

CONCESSION AGREEMENT - AMENDMENT #1

(Lovers Key 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 through its Division of Recreation and Parks ("Division"), whose address is 3900 Commonwealth Boulevard, Tallahassee, Leon County, Florida 32399, and Nature Recreation Management of Lee County, LLC. ("Concessionaire") organized as a Florida Limited Liability Company, whose headquarters is 8720 Estero Boulevard, Lee County, Florida 33931.

RECITALS

WHEREAS, on or about December 18, 2018, the Department and Concessionaire entered into a Concession Agreement (DEP Agreement No. CA-0818) (the "Concession Agreement"); and

WHEREAS, pursuant to the Concession Agreement, the Concessionaire agreed to provide the described visitor services within the boundaries of Lovers Key State Park (the "Park"), as such services are more particularly described in the 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 Agreement is hereby deleted in its entirety and replaced with the following language:

" F. Compensation. The Concessionaire will pay the Department a commission fee based on the following schedule and General Conditions, Sections 17 and 18 herein:

1. Compensation Period 1: From December 18, 2018 through November 30, 2019 ("Compensation Period 1"), The Concessionaire will pay the Department a commission fee equal to 17% of Total Gross Sales each month, but not less than \$190,000.00 annually ("Compensation Period 1 Minimum Guarantee"). Concessionaire will also pay 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); and
2. Compensation Period 2: From December 1, 2019 through November 30, 2020 ("Compensation Period 2"), The Concessionaire will pay the Department a commission fee equal to 17% of Total Gross Sales each month, but not less than \$152,000.00 annually ("Compensation Period 2 Minimum Guarantee"). Concessionaire will also pay 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); and
3. Compensation Period 3: From December 1, 2020 through August 31, 2028 ("Compensation Period 3"), The Concessionaire will pay the Department a commission fee equal to 17% of Total Gross Sales each month, but not less than

\$190,000.00 annually ("Compensation Period 3 Minimum Guarantee").
Concessionaire will also pay 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); and

Each Compensation Period Minimum Guarantee above represents the minimum amount due for each 12-month period in each listed Compensation Period. 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 Compensation Period Minimum Guarantee. If a shortfall exists, the Department will notify the Concessionaire of the amount owed within 90 days of the end of the 12-month period. The Concessionaire will remit any shortfall within fifteen (15) days of receiving a notice from the Department.

The Department will adjust the Compensation Period Minimum Guarantee during any Compensation Period 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 Period Minimum Guarantee for the effected Compensation Period 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, shall 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 shall not include:

1. Sales tax collections, or
2. gratuities, or
3. pass through fees, which include:
 - a. Park 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. other fees collected by the Concessionaire 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 shall be accounted for separately at the point of sale. If the Concessionaire is unable to do this, it shall calculate sales tax from gross receipts using a method approved by the Florida Department of Revenue."

- b. Monthly revenue reporting. Paragraph 17 of the General Conditions of the Agreement is hereby deleted in its entirety and replaced with the following language:

" 17. Monthly revenue reporting. The Concessionaire will submit the Monthly Report of Concessionaire's Total Gross Sales ("Monthly Report" detailed in Exhibit D) to the Park Business Development Section by email to FPS.Concession@FloridaDEP.gov. The Concessionaire will submit the report(s) to the Park Business Development Section no later than the 10th day of each month following the month the Gross Sales were collected by the Concessionaire. The Concessionaire will await confirmation of the Monthly Payment amount by the Park Business Development Section before submitting payment as detailed in paragraph 18 of this Agreement."

- c. Accounting. Paragraph 18 is hereby deleted in its entirety, renumbered to paragraph 19, and replaced with the following language:

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

a. Minimum Accounting Requirements and Audit Requirements. The Concessionaire and any subcontractors will document compliance with the Minimum Accounting Requirements detailed in Exhibit C. The Concessionaire and any subcontractors will establish and maintain books, records, and documents directly pertinent to performance under this Agreement according to the Minimum Accounting Requirements and with generally accepted accounting principles. The Department and other appropriate government agencies will have access to all records for audit purposes during the Term of this Agreement and for five years following the Agreement's expiration or termination. The Department will conduct audits at locations and at a frequency determined by the Department or other state agency and communicated to the Concessionaire and any subcontractor. The Concessionaire and any subcontractor will provide materials for the audit at the designated place within 20 days after receiving the Department's or other government agency's notice. In addition, the Department may require the Concessionaire, and any subcontractor, to procure an annual financial audit of the Concessionaire's or subcontractor's operations if the appropriate government agency's audit shows that the Limited Engagement document (prepared pursuant to subsection f, below) shows a gross sales discrepancy of greater than five percent (5%) from such agency's audit. The audit will be conducted by a Certified Public Accountant at the Concessionaire's or subcontractor's expense. The Concessionaire agrees the 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 90 days by the Department.

b. Monthly Report of Total Gross Sales. The Concessionaire will provide the Department with a Monthly Report of Concessionaire's Total Gross Sales. This report will include gross sales attributable to all subcontracts and be in the form attached hereto as Exhibit D, as it may be modified by the Department from time to time. Each monthly report will contain the required detail based upon Total Gross Sales for such month by point of sale. The Concessionaire will deliver the report and required payment(s) to the Park Business Development Section by email to FPS.Concession@FloridaDEP.gov no later than the 10th 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 as Exhibit F. The statement will include the results of the Concessionaire's operations for each calendar year or portion thereof. The statement will be delivered to the Park Business Development Section by email to FPS.Concession@FloridaDEP.gov no later than April 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 d. above.

e. Limited Engagement document. If, during any calendar year where this Agreement is effective, the annual Total Gross Sales from the Concessionaire's Services under this Agreement exceed \$400,000, the Concessionaire will obtain and submit, at its cost, a limited engagement document, prepared in accordance with the Agreed-Upon Procedures for a Certified Public Accountant specified in Exhibit G. Such limited engagement document will be conducted in accordance with generally accepted auditing and accounting principles. The limited engagement

document will be submitted to the Park Business Development Section by email to FPS.Concession@FloridaDEP.gov 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 tax on commission fees. If it is tax exempt, the Concessionaire will provide the Department with verification of its tax-exempt status by completing the State Use Tax Exempt Certification form attached hereto as Exhibit H. The Concessionaire will provide its completed certification form to the Department at the time it delivers the executed Agreement to the Department.

g. Purchasing card industry ("PCI"). The Concessionaire will be responsible, at Concessionaire's cost, for complying with the PCI Data Security Standards ("PCIDSS"), which include a set of comprehensive requirements for enhancing payment account data security. The PCI DSS standards can be found at the PCI Security Standards Council website <https://www.pcisecuritystandards.org/>. The Concessionaire may obtain additional information through the Florida Department of Financial Services ("DFS"), which coordinates the State of Florida's efforts directly with the PCI Security Standards Council. Prior to beginning operations, the Concessionaire will ensure that the required data security measures are in place by submitting a completed Self-Assessment Questionnaire ("SAQ") to the Department. The Concessionaire will submit an updated SAQ to the Park Business Development Section by email to FPS.Concession@FloridaDEP.gov annually on the anniversary of the Agreement commencement date. 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 amendment to or update of the PCI DSS. The Concessionaire, at its cost, is required to modify its annual SAQ to comply with the most current version of the PCI DSS."

d. Monthly fee payment. A new paragraph 18 is hereby inserted with the following language:

" 18. Monthly fee payment. The Concessionaire will submit the monthly commission fee, plus the State Use Tax and any other fees or payments due ("Monthly Payment") through the Park Manager. The Concessionaire will submit the funds to the Park Manager no later than the 20th day of each month following the month the Gross Sales were collected by the Concessionaire. The Department will assess a late fee in the amount of 1% of the current amount due for each day the Monthly Payment is late. The Department may waive the late fee based on documented circumstances beyond the Concessionaire's reasonable control. If the Concessionaire fails to submit the Monthly Payment and accumulated late fees within 30 days of the normal monthly payment deadline, the Department may either suspend the Concessionaire's performance of Services under this Agreement until the Department receives full payment or terminate this Agreement for cause and begin procedures to collect the Security Deposit. When the Department completes a system for accepting electronic payments from concessionaires, the Concessionaire agrees to use the system for making or delivering its monthly payments to the Department. Concessionaire's agreement to use the system is contingent upon there being no fee or a nominal fee to use the system. "

e. Public records. Paragraph 19 is hereby renumbered to paragraph 20. The email address ombudsman@dep.state.fl.us is hereby deleted and replaced with "Public.Services@FloridaDEP.gov."

f. No vested real property right; Violation of grant terms. Paragraph 20 is hereby renumbered to paragraph 21.

g. Termination. Paragraph 21 is hereby renumbered to paragraph 22.

- h. Equipment and other tangible property. Paragraph 22 is hereby renumbered to paragraph 23.
- i. Review of terms. Paragraph 23 is hereby renumbered to paragraph 24.
- j. Insurance coverage. Paragraph 24 of the General Conditions of the Agreement is hereby renumbered to paragraph 25, deleted in its entirety and replaced with the following language:

“ 25. Insurance coverage. The Concessionaire's failure to comply with any part of the insurance requirements is considered a material breach and will be cause for termination by the Department. All insurance policies will name the Florida Department of Environmental Protection and the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (“Board of Trustees”) as Additional Named Insureds for the entire Term of the Agreement, including all extensions, if any. The Concessionaire may not begin Services under this Agreement prior to compliance with these insurance requirements. Compliance with these requirements does not relieve the Concessionaire of liability under any portion of this Agreement. All insurance obtained by the Concessionaire in accordance with this Agreement will include a Hold Harmless Agreement in favor of the Department and the Board of Trustees. All insurance policies will include the DEP Agreement No. on the certificate. The Concessionaire will submit insurance policy certificates to the Park Business Development Section by email to FPS.Concession@FloridaDEP.gov and will list the Park Manager's name, Lovers Key State Park, and mailing address, as listed in Paragraph G of the Special Conditions of this Agreement, as the insurance policy certificate holder. All insurance policies will be with insurers licensed or eligible to do business in the State of Florida. The Concessionaire's current certificate of insurance will contain a provision that the insurance will not be canceled for any reason except after 30 days prior written notice to the Department or its designee, except for nonpayment of insurance premium, which will be handled in accordance with Florida law. The Concessionaire will provide evidence of its current insurance coverage to the Department prior to beginning any activity permitted by this Agreement. All required insurance policies will remain in full force and effect throughout the term of this Agreement. Evidence of all policy renewals will be provided to the Park Business Development Section by email to FPS.Concession@FloridaDEP.gov, at the time of every renewal of the policy and prior to any extension of this Agreement. The Department reserves the right to request copies of insurance policies for examination and copying at any time during the Term of the Agreement. Required per occurrence and aggregate loss limits for insurance coverage of the Concessionaire's services under this Agreement will not be subject to dilution or reduction by any other insurable loss or interest of the Concessionaire under the policy. Any releases required by the Concessionaire's insurer to be signed by members of the public may be used in accordance with applicable law. To the extent releases are used, the release will also release the Department and the Board of Trustees, in addition to the Concessionaire, and must be pre-approved in writing by the Department. If, at any time, the Department deems it necessary, the Concessionaire will obtain liability waivers signed by members of the public. Waivers seeking parents' or guardians' signature on behalf of a minor will comply with the form requirements set forth in Section 744.301, Florida Statutes.

The Concessionaire will secure and maintain the following types of insurance covering its operations under this Agreement:

- a. Liability. The Concessionaire will secure and maintain Commercial General Liability insurance, including bodily injury, property damage, personal and advertising injury, coverage for factors relevant to the Concessionaire's business, personal and property damage, and provide coverage for contents of the Facilities and space, including additional products, services, and expansion of the Concessionaire's Services. Insurance coverage must include

coverage for all claims that may arise from the Services and operations provided under this Agreement, whether such Services and operations are by the Concessionaire or someone directly or indirectly employed by the Concessionaire. The minimum limits of liability will be \$1,000,000 for each occurrence and \$2,000,000 in the aggregate.

b. Automotive. The Concessionaire will secure and maintain Commercial Automobile Liability insurance for company-owned vehicles and for hired and non-owned vehicles that are used to conduct business and provide Services. For these vehicles, the Concessionaire will have a minimum combined single limit of \$1,000,000. Commercial Automobile Liability insurance coverage may be provided as either vehicle specific coverage or as a coverage for the business use as a rider on the Concessionaire's general liability insurance policy.

c. Other as needed. The Department may require other insurance under this Agreement for the unique operations, recreations, or facilities provided and any unique hazards arising from them. Examples include liability for the operation of vessels, water sports, operation of other motorized vehicles, and diving and snorkeling. The Concessionaire must provide its own insurance for boat hulls, building contents, theft, vehicle comprehensive, and any other applicable insurance. The Concessionaire understands the State's insurance does not cover the Concessionaire's personal property or business losses in the Park. The Concessionaire is advised to thoroughly research its insurance needs prior to executing this Agreement.

d. Workers' Compensation. The Concessionaire will maintain Workers' Compensation insurance for all of its employees for the duration of this Agreement. The Concessionaire will provide evidence of the coverage to the Department prior to starting Services under this Agreement. The self-insurance program or insurance coverage will comply fully with the Florida Workers' Compensation Law and the Merchant Marine Act of 1920 (P.L. 66-261), commonly known as the Jones Act, including any subsequent amendments or conditions. If any employees engaged in work under this Agreement are not protected under Workers' Compensation statutes, the Concessionaire will provide adequate insurance, satisfactory to the Department, for the protection of its non-covered employees."

- k. Risk in operation. Paragraph 25 is hereby renumbered to paragraph 26.
- l. Force majeure event. Paragraph 26 is hereby renumbered to paragraph 27.
- m. Waiver in light of force majeure event. Paragraph 27 is hereby renumbered to paragraph 28.
- n. Natural and cultural resources. Paragraph 28 is hereby renumbered to paragraph 29.
- o. Recyclables or biodegradable materials. Paragraph 29 is hereby renumbered to paragraph 30.
- p. Intellectual Property. Paragraph 30 is hereby renumbered to paragraph 31.
- q. Federal, state, and local laws. Paragraph 31 is hereby renumbered to paragraph 32.
- r. Civil Rights Act. Paragraph 32 is hereby renumbered to paragraph 33.
- s. Unauthorized aliens. Paragraph 33 is hereby renumbered to paragraph 34.
- t. E-Verify Employment Eligibility Verification. Paragraph 34 is hereby renumbered to paragraph 35.

- u. Sexual predator and offender check. Paragraph 35 of the General Conditions of the Agreement is hereby renumbered to paragraph 36, deleted in its entirety and replaced with the following language:

“ 36. 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 Agreement. The Concessionaire will conduct a sexual predator and sexual offender investigation on all employees and subcontractors hired subsequent to execution of this Agreement. 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 Agreement. 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 Agreement. 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 Park Business Development Section by email to FPS.Concession@FloridaDEP.gov.
 - 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 this Agreement for cause.
 - d. The Concessionaire will be responsible for including all of the provisions of this paragraph in all subcontracts entered into under this Agreement.”
- v. Public Entity Crime; Convicted Vendor. Paragraph 36 is hereby renumbered to paragraph 37.
 - w. Indemnification. Paragraph 37 is hereby renumbered to paragraph 38.
 - x. State of Florida Department of Environmental Protection employees act in representative capacity. Paragraph 38 is hereby renumbered to paragraph 39.
 - y. Appropriation by Legislature. Paragraph 39 is hereby renumbered to paragraph 40.
 - z. Limitation of damages. Paragraph 40 is hereby renumbered to paragraph 41.
 - aa. Delivered under laws of Florida and action brought in Leon County. Paragraph 41 is hereby renumbered to paragraph 42.

- bb. Delay and failure to exercise right will not impair right. Paragraph 42 is hereby renumbered to paragraph 43.
- cc. No interest given to any third party. Paragraph 43 is hereby renumbered to paragraph 44.
- dd. Bona fide employee. Paragraph 44 is hereby renumbered to paragraph 45.
- ee. Time is of the essence. Paragraph 45 is hereby renumbered to paragraph 46.
- ff. Severability. Paragraph 46 is hereby renumbered to paragraph 47.
- gg. Conflict. Paragraph 47 is hereby renumbered to paragraph 48.
- hh. Entire agreement. Paragraph 48 is hereby renumbered to paragraph 49.
- ii. Acceptance of terms per signature. Paragraph 49 is hereby renumbered to paragraph 50.
- jj. Counterparts; electronic signature. Paragraph 50 is hereby renumbered to paragraph 51.
- kk. 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 shall cover proper preparations and responses to all natural and man-made disasters.”

II. 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 will be attached to the original Agreement. In the event of a conflict between the Agreement and this Amendment #1, this Amendment #1 will control. Henceforth, the term “Agreement” will collectively mean the Agreement, as amended by this Amendment #1.

4. 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. In the event that 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:

NATURE RECREATION MANAGEMENT OF
LEE COUNTY, INC.

By: 

President or Authorized Signatory

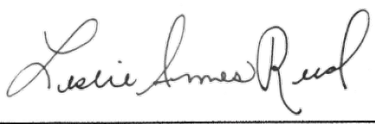
Print Name: Todd J. Richards

Print Title: Managing Member

Date: 3/1/2021

DEPARTMENT:

STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION

By: 

Secretary's Signature or Designee

Print Name: Leslie Reed

Print Title: Chief of Staff

Date: 06/02/2021