

RESOLUTION NO. 19-367

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING THE ATTACHED AGREEMENT BETWEEN THE CITY AND THE KEY WEST CULTURAL PRESERVATION SOCIETY, INC. FOR THE USE OF MALLORY SQUARE FOR THE SUNSET CELEBRATION AND AN ARTISAN MARKET ON CRUISE SHIP DAYS; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, the non-profit Key West Cultural Preservation Society, Inc., has successfully operated the sunset celebration at Mallory Square for decades; and

WHEREAS, the City Commission finds that continued use of the property by the Key West Cultural Preservation Society, Inc., pursuant to the terms and conditions of the attached Agreement, provides a valuable public benefit and is otherwise consistent with City Code of Ordinances section 2-941(c).

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

Section 1: That the attached Agreement between the City and the Key West Cultural Preservation Society, Inc. for the use of Mallory Square for the Sunset Celebration and an artisan market on cruise ship days, is hereby approved.

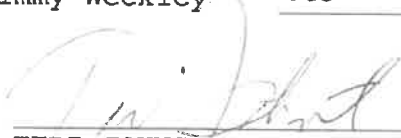
Section 2: That this Resolution shall go into effect immediately upon its passage and adoption and authentication by the signature of the Presiding Officer and the Clerk of the Commission.

Passed and adopted by the City Commission at a meeting held this 3rd day of December, 2019.

Authenticated by the Presiding Officer and Clerk of the Commission on 3rd day of December, 2019.

Filed with the Clerk on December 4, 2019.

Mayor Teri Johnston	<u>Yes</u>
Vice Mayor Sam Kaufman	<u>No</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

AGREEMENT BETWEEN

THE

CITY OF KEY WEST

AND

CULTURAL PRESERVATION SOCIETY, INC.

DATED December 3, 2019

AGREEMENT

THIS AGREEMENT is entered into this 3rd day of December 2019, between the CITY of Key West (hereinafter "CITY") and the Key West Cultural Preservation Society, Inc. (hereinafter, "CPS"), a corporation not for profit, organized and existing under the laws of the State of Florida.

WITNESSETH:

WHEREAS, the CITY controls the use of the waterfront structure owned by the CITY and known as Mallory Dock, and owns property known as Mallory Square; and

WHEREAS, CPS wishes to use Mallory Dock and Mallory Square at certain hours daily in order to provide to the public a "Sunset Celebration" consisting of free live performances, limited sales of edibles, and goods hand-crafted by the artists; and

WHEREAS, CPS agrees to operate in accordance with its Articles of Incorporation, By Laws, and Standard Operating Procedures;

WHEREAS, CITY and CPS desire to enter into a written agreement providing for the terms of the use of Mallory Dock and Mallory Square;

NOW THEREFORE, in consideration of the benefits conferred upon the parties by the terms of this Agreement, CITY and CPS agree as follows:

(1) Area Occupied

In consideration of the payments and covenants of the respective parties hereto, CITY agrees to the use by CPS of the premises known as Mallory Square and Mallory Dock, (hereinafter the "Premises") located in the Mallory Square Area of Key West and being more particularly described on Exhibit "A" attached.

(2) Period of Daily Use

CPS shall have the right to the use and occupancy of the Premises for four hours daily, the period commencing two hours prior to sunset and expiring two hours after sunset each day, except as otherwise provided in this Agreement. The period of daily use shall expire two hours after sunset whether or not four hours have expired since its beginning. Time of sunset shall be as indicated in Key West on NOAA weather radio, or as listed in NOAA navigational

publications (adjusted). Exceptions to the period of daily use may be granted by the City Manager upon special request made by CPS.

CPS shall have the right to establish guidelines, subject to approval by the City Manager, for the extended use and occupancy of the Premises beginning at ten in the morning (10:00 A.M.) and continuing through the Sunset Celebration period of use on the days that cruise ships are docked at Pier B, Mallory Square, or the Outer Mole.

(3) Vessels Docked During Period of Daily Use

CITY shall have such rights to dock or keep docked during the period of daily use any cruise ship at Mallory Dock, subject to those limitations set forth in Sovereignty Submerged Land Lease No. 440769265. CITY shall allow no other type of vessel to be docked at Mallory Dock during the period of daily use unless the vessel meets one or more of the following criteria:

- (a) The vessel or its crew is in distress, is under emergency, is disabled, or is in need of safe haven, and the dockage mitigates the conditions;
- (b) The vessel's presence is required to help mitigate an emergency involving the City of Key West or Monroe County;
- (c) The vessel is a military vessel allowed to be docked pursuant to Paragraph (12).
- (d) The vessel's wall of view-obstructing superstructure and full-side combination is not over 6 feet in height above dock level for 150 feet or more of continuous length;
- (e) The period of daily use shall commence not before 4:30 P.M. on days that vessels over 300 ft. in length are docked at the dolphins and "T"-shaped structure adjacent to Mallory dock. When provisions are being loaded upon any vessels at Mallory Dock, or vehicles or machines are servicing any vessel from Mallory Dock, the period of daily use shall not commence until such activity is completed.

(4) Special Events

No more than thirty (30) days per year during the term of this Agreement, CPS shall allow CITY to occupy the Mallory Dock and Mallory Square during the period of daily use for CITY's special purposes, provided that CITY complies with the following:

- (a) CITY shall give CPS written notice of its' intent to so occupy and shall deliver the notice after the special event is approved by the CITY.

(b) CITY shall allow CPS to occupy the Premises jointly with CITY, except in cases where the nature of the special event makes joint occupancy not feasible or impossible.

(5) Term

The term of this Agreement is five (5) years with Commencing on December 1, 2019 and ending November 30, 2024.

(6) Payment; Late Fee; Termination for Nonpayment

CPS agrees to pay to CITY equal monthly payments of Six Thousand and Eighty-Three and 33/100 dollars (\$6,083.33) plus applicable sales tax. This amount shall be increased on annually thereafter on the anniversary date of this Agreement for each remaining year by the total percentage increase (if any) in the U.S. Department of Commerce Consumers Price Index (CPI) for All Urban Consumers as reported by the Bureau of Labor Statistics for January of each year. Payments shall be paid to CITY ten (10) days after the close of the preceding month. In the event the funds are not fully paid by the tenth of the month, CPS shall pay a five percent (5%) late fee. In the event any payment is not fully paid within thirty (30) days of the date due, this Agreement may be terminated or renegotiated by CITY upon written notice to CPS.

(7) Use

The parties agree to the following use of the Premises:

(a) CITY authorizes CPS to manage the daily public "Sunset Celebration" on the Premises, consisting of live performances and limited sales of edibles and goods handcrafted by the artists, by establishing guidelines for participants, enforceable by CPS, and by controlling the number of participants on the Premises. The initial fee established for participants under this Agreement is Twenty Dollars (\$20.00). CPS covenants that its sole use of the Premises shall be to provide to the public a daily "Sunset Celebration" as herein described. The CPS 2018 Amended Standard Operating Procedures (SOP'S) are attached hereto as Exhibit "E" and incorporated herein by reference. Any addition or deletions to the Standard Operating Procedures (SOP'S) must have an affirmative vote of participating CPS members prior to submission for approval by the City Manager. In the event that CPS and the City Manager do not agree on the changes, CPS shall have the right to appeal to the City Commission. The decision of the City Commission shall constitute final administrative action. Any adjustments to fees initially established shall require written justification by CPS evidencing increased costs of operation.

- (b) CPS agrees that citizens of Key West and all members of the public shall have free access to the Premises during the period of daily use; no fee shall be charged for such access.
- (c) CPS shall provide for safe access for the public and shall arrange the artists and performers in the best interests of the parties to this Agreement, making allowances for access for emergency vehicles. The placement of performers and vendors and the use of space shall be arranged according to the security level in effect at the time, and provide for safety of vendors, performers and the public.
- (d) CPS agrees that it shall not allow solicitation or acceptance of any funds or donations in return for non-edible goods on the Premises during the period of daily use, unless the goods are predominantly created or are substantially altered in form by the person accepting the funds.
- (e) CPS agrees that it shall allow no person to accept funds or donations in return for edible goods on the Premises during the period of daily use unless the goods are prepared and traded in conformity with all state, county, and city health laws and regulations. CPS further agrees not to allow any persons to prepare edibles by combustion or flame unless they have at hand a fire extinguisher capable of extinguishing accidental fire arising from the fuel, and agree that no compressed flammable liquids or gases shall be allowed on the Premises, except propane/butane cooking systems duly certified by state or county health officials approved by the City Fire Inspector.
- (f) CPS shall apportion spaces for non-profit organizations approved by the City Manager on a space available basis, as CPS deems proper. Each non-profit group shall be limited to six nights per year. The non-profit organization shall not be included in the total number of vendors and shall be exempt from the requirements of Paragraph (8)(d).
- (g) The parties agree that the number of participants shall be as set forth in the CPS Standard Operating Procedures (SOP'S) and CPS shall control the number and locations of participants present on the Premises as depicted on Exhibit 'A' attached hereto. Those persons licensed as mobile vendors, or having any other occupational license, shall be subject to all limitations and guidelines imposed upon other participants, including but not limited to CPS daily lottery for space.
- (h) CPS agrees that at the end of each period of daily use it shall return the Premises to CITY's exclusive use and control, and that the Premises and immediately adjacent areas shall be as clean and clear of litter and debris as at the beginning of the period of

daily use. CPS agrees to empty all trash receptacles on the Premises, replace bags, and deposit trash in the CITY compactor located at Mallory parking lot.

- (i) CPS agrees to hire and provide on the Premises during the period of daily use, a manager, who shall have administrative responsibilities for the "Sunset Celebration". The manager shall have the responsibilities of instructing person not to go upon the cement "T" structure and to abide by all regulations contained herein. In addition, unless otherwise determined by the City Manager, CPS shall provide licensed security personnel every day of each week during CPS's entire operating hours for that day. The City Manager may require CPS to utilize off-duty police officers, if in the City Manager's sole discretion, it is deemed necessary for the protection and safety of the public.
- (j) CPS agrees to maintain the kiosk owned by it in good and safe condition. If the kiosk is removed by CITY, CITY agrees to provide similar enclosed and secured space to CPS adjacent to the Premises for management of the "Sunset Celebration."
- (k) CPS shall require participants, prior to occupying the Premises, to register with CPS and to execute a form releasing CITY from any claims whatsoever arising from personal injury and property damage as a result of a person participating in the nightly event.
- (l) CPS shall ensure that artists and food participants participate personally in the nightly event; no agents shall be allowed.
- (m) CPS shall ensure that each participant that offers anything for sale has a current Sales and Use Tax Certificate Number prior to allowing them to participate in the nightly event. CPS shall require that participants possess current certificates, and CPS shall collect and maintain records of the documentation of participant names and Certificate Numbers and have them available for periodic review.
- (n) CPS agrees to use it best efforts to manage artists, food participants, and performers so as to prevent inconvenience to passengers and crew of cruise ships at Mallory Dock.
- (o) CPS agrees to pay any and all taxes that may be or become due upon the Premises during the lease term, and renewal term, including but not limited to sales tax, real property, and ad valorem taxes, and personal property tax. It is specifically agreed that in the event that any of the aforementioned taxes shall become due, CPS shall be charged only those amounts directly related to its period of use per day. Should the tax burden become such so that CPS can no longer continue paying the tax charges,

then at the end of the tax year, CPS may terminate this Agreement upon thirty (30) days' notice to CITY.

(p) In the event that inclement weather prohibits any set up whatsoever CPS shall have two inclement weather days per month, or 24 per calendar year, and the CITY shall abate the rent at \$200 per day, provided that CPS notifies the CITY of its intent to utilize an inclement weather abatement day and the CITY confirms that no use has taken place. Unused weather days shall not roll over to the next calendar year.

(q) CPS is required to re-locate all CPS members/vendors away from the Mallory Square planters to allow enough room for the public to access the areas surrounding them. There will be no use of the planters as part of the vendor set ups which will then provide additional seating for the public to enjoy the Sunset Celebration.

(r) CPS will not use the property or permit the same to be used in any manner which violates any law, ordinance including but not limited to;

Ordinance 19-03 amending Chapter 26, Section 223 of the Code of Ordinances entitled "Sale of Sunscreen";

Ordinance 19-22 amending Chapter 26, Sections 312-315 entitled "Plastics" to prohibit the distribution or sale of plastic straws or stirrers;

Resolution 19-174 that restricts the use of polystyrene

or constitutes a nuisance; that may injure the reputation of the property or annoy, inconvenience or damage its patrons or other tenants; or that would constitute an extra-hazardous use or violate any insurance policy of the CPS or the CRA or any other tenant on the property or increase the cost thereof.

(8) Care of premises, Emergencies, and Security Measures

CPS shall make no structural alteration to the premises, its fixtures or appurtenances, and shall keep clear and unencumbered the "T"-shaped pier, the dolphins and catwalks and all vehicular ramps. CPS shall not perform any acts or practices which cause damage to the Premises or its fixtures, or which present a menace or nuisance to the Public; nor shall CPS paint or deface the premises or permit the use of any portion of the Premises for any unlawful purposes. CPS agrees to provide, at its, life-saving throw-rings or buoys at the Premises. CPS also agrees to use all reasonable effort to clear the Premises and maintain clear of all persons and objects upon an emergency request by any agent of the city, Monroe County or the United States of America. CPS shall keep clear the area designated according to the security level in effect according to the Exhibits B, C, and D as attached when cruise ships are present at the Premises, or as directed by the CITY.

(9) Indemnification and Insurance

CPS does hereby agree to indemnify, defend, and save LANDLORD, its respective officers, directors, agents and employees harmless from and against any and all liability for any injury to or death of any person or persons or damage to property (including adjoining property for environmental damage) in any way arising out of or connected with the conditions, use or occupancy of the Demised Premises, or in any way arising out of the activities of CPS, its agents, employees, licensees or invitees on the Demised Premises and/or the building, including reasonable attorney's fees and court costs incurred by LANDLORD in connection therewith, such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this Paragraph, excepting, however, only liability caused by LANDLORD'S gross negligence in its failure to perform any of LANDLORD'S covenants, obligations or agreements of this Lease. Nothing herein is intended to waive the sovereign immunity afforded to City pursuant to Florida law, including section 768.28, Florida Statutes.

The indemnification obligations under this Section shall not be restricted in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for CPS 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 CPS or of any third party to whom CPS may subcontract work. This indemnification shall continue beyond the date of termination of the Agreement.

CPS covenants and agrees to keep in force during the lease term a comprehensive general liability policy of insurance insuring the CITY and CPS against any liability whatsoever occasioned by accident on or about the Premises during the period of daily use and agrees that the CITY shall be listed thereon as additional-insured. Such policy or policies shall be issued by companies authorized to do business in the State of Florida and having agents upon whom service of process may be made in the State of Florida. The comprehensive general liability policy shall be in the amount of 1,000,000 (One Million Dollars) in respect to any one(1) incident and \$2,000,000 (Two Million Dollars) in the aggregate, and shall include \$300,00,00 (Three Hundred Thousand Dollars for property damage. The original policy or certificate, together with evidence of premium payment, shall be delivered to the CITY. CPS shall renew the policy not less than (30) days prior to the expiration date each year and shall furnish evidence of the renewals and payment to the CITY. To the extent that such a provision is obtainable, the policy shall provide that it cannot be cancelled or terminated until at least thirty (30) days prior notice has been given to CITY .Failure of CPS to maintain the insurance in full force and effect at any time shall be deemed a material breach of the provisions of this Agreement, and shall entitle CITY to terminate

the Agreement as provided in section 15(B) below. Upon such breach, CPS shall immediately suspend all use of the Premises and shall provide to CITY written notice of failure to maintain insurance coverage,

No acceptance or approval of any insurance policy or policies by CITY shall relieve or release or to be construed to relieve CPS from any liability, duty or obligation assumed by or imposed upon it by the provisions of this Agreement.

None of the rights or obligations provided by this Agreement shall accrue to either party until CPS has in force the insurance coverage required hereunder.

(10) Nonprofit Status; Records; CITY Inspection

(a) CPS shall maintain its status with the state and federal government as a non-profit, tax-exempt corporation. Any failure to maintain such status, any change in corporate purpose, or any restriction or limitation of corporate membership, shall be deemed to be a material breach of the provisions of this Agreement and shall entitle the CITY to terminate this Agreement as provided in paragraph(14)(b) below.

(b) CPS shall use standard accounting practices and shall keep all books and records up to date and in order. CITY shall have the right, upon reasonable notice, to inspect CPS' books and records. CPS shall file quarterly financial statements with CITY showing, at a minimum, receipts, disbursements, and net profit. In addition to other periodic reviews, at least once every three years CPS shall provide to the CITY an audit prepared by an external certified public accountant utilizing generally accepted accounting principles (GAAP) and in such a manner as directed by the City Manager.

(11) Assignment

CPS shall not assign or mortgage any of its rights or interest under this Agreement in whole or in part; provided however, that CPS may collect a fee from CPS participants during the period of daily use without constituting an assignment. This prohibition against assigning shall be construed to include a prohibition against any assignment or subletting by operation of law.

(12) Use by Military Vessels

The parties agree that from time to time military vessels may dock at the Premises. The parties agree that security regulations and access by the parties may change depending upon the military's requirements. Military regulations shall take precedence over the terms of this Agreement. The use by military

vessels is not included in the number of special events allowed in this Agreement, nor is the use by military vessels permitted to remain docked during the sunset celebration included in the number of vessels permitted to remain in place as specified in the current Sovereign Submerged Land Lease No.440769265 as it exists or is amended or renumbered.

(13) Destruction

If by reason of fire, act of God, unavoidable accident, or other casualty not the fault of CPS, its agents, employees, contractors, licensees or invitees, the Premises shall be rendered unusable, the monthly fee and vendor fee shall be abated during the period of repairs. This abatement shall be proportionate to the portion rendered unusable. CITY recognizes the possibility of disruption of "Sunset Celebration" during periods of renovation or repair and shall use its best efforts to plan and implement any and all renovations or repairs in the manner least disruptive to CPS. These efforts shall include, but not limited to, providing signage, public service announcements, and coordination. If the Premises shall be rendered wholly unusable, CITY may, at its election, terminate this Agreement by giving CPS, within (60) days following the date of any of the above-mentioned events, written notice of CITY'S election to terminate the Agreement. In the event of such termination, payment by CPS shall be adjusted as of the date of termination. If the CITY does not elect to terminate this Agreement, it shall cause such damage to be repaired. CPS agrees that CITY may close the Premises to it and to the public in the event of disaster or emergency, which renders it temporarily or permanently unusable.

(14) Default for other than Nonpayment; Termination

Strict observance of the conditions and covenants in this Agreement are essential conditions upon which this Agreement is made and accepted. This Agreement shall be terminated upon any one of the following:

(a) By breach of any of the covenants or provisions of this Agreement: provided, however, that except as provided in Paragraph (14)(b) below, CPS shall be to one written warning of any such breach delivered as provided in Paragraph (17) hereof and shall have (5) days after such delivery in which to achieve compliance. Subsequent violations of the same covenant or provision shall, at CITY's sole discretion, terminate this Agreement, and CITY shall not be required to issue another warning.

(b) By breach of covenants set forth in Paragraphs(7)(a),(b),(d) and(e),(8),(9),(10)(a), and (11). Written notice of termination shall be given to CPS as provided in paragraph (15) of this Agreement.

(c) By operation of paragraph (13) of this Agreement.

(d) By CPS vacating or abandoning the use of the Premises

(e) By reaching the end of the term as provided in paragraph (5) above.

(15) Access to premises

CITY, its agents or employees shall have the right to enter upon the Premises during the period of daily use for the inspection, making repairs improvements, and additions to the premises or to any fixtures or property owned or controlled by CITY.

(16) Payment

Payment by CPS shall be presented to the CITY at the following Address;

Revenue Division
City of Key West
Post Office Box 1409
1300 White Street
Key West, Florida 33041-1409

(17) Notices

All notices given pursuant to this Agreement shall be mailed United States mail, return receipt requested to the following addresses;

CITY	CPS
City Manager	Chairman
City of Key West	Key West Cultural Preservation Society, Inc.
PO Box 1409	PO Box 4837
Key West, FL 33041-1409	Key West, FL 33041-4837

The parties agree that notice to each shall be considered received and binding if delivery is attempted to the above address by Postal officials. The parties are fully and solely responsible for the receipt of mail at these addresses.

(18) Waiver

One or more waivers of any covenants or conditions by CITY shall not be construed as a waiver of a subsequent breach of the same covenant or conditions, and the consent or approval by CITY to act by CPS requiring CITY consent or approval shall not be deemed to waive or render unnecessary CITY's consent or approval to any subsequent similar act by CPS. The subsequent acceptance of payment by CITY shall not be deemed to be a waiver of any preceding breach by CPS of any term, covenant, or condition of this Agreement, other than the failure of CPS to pay the particular payment so accepted, regardless of CITY'S knowledge of such preceding breach at the time acceptance of such funds or additional vendor fee. No covenant, terms, or condition of this Agreement shall be deemed to have been waived by CITY, unless such waiver is in writing by CITY.

(19) Surrender at End of Term

Upon the expiration of the term hereof, or upon sooner termination of this Agreement as herein provided, CPS agrees to surrender and yield possession of the Premises to CITY peacefully and without further notice, and in good order and condition, but subject to ordinary wear and reasonable use thereof.

(20) Entire Agreement

This Agreement sets forth all covenants, promises, and understandings between the CITY and CPS concerning the Premises. Except as herein provided, no subsequent alteration, amendment, change, or addition to this Agreement shall be binding upon CITY or CPS unless reduced to writing and signed by both parties.

(21) No Partnership

CITY is not, and shall not become, in any way or for any purpose, a partner of CPS in the conduct of its business. CITY is not, and shall not become, in any way or for any purpose, a joint venture partner or a member of a joint enterprise with CPS.

(22) Captions and Section Number

The captions and section numbers appearing in this Agreement are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope or intent of such sections nor in any way affect the Agreement.

(23) Attorney's Fees

In the event of litigation arises out of or results from contractual relationship established between CITY and CPS by this Agreement, the non-prevailing party shall be liable for all costs, expenses, and fees, including attorney's fees, reasonably and necessarily incurred by the prevailing party as, and incident to, enforcement to the terms of this Agreement.

(24) Subordination to Other Agreements

The parties agree that the authority of CITY to enter into this Agreement, and the rights and duties of the parties to this Agreement, are limited by and subordinate to the terms of existing and future agreements between CITY and other parties, and specifically to existing and future leases and to the terms of Sovereignty Land Lease No. 440769265 entered into between CITY and the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, as they may be amended from time to time, Should the CITY lose control of the Premises due to loss of the bay bottom lease or failure of negotiations to result in a new bay bottom lease, this Agreement shall become null and void.

(25) Severability Clause

If a court of competent jurisdiction determines that any restriction in a clause provision of this Agreement is void, illegal, or unenforceable, the other clauses and provisions of this Agreement shall remain in full force and effect, and the clauses and provisions that are determined to be void, illegal or unenforceable shall be limited so that they shall remain in effect to the extent permissible by law.

(26) "Chain of Command"

In the event of disputes at the Premises which are not an immediate threat to life, safety, or property, the following shall be contacted, in order, for dispute resolution purposes:

- (a) Pier Manager
- (b) CPS Board of Directors
- (c) City Manager
- (d) Binding Arbitration

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date first written above.



Cheryl Smith
Cheryl Smith, CITY Clerk

CITY OF KEY WEST

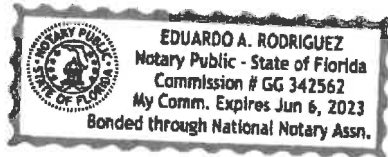
By: *Teri Johnston*
Teri Johnston, Mayor

THE KEY WEST CULTURAL
PRESERVATION SOCIETY, INC.

ATTEST:

E. Rodriguez

By: *Mike Sattelmeier*
By: Mike Sattelmeier, Chairman



Demised Premises Site Plan

EXHIBIT A

