all claims related to the franchisee's operations;

(10) A provision whereby the operator expressly acknowledges that the operator is prohibited from transacting ticket sales on the streets or sidewalks of the city; and

Consider expanding the ability of franchise to provide information in front of their stand. Franchises are different from other OPC activity.

(11) A provision requiring that all tour and shuttle vehicles operated pursuant to the franchise agreement use propane fuel or some other environmentally sensitive alternative fuel. ~~If a proposed vehicle presently does not utilize an environmentally sensitive fuel, the franchisee shall submit a plan specifying that such franchisee will do so within one year of the commencement of its franchise as an agreed upon condition of continued operation.~~

(12) A provision requiring the franchisee to have its gross revenues and payments to the city audited at least every ~~three~~ year~~s~~ by a certified public accounting firm pursuant to generally accepted accounting principles, and the results of said audit be promptly transmitted to the city. City shall also retain the right to have gross

We support not changing this requirement. CityView and Duck Tours are not public companies that require this to be done yearly as the competition may be.

revenues and payments to the city audited at its own expense by a certified public accounting firm selected by city upon 14 days' written notice to franchisee and further provided that the results of such audit be immediately transmitted to franchisee promptly upon completion. Upon 14 days' written notice to franchisee, city shall be permitted to inspect franchisee's books, records and other pertinent financial information to ensure compliance with the provisions of paragraph (2) above.

(13) A provision whereby the proposed number of vehicles must be placed into service within sixty (60) days from the effective date of the franchise agreement. The number of permitted vehicles allowed under the franchise agreement shall be reduced by the number not placed into service within 60 days of the service effective date of the franchise agreement.

This should be changed to the operation being in business within a time frame. The number of vehicles and a phase in of those vehicles should be addressed in an individual franchise.

(14) A provision requiring the franchise operator to keep records of the number of vehicles operated each day and the number of fare paying passengers on each vehicle. The records shall be provided to the City on a monthly basis to determine the percentage of occupancy and ridership.

Determine the purpose for this information depending upon how the city regulates the number or capacity of vehicles.

* ~~(15) A provision providing for the reduction of vehicles permitted under the franchise agreement if vehicles are being operated at less than fifty percent (50%) occupancy~~

~~(16) A provision detailing the franchise operators plan to maximize the percentage of riders on each vehicle and minimize the number of vehicles on City~~

We agree with eliminating the following paragraphs. The City Manager may address any situation at any time. In addition the cost of record keeping and GPS compared to what information is produced. Perhaps expanded ability for the City Manager to obtain information upon request or as a study.

* (15)(16)(17) attempts to substitute the City's judgment on reasonable business practices without taking into consideration the business model employed by Franchisee

~~streets.~~

~~(17) A provision for GPS tracking or a similar tracking ability to illustrate the route, speed, frequency, etc. of each vehicle to be provided to the City to determine compliance with the terms contained in the franchise agreement and minimize adverse impacts to the health, safety and welfare of the public.~~

(18) A provision that requires a franchise operator to report any damage to persons or property involving a vehicle used in the operation of the franchise within twenty-four (24) hours of an occurrence.

This information is already recorded by the police department and court records. The existing information would also provide the outcome of who is at fault. If this provision is to remain then lengthen the time to report because of weekends or holidays.

(19) A provision that details the Franchisee's plan to control sound from the tour's narration. ~~No sound from such narration shall be audible outside of the sightseeing vehicle.~~ The City Manager shall have the authority to determine if Franchisee has utilized reasonable means including the best technology practicable based upon the vehicle design and best sound reduction technology utilization.

Agree that Sound should be in the purview of the City Manager to determine after commission approves each franchise sound reduction plan.

* ~~(20) A provision providing for an annual performance review of the franchise operation. The provision shall provide that the city manager or his/her designee shall review the performance of the franchise holder. The evaluation shall include, but not be limited to, the following categories: Compliance with the terms and conditions of this article and grantee's franchise agreement; percentage of ridership and need for alteration of the number of vehicles permitted under the franchise agreement; Responsiveness to customer complaints; Safety of operations; Cleanliness, condition and appearance of~~

* The City Manager already has the power to review franchise compliance. The meaningless review of items which are not areas of concern based upon decades of business operation is "make work".

~~sightseeing motor vehicles. After each such evaluation an evaluation report specifically addressing any area of concern shall be provided to the evaluated franchise holder ("evaluation report"). Each franchise holder may respond to areas of concern noted in the report. The city manager or his/her designee may issue such follow up reports, or take such other action as is warranted, up to and including termination, as set forth herein.~~

(21) A provision detailing the parking and storage plan for the vehicles when not in use.

Not sure why this is needed. Zoning already determines appropriate place. Location may also change over time.

(22) A provision that details the training plan for the operators of each sightseeing vehicle, including but not limited to licensure requirements and ensuring historical accuracy of tour narration.

(b) Subject to the plenary authority of the city commission regarding the issuance and renewal of franchise hereunder, factors which the city commission ~~may~~ shall take into consideration in acting upon a duly submitted franchise application include, but are not limited to, the following:

(1) Public safety;

(2) Traffic impacts, including whether the grant of a franchise would unreasonably increase congestion in the historic district;

This may be the location to address the standard for more vehicles for the existing franchises. If City Manager has the ability to control unnecessary vehicles on the road, let the market control how many vehicles are necessary.

(3) Performance history of the applicant, if applicable;

(4) Financial responsibility and wherewithal of applicant;

(5) Consistency of vehicle aesthetics and city environment;

(6) Consistency between vehicle aesthetics and historical neighborhoods;

(7) Environmental impacts;

(8) Capacity and volume of noncommercial and commercial traffic;

(9) Public input; ~~and~~

Agree with removing this section or create an exemption for existing franchise holders.

(10~~1~~) Any other factors in which legislative bodies would normally consider in acting upon proposed ordinances.

Section 2: 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 3: 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.

Section 4: 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.

Read and passed on first reading at a regular meeting held this _____ day of _____, 2015.

Read and passed on final reading at a regular meeting held this _____ day of _____, 2015.

Authenticated by the presiding officer and Clerk of the Commission on _____ day of _____, 2015.

Filed with the Clerk _____, 2015.

Mayor Craig Cates _____