

RESOLUTION NO. 08-274

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING THE ATTACHED CONCESSION AGREEMENT BETWEEN THE CITY AND SUNSET WATERSPORTS INC. AT SMATHERS BEACH (TWO LOCATIONS); PROVIDING FOR AN EFFECTIVE DATE

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

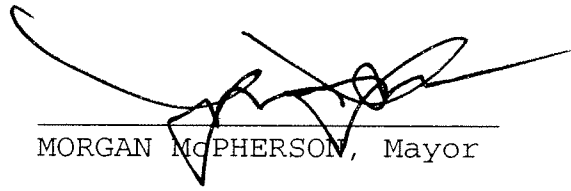
Section 1: That the Concession Agreement between the City and Sunset Watersports, Inc. is hereby approved.

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 7th day of October, 2008.

Authenticated by the presiding officer and Clerk of the Commission on October 8, 2008.

Filed with the Clerk October 8, 2008.


MORGAN McPHERSON, Mayor

ATTEST:


CHERYL SMITH, CITY CLERK



EXECUTIVE SUMMARY

CITY OF KEY WEST
CITY MANAGERS DEPARTMENT

TO: Jim Scholl
City Commission

CC: Mark Finigan

FR: Marilyn Wilbarger, RPA, CCIM

DT: September 25, 2008

RE: Sunset Watersports Concession Agreement Renewal at Smather's Beach

ACTION:

This is a request to approve the renewal of a concession agreement between the City of Key West and Sunset Watersports for two existing water sports concession stands located on Smather's Beach.

HISTORY:

Sunset Watersports has operated the water sports activities at Smather's Beach under the most recent agreement since June 2001 pursuant to Resolution 01-31 which provided for a five year renewal. They also operate a second location that was assigned from Tropical Sailboats in 2005 pursuant to Resolution 05-375 and also provides for renewal. Therefore for renewal purposes the two agreements will be consolidated. The following terms are proposed for the renewal of the concession agreements:

- Demised Premises:** Two locations with the re-location of the Tiki Hut to the agreed upon location.
- Term:** 10 years
- Concession Use:** As per the prior agreement with the deletion of windsurfer rentals and the addition of 6 small guided touring boats operating from Concession #1, which has a designated ingress/egress area.
- Concession fee:** A minimum fee of \$2500 per month or 10% of gross sales for both locations.
- Increases:** 5% annual increase in minimum fee beginning in year three.
- Improvements;** Due to the erosion of the beach at their current location in the cove area the concessionee will re-locate the existing Tiki Hut, add ADA access, re-locate a palm tree and the add a new stairwell as well as removing the existing pilings at the current location, at their sole cost and expense.

Hardship Provision 50% of the minimum fee is eliminated for any month when the beach is closed for more than 15 days due to events beyond the concessionee's control in the sole discretion of the City Manager.

RECOMMENDATION:

The proposed concession agreement is in compliance with the permitted uses in the lease agreement between the City and the State Department of Natural Resources dated April 12, 1971.

The concession fee has been increased to reflect a minimum payment that will guarantee that the City continues to receive fair value for the use of the sites while continuing to share in a percentage of the gross sales derived from this use.

This Concessionee has operated at this location for over twenty years and has re-invested in the site after every storm. A ten year term is proposed to amortize the improvement costs associated with the re-location of the concession and the addition of ADA access, etc.

Staff recommends approval of the concession agreement renewal as proposed.

ATTACHMENTS:

Concession agreement
Guaranty

CONCESSION AGREEMENT

THIS AGREEMENT is entered into this 7th day of October 2008, between the City of Key West, Florida (hereinafter referred to as "City"), a municipal corporation organized and existing under the laws of the State of Florida, and Sunset Watersports, Inc., a corporation organized and existing under the laws of the State of Florida, (hereinafter referred to as "Concessionee").

WITNESSETH:

- (1) Concessionee wishes to obtain from City certain rights to vend to the public at two concession locations on Smather's Beach certain watersports services.
- (2) City wishes to convey such rights for a stated period, in return for monetary consideration and other assurances, in order that the watersports services shall be available to the public.
- (3) City and Concessionee desire a written agreement between them providing terms by which City grants, and Concessionee accepts, such rights.

NOW THEREFORE, in mutual consideration of the benefits that will accrue to the parties in faithfully abiding by the terms of this Agreement, City and Concessionee agree as follows:

(1) Concession Premises

City hereby grants to Concessionee the right and authority to use only as hereinafter described the two demised areas as shown on the attached exhibit A. (hereinafter, "Concession Premises"), being more particularly described as follows:

Concession #1

On the Island of Key West, Monroe County, Florida: Commence at the intersection of the westerly right of way of Bertha Street with the southerly right of way of South Roosevelt Boulevard and run thence easterly along the said southerly right of way of South Roosevelt Boulevard for a distance of 140 feet to the easterly side of an existing concrete boat ramp and the Point of Beginning of the parcel of land being described herein; thence at right angles in a southerly direction for a distance of 130 feet, more or less to a point 100 feet offshore of the apparent shoreline of the Atlantic Ocean (or Straits of Florida); thence at right angles in an easterly direction for a distance of 406 feet, more or less, until intersection with the apparent westerly shoreline of a groin of boulders; thence in a northerly direction along the groin onto shore for a distance of 130 feet, more or less, to the southerly right of way of South Roosevelt Boulevard; thence at right angles in a westerly direction along the southerly boundary of South Roosevelt Boulevard to the Point of Beginning.

Concession #2

On the Island of Key West, Monroe County, Florida: Commence at the intersection of the westerly right of way of Bertha Street with the southerly right of way of South Roosevelt Boulevard and run thence easterly along the said southerly right of way of South Roosevelt Boulevard for a distance of 140 feet to the easterly side of an existing concrete boat ramp thence continuing therefrom in the same easterly direction along the southerly right of way of South Roosevelt Boulevard for a distance of an additional 1,350 feet to the Point of Beginning of the parcel of land described herein: thence at right angles, to the apparent shoreline of the Atlantic Ocean (or Straits of Florida); thence at right angles in an easterly direction for a distance of 150 feet; thence at right angles in a northerly direction, to the southerly right of way of South Roosevelt Boulevard. Thence at right angles in a westerly direction for a distance of 150 feet along the southerly boundary of South Roosevelt Boulevard to the Point of Beginning.

An aerial photograph of the above-described Concession #1 and Concession #2 Premises is attached hereto as "Exhibit A", and is made a part hereof.

Concession#1 shall be located in the area as depicted on the attached Exhibit A-1 in accordance with the following:

Concessionee, at its sole cost and expense, will re-locate the existing portable 10' X16' Tiki Hut structure to the area between 365 feet and 406 feet as shown on Exhibit A. This location must be between 5 feet minimum and 18 feet maximum away from the existing retaining wall at the sidewalk, and shall meet all other physical location requirements as determined by the City.

The new location will comply with all governmental laws, regulations or other requirements of any agency having jurisdiction over the Concession Premises and Concessionee will be responsible for obtaining the permits necessary for placement of the portable structure at this location. The City must approve the final location and foundation or method of placement of the portable structure.

Concessionee agrees, at its sole cost and expense, to remove all materials and piles from its current location.

Concessionee agrees, at its sole cost and expense, to install a walkway from the existing ramp serving the adjacent public restrooms to this new location. The walkway must meet the standards of the Americans with Disabilities Act and the exact location and specifications must be approved by the City.

Concessionee may, at its sole cost and expense, add a new stairway that does not create a breach in the retaining wall and built to the specifications and in a location approved by the City, to access this new location from the street level.

Concessionee may, at its sole cost and expense, obtain a tree permit to re-locate the single palm tree as shown on the attached Exhibit A-1 to an area approved by the City. In the event the palm tree dies within one year of transplantation, Concessionee will replace the palm tree with a comparable type and size of tree at its expense, at a location determined by the City.

Concessionee agrees to use its best efforts to apply for the necessary approvals and permits within thirty (30) days and complete the re-location within 60 days of receiving all necessary approvals and permits required.

Concessionee hereby accepts both Concession Premises in an "as is" condition, and shall cause no harm by act or neglect to the Concession Premises or property contiguous thereto owned or controlled by City. The City does not guarantee the width of the beach area of the Concession Premises, or the amount of sand on the beach area of the Concession Premises. Furthermore, the City shall not be responsible for debris or damage to any property of the Concessionee caused by storms of any nature. The City shall, however, provide routine beach cleaning as part of the customary maintenance schedule for preservation of Smathers Beach.

In the event that a hurricane warning is issued by the National Weather Service, Concessionee shall immediately remove all personal property, equipment, inventory, storage boxes and other property that poses an imminent and serious danger to the public health, safety or welfare.

(2) Concession Term

City hereby grants to Concessionee's use as hereinafter described, the Concession Premises for a term of ten (10) years (hereinafter, "Concession Term") The Concession Term is subject to all rights of termination as hereinafter described. The City will enter into negotiations with an existing tenant for a lease renewal pursuant to City of Key West Code of Ordinances 2-941.

(3) Concession Use

Subject to all terms and conditions provided in this Agreement, City hereby grants to Concessionee the right and authority to operate, as herein described, a watersports concession (hereinafter, "Concession Use") upon the Concession Premises. It is the sole responsibility of the Concessionee to keep all equipment in good repair and supply all needed Coast Guard approved equipment required to conduct the watersport activities described below. Concessionee shall not pour, pump, siphon or transfer fuel at the Concession Premises under any circumstances.

(A) Watersports Concession Services

The Concession Use shall be specifically limited to:

- 1) Rental of:
 - a) 6 sailboats 21 feet or less in length (Hobie catamarans) from each location;

- b) 6 – 15 ft touring boats for guided tours only from Concession Premises 1
 - c) inflatable rafts and inner tubes; and
 - d) snorkeling equipment, limited to snorkels, masks and swim fins;
 - e) chairs and umbrellas; and
 - f) water kayaks
- 2) sale of parasail rides;
 - 3) sale of suntan products, towels, and hats;
 - 4) sale of Hobie catamaran rides, water-skiing, and water rides (hydrosleds, inner tubes, boogie boards);
 - 5) ticketing and information for the Concession Use as herein described; and
 - 6) sale of windsurfing, sailing, and snorkeling instruction;
 - 7) unloading and offloading of passengers for offshore watersport activities.
 - 8) sale of tickets for other water sports activities being conducted by other businesses at other locations

(B) Watersports Concessions: Location

Strictly as necessary to accomplish the Concession Use, Concessionee may occupy the Concession Premises only as follows:

- 1) sailboats may be anchored to submerged land of the cove or stored on the beach in the cove area in a number not to exceed six per location;
- 2) up to 6 small guided tour boats may be stored on the beach at Concession 1, when not in use.
- 3) inflatable rafts, inner tubes, life jackets, kayak paddles and snorkeling equipment and all ticketing, rental and other operations shall be entirely located in the structure as currently built or in 2 beach boxes per each location as approved by the City. Chairs and umbrellas may be rented for use during the day; Concessionee shall collect same at the end of each workday.
- 4) Concessionee may, while exercising extreme caution, on-load and off-load passengers from the vicinity of the cove for offshore activities and may utilize the area designated for ingress/egress of the guided tour boats.
- 5) Concessionee shall be limited to the use of no more than 2 signs at each location of a size not greater than 4 feet for the purposes of advertising its name and/or concession activities. Said signs shall be limited to display on the structures, and shall be subject to the approval of the City.
- 6) Concessionee may store up to 6 kayaks on the beach when not in use in the rack also utilized for windsurfers.
- 7) No jetski or other motorized personal watercraft operation is permitted.

(C) Watersports concessions: Hours

Concessionee shall provide watersports concession services as defined herein only between the hours of 8 a.m. and 7 p.m. daily. In addition, unless prevented by weather or other circumstances beyond Concessionee's control, Concessionee's businesses shall be open and available to the public between the hours of 8a.m. and 7p.m. daily.

Between the hours of 7 p.m. and 8 a.m., Concessionee, its personnel, equipment and structures, shall occupy none of the Concession Premises except for storage of equipment and supplies.

(4) Concession Fee

(A) Payment Amount

Concessionee agrees to pay to City as rent the minimum fee of \$2,500 per month as shown on the attached Exhibit B, or ten percent (10%) of gross income, whichever is greater (hereinafter, "Concession Fee"), plus applicable sales tax. Gross income shall include all revenues derived by Concessionee from the Concession Use excluding sales tax collected for direct pass-through to local or state government.

(B) Increases in Minimum Fee.

Beginning in year three of the Concession Agreement Concessionee agrees to pay annual increases of five percent (5%) in the minimum concession fee thereafter for the remainder of the Concession Agreement term as shown on Exhibit B.

(C) Payments Due

The Concession Fee for each month is due at the City of Key West Revenue Office, P.O. Box 1409, Key West, Florida 33041, on the fifth (5th) day of the following calendar month. Any Concession Fee payment not received at the office by the twentieth (20th) day following the said due date shall bear interest at the highest rate permitted by law from the twenty-first (21st) day after the due date until the date it is received by the City. In addition, all payments received after the due date shall incur a Fifty Dollar (\$50.00) administrative fee to cover the costs of collecting and processing late payments.

In addition, within twenty (20) days following the end of each month, Concessionee shall forward to City an accurate and complete copy of the Concessionee's State of Florida Department of Revenue Sales and Use Return Form DR-15 and any necessary accounting reports to reconcile between the amounts reported to the City and the amount reported to the State. Concessionee shall execute an authorization letter attached hereto as Exhibit C to enable the City to obtain copies of the Sales and use Tax Form DR-15 directly from the State of Florida at any time during the term of this agreement. Concessionee's failure to comply with this provision shall constitute a default of the Agreement pursuant to paragraph 10 below.

(D) Additional Rent

Should any fee, tax, penalty, fine, or other amount due City be levied or imposed upon Concessionee for any reason related to Concessionee's use of the Premises involved in this agreement, from any source whatsoever, including but not limited to sales tax, ad valorem tax, code enforcement fine, or submerged land lease fees, the same shall be the responsibility of the Concessionee and Concessionee shall pay the same promptly when due as additional rent hereunder.

(E) Hardship Provision

If the beach is deemed "closed" through no fault of the Concessionee by an event beyond their control, including polluted nearshore waters, beach construction and destructive storms for more than 15 days of the month the Concessionee may request, by writing to the City Manager, that the hardship provision be invoked. The Concessionee will be required to pay the greater of 50% of the minimum fee or 10% of gross income for the month that the hardship provision is invoked. The hardship provision can only be invoked at the sole discretion of the City Manager.

(5) Insurance

Concessionee agrees to provide at its expense comprehensive liability insurance insuring itself and the City against all claims of damages or injury to persons or property arising for any reason out of the Concessionee's Use of the Concession Premises, or arising out of its activities related to the Concession Use, or otherwise arising from its exercise of rights or failure to perform obligations pursuant to this Agreement. The insurance policy shall be written by a solvent insurance company in good standing and fully licensed to do business in Florida, and shall provide (i) an occurrence form commercial general liability policy, covering the operations of Concessionee and any person conducting business in, on or about the Concession Premises in which the limits with respect to liability and property damage shall not be less than One Million (\$1,000,00.00) Dollars per occurrence (ii) all risk property insurance, including theft coverage, written at replacement cost value and a replacement cost endorsement insuring Concessionee's improvements and betterments, fixtures, furnishings, equipment and any other property belonging to Concessionee; (iii) workers compensation coverage as required by the provisions of Florida statute (iv) and any additional coverage specific to the Concessionee's Use or activities related to the Concession Use to adequately insure the Concessionee and the City. The policy shall show the City as a named insured, and shall provide that it cannot be canceled or revoked except after a minimum of thirty (30) days written notice to City. A true copy of the insurance contract shall be filed with the City Clerk within ten (10) days after execution of this Agreement, and shall be maintained on file throughout the Concession Term and any Renewal Term. Concessionee's failure to maintain the insurance policy in full force and effect at any time during the Concession Term or any Renewal Term shall be a default hereunder, and upon such default Concessionee shall immediately suspend all Concession Use and shall provide to City written notice of the default.

The insurance amounts here provided shall not in any way operate to limit or release, or be construed to limit or release, Concessionee from any liability to City, or from any obligation to indemnify City as provided herein. Said insurance amounts are minimum

requirements, and shall be supplemented by Concessionee as necessary to meet its obligations, and to fully indemnify the City, as provided in this Agreement.

(6) Indemnity

Concessionee agrees to indemnify, defend and hold harmless the City, its officers, employees, and agents from all actions, claims, penalties, and judgments for damages at law or equity of any nature whatsoever arising, or alleged to arise, out of (i) the act of City in granting this concession, or out of (ii) the acts or omissions of Concessionee, its employees, agents, independent contractors, licensees, customers, or invitees, or out of (iii) Concessionee's operation of its business or rights conferred by this Agreement. Concessionee shall defend City, and shall pay all reasonable expenses incurred by City in defending itself, with regard to all damages and penalties the City may legally be required to pay as a result of the rights granted hereunder. Expenses shall include all incidental expenses including attorney fees, and shall include a reasonable value of any services rendered by the Office of the City Attorney.

Concessionee's obligations hereunder shall not in any way be limited by the amounts of insurance expressly required by Paragraph 5 above. In all instances where Concessionee may be required to indemnify City, City shall give Concessionee prompt and timely notification of any claims. Concessionee shall have the right to select counsel and to direct the conduct of the legal action. City shall not enter into any settlement agreement or otherwise terminate the action without the consent of, and at its option, participation by the Concessionee or its legal representative. Such consent of Concessionee shall not be unreasonably withheld.

(7) Access to Records

Concessionee agrees to keep, at its principal office, records in accordance with generally accepted accounting principles, in which gross sales shall be recorded. Such records shall be open for inspection by City or its agents, including accountants retained for that purpose, during reasonable business hours for the term(s) of the concession and for at least three (3) years thereafter. If any audit shows that the amount of gross sales on Concessionee's statement was understated by more than one percent (1%) for any year, then Concessionee (in addition to paying the percentage Concession Fee due for such understatement) shall pay to City the reasonable cost of the audit.

Annually, the Concessionee shall submit to City a report of its operations showing in detail annual gross revenue as defined herein. The report shall be submitted within ninety (90) days of the close of each fiscal period; it shall be prepared in accordance with generally accepted accounting principles and shall be in sufficient detail to allow for a complete accounting for all gross sales derived from the Concession Use. A financial officer of the Concessionee shall certify the report.

(8) Assignment, Sublease, Transfer of Control

(A) Identification of Ownership

At the time of execution of this Agreement, Concessionee shall provide to City the identification and ownership interest of all officers, directors, and stockholders owning and voting 5 percent (5%) or more of the stock in Sunset Watersports, Inc., and shall provide the following stock information concerning these corporations: classes of stock, par value, votes per share, number of shares authorized, number of shares issued, number of shares subscribed, and total number of stock holders. If there are any assignments of voting rights or intended assignment of voting rights, Concessionee shall furnish full details and attach copies of documents evidencing the same.

(B) Transfer

The Concession shall be a privilege to be held by the Concessionee for the benefit of the public. Said Concession Use cannot under any circumstances be assigned, or control thereof transferred, by any means whatsoever including but not limited to, voluntary or involuntary sale, merger, consolidation, foreclosure, receivership, or other means without the prior written consent of the City, and then only under such conditions as the City may establish. Any purported transfer of control of, or sublease or assignment of, this Concession without prior written authorization by the City Commission shall be null and void. The authorization shall be at the absolute discretion of the City.

The word "control" as used herein is not limited to majority stock ownership but includes actual working control in whatever manner exercised; provided, however, that routine changes in corporate or managerial personnel or positions shall not be deemed a transfer of control subject to this section. A rebuttable presumption that a transfer of control has occurred shall arise upon the acquisition or transfer by any person or group or persons of ten percent (10%) of the voting shares of either of the corporations here combined as Concessionee unless a single and the same person holds more than fifty percent (50%) of the voting interest both before and after the transfer.

The restrictions, requirements, and procedures contained in this section apply equally whether the transaction proposed is a sublease or assignment of above-named corporations resulting from changes in voting interests.

(9) Notice

(A) Notice from City to Concessionee shall be deemed received and binding:

- 1) Upon written notice hand-delivered to Richard C. Welter, or
- 2) two business days after written notice is locally mailed by certified letter to the following address:

Richard C. Welter
10 Diamond Drive
Key West, FL 33040

Concessionee agrees that delivery of notice hereunder shall be considered accomplished regardless of whether delivery to the above address is accepted, and regardless of the identity of any person there accepting delivery. Concessionee is fully and solely responsible for the receipt of notice at the above address.

- (B) Notice from Concessionee to City shall be deemed received and binding:
- 1) Upon written notice hand-delivered to the City Manager; or
 - 2) Two business days after written notice is locally mailed by certified letter to:

City Manager, City of Key West
P.O. Box 1409
Key West, FL 33041

(10) Default

(A) Any one of the following events shall constitute a default and material breach under this Agreement:

- 1) Any material misrepresentation intentionally made by or on behalf of Concessionee in its concession proposal, or in support thereof, or in connection with the negotiation or renegotiations, or any amendment or modification thereof, or any attempts to evade any of the material provisions of this Concession Agreement, or to practice any fraud or deceit upon the City;
- 2) Any failure by Concessionee to restrict its operations to the Concession Premises and Concession Use as herein provided, or to otherwise comply with Sections 1 through 3 hereof;
- 3) Any failure to comply with the terms of Section 4 hereof governing the Concession Fee and timely payments thereof;
- 4) Any failure by Concessionee to fully comply with Sections 5 or 6 hereof governing liability insurance and indemnification;
- 5) Any failure by Concessionee to comply with Sections 7 or 8 hereof;
- 6) Any failure by Concessionee to provide to the public on a daily basis the watersports concession services described at Section 3(A) hereof, at reasonable rates as reflected on a Schedule of Charges previously filed with the City Clerk by Concessionee throughout the Concession Term or any Renewal Term, unless performance is prevented by force majeure;
- 7) Any failure by Concessionee to comply with all City, State, and Federal law, or with all lawful directives issued by any public agency; or

- 8) Any material breach of any other duty or obligation of Concessionee by the terms of this Agreement.
- 9) Bankruptcy or Insolvency - If at any time during the term hereof proceedings in bankruptcy shall be instituted against TENANT and which proceedings have not been dismissed within a reasonable time period, and which bankruptcy results in an adjudication of bankruptcy; or if any creditor of TENANT shall file any petition under Chapter X of the Bankruptcy Act of the United States of America, as it is now in force or may hereafter be amended; and TENANT be adjudicated bankrupt, or TENANT makes an assignment for the benefit of creditors; or sheriff, marshall, or constable take possession thereof by virtue of any attachment or execution proceedings and offer same for sale publicly, and such taking and offer for sale is not rescinded, revoked, or set aside within ten (10) days thereafter, then LANDLORD may, at its option, in any of such events, immediately take possession of the Demised Premises and terminate this Lease. Upon such termination, all installments of rent earned to the date of termination and unpaid, shall at once become due and payable; and in addition thereto, LANDLORD shall have all rights provided by said bankruptcy laws relative to the proof of claims on an anticipatory breach of an executory contract.

(B) Upon finding that Concessionee is in default of this Agreement, the City Manager (or his designee) may

- 1) Suspend Concessionee's rights conferred by this Agreement, including Concessionee's use of the Concession Premises, by entering upon and taking possession of the Concession Premises, whereupon Concessionee shall surrender possession pending hearing as provided in Paragraph (C) below; or
- 2) Provide to Concessionee written notice of the basis of the default, and request Concessionee to show cause, at a subsequent hearing before the City Commission, why the Concessionee should not be declared in material breach of this Agreement.

(C) Only upon finding that Concessionee has substantially failed to comply with Sections 5 or 6 hereof, or is otherwise in default in a manner presenting a clear and present threat to public health or safety, the City Manager or designee shall proceed pursuant to paragraph (B)(1) of this Section. Within 48 hours after Concessionee's surrender of possession of the Concession Premises as there provided, the City Manager shall fully comply with paragraph (B) (2) above. At all reasonable times after Concessionee's surrender of possession, and pending hearing pursuant to (B)(2) above, the City Manager or his designee shall provide to Concessionee the opportunity informally to be heard why the suspension of rights should be lifted. In reaching decisions under this section, the City Manager/designee shall:

- 1) Consider Concessionee's past record of compliance with provisions of this Agreement and related laws; and
- 2) Consider the degree of risk to public health, safety, and peace arising from the default by Concessionee.

(D) Upon City Commission finding, after hearing as provided in paragraph (B) 2) above, of default by Concessionee the City Commission may direct Concessionee to surrender possession of the Concession Premises, and Concessionee hereby agrees immediately to so do. Concessionee shall thereafter have no further right to possession of the Concession Premises, and City may occupy same for its own uses, and may rescind the rights granted to Concessionee by this Agreement, and may in its absolute discretion grant any or all concession rights to a new party. Alternatively, the City Commission may direct such other remedy as may be agreed to by the parties.

(11) Cumulative Remedies; Nonwaiver

The specification of certain procedures herein shall not affect the City's right to pursue such other just and appropriate relief as may be provided by law. The remedies provided herein are cumulative and shall be in addition to, and not in derogation of, any other rights or remedies the City may have. The City's waiver of, or failure to exercise any rights or remedies shall have no effect on the enforcement of such rights at any subsequent time, and shall not operate to limit by way of estoppel, laches, or otherwise, City's discretion to exercise any such rights.

(12) Joint, Several Liability

Richard C. Welter as owner of Sunset Watersports, Inc., shall execute a personal guarantee in a form acceptable to the City for the performance of all duties, obligations, and liabilities of Concessionee as provided by this Agreement, and for payment of the Concession Fees.

(13) Surrender of Possession

Upon expiration of the Concession Term or any Renewal Term, or sooner termination of Concessionee's rights pursuant to paragraph 10 or 11 hereof, Concessionee agrees to surrender and yield possession of the Concession Premises to City peacefully and without further notice, and in good order and condition.

(14) Utilities and Taxes

Concessionee shall bear all costs of any utilities provided to the Concession Premises for its use, including but not limited to all costs for electricity, water, solid waste service, telephone service, or sewer service. Concessionee shall pay all impact fees pertaining to

installation, hook-up or use of any utility. Concessionee shall be responsible for any taxes due or that may become due rising out of the Concessionee's use of the property.

(15) Public Access

Concessionee agrees that there shall at all times be free and clear public access to the Concession Premises. The public shall have the right to make full noncommercial use of the property, including but not limited to enjoyment of watersports with equipment in their own possession.

(16) No Partnership

City does not in any way or for any purpose, become a partner of Concessionee in the conduct of its business, or otherwise, or joint venturer or a member of a joint enterprise with Concessionee.

(17) Captions

Headings labeling any provisions herein are for convenience only, and shall not in any way be construed as affecting, limiting, expanding, or stating the contents, meaning, or intent of this Agreement.

(18) State Approval

The parties acknowledge that City's authority to enter into this Agreement is subject to review and approval of the Director of the Division of Recreation and Parks of the Florida Department of Natural Resources, as provided in a certain Lease Agreement executed June 23, 1971, between City and the State of Florida Board of Trustees of the Internal Improvement Trust Fund. Accordingly all rights conferred herein by City to Concessionee are granted entirely subject to such approval.

(19) Validity of Agreement

If all or any portion of this Agreement is determined by any court of law to be invalid for any reason whatsoever, the Agreement or any such portion shall be subject to renegotiation between the parties insofar as is consistent with the court order. Neither party shall be entitled to any damages whatsoever arising from such invalidity.

(20) Entire Agreement

This Agreement sets forth all the covenants, promises, agreements, and understandings between City and Concessionee concerning the Concession Premises. No subsequent alteration, amendment, change, or addition to this Agreement shall be binding upon City or Concessionee unless reduced to writing and duly executed by both parties.

IN WITNESS WHEREOF, the parties hereto have executed this Concession Agreement the day and year first above written.

CITY OF KEY WEST
P.O. 1409
KEY WEST, FL 33041

By: J.K. Scholl
James Scholl
City Manager

SUNSET WATERSPORTS, INC.

By: Richard C. Welter
Richard C. Welter
President

The seal of the City of Key West, Florida, is circular with a scalloped edge. It contains the text "SEAL OF THE CITY OF KEY WEST, FLORIDA" around the perimeter. In the center, the word "ATTEST:" is written above a signature. The signature is "Cheryl Smith" in cursive. Below the signature, the text "Cheryl Smith, City Clerk" is printed.
ATTEST:
Cheryl Smith
Cheryl Smith, City Clerk

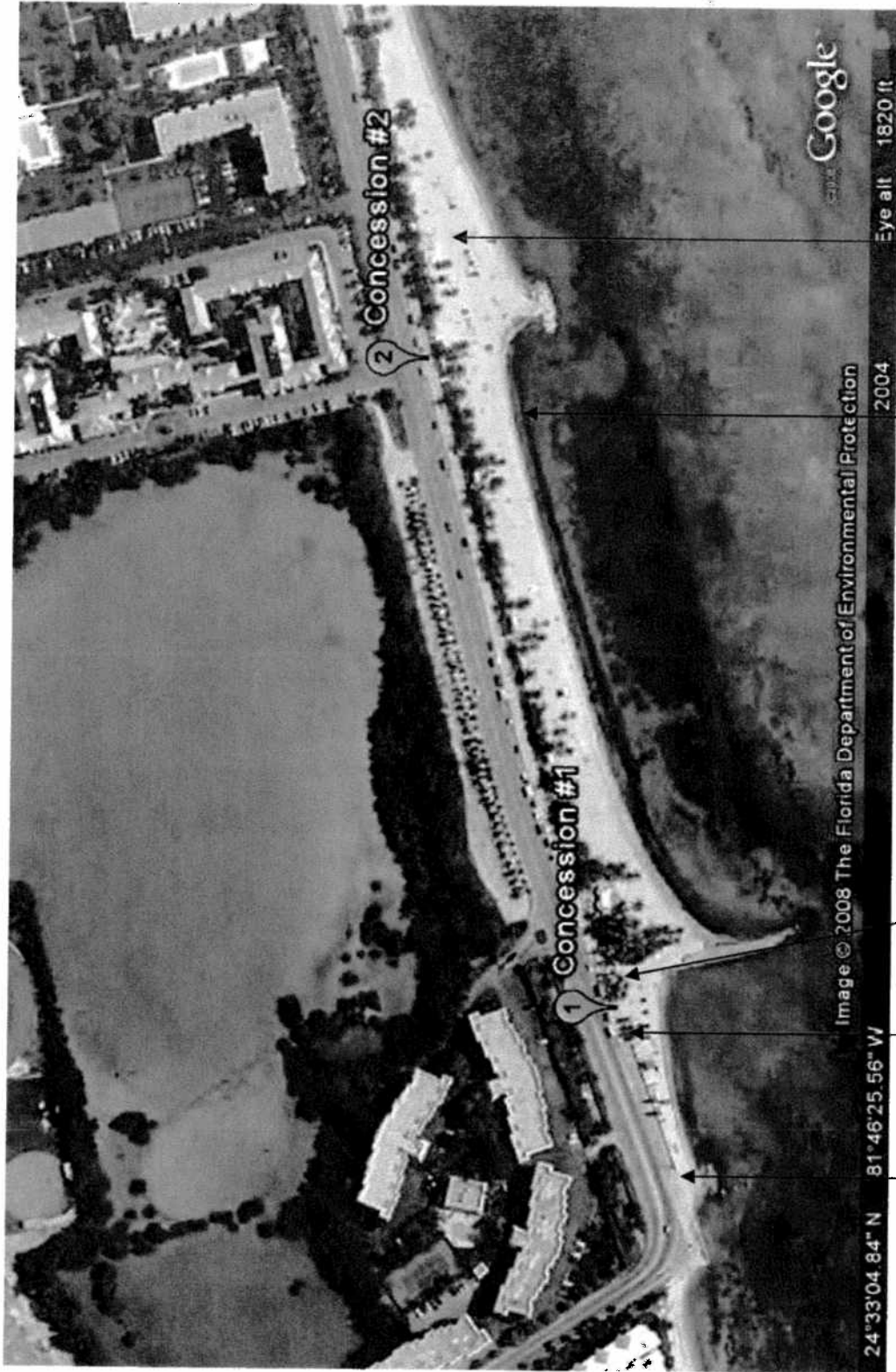
WITNESS:

[Signature]
Print Name: _____

Maxine W. Dargatzis

CONCESSION AGREEMENT EXHIBITS

EXHIBIT A
SUNSET WATERSPORTS DEPICTING APPROXIMATE LOCATION OF CONCESSIONS #1, #2



- Point of Beginning is the Easterly side of concrete boat ramp
- Begin 365 Ft.
- End 406 Ft.
- Begin 1350Ft.
- End 1500 Ft.

Beginning and ending point markers are approximate

Exhibit A-1
Sunset Watersports New Location Concession #1 detail

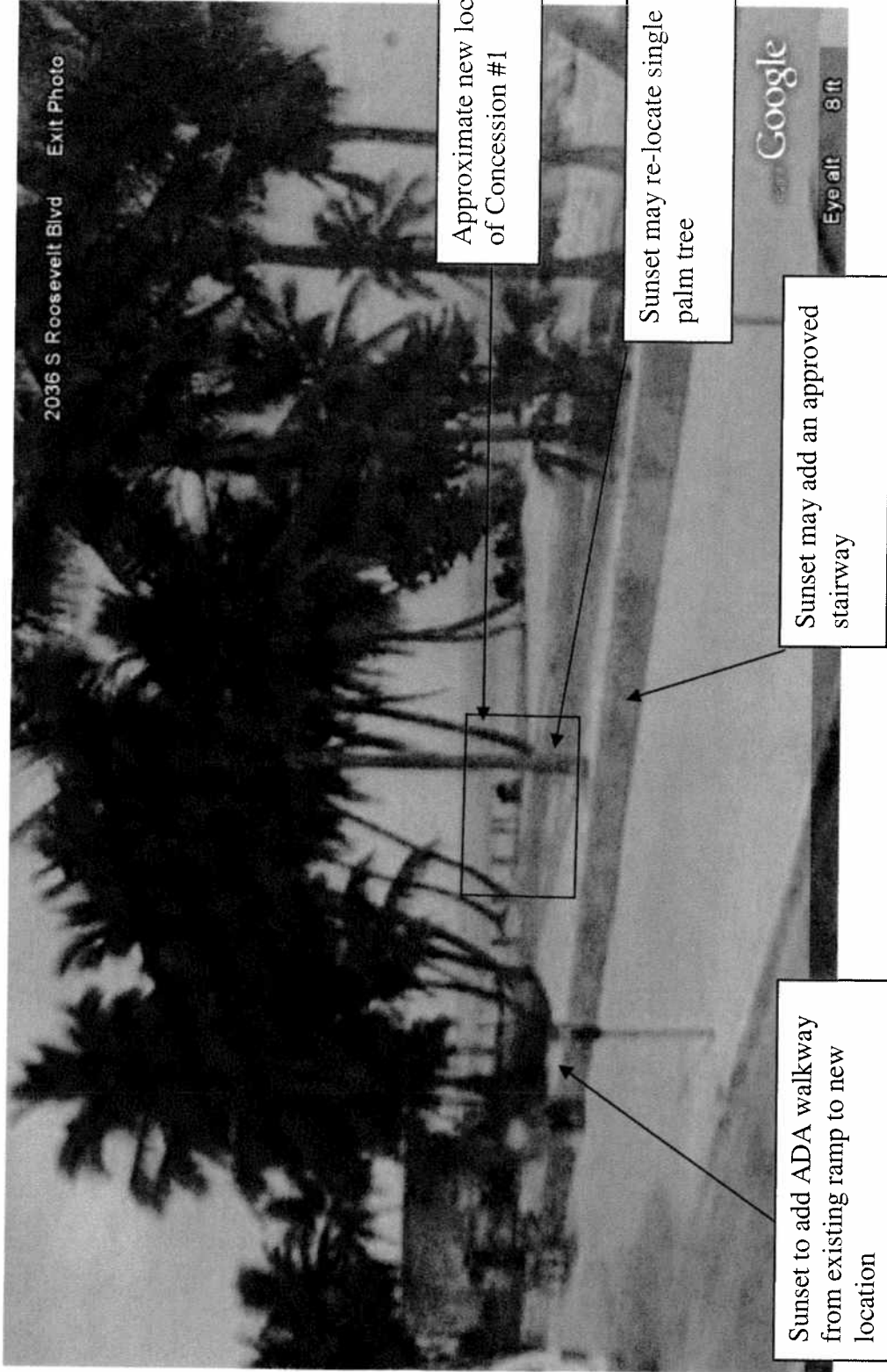


EXHIBIT B
MINIMUM CONCESSION FEES

Tenant: Sunset Watersports
Concession #1, 2

Location: Smathers Beach

Contact: Richard Welter

YEAR #	Period	Minimum Concession Fees		Annual 5% Increase	Sales Tax	Total Minimum Fees	
		Monthly 5% Increase	Monthly			With Tax	Concession Fees
1	Beginning						
1	October 1, 2008	\$2,500.00	\$187.50	\$30,000.00	\$187.50	\$2,687.50	\$32,250.00
2	October 1, 2009	\$2,500.00	\$187.50	\$30,000.00	\$187.50	\$2,687.50	\$32,250.00
3	October 1, 2010	\$2,625.00	\$196.88	\$31,500.00	\$196.88	\$2,821.88	\$33,862.50
4	October 1, 2011	\$2,756.25	\$206.72	\$33,075.00	\$206.72	\$2,962.97	\$35,555.63
5	October 1, 2012	\$2,894.06	\$217.05	\$34,728.75	\$217.05	\$3,111.12	\$37,333.41
6	October 1, 2013	\$3,038.77	\$227.91	\$36,465.19	\$227.91	\$3,266.67	\$39,200.08
7	October 1, 2014	\$3,190.70	\$239.30	\$38,288.45	\$239.30	\$3,430.01	\$41,160.08
8	October 1, 2015	\$3,350.24	\$251.27	\$40,202.87	\$251.27	\$3,601.51	\$43,218.08
9	October 1, 2016	\$3,517.75	\$263.83	\$42,213.01	\$263.83	\$3,781.58	\$45,378.99
10	October 2, 2017	\$3,693.64	\$277.02	\$44,323.66	\$277.02	\$3,970.66	\$47,647.94

Concessionee pays the greater of the minimum concession fees or ten percent (10%) of gross income.

EXHIBIT C
LETTER OF AUTHORIZATION
TO OBTAIN SALES AND USE TAX REPORTS

State of Florida, Department of Revenue
Records Management
Via Facsimile 850-922-5936

Records Management:

The City of Key West, through its City Manager, has authorization to obtain copies of the Sales and Use Tax DR15 forms of Sunset Watersports, Inc. Certificate #54-8012161702-9 from the period beginning October 2008 to the most current report on file.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard C. Welter". The signature is written in a cursive style with a large, prominent initial "R".

Richard C. Welter
President
Sunset Watersports, Inc.

GUARANTY

This Guaranty is made this 24 day of Sept, 200_ in accordance with the Concession Agreement (hereinafter Agreement) dated _____, 200_ by and between the City of Key West (hereinafter City) and Sunset Watersports, Inc. (hereinafter Concessionee) and Richard C. Welter (hereinafter Guarantor) for the Concession Premises (hereinafter Concession Premises) located at Smather's Beach, Key West, Florida.

In consideration of granting the use of the Concession Premises to Concessionee, and other good and valuable consideration, Guarantor does hereby covenant and agree that:

- (a) The Guarantor does hereby absolutely, unconditionally and irrevocably guarantee to the City the full and complete performance of all of Concessionee's covenants and obligations under the Agreement and full payment by Concessionee of all rentals, additional charges and other charges and amounts required to be paid hereunder during the entire term. Guarantor's obligations hereunder shall be primary and not secondary and are independent of the obligations of the Concessionee.
- (b) A separate action or actions may be brought and prosecuted against Guarantor, whether or not action is brought against Concessionee or whether Concessionee shall be joined in any such action or actions. At the City's option, the Guarantor may be joined in any action or proceeding commenced by the City against Concessionee in connection with and based upon any covenants and obligations under the Agreement, and the Guarantor hereby waives any demand by City and/or prior action by City of any nature whatsoever against Concessionee.
- (c) The Guarantor consents to forbearance, indulgences and extensions of time on the part of the City being afforded to Concessionee, the waiver from time to time by City of any right or remedy on its part as against Concessionee. The Guarantor hereby agrees that no act or omission on the part of the City, shall affect or modify the obligation and liability of the Guarantor hereunder.
- (d) This Guaranty shall remain and continue in full force and effect, notwithstanding (i) any alteration of the Agreement by parties thereto, whether prior or subsequent to the execution hereof, (ii) any renewal, extension, modification or amendment of the Agreement, (iii) any subletting of the Demised Premises or assignment of Concessionee's interest in the Agreement.
- (e) The Guarantor's obligations hereunder shall remain fully binding although City may have waived one or more defaults by Concessionee, extended the time of performance by Concessionee, released, returned, or misapplied other collateral given later as additional security (including other guarantees) and released Concessionee from the performance of its obligations under the Agreement.
- (f) In the event any action or proceeding be brought by City to enforce this Guaranty, or City appears in any action or proceeding in any way connected with or growing out of

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

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

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

IN WITNESS WHEREOF, the Guarantor has caused the foregoing Guaranty to be executed on this 24th day of September 2008.

Witness:

By: [Signature]
Name: MARILYN NIBALGAN

Date: 9-24-08

Guarantor:

By: [Signature]
Name: RICHARD C. WELTER

Date: 9-24-08

State of Florida }
County of Monroe }

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State last aforesaid, this 26 day of September, 2007.

[Signature]
Notary Public, State of Florida

My Commission Expires:

