

**HALIFAX HARBOR MARINA**  
**MANAGEMENT SERVICES AGREEMENT**

This **HALIFAX HARBOR MARINA MANAGEMENT SERVICES AGREEMENT** ("Agreement") is made and entered into as of the date of last execution below ("Effective Date"), by and between the City of Daytona Beach, a municipal corporation (the "City") and FOUNDERS 3 MANAGEMENT COMPANY d/b/a F3 Marina, a Wisconsin Profit Corporation (the "Operator").

Based on the mutual consideration contained below, the Parties agree as follows:

**1. TERM OF AGREEMENT**

**1.** The Initial Term of this Agreement will commence on the Effective Date (which is the date last signed below) and will remain in effect for five years. The CITY will have the option to renew this Agreement for one (1) term of five years by giving the Operator written notice. Such notice must be provided at least 60 days prior to the end of the Initial Term unless waived by Operator.

**2. DESCRIPTION OF PREMISES TO BE MANAGED**

The premises to be managed includes the Harbormaster Building, the existing North and South Basins; the areas surrounding the Halifax Harbor Plaza building but not the actual Plaza building and excluding the Armory lands (hereinafter referred to collectively as the "Premises" or "Marina.") The Premises are further described on **Exhibit A**, attached hereto and incorporated herein by reference. Pursuant to this Agreement, the Operator will have a license to occupy a portion of the Harbormaster building identified on **Exhibit A**, for use as office space by Operator's employees in relation to the services to be provided in this Agreement and for customer service for Marina customers. This license conveys no property interest in the Marina to the Operator and will automatically end when this Agreement terminates.

**3. COMPENSATION**

As consideration for managing the Premises during the term of the Agreement, the City will pay the Operator the following Fees, which will constitute the Operator's sole compensation for all services performed under this Agreement:

**A. Base Management Fee**

The City will pay Operator a Base Management Fee of \$92,400 annually paid in equal monthly installments of \$7,700 per month. The City will pay the initial month's Base Management Fee, prorated, within five business days after the Effective Date. Thereafter, the City will pay the Base Management Fee monthly, in advance, on the first day of each month. If the City exercises its option to renew, the Base Management Fee will increase to \$101,640 annually paid in equal monthly installments of \$8,470

**B. Incentive Fee**

The City will pay the Operator an annual Incentive Fee, in arrears, thirty days after the conclusion of the City's fiscal year. The Incentive Fee will equal the sum of the following:

- (1) 5% of the Adjusted Gross Revenue from \$2,300,001 through \$2,700,000;  
plus
- (2) 7% of the Adjusted Gross Revenue from \$2,700,001 through \$3,100,000,  
plus
- (3) 9% of the Adjusted Gross Revenue of \$3,100,001 or more.

The term "Gross Revenue" means all revenues earned by the Operator from the operation of the Marina, including rental payments paid by boating slip space tenants; ancillary fees paid by such tenants such as for cable television; vending machine or concession revenues, including rent from concessionaires; parking fees; and revenues the sale of goods or merchandise.

The term "Adjusted Gross Revenue" means Gross Revenue excluding the following: (i) revenues from the sale of trade fixtures, equipment, or property which are not stock in trade; (ii) the cost of fuel, sold by the Operator; (iii) intergovernmental revenues and transfers, such as grant funds; (iv) county, state, or federal sales, luxury, excise, gross receipts taxes or other similar taxes by whatever name called on the sale of products, merchandise, or services which are both added to the selling price or absorbed therein, and paid to the taxing authority; (v) receipts from vending machines installed solely for the Operator's employees; (vi) bad checks and bad debts, provided that if subsequently collected, these checks and debts will be included within Adjusted Gross Revenue in the fiscal year in which subsequently collected; and (vii) interest income.

**4. OPERATORS DUTIES**

The Operator will manage and operate the Marina as a first-class public marina and recreation facility offering dockage and other marina related services for the use of and by the general public. The Operator will perform all duties assigned in a careful, diligent, efficient, prudent, and vigilant manner. Except where specifically provided, and subject to the funding limitations in the current approved budget, the Operator will perform the services described herein at the City's expense.

Required services include the following:

**A. General Management Services.** The Operator will act as management agent for the City. These services will include the following:

- (1) Executing and managing slip space leases on behalf of the City for docking and mooring of boats. Management responsibilities include receipt of rental and other payments due, responding to tenant concerns, enforcing and monitoring tenant compliance with lease provisions and applicable City ordinances, rules, and regulations. Operator's enforcement responsibilities include making reasonable attempts to secure rent and tenant compliance, providing notices of breach in the event of continued noncompliance, promptly notifying the City where eviction or suit is warranted,

contacting police or code enforcement when needed, and with the City's approval arranging for nonjudicial sale of vessels moored in the Marina in accordance with Florida law. The operator will use only those slip space leases that are provided or approved by the City.

(2) Maintaining sidewalks in a manner that ensures the public full and free access, except those walkways where boats are docked;

(3) Reserved.

(4) Sale of bait, tackle, ice, and other sundries incidental to the boating public's needs or negotiating leases on behalf of the City for the ships store, convenience store, and bait shop if established by the Operator.

(5) Maintaining a list of appropriately insured boat and marine equipment maintenance and repair technicians for referral on a non-exclusive basis, for general minor repairs and servicing of boats while docked or moored in the water only. No boats or craft will be removed from the water at the facility for repairs or maintenance on the Premises.

(6) Managing any cable, Wi-Fi, telephone, electrical, and other utility services provided through the City. Responsibilities include monitoring tenant usage and responding to service complaints, including by contacting the utility provider. The cost of obtaining these utility services will be part of the budget as approved herein.

(7) Operating an Information Center and telephone, mail, and messages services.

(8) Selling fuel.

(9) Managing and maintaining shower, restroom, and laundry facilities for the use of persons docking at the Marina.

(10) Operating other profit centers to be approved by the City Manager or City Commission.

(11) Organizing and attending monthly boaters' meetings and any other meetings or functions upon the City's request.

(12) Publishing a monthly electronic newsletter.

(13) Maintaining the Marina's compliance with the State of Florida's Clean Vessels/Clean Marina Program.

(14) Providing an annual Holiday gala in December.

(15) Managing security contractors provided by the City for those occasions on which Operator's staff is not on duty to provide such services.

(16) Providing the City reasonable assistance in obtaining all required federal and state permits, including the calendaring of deadlines for permit applications and renewal, and in complying with the conditions of such permits when issued.

(17) Providing any other management services provided for during the budget approval process, below.

**B. Rates and Fees.** All rates and fees for operating revenues will be set by the City; however, consideration will be provided to recommendations from the Operator. The Operator will annually perform a survey and analysis of comparable Marinas' rates and fees for reference when developing the annual operating budget

**C. Rules and Regulations.** The Operator will oversee compliance with the City's rules and regulations regarding the conduct of vessel owners and others using the Marina. The Operator will ensure that current rules are furnished to each and every user, tenant, and concessionaire; and that the rules are prominently displayed in the Marina office. The Operator may from time to time make recommendations for revising the rules and regulations. Additionally, the Operator may develop for the City's consideration additional policies with respect to the installation of new features and profit centers for approval by the City.

**D. Advertising and Marketing.** The City will approve funds in the budget for a marketing/advertising program in order to stimulate the general business of the Marina. The Operator agrees to undertake an aggressive program to inform the public of the availability of services of the Marina, and the City agrees to use its best efforts to assist the Operator in promoting the public use and enhancement of the Marina.

The Operator agrees to develop policies with respect to advertising and publicity of the Marina for the purpose of creating the greatest possible net income, consistent with the operation of the Marina as a first-class public marina and recreational facility.

The Operator agrees to work with area merchants and businesses to develop an integrated program of auxiliary services, such as hotel accommodations, car rentals, and other services for Marina uses.

**E. Cleaning, Maintenance, and Repair.** The Operator will provide cleaning, maintenance, and repairs as follows:

(1) Cleaning and maintenance, including janitorial and landscaping services, will be provided so as to maintain the Marina in good, clean, and sanitary condition, free from hazardous conditions and deterioration. This will include at a minimum regularly scheduled cleaning and maintenance.

(2) Operator's routine cleaning and maintenance activities will include visual inspections in order to keep reasonably informed of the potential need for repair or replacement of facilities and equipment.

(3) The Operator will repair or replace Facilities listed in Exhibit A and associated equipment to the extent provided for in the approved budget. Operator shall comply with the City's procurement code and policies for contracted services and equipment.

(4) The Operator will immediately apprise the City if hazardous conditions exist on the Premises.

**F. Legal Requirements.** The Operator will comply with all federal, state, and local laws, regulations, and permits, and the terms and conditions of the City's sovereign submerged land leases with the State of Florida (hereinafter collectively "Legal Requirements"), as these Legal Requirements may be amended from time to time. The Operator will also all use reasonable efforts to secure full compliance by all tenants, guests, and invitees of the Premises with all Legal Requirements.

The Operator further covenants and agrees that it will not discriminate as to race, color, creed, sex, age, national origin, or any other type of discriminatory practice in the use of Premises or in the employment of its personnel.

The City will obtain all permits necessary for the development and continued operation of the Marina and will be responsible for renewing the above-referenced submerged land leases.

**G. Security Services.** The Operator will provide security services during the Marina's normal business hours and at such other times as may be provided through the approved budget. The Operator will notify the City of any security issues that the Operator becomes aware of.

**H. Public Records.**

(1) To the extent applicable, Operator will comply with the requirements of Florida Statutes Section 119.0701, which include the following:

(i) Keeping and maintaining public records that the City requires for performance of the service provided herein.

(ii) Upon the request of the City Clerk of the City, (i) providing the City Clerk with a copy of requested public records or (ii) allowing inspection or copying of the records, within a reasonable time after receipt of the City Clerk's request, at a cost that does not exceed the cost provided in Ch. 119, Florida Statutes, or as otherwise provided by law.

(iii) Ensuring that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law until completion of this Contract, and following such completion if Operator fails to transfer such records to the City.

(iv) Upon completion of this Contract, keep and maintain public records required by the City to perform the service. Operator will meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City upon request from the City Clerk, in a format that is compatible with the City's information technology systems.

**IF THE OPERATOR HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE OPERATOR'S DUTY TO PROVIDE PUBLIC RECORDS RELATING**

TO THIS CONTRACT, OPERATOR MUST CONTACT THE CITY CLERK, WHOSE CONTACT INFORMATION IS AS FOLLOWS:

(Phone) 386 671-8023  
(Email) clerk@codb.us  
(Address) 301 S. Ridgewood Avenue  
Daytona Beach, FL 32114

(b) Nothing herein will be deemed to waive Operator's obligation to comply with Section 119.0701(3)(a), Florida Statutes, as amended by Chapter 2016-20, Laws of Florida (2016).

**I. Notices.** The Operator will promptly forward to the City (i) all notices with respect to the Premises received from any governmental or quasi-governmental agency or authority, or (ii) those notices received from any person, party or entity, which notices, in Operator's reasonable judgment, may have a material and adverse impact on the value or use of the Premises.

## 5. PERSONNEL.

**A. Quality of Personnel.** The Operator warrants that the Operator will provide competent, skillful, personnel to fulfill Operator's obligations under this Contract. At all times while on the Premises, the Operator's personnel will act courteously and in accordance with the highest professional standards; and will be well-groomed in appearance.

The City will have the right to require the Operator to remove from the Premises any personnel who do not meet these requirements.

**B. Uniform Requirements.** The Operator will ensure that all personnel have badges, logoed shirts, or uniforms with the name of the Marina and identifying them as personnel of the Operator. No product or service advertisements will be included on such materials, although the Operator's name or logo may be included.

**C. Hiring Practices.** The Operator will be responsible for hiring, firing, disciplining, and discharging its own employees. The Operator will not use contract workers unless they are engaged through an employment organization acceptable to the City Manager. The Operator will establish and implement a hiring plan which does not discriminate on the basis of race, creed, color, sex, age, national origin, or on the basis of any other type of prohibited discrimination.

**D. Payment of Wages and Benefits.** The Operator will be responsible for establishing compensation rates and benefits for all employees, for paying its employees, and for withholding any appropriate government prescribed deductions and taxes and remitting the same to the government in a timely manner.

Under no circumstances will the Operator's employees be deemed to be City employees.

## 6. HOURS OF OPERATION; AFTER HOUR SERVICES.

The Operator will ensure that the Marina is staffed and operated, at a minimum, from 8:00 am through 5:00 pm, 365 days per year, with certain holidays exempted through the budget approval process, and certain hours extended for special events as directed by the City.

Unless otherwise agreed to by the Operator and the City and provided for in the approved budget, the Operator will not be responsible for procuring the services of third party contractors to provide services, such as security services and dockage services, during those times that, pursuant to the City and Operator's agreement, the Operator's personnel are insufficient or unavailable to provide such services. The City will keep the Operator reasonably informed of any such arrangements entered into by the City. The Operator will notify the City of any such "after-hour" service needs that the Operator becomes aware of.

## **7. INSURANCE RESTRICTIONS ON USE**

The Operator will not knowingly use or suffer the use of the Marina for any illegal or otherwise prohibited purpose or for any purpose that: (i) could void or render voidable any policy of insurance held by the City or the Operator; (ii) could prohibit the procurement of required insurance from companies acceptable to the City; (iii) could render uncollectible any loss insured under any insurance policy held by City or Operator; (iv) would materially reduce the value of the Premises; or (v) would otherwise be in violation of any Legal Requirements as defined herein; and the Operator will not commit or allow to be committed, any action under its control which will cause a violation of the terms or conditions thereof. The Operator will use all reasonable efforts to secure full compliance by all tenants, guests, and invitees of the Marina with all such Legal Requirements and the Marina rules and regulations.

## **8. LIMITATIONS ON AUTHORITY**

Except where specifically authorized under or pursuant to this Agreement, the Operator will not hold itself out as having any authority whatsoever to approve any contract or expenditure for or on behalf of City with respect to the Marina or any portion thereof, whether for maintenance, repair, restoration, or otherwise.

## **9. FISCAL PROCEDURES**

The Operator will strictly adhere to the City's accounting and purchasing procedures. The Operator acknowledges receipt of the City's existing procedures. The City will apprise the Operator as these procedures are amended from time to time.

**A. Application of Approved 2019-2020 FY Budget.** The Operator affirms that the Operator has had the opportunity to review the Fiscal Year (FY) 2019-2020 and the proposed FY 2020-2021 budget for the Marina, and that the Operator's right to receive payment of its labor expenses and reimbursement of other expenses will be subject to the dollar and line limits in the budget.

**B. Future FY Budgets.** For Future FY budgets, the Operator will assist the City in preparing a proposed annual operating budget and a capital improvement budget for the Marina in accordance with the procedures and schedule established by the City. The line item revenue and expense operating budget should include projections of both revenues and

expenses with a narrative regarding recommended rates for all fees and a discussion of any new or expanded program initiative. The proposed budget will include projected costs of insurance, labor, and all other expenses.

**C. Expenditures.** The City will reimburse expenditures made by the Operator to provide the services herein subject to the following terms and conditions:

(1) No expenditures will be reimbursed where they exceed the budgeted amount. The Operator will promptly advise the City in those circumstances in which recurring or other projected expenditures may exceed budgeted amounts.

(2) Except for labor costs, and certain procurement expenditures as identified below, no expenditures will be reimbursed unless the City has approved them in advance, in writing.

(3) Labor costs eligible for reimbursement are limited to the cost (including salaries, wages, and benefits) of Operator's personnel engaged in providing services required by this Agreement and located at the Marina. Indirect costs, such as company overhead or labor expenses of any officer or employee of the Operator above the on-site manager, will not be eligible for reimbursement. In addition, if any of Operator's on-site personnel are engaged in services outside of this Agreement (such as for another marina), costs will be pro-rated accordingly. Labor costs will be paid in accordance with the following procedure:

(a) Within five days after the Effective Date, the City will forward 1/12 of the total budgeted labor costs established in the Approved FY 2019-2020, for application toward the Operator's eligible labor costs for the initial thirty day pay period. All future actual eligible labor costs will be submitted to the City within 14 days after the end of each month for reimbursement. The City and the Operator will thereafter reconcile the payment with actual costs, in general conformance to the procedure described in subparagraph (b) immediately below.

(b) In all other instances, the City's payment to the Operator to cover the anticipated payroll will be made in advance based on the payroll amount estimated through a cash flow analysis as reviewed and approved by the City. This cash flow analysis may be adjusted from time to time but may not exceed the total amount for this expense as shown in the approved budget. This estimated cash flow analysis will be reconciled by the City and the Operator to actual documented expenses (payroll records), after the end of the first month and adjustments made in the following pay period.

(4) The Operator will comply with all applicable City ordinances and policies in ordering materials, supplies, or services, including where applicable requirements to obtain multiple quotes or bids and provide the City detailed vendor invoices.

Procurement expenditures made by the Operator will not be reimbursed if they fail to comply with these ordinances and policies. Consistent with the terms of this Agreement and applicable procedures, the City will review the Operator's requisition



requests, issue appropriate City purchase orders to vendors, and pay the vendors directly from budgeted funds.

(5) Any inventory eligible for reimbursement must be kept on site until consumed, used, or sold in the course of the services provided herein.

**D. Budget Amendments.** The Operator may from time to time advise the City of supplemental budget adjustments that may be needed. All budget adjustments are subject to City approval in accordance with City ordinances and regulations.

**E. Transmittals; Recordings.** The Operator will transmit all consideration that the Operator receives or may be entitled to by virtue of this Agreement whether it be cash, checks, credit card, discounts, promotional incentives, or any other type of consideration, to the City; and immediately record the transmittal on an acceptable recording device by date, type of consideration or revenue in category, and this recording device will have the capability to produce an audit tape of all transactions as needed. All cash, checks, and credit card type transactions will be recorded on a daily cash report and these items then deposited daily to the City's bank account by 2:00 P.M. each banking business day. Also, a copy of the daily cash report and bank deposit slip will be presented to the City Hall cashier before the close of business each day. The term "consideration" will not be construed to include the consideration paid the Operator by the City under this Agreement or any gratuities paid by Marina patrons to the employees of the Operator.

**F. Weekly Dockage Reports.** The Operator will provide a dockage report on a weekly basis.

**G. Monthly Reports.** The Operator will provide the City a monthly report, on or before the 20th day of each month for the previous month. The report will include the following information:

- (1) A list of revenues and expenses, reflecting comparisons between actual and budgeted amounts for the interval selected and the fiscal year;
- (2) Aged accounts receivable report; and
- (3) Any other information reasonably requested by the City to be properly advised of the financial status and operational results of the Marina for the interval selected, such as appropriate invoices, payroll records, and other documentation.

**H. Audited Financial Statements.** Upon the City's request and at the City's expense, the Operator will prepare and deliver to the City, an audited financial statement for the prior quarter or Fiscal Year, prepared in accordance with accounting principles generally accepted in the United States consistently applied. The financial statement will include the same type of information as is required for the monthly report referenced above. For purposes herein the term "audited financial statement" means a statement reviewed or compiled by a certified public accountant of the City's choosing, with accountant's signature included.

## 10. BOOKS AND RECORDS; AUDITS

**A. Duty to Keep and Maintain.** The Operator will prepare and keep books and records regarding the management of the Marina in sufficient detail to meet generally acceptable accounting practices. For purposes herein "books and records" will include general ledgers, income statements, tax returns (if required by the City), and any other relevant bookkeeping documents the Operator uses in its business operations.

The Operator will continue to maintain such books and records for a period of three years after the termination of this Agreement; except that, if an audit is made in accordance with this Agreement within this three-year period and the City claims that errors or omissions have occurred, the Operator will maintain these books and records until the matter is resolved.

**B. Audits.** At any time during the term of this Agreement and for a period of three years after termination, the City will have the right to audit the Operator's books and records, at the City's expense except as provided below. The Operator will make the books and records available for the City's representative to perform the audit either electronically or at a location no more than 50 miles from the City of Daytona Beach City limits, no more than three days after the City provides written demand.

If the audit shows that the Operator has underpaid to the City any consideration required to be provided to the City, the Operator will either (i) pay to the City the amount owed plus interest at the statutory rate, within 30 calendar days of the City's written demand, and in addition if the audit discloses an underpayment by an amount in excess of 10% of the consideration owed for the year audited, all actual and reasonable expenses incurred by the City in connection with the audit; or (ii) give the City written notice within the same 30-day period referred to above that the Operator disagrees with said findings. If the Operator fails to give written notice of dispute within the 30-day period, the Operator will be deemed to have accepted the findings of the audit report. If the Operator gives written notice that the Operator disputes any portion of the audit findings, the Operator will promptly pay the City for that portion of the findings that the Operator disputes, plus the cost of the original audit if the agreed-upon amount shows an underpayment of consideration in excess of 10% of the amount actually owed for the year audited.

**C. Additional Audit if Dispute Exists.** Within 30 calendar days after the Operator's provision of timely written notice of its dispute under the preceding paragraph, the Operator will designate (subject to the City's reasonable approval) an independent public accounting firm, other than a firm which performed the City's audit, to audit the disputed records or calculation. If this audit shows that the Operator underpaid the consideration due, within 30 days of receipt of the audit report the Operator will pay the City the amount owed plus interest as provided herein.

The costs of this audit will be borne as follows:

(1) If the audit shows that the City's calculations under this Section with respect to the disputed amounts were correct, then the Operator will bear the entire cost;

(2) If the audit shows that the Operator's calculations and payment of the consideration were correct, the City will bear the entire cost; and

(3) If the audit shows that neither the City's nor the Operator's calculations with respect to the disputed amounts were entirely correct, then the Operator will pay the portion of the cost of the audit determined by multiplying said cost by a fraction, the numerator of which is the total amount not paid to the City when due and the denominator of which is the disputed amount, and City will pay any remaining portion of such cost.

**D. Additional Rights.** The City reserves the right to access and inspect the Premises at all times, including for the purpose of performing unannounced cash audits and inventory reviews. The Operator will make all areas of the Premises available for such inspections at any time. If requested by the City, an employee of the Operator will accompany on such inspections

## **11. OWNERSHIP OF PROPERTY**

All improvements and fixtures located at the Marina, and all equipment, supplies, and other items of personal property included in the inventory referenced below or constructed, installed or located at the Marina or purchased with City funds, will be the property of the City. Upon expiration or termination of this Agreement, possession and title to all such property will be peacefully surrendered and delivered to the City.

## **12. DAMAGE OR LOSS TO THE OPERATOR'S PROPERTY**

The Operator assumes all risk of damage or loss to its own property for any cause whatsoever, which will include any damage or loss that may occur to its merchandise, goods, or equipment, covered under this Agreement, if lost, damaged or destroyed by fire, theft, rain, water or leaking of any pipes or wastewater in or about the Premises, or from hurricane or any act of God, or any act of negligence of any user of the facilities, or occupants of the Premises, or any person whomsoever.

## **13. DAMAGE TO AND DESTRUCTION OF PREMISES**

**A. In General.** Except as provided below, if fire, hurricane, decay, or any other Casualty Event renders the Premises inoperable in whole or in part, the City will make all repairs reasonably necessary within 90 days of the conclusion of such event, or if repairs cannot reasonably be made within this period, within such period as the City may determine. During any period of reconstruction the Marina will be operated under an interim budget, proposed by the Operator and adopted by the City, that reflects the most probable forecast of income and expenses; and, if the nature of the damage is such that it renders a portion of the Premises reasonably unavailable for leasing to boaters.

**B. Exception.** If a Casualty Event substantially destroys or causes substantial damage to the Premises, the City may thereafter terminate this Agreement if the City determines that it would not be feasible or prudent to restore the Premises to the condition they were in prior to the Event, provided that the City gives the Operator timely notice of termination. Such notice will be timely if provided by the City no more than 90 days after the Event, or within such other period of time that the City and Operator may mutually agree

to in writing, If the City elects to terminate this Agreement as provided herein, the consideration paid to Operator will be prorated through the date that the Premises were rendered inoperable.

**C. Application of Insurance Proceeds.** Operator will not be entitled to any portion of the proceeds received by the City on insurance policies covering damage to the Premises.

#### **14. INDEMNIFICATION OF THE CITY BY OPERATOR**

The Operator will indemnify and hold harmless the City and the City's officers, employees and other agents, from and against all claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from the work provided that the claim, damage, loss, or expense is caused in whole or in part by any negligent act or omission of the City, the Operator, any subcontractor, anyone directly or indirectly employed by any one of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder except the Operator will not have to indemnify and hold harmless the City if such claim, damage, loss and expense is the result of the sole negligence of the City or of anyone directly or indirectly employed by the City or anyone for whose acts the City may be liable.

The Operator's obligation to indemnify and hold the City harmless herein is independent and not limited by the Operator's obligation to obtain insurance required herein.

#### **15. DEFAULT BY OPERATOR; SUSPENSION AND TERMINATION**

##### **A. Breach and Default.**

(1) The following each constitute an immediate default by the Operator:

(a) The Operator's failure to comply with any provision of this Agreement, where such failure creates an imminent threat to public health or safety or an imminent risk of injury to persons or loss of property or is irreparable.

(b) The Operator submits falsified documents or fraudulent billings, intentionally withholds payments due to the City, or diverts funds provided by the City to a use not approved under this Agreement.

(c) The Operator's failure to account for funds belonging to the City or the Operator's refusal or failure to deposit consideration from the operation of the Marina to the credit of the City, all as provided in this Agreement.

(2) Except as provided in paragraph (1) above, a Party will be in default if the Party fails to meet any material obligation under this Agreement, and such failure continues beyond the Cure Period. The Cure Period is 30 days from the date that the non-breaching Party provides notice of breach and a demand for cure to the breaching Party; provided that where the nature of the breach is such that it cannot be reasonably cured within this period, the Cure Period will be extended by one day for each day that the breaching Party is diligently working toward effecting a cure, up to a maximum of 60 days.

## **B. Termination.**

(1) Upon Operator's default the City may immediately terminate this Agreement; and additionally or alternatively, may pursue all other remedies that the City may have under Florida law.

(2) Upon the City's default, the Operator may terminate this Agreement, and in such instance, the Operator's sole remedy will be payment of any fees owed through the date of termination, including all reimbursable expenses and the prorated Management Fee.

(3) Upon termination by either Party, or expiration of this Agreement, the Operator will:

(a) Return all of the City's property to the City.

(b) Remove all signs that the Operator placed on the Premises indicating its management of the Marina, and fully restore any damage resulting from such removal; and

(c) Promptly deliver notice of such termination to all tenants, guests, and invitees of the Marina, and thereafter use its best efforts to cooperate with the City to accomplish an orderly transfer of management of the Marina to the City or to a new manager selected by the City. Manager will, after termination, make itself available to the City for a period of 30 days after such termination or expiration to consult with or advise the City (or the manager selected by the City) regarding operation and maintenance of the Premises.

## **16. CONSTRUCTION**

The Operator will abide and conform to the provisions of the City's purchasing system and procedures with respect to submission of requisitions and requests for payments incidental to its responsibilities for managing the marina facility. Subject to the limitations and authority imposed by the purchasing system, the Operator will make no addition, alteration, or adjustment to the Premises, and will not apply for construction permits of any kind without first having obtained the written consent of the City Manager, which will not be unreasonably withheld. All requests will be in writing and will include plans and specifications pertaining thereto. All permits must be received from the appropriate governmental agencies prior to undertaking any repairs, alterations, additions or improvements. All permanent alterations, improvements or repairs made or installed by the Operator will be the property of the City. The Operator will observe and report to the City on the progress of any work being performed by third parties at the Marina.

The Operator will not provide other capital projects or construction services unless the Parties agreed to such services in writing.

## **17. NOTICES**

A. Notices to the Operator will be hand delivered to the Marina Office or may be sent to the following address:

F3 Marina  
John Matheson  
252 East Highland Avenue  
Milwaukee, WI 53202

Notices to the City will be sent to the following address:

THE CITY OF DAYTONA BEACH  
Office of the City Manager  
301 S. Ridgewood Avenue  
Daytona Beach, Florida 32114

The Parties may change such mailing address at any time upon giving the other party written notice.

B. Provided that Paragraph A above is complied with, all notices under this Agreement will be in writing and will be deemed to be served: (i) when hand delivered to the address of the addresses and a receipt thereof is obtained or the addressee refuses to provide such receipt; (ii) three days following the day on which such notice is mailed by certified or registered mail, postage prepaid, return receipt requested; or (iii) one day following the day on which notice is delivered by Federal Express or such other overnight courier service with all delivery charges paid.

#### **18. CONFLICT OF INTEREST**

No stockholders, directors, partner, employees of the Operator, or members of their families, will have any interest in any business which supplies goods or services for the benefit of the Marina without advice to and consent of the City Manager, but said individuals may have an interest in marine exhibits located at the Premises.

#### **19. INSURANCE**

The provisions of this Section on Insurance will be administered by the Risk Manager for the City.

##### **A. Types and Amounts Required.**

The Operator will purchase and maintain, the following types and amounts of insurance listed below in form and companies satisfactory to the City. This will be a reimbursable expense subject to budget allocations. The City may ask for and shall receive any necessary documentation from the Operator or Operator's insurance representative(s) to determine the appropriate amount of reimbursable expenses. The City is not responsible for reimbursement of insurance expenses associated with insurance types and amounts other than the insurance applicable to the Operator's services rendered under this contract and required in this section.

##### **(1) Workers' Compensation Insurance -**

As required by Florida Statutes, Chapter 440, Workers' Compensation Insurance, and any other applicable federal laws (including but not limited to, longshore & Harbor Workers' Act, Jones Act, and Maritime Coverage Endorsement),

for all employees of the Operator, employed at the Marina or in any way required to fulfill or connected to the fulfillment of the terms of this Agreement.

The insurance required by this provision will comply fully with the Florida Workers' Compensation Law and include Employers' Liability Insurance with limits of not less than \$500,000 per occurrence. Any associated or subsidiary company involved in the service must be named in the Workers' Compensation coverage. No class of employee, including The Operator himself, if an individual, will be excluded from the Workers' Compensation coverage.

**(2) Liability Insurance -**

Commercial General Liability Insurance, including coverage for operations, independent contractors, products-completed operations, broad form property damage, and personal injury on an "occurrence" basis insuring the Management Company and any other interests, including but not limited to any associated or subsidiary companies involved in the performance of the Agreement.

Automobile Liability Insurance which will insure claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicle used by the Operator at the Marina or in any way connected with the work which is the subject of this agreement.

The limit of liability will be a combined single limit for bodily injury and property damage of no less than \$1,000,000 per occurrence. If insurance is provided with a general aggregate, then the aggregate will be in an amount of no less than \$2,000,000.

**(3) Marina Operators Legal Liability and Protection and Indemnity Insurance** - coverage in the amount of not less than \$5,000,000 insuring the Operator.

**(4) Pollution Coverage** - in an amount of no less than \$1,000,000, to include coverage for sudden or accidental release of pollution as a result of Operator's operations Operator is not responsible for any known or unknown releases from the tanks occurring prior to August 1, 2019. The City will maintain coverage for discharges from the tanks not related to Operator's actions to include clean up and third-party claims.

**(5) Employee Dishonesty Insurance** - the Operator will obtain and maintain an Employee Dishonesty Insurance Policy in the principle amount of not less than \$200,000, with third party coverage naming the City as a Loss Payee.

**B. Additional Insured.** The City of Daytona Beach shall be named as additional insured on all liability policies. All coverage provided to the City as an additional insured by said policies shall be primary and shall not be additional to or contributing with any other insurance carried by or for the benefit of the City with any other insurance available to the City.

**C. Waiver of Subrogation.**

Unless specifically waived hereafter in writing by the Risk Manager, the Operator agrees that the insurer will waive its rights of subrogation, if any, against the City on each of the foregoing types of required insurance coverage.

**D. Loss Deductible Clause.**

The City will be exempt from, and in no way liable for, any sums of money that may represent a deductible in any insurance policy. The payment of such deductible will be the sole responsibility of the Operator or sub-contractor providing such insurance.

**E. Required Changes in Coverage and Amounts of Coverage.**

The Risk Manager may at any time require the Operator to modify the amount of coverage, change the terms of coverage, and provide additional or different types of coverage, as the Risk Manager may deem necessary; provided that the changes or increase in coverage are consistent with such requirements for similar operations and businesses then operating within the Central Florida area or are reasonable in light of prior claims made against Operator's policies. The Operator must comply with such requirements within 30 days after the City's demand. Any increase in costs associated with such changes will be the responsibility of the City.

**F. Reasonable Deductible.**

Any insurance policy required by or pursuant to this Section may contain a reasonable deductible provision, provided advance notice of said deductible provision is given by the Operator to the City and approval from the Risk Manager is given, which approval shall not be unreasonably withheld or delayed.

**G. Proof of Insurance.**

The Operator will furnish proof of the required forms and coverages referenced above to the Risk Manager in the form of a certificate of insurance prior to or at the time of execution of this Agreement. The certificate of insurance will clearly outline all hazards covered as itemized above, the amounts of insurance applicable to each hazard, the expiration dates and give no less than 30 days advance written notice to the City in the event of cancellation of any of the policies by the insurer or insured. The Operator will not commence work until all proof of such insurance has been filed with and approved by the Risk Manager. The Operator will furnish proof of any new or amended coverages to the Risk Manager promptly upon being directed to do so. The City may require Operator to halt operations until the Operator has provided such insurance.

If requested by the Risk Manager, the Operator will furnish copies of the insurance contracts to support the certificates of insurance and the copies of said insurance must be acceptable to the Risk Manager.

**H. Obligations Survive.**

The liabilities of the Operator under this Agreement will survive and not be terminated, reduced, or otherwise limited by any expiration, limitation, exclusion, or termination of insurance coverage. Neither approval nor failure to disapprove insurance furnished by the



Operator will relieve the Operator or its sub-contractors from responsibility to provide insurance as required by this Agreement.

**I. Replacement Required.**

The Operator will file replacement certificates 30 days prior to expiration or termination of the required insurance occurring prior to the acceptance of the work by the City. If such insurance lapses, the City expressly reserves the right to renew the insurance at Operator's expense.

**J. Termination of Insurance.**

The Operator may not cancel the insurance required by this Agreement until all services are completed, accepted by the City, and the Operator has received written notification from the Risk Manager that the Operator may cancel the insurance required by this Agreement and the date upon which the insurance may be cancelled.

**20. HURRICANE AND EMERGENCY**

The City will, during any emergency such as hurricane, flood, fire or any type of disaster, cooperate with the Operator for the security of the Premises. The City will use its best efforts during an emergency to safeguard the Premises,

**21. INVENTORY**

Prior to the Effective Date or within 14 days thereafter, a representative of both the City and the Operator will jointly perform a physical inventory count and observation of all fixtures, furnishings, furniture, and equipment, in or upon the Premises and the inventory will immediately become attached hereto and made a part hereof, The Operator agrees that the fixtures, furnishings, and equipment are in the condition as stated in the inventory; that the Operator personally inspected and assisted in the taking of said inventory; that the Operator will maintain the fixtures, furnishings, furniture, and equipment, if any, during the term of this Agreement; and that said property will be deemed in its sole custody and care.

At least once annually during the contract period, the City will provide the Operator with an amended listing of fixed assets to verify those assets currently in place taking into account deletions and additions. The City will provide the Operator with fixed asset identification tags to be affixed to such assets.

At the termination of this Agreement, a representative of the City and the Operator will jointly perform a physical inventory count and observation of all fixtures, furnishings, furniture and equipment.

If any of the aforementioned items are lost, stolen, or damaged, through the culpable negligence of the Operator, they will be replaced or repaired at the cost and expense of the Operator.

**22. NON-ASSIGNABILITY CLAUSE**

This Agreement may not be assigned by the Operator without prior approval of the City Commission. Any assignment, transfer, or conveyance of a controlling interest in stock to parties who are not stockholders or partners as of the Effective Date will be deemed an

assignment requiring the City Commission's approval. An assignment subject to the restriction contained herein will not include an assignment to the personal representative of a deceased stockholder or to said stockholder's estate or heir, provided\* however, that a subsequent transfer, assignment, or conveyance from the stockholder's estate or heir to a third party who is not a stockholder as of the date the Agreement will require such approval. Also excluded from the operations of the restrictions of this clause will be assignments, transfers, or conveyance between and amongst persons who are stockholders as of the Effective Date or members of their immediate family.

### **23. REPRESENTATION BY THE CITY**

The City warrants and represents that it has full power and authority to enter into this Agreement under the Constitution and Laws of the State of Florida and Ordinances and resolutions of the City of Daytona Beach, and that all conditions and things required by the Constitution and Laws of the State of Florida, Volusia County, and the City of Daytona Beach to happen, exist, and be performed precedent to the signing of the Management Services Agreement have happened, exist, and have been performed as so required.

### **24. ADDITIONAL TERMS AND CONDITIONS**

**A. Time of the Essence.** Time is of the essence with respect to this Agreement and each of its provisions.

**B. Safe Harbor.** In the event of an act of bankruptcy, the Operator must immediately affirm the Agreement, cure all defaults, and thereafter remain in full compliance with this Agreement, or reject the Agreement pursuant to applicable bankruptcy laws. In case of conflicts between this Section and any other provision of this Agreement, this provision will govern.

**C. Limitation on Waivers.** The waiver by the City or the Operator of any term, covenant, or condition herein contained will not be deemed to be a waiver of such term, covenant or condition on any prior or subsequent break of the same or any other term, covenant or condition herein contained.

**D. Applicable Law; Venue.** This Agreement will be subject to and construed in accordance with the laws of the State of Florida. Venue in case of any suit filed to enforce the provisions of this Agreement will be in the middle district of Florida, if filed in federal court, and in the state courts in and for Volusia County, if filed in state court.

**E. Force Majeure.** A Party will be excused for the period of any delay and will not be deemed to be in default with respect to the performance of any of the non-monetary obligations hereunder, when prevented from performing by causes beyond that Party's control, excluding filing of bankruptcy, but including labor disputes, governmental regulations that prohibit compliance with the provisions of this Agreement, fire or other casualty, and acts of God.

**F. Severability.** If any provision of this Agreement is held invalid or unenforceable with respect to either Party, the remainder of this Agreement or the application of such provision to the other Party will not be affected. Each provision of this Agreement will be valid and enforceable to the fullest extent permitted by law.

**G. Enforcement.** The City's rights and remedies under this Agreement will be cumulative and not exclusive.

**H. Waiver of Jury Trial.** The City and the Operator waive all right to trial by jury in any claim, action, proceeding, or counterclaim by either Party against the other of any matters arising out of or in any way connected with this Agreement.

**I. Survival.** The Operator's obligations hereunder will not be limited to any extent by the term of this Agreement and, as to any act or occurrence prior to the expiration or termination of this agreement which gives rise to liability hereunder. The Operator's obligations will continue, survive, and remain in full force and effect notwithstanding the expiration or termination of this Agreement.

**J. City Manager/Designee.** All references herein to the City Manager will be construed to include the City Manager's designee.

**K. Drug Free Workplace and Anti-Collusion.** The Operator affirms that the Drug Free Workplace and Anti-Collusion certification forms, attached as Exhibit B, are true and correct and will remain so during this Agreement.

**25. ENTIRE AGREEMENT**

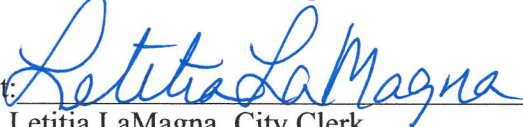
The provisions of this Agreement constitute the entire contract between the Parties and no prior agreements or representations will be binding upon either of the Parties unless incorporated in this Agreement. No modification, release, discharge, or waiver of any of the provisions hereof will be of force and effect unless in writing and signed by both Parties.

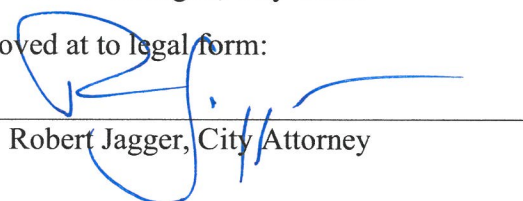
**IN WITNESS WHEREOF**, authorized representatives of the Parties have signed this Agreement on the dates indicated below.

**The City of Daytona Beach**

By:   
Derrick L. Henry, Mayor

Date: 10-21-20

Attest:   
Letitia LaMagna, City Clerk

Approved at to legal form:  
By:   
Robert Jagger, City Attorney

**Founders 3 Management Company  
d/b/a F3 Marina**

By:   
John Matheson, President

Date: 8/11/20

## **EXHIBIT A: MARINA DESCRIPTION, INCLUDING MAP**

The Facilities to be managed on the Premises, as shown on the attached map, include the following:

### **Halifax Harbor South Basin Facilities**

- a. Concrete floating dock system
- b. Administrative offices
- c. Maintenance space
- d. Laundry and Restrooms, showers, etc. (4 locations)
- e. Fuel dock
- f. Pump out
- g. Small boat ramps
- h. Parking
- i. Grounds and landscaping
- j. Related equipment

### **Halifax Harbor North Basin Facilities**

- a. Wooden Fixed Pier System
- b. Boaters' Lounge Building (includes lounges, laundry, restrooms, storerooms, etc.)
- c. Repair and Maintenance Dock
- d. Parking and Storage Area
- e. Grounds and Landscaping
- f. Picnic Area
- g. Restroom facilities and Laundromat at "C" Dock and City Dock.

Map to be attached