

ACTION FORM BRYAN CITY COUNCIL

DATE OF COUNCIL MEETING: July 12, 2011		DATE SUBMITTED: July 1, 2011	
DEPARTMENT OF ORIGIN: CMO's		SUBMITTED BY: Hugh R. Walker	
MEETING TYPE:	CLASSIFICATION:	ORDINANCE:	STRATEGIC INITIATIVE:
<input type="checkbox"/> BCD	<input type="checkbox"/> PUBLIC HEARING	<input type="checkbox"/> 1ST READING	<input type="checkbox"/> DIVERSITY
<input type="checkbox"/> SPECIAL	<input type="checkbox"/> CONSENT	<input type="checkbox"/> 2ND READING	<input type="checkbox"/> EDUCATION
<input checked="" type="checkbox"/> REGULAR	<input type="checkbox"/> STATUTORY		<input type="checkbox"/> GROWTH
<input type="checkbox"/> WORKSHOP	<input checked="" type="checkbox"/> REGULAR		<input checked="" type="checkbox"/> IMAGE
			<input type="checkbox"/> INFRASTRUCTURE
			<input checked="" type="checkbox"/> PUBLIC SAFETY
<p>AGENDA ITEM DESCRIPTION: Consideration of a long-term Animal Shelter Service Agreement between the City of Bryan, Texas and the Brazos Animal Shelter, Inc. In particular, the Bryan City Council will need to specifically address the following terms:</p> <ul style="list-style-type: none"> • Annual Payment amount (in an amount not to exceed \$379,810.00) for Fiscal Year 2011-2012; • Annual cap increase (in a percent not to exceed five (5) percent per year); and, • Cap implementation year (with a fiscal year no later than Fiscal Year 2013-2014). <p>The amounts listed represent the Brazos Animal Shelter, Inc. Board's requested or approved terms.</p>			
<p>SUMMARY STATEMENT: For about thirty (30) years, the Brazos Animal Shelter, Inc. (BAS) has provided animal shelter services to the Cities of Bryan and College Station, and Brazos County. For approximately the first twenty-five (25) years, the BAS governing Board consisted of the mayors of the two cities and the county judge, which was a three-member board. For about a year, the two mayor positions were replaced with the city managers of the two cities. In 2006, the BAS board composition was changed from the three government representatives to a larger board consisting of citizens and government appointed positions. Today, the fifteen-member board includes six (6) government appointment positions and the remaining positions are BAS board appointments.</p> <p>Since the beginning of Fiscal Year 2011 (FY2011), the City of Bryan has reviewed animal shelter alternatives. This review included alternatives such as a City-operated shelter, continued partnership with the Brazos Animal Shelter, Inc. (BAS), and a request for proposal (RFP) process. The review was caused by a substantial increase in sheltering services costs when the BAS increased annual cost to the City by over 105 percent when comparing FY2010 to FY2011. The City's cost went from \$145,671.00 (FY2010) to \$299,185.48 (FY2011) for a contract amount increase of \$153,514.48 between the two fiscal years. According to BAS, the City's annual rate is based on projected expenses (including depreciation of about \$30,000.00) of approximately \$1,000,000.00 (for FY2011) less the license fees collected by BAS (about \$220,000.00) divided by the most current year of total number of animals sheltered (8,584 in FY2009). For FY2011, BAS used a total animal count of 8,584 animals with the City of Bryan being responsible for 3,124 animals. The average cost per animal is \$95.77 for the seventy-two (72) hour sheltering service. The formula equates to the City's total costs being \$299,185.48 (3,124 animals x \$95.77 per animal = \$299,185.48). The FY2011 funding formula, as provided by BAS on May 27, 2010, is as follows:</p> <ul style="list-style-type: none"> • Best estimate of 2010-2011 expenses: \$1,011,041.00 • Add Depreciation: <u>\$ 30,403.00</u> • Subtotal: \$1,041,444.00 • Deduct Revenue from Brazos County Tags: <u>\$ 219,390.00</u> 			

- Best estimate of 2010-2011 net expenses: \$ 822,054.00
- Divide by number of animals (FY2009): 8,584.00
- Cost per animal: \$ 95.77
- Bryan ACO/Stray Animals: 3,124.00
- **Bryan annual cost for animals:** **\$ 299,185.48**

For the above formula, it is important to note the Brazos County tag fee revenue is deducted from operating expenses. According to the BAS and based on the above figures, the per animal cost before deducting the Brazos County tag fee revenue is \$121.32; this figure represents a difference of \$25.55 from the \$95.77 rate. So, depending on the formula and at what point the per animal rate is calculated, the per animal rate varies. Several other cities were surveyed in past months to determine per animal costs. The per animal cost ranged from about \$60.00 to almost \$238.00.

On November 22, 2010, the City released RFP #11-008, which was a request for proposals regarding animal sheltering services. The RFP deadline to submit proposals was January 14, 2011, and the City received one proposal, which was from Care Corporation. A subcommittee of the City of Bryan Animal Shelter Advisory Committee reviewed animal shelter services alternatives, including the proposal from Care Corporation. On February 15, 2011, the Committee-as-a-whole voted (5 – 0 with two abstentions) to recommend to the City Council to reject the Care Corporation proposal and for the City to consider a City-operated facility. The Animal Shelter Advisory Committee did not have new BAS agreement information to review. On April 12, 2011, the Bryan City Council rejected (6 – 0 vote with one abstention) the proposal from Care Corporation while retaining the right to negotiate an animal shelter services agreement with Care Corporation. The City staff continued to review animal shelter services alternatives, including negotiating a new agreement with BAS.

At a Special City Council Meeting on May 13, 2011, the Bryan City Council unanimously approved a motion directing City staff to move towards a long-term agreement with BAS for animal sheltering services. The motion included a short-term agreement for BAS to continue to provide the City with animal sheltering services for the period from July 1, 2011, through and including September 30, 2011. Since May 13, City staff and BAS representatives have negotiated terms to a short-term agreement (commonly referred to as the First Amendment to the Animal Shelter Service Agreement dated October 7, 2010) and long-term agreement. On Monday, June 20, 2011, at a Special Meeting of the Bryan City Council, the City Council approved a short-term agreement (First Amendment to the Animal Shelter Service Agreement). This Council Action Form (CAF) addresses the long-term agreement.

Several key components to the long-term animal shelter services agreement include (please note: specific City Council action is needed for certain terms within Article Five, Section 5.1):

- **Article One (Definitions):** This article provides certain definitions.
- **Article Two (Impoundment):** Article Two addresses impoundment, including requiring BAS to abide by Chapter 823 Texas Health and Safety Code, the three-day hold period, and appropriate care of animals. Section 2.3 provides that once animals are delivered by the City to BAS, the animal becomes the “sole and exclusive property” of BAS. This section addresses the “Redemption Period,” which is three (3) working days.
- **Article Three (Animal Disposition):** Article Three discusses the disposition of animals with options such as returning the animal to the owner, finding an animal new owners, or worst-case scenario of destroying an animal. Within this section, BAS has sole and exclusive right to determine responsible owners for unclaimed animals. Section 3.2 provides BAS with authority to set and collect impoundment fees from

animal owners.

- **Article Four (Collection of Fees):** Section 4.1 names BAS as an “enforcing agency” and provides BAS with authority to act on the City’s behalf by charging, collecting and/or accounting for fees it receives pursuant to City Ordinance (e.g., licensing fees, impoundment fees, and boarding fees). Section 4.2 provides that licensing fees shall be accounted for separately and used to offset the City’s annual payment calculation.
- **Article Five (Cost of Services and Fees):** Section 5.1 establishes the “Annual Payment.” The BAS Board requested a Fiscal Year 2012 Annual Payment amount of \$379,810.00, which represents an increase of over 26 percent when compared to the Fiscal Year 2011 rate of \$299,185.48. A five (5) percent increase from FY2011 to FY2012 results in an Annual Payment of \$314,144.75. **The City Council will need to determine the FY2012 Annual Payment amount for the proposed agreement but in an amount not to exceed \$379,810.00.**

A revised formula provides for a benchmark for future years by stating the City’s rate shall be a percentage of “Governmental Costs.” **Section 5.1 also includes an annual rate cap, which the City Council will need to determine, but in a percent no greater than five (5).** The BAS Board approved a cap of five (5) percent per year.

Additionally, Section 5.1 includes an implementation year for the rate cap. The BAS Board approved a rate cap implementation year of Fiscal Year 2013-2014, which is in two years. **The City Council will need to determine the implementation year for the rate cap with a start date of no later than FY2014.**

Depending on the fiscal year selected for the rate cap, Fiscal Years 2012 and 2013 may not have a rate cap. If not, BAS will use the initial first two years of the agreement to establish a baseline operating cost for their new facilities and location. Section 5.1 requires BAS to provide the City with the Contract Rate by May 31 (four months before the City’s budget effective date). Section 5.2 is a “most favored nation clause.” Section 5.5 addresses the City’s responsibility to construct and pay for an animal shelter building in an amount not to exceed \$500,000.00 on BAS’ Leonard Road property. The City’s new kennels (valued at \$98,000.00) will be used at the Leonard Road property. Section 5.6 recognizes the County is responsible for livestock; however, if the City delivers livestock, birds, or fowl to BAS, the City will be responsible for costs associated with feeding, housing, transporting, and disposing of such. Section 5.7 provides for the reports to be provided to the City; reports address City and State requirements. Section 5.8 requires BAS to conduct an annual audit and provide a copy to the City. Additionally, BAS will provide quarterly financial reports to the City and the City may conduct its own audit of BAS’ records to verify the Annual Payment Rate.

For comparison purposes, two formulas are shown below to demonstrate the new formula to calculate the Annual Payment amount. Both formulas use the same basis to calculate Bryan’s Annual Payment amount. However, the first calculation uses FY2011 figures while the second calculation uses estimated figures for Fiscal Year 2012 (based on available information to City staff). The second formula represents the BAS Board’s FY2012 funding request.

The below is a Sample Contract Rate Formula using the BAS’ new formula but as if it were implemented for the current fiscal year, which it was not (the below are figures from BAS’ FY2011 funding formula and based on information available to City staff):

• Annual BAS Cost for Services:	\$1,041,444.00
• Divide by Total BAS Animals:	<u>8,584.00</u>
• BAS Per Animal Cost:	\$ 121.32
• Bryan ACO/Stray Animals:	<u>3,124.00</u>
• Bryan Sub-Total Costs:	\$ 379,003.68

• Revenue from Brazos County Tags:	\$ 219,390.00
• Bryan's Percent of Tag Revenue:	<u>40.00%</u>
• Bryan's Tag Revenue:	\$ 87,756.00
• Bryan's Annual Payment (Annual Cost)	<u>\$ 291,247.68</u>

The below is the BAS' new formula based on the Fiscal Year 2012 (next fiscal year) estimated operating cost, estimated intake figures, and estimated tag fee revenue; and, the following formula represents the BAS Board's Fiscal Year 2012 funding request:

• Annual BAS Cost for Services:	\$1,185,298.00
• Divide by Total BAS Animals (estimated):	<u>9,000.00</u>
• BAS Per Animal Cost (figure rounded down):	\$ 131.00
• Bryan ACO/Stray Animals (estimated):	<u>3,510.00</u>
• Bryan Sub-Total Costs:	\$ 459,810.00
• Estimated Revenue from Brazos County Tags:	\$ 200,000.00
• Bryan's Percent of Tag Revenue (estimated):	<u>40.00%</u>
• Bryan's Estimated Tag Revenue:	\$ 80,000.00
• Bryan's Annual Payment (Annual Cost)	<u>\$ 379,810.00</u>

(Note: The Fiscal Year 2012 operating cost does not include depreciation costs. The Fiscal Year 2011 operating cost did include depreciation costs and future years will likely include depreciation costs. Estimated Bryan animal counts include partial year actual and estimates for remaining months. Tag fee revenue is down for Fiscal Year 2011 and therefore an estimate for FY2012 is estimated to be lower than in previous funding formula models.)

- **Article Six (Rabies Observation):** BAS facilities will serve as the City's rabies observation site.
- **Article Seven (Legal Holds):** This article could pose an additional cost to the City if the City is determined to be the party responsible for costs associated with legal holds, which may be required due to cruelty seizure cases, criminal prosecution, etc.
- **Article Eight (City Representations and Obligations):** Article Eight references the City ordinance regarding vaccination and licensing of animals.
- **Article Nine (Shelter Representations and Obligations):** Section 9.1 addresses hours of operation. Section 9.3 states monies collected by BAS on behalf of the City shall be handled in accordance with applicable law, including Sections 826.031 and 826.033 Texas Health and Safety Code. Section 9.4 allows certain City officials access to the shelter facility.
- **Article Ten (Insurance):** This article states insurance coverage and limits the City requires of BAS. When appropriate, the City receives a waiver of subrogation or is named as an additional insured.
- **Article Eleven (Contract Term):** According to Article Eleven, the term of this agreement is fifteen (15) years with a possible ten (10) year extension unless the governing body of one or both parties provides written intent to terminate the agreement at least twelve (12) months but not less than nine (9) months before the end of the current term. The terms and conditions of the agreement are subject to annual appropriations in accordance to State law (i.e., as part of the City's budget process).

- **Article Twelve (Default and Termination):** Article Twelve addresses default and breach of the agreement. Essentially, either party is in breach if it fails to meet the terms of the agreement. Additionally, Section 12.3 requires the City to diligently pursue the construction of a new building by September 30, 2011.
- **Article Thirteen (Notice):** Article Thirteen provides the legal notice requirement.
- **Article Fourteen (Mediation):** If a dispute or claim in law or equity arises, Article Fourteen states a neutral, non-binding mediation process prior to litigation. The cost of mediation will be shared equally.
- **Article Fifteen (Miscellaneous):** Article Fifteen covers miscellaneous terms of the agreement such as assignment, governing law and venue, amendment, etc.

If the City Council approves the long-term animal shelter services agreement, the City has animal shelter services well into the future with a fifteen (15) year initial agreement. At the same time, the Brazos Animal Shelter, Inc. has a committed partner (subject to State annual appropriation laws). The current funding source for animal sheltering services is the Environmental Services Department – an enterprise fund – with revenues being derived from solid waste fees. As costs for animal shelter services increase to the City, solid waste rates may need to be increased.

At the time of drafting this Council Action Form (CAF), the Brazos Animal Shelter Board had not considered this proposed agreement in its entirety. The two parties had negotiation teams representing each entity and the terms were generally agreed upon by the teams. The exception to agreement terms at the time of drafting this CAF is in Section 5.1 regarding the Fiscal Year 2012 “Annual Payment.” The BAS negotiating team shared the City’s negotiation teams FY2012 Bryan Annual Payment amount of \$314,144.75 with the BAS Board; however, the BAS Board approved a FY2012 Annual Payment amount \$379,810.00. City staff recommends that if the City Council approves this proposed agreement (including addressing the specific terms), it is approved subject to the Brazos Animal Shelter, Inc. Board approving the same agreement by July 29, 2011.

Important note: the Bryan City Council needs to take specific action for the following three (3) terms within the proposed agreement (refer to Article Five, Section 5.1):

1. Annual Payment amount (in an amount not to exceed \$379,810.00) for Fiscal Year 2011-2012;
2. Annual cap increase (in a percent not to exceed five (5) percent per year); and,
3. Cap implementation year (with a fiscal year no later than Fiscal Year 2013-2014).

STAFF ANALYSIS:

A. PROS: Approval of the proposed long-term agreement provides the City of Bryan with animal shelter services into the future. The Brazos Animal Shelter, Inc. has experience in the community providing such services and indicates plans to continually improve upon services. Assuming the three government entities (Cities of Bryan and College Station and Brazos County) continue to receive services from BAS, an economy of scale should be realized. Additionally, partnerships, new facilities, and enhanced programs should result in a reduced euthanasia rate.

B. CONS: Approval of the proposed long-term agreement limits the City of Bryan’s ability to continue to review animal shelter service alternatives. Additionally, approval of the proposed long-term agreement results in an increase cost to the City and an expenditure of public funds; however, to provide animal sheltering services requires the expenditure of funds and possibly the use of other resources, depending on the service delivery method selected. Having an external service provider somewhat limits the City’s control over future costs, but a cap will help limit significant increases.

STAFF'S RECOMMENDATION (Including Rationale and Justification): City staff recommends approving the long-term animal shelter services agreement between the City of Bryan and the Brazos Animal Shelter, Inc. The long-term agreement with an annual increase cap provides the City better assurance that significant rate increases will not occur in the future. The new agreement results in the City’s shelter services being moved to the Leonard Road property along with the other two governmental entities (i.e., City of College Station and Brazos County).

Having the three governmental entities at a single location better enables economies of scale to exist, creates less confusion for the public, and better enables a service provider to provide multiple programs such as low-cost spay/neuter programs, adoption programs, foster programs, and education programs. Ultimately, these partnerships should reduce the community's euthanasia rate, which creates an improved quality of life for residents and animals.

OPTIONS (In Suggested Order of Staff Preference):

1. Approve the proposed agreement subject to the Brazos Animal Shelter, Inc. Board approving the same agreement by July 29, 2011. The Bryan City Council needs to take specific action to address each of the following three terms (refer to Article Five, Section 5.1):
 - 1) Annual Payment amount (in an amount not to exceed \$379,810.00) for Fiscal Year 2011-2012;
 - 2) Annual cap increase (in a percent not to exceed five (5) percent per year); and,
 - 3) Cap implementation year (with a fiscal year no later than Fiscal Year 2013-2014)
2. Approve the proposed long-term agreement without being contingent upon BAS Board approval
3. Modify and approve the proposed long-term agreement, which may require consideration at a future City Council meeting, additional negotiations with the Brazos Animal Shelter, Inc. Board, and consideration at a future Brazos Animal Shelter, Inc. Board meeting
4. Do not approve the proposed long-term agreement and provide direction to staff for animal shelter service operations effective October 1, 2011 or possibly sooner

ATTACHMENTS:

1. Proposed Animal Shelter Service Agreement between the City of Bryan, Texas and the Brazos Animal Shelter, Inc. (pdf document)

FUNDING SOURCE: Environmental Services (Solid Waste Funds), which is an Enterprise Fund – revenues (funds) are derived from solid waste fees, which could result in increased rates depending on the financial impact of animal shelter services costs and animal shelter facility construction costs along with the costs to continue to provide solid waste collection services.

APPROVALS:

APPROVED FOR SUBMITTAL: CITY ATTORNEY Janis K. Hampton, 07/03/2011

APPROVED FOR SUBMITTAL: CITY MANAGER Kean Register, 07/01/2011

**AGREEMENT FOR ANIMAL SHELTER SERVICES
PROVIDED BY BRAZOS ANIMAL SHELTER, INC.**

**THE STATE OF TEXAS §
 §
COUNTY OF BRAZOS §**

This Agreement is made this _____ day of _____, 2011 by and between The Brazos Animal Shelter, Inc., a Texas non-profit corporation (“SHELTER”) and the City of Bryan, Texas, Texas a home rule municipality (“CITY”).

Whereas, the SHELTER plans to operate an animal shelter facility to be located at 5359 Leonard Road, Bryan, in Brazos County, Texas, to house stray, unwanted, or abandoned animals; and

Whereas, the CITY has need of a facility to house animals it takes possession of throughout the CITY pursuant to City Ordinance after such animals have been abandoned, seized, or are considered strays as defined by the City Ordinance; and

Whereas, the SHELTER and the CITY have both long been concerned with the euthanasia rate and are actively seeking ways to reduce the number of animals destroyed due to lack of space; and

Whereas, the SHELTER has begun to operate out of the Leonard Road Facility to provide more space for animals, and the CITY is agreeing to build a structure at a cost not to exceed \$500,000.00 to provide additional space to house the historic intake of animals from the CITY, as well as the other entities; and

Whereas, the SHELTER will adopt a resolution upon completion of the above referenced structure acknowledging the CITY’s contribution and affirming that the CITY will not be asked to provide additional funding for capital improvements until matching contributions have been obtained from other sources; and

Whereas, the CITY desires to have the SHELTER perform such other animal services, including the collection, administration, and accounting of certain monies associated with impoundment, boarding, and licensing of CITY animals as set forth herein; and

Whereas, the SHELTER and the CITY have agreed to the execution of this Agreement for the purpose of the SHELTER providing such services;

NOW THEREFORE in consideration of the mutual covenants herein expressed, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

ARTICLE ONE-DEFINITIONS

The Parties agree that the following definitions shall apply to this Agreement:

- 1.1 “Animals” shall mean domestic animals such as dogs, cats and domesticated rabbits, non-indigenous reptiles and shall exclude birds, fowls and livestock as defined herein.
- 1.2 “Annual Payment” shall mean the annual amount CITY pays SHELTER for SHELTER’s services calculated as set forth in paragraph 5.1 of this Agreement.

- 1.3 “Birds” and “Fowl” shall be defined as an animal belonging to the class of Aves including members of the parrot family and all game birds, including but not limited to dove, quail, duck, goose, pigeon, cardinal, blue jay, robin, sparrow, blackbird and crow.
- 1.4 “City Ordinance” shall refer to Chapter 10 of the City of Bryan Code of Ordinances as same may, from time to time be amended.
- 1.5 “Licensing Program” shall mean the program of licensing dogs and cats in accordance with Chapter 826, Texas Health and Safety Code.
- 1.6 “Facility” shall mean those facilities used by SHELTER in providing shelter and other services for CITY pursuant to this Agreement currently anticipated to be located at 5359 Leonard Road, Bryan, TX.
- 1.7 “Livestock” shall be as set forth in the Texas Agriculture Code Section 1.003(3) and shall include cattle, horses, mules, asses, sheep, goats and hogs and shall also include bison, swine and other equine, poultry, wild rabbits, exotic animals, or domestic game birds.

ARTICLE TWO-IMPOUNDMENT

- 2.1 **Facility.** The SHELTER represents that its Facility may house and process animals for CITY in a manner for SHELTER to meet its obligations herein as well as meets applicable legal requirements for animal shelters, including all rules and regulations pursuant to Chapter 823 Texas Health and Safety Code.
- 2.2 **Impoundment.** The SHELTER agrees that it will accept all animals brought to its Facility by CITY. Such animals shall be impounded under the exclusive control and custody of the SHELTER for periods of time as required by Title 10, Texas Health and Safety Code and the City Ordinance except as hereinafter set forth. Prior to delivery to the SHELTER, the CITY shall scan for microchips or search for a license and use all reasonable diligence to notify the licensed owner, if any. The CITY shall take all injured animals that are licensed and tagged in accordance with the Licensing Program to a veterinarian or animal clinic during SHELTER non-business hours for treatment in accordance with the City Ordinance. The CITY shall not accept a surrender of ownership of an animal by its owner at the Facility, except through and at the SHELTER.
- 2.3 **Hold Period.** Every animal delivered to the Facility by the CITY shall become the sole and exclusive property of the SHELTER to process in accordance with this Agreement, including in accordance with the City Ordinance regarding impoundment and redemption. The CITY agrees that the passage of three (3) working days beginning from the date of delivery to the SHELTER of every impounded stray animal is the “Redemption Period.” Neither the CITY nor any agency nor agent of the CITY shall have any claim or right to any animal not claimed and redeemed during the Redemption Period.
- 2.4 **Care.** The SHELTER agrees and represents that it will provide reasonable care for all animals delivered to the Facility by the CITY. This includes adequate shelter, food, water and all other humane treatment.

ARTICLE THREE-ANIMAL DISPOSITION

- 3.1 **Disposition Policy.** The SHELTER shall have the undisputed right, consistent with the City Ordinance, Title 10, Texas Health and Safety Code and this Agreement, to dispose of every animal given into its custody in accordance with the following policy:
- a. to return the animal to its former owner, if possible;
 - b. to place unclaimed animals in the care, custody and control of new owners; or
 - c. to humanely destroy animals which are not claimed by owners.

The SHELTER shall have the sole and exclusive right to determine the responsibility of persons offering to become the owners of unclaimed animals and the suitability of the home offered, and shall have the sole and exclusive right to accept or reject such applicants for unclaimed animals. Pursuant to the terms of this Agreement, the SHELTER shall have the sole and exclusive right to determine if and when animals are to be placed in a new home or destroyed but agrees to make a good faith attempt to place animals prior to destroying them. Notwithstanding the foregoing, the SHELTER shall have the right to humanely destroy any animal impounded that is found to be physically suffering, injured or have a communicable disease prior to the end of the Redemption Period.

- 3.2 **Impoundment, Boarding, and Adoption.** The SHELTER agrees, in accordance with Paragraph 3.1 of this Agreement, that if the owner of an impounded animal shall claim the animal prior to the Redemption Period the SHELTER shall collect from the owner the then current impoundment fee together with the cost of board at the then current rate per animal so impounded. Further, the SHELTER shall require the owner of every impounded animal to pay all applicable fees including licensing and vaccination fees of an impounded animal which has not been inoculated and licensed, as appropriate. The SHELTER shall set, in its sole discretion, all fees, if any, it charges to the public for an animal adoption.

ARTICLE FOUR-COLLECTION OF FEES

- 4.1 **Enforcing Agency.** CITY herein designates SHELTER and SHELTER herein agrees to serve as an enforcing agency on behalf of the CITY for purposes set forth in this Agreement. Specifically, SHELTER agrees that it will act on CITY's behalf by charging, collecting, and accounting for those fees it receives pursuant to City Ordinance, including licensing fees, impoundment fees, and boarding fees.
- 4.2 **Disposition of Funds.** Any Licensing Program fees collected or received by SHELTER shall be accounted for separately and shall be used in calculating the Annual Payment as required in paragraph 5.1 of this Agreement. Any monies paid in owner-returned cases to the SHELTER for impoundment during the Redemption Period will be accounted for separately but will not be used to offset the calculation of the Annual Payment, rather those funds shall be used to defray incidental soft costs incurred by the SHELTER as part of providing services under this Agreement.

ARTICLE FIVE-COST OF SERVICES AND FEES

- 5.1 **Annual Payment.** As compensation for the services provided by the SHELTER under this Agreement, the CITY agrees to pay an Annual Payment as calculated below. The SHELTER shall estimate that sum of money necessary to recover its operating costs for the next succeeding fiscal year ("Operating Costs"). Those Operating Costs shall be divided by the total number of animals taken in by the SHELTER from all sources to produce a cost per animal. The cost per animal shall be multiplied times the number of owner surrender, stray, and animal control animals

originating from the CITY, the product of which shall be credited or offset by the reasonably anticipated annual amount of Licensing Fees attributable to the CITY, resulting in the Annual Payment. Beginning on the fiscal year starting October 1, 20____, the Annual Payment may not exceed the previous fiscal year's annual payment by greater than ____ percent (____%). The Annual Payment, commencing on the date of approval until September 30, 2011, shall continue to be \$299,185.48, the amount stated in the prior Agreement which has been extended by Amendment. The Annual Payment, commencing on October 1, 2011 and ending September 30, 2012, shall be \$_____. By the last day of May 2012, and each year thereafter, the SHELTER agrees to provide written notice to the CITY of the Annual Payment amount for the coming fiscal year, as well as the SHELTER's operating costs from the previous and current years, and supporting documentation (i.e. independent financial audits and quarterly reports).

- 5.2 **Most favored nation clause.** Should the CITY determine that the SHELTER has entered into any subsequent agreement with another public entity during the term of this Agreement which provides for terms and conditions more favorable than those contained in this Agreement, then this Agreement shall be deemed to be modified to provide CITY with those more favorable terms and conditions. SHELTER shall notify CITY promptly of the existence of such agreement with a public entity and CITY shall have the right to receive the more favorable terms and conditions immediately. If requested in writing by the CITY, SHELTER shall amend this Agreement to contain the more favorable terms and conditions.
- 5.3 **Billing.** The SHELTER agrees to bill the CITY the Annual Payment in twelve equal monthly installments. CITY agrees to pay such bill pursuant to the Texas Prompt Payment Act.
- 5.4 **Additional Charges.** In addition to the Annual Payment, there may be such additional charges assessed CITY for services performed by SHELTER hereunder and as may from time to time be mutually agreed upon in writing.
- 5.5 **Building Construction.** The CITY agrees to coordinate with the SHELTER to construct a building on the Leonard Road property sufficient to house the CITY's historic intake of animals. The CITY will bid the construction, using plans and terms acceptable to the SHELTER, and will pay for the cost of construction, provided such cost does not exceed \$500,000.00. The SHELTER agrees that in exchange for financing such construction, the SHELTER shall provide the services that are the subject of this Agreement to the CITY at the Leonard Road property for the term of this Agreement. The parties agree that the CITY has no ownership rights in the building. Such building shall not be for the exclusive housing of CITY animals. Construction is scheduled to begin on September 1, 2011 and the estimated date of completion is December 31, 2011. Any liquidated damages assessed against the contractor for late completion shall be paid to the CITY, but shall be used to offset costs incurred by the SHELTER during the construction, including staffing, travel, and related costs. During the construction of the building, SHELTER will be permitted to continue to use the property owned by the CITY at 2207 Finfeather Road. The CITY agrees to pay for maintenance costs associated with the Finfeather Road property and the CITY agrees to pay an additional \$6,000.00 per month at the same time as the monthly installment of the Annual Payment, to cover the cost of additional staffing at that location. In addition to other in-kind contributions to the SHELTER, the CITY is providing the SHELTER with new kennels, valued at \$98,000.00, for use in the Leonard Road facility.
- 5.6 **Livestock, Birds, and Fowl.** The CITY agrees that the responsibility for seizing, securing, housing and disposing of livestock belongs to the sheriff's department of Brazos County, Texas. In the event, for any reason, the CITY delivers livestock to the SHELTER which was seized in its jurisdiction by the duly appointed agents of the CITY, the SHELTER shall be paid for actual

expenses it incurs to feed, house, transport and dispose of such livestock in addition to any other amounts under this Agreement. In the event, for any reason, the CITY delivers birds or fowl to the SHELTER which was seized in its jurisdiction by the duly appointed agents of the CITY, the SHELTER shall be paid for actual expenses it incurs to feed, house, transport and dispose of such birds and fowl in addition to any other amounts under this Agreement. SHELTER agrees to abide by all applicable law in processing livestock, birds and fowl hereunder.

- 5.7 **Report.** The SHELTER agrees to provide to the CITY, on a quarterly basis, a report setting forth the following information for each animal, livestock, or fowl attributable to the CITY:
- i. date delivered to the SHELTER;
 - ii. type of animal, livestock, or fowl;
 - iii. reason for impoundment; and
 - iv. date and nature of the disposition, including (if applicable), amount of purchase price, and date of purchase.

The SHELTER agrees to keep a record of the name and address of purchasers of stray and animal control animals for a year from the date of purchase.

- 5.8 **Financial Records and Audit.** SHELTER agrees to conduct an audit on an annual basis using an outside agency to perform same, and agrees to provide CITY a copy of such audit as soon as it is available but no later than May 31st of the following fiscal year. The SHELTER agrees to provide to the CITY, on a quarterly basis, financial reports detailing the income from all Licensing Program fees and the income from the Licensing Program fees attributable to the CITY, the total number of animals taken in by the SHELTER and the number attributable to the CITY. CITY reserves the right to conduct its own audit of the records of the SHELTER at any time it deems necessary for the limited purpose of verifying the Annual Payment, the number of animals licensed, and the number and ratio of animals processed on behalf of the CITY compared to the total number of animals processed by the SHELTER, the length of stay of each such animal and the collection of fees for various services and items.

ARTICLE SIX-RABIES OBSERVATION

The SHELTER agrees to accept from the CITY animals for rabies observation. Such animals delivered for rabies observation shall be isolated for a period of not less than ten (10) days or, in the case of a wild, stray or owner surrendered animal, such time as the SHELTER, in its sole discretion determines in deciding, to destroy the animal and send it to the Texas Department of State Health Services for rabies testing. The SHELTER shall be responsible for the processing, storage and delivery for testing of animal carcasses and diagnostic fees for suspected rabies animals. The SHELTER shall make available to the CITY, upon request, information about the disposition of any rabies suspected animal.

ARTICLE SEVEN-LEGAL HOLDS

In the event an animal or livestock is being held by the SHELTER as a result of a cruelty seizure, criminal prosecution or other legal hold by the CITY, the CITY shall reimburse the SHELTER for any veterinarian invoices and medical bills incurred by the SHELTER until the Court awards the animal or livestock to the SHELTER, orders it destroyed or orders it returned to its owner. The CITY shall not be liable for these costs in the event the Court orders the animal or livestock owner to pay such costs and the same are paid within sixty (60) days of such order. If the fees are not paid by the animal or livestock owner, after sixty (60) days the CITY shall be liable for those fees and shall remit the same upon invoice by the SHELTER. In such instance, the SHELTER confers upon the CITY all rights and remedies it may have by law or equity to recover such fees and costs from the owner.

ARTICLE EIGHT-CITY REPRESENTATIONS AND OBLIGATIONS

The CITY represents to the SHELTER that the City Ordinance provides for the vaccination and licensing of animals under appropriate circumstances, impounding of animals running at large, and the regulation of the sale of animals, and that while this Agreement is in effect, such City Ordinance will be continued in force, provided, however, that such City Ordinance may be modified from time to time as the CITY deems appropriate.

ARTICLE NINE-SHELTER REPRESENTATIONS AND OBLIGATIONS

- 9.1 **Hours of Operation.** The SHELTER will keep its Facility open to the public for not less than three (3) hours per day on weekdays, and not less than three (3) hours on Saturday (except holidays), for the purpose of giving owners ample opportunity to redeem their impounded animals.
- 9.2 **Nondiscrimination.** The SHELTER covenants and agrees that, in connection with the performance of the Agreement, it will not discriminate against any individual with respect to adoption of animals, compensation, terms or privileges of employment by reason of such individual's race, color, religion, gender, national origin or handicap, except as exempted by bona fide occupational qualification and bona fide criteria for adoption.
- 9.3 **Use of CITY funds.** SHELTER agrees that any monies it collects on behalf of CITY pursuant to the terms of this Agreement shall be handled in accordance with applicable law, including Sections 826.031 and 826.033 Texas Health and Safety Code.
- 9.4 **Access.** SHELTER agrees to provide CITY animal control officers with access to the Facility at all times necessary to conduct animal control activities. SHELTER agrees to provide the City Manager or his designee access to the Facility upon reasonable notice, during business hours.

ARTICLE TEN-INSURANCE

- 10.1 **Coverage and Limits.** SHELTER shall at all times relevant to the fulfillment of this Agreement have, keep, and maintain insurance covering general liability, property, worker's compensation if required by State law, and automobile liability in the following amounts:
- (a) Workers Compensation insurance shall be at statutory limits, including employer's liability coverage at minimum limits of \$500,000.00 each accident, including a waiver of subrogation in favor of the CITY.
 - (b) The General Liability insurance shall have a minimum combined single limit for bodily injury, personal injury, and property damage of \$1,000,000.00 per occurrence. The CITY shall be named as an additional insured.
 - (c) Automobile Liability insurance shall be continuously held with limits for bodily injury and for property damage of not less than \$1,000,000.00 on all self-propelled vehicles used in connection with the SHELTER operation, whether owned, non-owned or hired.
 - (d) Property insurance shall be held, once the building has been completed, with a minimum limit of the value of the building being constructed by the CITY in accordance with this Agreement. The CITY shall not be an additional insured on that policy.
- 10.2 **Review.** All insurance policies shall be subject to the examination and approval of CITY, as to the adequacy of form, content, form of protection, and insurance company. The SHELTER shall furnish to CITY's Risk Manager, for the City of Bryan's files, certificates or copies of the policies, plainly and clearly evidencing such insurance prior to commencing any activities set forth in this

Agreement, and thereafter, new certificates or policies prior to the expiration date of any prior certificate or policy throughout the term of this Agreement.

ARTICLE ELEVEN-AGREEMENT TERM

This Agreement shall be for a term commencing as of the date of approval by the governing bodies of both parties, and ending on September 30, 2026. This Agreement shall automatically renew for one ten-year term, unless the governing body of one or both of the parties provides a written statement of intent to terminate at least twelve months but not less than nine months before the end of the current term. The terms and conditions of this Agreement are subject to annual appropriation in accordance with State law. In the event that the CITY fails to appropriate funds for this Agreement, the SHELTER may terminate this Agreement, and may submit a bill for any past due Annual Payment or additional fees or expenses due, which shall bear interest in accordance with Texas Government Code, Chapter 2251.

ARTICLE TWELVE-DEFAULT AND TERMINATION

- 12.1 **SHELTER Default.** If SHELTER fails in any material term or condition of this Agreement, including failing to obtain or comply with applicable State law requirements for performing services hereunder, SHELTER shall be in breach of this Agreement. In the event of a breach, the CITY shall give SHELTER ninety (90) days notice and opportunity to cure the breach, unless the parties agree in writing that more time is required due to the nature of the breach.
- 12.2 **CITY Default.** If CITY fails in any material term or condition of this Agreement, CITY shall be in breach of this Agreement. In the event of a breach, the SHELTER shall give the CITY ninety (90) days notice and opportunity to cure the breach, unless the parties agree in writing that more time is required due to the nature of the breach.
- 12.3 **Termination for Default.** Should CITY fail to diligently pursue the construction of the building prior to September 30, 2011, the SHELTER may, upon thirty (30) days notice, terminate this Agreement.

ARTICLE THIRTEEN-NOTICE.

Any notice sent under this Agreement except as may be otherwise expressly required in this Agreement shall be written and mailed by certified mail return receipt requested, or sent by electronic or facsimile transmission confirmed by mailing written confirmation at substantially the same time as such electronic or facsimile transmission, or personally delivered to an officer of the receiving party at the following:

To the SHELTER:
Brazos Animal Shelter, Inc.
Attn: Executive Director
5359 Leonard Rd.
Bryan, TX 77807

To CITY:
City of Bryan
Attn: City Manager
P.O. Box 1000
Bryan, TX 77805

300 S. Texas Ave.
Bryan, TX 77803

Each party may change its address by written notice to the other party in accordance with this section. Any communication addressed and mailed in accordance with this section shall be deemed to be given when so mailed, any notice so sent by electronic or facsimile transmission shall be deemed to be given when receipt of such transmission is acknowledged or confirmed, and any communication so delivered in person shall be deemed to be given when receipted for, or actually received, by the other party, as the case may be.

ARTICLE FOURTEEN-MEDIATION

Any dispute or claim in law or equity arising out of this Agreement or any resulting transaction, including disputes or claims involving the parties to this Agreement, their officers, agents or employees, shall be submitted to neutral, non-binding mediation prior to the commencement of litigation or any other proceeding before a trier of fact. The parties to the dispute or claim agree to act in good faith to participate in mediation, and to identify a mutually acceptable mediator. Both parties to the mediation agree to share equally in its cost. If the dispute or claim is resolved successfully through the mediation, the resolution will be documented by a written agreement executed by both parties. If the mediation does not successfully resolve the dispute or claim, the mediator shall provide written notice to the parties reflecting the same, and the parties may then proceed to seek an alternative form of resolution of the dispute or claim, in accordance with the remaining terms of this Agreement and other rights and remedies afforded to them by law.

ARTICLE FIFTEEN-MISCELLANEOUS

- 15.1 **Assignment.** This Agreement is not assignable by either party without the written consent of the other.
- 15.2 **Governing Law and Venue.** The law of the State of Texas shall govern the validity, interpretation and performance of this Agreement and this Agreement shall be considered performed in Brazos County.
- 15.3 **Entirety.** This Agreement is the entire agreement concerning the terms and conditions under which the services defined herein will be performed.
- 15.4 **Prior Matters.** All prior agreements, negotiations, representations, understandings, and partial agreements concerning this Agreement's subject matter are superseded by and merged with this Agreement.
- 15.5 **Amendment.** Except as may be expressly set forth elsewhere in this Agreement, no attempted amendment, modification, waiver, or release of this Agreement's obligations shall be binding unless a writing exists that (a) identifies the amended, modified, waived, or released obligation, (b) describes the nature of the amendment, modification, waiver, or release, and (c) is duly approved by each party and executed by each party's authorized representative.
- 15.6 **Severability of Provisions.** If any part of this Agreement contravenes any applicable statutes, regulations, rules, or common law requirements, then to the extent and only to the extent of such contravention, such part shall be severed from this Agreement and deemed nonbinding while all other parts of this Agreement shall remain binding.
- 15.7 **Headings.** The headings, sub-headings, and other subdivisions of this Agreement are inserted for convenience only. The Parties do not intend them to be an aid in legal construction.

15.8 **Counterparts Permitted.** This Agreement may be executed in any number of counterparts, and each such counterpart shall be deemed an original of this Agreement for all purposes.

EFFECTIVE THIS ____ DAY OF _____, 2011

CITY OF BRYAN

BRAZOS ANIMAL SHELTER, INC.

Jason P. Bienski, Mayor

Judy LeUnes, Board President

ATTEST

Mary Lynne Stratta, City Secretary

APPROVED AS TO FORM

Janis K. Hampton, City Attorney