



Lake County Forest Preserves

General Offices
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DATE: February 28, 2022

MEMO TO: Jessica Vealitzek, Chair
Operations Committee

Julie Simpson, Chair
Finance Committee

FROM: Nan Buckardt
Director of Education

RECOMMENDATION: Recommend approval of an Ordinance approving an interim License Agreement with Possibility Place Nursery (PPN) to provide plants and support services for an online annual Native Plant Sale and authorize either party, by April 1, 2022, to suspend the Five-Year License Agreement.

STRATEGIC DIRECTION SUPPORTED: Organizational Sustainability

FINANCIAL DATA: The net revenue from the on-line 2022 Native Plant Sale is anticipated to be approximately \$7,000.00. If the parties proceed with the traditional “in person” 2022 Native Plant Sale, revenue is anticipated to be approximately \$20,000.00.

BACKGROUND: The Lake County Forest Preserve District has worked with PPN as its Native Plant Sale vendor since 2008. The District and PPN currently have a five-year license agreement pursuant to which PPN conducts the District’s annual Native Plant Sale (the “Five-Year License Agreement”). PPN provides high quality products for Native Plant Sale customers and the Five-Year License Agreement is economically advantageous to the District.

The initial term of the Five-Year License Agreement with PPN expires on December 31, 2022. Because of health concerns associated with the on-going COVID-19 pandemic, the District and Possibility Place desire to enter into the Interim License Agreement attached to the attached ordinance, which would for 2022 (i) give each party the option to suspend the in-person Native Plant Sale to be held under the Five-Year License Agreement (and if neither party suspends, the in-person sale would proceed) and (ii) whether or not the in-person sale is suspended, provide for Possibility Place to conduct an online Native Plant Sale commencing on March 15, 2022 at 12:01 a.m. and ending on October 31, 2022 at 11:59 p.m. In both 2020 and 2021, the District and Possibility Place entered into similar Interim Agreements for the Native Plant Sale (although those agreements did not provide for a possible in-person sale).

The Interim License Agreement requires Possibility Place Nursery to provide for a virtual plant sale, in which (i) Possibility Place will provide an online portal to conduct the sale and receive, process, and deliver all plant orders and (ii) the District will promote the sale (promotion activities will include promoting the sale on the District website and providing social media links to the sale portal). The District will receive commissions on all sales as follows: 10% on the first 200 orders and an additional .5%, cumulative, on each 50 orders thereafter until 13% is reached.

The virtual plant sale still allows the District to achieve the goals of the sale: to provide local native plant stock to the public while providing revenue for the District (though at a reduced rate in this situation). In addition, the virtual plant sale will minimize any public health risks for plant sale purchasers, vendor staff and District staff and volunteers.

REVIEW BY OTHERS: Chief Operations Officer, Finance Director, Education Manager, Corporate Counsel.

**LAKE COUNTY FOREST PRESERVE DISTRICT
LAKE COUNTY, ILLINOIS**

**AN ORDINANCE APPROVING AN INTERIM LICENSE AGREEMENT
WITH POSSIBILITY PLACE NURSERY FOR THE 2022 NATIVE PLANT SALE**

WHEREAS, on May 8, 2018, the Lake County Forest Preserve District (the "District") and Possibility Place Nursery (the "Licensee") entered into a five-year license agreement, pursuant to which (i) the Licensee sells native plants and provides other services related to the District's annual Native Plant Sale, (ii) the District allows the Licensee to conduct the annual Native Plant Sale at the District's Independence Grove Forest Preserve, and (iii) the Company shares its gross receipts from the Native Plant Sale with the District (the "Five-Year Agreement"); and

WHEREAS, the Five-Year Agreement has a term commencing on May 8, 2018, and ending on December 31, 2022, unless sooner terminated or extended as provided in the Five-Year Agreement (the "Five-Year Term"); and

WHEREAS, because of health concerns associated with the ongoing COVID-19 pandemic, the District and Licensee desire to enter into an interim license agreement, in substantially the form attached hereto (the "Interim License Agreement"), pursuant to which they would agree that (i) each party may suspend the in-person Native Plant Sale to be held in 2022 under the Five-Year Agreement (the "2022 In-Person Native Plant Sale"), and if neither party suspends, the 2022 In-Person Native Plant Sale would proceed and (ii) whether or not the 2022 In-Person Native Plant Sale is suspended, Licensee will conduct an online Native Plant Sale commencing on March 15, 2022 at 12:01 a.m. and ending on October 31, 2022 at 11:59 p.m. (the "2022 Online Native Plant Sale"); and (iii) Licensee would share revenue from the 2022 Online Native Plant Sale with the District; and

NOW, THEREFORE, BE IT ORDAINED by the Board of Commissioners of the Lake County Forest Preserve District, Lake County, Illinois THAT:

Section 1. Recitals. The recitals set forth above are incorporated as part of this Ordinance by this reference.

Section 2. Approval of Interim License Agreement; Delegation of Authority to Executive Director. The Interim License Agreement with Possibility Place Nursery, in substantially the form attached hereto, is hereby approved. The Executive Director is hereby authorized to (i) determine whether a 2022 In-Person Native Plant Sale is appropriate in light of then-existing public health conditions and whether to deliver, on or prior to April 1, 2022, the Suspension Notice provided for in the Interim Agreement, based on such public health conditions and (ii) if neither party to the Interim License Agreement sends a Suspension Notice, and if he determines it is appropriate to do so in light of public health concerns, approve an amendment to the Five-Year Agreement that (a) changes the location of the In-Person Native Plant Sale to a venue that allows greater social distancing or (b) otherwise addresses public health concerns.

Section 3. Effective Date. This Ordinance shall be in full force and effect from and after its passage and approval in the manner provided by law.

PASSED this _____ day of _____, 2022

AYES:

NAYS:

APPROVED this _____ day of _____, 2022

Angelo D. Kyle, President
Lake County Forest Preserve District

ATTEST:

Julie Gragnani, Secretary
Lake County Forest Preserve District

Exhibit No. _____

**LAKE COUNTY FOREST PRESERVE DISTRICT
2022 NATIVE PLANT SALE INTERIM AGREEMENT**

This Agreement (the "Interim Agreement"), made as of March ____, 2022 (the "Effective Date"), by and between the Lake County Forest Preserve District, an Illinois unit of local government and a political subdivision, with its principal office located at 1899 West Winchester Road, Libertyville, Illinois 60048 (the "District"), and Possibility Place Nursery, Incorporated, an Illinois Corporation (the "Company"),

WITNESSETH:

WHEREAS, District and Company entered into an agreement on May 8, 2018, pursuant to which the parties agreed, among other matters, that (i) Company would sell native plants and provide other services related to District's annual Native Plant Sale, (ii) District would allow Company to conduct the annual Native Plant Sale at District's Independence Grove Forest Preserve, and (iii) Company would share its gross receipts from the Native Plant Sale with District (the "Five-Year Agreement"); and

WHEREAS, the Five-Year Agreement has a term commencing on May 8, 2018, and ending on December 31, 2022, unless sooner terminated or extended as provided in the Five-Year Agreement (the "Five-Year Term"); and

WHEREAS, because of health concerns associated with the ongoing COVID-19 pandemic, and the uncertainty concerning the impacts such health concerns will have on the 2022 annual Native Plant Sale that would be held under the Five-Year Agreement, District and Company desire to (i) give each party the right to suspend the parties' rights and obligations under the Five-Year Agreement and (ii) whether or not a party suspends the parties' rights and obligations under the Five-Year Agreement, for 2022, conduct an online Native Plant Sale (the "2022 Online Native Plant Sale") commencing on March 15, 2022 at 12:01 a.m. and ending on October 31, 2022 at 11:59 p.m. (the "Temporary Term"); and

NOW, THEREFORE, in consideration of the recitals set forth above and the mutual covenants and agreements set forth below, the parties do hereby agree as follows:

SECTION 1. RECITALS. The recitals set forth above are by this reference incorporated into, and made a part of, this Interim Agreement.

SECTION 2. RIGHT TO SUSPEND FIVE-YEAR AGREEMENT. Either party may suspend both parties' rights and obligations under the Five-Year Agreement by providing the other party with written notice, that is received by the other party on or before April 1, 2022, that the first party desires to suspend such rights (a "Suspension Notice"). If a party timely delivers a Suspension Notice to the other party, then the Five-Year Agreement will be suspended from the date the other party receives such Suspension Notice through the end of the Temporary Term. If neither party timely delivers a Suspension Notice to the other party, then the Five-Year Agreement will remain in full force and effect and the parties shall provide for the 2022 Annual Native Plant Sale as set forth in the Five-Year Agreement.

SECTION 3. DEDICATED LINK; PROMOTION. On the Effective Date, Company shall provide to District a dedicated website link for purposes of promoting the 2022 Online Native Plant Sale (the "Dedicated Link"). District, at its cost, shall promote the 2022 Online Native Plant Sale to the general public by making the Dedicated Link available via its website, social media, and other means.

SECTION 4. FULFILLMENT OF ORDERS. Company shall, absent circumstances outside of its control, take all actions necessary to fulfill all orders placed to Company via the Dedicated Link

during the 2022 Online Native Plant Sale ("Sales"), including, without limitation, by receiving and processing the orders and the payments therefor and by delivering the orders to the customers in a timely and commercially reasonable manner. Regarding the 2022 Online Native Plant Sale, Company will be the selling party and in privity with the customer.

SECTION 5. PAYMENT.

A. **Payment.** Within fourteen (14) days after the conclusion of the 2022 Online Native Plant Sale, Company shall pay to District the following amounts (the aggregate amount being the "Payment"):

	Percentage of Gross Receipts
Customer Orders 1 – 200	10.0%
Customer Orders 201 – 250	10.5%
Customer Orders 251 – 300	11.0%
Customer Orders 301 – 350	11.5%
Customer Orders 351 – 400	12.0%
Customer Orders 401 – 450	12.5%
Customer Orders 451 +	13.0%

Company may elect to characterize the Payment as a donation for tax purposes. However, District makes no representation or warranty as to whether the Payment is a donation and, if any government agency determines that the Payment is not a donation, that determination will not reduce or offset the Payment or diminish or limit District's rights or Company's obligations under this Interim Agreement.

B. **Late Payment Penalties.** If any Payment is not paid when due and payable, Company shall pay to District an additional twenty-five and 00/100 dollars (\$25.00) each month or fraction thereof the Payment is late as an administrative processing charge. The parties agree that this late charge represents a fair and reasonable estimate of the costs that District will incur by reason of late Payment by Company. Acceptance of any late charge shall not constitute a waiver of Company's default with respect to the overdue amount or prevent District from exercising any of the other rights and remedies available to District.

C. **Gross Receipts.** The term "Gross Receipts," as used in this Interim Agreement, is defined as all money, cash, receipts, assets, including but not limited to gross charges, sales, fees and commissions made, or earned, and all gross sums received by Company, its assignees, or successors in interest, when collected or accrued, from any business, use or occupation, or any combination thereof, originating, in whole or in part, from the Sales.

(1) There shall be no deduction from Gross Receipts of any overhead or expense of operation, such as, but without limitation to, salaries, wages, cost of goods, advertising, interest, debt amortization, discount, collection, credit card and bad debt charges, insurance and taxes, except as specifically provided for herein.

- (2) Gross Receipts shall include the amount of any manufacturer's or importer's excise tax included in the prices of any property or material sold, even though the manufacturer or importer is also the retailer thereof; and it is immaterial whether the amount of such excise tax is stated as a separate charge.\
- (3) Gross Receipts shall not include Federal, State, Municipal, or other taxes collected from the consumer (regardless of whether the amount thereof is stated to the consumer as a separate charge) and paid periodically by Company to a governmental agency, accompanied by a tax return or statement ("Consumer Taxes"). However, the amount of Consumer Taxes shall be shown on the books and records elsewhere herein required to be maintained.

SECTION 6. RECORDS AND ACCOUNTS.

- A. **Records and Accounts.** Company shall keep or cause to be kept at its principal place of business, true and complete books, records, and accounts of all financial transactions relating to the Sales and Gross Receipts of the 2022 Online Native Plant Sale (the "Records") for the duration of the Five-Year Term and such obligation shall survive the expiration of the Interim Term. If any Records are maintained by any accountant, consultant, or other entity, upon District's request, Company shall provide District with the name and address of such entity.
- B. **Recording of Sales.** Company shall record each Sale in an invoice or receipt that is emailed directly to the customer immediately following a Sale and displays for such Sale the products sold and the amounts paid, including any Consumer Taxes.
- C. **Reports.** Company shall deliver to District, with its Payment, a true and correct sworn statement of all Gross Receipts for the Sales.
- D. **Inspection of Records.** All Records shall at all reasonable times be open and made available for inspection or audit by District or its accountants, agents, or employees, upon District's request.
- E. **Audit.** District shall have the right to audit, at no cost to Company except as hereinafter provided, any or all Records for the purpose of verifying the Payment. If such audit shows that the Payment due is \$500 or greater than the amount paid by Company, District shall conduct a special audit. If such special audit confirms that a greater Payment is due to District, Company shall pay for such audit. Within ten (10) days after the audit or special audit report is furnished to Company, it shall pay to District the full amount of any underpayment demonstrated by such audit or special audit, together with interest on the amount of such underpayment at the rate of ten percent (10%) per annum.

SECTION 7. AMENDMENTS. No provision of this Interim Agreement may be amended or added to except by an amendment in writing properly approved and signed by the parties hereto expressing by its terms an intention to modify this Interim Agreement.

SECTION 8. VIOLATION OF AGREEMENT.

- A. **Default.** If Company violates any of the terms and conditions of this Interim Agreement, District shall give Company a written notice specifying such violation and demanding correction (a "Default Notice").
- B. **Termination for Default.** If Company receives a Default Notice for a violation, Company shall within fourteen (14) days thereafter (i) if the violation was not a failure to make a full

Payment, either (a) cure such violation or (b) if such violation cannot reasonably be cured within such 14-day period, commence and diligently pursue a cure or (ii) if the violation was a failure to make a full Payment, cure such violation by making full Payment. If Company does not take the required action within the 14-day period, District may immediately terminate this Interim Agreement and the Five-Year Agreement and may pursue any and all remedies available to it at law or in equity.

- C. **Liability for Breach.** Termination for default shall not excuse Company from any liability for breach of contract; such breach shall be deemed total. If District sends a Default Notice prior to the end of the Interim Term, then its rights related to such Default Notice survive the expiration of the Interim Term.

SECTION 9. NOTICE.

Notice or communications required or permitted to be given under this Interim Agreement shall be given to the respective parties in writing, by registered or certified mail, postage prepaid or otherwise delivered as follows:

- (a) To District:

Lake County Forest Preserve District
1899 West Winchester Road
Libertyville, IL 60048
ATTN: Executive Director

- (b) To Company:

Kelsay Shaw
Possibility Place Nursery
7548 W. Monee-Manhattan Rd.
Monee, IL 60449

or at such other address or to such other persons as either of the parties may from time to time designate by written notice given as herein provided. The requirements of this Section will not be deemed to void or invalidate any notice that is actually received.

SECTION 10. HOLD HARMLESS, INVALIDITY.

- A. **Hold-Harmless Agreement.** Notwithstanding anything to the contrary herein contained, and irrespective of any insurance carried by Company for the benefit of District, Company agrees to protect, indemnify, and hold harmless, and defend District and its commissioners, officers, agents, attorneys, volunteers, and employees from any and all losses, expenses, claims, costs, causes, and damages including, without limitation, litigation costs and attorneys' fees and items that may arise, or be alleged to have arisen, out of or in connection with Company's performance of, or failure to perform, its obligations under any of the terms or conditions of this Interim Agreement or any part thereof.
- B. **Invalidity.** In the event that this Interim Agreement or any provision thereof shall be determined to be null and void by a court of competent jurisdiction, neither District nor any of its commissioners, officers, agents, or employees shall be liable to any person holding under or through Company for any claim, loss or damage of any nature whatsoever suffered or alleged to be suffered by Company or such person by reason of such determination.

SECTION 11. MISCELLANEOUS.

- A. **No Assignment.** Company shall not assign or encumber its rights or obligations in this Interim Agreement.
- B. **Use of Name.** Any of Company's advertising, promotion, or notices related to the operation of the 2022 Online Native Plant Sale and that references District is subject to prior written approval by District, which may require that any such advertising, promotion, or notices bear/display the phrase "Operated through Agreement with the Lake County Forest Preserve District," along with displaying District logo and other identifying information as required by District.
- C. **No Partnership.** It is expressly understood and agreed that District does not, in any way nor for any purpose, become a partner, agent, or principal of, or joint venturer with, Company by reason of any provision of this Interim Agreement.
- D. **Binding Effect.** Each and all of the covenants, conditions, and agreements herein contained shall, in accordance with the context, inure to the benefit of District and apply to and bind Company and its respective heirs, legatees, devisees, executors, administrators, successors, agents, assignees, concessionaires and licensees.
- E. **Captions.** The captions of articles and paragraphs of this Interim Agreement are for convenience only and do not in any way limit or amplify the terms and provisions hereof.
- F. **No Waiver.** No waiver by District at any time of any of the terms and conditions of this Interim Agreement shall be deemed to operate as a waiver at any time thereafter of the same or of any other terms or conditions contained herein or of the strict and timely performance of such terms and conditions.
- G. **No Discrimination.** Company shall not unlawfully discriminate in its recruiting, hiring, promotion, demotion, or termination practices on the basis of race, religious creed, color, national origin, ancestry, sex, age, disability, marital status, or any other with respect to the 2022 Online Native Plant Sale, and Company shall comply with the applicable provisions of the Illinois Human Rights Act, the Americans with Disabilities Act of 1990 and all other acts and laws of whatever kind and all administrative rules and regulations issued pursuant to said Acts.
- H. **Non-Disparagement.** During the Temporary Term and thereafter, Company agrees not to disparage nor take any other action that harms the reputation or goodwill of District.
- I. **Invalidity.** The invalidity of any provision in this Interim Agreement as determined by a court of competent jurisdiction shall in no way affect the validity of any other provision hereof.
- J. **Designee.** The Executive Director of District or his designee shall be responsible for the administration of this Interim Agreement on behalf of District.
- K. **Time of Essence.** Time is of the essence of each provision of this Interim Agreement which specifies a time within which performance is to occur. In the absence of any specified time for performance, performance must be made within a reasonable time.

IN WITNESS WHEREOF, the parties hereto have caused their respective names to be hereunto subscribed by their respective proper officers thereunto dully authorized.

WITNESS:



ATTEST:

COMPANY:

Possibility Place Nursery, Inc.


BY: _____
ITS: owner

DISTRICT:

Lake County Forest Preserve District

BY: _____
ITS: _____