

ORDINANCE NO. _____

AN ORDINANCE GRANTING A FRANCHISE TO CONCH TOUR TRAIN, INC. TO OPERATE CITY-WIDE SIGHTSEEING / SHUTTLE OPERATION; PROVIDING TERMS AND CONDITIONS, INCLUDING THE FOLLOWING: PROVIDING THAT ORDINANCE DOES NOT PROHIBIT CITY FROM OPERATING A SHUTTLE SERVICE; DEFINING THE TERRITORY TO BE SERVED; AUTHORIZING CITY INSPECTION OF SIGHTSEEING/SHUTTLE VEHICLES; PROVIDING FOR THE OBSERVANCE OF CURRENT AND FUTURE RULES AND REGULATIONS, INSURANCE REQUIREMENTS AND INDEMNIFICATION; LIMITING ASSIGNMENT OF THE FRANCHISE; PROVIDING CONSIDERATION FOR GRANT OF THE FRANCHISE AND CONTINGENT RELIEF; DIRECTING THE PROCEDURE FOR DESIGNATION OF STOPS AND OPERATIONAL REQUIREMENTS OF FRANCHISEE; PROVIDING FOR INSPECTION OF BOOKS AND RECORDS; AUTHORIZING THE ISSUANCE OF PERMITS; ESTABLISHING THE DURATION OF THE FRANCHISE; PROVIDING FOR THE ESTABLISHMENT OF RATES, FEES AND ROUTES; SPECIFYING DEFAULT PROVISIONS AND PROCEDURE FOR NOTICE, SUSPENSION AND/OR TERMINATION UPON DEFAULT, INCLUDING APPEAL PROVISIONS; PROVIDING REMEDIES UPON BANKRUPTCY OF FRANCHISEE; INDICATING FRANCHISE IS NOT A WAIVER OF OTHER CITY REQUIREMENTS; CLARIFYING THAT NO JOINT VENTURE IS CREATED; PROHIBITING DISCRIMINATION; PROVIDING FOR CONSTRUCTION AND INTERPRETATION OF PROVISIONS; INDICATING TIME IS OF THE ESSENCE; PROVIDING FOR ATTORNEYS FEES, WAIVER OF JURY TRIAL AND SPECIFYING VENUE IN THE EVENT OF LITIGATION; PROVIDING FOR NOTICE, ACKNOWLEDGEMENT, ACCEPTANCE AND CUMULATIVE PROVISIONS; SPECIFYING THE FRANCHISE CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES AND MAY ONLY BE AMENDED BY SUBSEQUENT ORDINANCE OF THE CITY COMMISSION; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF INCONSISTENT PROVISIONS; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, municipalities in the State of Florida are authorized to regulate commercial traffic upon municipal streets. *Pennington v. Quigg*, 114 So. 859 (Fla. 1927); *Jarrell v. Orlando Transit Co.*, 167 So. 664 (Fla. 1936); *City of Coral Gables v. City of Miami*, 190 So. 427 (Fla. 1939); *City of Miami v. South Miami Coach Lines, Inc.*, 59 So. 2d 52 (Fla. 1952); *Pratt v. City of Hollywood*, 78 So. 2d 697 (Fla. 1955).

WHEREAS, the City of Key West and BUGGY BUS, INC. desire to enter into a franchise agreement for sightseeing / shuttle operations.

WHEREAS, Key West City Charter section 7.01(4) requires that the grant of a franchise must be done by ordinance.

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

Section 1. GRANT

For the purpose of providing a non-exclusive citywide sightseeing / shuttle service, there is hereby granted to CONCH TOUR TRAIN, INC. a Florida Corporation (hereinafter referred to as "Grantee" or "Franchisee"), a franchise to operate a citywide sightseeing / shuttle service which shall include the right, privilege, and franchise to use

all public streets, avenues, sidewalks, public easements and other public highways, within the corporate limits of the City of Key West insofar as said operation does not unreasonably interfere with public transportation or block traffic, and in doing so employ and exercise the right hereby granted, subject at all times to the provisions, terms and conditions of this ordinance.

Section 2. TERRITORY TO BE SERVED.

The rights granted hereby shall be exercisable in and applicable to all sections of the City within the present or future corporate limits thereof.

Section 3. CITY INSPECTION OF SIGHTSEEING VEHICLES

All sightseeing / shuttle motor vehicles hereunder shall be maintained in good repair in order that they are suitable and safe at all times for operation in public service. The Grantee shall permit the City to make such inspections of such motor vehicles as the City shall deem necessary in the public interests, and shall comply in every respect with the provisions of all Ordinances relating to the inspection of motor vehicles by the City. The City shall have the right to conduct such inspections, but not the obligation to do so.

Section 4. INSPECTION OF SIGHTSEEING / SHUTTLE SERVICE

The City shall have the right to designate from time to time a municipal department, or one or more duly authorized representatives of the City, to exercise appropriate control, supervision, inspection and regulation by the City of the sightseeing / shuttle service provided for herein.

The Grantee shall keep records of the number of vehicles operated each day and the number of fare paying passengers . The records shall be provided to the Grantor upon written request for same, on a quarterly basis to determine the percentage of occupancy and ridership.

Grantee shall report any damage to persons or property involving a vehicle used in the operation of the franchise to the Grantor on a quarterly basis, upon request.

Grantor may conduct an annual performance review of the franchise operation. The city manager or his/her designee shall review the performance of the Grantee. The evaluation shall include, but not be limited to, the following categories: compliance with the terms and conditions of Chapter 78, Article V of the Key West Code of Ordinances and Grantee's franchise agreement; percentage of ridership and need for alteration of the number of vehicles

permitted under the franchise agreement; responsiveness to customer complaints; safety of operations; cleanliness, condition, and appearance of sightseeing motor vehicles. After each such evaluation an evaluation report specifically addressing any area of concern shall be provided to the evaluated Grantee ("evaluation report"). Said report may include findings of concern that does not constitute a "default" under this Franchise. Any finding during said evaluation that constitutes a Default under Section 17 of this Franchise shall be noticed and processed in accordance with Sections 18 and 19 herein.

Section 5. OBSERVANCE OF TRAFFIC RULES AND REGULATIONS, TRAINING AND HISTORICAL ACCURACY

The Grantee shall observe, obey and fully comply with all present and future traffic laws and ordinances affecting the operation of motor vehicles, and shall also observe and carry into effect any rules, orders or regulations which may be promulgated by the City for the purpose of safeguarding public health, comfort, safety or property.

The Training plan for the operators of each sightseeing vehicle, shall ensure proper licensure of operator, compliance with all State, Federal, and local

requirements of such an operator, compliance with Grantees training and continuing education requirements,

Historical accuracy of tour narration by operator is to be ensured by Grantees training program: including but not limited to working knowledge of the script and bullet points of tour; testing by grantee; peer observance and consistency, operator research into local history.

Section 6. LIMITATION ON ASSIGNMENT OF FRANCHISE

This franchise shall not be leased, assigned or otherwise alienated except with the consent of the City Commission as expressed by Ordinance, which consent shall not be unreasonably withheld. Without in any way limiting the foregoing, the sale, transfer or disposition by any other means of twenty-five (25) percent or more of the stock or assets of a Grantee shall be deemed an assignment. Notwithstanding the above, any transfer between and among individuals or entities that are stockholders of the corporation on the effective date of this ordinance shall not violate this provision. The Grantee shall furnish prior written notice to the City of any proposed assignment, along with the names, addresses and relevant financial information of the persons or entities offering to acquire

such stock or assets, in addition to any other information requested by the City Manager.

Section 7. PUBLIC LIABILITY INSURANCE.

The Grantee shall keep in full force and effect at all times during the effective period of this ordinance, liability insurance to provide insurance for the City and for all persons suffering injury, loss or damage to their persons or to property by reason of the negligent operation of each sightseeing / shuttle vehicle operating by authority of this ordinance. The Grantee shall, at all times, maintain liability insurance in an amount of not less than ten million dollars (\$10,000,000.00) per occurrence. Such insurance shall comply with the laws and regulations of the State of Florida. All insurance policies insuring said sightseeing / shuttle vehicles shall be issued by an insurance company registered to do business in the State of Florida, subject to the laws and regulations of the State of Florida. Insurers issuing the above referenced policies must maintain an A.M. Best rating of no less than "A". The City of Key West shall be named as an additional insured on all liability policies. The Policies shall contain a waiver of subrogation provision whereas the Grantee's insurer waives any claim against the City of Key

West. Certificates of insurance shall be filed and maintained with the City Clerk evidencing the minimum limits of insurance cited above. All policies shall provide they may not be terminated or modified without the insurer providing the City at least thirty (30) days advance notice. The Grantee shall immediately notify the City of any cancellation of such insurance.

At the request of the City Manager, the Grantee shall meet with the Grantor's representatives to review the extent and amount of insurance coverage provided hereunder. Should the City Manager believe that the coverage provided is not sufficient to protect its interest, it may specify the increased level of insurance required. If Grantee objects to the level of coverage, Grantor and Grantee shall enter into a binding arbitration within fifteen (15) days of the date of the dispute to resolve the issue. If Grantor and Grantee are unable to agree on a neutral arbitrator, each party shall select an arbitrator who will then appoint a third arbitrator to resolve the matter. If an arbitrator is not selected through no fault of the Grantor, the coverage required by the Grantor shall be placed.

The City hereby expressly assumes no responsibility for injury or damage done or caused to persons or property

by reason of the operation of said sightseeing / shuttle operation and no third party benefit is intended to be conferred by any provision of this franchise. Nothing herein is intended to waive the sovereign immunity accorded to Grantor pursuant to Florida Statutes, including Section 768.28.

Section 8. INDEMNIFICATION

Grantor shall not be liable for injury or damage caused to any person or property by reason of the failure of Grantee, its' employees or agents to perform any of its obligations hereunder or in the operation of the activities authorized herein. Grantee shall indemnify, hold harmless and defend Grantor, its employees, officials, officers and agents against all loss, damage, claim, demand, liability or expense, including attorneys' fees, by reason of any damage or injury to persons (including loss of life) or property which may arise or be claimed to have arisen as a result of, in connection with, or in any way related to Grantee's operations. Nothing herein is intended to waive the sovereign immunity accorded to Grantor pursuant to Florida Statutes, including Section 768.28.

Section 9. CONSIDERATION FOR GRANT AND AUTHORIZED NUMBER OF VEHICLES

During the period of time in which the Grantee is operating under this ordinance, the Grantee shall pay to the City five percent (5%) of the gross revenues it receives from all sources derived from sightseeing operation sources, including tours, charters, shuttles and other transportation functions pursuant to the franchise agreement , or the sum of seven thousand five hundred dollars (\$7,500) per vehicle, per year whichever is greater (this amount shall be referred to as the "guaranteed minimum payment"). Said five percent (5%) shall be paid at the end of each calendar month with a 15-day grace period. The yearly guaranteed minimum payment shall be payable at the end of each 12-month period with a 15-day grace period.

The guaranteed minimum payment per vehicle is payable based upon the number of vehicles authorized, per year in the franchise agreement and not the number actually operated, per year pursuant to the franchise.

Failure to pay any sum when due shall result in imposition of interest at the rate of eighteen percent (18%) per annum of the delinquent amount per month, or such maximum amount permitted by law, until paid in full.

If Grantee elects to sell advertising on its sightseeing vehicles, (said revenue is not included in calculation of gross revenue) no more than twenty percent (20%) of the surface area of the vehicle available for such purposes may be used. In consideration of the allowance to provide advertising, Grantee agrees not to enter into any agreement that requires it to operate any sightseeing vehicle on a minimum basis.

Grantee is hereby authorized to immediately operate up to twenty (20) sightseeing vehicles each year under the provisions of this franchise. The number of authorized vehicles allowed under the franchise agreement shall be reduced by the number not placed into service within three hundred sixty days (360) of the effective date of the franchise agreement or within any consecutive (360) day period during the franchise agreement. Placed into service shall mean the sightseeing vehicle is used for 1 day and located within the area governed by the franchise agreement and available for operation in the Grantees regular course of business.

True and accurate color photographs of the vehicles authorized to be used in the operation are attached hereto as Exhibit "A".

Section 10. RESERVED

Section 11. STANDS, STOPS AND OPERATIONAL REQUIREMENTS

The City Manager, with the input of the Grantee, shall designate stops for the loading and unloading of the Grantee's patrons. The City Manager shall have the authority to disapprove any stop or stand, which in the City Manager's opinion disrupts traffic, City operations, or is otherwise unreasonably injurious to the public welfare. Should Grantee or any affected party or entity disagree with the decision of the City Manager, it shall, by filing written notice with the City Clerk within 3 business days of receiving the City Manager's decision, appeal the decision to the City Commission. All regularly scheduled routes, stands and stops previously established and approved by the City Manager are approved herein. Grantee and Grantor agree that routes for special occasions, such as weddings and holiday tours cannot reasonably be anticipated in advance, and shall be deemed acceptable

unless such operation is determined by the City Manager to be injurious to public welfare. (See Composite Exhibit "B" attached).

Upon the establishment of any newly proposed stop, the City Manager shall mail notice to all property owners and franchisees located within three-hundred (300) feet of the proposed stop. Such property owners and franchisees shall have twenty days from the mailing of the notice to appeal the decision of the City Manager to the City Commission in accordance with the provisions of this chapter. The City Manager shall also cause notice to be mailed to all property owners and franchisees located within three-hundred (300) feet of any location that the City Manger has denied the Grantee an opportunity to establish a stop, and for which the Grantee has appealed, informing them of the City Commission meeting at which such appeal will be considered.

The City Commission shall set the matter for hearing with appropriate public notice for the next regularly scheduled Commission meeting. By majority vote, the Commission may affirm, reverse or modify the decision of the City Manager based upon the factors considered by the City manager and those contained in City of Key West Code of Ordinances section 78-252(b).

Such authorized stops shall be for the loading and unloading of passengers only. The Grantee shall not solicit persons or transact ticket sales on the City streets or sidewalks. Grantor acknowledges that tickets may be sold on the Franchise vehicle themselves, but in no event shall individuals be solicited from the vehicles while on adjacent public areas.

In addition to the stops designated above, City agrees to provide "Stands": generally as shown on Composite Exhibit "B" attached. A Stand is a specific on-street area for exclusive use by Grantee that are intended for waiting, loading or unloading, and are not time restricted except as limited to permitted hours of operation.

The City Manager shall have the authority to move stands and stops and to reasonably regulate their use by the Grantee, including requiring of the sharing of stops with other franchisees only upon establishing a factual basis to support a determination that same is necessary to protect the public health, safety or welfare. The location of stands and stops may be marked on City Streets in accordance with the City Code of Ordinances by the City for the benefit of the Grantee. The Grantee, with the consent of the City Manager, may install signage at such stands and stops subject to any applicable City regulations. If the

City should lawfully decide to alter or change the grade of any street or to make any other public improvements which, in the City Manager's sole discretion, requires the Grantee to temporarily relocate, modify, or otherwise alter its operations under this Franchise, the City shall give the Grantee at least forty-eight (48) hours notice of such decision and may require the Grantee to remove its signs, vehicles, or other property in order to facilitate such City project. The Grantee acknowledges and agrees to release the City from any losses, injuries, or damages it may suffer as a result of such decision by the City. The movement or relocation of any stops on public property shall be applied equally to all operators under City franchises. The City shall not require Grantee to relocate, temporarily or otherwise, unless the same request is made to a similarly situated franchisee.

The Grantee shall not utilize loudspeakers in the operation of its business other than in the confines of its own sightseeing/ shuttle vehicles for the benefit of its patrons within such vehicles. Grantee acknowledges the requirement to comply with the City's sound control ordinance as may be amended from time to time and to contain sound from the tour's narration within the public right of way. Operators of the sightseeing vehicle must

comply with Grantees internal program and recommendations to minimize unnecessary sound ,which methodology and technical specifications are included in the application for this franchise agreement, and have been previously installed and approved by the City Manager.

All vehicles operating under this agreement shall utilize an environmentally sensitive alternative fuel such as propane, CNG or bio-fuel in order to reduce carbon emissions.

Section 12. BOOKS AND RECORDS

Grantee further agrees to have its gross revenues and payments to the City audited at least every three years by a Certified Public Accounting firm pursuant to generally accepted accounting principles, and the results of said audit shall be promptly transmitted to the City. Grantor shall also retain the right to have gross receipts and payments to the City audited at its own expense by a Certified Public Accounting firm selected by City upon fourteen (14) days written notice to Grantee and further provided that the results of such audit be immediately transmitted to Grantee promptly upon completion. Upon fourteen (14) days written notice to Grantee, Grantor shall be permitted to inspect Grantee's books, records and other

pertinent financial and other information related to revenue and ridership numbers, to ensure compliance with the provisions of section 9 above.

Section 13. PERMITS

As a franchisee and an exception to Article IV of Chapter 78 of the Key West Code of Ordinances, the appropriate officers of the City are authorized and directed to issue such written permits and business tax receipts as the Grantee may need for the operation of its sightseeing / shuttle service as authorized by this Franchise. In all other respects, except as specifically agreed to in this franchise agreements, said Article remains in full force and effect, however in accepting this Franchise Agreement, Grantee reserves all rights it currently possesses to assert its vested property right in the permits and licenses needed to operate its sightseeing tours as granted pursuant to City Ordinances Nos. 83-111, 83-112, 95-04 and 95-05. Nothing herein constitutes a waiver by the City to challenge the vested property rights claimed by Grantee above.

Section 14. SHUTTLE SERVICE

It is the intention of the City to allow the Grantee to operate a shuttle service in addition to the traditional sightseeing operation. The Grantee may shuttle groups or individuals from place to place within the City corporate limits subject at all times to this Ordinance and provided that any receipts realized from said operation are subject to and included in Section 9, Consideration for Grant. This section shall not be construed to either prohibit or allow private taxicabs or the City, its agencies or authorities from operating a shuttle service. Whether or not taxicabs or the City, its agencies or authorities may enter into a shuttle service operation in competition with the Grantee shall be determined by applicable City, State and Federal law.

Section 15. PERIOD OF GRANT

This franchise hereby granted to Conch Tour Train, Inc., a Florida Corporation, shall be effective following final adoption by the City Commission and upon acceptance by Grantee as specified in section 28 below. Unless earlier terminated as specified herein, this grant shall remain in place for ten (10) years from the effective date, in the form of an initial five year term, with an option for an additional five years conditioned upon grantee's

giving written notice to City not less than 6 months prior to the expiration of the initial 5 year term of its intention to be renewed, and compliance with the terms and conditions of the franchise agreement during the initial term. A finding of non compliance resulting in denial of the second five year term must be based upon a final finding of Default pursuant to Sections 17-19 of this Franchise Agreement

16. RATES, FEES, AND ROUTE PROVISIONS

The Grantee shall have the power to establish, increase or decrease rates, fares and charges to users of its services. However, prior to permanently increasing or decreasing rates, fares or charges, the Grantee shall notify the City Manager.

Prior to commencing operations, the Grantee shall provide the Grantor with a proposed script of the sightseeing tour to be given to passengers. Material alterations to such script shall be forwarded to the City Clerk.

The Grantee shall also have the power to establish its own routes, schedules, stops and hours of operation, subject to review by the City Manager as specified herein. Grantee acknowledges that no operator of a sightseeing

vehicle authorized under this franchise shall, without cause, drive at such a slow speed as to impede or block the normal and reasonable movement of traffic. At least ten (10) days prior to the implementation of any new or changed route or schedule, the Grantee shall provide the City Manager with a copy of the route and/or schedule specified on a City map. The City Manager shall have the authority to disapprove any route, which in the City Manager's opinion disrupts traffic, City operations, or is otherwise unreasonably injurious to the public welfare. Should Grantee disagree with the decision of the City Manger, it shall, by filing written notice with the City Clerk within three (3) business days, appeal the decision to the City Commission. The City Commission shall set the matter for hearing with appropriate public notice and in accordance with Section 19.

Section 17. DEFAULT BY THE FRANCHISEE

Franchisee/Grantee shall be in default of this Agreement in the event of any of the following

- (A) Failure to comply with any federal, state or local law, ordinance, rule, or regulation governing any part of the operations of activities authorized herein; or

- (B) Failure to comply with any provision of this Franchise; or
- (C) Voluntarily or involuntarily becomes bankrupt; or
- (D) Voluntarily or involuntarily has a receiver appointed; or
- (E) Has assets sold at sheriff's sale or any other judicial sale; or
- (F) Involuntarily assigns, transfers, or encumbers any rights or privileges contained in the franchise; or
- (G) Voluntarily assigns, transfers, or encumbers any rights or privileges contained in the franchise without first obtaining the written consent of the City commission; or
- (H) Knowingly files false financial statements with the city; or
- (I) Willfully fails to file the required financial information with the city.

While in default, Grantee and City agree that City may accept any payment, whether full or partial, without waiving or relinquishing any right to continue default proceedings.

Section 18. NOTICE; SUSPENSION, TERMINATION UPON DEFAULT

If the City Manager determines that the Grantee has defaulted in its performance under this Franchise, the City Manager shall provide written notice of such default and give the Grantee a reasonable time, but not less than seven (7) days, to cure such default. If default by the Grantee continues longer than the period of time specified in said notice, the City Manager shall provide the Grantee a second written notice, that the Grantee's right to operate a Sightseeing/Shuttle service under this Franchise may be suspended or terminated and that an administrative hearing shall be held not less than fourteen (14) days after the date of said notice for the purpose of hearing evidence from the Grantee and to determine an appropriate remedy. The Grantee shall have the right to call and cross-examine witnesses and be represented by counsel at such hearing. Following the hearing, the City Manger shall have the right to suspend or terminate this Franchise or to take other appropriate remedies to ensure compliance with its terms.

The foregoing reasons for forfeiture, suspension, termination, cancellation or other action by the city manager are cumulative and not exclusive, and a franchise agreement may be forfeited, suspended, terminated, cancelled or other such measures taken by the City Manager

for any other reason authorized by the law of the State of Florida.

Section 19. APPEAL PROVISIONS

Upon a finding of Default or any other decision made in writing by the City Manager as authorized under the Franchise, the Grantee shall have the right to appeal the City Manager's decision to the City Commission provided such appeal is filed in writing with the City Clerk within three (3) business days following the City Manager's decision. The City Commission shall have the right to affirm, modify, or reverse the City Manager's decision, so long as said decision is not injurious to the public welfare and supported by a preponderance of evidence presented.

Section 20. BANKRUPTCY OF GRANTEE

IN THE EVENT GRANTEE FILES ANY FORM OF BANKRUPTCY, GRANTOR SHALL BE ENTITLED TO IMMEDIATE TERMINATION OF THE AUTOMATIC STAY PROVISIONS OF 11 U.S.C. §352, GRANTING THE GRANTOR COMPLETE RELIEF AND ALLOWING THE GRANTOR TO EXERCISE ALL OF HIS LEGAL AND EQUITABLE RIGHTS AND REMEDIES, INCLUDING, WITHOUT LIMITATION, THE RIGHT TO TERMINATE THIS FRANCHISE. ADDITIONALLY, GRANTEE AGREES NOT TO DIRECTLY OR INDIRECTLY OPPOSE OR OTHERWISE DEFEND AGAINST THE GRANTOR'S EFFORT TO GAIN RELIEF FROM THE AUTOMATIC STAY. THE GRANTOR SHALL BE ENTITLED AS

AFORESAID TO THE LIFTING OF THE AUTOMATIC STAY WITHOUT THE NECESSITY OF AN EVIDENTIARY HEARING. GRANTEE SPECIFICALLY AGREES AND ACKNOWLEDGES THAT THE LIFTING OF THE AUTOMATIC STAY HEREUNDER BY THE APPROPRIATE BANKRUPTCY COURT SHALL BE DEEMED TO BE "FOR CAUSE" PURSUANT TO SECTION 362(D)(1). SHOULD A COURT DETERMINE THAT THE FRANCHISE IS NOT TERMINATED IN ACCORDANCE WITH THE PROVISIONS OUTLINED HEREIN, THE DEBTOR SHALL MAKE AN ELECTION OF WHETHER TO ACCEPT OR REJECT THE FRANCHISE WITHIN FOURTEEN (14) DAYS OF FILING FOR BANKRUPTCY.

THIS CLAUSE WAS A MATERIAL CONSIDERATION TO THE GRANTOR IN GRANTING THIS FRANCHISE.

Section 21. PROVISIONS CUMULATIVE

The rights and remedies reserved to the City by this Franchise are cumulative and shall be in addition to and not in derogation of any other rights or remedies which the City may have with respect to the subject matter of this Franchise.

Section 22. NO JOINT VENTURE

Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties. Neither party is authorized to act toward third persons or the public in any manner which would indicate any such relationship with the other.

Section 23. NO WAIVER OF OTHER CITY REQUIREMENTS

Except as specifically provided herein, this franchise is not intended to waive any requirement of the Key West City Code of Ordinances or City Charter. The failure of a party to insist, in any one or more instances, upon strict performance of any covenants or conditions of this Franchise or to exercise any option of such party herein contained, shall not be construed as a waiver or relinquishment of that or any other right or remedy of such party hereunder and shall not be deemed a waiver of any subsequent breach or default by the other party of the covenants or conditions herein. No waiver by a party of any provision hereof shall be deemed to have been made unless expressed in writing and signed by such party. With respect to Grantor, such written expression of waiver may only occur by resolution of the Key West City Commission.

Section 24. DISCRIMINATION

The Franchisee shall not deny service, access or otherwise discriminate against any person, including customers, on the basis of race, color, religion, national origin, age, sex or sexual orientation. The Franchisee shall comply at all times with all other applicable

federal, state and local laws and regulations, including but not limited to the Americans With Disabilities Act.

Section 25. CONSTRUCTION; TIME IS OF THE ESSENCE

The provisions of this Franchise shall be liberally construed in order to effectuate its purposes and objectives consistent with the public interest. In construing any and all terms of this franchise agreement, time is of the essence.

Section 26. ATTORNEY'S FEES, WAIVER OF JURY TRIAL AND VENUE

In the event of any dispute affecting the rights of either party under this Franchise, the losing party shall pay the prevailing party's costs, expenses, and Attorney's Fees incurred in the enforcement of the prevailing party's rights hereunder upon a final determination on the merits.

As consideration for this agreement, the parties hereby waive the right to trial by jury in any action or proceeding brought by any party against any other party pertaining to any matter whatsoever arising out of or in any way connected with this agreement.

This agreement has been executed and delivered in the State of Florida and shall be construed in accordance with

the laws of Florida. Any action in connection herewith, in law or equity, shall be brought in Monroe County, Florida.

Section 27. NOTICES

All notices, requests, demands, and other communications which are required or may be given under this franchise shall be in writing and shall be served on the parties at the addresses indicated below:

To Grantee: CONCH TOUR TRAIN, INC.
 C/O HISTORIC TOURS OF AMERICA
 201 FRONT STREET
 Key West, Florida 33040
 Att: Chris Belland

To Grantor: City Manager
 City Hall
 1300 White Street
 Key West, FL 33040

Any such notices shall be delivered by one of the following methods: (a) sent by certified mail, return receipt requested, in which case notice shall be deemed delivered three (3) business days after deposit, postage prepaid in the U.S. Mail, (b) sent by overnight delivery using a nationally recognized overnight courier, in which case notice shall be deemed delivered one business day after deposit with such courier, (c) sent by telephone

facsimile transmission, in which case notice shall be deemed delivered on the day of transmission of such notice and confirmation of such transmission, or (d) sent by personal delivery, in which case notice shall be deemed delivered on the day of actual delivery. The above addresses may be changed by written notice to the other party; provided, however, that no notice of a change of address shall be effective until actual receipt of such notice.

Section 28. ACCEPTANCE

Within ten (10) days of the passage and adoption hereof, the Grantee shall file with the City Clerk written notice of its acceptance of all terms and conditions of this Ordinance, and both the City and Grantee shall thereafter be bound thereby. By its execution of the Franchise Agreement, Grantee acknowledges and accepts the City's legal right and authority to issue this Franchise and impose the requirements set forth herein.

Section 29. ACKNOWLEDGMENT AND INTERPRETATION

The parties hereto acknowledge that they have read, understand and have had the opportunity to be advised by legal counsel as to each and every one of the terms, conditions, restrictions and effect of all of the provisions

of this Agreement, and each agrees to the enforcement of any and all of these provisions and executes this Agreement with full knowledge of these provisions. Should any provision of this Agreement require judicial interpretation, it is agreed that the court interpreting or construing the provision shall not apply a presumption that the terms hereof shall be more strictly construed against one party by reason of the rule of construction that a document is to be construed more strictly against the party who itself or through its agent prepared the document.

Section 30. ENTIRE AGREEMENT; AMENDMENTS

This Franchise, all Exhibits, the application and any attachments hereto represent the entire understanding and agreement between the parties hereto, supersede all prior oral negotiations or written agreements between the parties, and can be amended, modified, or changed only by written instrument executed by both parties hereto.

Section 31. REPEALING SECTION

All ordinances or parts of ordinances of said City in conflict with the provisions of this Ordinance are hereby repealed to the extent of such conflict.

Section 32. SAVING PROVISION

If any section, part of section, paragraph, sentence or clause of this Ordinance shall be adjudged by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of any other portion hereof, but shall be restricted and limited in its operation and effect to that specific portion hereof involved in the controversy in which such decision shall have been rendered.

Section 33. WHEN ORDINANCE SHALL GO INTO EFFECT

This Ordinance shall go into effect immediately upon its passage and adoption and authentication by the signature of the presiding officer and the Clerk of the Commission. _____

***(Coding: Added language approved at first reading is underlined; language deleted at first reading is ~~struck through~~.)**

Read and passed on first reading at a meeting held this _____ day of _____, 2017.

Read and passed on final reading at a meeting held this _____ day of _____, 2017.

Authenticated by the presiding officer and Clerk of the Commission on _____ day of _____, 2017

Filed with the Clerk _____, 2017.

CRAIG CATES, MAYOR

Attest:

CHERYL SMITH, CITY CLERK