

RESOLUTION NO. 29188

A RESOLUTION AUTHORIZING THE MAYOR TO ENTER INTO A BERTHING AGREEMENT, IN SUBSTANTIALLY THE FORM ATTACHED, FOR A TERM OF FOUR (4) YEARS, WITH THE TENNESSEE AQUARIUM FOR BERTHING OF THE RIVER GORGE EXPLORER.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, TENNESSEE, That it is hereby authorizing the Mayor to enter into a Berthing Agreement, in substantially the form attached, for a term of four (4) years, with the Tennessee Aquarium for berthing of the River Gorge Explorer.

ADOPTED: September 26, 2017

/mem

BERTHING AGREEMENT

This Berthing Agreement for Ross's Landing Commercial Dock is entered into between the City of Chattanooga, Tennessee, (the "City"), a municipal corporation and Tennessee Aquarium (the "Licensee"), a Tennessee nonprofit corporation (the "Agreement").

WHEREAS, the parties intend to enter into an Agreement for the berthing of certain water craft, also known as the 'River Gorge Explorer'; and,

WHEREAS, the Licensee intends to maintain, erect, or place certain improvements in the area that is the subject of this Agreement.

For valuable consideration exchanged between the parties including the mutual promises and covenants contained herein, the receipt and sufficiency of which are acknowledged by each party to this Agreement, do here covenant, contract and agree as follows:

1. TERM. The initial term of this Berthing Agreement shall be for a period beginning October 1, 2017, through September 30, 2021.

2. PREMISES. City agrees to allow Licensee to use the City's Ross's Landing commercial dock for the time required to load and unload passengers and to berth the vessel known as the River Gorge Explorer at a space on the commercial dock, below the pier, beginning at the outside Northwest corner and extending seventy-five (75') as depicted on Exhibit A, overnight and when the River Gorge Explorer is not in use, except as further provided in this section. If the pier, or space below the pier should be needed at any time for municipal purposes, other than for the purpose of the operation of a commercial passenger vessel and ancillary facilities, the Licensee may be required to vacate the premises upon reasonable notice. Such notice will be given at least fourteen (14) days prior to the date the Licensee is required to vacate the premises. In the event Licensee is required to vacate the premises prior to the expiration of the lease term because the

property is needed for municipal purposes, then the City shall forgive the fee for each full month the Licensee is not allowed to use the premises or a reasonable substituted site, or a prorated portion thereof.

3. RENTAL FEES. In consideration for mooring of the River Gorge Explorer, Licensee shall pay to the City a monthly dockage access and rental fee of \$1,000.00, during the term of this Agreement. This fee shall permit the Licensee and its customers to use the dock for access to the River Gorge Explorer. The Licensee acknowledges that the dockage access is non-exclusive.

All payments shall be made by Licensee to the City without notice or demand, on or before the 15th day of the month, at the offices of City Parks Division as set forth in Paragraph 18 of this Agreement. All delinquent fee payments shall bear interest from the due date at a rate of ten percent (10%) of the full amount past-due. If the City institutes legal proceedings to collect delinquent fees, it shall also be entitled to recover its costs and attorney's fees.

3.1. If requested, Licensee shall provide quarterly attendance figures to the City.

4. LICENSES, COMPLIANCE WITH LAWS. Licensee agrees to obtain, at its sole expense, any and all Federal, State, City and County licenses and permits that may be required for its business operation. Licensee also agrees to obtain, and maintain in full force and effect throughout the term of this Agreement, any and all licenses and permits that may be required by the United States Government, or any of its agencies (including, without limitation, the Tennessee Valley Authority, U.S. Corps of Engineers, and U. S. Coast Guard) for its business operations. Licensee shall hire and maintain a licensed U.S. Coast Guard Captain for the vessel. Licensee shall observe and comply with all laws, statutes, ordinances, rules, regulations and directives of the United States Government, the State of Tennessee, the City of Chattanooga, and any department,

board or agency of any of the above. Licensee shall indemnify the City and/or City and its agents and employees from any liability that may be imposed by any governmental authority by reason of asserted violations by Licensee, or the agents or employees of Licensee, or any said applicable laws and regulations.

5. USE OF PREMISES. Licensee shall use the premises solely for the mooring, docking, and minor maintenance of and space for the operation of the River Gorge Explorer. If, at any point in time Licensee ceases to operate the River Gorge Explorer, or any other water craft, either party may terminate this agreement, upon ninety (90) days written notice to the other party.

5.1 Licensee shall be entitled to substitute an excursion boat of similar quality and passenger capacity for the River Gorge Explorer in accordance with the laws of the State of Tennessee and the United States Government. No other vessel shall be moored without a written request for the City's permission, provided ninety (90) days prior to the desired placement of any other vessel. The City's permission shall not be unreasonably withheld, with provision of the aforementioned notice, subject to a correlating reasonable increase in fees. Any usage other than for these purposes and/or other uses instant to and customarily necessary to the normal operations of said excursion vessel(s) must be first submitted to and approved in writing by the City Council for the City.

5.2 Upon expiration, termination or cancellation of the Agreement, Licensee shall remove any and all of its boats, and equipment or other practical movable structures from the premises, without expense to the City. In the event that this Agreement shall remain in full force for its entire term, including any additional term, Licensee shall be under a duty to remove said vessels and structures prior to the final expiration date. At the natural expiration, early termination or cancellation of this Agreement, should Licensee fail to remove said vessels, boats, watercraft

or other practical movable structures, within thirty (30) days after receipt of notice from the City to vacate, or immediately upon the natural expiration of the contract, the City may take possession of said vessels, boats, watercraft, office equipment, or other practical movable structures or may cause same to be removed at the sole expense and risk of the Licensee.

6. PARKING. The Licensee and its guests and patrons shall have no express or implied priority for the use of parking facilities located adjacent to the property licensed by this Agreement. Licensee shall keep the area free of garbage, trash and rubbish, and shall immediately notify City's Police and Public Works Departments of any and all vandalism, criminal activity and/or disturbances within the area. Licensee understands and agrees that the City does not guarantee Licensee any parking facilities.

7. UTILITIES. City shall be responsible for the payment of all utilities and they shall be reflected in total rental fees paid.

8. REPAIRS, MAINTENANCE AND IMPROVEMENTS. Licensee agrees to maintain the overnight berthing location in good order and repair, including replacing, repairing and/or restoring any part of the premises subject to this Berthing Agreement that may be damaged during the term of this Agreement by Licensee's use, ordinary wear and tear being specifically excepted. Licensee shall make no structural repairs or alterations to the premises without first submitting plans and specifications for same to the City and obtaining its prior written consent.

8.1 Licensee shall, at its own expense, provide for the removal and disposal of all garbage or waste generated through its operation at Ross's Landing Park. Licensee must keep its vessels, boats, structures, equipment, and the premises and the area immediately adjacent thereto neat and clean and free of all garbage, trash and rubble, and shall daily remove any and all of same from the property. Further, Licensee shall prohibit and enforce the ruling that no trash or articles

of any sort shall be thrown overboard or into the Tennessee River. In addition, Licensee shall not intentionally, negligently, or otherwise discharge, spill, leak or place into the Tennessee River any trash, garbage oils, petroleum products, chemicals, chemical agents or other substances or foreign objects. Licensee shall store no hazardous materials on its vessels or on or around the premises. Violation of any provision of this paragraph shall be considered a breach of this Agreement.

8.2 In the event of flood or other natural disaster, Licensee shall have the right (but not the obligation) to make request for, receive, utilize and apply federal disaster assistance or aid, and in such circumstances City will not unreasonably delay or withhold such consents of approval as may be required.

9. SUBLETTING AND ASSIGNMENT. Licensee shall neither sublet the whole nor any part of the premises, nor assign, hypothecate nor mortgage this Agreement or any or all of its rights hereunder, without the express prior approval of the City Council for the City. In the event of any approval of a sublease or assignment, all parts of this Agreement shall become binding upon the sub-lessee and/or assignee; provided, Licensee shall remain jointly liable and responsible for the payment of all fee and the performance of all obligations herein.

10. CASUALTY INSURANCE AND DAMAGE. City shall be under no duty to carry any casualty insurance which would cover the property of Licensee within, upon or adjacent to the premises, and Licensee shall bear all risk of loss of its property. If the premises are rendered totally or substantially untenable by fire, other casualty, or due to unsuitable structural integrity, this Agreement, at the option of City or Licensee, shall terminate. If the premises are rendered totally or substantially untenable by fire, other casualty, or due to unsuitable structural integrity, City shall make reasonable efforts to relocate Licensee to an equal and acceptable site, or at the option of City or Licensee, this Agreement shall terminate.

11. INDEMNITY, LIABILITY AND LIABILITY INSURANCE. Licensee shall conduct its activities within the premises subject to this Agreement, and upon any boating vessel berthing at the premises subject to this Agreement, so as not to endanger any persons or property therein. Licensee shall indemnify, save and hold harmless and defend the City, and all of its officers, agents and employees from any and all claims resulting from losses, injuries, damages and liabilities to persons or property resulting, wholly or in part, from acts or omissions of Licensee, including acts or omissions of its agents, officers, employees, guests and/or patrons to the full extent of its insurance coverage provided within this paragraph. This paragraph further requires Licensee to indemnify, save and hold harmless and defend the City, and all of City's officers, agents and employees, from any and all claims for injuries or damages resulting from "runaway" barges or other watercraft owned or operated by Licensee dislodged or freed in any manner from mooring at the premises.

Notwithstanding the foregoing, the Licensee shall not be liable (or held to indemnify) on liability arising from any part of the premises which is under the control of, or is caused by, the act, omission, design or construction by the City. This indemnification provision shall survive the expiration or termination of this Agreement.

Licensee shall, at Licensee's expense, purchase and maintain for the benefit of the City a policy or policies of public liability and property damage insurance, issued in the name of the Licensee and naming the City as an additional named insured, with limits not less than Five Million Dollars (\$5,000,000.00) for injury to and/or death of any one person in a single occurrence, and not less than Five Million Dollars (\$5,000,000.00) for injury to and/or death of more than one person in a single occurrence, and not less than Five Million Dollars (\$5,000,000.00) for damage

to property in a single occurrence. Said insurance policy shall include contractual liability coverage which shall recognize and include the indemnification provisions of this Agreement.

Said policy shall be approved by the City Attorney, which approval shall not be unreasonably withheld, and the policy or policies shall be filed with the City Real Property Office of ECD before execution of this Agreement. Said insurance coverage must be maintained during the entire term life of this Agreement, plus any extension, and each insurance policy shall contain a clause whereby the insurance company shall give written notice to the City at least sixty (60) days prior to any cancellation or alteration of said insurance policy. Any notice of cancellation or alteration of insurance policies during the term of this Agreement shall be considered as a default. Following notice of cancellation or alteration of any said insurance policy during the term of this Agreement and the failure of licensee to cure such default, City may, upon the date of cancellation or alteration of said insurance policy, without further notice, terminate this Agreement, and Licensee shall immediately cease its operations and vacate the premises.

12. NON-PERFORMANCE BY LICENSEE. The nonpayment of any fees contained within this Agreement at the time when same becomes due, and/or the non-performance by Licensee of any of the covenants herein contained, shall be considered a default and breach of contract, and the City, at its election, may terminate this Agreement; provided, City shall give Licensee written notice of any default and Licensee shall thereafter have thirty (30) days to correct the default. Licensee waives any notice of such election, notice to quit possession of said premises, or any further demand for the payment of the fee as the same becomes due, or the performance of any of the covenants herein, or for the possession of the premises. The failure and omission of the City to declare this Agreement forfeited upon any default of said Licensee and the non-payment of said fee as the same becomes due, or the non-performance of any of the covenants to be

performed by the Licensee, shall not operate to bar, abridge or destroy the right of the City to declare this Agreement null and void upon any subsequent breach, forfeiture or non-performance by the Licensee. The City may terminate this Agreement for cause as set forth in this paragraph or for no cause upon ninety (90) days' written notice to the Licensee.

13. HOLDOVER PROVISION. If the Licensee uses the premises provided herein after the expiration of the term of this Agreement, including the extended term, and Licensee continues to pay the fee, as specified in paragraph 3. of this Agreement, and City continues to accept said fee, such possession shall be construed as creating a month-to-month license agreement and not as a renewal or extension of this Agreement; but such month-to-month license agreement shall not continue for more than one (1) year.

14. DATES OF OPERATION. Licensee agrees that it will moor, dock and maintain its commercial vessels for excursion purposes; and that it will operate its boating concession from the premises not less than the months from March 1 through November 30 of each year during the term of this Agreement. Failure to maintain such a vessel, as required herein, during the months of March through November, shall constitute a breach of this Agreement, except that such failure which results from emergency repairs, reasonable down time or maintenance time or from *force majeure* or such failure which results from special events utilizing the vessel(s) for planned excursion trips and the like, shall not constitute a breach.

15. COOPERATION WITH CITY. Licensee agrees that it shall coordinate its scheduling of any special activity that is outside the scope of the normal operation of the boating concession, and which may occur from or in connection with the premises, with the City or its designated representative. Licensee shall submit in writing to the City at least ten (10) days prior to the requested date (which time period may be waived by the City), a description of any special

event to be scheduled including sufficient details so as to allow a determination by the City of any conflict or potential conflict.

15.1 Licensee will continue to be kept current on scheduled Riverfront events by their continued participation in Waterfront Event Committees, which would require Licensee to modify or eliminate its normal operation of a boating concession.

15.2 Licensee agrees it shall coordinate its scheduling of any special activity that is outside the scope of the normal operation, and which may occur from or in connection with the premises, with Licensor or its designated representative. Licensee agrees to work in good faith and coordinate with Licensor or its designated representative for any and all special events to include the 10-day annual Riverbend Festival. Licensee recognizes and agrees that landing position for the subject vessel may vary during the Riverbend Festival.

15.3 It is expressly agreed and understood by Licensee that it waives any claim or action that it may have for damages or other compensation that might arise or be allowed by reason of any disruption of business activities on the premises during the Riverbend Festival, and the City shall be entitled to exercise its right under this section without penalty or decrease in fee payments.

16. LOCATION OF BOAT. Licensee shall moor its boat in a seaman-like manner and shall keep the boat clear of the pier located within Ross' Landing Park. Licensee shall allow no auxiliary craft to be moored to any craft covered by this Agreement except for reasonable public safety and maintenance, with immediate notice to the Licensor.

17. BREACH OF CONTRACT. In the event of any breach of any of the items or provisions of this Agreement by Licensee, City shall have, upon the failure of Licensee to cure any default within thirty (30) days after notice, the right to terminate this Agreement, to enter and obtain possession of the entire premises, to remove and exclude any and all persons from the

premises, and to remove and exclude all property of Licensee therefrom in addition to any other recourse identified in this Agreement, at the sole expense of Licensee. If it shall become necessary for City to employ an attorney to assert any right or to enforce any obligation under this Agreement after default, City shall be entitled to recover, in addition to all other costs and expenses, the reasonable costs and charges of such attorney.

18. NOTICES. All notices or communications which this Agreement requires or permits to be given shall be in writing and shall be mailed or delivered to the respective address as set forth below or to such other address as may be designated in writing by either party.

To the City as follows:

Administrator
City of Chattanooga
Public Works Park Division
1250 Market Street, Suite 200
Chattanooga, TN 37402

City of Chattanooga
Real Property of ECD
101 E. 11th Street, Suite G4
Chattanooga, TN 37402

With a copy to:

Office of the City Attorney
100 E. 11th Street, Suite 200
Chattanooga, TN 37402

To the Licensee as follows:

Tennessee Aquarium
Director of Finance
201 Chestnut Street
Chattanooga, TN 37402

19. RECORDS RETENTION AND AUDIT. The term "Licensee" is used interchangeably to describe signatories to contracts, grants, and agreements with the City and

applies to reflect the relationship with the City (Engineer, Contractor, Licensee, Supplier, Vendor, Contractor, Grant Recipient, etc.)

- a. All records relating in any manner whatsoever to the Project, or any designated portion thereof, which are in the possession of the Licensee, or any of the Contractor's independent contractors, associates, and/or subcontractors, shall be made available for inspection and copying upon written request to the City. Additionally, said records shall be made available upon request by the City to any state, federal or other regulatory authorities and any such authority may review, inspect and copy such records. Said records include, but are not limited to, all plans, specifications, submittals, correspondence, minutes, memoranda, tape recordings, videos, or other writings or things which document the Project, its design, and its construction. Said records expressly include those documents reflecting the time expended by the Licensee and its personnel to perform the obligations of this Agreement, and the records of expenses incurred by the Licensee in its performance under said Agreement. The Licensee shall maintain and protect these records for no less than **seven (7) years** after the completion of the Project, or for any longer period of time as may be required by applicable law, good professional practice, and upon notice during the pendency of any claims or litigation arising from the Project.
- b. The City, or its assigns, may audit all financial and related records (including digital) associated with the terms of the contract or agreement, including timesheets, reimbursable out of pocket expenses, materials, goods and equipment claimed by the Licensee. The City may further audit any of the Contractor's records to conduct performance audits (to identify waste and abuse or to determine efficiency and effectiveness of the contract or agreement), or to identify conflicts of interest.
- c. The Licensee shall at all times during the term of the contract or agreement, and for a period of seven (7) years after the end of the contract, keep and maintain records of the work performed pursuant to this contract or agreement. This shall include proper records of quotations, contracts, correspondence, invoices, vouchers, timesheets, and other documents that support actions taken by the Licensee. Documents shall be maintained by the Licensee, which are necessary to clearly reflect all work and actions taken. All such records shall be maintained in accordance with general accepted accounting principles. The Licensee shall, at its own expense, make such records available for inspection and audit (including copies and extracts of records as required) by the City at all reasonable times and without prior notice.
- d. The obligations of this Section shall be explicitly included in any subcontracts or agreements formed between the Licensee and any subcontractors or suppliers of goods or non-professional services to the extent that those subcontracts or agreements relate to fulfillment of the Licensee's obligations to the City.

- e. Costs of any audits conducted under the authority of this section and not addressed elsewhere will be borne by the City, unless the audit identifies significant findings that would benefit the City. The Licensee will reimburse the City for the total costs of an audit that identifies significant findings that would benefit the City.
- f. This Section shall not be construed to limit, revoke, or abridge any other rights, powers, or obligations relating to audit which the City may have by Federal, State, or Municipal law, whether those rights, powers, or obligations are express or implied.

20. LIMITATION OF CITY'S LIABILITY. Licensee acknowledges that prior to moving the boat to the premises, Licensee will have inspected the premises and adjacent area, to the extent it deems necessary, and will have satisfied itself that the premises are adequate and safe for its use and that of its patrons. This Agreement is not a bailment of Licensee vessels, but a license for berthing space, and the City's liability is limited solely to the negligence of its agents and employees and by the common law and statutes of the State of Tennessee. The City assumes no responsibility for tending mooring lines or moving vessels from the premises under any condition.

21. SEVERABILITY. If any provision of this Agreement is held by a court of competent jurisdiction to be illegal or in conflict with an applicable law, the validity of the remaining provisions of this Agreement shall not be affected thereby.

22. FURTHER CONDITIONS OF USE. Licensee shall insure that all boats and vessels are safely moored with lines adequate for weather conditions. Licensee shall be allowed to perform ordinary minor maintenance on any boat, barge or other vessel while at the premises, provided that it shall hold harmless and indemnify the City from any and all liability to person or property resulting therefrom in accordance with the provisions of this Agreement. Licensee shall insure that all vessels berthed at the premises are properly maintained, including but not limited to having its boats, vessels and barges painted, cleaned and free of litter, debris and refuse.

Lessee understands that no motor vehicles are permitted on the waterfront hard edge, without prior express permission by City. Any motor vehicles so authorized by City must be equipped with drip pans by Licensee, and/or Licensee must place a thorough protective covering over any exposed concrete on the premises, during the placement of said motor vehicles.

23. CONFLICT OF LAWS. The interpretation and enforcement of this Agreement shall be construed according to the laws of the State of Tennessee.

24. MODIFICATION OR AMENDMENT OF AGREEMENT. This Agreement may be modified only by written agreement of the parties subject to approval, as necessary by appropriate City officials. The City reserves the right to modify or amend this Agreement, in the event the City determines that the premises are needed for right-of-way, sewer or for other municipal purposes upon providing Licensee with forty-five (45) days written notice. Following notice, the City shall be entitled to and relocate Licensee to comparable premises at some other location on the Tennessee River so long as any relocation shall not occur until the first three (3) months of the following year and from which Licensee may exercise its rights under this Agreement. In the event of modification, amendment or relocation pursuant to the terms of this Agreement, it is agreed and understood by Licensee that no claim or action for damages or other compensation shall arise or be allowed by reason of such elimination, modification or relocation. If the parties are not able to negotiate mutually acceptable amendments, the Licensee shall have the right to terminate this agreement. If following relocation, the Licensee has either more or less space in the relocated area than it currently occupies, then the amount of payments due to the City shall be adjusted in direct proportion to the change in the areas as shall be determined by the City. City shall not be responsible and/or liable to Licensee for any incidental and consequential

damages resulting from relocation and/or loss of permitted capital improvements which Licensee has made to the premises at Licensee's expense.

25. ENTIRE AGREEMENT. This Agreement contains the entire agreement between the parties hereto and may not be modified in any manner unless by agreement in writing signed by the parties hereto or their respective successors in interest. All the terms of this Agreement shall inure to the benefit of the successors and assigns of the parties to this Agreement. The provisions of this section shall not be deemed a waiver of any of the conditions against assignment set forth in this Agreement.

26. EXECUTIONS AND ACKNOWLEDGEMENTS. Licensee and City represent and assure that each is authorized by law to execute this Agreement as acknowledged by the signatures affixed to this Agreement:

s

Tennessee Aquarium:

By: _____

Printed Name: _____

Date: _____

City of Chattanooga:

By: _____

Printed Name: Andy Berke

Date: _____