

CONCESSION AGREEMENT – AMENDMENT #1
(Sebastian Inlet State Park)

THIS AMENDMENT #1 TO CONCESSION AGREEMENT (“Amendment #1”) is entered into between the State of Florida Department of Environmental Protection (“Department”), an agency of the State of Florida, by and through its Division of Recreation and Parks (“Division”), and BG Sebastian Inlet, LLC (“Concessionaire”) organized as a Limited Liability Company.

RECITALS

WHEREAS, on or about June 20, 2017, the Department and Concessionaire entered into a Concession Agreement (DEP Agreement No. CA-1117) (the “Original Concession Agreement”), and

WHEREAS, pursuant to the Original Concession Agreement, the Concessionaire agreed to provide certain goods and services at Sebastian Inlet State Park (the “Park”), as such goods and services are more particularly described in the Original Concession Agreement, and

WHEREAS, the Original Concession Agreement, and all exhibits/attachments referenced therein (collectively, the “Agreement”) is incorporated in this Amendment #1 by reference.

NOW, THEREFORE, the parties hereby mutually agree as follows:

1. Recitals:

The Recitals are true and correct and are incorporated herein by reference.

2. Modifications to the Agreement:

- a. Compensation: Paragraph F of the Special Conditions of the Agreement is hereby deleted in its entirety and replaced with the following language:

“ F. Compensation. The Concessionaire will pay to the Department a commission fee based on the following schedule and pursuant to the terms set forth in this Agreement, including, but not limited to, Special Conditions, Section F, and General Conditions, Sections 17 and 18 herein:

1. Compensation Period 1:

From the Effective Date through June 30, 2019 (“Compensation Period 1”), the Concessionaire will remit a commission equal to 10% of Total Gross Sales each month, but not less than \$63,000.00 annually (“Period 1 Minimum Guarantee”), the applicable State Use Tax, (a percentage of the amount paid to the Department, equal to the sum of the state sales tax and applicable county discretionary sales tax percentages.

2. Compensation Period 2:

From July 1, 2019 through June 30, 2020 (“Compensation Period 2”), the Concessionaire will remit a commission equal to 10% of Total Gross Sales each month, but not less than \$45,000 (“Period 2 Minimum Guarantee”), plus, the applicable State Use Tax (a percentage of the amount paid to the Department, equal to the sum of the state sales tax and applicable county discretionary sales

tax percentages).

3. Compensation Period 3:

From July 1, 2020 through December 31, 2020 ("Compensation Period 3"), the Concessionaire will remit a commission equal to 12% of Total Gross Sales each month, plus, the applicable State Use Tax (a percentage of the amount paid to the Department, equal to the sum of the state sales tax and applicable county discretionary sales tax percentages).

4. Compensation Period 4:

From January 1, 2021 through December 31, 2021 ("Compensation Period 4"), the Concessionaire will remit a commission equal to 4% of Total Gross Sales each month, but not less than \$17,000 ("Period 4 Minimum Guarantee"), plus, the applicable State Use Tax (a percentage of the amount paid to the Department, equal to the sum of the state sales tax and applicable county discretionary sales tax percentages).

5. Compensation Period 5:

From January 1, 2022 through December 31, 2024 ("Compensation Period 5"), the Concessionaire will remit a commission equal to 8% of Total Gross Sales each month, but not less than \$34,000 annually ("Period 5 Minimum Guarantee"), plus, the applicable State Use Tax (a percentage of the amount paid to the Department, equal to the sum of the state sales tax and applicable county discretionary sales tax percentages).

6. Compensation Period 6:

From January 1, 2025 through December 31, 2026 ("Compensation Period 6"), the Concessionaire will remit a commission equal to 12% of Total Gross Sales each month, but not less than \$53,000 annually ("Period 6 Minimum Guarantee"), plus, the applicable State Use Tax (a percentage of the amount paid to the Department, equal to the sum of the state sales tax and applicable county discretionary sales tax percentages).

7. Compensation Period 7:

From January 1, 2027 through June 30, 2027 ("Compensation Period 7"), the Concessionaire will remit a commission equal to 12% of Total Gross Sales each month, but not less than \$26,500 ("Period 7 Minimum Guarantee"), plus, the applicable State Use Tax (a percentage of the amount paid to the Department, equal to the sum of the state sales tax and applicable county discretionary sales tax percentages).

8. Compensation Period 8:

From July 1, 2027 through June 30, 2032 ("Compensation Period 8"), the Concessionaire will remit a commission equal to 13% of Total Gross Sales each month, but not less than \$59,000 annually ("Period 8 Minimum Guarantee"), plus, the applicable State Use Tax (a percentage of the amount paid to the Department, equal to the sum of the state sales tax and applicable county discretionary sales tax percentages).

The Department will determine if an amount is owed by comparing the amount of commission fees paid for each 12 month period within each Compensation Period listed above to the corresponding Period Minimum Guarantee. Where the Compensation Period is less than 12 months, The Department will determine if an amount is owed by comparing the amount of commission fees paid within the Compensation Period to the corresponding Period Minimum Guarantee. If a shortfall exists, the Department will notice the Concessionaire of the amount owed within 90 days of the end of the 12 month period or, where the Compensation Period is

less than 12 months, within 90 days of the Compensation Period end. The Concessionaire will remit any shortfall within fifteen (15) days of receiving a notice from the Department.

Concessionaire will not be required to pay the full Minimum Fee during any period of time in which: (a) the Park is closed, or (b) other Force Majeure Event (defined below) prevents Concessionaire from conducting its operations; in which event the Minimum Fee will be reduced by a fraction, the numerator of which is the number of days such events prevent Concessionaire from conducting its operations in the Park and the denominator of which is 365.

"Total Gross Sales," for the purpose of this Agreement, will be defined as all sales of goods, merchandise, food, vending and services generated as a result of the Concessionaire's operations at or associated with the Park. This includes all sales made or advertised within the Park, advertised on the Concessionaire's website associated with the Park, transactions conducted through the point of sale and bank accounts utilized by the Concessionaire for its Park operations, and sales generated by subcontractors or related entities whose sales are associated with the Concessionaire's authorized operations at the Park. Total Gross Sales will not include:

1. tax collections, or
2. gratuities, or
3. pass through fees, which include:
 - a. admission fees collected by the Concessionaire on behalf of the Department, and
 - b. events fees collected by the Concessionaire on behalf of the Department, and
 - c. security fees collected by the Concessionaire to pay Park staff on behalf of the Department; or
4. funds that were collected but have been refunded to the customer.

Sales of goods and services and collections of sales tax will be accounted for separately at the point of sale. If the Concessionaire is unable to do this, it will calculate sales tax from gross receipts using a method approved by the Florida Department of Revenue."

- b. Concessionaire employee standards: Paragraph 16 of the Agreement is hereby deleted in its entirety and replaced with the following language:

" 16. Concessionaire employee standards. The Concessionaire will provide continual training and evaluation of all employees assigned to the Concessionaire's Service operations to ensure an appropriate level of proficiency, a public service attitude, and a good understanding of the principles of hospitality. All Concessionaire's employees and/or those acting on behalf of or providing services under the supervision of the Concessionaire will be required to wear a visitor service uniform and name tag while on duty in the Park. The Concessionaire will obtain written pre-approval from the Park Manager for all service uniforms and name tags. The Concessionaire has a duty to replace any employee and/or those persons acting on behalf of or providing services under the supervision of the Concessionaire if the Park Manager so requests. No Department employee or close relative of a Department employee is permitted to be employed by the Concessionaire or a subcontractor, or otherwise compensated by the Concessionaire or a subcontractor, without the prior written approval of the Department's Bureau of Human Resources Management and the Office of General Counsel."

c. Accounting: Paragraph 18 of the Agreement is hereby deleted in its entirety and replaced with the following language:

“ 18. Accounting. Accounting requirements will be as follows:

a. Minimum accounting requirements including subcontractors and audit. The Concessionaire will comply with, and document compliance with, the Minimum Accounting Requirements detailed in Exhibit C, attached hereto and incorporated herein by reference. The Concessionaire will establish and maintain books, records, and documents directly pertinent to performance under this Agreement in accordance with the Minimum Accounting Requirements and with the generally accepted accounting principles, which will be consistently applied. The Department, and other appropriate government agencies, or their authorized representatives, as provided by law, will have access to all such records for audit purposes during the term of this Agreement and for five years following the Agreement's expiration or termination. Audits will be conducted at locations and at a frequency determined by the Department or other state agency and communicated to the Concessionaire. The Concessionaire will provide materials for the audit at the designated place within 15 days after the Department's or other government agency's notice is received. In addition, the Department may require the Concessionaire to procure an annual financial audit of the Concessionaire's operations conducted by a Certified Public Accountant, at the Concessionaire's sole cost and expense. If requested, the Concessionaire agrees such an audit will be conducted in accordance with generally accepted auditing and accounting principles and will be completed within a reasonable time frame, which will not be set at less than 60 days by the Department.

b. Monthly report of Total Gross Sales. The Concessionaire will provide to the Department a Monthly Report of Concessionaire's Total Gross Sales, which will include gross sales attributable to any and all subcontracts, in the form attached hereto as Exhibit D-2 and incorporated herein by reference. Each monthly report will contain the required detail based upon Total Gross Sales for such month by point of sale. The Concessionaire will deliver such report and required payment(s) to the Park Manager no later than the 20th day of the succeeding month.

c. Annual Profit and Loss Statement. The Concessionaire will provide an Annual Profit and Loss Statement to the Department, in the form attached hereto as Exhibit E and incorporated herein by reference. Such statement will include the results of the Concessionaire's operations pursuant to this Agreement for each calendar year or portion thereof for which this Agreement is in effect. The statement will be delivered to, or sent so it is received by, the Park Manager no later than June 30th of the succeeding calendar year, or within 90 days of the expiration or termination of this Agreement, whichever is sooner.

d. Books of original entry. Both the monthly reports of Total Gross Sales and the Annual Profit and Loss Statements will be based on source documents and books of original entry. The Concessionaire will retain books of original entry and source documents for five years, or until final resolution of matters resulting from any litigation, claim, or audit that started prior to the expiration of the five year retention period, whichever is later. The retention period commences from the date of submission of the last annual profit and loss statement required in Paragraph 18 c. above.

e. Limited Engagement document. If annual Total Gross Sales from the Concessionaire's operations under this Agreement exceed \$400,000, the Concessionaire will obtain and submit, at its sole cost and expense, a limited engagement document, prepared in accordance with the Agreed - Upon Procedures for a Certified Public Accountant as stated in

Exhibit F, attached hereto and incorporated herein. Such limited engagement document will be conducted in accordance with generally accepted auditing and accounting principles. This limited engagement document will be submitted to the Park Manager no later than June 30th of the following calendar year or within 120 days after the expiration or termination of this Agreement, whichever is sooner.

f. Revenue subject to sales tax. The Concessionaire's revenue is subject to State Use Tax, unless the Concessionaire is exempt from paying such tax on commission fees to the Department. If it is tax exempt, the Concessionaire will provide verification of its tax exempt status by completing the State Use Tax Exempt Certification form attached hereto as Exhibit G and incorporated herein by reference. The Concessionaire will provide its completed Certification form to the Department contemporaneously with its delivery of the executed Agreement to the Department.

g. Purchasing card industry ("PCI"). The Concessionaire will be responsible for complying with the PCI Data Security Standards ("PCI DSS"), which include a set of comprehensive requirements for enhancing payment account data security, at the Concessionaire's sole cost and expense. The PCI DSS standards can be found at the PCI Security Standards Council website, which is linked through: <https://www.pcisecuritystandards.org/>. Additional information can be obtained through the Florida Department of Financial Services ("DFS"), which coordinates the State of Florida's efforts directly with the PCI Security Standards Council. The Concessionaire will ensure that the required data security measures are in place no later than 60 days after the execution of this Agreement or prior to the commencement of operations, whichever is sooner, by submitting a completed Self-Assessment Questionnaire ("SAQ") to the Park Manager. The Concessionaire will submit an updated SAQ to the Park Manager annually on the anniversary of the commencement date through the expiration or termination of this Agreement. The SAQ can be found on the PCI DSS website listed above. During the term of this Agreement, it will be the Concessionaire's responsibility to be apprised of any subsequent version, modification, amendment, or update of the PCI DSS, and, if necessary, in order to comply with the most current version of the PCI DSS, to modify its annual SAQ as it pertains to its operations under the Agreement, at the Concessionaire's sole cost and expense.

h. Electronic Payment. At such time the Department completes a system for accepting electronic payments from concessionaires, the Concessionaire agrees to use such system for making or delivering its monthly payments to the Department. Concessionaire's agreement to use the system is contingent upon the system being no-cost or nominal fee to use the system."

d. Public records: Paragraph 19 of the Agreement is hereby deleted in its entirety and replaced with the following language:

" 19. Public records.

a. Concessionaire will comply with Florida Public Records law under Chapter 119, F.S. Records made or received in conjunction with this Agreement are public records under Florida law, as defined in Section 119.011(12), F.S. Concessionaire will keep and maintain public records required by the Department to perform the services under this Agreement.

b. This Agreement may be unilaterally canceled by the Department if the Concessionaire fails to either provide to the Department all public records relating to this Agreement upon request or allow the records to be inspected or copied within a reasonable time.

c. If Concessionaire meets the definition of “Contractor” found in Section 119.0701(1)(a), F.S.; [i.e., an individual, partnership, corporation, or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency], then the following requirements apply:

1. Pursuant to Section 119.0701, F.S., a request to inspect or copy public records relating to this Agreement must be made directly to the Department. If the Department does not possess the requested records, the Department will immediately notify the Concessionaire of the request, and the Concessionaire must provide the records to the Department or allow the records to be inspected or copied within a reasonable time. If Concessionaire fails to provide the public records to the Department within a reasonable time, the Concessionaire may be subject to penalties under s. 119.10, F.S.
2. Upon request from the Department’s custodian of public records, Concessionaire will provide the Department with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes, or as otherwise provided by law.
3. Concessionaire will identify and ensure that all public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the Term of the Agreement and following completion of the Agreement if the Concessionaire does not transfer the records to the Department.
4. Upon completion of the Agreement, Concessionaire will either transfer, at no cost to the Department, all public records in possession of Concessionaire or keep and maintain public records required by the Department to perform the Services under this Agreement. If the Concessionaire transfers all public records to the Department upon completion of the Agreement, the Concessionaire will destroy any duplicate public records that are exempt or confidential and exempt from public disclosure requirements. If the Concessionaire keeps and maintains public records upon completion of the Agreement, the Concessionaire will meet all applicable requirements for retaining public records. All records that are stored electronically must be provided to the Department, upon request from the Department’s custodian of public records, in a format that is accessible by and compatible with the information technology systems of the Department.

d. IF THE CONCESSIONAIRE HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONCESSIONAIRE’S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE DEPARTMENT’S CUSTODIAN OF PUBLIC RECORDS by telephone at (850) 245-2118, by email at ombudsman@dep.state.fl.us, or at the mailing address below:

Department of Environmental Protection

**ATTN: Office of Ombudsman and Public Services
Public Records Request
3900 Commonwealth Blvd, Mail Slot 49
Tallahassee, FL 32399**

- e. Review of terms: Paragraph 23 of the Agreement is hereby deleted in its entirety and replaced with the following language:

“ 23. Review of terms. This Agreement will be reviewed by the parties periodically to determine whether the value of compensation, services provided, and required Capital Improvements are appropriate. The Department may consider the following reasons for altering the compensation: whether the Concessionaire has made Capital Improvements, a significant increase or decrease in use by the public, the Concessionaire's contributions to the Park other than Capital Improvements, a significant increase in the Concessionaire's profits without a comparable increase in value to the Park, a decrease in overhead costs, competitive rates in the marketplace, and other relevant reasons. If the parties mutually determine the value of compensation, Services provided, and Capital Improvements are no longer appropriate, the parties will negotiate until agreement is reached and the parties execute a written amendment to this Agreement. If the parties cannot agree upon the amount to be paid the Department, then the Department will terminate the Agreement after 90 days' written notice to the Concessionaire.”

- f. Sexual predator and offender check: Paragraph 35 of the Agreement is hereby deleted in its entirety and replaced with the following language:

“ 35. Sexual predator and offender investigation. The Concessionaire will not employ within the Park any person who is listed on either the sexual predator or sexual offender list maintained by the Florida Department of Law Enforcement (“FDLE”) or maintained by the U.S. Department of Justice's Dru Sjodin National Sex Offender Public Website (“NSOPW”).

- a. The Concessionaire will conduct a sexual predator and sexual offender investigation on all employees and subcontractors prior to executing this Amendment #1. The Concessionaire will conduct a sexual predator and sexual offender investigation on all employees and subcontractors hired subsequent to execution of this Amendment #1. The Concessionaire will keep a copy of its investigation records in the Concessionaire's personnel files and have those files available to the Department during the Concessionaire's regular office hours.
- b. At the Department's election, the Concessionaire will at its sole cost and expense, conduct criminal and civil, and sexual predator and sexual offender background investigations on all officers prior to executing this Amendment #1. The Concessionaire will at its sole cost and expense, conduct criminal and civil and sexual predator and sexual offender background investigations on all officers elected, hired or otherwise taking office subsequent to execution of this Amendment #1. All background investigations of the Concessionaire's officers required under the provisions of this paragraph will be conducted by an independent third-party entity and the Concessionaire will authorize the investigating entity to release the investigation results directly to the Department's Agreement Manager.

- c. If the Concessionaire or any subcontractor employs a sexual predator or sexual offender or fails to perform the required research of the FDLE list or the NSOPW, the Department may immediately terminate the Agreement for cause.
- d. The Concessionaire will be responsible for including all of the provisions of this paragraph in all subcontracts entered into under the Agreement.”
- g. Safety Plan: Paragraph 7 in Exhibit A of the Agreement is hereby deleted in its entirety and replaced with the following language:

“ 7. Safety Plan: Prior to commencing operations under this Agreement, the Concessionaire will provide a draft Safety Plan to be evaluated by the Department's Safety Officer and Department's Agreement Manager. The Concessionaire will implement a final Safety Plan incorporating the District's and Department's Agreement Manager's comments. The Safety Plan will be revised at least once a year before the Agreement anniversary date, prior to the commencement of any new services, or as otherwise requested by the Department, and the Concessionaire will submit the proposed revision to the Department's Safety Officer and Department's Agreement Manager for evaluation and approval. The Safety Plan will include guidelines for all aspects of the Concessionaire's operation, with special attention to traffic control, first aid, security, fire prevention, health safety and water related activities and equipment. A section of the Safety Plan will be devoted to Emergency Action, which will cover proper preparations and responses to all natural and human-caused emergencies.”

- h. Force majeure event: Paragraph 26 of the Agreement is hereby deleted in its entirety and replaced with the following language:

“ 26. Force majeure event. A force majeure event is an act of God or nature, a strike, lockout or other industrial disturbance, an act of a public enemy, war, blockade, public riot, lightning, fire, flood, explosion, failure to receive timely necessary government or third party approvals, government restraint, pandemic disease, terrorism, threat to homeland security, tornado, hurricane or other severe storms, civil commotion, criminal activity, or any other cause that is not reasonably within the control of the Concessionaire. The following do not constitute force majeure events: (1) failures by the Concessionaire's subcontractor to perform; (2) business losses; or (3) equipment failures.

A force majeure event does not relieve the Concessionaire of any terms of this agreement that can be performed. No commission payment or Utility fees payable to the Department from the Concessionaire will be due for the period during which its operations are totally suspended because of a force majeure event.

The Concessionaire hereby waives all claims for compensation arising from loss or damage sustained from a force majeure event that takes place in or affects the Park, except as outlined in Paragraph E of the Special Conditions of this Agreement. If a force majeure event causes delay or a reasonable likelihood of delay in the Concessionaire's performance, the Concessionaire will promptly notify the Department's Agreement Manager orally, and, within seven calendar days, notify the Department's Agreement Manager in writing of the anticipated length and cause of the delay, the measures to minimize the delay, and the Concessionaire's timetable for implementing these measures. If the parties agree that a delay or anticipated delay has been or will be caused by a force majeure event, time for performance of this Agreement may be extended for a period equal to the delay resulting from the force majeure event. Except as outlined in Paragraph E of

the Special Conditions of this Agreement, such extension is the Concessionaire's sole remedy under this Agreement for a delay caused by a force majeure event. The extension will be confirmed by an amendment to this Agreement, reduced to writing and executed by both parties."

- i. Minimum Accounting Requirements: The following language is added to Paragraph A of Exhibit C of the Agreement:

"10. If receipts exceed \$2,000.00, they will be deposited intact daily. If receipts do not exceed \$2,000.00 a day, they will be deposited intact periodically, which will be no more than a five-day working period. Un-deposited receipts will be stored in a secure manner – a safe is preferable. Validated deposit slips and bank statements supporting amounts deposited will be retained by the Concessionaire."

3. Ratification:

Except as modified by this Amendment #1, the Agreement remains in full force and effect and is hereby ratified and confirmed. This Amendment #1 shall be attached to and incorporated into the Agreement. In the event of a conflict between the Agreement and this Amendment #1, this Amendment #1 will control. Henceforth, the term "Agreement" will mean the Agreement as further amended by this Amendment #1.

5. Execution in Counterparts:

This Amendment #1 may be executed in two identical counterparts, each of which will be deemed an original. The two, executed, identical counterparts will constitute this Amendment #1. If any signature is delivered by facsimile transmission or by e-mail delivery of a ".pdf" format data file, such signature will create a valid and binding obligation of the party executing (or on whose behalf such signature is executed) with the same force and effect as if such facsimile or ".pdf" signature page were an original thereof. Any party transmitting an electronic signature will provide the inked original thereof to the receiving party, at the receiving party's request.

WHEREFORE, the parties hereto have caused this Amendment #1 to be executed as of the day and year last set forth below.

CONCESSIONAIRE:

BG SEBASTIAN INLET, LLC

By: 

President or Authorized Representative

Printed Name: Dane White

Title: COO

DEPARTMENT:

STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION

By: 

12/09/2020

Secretary's signature or designee

Printed Name: Leslie Reed, Chief of Staff

Title: _____

Date: 10-28-20 _____

Date: _____