

RESOLUTION NO. 19-306

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING THE ATTACHED "SUBMERGED LANDS LEASE" FOR CITY-OWNED SUBMERGED LANDS IN GARRISON BIGHT ADJACENT TO 903 EISENHOWER DRIVE BETWEEN THE CITY AND HARBORSIDE MOTEL AND MARINA, INC.; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Florida Department of Environmental Protection required the City to make certain corrective procedural changes related to Deed 19259-A, B and C, including the collection of revenue from private structures under private lease agreements. The attached lease is a renewal of the lease originally approved in Resolution 14-243.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA AS FOLLOWS:

Section 1: That the attached Submerged Lands Lease for property adjacent to 903 Eisenhower Drive between the City and Harborside Motel and Marina, Inc. is hereby approved.

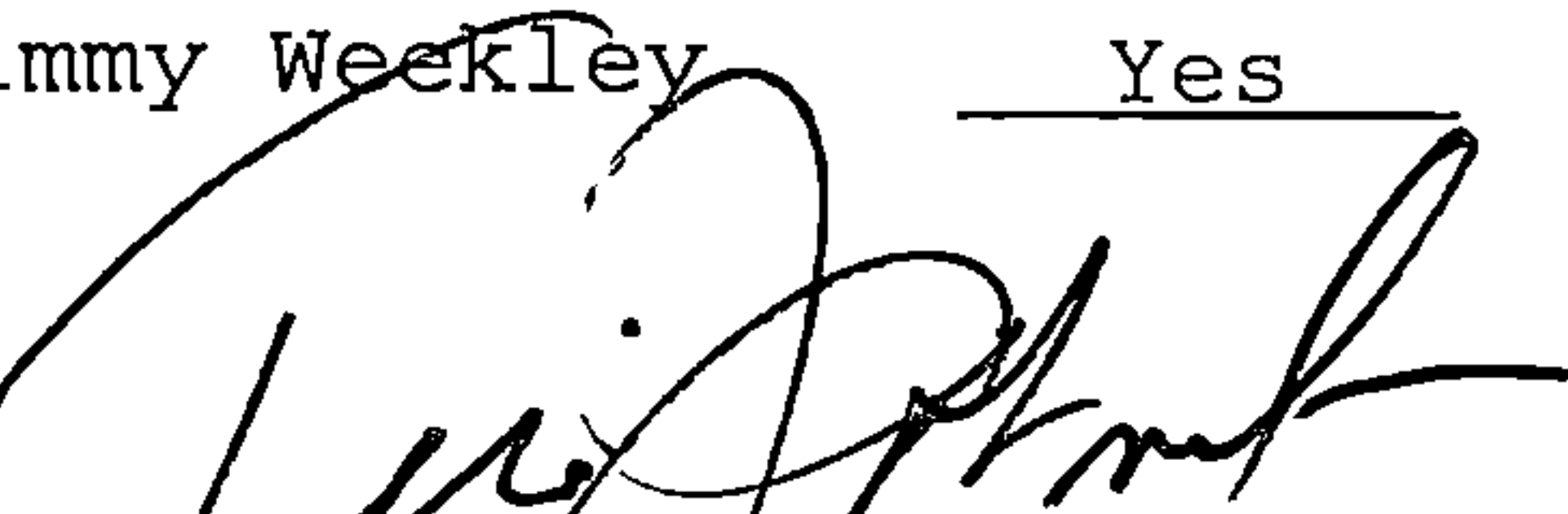
Section 2: That this Resolution shall go into effect immediately upon its passage and adoption and authentication by the signature of the Presiding Officer and the Clerk of the Commission.

Passed and adopted by the City Commission at a meeting held this 2nd day of October, 2019.

Authenticated by the Presiding Officer and Clerk of the Commission on 2nd day of October, 2019.

Filed with the Clerk on October 3, 2019.

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

  
\_\_\_\_\_  
TERI JOHNSTON, MAYOR

ATTEST:

  
\_\_\_\_\_  
CHERYL SMITH, CITY CLERK

# EXECUTIVE SUMMARY



**TO:** City Commission

**CC:** Greg Veliz

**FR:** Marilyn Wilbarger, RPA, CCIM

**DT:** September 3, 2019

**RE:** Submerged Land Lease Renewal for City Owned Submerged Lands in Garrison Bight

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**ACTION:** This a request to approve a submerged land lease renewal for 903 Eisenhower.

**HISTORY:** The City of Key West entered into submerged land leases in September of 2014 in accordance with the procedural changes authorized by the State of Florida for the City owned submerged land. The leases are now expiring and the existing tenants may renew the leases at the proposed rental rate, as follows:

**Lessee:** Harborside Motel and Marina

**Demised**

**Premises:** 903 Eisenhower submerged lands  
Containing approximately 18,486 square feet,

**Term:** Five (5) years from September 1, 2019, the effective date of this lease.

**Use:** The Lessee is hereby authorized to operate commercial docking facility to be used exclusively in conjunction with the upland use,

**Lease Fees:** The Lessee hereby agrees to pay to the Lessor an annual lease fee rate of \$.35 per square foot plus sales tax, if applicable, on a monthly basis, as follows:

|              |                 |
|--------------|-----------------|
| Monthly Fee  | \$539.18        |
| Sales Tax    | \$38.82         |
| <b>Total</b> | <b>\$578.00</b> |

**Increases:** The annual fee for the remaining years of this lease shall be increased annually by .10 per square foot.

**FINANCIAL:** All revenues collected from the use of the submerged land in this deed will be placed back into water related activities for the general public.

**CONCLUSION:** There is no change of use and the rate reflects gradual increases to begin to achieve the market value of the use of the submerged land at this location. Staff recommends approval of the proposed lease renewal.

**ATTACHMENTS:**  
2019 Lease Renewal  
2014 Lease

This Instrument Prepared By:  
Office of the City Attorney  
P.O. Box 1409  
Key West, FL 33041

Filed and Recorded in Official Records of  
MONROE COUNTY KEVIN MADOK, CPA

**CITY OF KEY WEST, FLORIDA**

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**SUBMERGED LANDS LEASE**

**THIS LEASE is hereby issued by the City of Key West, Florida, a municipal corporation, hereinafter referred to as the Lessor.**

**WITNESSETH: That for and in consideration of payment of the annual lease fees hereinafter provided and the faithful and timely performance of and compliance with all terms and conditions stated herein, the Lessor does hereby lease to Harborside Motel and Marina, Inc., whose riparian upland property is located at 903 Eisenhower Drive Key West, Florida 33040 hereinafter referred to as the Lessee, the submerged lands described as follows:**

**A parcel of submerged land in Section 33,  
Township 67 South, Range 25 East, in Monroe County,  
Containing approximately 18,486 square feet,  
more particularly described and shown on Attachment A  
which is attached hereto and incorporated herein.**

**TO HAVE THE USE OF the hereinabove described premises for a period of five (5) years from September 1, 2019, the effective date of this lease. The terms and conditions on and for which this lease is granted are as follows:**

**1. USE OF PROPERTY: The Lessee is hereby authorized to operate commercial docking facility to be used exclusively in conjunction with the upland use, without fueling facilities, with a sewage pump out facility if it meets the regulatory requirements of the State of Florida Department of Environmental Protection or State of Florida Department of Health, or City of Key West Ordinance whichever agency has jurisdiction, and with liveboards as defined in paragraph 26 hereof.**

**2. LEASE FEES: The Lessee hereby agrees to pay to the Lessor an initial annual lease fee of \$.35 per square foot plus sales tax, if applicable, in monthly payments due without demand therefor on the first of each month. The annual fee for the remaining years of this lease shall be increased annually by .10 per square foot. The Lessor will notify the Lessee annually in writing of the amount of each subsequent annual and monthly lease payment during the remaining term of this lease. All lease fees due hereunder shall be remitted to the Lessor. The initial monthly lease fee without the supplemental payment is as follows:**

|                          |                 |
|--------------------------|-----------------|
| Monthly Lease Fee        | \$539.18        |
| Sales tax                | \$38.82         |
| <b>Total Monthly Fee</b> | <b>\$578.00</b> |

**3. WET SLIP RENTAL CERTIFICATION/SUPPLEMENTAL PAYMENT:** (A) The Lessee shall provide upon request by the Lessor any and all information in a certified form needed to calculate the lease fee specified in paragraph two (2) above, including the income, as defined in subsection 18-21.003(31), Florida Administrative Code, derived directly from the lease of wet slips over submerged lands on an annual basis. When six percent (6%) of said annual income exceeds the base fee or minimum annual fee established pursuant to Rule 18-21.011, Florida Administrative Code, for any lease year during the term of this lease, the Lessor shall send the Lessee a supplemental invoice for the difference in the amounts for that lease year. (B) The instrument or agreement used by the Lessee to transfer or assign the right to use a wet slip at the docking facility to a third party shall include a provision that clearly notifies the wet slip renter/user/holder that if the wet slip renter/user/holder subsequently transfers his right to use said wet slip to another party, the instrument or agreement used to transfer said wet slip shall contain a provision that requires six percent (6%) of the annual gross income derived from said instrument or agreement for the use of said wet slip be paid to the Lessee who, upon receipt, shall report and transmit said amount to the Lessor. The instrument or agreement used by the Lessee to transfer a wet slip shall also include a provision that clearly notifies the wet slip renter/user/holder that no interest in said wet slip may be further transferred unless a substantially similar provision to the one contained in the preceding sentence is placed in each succeeding instrument or agreement used to transfer said wet slip to each new wet slip renter/user/holder. (C) The Lessee shall submit to the Lessor each instrument or agreement used by the Lessee to transfer or assign the right to use a wet slip at the docking facility to a third party annually at the same time the Lessee submits the required Annual Wet Slip Revenue Report to the Lessor.

**4. LATE FEE ASSESSMENTS:** The Lessee shall pay a late payment assessment for lease fees or other charges due under this lease which are not paid within 30 days after the due date. This assessment shall be computed at the rate of twelve percent (12%) per annum, calculated on a daily basis for every day the payment is late.

**5. EXAMINATION OF LESSEE'S RECORDS:** For purposes of this lease, the Lessor is hereby specifically authorized and empowered to examine, for the term of this lease including any extensions thereto plus three (3) additional years, at all reasonable hours, the books, records, contracts, and other documents confirming and pertaining to the computation of annual lease payments as specified in paragraph two (2) above.

**6. MAINTENANCE OF LESSEE'S RECORDS:** The Lessee shall maintain separate accounting records for: (i) the gross revenue derived directly from the use of the leased premises. The Lessee shall secure, maintain and keep all records for the entire term of this lease plus three (3) additional years. This period shall be extended for an additional two (2) years upon request for examination of all records and accounts for lease verification purposes by the Lessor.

**7. AGREEMENT TO EXTENT OF USE:** This lease is given to the Lessee to use or occupy the leased premises only for those activities specified herein and as conditioned by the Lessor. The Lessee shall not (i) change or add to the approved use of the leased premises as defined herein; (ii) change activities in any manner that may have an environmental impact; or (iii) change the type of use of the riparian uplands or as permitted by the Lessee's interest in the riparian upland property that is more particularly described as the street address shown in Attachment A without first obtaining, the Lessor's written authorization, which authorization shall not be unreasonably withheld, in the form of a modified lease, the payment of additional fees, if applicable, and, if applicable, the removal of any structures which may no longer qualify for authorization under the modified lease.

**8. PROPERTY RIGHTS:** The Lessee shall make no claim of title or interest to said lands hereinbefore described by reason of the occupancy or use thereof, and all title and interest to said land hereinbefore described is vested in the Lessor. The Lessee is prohibited from including, or making any claim that purports to include, said lands described or the Lessee's leasehold interest in said lands into any form of private ownership, including but not limited to any form of condominium or cooperative ownership. The Lessee is further prohibited from making any claim, including any advertisement, that said land, or the use thereof, may be purchased, sold, or re-sold.

**9. INTEREST IN RIPARIAN UPLAND PROPERTY:** During the term of this lease, the Lessee shall maintain satisfactory evidence of sufficient upland interest as required by paragraph 18-21.004(3)(b), Florida Administrative Code, in the riparian upland property that is more particularly described as the street address shown in Attachment A and by reference made a part hereof together with the riparian rights appurtenant thereto. If such interest is terminated or the Lessor determines that such interest did not exist on the effective date of this lease, this lease may be terminated at the option of the Lessor. If the Lessor terminates this lease, the Lessee agrees not to assert a claim or defense against the Lessor arising out of this lease. Prior to sale and/or termination of the Lessee's interest in the riparian upland property, the Lessee shall inform any potential buyer or transferee of the Lessee's interest in the riparian upland property and the existence of this lease and all its terms and conditions and shall complete and execute any documents required by the Lessor to effect an assignment of this lease, if consented to by the Lessor, which consent may be withheld by the Lessor in Lessor's sole discretion. Failure to do so will not relieve the Lessee from responsibility for full compliance with the terms and conditions of this lease which include, but are not limited to, payment of all fees and/or penalty assessments incurred prior to such act.

**10. ASSIGNMENT OF LEASE:** This lease shall not be assigned or otherwise transferred without prior written consent of the Lessor, which consent may be withheld in the sole discretion of the Lessor. Such assignment or other transfer shall be subject to the terms, conditions and provisions of this lease, current management standards and applicable laws, rules and regulations in effect at that time. Any assignment or other transfer without prior written consent of the Lessor shall be null and void and without legal effect.

**11. INDEMNIFICATION AND INSURANCE:** To the fullest extent permitted by law, Lessee expressly agrees to indemnify and hold harmless the City of Key West and their respective officers, directors, agents, and employees (herein called the "indemnitees") from any and all liability for damages, including, if allowed by law, reasonable attorney's fees and court costs, such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this Paragraph, to persons or property caused in whole or in part by any act, omission, or default by Lessee or its subcontractors, material men, or agents of any tier or their employees, arising out of this Lease or its performance, including any such damages caused in whole or in part by any act, omission, or default of any indemnitee, but specifically excluding any claims of, or damages against an indemnitee resulting from such indemnitee's gross negligence, or the willful, wanton or intentional misconduct of such indemnitee or for statutory violation or punitive damages except and to the extent the statutory violation or punitive damages are caused by or result from the acts or omissions of Lessee or its subcontractors, material men, or agents of any tier or their respective employees.

The indemnification obligations under this Lease shall not be restricted in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Lessee under workers' compensation acts, disability benefits acts, or other employee benefits acts, and shall extend to and include any actions brought by or in the name of any employee of Lessee or of any third party to whom Lessee may subcontract work. This indemnification shall continue beyond the date of termination of the Agreement.

Lessee agrees that Lessor is not in any way an insurer of Lessee's vessel(s), property, family, invitees, employees, agents, passengers or guests. Lessee hereby agrees to maintain and pay for a marine insurance policy providing such protection and indemnity throughout the term of this Agreement. Said policy of protection and indemnity shall protect Lessor and Lessee from all liability for injury to any persons or property which may arise in connection with the operation of or conduct of Lessee or its vessel(s), equipment, agents, invitees, passengers, guests or employees.

Lessee hereby agrees to maintain and pay for, and provide current Certificate of Insurance at all times evidencing the following coverages:

- Protection & Indemnity limits of a minimum of \$1,000,000 Per Occurrence.
- Removal of Wreck coverage included in Protection & Indemnity limit

- Vessel Pollution Coverage included in a minimum amount of \$800,000
- Crew coverage as required by the Federal Jones Act as applicable
- Any other insurance coverage as required by law
- Lessor as certificate holder for purposes of notification of cancellation, termination, or renewal.
- Lessor listed as Additional Insured.

**12. NOTICES/COMPLIANCE/TERMINATION:** The Lessee binds itself, its successors and assigns, to abide by the provisions and conditions herein set forth, and said provisions and conditions shall be deemed covenants of the Lessee, its successors and assigns. In the event the Lessee fails or refuses to comply with the provisions and conditions herein set forth, or in the event the Lessee violates any of the provisions and conditions herein set forth, and the Lessee fails or refuses to comply with any of said provisions or conditions within twenty (20) days of receipt of the Lessor's notice to correct, this lease may be terminated by the Lessor upon thirty (30) days written notice to the Lessee. If canceled, all of the above-described parcel of land shall revert to the Lessor. All notices required to be given to the Lessee by this Lease or applicable law or administrative rules shall be sufficient if sent by U.S. Mail to the following address:

The Lessee shall notify the Lessor by certified mail of any change to this address at least ten (10) days before the change is effective.

**13. TAXES AND ASSESSMENTS:** The Lessee shall assume all responsibility for liabilities that accrue to the subject property or to the improvements thereon, including any and all drainage or special assessments or taxes of every kind and description which are now or may be hereafter lawfully assessed and levied against the subject property during the effective period of this lease.

**14. NUISANCES OR ILLEGAL OPERATIONS:** The Lessee shall not permit the leased premises or any part thereof to be used or occupied for any purpose or business other than herein specified unless such proposed use and occupancy are consented to by the Lessor and the lease is modified accordingly, nor shall Lessee knowingly permit or suffer any nuisances or illegal operations of any kind on the leased premises.

**15. MAINTENANCE OF FACILITY/RIGHT TO INSPECT:** The Lessee shall maintain the leased premises in good condition, keeping the structures and equipment located thereon in a good state of repair in the interests of public health, safety and welfare. No dock or pier shall be constructed in any manner that would cause harm to wildlife. The leased premises shall be subject to inspection by the Lessor or its designated agent at any reasonable time.

**16. NON-DISCRIMINATION:** The Lessee shall not discriminate against any individual because of that individual's race, color, religion, sex, national origin, age, handicap, or marital status with respect to any activity occurring within the area subject to this lease or upon lands adjacent to and used as an adjunct of the leased area.

**17. ENFORCEMENT OF PROVISIONS:** No failure, or successive failures, on the part of the Lessor to enforce any provision, nor any waiver or successive waivers on its part of any provision herein, shall operate as a discharge thereof or render the same inoperative or impair the right of the Lessor to enforce the same upon any renewal thereof or in the event of subsequent breach or breaches.

**18. PERMISSION GRANTED:** Upon expiration or cancellation of this lease all permission granted hereunder shall cease and terminate.

**19. RENEWAL PROVISIONS:** Renewal of this lease shall be at the sole option of the Lessor, which consent may withheld in the sole discretion of the Lessor. Such renewal shall be subject to the terms, conditions and provisions of management standards and applicable laws, rules and regulations in effect at that time. In the event that the Lessee is in full compliance with the terms of this lease, the Lessor will begin the renewal process.



The term of any renewal granted by the Lessor shall commence on the last day of the previous lease term. In the event the Lessor does not grant a renewal, the Lessee shall vacate the leased premises and remove all structures and equipment occupying and erected thereon at its expense. The obligation to remove all structures authorized herein upon termination of this lease shall constitute an affirmative covenant upon the Lessee's interest in the riparian upland property more particularly described as the street address shown in Attachment A, which shall run with the title to the Lessee's interest in said riparian upland property and shall be binding upon the Lessee and the Lessee's successors in title or successors in interest.

**20. REMOVAL OF STRUCTURES/ADMINISTRATIVE FINES:** If the Lessee does not remove said structures and equipment occupying and erected upon the leased premises after expiration or cancellation of this lease, such structures and equipment will be deemed forfeited to the Lessor, and the Lessor may authorize removal and may sell such forfeited structures and equipment after ten (10) days written notice by certified mail addressed to the Lessee at the address specified in Paragraph 12 or at such address on record as provided to the Lessor by the Lessee. However, such remedy shall be in addition to all other remedies available to the Lessor under applicable laws, rules and regulations including the right to compel removal of all structures and the right to impose administrative fines.

**21. REMOVAL COSTS/LIEN ON RIPARIAN UPLAND PROPERTY:** Subject to the noticing provisions of Paragraph 20 of this lease, any costs incurred by the Lessor in removal of any structures and equipment constructed or maintained on state lands shall be paid by Lessee and any unpaid costs and expenses shall constitute a lien upon the Lessee's interest in the riparian upland property that is more particularly described as the street address shown in Attachment A. This lien on the Lessee's interest in the riparian upland property shall be enforceable in summary proceedings as provided by law.

**22. RIPARIAN RIGHTS/FINAL ADJUDICATION:** In the event that any part of any structure authorized hereunder is determined by a final adjudication issued by a court of competent jurisdiction to encroach on or interfere with adjacent riparian rights, Lessee agrees to either obtain written consent for the offending structure from the affected riparian owner or to remove the interference or encroachment within 60 days from the date of the adjudication. Failure to comply with this paragraph shall constitute a material breach of this lease agreement and shall be grounds for immediate termination of this lease agreement at the option of the Lessor.

**23. AMENDMENTS/MODIFICATIONS:** This Lease is the entire and only agreement between the parties. Its provisions are not severable. Any amendment or modification to this lease must be in writing, must be accepted, acknowledged and executed by the Lessee and Lessor, and must comply with the rules and statutes in existence at the time of the execution of the modification or amendment. Notwithstanding the provisions of this paragraph, if mooring is authorized by this lease, the Lessee may install boatlifts within the leased premises without formal modification of the lease provided that (a) the Lessee obtains any state or local regulatory permit that may be required; and (b) the location or size of the lift does not increase the mooring capacity of the docking facility.

**24. ADVERTISEMENT/SIGNS/NON-WATER DEPENDENT ACTIVITIES/ADDITIONAL ACTIVITIES/MINOR STRUCTURAL REPAIRS:** No permanent or temporary signs directed to the boating public advertising the sale of alcoholic beverages shall be erected or placed within the leased premises. No restaurant or dining activities are to occur within the leased premises. The Lessee shall ensure that no permanent, temporary or floating structures, fences, docks, pilings or any structures whose use is not water-dependent shall be erected or conducted over the submerged lands without prior written consent from the Lessor, which consent may be withheld by Lessor in Lessor's sole discretion. No additional structures and/or activities including dredging, relocation/realignment or major repairs or renovations to authorized structures, shall be erected or conducted on or over the submerged lands without prior written consent from the Lessor, which consent may be withheld by Lessor in Lessor's sole discretion. Unless specifically authorized in writing by the Lessor, such activities or structures shall be considered unauthorized and a breach of this Lease. This condition does not apply to minor structural repairs required to maintain the authorized structures in a good state of repair in the interests of public

health, safety or welfare; provided, however, that such activities shall not exceed the activities authorized by this Lease.

**25. COMPLIANCE WITH FLORIDA LAWS:** On or in conjunction with the use of the leased premises, the Lessee shall at all times comply with all Florida Statutes and all administrative rules promulgated thereunder. Any unlawful activity which occurs on the leased premises or in conjunction with the use of the leased premises shall be grounds for the termination of this Lease by the Lessor.

**26. LIVEBOARDS:** The term "liveboard" is defined as a vessel docked at the facility and inhabited by a person or persons for any five (5) consecutive days or a total of ten (10) days within a thirty (30) day period. If liveboards are authorized by paragraph one (1) of this lease, in no event shall such "liveboard" status exceed six (6) months within any twelve (12) month period, nor shall any such vessel constitute a legal or primary residence.

**27. GAMBLING VESSELS:** During the term of this Lease and any renewals, extensions, modifications or assignments thereof, Lessee shall prohibit the operation of or entry onto the leased premises of gambling cruise ships, or vessels that are used principally for the purpose of gambling, when these vessels are engaged in "cruises to nowhere," where the ships leave and return to the state of Florida without an intervening stop within another state or foreign country or waters within the jurisdiction of another state or foreign country, and any watercraft used to carry passengers to and from such gambling cruise ships.

**28. FINANCIAL CAPABILITY:** To assure the Lessor that the Lessee has the financial capability to undertake and operate the project authorized by this lease, the Lessee certifies to the Lessor as follows: (i) the Lessee is not the subject of a pending bankruptcy proceeding; (ii) the Lessee has no unsatisfied judgments entered against it; (iii) the Lessee has satisfied all state and local taxes for which it is responsible; and (iv) no other matters are pending or threatened against or affecting the Lessee or the Lessee's interest in the riparian upland property that would impair the Lessee's financial capability to undertake and operate the project authorized by this lease. Any breach of this lease condition shall constitute a default under this lease.

**30. SPECIAL LEASE CONDITION(S):** None

IN WITNESS WHEREOF, the parties hereto have caused the foregoing Lease to be executed on the day and year first above written.

LESSOR: CITY OF KEY WEST, FLORIDA



ATTEST:

CITY CLERK

Date:

9-25-19

By:

Teri Johnston, Mayor

Date:

10-5-19

LESSEE: HARBORSIDE MOTEL AND MARINA, INC.

ATTEST:

Rose Van Wyndberg

By:

M. J. ...

Date:

9-24-19

Date:

9-24-19

# Attachment "A"

## Submerged Land Survey with Upland Riparian Property Street Address

