

Proposed by:	Administration
Attorney Review:	08/11/2022
Vote:	<input type="checkbox"/> Aye <input type="checkbox"/> Nay <input type="checkbox"/> Absent

**MUNICIPALITY OF SKAGWAY, ALASKA
RESOLUTION NO. 22-26R**

A RESOLUTION OF THE MUNICIPALITY OF SKAGWAY, ALASKA APPROVING A PORT BERTHING AGREEMENT TEMPLATE AND AUTHORIZING THE MANAGER TO NEGOTIATE PORT BERTHING AGREEMENTS WITH PASSENGER CRUISE SHIP COMPANIES.

WHEREAS, the Municipality of Skagway will require passenger cruise ship companies to enter into berthing agreements in order to operate from and berth their vessels in the Port of Skagway; and

WHEREAS, the Municipality’s goal is to initially enter into short-term 2-year berthing agreements, with the goal of ensuring an efficient and seamless transition of port operations to the Municipality of Skagway in 2023; and

WHEREAS, longer-term berthing agreements will be developed and utilized for 2025 and beyond;

NOW, THEREFORE, BE IT RESOLVED by the Borough Assembly of the Municipality of Skagway, Alaska that the Port of Skagway Berthing Agreement template (Attachment A) is hereby approved for use as the basis of negotiations with passenger cruise ship companies utilizing the Port of Skagway; and

BE IT FURTHER RESOLVED that the borough manager is authorized to negotiate port Berthing Agreements with passenger cruise ship companies using the approved template, for subsequent approval by the Assembly.

PASSED AND APPROVED by a duly constituted quorum of the Borough Assembly of the Municipality of Skagway this __ day of _____, 2022.

Andrew Cremata, Mayor

ATTEST:

Steve Burnham Jr., Borough Clerk

(SEAL)

Berthing Agreement

THIS BERTHING AGREEMENT (Agreement) is made as of _____, 2022, by and among the Municipality of Skagway Borough (Skagway) and _____ (Cruise Company). Skagway and Cruise Company are hereinafter sometimes collectively referred to as Parties and each a Party.

I. RECITALS

1. Skagway is the owner of two large-vessel cruise berths and one small-vessel cruise berth located at its waterfront in Skagway, Alaska (Broadway Dock, Ore Dock, and Ferry Float, respectively) (Port of Skagway Terminal); and
2. Cruise Company wishes to secure, and Skagway is willing to grant, the right to operate from and berth their vessels at the Port of Skagway Terminal as provided herein.

In consideration of the recitals set forth above, the Parties agree as follows:

II. AGREEMENT

1. **Term.** This Agreement shall be effective for the 2023 and 2024 cruise seasons, unless terminated earlier pursuant to any provision hereof (Term). The typical cruise season for the Port of Skagway Terminal runs from early-to-mid April through mid-to-late October.

2. **Berthing Rights.**

2.1 Scheduling. Scheduling of cruise berth days at the Port of Skagway Terminal for the 2023 cruise season has been accomplished by agreement between Cruise Line Agencies of Alaska (CLAA) on behalf of Cruise Company and Skagway. Skagway and Cruise Company agree that CLAA may schedule Cruise Company's 2024 cruise berth days at the Port of Skagway Terminal subject to Skagway's approval of the schedule proposed by CLAA.

2.2 Cruise Berth Days. Each of Skagway's three cruise berths is generally available for use Sunday through Saturday, April 15 through October 15, unless previously scheduled for use. Unless otherwise specifically agreed, only one cruise vessel may utilize each berth on any day. As used herein, each day of the week during the cruise season for each cruise berth at the Port of Skagway Terminal is referred to as a "cruise berth day." For example, each Sunday during the cruise season for a particular berth is considered a cruise berth day; each Monday during the cruise season for a particular berth is considered a cruise berth day, etc.

3. Operation and Maintenance of Port of Skagway Terminal.

3.1 General Standard. Subject to the terms of this Agreement, Skagway shall, throughout the Term of this Agreement, ensure that the Port of Skagway Terminal and ancillary Skagway facilities are maintained and operated consistent with good maritime practices and industry standards for a functional cruise vessel terminal and otherwise as necessary to ensure the Port of Skagway Terminal is able to be utilized by the Cruise Company for its intended purpose.

3.2 Port of Skagway Tariff No. 3. For the Term of this Agreement, Cruise Company agrees to comply with the terms and conditions set forth in the Port of Skagway Tariff No. 3 (Tariff No. 3). Tariff No. 3 is hereby incorporated by reference into this Agreement. In the event of a conflict between the terms and conditions of this Agreement and the terms and conditions of Tariff No. 3, the terms and conditions of this Agreement shall control.

3.3 Safety and Environmental Stewardship. For the Term of this Agreement, Cruise Company agrees to comply with Skagway and Port of Skagway codes, rules, and standards including, without limitation, those established to ensure the Port of Skagway Terminal is operated in a safe, efficient, and environmentally-sound manner. For the Term of this Agreement, the Cruise Company shall not, while in the Port of Skagway, clean its hulls, dump grey or black water, rinse vessel scrubbers, dump any harmful chemicals or materials, or take similar actions while in the Port of Skagway.

3.4 Reservation of Secondary Use. Cruise Company's berthing rights set forth under Section 2 of this Agreement are nonexclusive, and Skagway reserves the right of secondary use of all or any part of the Port of Skagway for berthing of vessels operated by companies, other than the Cruise Company, for embarking and disembarking passengers, loading and discharging cargoes of such vessels, for transporting cargo, and for cargo storage and operations incidental thereto, provided that such secondary use of the Port of Skagway by Skagway shall not unreasonably interfere with Cruise Company's operations as authorized in this Agreement. In the event of such secondary use by Skagway, all applicable charges shall accrue to the benefit of and shall be billed and retained by Skagway.

4. Skagway Fees.

4.1 General Rule. For the Term of this Agreement, Cruise Company shall pay the Port of Skagway fees and assessments set forth in this Agreement and in Tariff No 3 without protest, complaint, set off, or participation in any legal action challenging the legality of such fees. Such fees and assessments to include, without limitation, the following fees: (1) Vessel Impact Fee in accordance with Item 220 of Tariff No. 3; (2) Dockage Fee in accordance with Item 230 of Tariff No. 3; (3) Baseline Security Fee in accordance with Item 270 of Tariff No. 3; (4) Freshwater Service in accordance with

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Item 280 of Tariff No. 3; and (5) Refuse Collection, as may be requested and approved, in accordance with Item 290C of Tariff No. 3.

4.2 No New Fees or Assessments. For the Term of this Agreement, Skagway shall not change or charge any new Port of Skagway fees or assessments other than: (1) those fees and assessments described above in Section 4.1; (2) those already existing, mandated, or collected by federal or state entities including, without limitation, the excise tax set forth under AS 43.52.200-.295; and (3) reimbursable costs associated with new or additional services requested by the Cruise Company. Notwithstanding the foregoing, Skagway may at any time (and without the consent of the Cruise Company) elect to discontinue its assessment and/or collection of any of the fees described in this Agreement.

4.3 Recommendations for Future Capital Projects. For the Term of this Agreement, Cruise Company may recommend, and Skagway may consider, future capital projects in or for the benefit of the Port of Skagway including, without limitation, capital projects (1) to improve the Port of Skagway infrastructure, (2) to provide improved or additional services to vessels and their passengers, or (3) to improve the safety and efficiency of interstate and foreign commerce.

5. Minimum Passenger Guarantees. For the Term of this Agreement, minimum passenger guarantees by Cruise Company are waived by Skagway.

6. Other Benefited Parties.

6.1 Affiliated Lines. The Cruise Company is owned by or under the direct control of _____. The Parties specifically agree that the Cruise Company may satisfy their obligations under this Agreement through vessels owned by: (i) _____ and/or (ii) any other operating line(s) owned by _____ (the Affiliated Lines). Likewise, the Affiliated Lines shall, when making use of the Port of Skagway, be entitled to any benefits hereunder and any revenue that passengers provide through such Affiliated Lines shall specifically apply, as designated by the Cruise Company under the terms of this Agreement, towards the satisfaction of the Cruise Company's obligations hereunder.

6.2 No Other Assignment. The benefits provided under this Agreement are personal to the Cruise Company and shall not, in whole or in part, be assigned, licensed, or otherwise transferred. The prohibition against assignment, license, or transfer specifically includes a prohibition against any assignment, license, or transfer by operation of law.

7. Other Terms.

7.1 Notice. All notices hereunder shall be in writing and shall be delivered personally, by certified or registered mail, or by recognized overnight courier addressed as follows:

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To Skagway:
Port of Skagway
Municipality of Skagway
Borough
Attention: Port Director
P.O. Box 415
Skagway, Alaska 99840
c.jennings@skagway.org

and with a copy to:
Robin O. Brena, Esq.
Anthony S. Guerriero, Esq.
Brena, Bell & Walker, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
rbrena@brenalaw.com
aguerriero@brenalaw.com

To the Cruise Company:

and with a copy to:

or to such other respective addresses as any Party hereto may hereafter from time to time designate in writing. Notices shall be deemed delivered (i) when personally delivered; (ii) on the third day after mailing when sent by certified or registered mail, and the postmark affixed by the United States Postal Service shall be conclusive evidence of the date of mailing; (iii) on the first business day after deposit with a recognized overnight courier if deposited in time to permit overnight delivery by such courier as determined by its posted cutoff times for receipt of items for overnight delivery to the recipient. Parties providing a notice hereunder shall also provide a courtesy copy of the notice via email to the email addresses indicated above.

7.2 Joint and Several Liability. To the extent that Cruise Company is comprised of more than a single entity, each such entity shall be jointly and severally liable under this Agreement with respect to any amounts payable under this Agreement. It is understood and agreed that for convenience the term “Cruise Company” and associated verbs are plural, but each of the companies constituting the Cruise Company shall have all of the benefits hereunder and shall be entitled to exercise any of the rights hereunder.

7.3 Insurance. The Cruise Company shall provide Skagway evidence of commercial general liability insurance against claims for bodily injury, personal injury, marine pollution, and property damage arising out of the use, occupancy, or maintenance of the Port of Skagway Terminal and all areas appurtenant thereto as defined in this Agreement. The policy shall be written on Marine Form SP 38, SP 23, or its equivalent and Skagway shall be listed as an Additional Insured on this policy. Coverage shall be

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for no less than TWO MILLION AND 00/100 DOLLARS (\$2,000,000) per occurrence.

7.3.1 The Cruise Company shall provide Skagway evidence of protection and indemnity insurance against claims for loss of life, injury, illness, property damage, as well as coverage for marine pollution, wreck removal, and legal expenses that arise out of the use, occupancy, or maintenance of the Port of Skagway Terminal and all areas appurtenant thereto as defined in this Agreement. The policy shall be written on Marine Form SP 38, SP 23, or its equivalent for no less than TWO MILLION AND 00/100 DOLLARS (\$2,000,000) per occurrence, per vessel. Skagway shall be added as an Additional Insured on this policy.

7.3.2 The Cruise Company is responsible for ensuring that it meets any and all applicable insurance requirements contained within the laws and regulations of the State of Alaska and, if applicable, the insurance requirements that pertain to the United States Longshore and Harbor Worker's Compensation Act and the Jones Act.

7.3.3 The Cruise Company shall furnish Skagway with an insurance certificate that shows evidence of all required insurance, including any deductibles or self-insured retention. No policy of insurance required under this Agreement shall be cancelable or subject to non-renewal or modification except after forty-five (45) days prior written notice to Skagway. The Cruise Company shall at least forty-five (45) days prior to the expiration of such policies, furnish Skagway with evidence of renewals or insurance binders evidencing renewal thereof, or Skagway may order such insurance and charge the cost thereof to the Cruise Company, which amount shall be payable by the Cruise Company to Skagway upon demand.

7.4 Indemnification. Skagway, its employees, and agents shall not be liable for any injury (including death) to any persons or for damage to any property regardless of how such injury or damage be caused, sustained, or alleged to have been sustained by the Cruise Company or by others including, but not limited to, all persons directly or indirectly employed by the Cruise Company or any agents, contractors, or subcontractors of the Cruise Company, as a result of any condition (including existing or future defects in the Port of Skagway) or occurrence (including failure or interruption of utility service) whatsoever related in any way to the Port of Skagway and the areas adjacent thereto, or related in any way to the Cruise Company's use or occupancy of the Port of Skagway and of areas adjacent thereto. The Cruise Company shall indemnify, defend, and hold and save Skagway harmless from all liability or expenses (including attorneys' fees, costs, and all expenses of litigation) in connection with any such items of actual or alleged injury or damage, except to the extent such injury or damage is caused by the sole negligence or intentional conduct of the Skagway. The Cruise Company expressly agrees that its duty to defend and indemnify Skagway includes negligent acts which are concurrent, contributory, or both by Skagway, resulting in said damage or injury. However, to the extent this Agreement is construed

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by the State of Alaska court of competent jurisdiction to be subject to any anti-indemnity law, rule, or case applicable in the State of Alaska, and where the injury or damage arises from the concurrent negligence of Skagway and the Cruise Company, the Cruise Company's indemnity will only extend to the degree permissible by law.

7.5 Captions. The captions in this Agreement are for convenience only and do not in any way limit or amplify the provisions of this Agreement.

7.6 Governing Law; Venue. This Agreement shall be construed under the laws of the State of Alaska. Exclusive jurisdiction and venue for any action relating hereto shall be in the Alaska state courts located in Juneau, Alaska, or federal courts located in Anchorage, Alaska.

7.7 Attorneys' Fees. In the event that either Party shall be required to bring any action to enforce any of the provisions of this Agreement or shall be required to defend any action brought by the other Party with respect to this Agreement, and in the further event that one Party shall substantially prevail in such action, the non-prevailing Party shall, in addition to all other payments required therein, pay all of the prevailing Party's actual reasonable fees and costs in connection with such action, including such sums as the court or courts may adjudge as reasonable actual attorneys' fees.

7.8 Invalidity of Particular Provisions. If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be invalid or enforceable, the remainder of this Agreement or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby and shall continue in full force and effect.

7.9 Amendments. No modification or amendment of this Agreement shall be valid or effective unless evidenced by an agreement in writing signed by the Parties.

7.10 Conflicts or Inconsistencies. In the event the provisions of this Agreement conflict with or are inconsistent with any other Skagway agreement or Skagway requirement regarding use of the Port of Skagway Terminal, the provisions of this Agreement shall control.

7.11 Security. Cruise Company shall, upon execution of this Agreement, obtain and deliver to Skagway a good and sufficient corporate surety company bond, irrevocable stand-by letter of credit, or other security equal to THREE MILLION AND 00/100 DOLLARS (\$3,000,000.00) (Security), to secure Cruise Company's full performance under this Agreement, including the payment of all fees and other amounts payable to the Skagway hereunder. The amount, form, provisions, and nature of the Security, and the identity of the surety or other obligor thereunder, shall at all times be subject to Skagway's approval. The Security shall remain in place at all times throughout the full term of this Agreement. If the Security is in a form that periodically requires renewal, Cruise Company shall renew the Security not less than forty-five (45) days before the

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Security is scheduled to expire. No interest shall be paid on the Security and Skagway shall not be required to keep the Security separate from its other accounts. No trust relationship is created with respect to the Security. Skagway may apply all or part of the Security to any unpaid sum due hereunder or to cure other defaults of Cruise Company. If Skagway uses any part of the Security, Cruise Company shall restore the Security to its then-currently required amount within fifteen (15) days after the receipt of Skagway's written request to do so. The retention or application of such Security by Skagway pursuant to this Section does not constitute a limitation on or waiver of Skagway's right to seek further remedy under law or equity. The Security is a part of the consideration for the execution of this Agreement.

7.12 Ethical Standards and Anti-Corruption. The Parties shall abide by their respective ethical standards and practices.

Dated: _____ Municipality of Skagway Borough

By _____

(Print name and title)

Dated: _____ [Insert Name of Cruise Company]

By _____

(Print name and title)