

2013 FACILITY USE AGREEMENT
CITY OF PFLUGERVILLE - PARKS & RECREATION DEPARTMENT
KAYAK/CANOE RENTAL CONCESSION AT LAKE PFLUGERVILLE

This Agreement is made by and between Pflugfun Watercraft Rentals (hereinafter referred to as the "Concessionaire"), and the City of Pflugerville, Texas (hereinafter referred to as the "City"). Wherever in this Agreement the term "Concessionaire" is used, it shall include Concessionaire and any of its employees, servants, agents, or representatives.

1. Purpose. The Concessionaire is to provide kayak and canoe concessions at Lake Pflugerville Park as set forth herein for the purpose of providing a location for watercraft rentals and services.

2. Use of Park. The City hereby agrees to assign the concession at Lake Pflugerville Park on a non-exclusive basis and for the purpose herein expressed to the Concessionaire for the period March 2013 through October 2013. During such period, the Concessionaire shall have the right to use the park and lake upon such hours as may be set by the City from time to time after presentation and approval of a proposed schedule by the Concessionaire. In consideration thereof, the Concessionaire agrees to pay to the City 15% of the gross revenues of any and all rentals, sales, and lessons. The Concessionaire shall pay such monies to the City on or before the last day of each month. The facility use agreement may be extended in one-year (1) increments twice with the mutual consent of both parties. The total length of this agreement will not exceed three (3) years.

3. Accounting. Upon three days written notice, the Concessionaire agrees to provide the City with access to all of its books and financial records, including, but not limited to, accounting records and banking records, in order to verify the amount of payments due to the City. The Concessionaire shall provide to the City an accounting of all Concession transactions including but not limited to any and all other sales or services provided.

4. Termination. The Concessionaire may terminate this Agreement upon submission of a 30 day written notice to the City. The City may terminate this Agreement: A) Upon submission of 30-day written notice "without cause"; or B) Immediately upon submission of written notice "for cause". All notices must be written and transmitted by certified mail.

5. Independent Contractor. The Concessionaire hereby agrees and acknowledges that it is an independent contractor and that its programs offered and services performed shall be and are independent of the City's supervision, oversight, direction, or control.

6. Concessionaire Obligations.

A. Provide all equipment, materials, labor, tools, and personnel necessary for proper operation of a quality watercraft rental concession operation.

a. Concessionaire shall provide all Personal Flotation Devices (PFDs) approved by the US Coast Guard, in serviceable condition, readily accessible and of appropriate size for intended user.

- b. All vessels must be equipped with one Type I, II, III, or V wearable PFD for each person on board. A Type V PFD is acceptable only if used in accordance with the specific instructions on the label of the device.
- c. Concessionaire shall assure all watercraft are in proper repair and operating order at all times.
- d. Concessionaire shall permit no loitering at the site.
- e. Concessionaire shall permit no glass containers on park property and must enforce said rule with customers.
- f. All material and services provided by the Concessionaire shall comply with all current Federal, State and Local boating laws and regulations, as well as City of Pflugerville ordinances, rules and regulations.

B. Concessionaire may sell other appropriate items such as souvenir items, prepackaged food, beverages (no alcohol) and other items as approved by the Director of Parks and Recreation.

C. The Concessionaire shall employ a number of people sufficient to meet the demands of the public at the contract premises. The staff shall be uniformed in a manner consistent with a quality operation acceptable to the City. The Concessionaire shall conduct a criminal background check on each employee by obtaining a Texas Department of Public Safety criminal history report and providing a copy of said report to the Director of Parks and Recreation of the City . Any applicant possessing a criminal history that includes a conviction for a Class A Misdemeanor within the past 10 years or any felony regardless of time period is ineligible for employment.

D Provide a plan to introduce Parks and Recreation Pfun Camp participants to beginning kayaking/canoeing skills.

E. Remove trash generated by the program from the park, lake and adjacent areas at the conclusion of each day of operation.

F The Concessionaire shall provide and post a list of rental prices and all other items offered for sale. The hours of operation and the Parks and Recreation Department's phone number for information and complaints shall be posted.

G. Ensure that its employees and the enrollees in the program shall use the park and lake in a normal manner, and shall not abuse, injure, or damage the park, lake, or facilities.

H. Timely investigate and promptly report to the City Parks & Recreation Department any and all injuries or damages to persons or property at the park and lake during the hours of the Concessionaire's use.

I. Do not sublet the use of the park or lake to any person or group of persons, unless approved in advance and in writing by the City.

J. Do not deny the general public access to the park or lake.

K. Designate and identify a contact person who will represent the Concessionaire before the City's Parks & Recreation Department regarding this Agreement.

L. Concessionaire shall provide marketing for the concession. All signage posted by Concessionaire must be approved by the City beforehand. Contractor shall permit no advertising at or on the building other than Concessionaire 's business signs.

M. Concessionaire must submit to a criminal background check prior to any agreement.

N. Concessionaire shall provide and bear the cost of complete maintenance services for the watercraft rental.

O. The Concessionaire shall not make any structural alterations, repairs, or improvements of the premises, without the written permission from the Director of the Parks and Recreation Department.

P. Concession facilities and premises shall be maintained in good condition and repair.

Q. The Concessionaire must use a cash register to enter all cash transactions with the capacity to provide each customer with a printed receipt. This cash register shall have a grand total, started at zero upon commencing business. In addition, this cash register shall be equipped with the capability to print out daily sales totals (Z tape).

7. City Obligations.

A. Provide a location to store the rental boats.

B. Provide trash receptacles.

C. Designate and identify a contact person who will represent the City regarding this Agreement.

D. Help with the advertisement of the watercraft rental through posting information on the City's website, public access channel and Parks and Recreation Department's print and electronic media.

E. In case of park closure, the City will make every effort to notify the Concessionaire.

8. Minimum Hours of Operation*.

Concessionaire may set its own days and hours of operation so long as the days and hours meet the below minimum:

From Memorial Day through labor Day Each Year

Peak Period: Five days a week from Memorial Day through Labor Day.

Wednesday --Friday 2 pm to 8 pm

Saturday – Sunday: 9 am to 8 pm

Other calendar periods unregulated.

*Concessionaire may operate more days or hours than the stated minimum requirement; however any operation beyond the minimum operation days and hours set forth in this agreement must be approved 72 hours in advance by the Director of Parks and Recreation.

9. Minimum Number and Types of Rentals. There shall be enough kayaks and canoes available to keep up with the demand for rentals.

10. Pricing Requirements. Rental prices, including price changes, the rental rules and all other relations of the Concessionaire with the public, shall be subject to approval by the City. The Concessionaire's pricing shall be in line with the going market rate in the prevailing Austin Metropolitan area. The prices shall remain the same for a minimum of one (1) year. After one (1) year, the Parks and Recreation Department must be notified of any proposed changes in prices or items sold 60 days prior to the suggested change in price going into effect. All changes in prices or items sold must be approved, denied or modified by the Director of Parks and Recreation within 30 days after a request to change process is submitted.

11. Payments. The Concessionaire agrees to pay the City **15% of the gross revenue of any and all rentals, sales and lessons.** "Gross revenue" as used in this contract shall be defined as all income of whatever nature is received by or accrued by Concessionaire, arising from the operation of the concession and for services performed under this contract by the Concessionaire including, but not limited to boat rental, instruction fees, nonrefundable deposits, and the sale of all appropriate related items, such as souvenir items, and prepackaged food or beverage, and other items as approved. Gross revenue is total receipts before the deduction of any costs or expenses whatsoever; provided, however, that gross revenue shall exclude any sales taxes. The contractor shall pay such monies to the City on or before the last day of each month. In addition, an itemized Monthly Concession Report shall be submitted with monthly payment. This report must include but not be limited to a complete listing of daily sales by item sold, with a daily revenue tally, daily sales tax tally, and a daily net revenue tally. In addition, monthly totals of each line item, including total amount due to the City of Pflugerville. Attached to this report shall be the daily cash register Z tapes.

12. Complaints. The Concessionaire shall assume full and complete responsibility for handling and resolving any and all complaints concerning the Concessionaire's operations, sales or service provided.

13. INDEMNITY. THE CONCESSIONAIRE AGREES TO INDEMNIFY AND HOLD HARMLESS THE CITY OF PFLUGERVILLE, ITS MAYOR, CITY COUNCIL, EMPLOYEES, AGENTS, SERVANTS, AND REPRESENTATIVES FROM ANY AND ALL CLAIMS, LOSSES, DAMAGES, CAUSES OF ACTION, SUITS AND LIABILITY OF EVERY KIND OR CHARACTER, INCLUDING ALL EXPENSES OF LITIGATION, COURT COSTS, AND ATTORNEY'S FEES FOR INJURY TO OR DEATH OF ANY PERSON OR FOR DAMAGE TO ANY PROPERTY ARISING IN TORT, OUT OF OR IN CONNECTION WITH THE CONCESSIONAIRE'S USE OF THE PARK OR LAKE PURSUANT TO THIS AGREEMENT, WHERE SUCH CLAIMS, LOSSES, DAMAGES, CAUSES OF ACTION, SUITS, OR LIABILITY OF ANY KIND OR CHARACTER ARISE, IN WHOLE OR IN PART, FROM THE ACTS, CONDUCT, OR OMISSIONS OF THE CONCESSIONAIRE AND/OR ITS EMPLOYEES, SERVANTS, AGENTS OR REPRESENTATIVES.

14. Insurance. The Concessionaire shall procure and maintain in force for the duration of this contract liability insurance against any claim for injury to a person or damage to property which may arise from, or in connection with, the use of the park or lake by the Concessionaire and its agents, representatives, volunteers, employees, subcontractors, invitees, and all enrollees in the Concessionaire's program. Such liability insurance shall be in an amount not less than \$300,000 per person and \$1,000,000 per occurrence. The Concessionaire shall procure and maintain such insurance coverage at its own expense. The Concessionaire shall provide proof of insurance prior to the execution of this Agreement and at such other times as demanded by the City. The Concessionaire shall ensure that the City is named as an additional insured on such policy. The Concessionaire shall provide a Certificate of Insurance with the types and amounts of coverage within 14 calendar days of notification of award.

15. Notice. Notices required by this Agreement shall be submitted to the persons and/or organizations, as follows:

A. Notices to the City shall be directed to:

City of Pflugerville
Parks & Recreation Director
P.O. Box 589
Pflugerville, TX 78691

B. Notices to the Concessionaire shall be directed to:

Mr. Randy Martin
Sole Proprietor
Pflugfun Watercraft Rentals
12010 Stout Oak Trail
Austin, TX 78750

The Parties may later designate in writing any other individual or entity to whom notices or referrals shall be submitted.

16. Closure of Park and Lake. The City reserves the right to close the Park and/or Lake at any time and under any conditions deemed necessary for public safety. The Concessionaire hereby waives, releases, discharges and disclaims any and all claims, causes of action, losses, liability, damages or injuries relating to any closure of the park or lake by the City and further agrees to indemnify and hold harmless the City, its Mayor, City Council, employees, agents, servants, and representatives from any and all claims, losses, damages, causes of action, suits, and liability of any kind or character, including all expenses of litigation, court costs and attorney's fees, resulting from any closure of the park and/or lake by the City. Every effort will be used to notify the Concessionaire when a closure occurs.

17. City Right to Operate Concession. The City reserves the right to take over and operate the Concessionaire's operations sales and services on Lake Pflugerville, using the equipment of the

Concessionaire, at any time during which Concessionaire is unable to perform under this agreement. Should City operation become necessary, the Director of the Parks and Recreation Department or his designee shall, when practical, give the Concessionaire notice of such intention to operate the concession by mailing notice of intention to Concessionaire at his last known address by regular United States mail. The City shall render an accounting to Concessionaire of all business done during such City operation. In addition, all such gross sales shall be included in the calculation of annual gross sales to be reported to the City by the Concessionaire as provided for elsewhere in this Agreement, and included in the calculation of payments as provided in Paragraph 11.

18. Retention of Improvements. Should the City terminate this Agreement resulting from the Concessionaire's breach, the City shall be entitled to keep any improvements made by the Concessionaire. Concessionaire shall be given credit against the minimum amount that would have been due to the City for the balance of the term of the Agreement.

19. Governing Law & Venue. This Agreement shall be governed by and is to be construed, interpreted and enforced in accordance with the laws of the State of Texas and of the United States of America. The Concessionaire and the City agree and consent to the exclusive jurisdiction of the District Courts and County Courts at Law of Travis County, Texas, and of the United States District Court for the Western District of Texas (Austin Division) and acknowledge that such courts shall constitute proper and convenient forums for the resolution of any actions between the Concessionaire and the City and agree that such courts shall be the exclusive forums for the resolution of any actions between the Concessionaire and the City.

20. Severability. If any provision of this Agreement is found to be invalid, illegal, or unenforceable for any reason, the Concessionaire and the City intend and agree that such provision is fully severable. If any provision of this Agreement is found to be invalid, illegal, or unenforceable for any reason, the Concessionaire and the City intend and agree that such provision is fully severable and that the remaining parts of the Agreement shall be effective and fully operative.

21. Entire Agreement. This Agreement sets forth the entire understanding and agreement of the parties. All other oral agreements by the parties hereto are hereby merged into this Agreement, which shall not be amended or altered except by a written document signed by the parties hereto.

22. Representations and Warranties by Concessionaire. If Concessionaire is a corporation, partnership or a limited liability company, Concessionaire warrants, represents, covenants, and agrees that it is duly organized, validly existing and in good standing under the laws of the state of its incorporation or organization and is duly authorized and in good standing to conduct business in the State of Texas, that it has all necessary power and has received all necessary approvals to execute and deliver the Agreement, and the individual executing the Agreement on behalf of Concessionaire has been duly authorized to act for and bind Concessionaire.

23. Franchise Tax Certification. A corporate or limited liability company Concessionaire certifies that it is not currently delinquent in the payment of any Franchise Taxes due under Chapter 171 of the Texas Tax Code, or that the corporation or limited liability company is exempt from the payment of such taxes, or

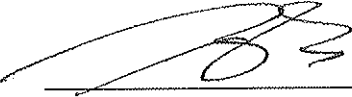
that the corporation or limited liability company is an out-of-state corporation or limited liability company that is not subject to the Texas Franchise Tax, whichever is applicable.

24. Eligibility Certification. Concessionaire certifies that the individual or business entity named in the Agreement is not ineligible to receive the award of or payments under the Agreement and acknowledges that the Agreement may be terminated and payment withheld if this certification is inaccurate.

25. Payment of Debt or Delinquency to the State or Political Subdivision of the State. Pursuant to Chapter 38, City of Pflugerville Code of Ordinances, Concessionaire agrees that any payments owed to Concessionaire under the Agreement may be applied directly toward any debt or delinquency that Concessionaire owes the City of Pflugerville, State of Texas or any political subdivision of the State of Texas regardless of when it arises, until such debt or delinquency is paid in full.

26. Texas Family Code Child Support Certification. Concessionaire certifies that no owner, partner or officer of the company is delinquent in child support obligations and therefore is not ineligible to receive the award of or payments under the Agreement and acknowledges that the Agreement may be terminated and payment may be withheld if this certification is inaccurate.

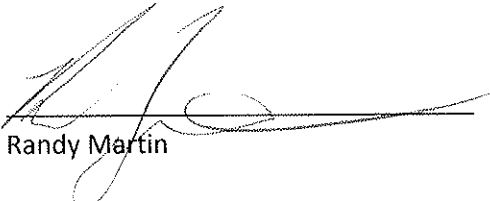
CITY OF PFLUGERVILLE

By: 

Brandon Wade, City Manager

Date: 2-28-13

CONCESSIONAIRE

By: 

Randy Martin

Date: 2-7-13