

AMENDED AND RESTATED TEMPORARY LICENSE AGREEMENT

THIS AMENDED AND RESTATED TEMPORARY LICENSE AGREEMENT (this "**Agreement**") is made this ___ day of May, 2012 (the "**Effective Date**") between the CITY OF AUSTIN, a Texas home-rule city and municipal corporation (the "**City**") and AUSTIN PETS ALIVE, a Texas non-profit corporation ("**APA**"). The City and APA are hereinafter sometimes collectively referred to as the "**Parties**."

RECITALS

WHEREAS, in March 2010, the Austin City Council approved the No Kill Implementation Plan, a component of which included partnering with a non-profit organization to operate the Davenport Building on the Town Lake Animal Center site, located at 1156 W. Cesar Chavez, Austin, Texas (the "**TLAC**"), as an adoption center and keeping the entire TLAC site open for a minimum of six months;

WHEREAS, on June 23, 2011, the City Council adopted certain operating criteria established by the Austin Animal Advisory Commission for the non-profit entity selected to temporarily operate the TLAC, which criteria were set forth in City Council Resolution No. 20110623-096;

WHEREAS, APA was subsequently selected to temporarily operate the TLAC during Austin Animal Services' ("**AAS**") transition of the City's animal shelter operations from the TLAC to the newly-constructed Austin Animal Center;

WHEREAS, the City and APA entered into that certain Temporary License Agreement dated November 10, 2011 (the "**Temporary License Agreement**") authorizing APA to occupy and use the TLAC for the purposes described in the Temporary License Agreement; and

WHEREAS, on April 26, 2012, the City Council voted to extend the term of the Temporary License Agreement and to expand APA's permitted use of the TLAC;

NOW, THEREFORE, in consideration of the mutual covenants contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and APA agree as follows:

AGREEMENT

1.0 Amendment and Restatement. This Agreement amends, restates and supersedes the Temporary License Agreement in its entirety.

2.0 License Grant. The City hereby grants to APA and APA hereby accepts from the City a temporary license to operate the portion of the TLAC depicted on Exhibit A (the "**Premises**") subject to the terms of this Agreement.

3.0 License Term. The term of this Agreement (the "**Term**") shall commence on the Effective Date and **shall terminate on May 23, 2015** unless terminated earlier according to the terms of this Agreement. Each Party may terminate this Agreement at any time upon ninety (90) days' written notice to the other Party. If APA remains on the Premises without the City's written consent after the expiration of the Term, APA's continued occupancy will not be deemed to extend or renew the Term, and during the period of continuing occupancy, a license fee payable by APA to the City will accrue at the rate of One Thousand Five Hundred and No/100 Dollars (\$1,500.00) per week. The acceptance of the license fee from APA does not constitute the City's consent to APA's continued occupancy of the Premises after the expiration of the Term.

4.0 License Fee. Except for the license fee described in Section 3.0, APA will not be required to pay a license fee for its use of the Premises, such fee being waived by City of Austin Ordinance No. _____. In lieu of a license fee, APA agrees to use the Premises solely for the Permitted Use (defined below), which Permitted Use promotes a public purpose of the City.

5.0 Premises Conveyed As-Is. APA acknowledges that it has had the opportunity to inspect the Premises and to conduct any inspections and testing of the Premises as it deemed necessary or desirable. In reliance solely on its inspections and testing of the Premises, APA accepts the Premises in their "AS IS," "WHERE IS" condition, "WITH ALL FAULTS," and with all latent and patent defects, if any; and the City makes no representations or warranties of any kind, express or implied, with respect to the Premises, including, without limitation, warranties as to habitability, fitness or suitability of the Premises for a particular purpose or for compliance with Governmental Regulations (defined below), or as to the presence or absence of any hazardous substances, including, but not limited to, asbestos and asbestos-containing materials.

6.0 Permitted Use of the Premises. APA may use the Premises solely **for operating an animal rescue and adoption center and uses ancillary thereto, including medical treatment, behavioral training, and fundraising and outreach events, and** for no other purpose (the "**Permitted Use**"). APA may not occupy or use the Premises for any unlawful use or purpose, and APA shall conduct its business in such a manner as not to create a nuisance.

7.0 Operation and Maintenance.

7.1 APA shall maintain the Premises during the Term in a clean, healthful and safe condition and in substantially the same condition as the Premises existed on the Effective Date, all at APA's sole cost and expense. APA shall be responsible at its sole cost for the repair, maintenance, operation and security of the Premises, including, without limitation, (a) repairs and maintenance of all electrical, mechanical, HVAC and plumbing fixtures and equipment serving the Premises, (b) all structural and non-structural repairs to the Premises required during the Term, including those required due to fire, casualty or acts of God, (c) utility services, (d) janitorial services, and (e) fire safety

services and equipment. APA acknowledges that the City has no maintenance, repair, operation or security obligations with respect to the Premises except as otherwise expressly provided in Section 9.1 of this Agreement.

7.2 APA shall conduct all its operations on the Premises in compliance with all applicable municipal, county, state and federal laws, codes, rules and regulations (collectively, "***Governmental Regulations***") at APA's sole cost and expense.

7.3 APA shall provide the City with copies of any key cards or keys to the Premises to enable the City's employees, representatives, agents and contractors to access the Premises for the purposes permitted under this Agreement and to permit the City to exercise its municipal functions.

7.4 APA will make no improvements, alterations or changes to the Premises without the City's prior written approval, which approval the City may withhold or condition at its sole and absolute discretion. Notwithstanding the foregoing, APA may make cosmetic improvements to the Premises, including painting the Premises.

7.5 APA will repair at its sole cost and expense all damage to the Premises caused by the actions or omissions of APA or APA's employees, agents, licensees, invitees, volunteers or contractors.

7.6 Upon the expiration of the Term or earlier termination of this Agreement, APA shall deliver the Premises to the City, with all improvements located thereon, in substantially the same condition in which it existed as of the Effective Date, reasonable wear and tear excepted, together with all keys, key cards and other access devices for the Premises. All furniture, removable trade fixtures and equipment installed by APA must be removed by APA upon the expiration of the Term or earlier termination of this Agreement, and APA agrees to repair any damage to the Premises caused by the removal of such items. If APA fails to timely remove any such furniture, removable trade fixtures or equipment installed by APA, those items will be deemed abandoned by APA, and the City may dispose of such items in the manner it deems appropriate without liability to APA. This Section 7.6 will survive the termination of this Agreement.

8.0 APA Covenants.

8.1 **Only animals sourced by AAS or originating from a source located in Bastrop, Caldwell, Flays, Travis or Williamson Counties** may be housed on the Premises.

8.2 AAS will provide APA with a list of animals most at risk for euthanasia each day (the "**At-Risk List**"). APA may select from the At-Risk List the animals it desires to house on the Premises; provided, however APA must:

(a) select a sufficient number of animals from the At-Risk List so that at the end of each year of the Term APA will have selected from the At-Risk List the greater of (i) 3,000 animals, or (ii) 12% of the total number of animals taken in by AAS during the preceding year (the "**Minimum Animal Inventory**");

(b) accept from the City all available "puppy puppies" and "bottle babies" on the At-Risk List and AAS requests APA to take as part of the Minimum Animal Inventory;

(c) accept from the City all stray dogs on the At-Risk List that AAS requests APA to take as part of the Minimum Animal Inventory;

(d) accept from the City at least five (5) behaviorally challenged dogs each month during the Term.

8.3 Once APA receives an animal from AAS, ownership of the animal will vest in APA; provided, however, if an animal APA receives from AAS subsequently becomes a poor adoption candidate due to the deterioration of the health or behavior of the animal, APA and AAS will collaborate in good faith to assess the condition of the animal in question, and if AAS and APA mutually agree that the best course of action is to return the animal to the custody of AAS, APA may return the animal to AAS.

8.4 APA must provide monthly reports to the City describing beginning and ending animal inventory, intakes, outcomes and live release rates. The report will be in substantially the form attached hereto as Exhibit B (the "**Monthly Report**"). The City will have the right to modify the required content of the Monthly Report from time to time. Additionally, APA will provide quarterly status briefings to the Austin Animal Advisory Commission.

8.5 APA will develop and implement a program to rehabilitate behaviorally challenged dogs.

8.6 At APA's sole cost and expense, APA will repair and refurbish the kennels and cages located on the Premises in accordance with all Governmental Regulations.

8.7 APA will conduct its operations on the Premises in compliance with the "Guidelines for Standards of Care in Animal Shelters" established by the Association of

~~Shelter Veterinarians as amended from time to time unless compliance would require APA to violate any Governmental Regulations or make any capital improvements to the TLAC~~

8.8 ~~APA will use kennels 101 through 154 as identified on Exhibit A solely for animals sourced by AAS~~

9.0 City Covenants. During the period commencing on the Effective Date and ending on November 9, 2012, the City will (a) pay for electric, water and wastewater utility charges for the Premises and (b) contribute to APA an amount not to exceed \$12,000 per month (the "**City Contribution Amount**"), which amount will be used by APA solely for operating expenses for the Premises and APA's off-site adoption efforts for animals housed on the Premises that were sourced by AAS. APA will maintain reasonably detailed, written records and receipts of its expenditure of the City Contribution Amount, and will make such records and receipts available for review by the City upon the City's written request. ~~Commencing on November 10, 2012, the City will no longer pay the City Contribution Amount, and the City and APA will share equally the cost of all utilities consumed at the TLAC. APA will reimburse the City for APA's share of utility costs within thirty (30) days after APA receives an invoice for the utility costs from the City~~

10.0 Hazardous Materials. APA shall comply in all respects with all Governmental Regulations relating to the protection of environment and natural resources, now existing or hereafter enacted (collectively for purposes of this Section 10.0, "**Environmental Laws**"), including, without limitation: (a) the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, as amended from time to time, (b) the federal Resource Conservation and Recovery Act of 1976, as amended by the Used Oil Recycling Act of 1980, the Solid Waste Disposal Act Amendments of 1980, and the Hazardous and Solid Waste Amendments of 1984, as amended from time to time, (c) the federal Water Pollution Control Act of 1972, as amended from time to time, (d) the federal Spill Compensation and Control Act of 1976, as amended from time to time, and (e) any and all other federal, state, county, and municipal laws, ordinances, codes and regulations which relate in any way to the matters regulated by any of the above-mentioned federal legislation. APA shall immediately notify the City if APA becomes aware of any actual or potential environmental hazard or any actual or alleged violation of one or more Environmental Laws. APA is responsible for any and all liabilities, liens, claims, demands, damages, expenses, fees, costs, fines, penalties, suits, proceedings, actions and causes of action (including, without limitation, all attorneys' fees and expenses) arising out of or relating to, directly or indirectly, any violation or alleged violation by APA or any party accessing the Premises by or through APA (whether before or after the Effective Date) of any one or more of the Environmental Laws. This Section 10.0 shall survive the expiration or termination of this Agreement.

11.0 Assignment and Sublicensing. APA shall not (a) mortgage, assign, pledge or transfer this Agreement to any party; (b) sublicense the Premises or any part thereof; (c) grant any concession or other right of occupancy of any portion of the Premises; or (d) permit the use of the Premises by any parties other than APA, its agents, employees, and

volunteers without the express prior written consent of the City, which consent may be withheld in the City's sole and absolute discretion.

12.0 Indemnity. THE CITY WILL NOT BE LIABLE TO APA, AND APA HEREBY WAIVES ALL CLAIMS AGAINST THE CITY, FOR ANY DAMAGE TO OR LOSS OR THEFT OF ANY PROPERTY OR FOR ANY BODILY OR PERSONAL INJURY, ILLNESS OR DEATH OF ANY PERSON IN, ON, ABOUT OR OFF THE PREMISES, INCLUDING, WITHOUT LIMITATION, ANY DAMAGE, INJURY, ILLNESS OR DEATH ARISING FROM OR RELATED TO ANY ANIMAL IN APA'S CUSTODY OR RELEASED FROM APA'S CUSTODY. APA HEREBY AGREES TO INDEMNIFY, DEFEND AND HOLD THE CITY HARMLESS FROM ALL CLAIMS, DEMANDS, LIABILITIES, DAMAGES, LOSSES, COSTS AND EXPENSES, INCLUDING REASONABLE ATTORNEYS' FEES AND DISBURSEMENTS, ARISING FROM OR RELATED TO ANY ANIMAL IN APA'S CUSTODY OR RELEASED FROM APA'S CUSTODY, ANY USE OR OCCUPANCY OF THE PREMISES, ANY CONDITION OF THE PREMISES, ANY DEFAULT IN THE PERFORMANCE OF APA'S OBLIGATIONS UNDER THIS AGREEMENT, ANY DAMAGE TO ANY PROPERTY, OR ANY BODILY OR PERSONAL INJURY, ILLNESS OR DEATH OF ANY PERSON OCCURRING IN, ON, ABOUT OR OFF THE PREMISES OR ANY PART THEREOF, ARISING AT ANY TIME, AND FROM ANY CAUSE WHATSOEVER. THIS SECTION 12.0 WILL SURVIVE THE TERMINATION OF THIS AGREEMENT.

13.0 Insurance Requirements. APA will obtain and maintain throughout the Term the types and in the amounts of insurance described on Exhibit C.

14.0 City's Right of Entry and Inspection; Use of Davenport Conference Room. The City and its officers, agents and representatives shall have the right (but not the obligation) from time to time to enter into and upon any and all parts of the Premises at all reasonable hours (or, in an emergency, at any hour) to inspect, clean, or make repairs, alterations or additions to the Premises that the City may deem necessary or desirable; to observe APA's operations; to plan for future uses of the Premises; to store and retrieve equipment and supplies; for ingress and egress to and from other portions of the TLAC; and to conduct other municipal functions. Additionally, the City and its animal rescue partners will have the right to use the Davenport Conference Room located on the Premises from time to time for animal adoption events. The City and APA will cooperate in good faith to schedule the use of the conference room. The City retains the exclusive right to use all portions of the TLAC that are not included in the Premises and the right to use together with APA all portions of the TLAC that are identified as "shared areas" on Exhibit A.

15.0 Condemnation.

15.1 If at any time during the Term all or substantially all of the Premises shall be taken for any public or quasi-public use under any statute or by right of eminent domain, this Agreement shall terminate on the date of such

taking. If less than all of the Premises shall be so taken and in the City's reasonable opinion the remaining portion of the Premises is insufficient for fulfilling the purposes of this Agreement, the City may terminate this Agreement by delivering written notice to the APA within sixty (60) days after the date the City received notice of the taking. If the City exercises its option to terminate, this Agreement shall end on the date specified in the City's notice.

15.2 If less than all of the Premises shall be taken and, in the City's reasonable opinion communicated by written notice to APA within sixty (60) days after the date the City received notice of the taking, the remaining portion of the Premises is sufficient for fulfilling the purposes of this Agreement, this Agreement shall remain in effect.

15.3 The City shall be entitled to receive the entire award or awards in any condemnation proceeding involving the Premises, and APA shall receive no part of such award or awards from the City or in the condemnation proceedings. APA hereby assigns to the City any and all of APA's right, title and interest in or to such award or awards or any part thereof. This Section 15.3 will survive the termination of this Agreement.

15.4 Taking by condemnation or eminent domain hereunder shall include the exercise of any similar governmental power and any sale, transfer or other disposition of the Premises in lieu of or under threat of condemnation.

16.0 * Fire and Other Casualty. If all or any portion of the Premises is damaged or destroyed by fire or other casualty, the City will have the right to terminate this Agreement by providing written notice to APA. If the City exercises its option to terminate, this Agreement shall end on the date specified in the City's notice. The City will have no obligation to repair, restore or rebuild the Premises following damage or destruction due to fire or other casualty.

17.0 City's Remedies Following APA Default. Any failure of APA to comply with the terms and conditions of this Agreement will be deemed a default of this Agreement if APA has not remedied such failure within thirty (30) days after receiving written notice of such failure from the City. If APA is deemed to have committed a default, the City may (but is not obligated to) terminate this Agreement upon ten (10) days prior written notice to APA, and the City may seek any other remedies available to it at law or in equity.

18.0 Non-Waiver.

18.1 Any act of forbearance by the City to enforce any provision of this Agreement shall not be construed as a modification of this Agreement or as a waiver of any breach or default of APA which then exists or may subsequently exist. The failure of the City to exercise any right or privilege granted in this Agreement shall not be construed as a waiver of that right or privilege.

18.2 All rights of the City under this Agreement are specifically reserved. Any payment, act or omission by a party shall not impair or prejudice any remedy or right of that party under this Agreement. Any right or remedy stated in this Agreement shall not preclude the exercise of any other right or remedy under this Agreement, the law or at equity. Any action taken in the exercise of any right or remedy shall not be deemed a waiver of any other rights or remedies.

19.0 Entire Agreement. This Agreement constitutes the entire agreement between the City and APA with regard to the Premises. Any other statement, representation, agreement or promise, either oral or written, relating to the subject matter of this Agreement that is not contained herein shall not be binding on the Parties. All exhibits, schedules, addenda and other documents attached to this Agreement are intended to be a part of this Agreement and are hereby incorporated into this Agreement for all purposes.

20.0 Governing Law and Venue. This Agreement and the rights and duties of the City and APA will be governed by Texas law. All obligations under this Agreement are performable in Travis County, Texas, and venue for any litigation arising under or in connection with this Agreement shall lie exclusively in Travis County, Texas.

21.0 Notices.

(a) Any notice given hereunder by either Party to the other shall be in writing and may be delivered by personal delivery or by registered or certified mail, return receipt requested, when mailed to the proper Party, at the following addresses:

If to the City: Abigail Smith
Chief Animal Services Officer
City of Austin Office of Animal Services
P.O. Box 1088
Austin, Texas 78767

with a copy to: Lauraine Rizer
Officer
City of Austin Office of Real Estate Services
P.O. Box 1088
Austin, Texas 78767

and a copy to: Judd L. Leach
Assistant City Attorney
City of Austin Law Department
301 West Second Street, 4th Floor
Austin, Texas 78701

If to APA: Ellen Jefferson, DVM
Executive Director
Austin Pets Alive
1156 West Cesar Chavez Street
Austin, Texas 78703

with a copy to:

(b) Either Party may change its address for purposes of this Section 21.0 by written notice delivered in accordance herewith.

22.0 Force Majeure. The computation for any period for performance under this Agreement shall exclude any delays due to acts of God, war, riot, terrorism, civil commotion, sovereign conduct, or governmental laws, regulations or restrictions.

23.0 Severability. If any clause or provision of this Agreement is ruled illegal, invalid or unenforceable in any respect by a court of competent jurisdiction, the remainder of this Agreement shall remain valid and binding. It is also the intention of the Parties to this Agreement that in lieu of each clause or provision of this Agreement that is ruled illegal, invalid or unenforceable, there be added as a part of this Agreement a legal, valid and enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as is possible.

24.0 Amendments and Binding Effect. This Agreement may not be amended, except in writing signed by both Parties. This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors, assigns and legal representatives.

25.0 Gender and Number. Words of any gender used in this Agreement shall include any other gender, and words in the singular number shall include the plural, unless the context otherwise requires.

26.0 Captions. The captions in this Agreement are for convenience of reference only and shall not in any way limit or enlarge the terms and conditions of this Agreement.

[The signature page follows.]

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

CITY:

CITY OF AUSTIN, a Texas home-rule city
and municipal corporation

By: _____
Lauraine Rizer, Officer
Office of Real Estate Services

APA:

AUSTIN PETS ALIVE, a Texas non-profit
corporation

By: _____
Ellen Jefferson, DVM, Executive Director

APPROVED AS TO FORM:

Judd L. Leach, Assistant City Attorney

Date: _____

APPROVED AS TO CONTENT:

Abigail Smith, Chief Animal Services Officer

Date: _____

EXHIBIT A

Description of Premises

EXHBIT B

Form of Monthly Report

EXHIBIT C

Insurance Requirements

Exhibit A - Town Lake Animal Center

