

SHUTTLE SERVICE AGREEMENT

CITY OF NIAGARA FALLS, NY and NIAGARA FALLS NATIONAL HERITAGE AREA, INC.

THIS AGREEMENT, effective as of the first day of January, 2021, by and between the City of Niagara Falls, New York, a municipal corporation (hereinafter, "CITY"), and Niagara Falls National Heritage Area, Inc., a New York non-profit corporation (hereinafter "NFNHA"), Timon Hall, Room 125, Niagara University, NY 14109, jointly referred to as the "Parties".

WITNESSETH:

WHEREAS, NFNHA has been formed to increase visitation to and within the Niagara Falls National Heritage Area ("NHA"), one of 55 National Heritage Areas designated by the United States Congress to draw people to the heritage tourism options in the NHA, and to boost economic development with tourism as the core industry; and

WHEREAS, the City and the NFNHA, together with Niagara County, the City of Lockport, and other partners and stakeholders, have developed a comprehensive transportation network that connects visitors and residents with the natural, cultural, and historic assets of the NHA; and

WHEREAS, NFNHA has assisted in the achievement of these goals by developing a hop-on/hop-off shuttle that will transport visitors to the CITY, Niagara County and the City of Lockport to tourism points in the City, Niagara County and the City of Lockport, the "Discover Niagara Shuttle"; and

WHEREAS, a tax has been imposed by the City on the businesses of lodging in the CITY (the "Occupancy Tax"), which is in part designated for the purposes of promoting convention and tourist activities within the City of Niagara Falls; and

WHEREAS, Niagara County and the City of Lockport have likewise imposed a similar tax on lodging in their respective jurisdictions; and

WHEREAS, by Chapter 692 of the 2019 Laws of the State of New York (the "Act"), the City has been authorized to increase the Occupancy Tax by one percent (1%) as a dedicated source of revenue for the sole purpose of NFNHA operating the Discover Niagara Shuttle (the "Additional 1% Occupancy Tax"); and

WHEREAS, the City has taken all necessary steps to increase and impose the Additional 1% Occupancy Tax pursuant to the Act (the "City Actions"); and

WHEREAS, Niagara County and the City of Lockport have likewise obtained authority to and implemented a similar increase in their occupancy tax as a dedicated source of revenue for the Discover Niagara Shuttle operated by the NFNHA; and

WHEREAS, NFNHA is also receiving funds to operate the Discover Niagara Shuttle for the New York Power Authority (the New York Power Authority, Niagara County and the City of Lockport being the "Other Funding Sources")

WHEREAS, NFNHA has, in reliance on the Act and the City Actions, operated the Discover Niagara Shuttle on a seasonal basis in 2020; and

WHEREAS, the CITY desires to formalize its relationship with NFNHA for the continued operation of the Discover Niagara Shuttle by the NFNHA utilizing the Additional 1% Occupancy Tax; and

NOW, THEREFORE, in consideration of the premises and mutual obligations herein, the Parties hereto do mutually agree as follows:

1. **SCOPE OF SERVICES**. The NFNHA shall perform the following services (hereinafter referred to as the "Services") in a satisfactory and proper manner, as determined by the CITY in conjunction with the Other Funding Sources:

A. **Shuttle Service**: The NFNHA shall operate, on a seasonal basis, the Discover Niagara Shuttle, a complimentary hop-on/hop-off shuttle service to connect visitors and residents to more than a dozen stops between the CITY and Fort Niagara. The shuttle will service and provide stops at such locations as downtown Niagara Falls, the Aquarium of Niagara, Niagara Falls Underground Railroad Heritage Center, Niagara Arts and Cultural Center, Oakwood Cemetery and Whirlpool State Park.

B. **Conduct of Services**: All of the Services provided by the NFNHA pursuant to this Agreement shall be in conformity with the Act.

2. **CONTRACT TERM AND PERFORMANCE**. This Agreement shall remain in effect for such period of time as the City shall impose the Additional 1% Occupancy Tax pursuant to the Act. The City warrants and represents that it shall take all necessary action to continue to impose the Additional 1% Occupancy Tax so long as permitted by New York State law.

3. **COMPENSATION AND METHOD OF PAYMENT**.

A. **2020 Compensation**: For performing the Services specified in Section 1 herein during 2020 upon execution of this Agreement, CITY will pay NFNHA the Additional 1% Occupancy Tax actually collected with respect to business activity in 2020, which amount is estimated to be not less than \$244,168.82.

B. **2021 and Future Funding Levels**: Commencing with 2021, the CITY shall pay the Additional 1% Occupancy Tax revenues it collects to NFNHA for the Services performed under this Agreement. No later than January 30 of each fiscal year, the City shall provide the NFNHA with its monthly estimate of occupancy taxes to be collected by the City for the current fiscal year.

C. Method of Payment: CITY shall continue to collect occupancy tax revenues as it currently does. Within ten (10) days of the beginning of each month, CITY will pay to NFNHA the monthly estimate for the preceding month. No later than March of the following year, CITY will either deduct from, or add to, the next scheduled monthly payment the amount necessary to cause the payments received by NFNHA to equal 1% of the actual occupancy tax collection for the preceding calendar year. No later than March 31 of each year, the City will provide to NFNHA a written accounting of its collection of the Additional 1% Occupancy Tax. This adjustment is to accurately distribute only and all of the additional 1% Occupancy Tax attributed to NFNHA.

D. Documentation of Costs: The NFNHA's books and records relating to the receipt and expenditure of the Additional 1% Occupancy Tax shall be made available for inspection by the City upon reasonable notice from the City. The City acknowledges that the Additional 1% Occupancy Tax only represents a portion of NFNHA's expenses, including administration and overhead, in providing the Discover Niagara Shuttle services and therefore it is impossible for NFNHA to allocate its revenues under this Agreement to specific expenses or costs.

E. Appropriations: Notwithstanding any other provisions of this agreement, the terms of this agreement are contingent upon the availability of the Additional 1% Occupancy Tax revenues. The City shall take all necessary actions to appropriate such funds in conformance with this Agreement and the Act.

4. STATUS OF NFNHA.

A. NFNHA shall provide all services hereunder as an independent contractor, and not as an employee of CITY. NFNHA shall be solely responsible for compensation of all independent contractors or employees hired by NFNHA and shall retain full control over the employment, direction, compensation, and discharge of all persons assisting in the performance of services. NFNHA shall be fully responsible for all matters relating to payment of NFNHA's employees, subcontractors or other persons hired by NFNHA perform some of the work under this contract, including compliance with social security, disability, unemployment insurance, workers' compensation, withholding tax and all other laws and regulations governing such matters.

B. NFNHA shall have no authority (and shall not hold itself out as having authority) to bind the CITY in any manner, and NFNHA shall not make any agreements or representations on the CITY's behalf without the CITY's prior written consent.

C. Without limitation, neither NFNHA nor any of its employees shall be eligible to participate in any vacation, group medical or life insurance, disability, profit sharing or retirement benefits, or any other fringe benefits or benefit plans offered by the CITY to its employees. The CITY shall not be responsible for withholding or paying any income, payroll, Social Security, or other federal, state, or local taxes, making any insurance contributions, including for unemployment or disability, or obtaining worker's compensation insurance on NFNHA's behalf. NFNHA shall be responsible for, and shall indemnify the CITY against, all such taxes or contributions, including penalties and interest,

as well as for minimum wage, overtime or other requirements relative to its employees. Any persons employed or engaged by NFNHA in connection with the performance of the Services shall be NFNHA' employees and NFNHA shall be fully responsible for them and indemnify the CITY against any claims made by or on behalf of any such employee.

D. In hiring, retaining, compensating or disciplining security guards or other personnel who perform or are to perform the Services, NFNHA shall conform with all laws, rules, regulations, executive orders or other legal requirements relative to employment that are imposed by any applicable federal, state or local governmental authority. Without limiting the generality of the foregoing, NFNHA shall comply with the Federal Civil Rights Act, the Fair Labor Standards Act, the Americans with Disabilities Act and the Labor Management Relations Act.

5. **INDEMNIFICATION AND INSURANCE.** To the fullest extent permitted by New York law, NFNHA shall defend, indemnify and hold harmless CITY, its officers, agents and employees, from and against any and all claims, suits, loss, costs, charges, expenses (including but not limited to reasonable attorney's fees and disbursements) and/or damage of any kind including bodily injury, death and damage to property of CITY or others claimed to be sustained or arising out of NFNHA's or its agents', subcontractor's or employees' acts, errors or omission arising directly or indirectly out of this Agreement or the work or activities undertaken pursuant hereto. In addition, NFNHA shall maintain in force during the full term of this Agreement comprehensive general liability, professional liability insurance and other insurance as required by the insurance requirements set forth on Exhibit "A" and annexed hereto. The City shall defend, indemnify ad hold harmless from and against any and all claims, suits, loss, costs, charges, expenses (including but not limited to reasonable attorney's fees and disbursements) and/or damage of any kind including bodily injury, death and damage sustained or arising out of City's or its agents', subcontractor's or employees' gross negligence or willful misconduct in connection with this Agreement.

6. **DISCRIMINATION PROHIBITED.** In performing the Services required hereunder, NFNHA shall not discriminate against any person on the basis of race, color, religion, sex, national origin or ancestry, age, sexual preference, gender or disability (as defined in the Americans With Disabilities Act), as now enacted or hereafter amended.

7. **AUDIT AND INSPECTION.** Each party shall make its records in connection with this Agreement available to the other for inspection at reasonable times and as often as either party may reasonably request, without the need to request same under New York State Public Officer's Law Section 84, et. seq. Such records shall also be available to any and all applicable State and Federal authorities having jurisdiction over the matters covered in this Agreement.

8. **EARLY TERMINATION.** In the event of NFNHA' failure to provide the services described in Section 1 above or inability to provide the Services because of a material decrease in funding form the Other Funding Sources, cessation of operations and/or termination of this Agreement for any reason, the CITY shall pay NFNHA on a pro-rata basis any payments then due and payable for any Services completed up to and including the effective date of such termination. To the extent allowable by the Act, any remaining or unused portion of the 1% Additional Occupancy Tax shall remain in the exclusive possession of the CITY. No termination of this Agreement by the City shall be effective except upon written notice and a sixty (60) day

opportunity to cure

9. **SEVERABILITY.** If any one or more of the provisions contained in this Agreement are for any reason held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

10. **ASSIGNMENT AND AMENDMENT.**

A. NFNHA shall not assign, transfer or convey this Agreement or any right, title or interest thereunder nor shall any part of the same subcontracted without the written consent of the City, but in no case shall such consent relieve NFNHA of its obligations, or change the terms of this Agreement.

B. Any assignment in violation of the foregoing shall be null and void. Subject to the Act, The CITY may assign its rights and obligations under this Agreement at any time. Subject to the limits on assignment stated above, this Agreement will inure to the benefit of, be binding on, and be enforceable against each of the Parties hereto and their respective successors and assigns.

C. This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each party. Any of the terms hereof may be waived only by a written document signed by the party waiving compliance with the term.

11. **REPRESENTATIONS AND WARRANTIES.**

A. NFNHA represents and warrants to the CITY that:

1) NFNHA has the right to enter into this Agreement, to grant the rights granted herein and to perform fully all of its obligations in this Agreement;

2) NFNHA's entering into this Agreement with the CITY and its performance of the Services do not and will not conflict with, or result in any breach or default under, any other agreement to which NFNHA is subject;

3) NFNHA has the required skill, experience and qualifications to perform the Services in accordance to the standards set forth in this Agreement, and shall perform the Services in accordance with the standards set forth in this Agreement. NFNHA shall devote sufficient resources to ensure that the Services are performed in a timely and reliable manner; and

4) All Services shall be performed by NFNHA in compliance with all applicable federal, state, and local laws, rules and regulations.

B. The CITY hereby represents and warrants to NFNHA that:

1) It has the full right, power, and authority to enter into this Agreement and to perform its obligations hereunder; and

2) The execution of this Agreement by its representative whose signature is set forth at the end hereof has been duly authorized by all necessary corporate action.

12. **NOTICE.** All notices, requests, consents, claims, demands, waivers, and other communications hereunder (hereinafter, "Notice") shall be in writing and addressed to the party at the addresses set forth below (or to such other address that may be designated by the receiving party from time to time in accordance with this Section). All Notices shall be delivered by personal delivery, nationally recognized overnight courier (with all fees prepaid), facsimile or email (with confirmation of transmission) to the facsimile number or e-mail address of the person executing this Agreement on behalf of the party to which notice is being given, or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this Agreement, a Notice is effective only if (a) the receiving party has received the Notice, or (b) the party giving the Notice has complied with the requirements of this Section.

Any and all notices shall be addressed as follows:

TO NFNHA: Niagara Falls National Heritage Area, Inc.
Timon Hall, Room 125
Niagara University, NY 14109

TO CITY: CITY OF NIAGARA FALLS
Office of the City Administrator
745 Main Street
P.O. Box 69
Niagara Falls, NY 14302-0069

CITY OF NIAGARA FALLS
Office of the Corporation Counsel
745 Main Street
P.O. Box 69
Niagara Falls, NY 14302-0069

13. **APPLICABLE LAW AND VENUE.** This Agreement shall be governed by the laws of the State of New York, and venue for any action or proceeding shall be in the New York State Supreme Court for the County of Niagara.

14. **MISCELLANEOUS.**

A. This Agreement represents the entire and integrated Agreement between CITY and NFNHA, and supersedes all other prior negotiations, representations or Agreements, either written or oral, and may be altered and amended only by written instrument signed by both Parties.

B. This Agreement may be executed in multiple counterparts and by facsimile signature, each of which shall be deemed an original and all of which together shall constitute one instrument.

C. The failure of either party to enforce any provision of this Agreement on one or more occasions shall not be construed as a waiver of the right of such party to enforce such provision in the future.

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

Niagara Falls National Heritage Area, Inc.

CITY OF NIAGARA FALLS, NY

BY: _____

BY: _____

Name: _____

Robert M. Restaino, Mayor

Title: _____

Attest: _____
City Clerk

EXHIBIT A

INSTRUCTIONS FOR CITY STANDARD INSURANCE REQUIREMENTS

Standard Insurance Requirements apply to the following classifications:

- Construction and Maintenance
- Purchase of or lease of merchandise or equipment
- Professional Services
- Property leased to others or Use of Facilities or grounds Concessionaire Services
- Livery Services
- All purpose Public Entity Contracts

The Provider of any of the above classifications shall obtain, at his own costs and expense, the following insurance coverage with insurance companies licensed in the State of New York with a Best Rating of at least B+ and shall provide a Certificate of Insurance as evidence of such coverage to the CITY before commencement of work and/or lease or delivery of merchandise or equipment.

Certificates should be made to the City of Niagara Falls, NY, P.O. Box 69, Niagara Falls, N.Y. 14302-0069 and should reference the operation.

Prior to non-renewal, cancellation of insurance policies, or material change, at least 30 days advance written notice shall be given to the Certificate Holder.

All Certificates of Insurance shall be approved by the Corporation Counsel prior to the inception of any work.

Minimum coverage with limits and provisions are as follows:

A. Comprehensive General Liability:

With a minimum combined single limit of liability for Bodily Injury and Property Damage of \$1,500,000.00 per occurrence and \$3,000,000.00 annual aggregate. The coverage shall include:

- *Premises and Operations
- *Products and Completed Operations
- *No exclusion for X C U coverages (explosion, collapse and underground)
- *Independent Contractors
- *Broad Form Property Damage
- *Contractual Liability
- *Fire Legal Liability
- *Personal Injury Liability (Coverage A, B, and C)

*Liquor Liability (if alcoholic beverages are to be dispensed under NYS License.)

If the work to be performed is undertaken pursuant to a home improvement contract and a City of Niagara Falls right-of-way permit is required only by reason of the installation, repair or replacement of a driveway, apron, or sidewalk within the City right-of-way, then the limit of liability for comprehensive general liability set forth in this section shall be \$1,000,000 per occurrence and \$2,000,000 aggregate.

CITY shall be named as an Additional Insured on the General Liability Policy with the following provisions:

1. The insurance company or companies issuing the policies shall have no recourse against CITY for payment of any premiums or for assessments under any form of policy.
2. The insurance shall apply separately to each insured (except with respect to the limit of liability.)

B. **Auto Liability:** (if licensed vehicles are to be used in the operation) With a combined single limit for Bodily Injury and Property Damage of \$1,000,000.00 each occurrence, the coverage shall include Owned, Hired and Non-owned autos (Symbol 1 should be designated for Liability Coverage on Business Auto Policy.)

C. **Excess Umbrella Liability:**

If General Liability and/or auto limits are lower than required in the above sections, Umbrella Liability or Excess Liability to the required limit is acceptable.

D. **Owners Protective Liability:** (for construction contracts with a cost exceeding \$100,000.00). With a minimum limit of \$1,500,000.00 each occurrence and \$3,000,000.00 aggregate. Named insured shall be City of Niagara Falls, NY.

E. **Professional Liability:** If the contract includes professional services (engineers, architects, etc.), contractor will carry professional liability insurance with a minimum limit of one million dollars (\$1,000,000.00).

F. **Property Insurance:** (if applicable)

Contractor shall purchase and maintain property insurance upon the work at or off the site to 100% of the contract completed value. This insurance shall include the interest of the Owner, Contractor, and Subcontractors in the work; shall insure against the perils of fire and extended coverage; shall include "all risk" insurance for physical loss and damage including theft, vandalism and malicious mischief, collapse and water damage. All such insurance required by this Paragraph shall remain in effect until the Work is completed and accepted by the Owner.

G. **Statutory Worker's Compensation and Employers Liability:**

All contractors doing business with or vendors entering upon CITY property shall carry the

above insurance, in compliance with the Worker's Compensation Law of the State of New York.

H. **Performance and Payment Bond:** (where applicable)

A performance and payment bond shall be issued by a Surety Company who is licensed by the Insurance Department of the State of New York in favor of CITY in the amount of not less than one hundred (100) per centum of the total amount of the accepted proposal and shall be delivered before commencement of lease or assumption of operations under Contract.

**NOTE: IF THE CONTRACT IS FOR PROFESSIONAL SERVICES ONLY
(ENGINEERS, ARCHITECTS, ETC.), PARAGRAPHS D, F, AND H WILL NOT APPLY.**