

BILL NO. 2998

ORDINANCE NO. _____

AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE AN AMENDMENT TO THE LEASE AGREEMENT BETWEEN FOREVER TOGETHER INCORPORATED, DBA, SCOTTY'S TROUT DOCK AND THE CITY OF BRANSON, MISSOURI

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF BRANSON, AS FOLLOWS:

Section 1: The Board of Aldermen hereby authorizes the Mayor to execute an amendment to the Lease Agreement with Forever Together Incorporated, DBA, Scotty's Trout Dock, substantially in the form attached as Exhibit "A".

Section 2: This ordinance shall be in full force and effect upon and after its passage and approval.

Read, this first time on this ____ day of _____, 2005.


Read, this second time, passed and truly agreed to by the Board of Aldermen of City of Branson, Missouri this ____ day of _____, 2005.

Louis E. Schaefer
Mayor

ATTEST:

APPROVED AS TO FORM:

Lisa K. Westfall
City Clerk



Daniel R. Wichmer
City Attorney

LEASE AGREEMENT

This agreement entered into this ____ day of _____, 2005, between Forever Together Incorporated, DBA, Scotty's Trout Dock {hereinafter "Sub-Lessee"} in the City of Branson, Missouri, a city of the fourth class, (hereinafter "Sub-Lessor").

WHEREAS, Sub-Lessee has been operating under a Lease agreement dated November 14, 1985, for the purpose of operating a commercial boat dock on property leased by Sub-Lessor; and

WHEREAS, said Lease was amended on October 14, 1987 adjusting the term of the Lease and the annual rental price per linear foot with the termination date of said Lease being November 14, 2002; and

WHEREAS, on November 14, 2002, the parties entered into an addendum to the Lease agreement wherein Sub-Lessee exercised its option to extend the original seventeen (17) year Lease term for an additional seventeen (17) years; and

WHEREAS, the parties agreed in the 2002 addendum that the terms of rental price, location of the dock upon the Lake Taneycomo waterfront and the amount of lake frontage allotted to Sub-Lessee's dock were not capable of being ascertained in 2002 by the parties due to ongoing development of the Lake Taneycomo waterfront for a project commonly known as "Branson Landing"; and

WHEREAS, the parties have now determined the terms of rental price, location, amount of lake frontage and additional time to be added to Sub-Lessee's sublease.

NOW, THEREFORE, the parties agree to amend the Lease agreement dated November 14, 1985 as follows:

1. The term of the Lease shall end on November 14, 2024, unless earlier terminated by law, by requirement of any regulatory agency having jurisdiction over demised premises, or by the terms of this Lease agreement as amended.
2. The parties understand that this Lease is subject to approval by Empire District Electric Company and the Federal Energy Regulatory Commission pursuant to the terms of the Sub-Lessor's Lease with Empire dated September 27, 2004.
3. Sub-Lessee agrees to operate the premises as a commercial dock, not to exceed 25,000 sq. ft. with not more than 250 linear feet of shoreline and that said commercial dock must serve the general public. The location of said dock shall be approximately 500 ft. downstream from the railroad bridge crossing Lake Taneycomo on the left bank descending from the City of Branson city limits as shown on a map attached to Sub-Lessor's Lease with Empire. Sub-Lessee understands that no modification or

additions may be made to the dock without prior written consent from Empire and Sub-Lessor and the review and approval of the Federal Energy Regulatory Commission.

4. The parties understand that there is no option to renew this agreement. However, the City of Branson reserves the right to itself to negotiate in good faith as to the terms and conditions for a possible renewal at the end of the present twenty (20) year term, and the question concerning reasonableness of terms and conditions shall be limited and understood that so long as the Board of Alderman of Branson has made offers and received offers, that final action of the Board of Alderman as representatives of the City of Branson shall be final as to the good faith and reasonableness of the negotiations.

5. The parties also understand that as of December 14, 2004 the new annual lease rate for years one and two of this Lease is \$6,000.00 per year. Therefore, retroactive to December 1, 2004 Sub-Lessee owes additional rent in the amount of \$62.50 per month for the months of December 2004, January 2005 and February 2005. Beginning March 1, 2005, Sub-Lessee's rent shall be \$6,000.00 annually (\$500.00 per month). The \$6,000.00 per year rental will be effective for the first and second year of the Lease only. Beginning on the third anniversary date of this Sub-Lease, Lessee's rent shall increase to \$10,000.00 plus a rate of increase calculated by applying to the \$10,000.00 rent the Consumer Price Index for the Kansas City Region as established on the third anniversary date of the Lease. Thereafter, from the fourth anniversary date of the Lease until its termination, on each anniversary date, the Consumer Price Index for the Kansas City Region shall be applied to the prior year's rent in order to establish rent for the upcoming lease year. The increases applied to the prior year's rent according to the Consumer Price Index for the Kansas City Region shall not exceed 3% per year nor shall any annual increase be less than 1% per year. In no event shall there ever be a decrease in the rent during the life of this Lease. Rental payments shall be made in equal monthly payments and shall be due in advance on the first day of each and every month during the term of the Lease. The monthly rental for any fractional month shall be prorated on a per diem basis. All rental payments shall be paid to the City of Branson, Director of Finance, 110 W. Maddux Street, Branson, Missouri 65616 unless Sub-Lessor designates another address in writing.

6. Sub-Lessee shall pay rent based on 250 linear feet of shoreline and its operations shall not exceed one-third of the width of Lake Taneycomo up to 25,000.00 square feet, as determined by the United States Corp of Engineer regulations, Empire District Electric Company and the Federal Energy Regulatory Commission.

7. In addition to the above referenced rent payments, Sub-Lessee shall pay an additional \$94.96 per month for the next 78 months beginning March 1, 2005. Said amount represents the balance of payments remaining due and owing by Sub-Lessee to Sub-Lessor for fuel tanks installed at the property. This amount is in addition to all rents listed in Paragraph 5 above.

8. Sub-Lessee does agree to operate said dock in compliance with all current and published safety rules and regulations as promulgated by the City of Branson and as approved by the Board of Alderman from time to time. Sub-Lessor reserves the right to move the location of the dock to other lakefront locations in the City as shall be determined by the City and this decision is not open to negotiation in any respect. Further, so long as lakefront development is part of an overall development of Lake Taneycomo, the question of wisdom of whether the City of Branson should actually even carry out such overall development shall not be a material question for the interpretation and clarification or enforcement of this Lease and the decision of the City of Branson in this regard is and shall be final, the City reserving the right to make decisions or take action regarding the lakefront and that these decisions and actions are left to the total and absolute discretion of the Board of Alderman. So long as that discretion is made part of an overall development and not made solely or directly to adversely affect Sub-Lessee under this Lease, the question of the propriety and reasonableness of the City's action on said plan shall be final as resolved and determined by its Board.

9. As a material and substantive provision of this Lease, Sub-Lessee does now consent that the City has the absolute right to control the lands leased hereunder, including any lands previously utilized by Sub-Lessee. Sub-Lessee waives each and every right in the land, property, or contract, in law or equity, that would give Sub-Lessee any right other than this Lease to remain located on the lakefront. The parties understand that notwithstanding the legality and enforceability of any other paragraph, phrase or clause in this Lease, that Sub-Lessee gives an unconditional waiver in favor of the City the following rights:

(a) Any contract right for any workable contracts made or promises made by the City of Branson through any person in years past to the right of the undersigned Sub-Lessee to occupy space at any location on Lake Taneycomo.

(b) Any right in land that may have come by the passing of time, or might be enforced by laches or estoppel in any way, said defenses now being unconditionally and freely waived, and Sub-Lessee promises that such defenses shall not be raised at any time in the future, except as those defenses might pertain to the enforceability and the construction and enforcement of this Lease, and no other rights claimed.

(c) Any right that might be Sub-Lessee's by virtue of a court action filed in any court, including but not limited to the actions in the Circuit Court of Taney County, Missouri concerning the interpretation, clarification, and enforcement of the rights of predecessors who had docks on Lake Taneycomo. All arguments or positions relating to a right to continue to operate by virtue of the fact that an operation has been maintained in the past, including all arguments and positions or rights that might be gained by virtue of the contributions made by the undersigned Sub-Lessee in years past in the development of the lakefront and to downtown Branson, all these and any other known defenses or arguments or positions are now unconditionally waived and for naught to be held, and the parties consent that the courts shall take judicial notice that all

such rights and any rights at law and equity are now waived and for naught held, and that the relationship of the parties now is and shall be in the future governed solely by this Lease as modified from time to time by action of the Board of Alderman as modified and

clarified from time to time as the parties themselves mutually agree, there being no mandatory duty to agree as a requirement of fairness.

10. The parties agree to the following provisions, to-wit:

(a) The parties agree that it is in the best interest of the City of Branson to encourage the orderly development of the lakefront in such a way as to compliment the tourist industry and the retirement community of Southwest Missouri, while at the same time providing employment in a clean, environmentally safe recreational and tourist oriented operation, and to operate on the lakefront in such a way as to enhance and preserve the natural beauty and cleanliness of Lake Taneycomo.

(b) The parties understand and agree that the City of Branson does have a right to seek the orderly enhancement and development of the lakefront in such a manner as would be in its sole discretion in the long term best interest of the City of Branson, and the undersigned Sub-Lessee has no right, other than the right of a citizen and such rights as are directly and specifically granted by this Lease, to discourage or obstruct said orderly development.

(c) The parties state that Sub-Lessee possesses no greater rights than those unknown persons who are interested in leasing property and dock space on the lakefront, and no greater rights than other dock owners who have leased or who desire to lease space, and no greater rights than those persons who have heretofore expressed interest in leasing dock space on the lakefront.

(d) Sub-Lessee will pay all taxes that may be levied or assessed on its property, and all sales taxes and other taxes, and the failure to pay any such taxes assessed when currently due shall be a breach of this Lease.

(e) Sub-Lessee now takes possession of its location and such substitute locations as the City of Branson Board of Aldermen determines are necessary to substitute in order to protect the public interest solely under the terms and conditions of this Lease and under no other right, all other rights having been waived by Sub-Lessee.

(f) The Sub-Lessee agrees that in order to promote the ultimate disposition and proper promotion and development of the lakefront that the Sub-Lessee shall immediately and upon a time schedule as set and approved by the Board of Aldermen, move its operation to those locations in the City of Branson and on the lakefront as determined from time to time would be in the public interest in order to properly promote the overall development of the downtown area and to protect Lake Taneycomo, and to maximize the use and enjoyment of the public to the waters of Lake Taneycomo. In this connection, the City of Branson shall be final upon notification, and

failure of the Sub-Lessee to comply therewith shall be and is a material breach of this Lease.

(g) Sub-Lessee shall, during the entire term of this Sub-Lease, keep in full force and effect a policy of Public Liability and Property Damage Liability coverage with respect to the Sub-Leased premises and the business operated by Sub-Lessee, (or any Sub-Tenants of Sub-Lessee) in the Sub-Leased premises as follows:

a. Liability Insurance with a company licensed to do business in the State of Missouri with limits of liability of not less than \$1 Million per occurrence for personal injuries (including death) and damage to property. The City of Branson must be named as an additional insured.

(h) Sub-Lessee will indemnify Sub-Lessor and save it harmless from and against any and all claims, actions, damages, liability and expense including reasonable attorney's fees and costs in connection with personal injury or damage to property arising from or out of any occurrence in, upon, or at the Sub-Leased premises.

(i) Sub-Lessee agrees not to conduct or permit any nuisance on the docks, and to maintain the area adjacent to and in front of the docks in a clean and attractive condition, and to not operate the business in any way as to create a nuisance.

(j) Sub-Lessee does agree at the expiration of the term of this Lease or any extension thereof, or sooner if termination shall come by virtue of a default, upon a 10 day demand by the City of Branson the Sub-Lessee agrees to peaceably surrender and yield up to Sub-Lessor the lands and all of them, and to remove and cause to be removed the dock from in front of the location where same is located, and the City of Branson reserves the right, and Sub-Lessee does designate the City of Branson as its agent for purpose of cutting away said dock and to remove said dock to a location away from the City of Branson at the expense of the Sub-Lessee, and Sub-Lessee shall pay such moving expense and all such reasonable storage expenses prior to claiming said dock.

(k) Sub-Lessee may encumber by mortgage or deed of trust or other proper instrument, Sub-Lessee's Leasehold interest and estate in leased premises, together with all buildings and estate in leased premises, together with all buildings and improvements placed by Sub-Lessee thereon as security for any indebtedness of Sub-Lessee. The execution of any such mortgage, deed of trust, or other instrument, or the foreclosure thereof, or any sale thereunder, either by judicial proceeding or by virtue of any power or privilege reserved in any mortgage or deed of trust shall not held as a violation of any of the terms or conditions of this Lease, or as an assumption by the holder of such of such indebtedness personally of the obligations hereof. No such encumbrance, foreclosure, conveyance, or exercise of right shall relieve the Sub-Lessee from Sub-Lessee's liability thereunder.

If Sub-Lessee shall encumber its leasehold interest and estate in leased premises, and if Sub-Lessee or the holder of the indebtedness secured by such encumbrance shall give notice to Sub-Lessor of the existence thereof, and the address of

such holder, then Sub-Lessor will mail or deliver to such holder, at such address, a duplicate copy of all notices in writing which Sub-Lessor may from time to time give or serve on Sub-Lessee under and pursuant to the terms and provisions hereof; such copies shall be mailed or delivered to said holder at or as near as possible to the same time as such notices are given to or served on Sub-Lessee. Such holder may, at its option, at any time before the rights of Sub-Lessee shall be terminated as provided herein, pay any of the rents due hereunder, or pay any taxes and assessments or do any other act or thing required of Sub-Lessee by the terms hereof, or do any other act or thing that may be necessary and proper to be done in the observance of the covenants and conditions hereof, or to prevent the termination hereof; all payments so made, and all things so done and performed by such holder shall be effective to prevent a foreclosure of the rights of Sub-Lessee thereunder as the same would have been done if done and performed by Sub-Lessee.

(l) Neither this Lease nor the leasehold estate of Sub-Lessee hereunder in the leased premises or in the improvements constructed thereon shall be subject to involuntary assignment, transfer or sale by operation of law in any manner whatsoever (except through statutory merger or consolidation or devise or instate succession), and any such attempt at involuntary assignment, transfer or sale shall be void and of no effect.

In the event any proceedings under the Bankruptcy Act or any amendment thereto be commenced by or against Sub-Lessee and, if against Sub-Lessee, such proceedings shall not be dismissed before either an adjudication in bankruptcy or in confirmation of a composition, arrangement, or plan or reorganization, or in the event Sub-Lessee is adjudged insolvent or makes an assignment for the benefit of Sub-Lessee's creditors, or if a receiver is appointed in any proceeding or action to which the Sub-Lessee is a party, with authority to take possession or control of leased premises or the business conducted thereon by Sub-Lessee, and such receiver is not discharged within a period of 90 days after his appointment, any such event or any such involuntary assignment prohibited by the provisions of the preceding paragraph of this section shall be deemed to constitute a breach of this Lease by Sub-Lessee and shall, at the election of Sub-Lessor, but not otherwise, without notice, or entry, or other action of Sub-Lessor, terminate this Lease and also all rights of Sub-Lessee under this Lease in and to the leased premises and the improvements constructed thereon, and also all rights of any and all persons claiming under Sub-Lessee.

(m) Sub-Lessee shall not have the right to assign this Lease or to sublet said premises or parts thereof without the prior written consent of Sub-Lessor, Empire and FERC. The City shall not reasonably withhold said approval of a request for assignment. However, any approval of said assignment will not relieve Sub-Lessee of Sub-Lessee's obligation, under this Lease.

(n) It is understood that from time to time the Sub-Lessee may be renting boat space to the public and this activity may be carried on without the approval of the City of Branson and as a part of the operation of the business itself.

(o) If any action at law or equity shall be brought to recover any rent under this Lease or for or on account of any breach of, or to enforce or to interpret any of the covenants, terms or conditions of this Lease, or for recovery of possession of the lease premises, the prevailing party shall be entitled to recover from the other party all reasonable costs, expenses and attorney fees, the amount of which shall be fixed by the court and shall be made a part of the judgment or decree rendered.

(p) No oral representations, agreements or understandings altering, modifying, taking from or adding to the terms and provisions of this Lease shall have any force and effect unless the same is reduced to writing and signed by Sub-Lessor and Sub-Lessee with the approval of the Board of Aldermen of the City of Branson.

11. The obligations of this agreement shall be binding upon and benefits hereof shall enure to the successors and assigns of the respective parties hereto.

12. All notices, demands or other writings in this Lease provided to be given or made or sent, or which may be given or made or sent by, either party hereto to the other shall be deemed to have been fully given or made or sent when made in writing and deposited in the U.S. Mail, certified or registered, and postage prepaid, and addressed as follows:

TO SUB-LESSOR: City Administrator
City of Branson
110 W. Maddux St.
Branson, MO 65616

TO SUB-LESSEE: Forever Together, Inc. d/b/a Scotty's Trout Dock
395 North Lakefront
Branson, MO 65616

13. The claiming of some right not enunciated and declared in this Lease by Sub-Lessee that arises prior to the date of this Lease shall be and is an act of default justifying the termination of the Lease, and this Lease shall be terminated and the Sub-Lessee shall vacate the premises, and the rights of the City of Branson, Missouri to remove said dock shall be at that time present.

WITNESS the hands of the parties hereto on this _____ day of _____, 2005.

ATTEST:

THE CITY OF BRANSON
("SUB-LESSOR")

Sandra L. Williams, C.M.C.
City Clerk

By: _____
Louis E. Schaefer, Mayor

FOREVER TOGETHER, INC. D/B/A
SCOTTY'S TROUT DOCK
("SUB-LESSEE")

By: _____
Rich Milstead

APPROVED AS TO FORM:

Daniel R. Wichmer
City Attorney