

OPERATING AND SETTLEMENT AGREEMENT

THIS OPERATING AND SETTLEMENT AGREEMENT (this "Agreement") is entered into by and between the CITY OF KEY WEST, FLORIDA, a municipal corporation (the "City") and PIER B DEVELOPMENT CORP., a Florida corporation ("PBDC"). The City and PBDC are sometimes referred to in this Agreement, individually, as a "Party") and, collectively, as the "Parties".

BACKGROUND RECITALS:

A. The City entered into a Development Agreement with the then-owner of the Truman Annex on December 8, 1986, and subsequently issued a DRI Development Order for the Truman Annex Development of Regional Impact ("the Truman Annex DRI") on March 8, 1988, which development order was amended numerous times, concluding with the Twelfth Amendment to the Development Agreement and a corresponding amendment to the Truman Annex DRI Development Order, approved and adopted by the City in Resolutions 95-278 and 95-279 on July 20, 1995.

B. Ronald M. Griffith, as Successor Trustee pursuant to that certain Land Trust Agreement dated as of August 10, 1991 and bearing Trust No. 1001 and the City caused that certain Declaration of Covenants, Conditions and Restrictions (the "Declaration") to be executed, which Declaration was considered by the City Commission and determined to be in the best interests of the City and execution of the Declaration by the City Manager was authorized by the City Commission pursuant to City Resolution No. 93-405, which resolution (together with the Declaration) was recorded February 18, 1994 in Official Records Book 1294 at Page 625, of the Public Records of Monroe County, Florida.

C. Pursuant to the Declaration, PBDC, as successor in interest to Ronald M. Griffith, as Successor Trustee, constructed City-required Improvements to which reference is made in Paragraph 2 of the Declaration, and upon the completion of said Improvements, as required, PBDC operated its cruiseport ("Pier B") on the mainland waterfront at Truman Annex in the manner required by the Declaration to "maximize disembarkation fee revenue" and pay the City 25% of the disembarkation fee collected from cruiseport operations at Pier B.

D. The Florida Department of Community Affairs, the City, Parcel G Island Development Corp., a Florida corporation, Parcel J Island Development Corp., a Florida corporation, Parcel K Island Development Corp., a Florida corporation, Parcel L Island Development Corp., a Florida corporation, Sunset Acquisitions Corporation, a Florida corporation, Sunset Key PB Corporation, a Florida corporation, Sunset Key Restaurant Corporation, a Florida corporation, Marpalm of Florida, Inc., a Florida corporation, Sunset Key Transportation Corporation, a Florida corporation, PBDC, Caroline Street Development Corp., a Florida corporation, Pier Bravo Development Corp., a Florida corporation, and Tannex Development Corp., a Florida corporation, entered into that certain Agreement for the Built-Out Truman Annex DRI dated February 1, 2000 (the "Built-Out Agreement"). The Built-Out Agreement (which provided, *inter alia*, for the expansion of Pier B) was considered by the City Commission and determined to be in the best interests of the City and execution of the Built-Out Agreement by the City Manager was authorized by the City Commission pursuant to City Resolution No. 99-457.

E. The foregoing development orders (to-wit, the Truman Annex DRI, and all amendments and development orders relating thereto, and the Built-Out Agreement) and the Declaration contemplated and approved the development of Pier B and said development orders and the Declaration govern the development and operation of Pier B and are binding upon and effective as to the Parties.

F. The Parties acknowledge that the three amendments to the Charter of the City approved by the voters in a City-wide election and enacted in 2020 (the "Charter Amendments") were pre-empted by

the State of Florida and the City and PBDC voluntarily participated in mediation on March 1, 2022 to explore certain operational accommodations which the Parties could agree to in order to avoid any dispute or litigation which may arise, including any dispute or litigation which may arise as a result of such state pre-emption of the Charter Amendments. This Agreement is entered into as a result of the aforementioned mediation and in furtherance of continued harmony between the Parties and to permanently, fully and finally resolve any and all present and potential differences or disputes regarding cruise ship operations by PBDC at its cruiseport and at the Port of Key West.

G. Pursuant to the Declaration: (a) PBDC is approved for a maximum of seven (7) cruise ships a week to disembark at Pier B, and (b) there is no limitation with respect to the number of passengers who disembark from a cruise ship that calls at Pier B.

H. The Declaration, provides, in part, that “[t]he Declarant shall use its best efforts to solicit and book cruise ships so as to maximize disembarkation fee revenue...”

I. The City has elected to not have cruise ships at Mallory Square or the Outer Mole cruise ports when a cruise ship is docked at Pier B and Pier B has no objection to same.

J. The Parties recognize that safe and orderly operation of cruise ships docking at the Port of Key West is vital for the health, safety and welfare of the City and its citizens.

K. In order to effectuate the operational accommodations to which reference is made in Recital F, PBDC has voluntarily agreed to certain changes in Pier B operations, which changes include (a) certain black out days on which cruise ships will not dock at Pier B, (b) the maximum number of cruise ships which will dock at Pier B annually, (c) the maximum number of passengers which will disembark from Pier B annually, (d) the minimum per passenger disembarkation fee collected at Pier B for the calendar year 2023, and (e) the donation of a portion of the per passenger disembarkation fee collected at Pier B to coral reef restoration or other Florida Keys environmental cause(s) designated by PBDC.

WHEREAS, the Parties: (a) agree that the terms of this Agreement are in the best interests of the Parties and the citizens of Key West, and (b) recognize that the Declaration has been, is and will remain in full force and effect;

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, the Parties hereby agree as follows:

I. TERMS

- A. Recitals.** The foregoing Background Recitals (to-wit, Recitals A through K, both inclusive) and the WHEREAS clause which follows the Background Recitals are true and correct and are each incorporated into and form an integral part of this Agreement.
- B. PBDC utilization of City Dolphin Pilings.** In furtherance of the safety of cruise ship passengers and the public, and at the discretion of the cruise ship captain, PBDC may utilize the City Dolphin Mooring Bollards and the mooring bollard on the southwest corner of Mallory Square identified in Exhibit B when not in use by City or where capable of use by both City and PBDC in connection with the management and operation of Pier B.
- C. Black Out Dates.** PBDC agrees to not have cruise ships dock at Pier B on the following dates (the "Black Out Dates") and PBDC shall use its best efforts to achieve the Blackout Out Dates but will implement Black Out Dates no later than January 1, 2025:
- New Year's Day – January 1 each year
Easter Sunday
Independence Day – July 4 each year
Thanksgiving Day – Fourth Thursday of each November
Christmas Eve – December 24 each year
- D. Maximum Annual Number of Cruise Ships.** As an operational concession, in consideration of this Agreement being and remaining in effect, in addition to the Black Out Dates, PBDC agrees to select ten (10) additional dates (which dates shall be determined by PBDC in its sole discretion) on which dates cruise ships will not dock at Pier B. The Parties acknowledge and agree that the number of cruise ships that may dock at Pier B shall average a maximum of Three Hundred Forty-Nine (349) ships per calendar year, over three consecutive calendar years, subject to the restrictions provided for Black Out Dates and aforementioned additional ten (10) days that no cruise ships shall dock at Pier B. PBDC acknowledges it is limited to one (1) cruise ship per day.
- E. Maximum Average Passenger Count.** As an operational concession, in consideration of this Agreement being and remaining in effect, PBDC agrees to limit, over any three (3) consecutive calendar years, the number of passengers who actually disembark at Pier B to an average of 3,700 passengers per day.
- F. Maximum Cruise Ship Length.** As an operational concession, in consideration of this Agreement being and remaining in effect, PBDC agrees that the maximum length of cruise ships that call at Pier B will not exceed 1,100 feet.
- G. Disembarkation Fee.** Beginning January 1, 2023, PBDC shall raise its disembarkation fee to \$15.00 per passenger as its minimum per passenger disembarkation fee during the 2023 calendar year and thereafter, the disembarkation fee for passengers disembarking at Pier B shall be set by PBDC.
- H. Charitable Contribution.** The Parties acknowledge that PBDC has been working together with Mote Marine Laboratory and PBDC agrees to support the Mote Marine Laboratory's

Florida Keys Coral Restoration initiative and other environmental efforts in the Florida Keys. PBDC will continue its donation program of \$1.00 to Mote Marine Laboratory in support of reef restoration for every passenger who disembarks at Pier B. Should Mote Marine Laboratory discontinue its Florida Keys Coral Restoration initiative or in the event that PBDC chooses to partner with another environmental group, PBDC will continue to donate \$1.00 for every passenger for every passenger who disembarks at Pier B to an IRS 501(c)(3) organization, the mission of which provides for improvements to the Florida Keys underwater ecosystem.

- I. Term.** Unless sooner terminated pursuant to this Agreement, the term of this Agreement shall be coterminous with the term of the Declaration and shall automatically extend thereafter for successive periods as provided in the Declaration.
- J. Admiral's Slip Shared Facilities.** PBDC shall cause Pier Bravo Development Corp., Tannex Development, L.C. and South Basin Development Corp., each an affiliate of PBDC, and Truman Annex Commercial Owners Association, Inc., a Florida not-for-profit corporation, to enter into a Secondary Access Joint-Use Agreement for Use of Shared Facilities (the "Joint-Use Agreement") with the City, subject to the negotiation of mutually-acceptable terms and conditions, to provide for the joint use of Admiral's Slip. The Parties agree that entering into the Joint-Use Agreement is a condition precedent to the Parties entering into this Agreement. This Agreement will have no force or effect until and unless the parties enter into the Joint-Use Agreement.
- K. Notice and Termination.** Upon any Party's material breach of the terms and conditions of this Agreement, the non-breaching Party may shall serve written notice of termination ("Notice of Termination Breach") of such breach to the breaching Party, which notice shall provide the opportunity to the breaching Party to cure the breach within the ten-day period. In the event that the breaching party fails to cure the breach within ten (10) days, the non-breaching party is entitled to all remedies available under Florida law including but not limited to all legal and equitable actions available.
- L. Amendment.** No modifications, extensions, amendments, or alterations of the terms or conditions contained in this Agreement shall be effective unless contained in a written document approved and executed by the Parties.
- M. Successors and Assigns.** This Agreement shall constitute a covenant running with the land, which shall be binding upon the Parties hereto, their successors in interest, heirs, assigns, and personal representatives.
- N. Joint Preparation.** This Agreement has been drafted with the participation of City and PBDC and their counsel and shall not be construed against any party on account of draftsmanship. The captions of each article, section and subsection contained in this Agreement are for ease of reference only and shall not affect the interpretational meaning of this Agreement. Whenever the term "included" is used in this Agreement, it shall mean that the included items, or terms are included without limitation as to any other items or terms, which may fall within the listed category.
- O. Notices.** All notices, demands, requests, or replies provided for or permitted by this Agreement shall be in writing and may be delivered by any one of the following methods: (a) by personal delivery; (b) by deposit with the United States Postal Service as certified or registered mail, return receipt requested, postage prepaid, to the addresses stated below; or

(c) by deposit with an overnight express delivery service with proof of receipt. Notice shall be deemed effective upon receipt. For purposes of notice, demand, request, or replies:

For City: City Manager
City of Key West
1300 White Street
Key West, Florida 33040

With a copy to: City Attorney
City of Key West
1300 White Street
Key West, Florida 33040

For PBDC: Pier B Development Corp.
1001 East Atlantic Avenue
Suite 202
Delray Beach, Florida 33483
Attention: Mark Walsh

With a copy to: SMITH HAWKS, PL
138 Simonton Street
Key West, Florida 33040
Attention: Bart Smith, Esquire

It is the responsibility of the Parties to notify all Parties of change in name or address for proper notice.

- P. Force Majeure.** Any prevention, delay or stoppage due to strikes, lockouts, labor disputes, acts of God, pandemic outbreak or other health or environmental disaster, inability to obtain labor or materials or reasonable substitutes therefore, riot, civil commotion, fire or other casualty and other causes beyond the reasonable control of the party obligated to perform, excluding the financial inability of such party to perform and excluding delays resulting from appeals or rehearing, shall excuse the performance by such party for a period equal to any such period of prevention, delay or stoppage. In order to avail itself of this force majeure provision, the party invoking the same shall provide the other party with a written notice that shall consist of a recitation of all events that constitute force majeure events under this Section, together with the beginning and ending dates of such events if determinable.
- Q. Exhibits and Recordation.** All of the exhibits attached to this Agreement are incorporated fully, and made a part of, this Agreement. The Parties acknowledge and agree that PBDC shall have and is hereby granted the option to record this Agreement in the Public Records of Monroe County, Florida at the sole cost and expense of PBDC.

R. Governing Law and Venue. This Agreement shall be construed and interpreted under the laws of the State of Florida. Venue for any proceeding shall be in Monroe County, Florida. If applicable state or federal laws enacted after the Effective Date preclude the Parties' compliance with the terms of this Agreement, this Agreement shall be modified to the limited extent necessary to comply with the applicable state or federal laws.

S. Entire Agreement. This Agreement, together with the documents referenced herein, constitute the entire agreement and understanding among the Parties with respect to the subject matter hereof. This Agreement may not be changed, altered or modified except by an instrument in writing signed by the Party against whom enforcement of such change would be sought. This Agreement and the Declaration are and shall remain separate agreements and shall in no event be merged.

T. Counterparts. This Agreement may be executed in one or more counterparts, and by the different Parties hereto in separate counterparts, each of which when executed shall be deemed to be an original but all of which taken together shall constitute one and the same agreement.

U. Severability. If any part of this Agreement is contrary to, prohibited by, or deemed invalid under any applicable law or regulation, such provisions shall be inapplicable and deemed omitted to the extent so contrary, prohibited, or invalid; however, the remainder of this Agreement shall not be invalidated thereby and shall be given full force and effect.

V. Jury Waiver. THE CITY AND PBDC EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT EITHER MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION (INCLUDING BUT NOT LIMITED TO, ANY CLAIMS, CROSS-CLAIMS OR THIRD-PARTY CLAIMS) BASED HEREON OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT OR ANY DOCUMENT EXECUTED IN CONJUNCTION HEREWITH.

W. Effective Date. The "Effective Date" of this Agreement is the date next following the date that the last Party executes this Agreement.

IN WITNESS WHEREOF, each Party has caused this Agreement to be executed by its duly authorized representative.

(SEAL)
ATTEST:

THE CITY OF KEY WEST, FLORIDA

By: _____
Deputy Clerk

By: _____
Mayor

Date: _____

Date: _____

STATE OF FLORIDA
COUNTY OF MONROE

The foregoing instrument was acknowledged before me by means of physical presence or online notarization, this _____ day of April, 2022, by Teri Johnston, as Mayor of THE CITY OF KEY WEST. He/she is personally known to me or has produced _____ as identification.

My Commission Expires:

(AFFIX NOTARY SEAL)

(Signature)

Name: _____
(Legibly Printed)

Notary Public, State of Florida

(Commission Number, if any)

[SIGNATURE PAGE OF PBDC APPEARS ON THE FOLLOWING PAGE]

PIER B DEVELOPMENT CORP.,
a Florida corporation

By:

Mark Walsh
President

STATE OF FLORIDA
COUNTY OF PALM BEACH

The foregoing instrument was acknowledged before me by means of physical presence or online notarization, this _____ day of _____, 2022, by Mark Walsh as President of PIER B DEVELOPMENT CORP., a Florida corporation, on behalf of said corporation. He is personally known to me or has produced _____ as identification.

My Commission Expires:

(AFFIX NOTARY SEAL)

(Signature)

Name: _____
(Legibly Printed)

Notary Public, State of Florida

(Commission Number, if any)