



TO: PEGGY ARRAIZ, DIRECTOR OF COMMUNITY RESPONSE
FROM: ANDREA H. DUENAS, ASSISTANT CITY ATTORNEY **AHD**
THROUGH: SARA HEDGES, CITY ATTORNEY *SH*
RE: NEGOTIATE FINAL VERSION PETSMART CHARITIES ADOPTION PARTNER AGREEMENT
CAO RLS FILE: 24-334 AND 24-365
DATE: NOVEMBER 12, 2024 – SUPPLEMENTAL MEMO

This Request for Legal Services (RLS) asks the City Attorney's Office ("Office") to review and approve an Adoption Partner Agreement between PetSmart Charities Inc. ("PetSmart") and the City of Fort Pierce ("City").

There are three attachments to this Supplemental Memo:

- (1) Final Agreement – Approved by PetSmart on November 5, 2024
- (2) CAO Memo from RLS 24-334 (August 28, 2024)
- (3) CAO Memo from RLS 24-365 (Sept. 24, 2024)

This Office was able to work with the attorney for PetSmart and resolve all of our concerns except for the Indemnification provision (¶12-D).

PetSmart insists on the Indemnification language and made that very clear from the outset. If the City wishes to partner with PetSmart, the City must sign the attached Final Agreement with the Indemnification provision intact.

As stated in my previous memos, this Office does not recommend entering into an Agreement that requires the City to indemnify or defend another party. The Agreement is otherwise approved as to form and correctness.

If you have any questions as to how to proceed, please do not hesitate to contact this Office.

/ahd



PETSMART
Charities
Adoption Partner Agreement

This Adoption Partner Agreement (this “Agreement”) is entered into as of the last date signed below between PetSmart Charities Inc., an Arizona nonprofit corporation and tax-exempt public charity under Section 501(c)(3) of the Internal Revenue Code (“Code”), whose address is 19601 N. 27th Avenue, Phoenix, AZ 85027 (“Charities”), and the City of Fort Pierce, a Florida municipal corporation, whose address is 100 North U.S. Highway 1, Fort Pierce, FL 34950 (“Adoption Partner”).

Section 1 – PetSmart Charities Adoption Program

- A. Adoption Program. Subject to the terms of this Agreement, Charities agrees to permit Adoption Partner to participate in the Charities’ adoption program (“Adoption Program”) located at one or more PetSmart Charities Adoption Centers or other space at PetSmart retail stores, or in the case of special events, locations specified by Charities (“Adoption Center”). The Adoption Program’s sole purpose is to help facilitate and provide a location to facilitate adoptions of dogs, cats, or other certain pets (“Pets”). Adoption Partner acknowledges that in addition to its organization, other adoption agencies may also be permitted by Charities to hold adoptions at the same time and location as the Adoption Partner.
- B. Adoption Policies. In addition to the terms and conditions contained in this Agreement, Adoption Partner acknowledges that it has received, and agrees that it and its employees and volunteers will comply with, any policies, procedures and/or manuals (collectively the “Policies”) as provided to Adoption Partner by Charities and/or PetSmart LLC (“PetSmart”), including any future changes to those policies, procedures and/or manuals provided by Charities and/or PetSmart to the Adoption Partner (e.g., email notice, etc.). Charities reserves the right to amend such adoption policies in its sole and absolute discretion and will update Adoption Partner of any changes.
- C. Adoption Process. Subject to this Agreement and applicable law, Adoption Partner will use its own adoption policies and procedures when offering Pets for adoption, and will make the final decision in the adoption of a Pet. Adoption Partner shall retain ownership of each Pet until the adoption process for such Pet is complete. Adoption Partner will require an adoption release form or other similar document specified by Charities to be signed by the adopting party.
- D. Adoption Assistance. If mutually agreed upon by Adoption Partner, Charities, and PetSmart, Charities may, through its relationship with PetSmart, facilitate use of PetSmart employees to support the Adoption Center, which may include conducting adoptions, providing care for Pets, and maintaining the facilities. In such event, Adoption Partner hereby authorizes Charities and/or PetSmart to carry out those activities agreed upon and to provide all reasonably necessary training on Adoption Partner’s practices, policies, and procedures.
- E. Adoption Center. Adoption Partner shall have the use of the Adoption Center free of rent or costs. The parties will mutually agree upon one or more Adoption Center locations and the date Adoption Partner will begin use of each Adoption Center. Additional locations may be added from time to time as deemed necessary by both parties. Additional locations and/or change of locations can be accomplished upon written request by Adoption Partner and written approval of such request by Charities in its sole and absolute discretion.
- F. Damage to Adoption Center. Adoption Partner will be responsible for any damage to the Adoption Center or related equipment caused by Adoption Partner, its staff, volunteers, Pets, or any other person or animal acting on or under Adoption Partner’s direction or control. Adoption Partner will, at its sole expense, maintain the Adoption Center in a clean, sanitary and orderly fashion and take preventative action to minimize the spread of communicable diseases among Pets. Adoption Partner is responsible for ensuring that the area is clean, fully sanitized and disinfected prior to departure. Nothing herein is intended to or shall be construed to be a waiver of Adoption Partner’s sovereign immunity under Section 768.28, Florida Statutes, nor to increase any limits therein.
- G. Adoption Rewards. Charities may elect to provide certain monetary grants in conjunction with the Adoption Program (“Rewards”). Charities, in its sole and absolute discretion may determine the election, amount, modification, or termination of Rewards. Adoption Partner agrees to use such Rewards in the furtherance of its charitable purpose,

specifically its Pet adoption program, or if permitted by Charities, other charitable purposes advancing animal welfare. Adoption Partner may not use Rewards for lobbying or political activities, or any purpose not permitted by the Code.

- H. Adoption Center Supplies. Charities may elect to provide products or pet food (collectively “Product”) for use by Adoption Partner solely for the operation of the Adoption Center. Charities, in its sole and absolute discretion may determine the election, modification, or termination of Product. Adoption Partner understands and agrees that Product is provided in “as-is” condition and that Charities and PetSmart make NO WARRANTY, COVENANT OR REPRESENTATION, EXPRESSED OR IMPLIED, REGARDING THE PRODUCT, INCLUDING WITHOUT LIMITATION, THEIR DESIGN OR MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE (EXCEPT CHARITIES WARRANTS IT HAS GOOD TITLE TO THE PRODUCT AND CAN TRANSFER GOOD TITLE TO ADOPTION PARTNER), NEITHER CHARITIES NOR PETSMAK SHALL BE LIABLE FOR ANY DIRECT, INDIRECT, SPECIAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES OR LOSSES SUFFERED OR INCURRED BY ADOPTION PARTNER OR A THIRD PARTY AS A RESULT OF THE USE, OR CONSUMPTION OF THE PRODUCT. Adoption Partner waives any and all claims against and releases Charities and/or PetSmart from all liability associated with the use or consumption of the Product. Adoption Partner further understands and agrees that the U.S. Food and Drug Administration (“FDA”) regulations specify that protein derived from mammalian tissues is not to be used in ruminant feed and that the feeding of any pet food included with any Product to cattle or other ruminant animals is expressly prohibited by federal regulations.
- I. Reporting. Adoption Partner is required to submit the impact report(s) related to the Adoption Program specified by Charities along with any other information reasonably requested by Charities.
- J. Pet Eligibility. Except as specified in the Policies, all Pets must be spayed or neutered, and evaluated and deemed to be healthy, safe for interaction, adoptable, and in compliance with any applicable laws and regulations prior to placement in the Adoption Program. Pets showing or previously having shown any signs of aggression are strictly prohibited from the Adoption Program. Adoption Partner will isolate Pets at the first sign of illness or aggression and remove such Pets immediately from the Adoption Center and PetSmart premises.
- K. Request for Removal of Pet. Charities or its designee may require Adoption Partner to immediately remove any Pet from the Adoption Center or PetSmart premises as may be reasonably necessary to comply with Charities’ Adoption Policies, operate the Adoption Program, ensure the safety or well-being of any Pet or person, or comply with any applicable law or regulation, in Charities’ sole discretion.
- L. Employees and/or Volunteers. Adoption Partner agrees that Adoption Partner’s employees who are working or facilitating adoptions in the Adoption Program must be at least 18 years old. Adoption Partner’s volunteers must be at least 16 years old and properly supervised by the Adoption Partner. Volunteers under the age of 18 must always be accompanied and supervised by an adult. Adoption Partner and its employees and volunteers must always maintain a clean, neat and professional appearance, and conduct themselves in a professional and courteous manner. Adoption Partner shall only permit its employees and volunteers to participate in the Adoption Program.
- M. Agreement. Adoption Partner agrees to require all employees and volunteers working on behalf of Adoption Partner in conjunction with the Adoption Program to sign an agreement with Adoption Partner acknowledging that they are aware of and agree to comply with all policies, procedures and manuals, including this Agreement.
- N. Potential Removal. In the event Charities or PetSmart has any objection to any Adoption Partner employee or volunteer, Charities or PetSmart shall have the right to require Adoption Partner to commence appropriate procedures to remedy the basis of any such objection. Upon reasonable request, PetSmart or Charities, in its sole discretion, may require the removal of the employee or volunteer from the Adoption Center or any other designated areas.
- O. Prohibited Conduct. Adoption Partner, its employees, volunteers or agents, may not, directly or indirectly, during the term of this Agreement:
1. Sell, gift or generally compete with any of the products and/or services sold by PetSmart (such as grooming, pet training and veterinary services) while in the Adoption Center or on PetSmart premises.
 2. Conduct fundraising activities while in the Adoption Center or on PetSmart premises, including directly soliciting donations; except Adoption Partner is welcome to collect donations through use of a donation collection canister located where adoptions are being performed.

3. Interfere in any way with the conduct of the business of PetSmart, Charities or any customer, tenant or occupant of the PetSmart store or shopping center while in the Adoption Center or on PetSmart premises participating in the Adoption Program.
4. Allow any person or other organization to use its Adoption Group Number as assigned by Charities, its tax identification number, or participate in the Adoption Program using its name or identity.

In addition, during the term of this Agreement, Adoption Partner and its employees, volunteers, or agents will not make, directly or indirectly, any negative statements, whether written or oral (including in any digital electronic format) or disparage Charities and PetSmart. In the event a negative statement is made, upon notice from Charities (email to suffice), Adoption Partner will use commercially reasonable efforts consistent with Chapter 119, Florida Statutes, and Florida's Public Records laws, to have the negative statement taken down or removed from any platform, and Charities may immediately terminate this Agreement for cause. Violation of this paragraph shall not give to any cause of action, including but not limited to, any cause of action for breach of contract, slander, or libel.

Section 2 – General Provisions

A. Representations. Adoption Partner represents to Charities, as of the date of this Agreement and at all times during the term, that:

1. Adoption Partner is either: (i) an organization exempt from federal income tax under Section 501(c)(3) of the Code, (ii) a governmental entity under Section 170(c)(1) of the Code that will use any Rewards exclusively for public purposes, or (iii) an "Indian tribal government," under Section 7701(a)(40) of the Code, that is treated as a State that will use any Rewards exclusively for public purposes.
2. Adoption Partner holds and will maintain any and all licenses, permits and registrations necessary or appropriate to operate and fulfill Adoption Partner's mission.
3. Adoption Partner is in compliance (and will comply) with all applicable federal, state, local and tribal laws, regulations and other requirements.
4. Adoption Partner is not on any federal terrorism "watch list" and any Rewards will be used in compliance with all applicable anti-terrorist financing and asset control laws, statutes and executive orders.
5. Adoption Partner agrees that all representations or statements made by Adoption Partner in any application or any related communications from or on behalf of Adoption Partner are true and accurate in all material respects. Adoption Partner will notify Charities promptly in writing of any changes in such representations or statements.

B. Audit. Adoption Partner agrees to maintain adequate books, records and other documents showing compliance with this Agreement. During the term of the Agreement and for two (2) years afterwards, Charities or its designee may audit or review Adoption Partner's books, records, and operations to confirm Adoption Partner's compliance with the terms of the Agreement. Any such request will be made with at least ten (10) business days' prior notice and during normal business hours; provided however, that in the event Charities has a bonafide reason to believe, in its sole discretion, that there may be issues related to the welfare of any people or animals associated with Adoption Partner, Adoption Partner shall permit such audit with no notice. Adoption Partner will provide Charities with the requested records and will fully cooperate with Charities. Adoption Partner acknowledges and agrees that any such audit may include, without limitation, (i) an on-site or in person inspection, (ii) observation of Adoption Partner's facilities and operations, and (iii) personnel interviews, including without limitation, employees and volunteers. During any such audit or review, Charities may, in its sole discretion, suspend participation in the Adoption Program and withhold any unpaid Rewards pending the outcome of the audit or review. Adoption Partner expressly grants permission to Charities or its designees to discuss with, or request documentation from, third parties about Adoption Partner related to performance under this Agreement. Adoption Partner agrees to cooperate with Charities in supplying additional information required for Charities to comply with governmental requests related to this Agreement. In addition, Adoption Partner agrees to retain and make available all records for Pet licensing and registration, adoptions and adopter information, adoption policies and procedures, as well as any other records required by law related to any Pet or operation of the Adoption Center.

C. Independent Entities. Nothing in this Agreement is intended or will be construed to create any type of partnership, joint venture, employment, franchise or other similar relationship between the parties. The parties agree that Adoption Partner is an independent entity solely responsible for itself, its employees, volunteers, agents, and its Pets. Each party shall be solely responsible for the acts and omissions of its respective officers, agents, servants, employees, representatives and subcontractors during and after the term of this Agreement.

- D. Indemnification. Adoption Partner shall defend, indemnify and hold harmless Charities and PetSmart, including their respective affiliates, directors, officers, managers, employees, representatives, agents, assigns and successors, from and against all costs, claims, losses, liabilities, property damage, bodily injury or death, or intellectual property infringement (including reasonable attorneys' fees and expenses), incident to or arising out of Adoption Partner's: breach of this Agreement; willful misconduct or negligent act(s) or omission(s); receipt or use of the Rewards; participation in the Adoption Program, including injury or damage caused by or involving Adoption Partner's Pets; possession, storage, use, consumption and disposal of any Product; employment and/or worker compensation claims; or violation of applicable law. Notwithstanding the foregoing, this provision shall not be applicable if Adoption Partner is a governmental entity and as such, is prohibited by law from indemnifying Charities.
- E. Equal Opportunity. Adoption Partner agrees that it will not discriminate by reason of race, color, creed, religion, national original, age, sexual orientation, disability, veteran status, gender, marital status or any other legally protected status.
- F. Publicity. Adoption Partner agrees that it will acknowledge Charities' support in any promotional materials related to its participation in the Adoption Program, including websites and social media platforms. Adoption Partner must obtain prior written approval by Charities and will provide Charities at least ten (10) business days to review, for quality control purposes, the proposed use of Charities' name and/or logo. If Charities permits Adoption Partner use of its logo, such use is a limited, non-exclusive, revocable right to use. Adoption Partner may not use Charities' logo for any purpose other than the use permitted by Charities, and Charities may immediately terminate use if it is determined by Charities to be unacceptable. Adoption Partner will not use either Charities' name or logo in a negative light or critical manner. Any right given to Adoption Partner for the use of Charities name or logo may not be transferred, assigned or sublicensed. Charities has the limited, non-exclusive, revocable right to publish, print, transmit, display or otherwise use Adoption Partner's name and logo. Such use may be in electronic or digital format (including e-mail, social media platforms or websites) or in printed form. Charities will not use Adoption Partner's name or logo in a negative light or critical manner. Charities' use of Adoption Partner's name or logo will be used only to support or further Charities' mission.
- G. Governing Law; Venue. Adoption Partner also agrees and understands that this Agreement may be enforced by legal action, including but not limited to injunctive or other equitable relief. This Agreement shall be governed by and construed in accordance with the laws of the State of Florida in the United States without regard to conflict of law provisions or international treaties or conventions, unless prohibited by law. Venue for any action arising out of this Agreement shall be St. Lucie County, Florida.
- H. Term and Termination. This Agreement shall remain in effect until terminated by either party as set forth herein. Either party may terminate this Agreement at any time, with or without cause, upon at least thirty (30) days written notice of such termination to the other party. Charities may immediately terminate this Agreement upon written notice to Adoption Partner if Charities determines, in its sole discretion, that Adoption Partner: has breached any term of this Agreement; is the subject of any legal, regulatory or media investigation or is engaged in any action or course that appears to be unprofessional, uncharitable, disreputable, or otherwise inappropriate; ceases to operate or materially and adversely changes its method of operation, is insolvent, or files for or is the subject of any type of receivership, bankruptcy or similar proceeding; or has not complied with the requirements of any other agreement with Charities. If Charities terminates this Agreement for cause, it may, in its sole and absolute discretion: withhold any pending or future Rewards; or revoke any Rewards not used in accordance with this Agreement and require that all previously provided Rewards be returned. All representations, warranties and obligations of Adoption Partner shall survive after the termination date of this Agreement.
- I. Miscellaneous. This Agreement constitutes the entire agreement and understanding between the parties and supersedes all other prior and contemporaneous communications, discussions, understandings, negotiations, arrangements and agreements, whether written or oral, relating to the subject matter of this Agreement. Adoption Partner will not assign or sublicense, in whole or in part, any of its rights or obligations under this Agreement without the prior written consent of Charities. Waivers must be in writing, signed by the party against whom enforcement is sought. The parties shall exercise their best efforts to meet their respective duties and obligations as set forth in this Agreement, but shall not be held liable for any delay or omission in performance due to force majeure or other causes beyond their reasonable control. If one or more provisions of this Agreement are held to be unenforceable under applicable laws by a court of competent jurisdiction, those provisions must be limited or eliminated to the minimum extent necessary and only in the applicable jurisdiction such that the balance of this Agreement remains enforceable and in full force and effect. This Agreement shall not be construed for or against any party based on which party drafted this Agreement, and each party had the opportunity to review this Agreement with their respective legal counsel to the party's satisfaction. PetSmart shall be a third party

beneficiary under this Agreement. Charities and Adoption Partner each represent that the individuals signing are duly authorized to execute this Agreement. This Agreement may be executed in one or more counterparts, each of which shall be deemed an enforceable original, but all of which together shall constitute one and the same instrument. Facsimile and other electronic signatures shall be as effective and binding as original signatures.

- J. Notices: All notices, requests and demands to be given hereunder shall be in writing, sent by (a) certified mail, return receipt requested, postage pre-paid; or (b) recognized overnight courier service guaranteeing next day delivery to the parties at the addresses set forth below or such other address as such party may designate by written notice given in advance.

As to Charities:
19601 North 27th Avenue
Phoenix, Arizona 85027
Attn: General Counsel

As to Adoption Partner:
City Manager
City of Fort Pierce
100 North U.S. Hwy 1
Fort Pierce, FL 34950

With a Copy to:
City Attorney
100 North U.S. Hwy 1
Fort Pierce, FL 34950

With a Copy to:
Director of Community Response
100 North U.S. Hwy 1
Fort Pierce, FL 34950

TO EVIDENCE THEIR AGREEMENT, the parties have executed and delivered this Agreement, all effective as of the date first written above.

“CHARITIES”

PetSmart Charities, Inc.

Signature: _____

Name: _____

Title: _____

Date: _____

“ADOPTION PARTNER”

City of Fort Pierce

By: _____
Linda Hudson, Mayor

Date: _____

ATTEST:

By: _____
Linda Cox, City Clerk

APPROVED AS TO FORM AND CORRECTNESS

By: _____
Sara Hedges, City Attorney



TO: PEGGY ARRAIZ, DIRECTOR OF COMMUNITY RESPONSE
FROM: ANDREA H. DUENAS, ASSISTANT CITY ATTORNEY *AHD*
THROUGH: SARA HEDGES, CITY ATTORNEY *SH*
RE: REVIEW PETSMAST CHARITIES ADOPTION PARTNER AGREEMENT
CAO RLS FILE: 24-334
DATE: AUGUST 28, 2024

This Request for Legal Services (RLS) asks the City Attorney's Office to review and approve an Adoption Partner Agreement between PetSmart Charities Inc (PetSmart) and the City of Fort Pierce. You have indicated that the partnership offers two benefits:

- (1) the agreement will allow our Animal Adoption Center to utilize the adoption centers that are located inside local PetSmart stores; and
- (2) as an approved partner, the City will have the ability to receive both material and monetary grants from PetSmart in support of our adoption efforts.

I made several changes to the agreement and uploaded a redline copy. The substantive changes made by me are:

- Policies, Procedures and Manuals (section 1-B): Based on your representation that you have not received any additional policies, procedures, or manuals, I deleted this paragraph. If PetSmart desires to include this paragraph, all documents referenced must be provided and this RLS resubmitted for review with all documents.
- Damage to Adoption Center (section 1-F/E): This section was amended to reflect that the City is not waiving its right to sovereign immunity or increasing the liability limits set forth in Section 768.28, Florida Statutes.
- Adoption Center Supplies (section 1-H/G): The language related to the waiver and release of all claims for products and pet food supplied by PetSmart has been deleted. While an issue arising that this language would impact is unlikely, it is not impossible. The language goes so far as to waive third party claims, not just the City's claims. This language is too broad, not something the City typically agrees to, and is not recommended by this Office.
- Waiver Agreement (section 1-M/L): The language requiring all employees and volunteers of the City to sign an agreement waiving all claims and liability against PetSmart has been deleted. This is not something we can force our employees or volunteers to agree to. If an individual is severely injured by PetSmart while at their property due to their acts, omissions, or negligence, that person should have the ability to make themselves whole.
- Prohibited Conduct (section 1-O/N): This section prohibits the City (including its employees, volunteers, and agents) from engaging in certain conduct. I deleted language making the section applicable beyond the term of the Agreement. The City cannot agree

to these terms after this Agreement is no longer in place. I changed the opening paragraph so the only prohibited conduct is conduct engaged in while the City employee, volunteer, or agent is participating in the Adoption Program.

With regard to conduct that interferes with PetSmart, its customers, tenants, or the shopping center, I added language prohibiting such conduct only when the City employee, volunteer, or agent is in the Adoption Center or on PetSmart premises.

I deleted a paragraph that prohibited “negative statements” about PetSmart (or any customer, tenant or occupant of the PetSmart store or shopping center, PetSmart’s products, service, employees, representatives, volunteers, or agents, or any other organization participating in the Adoption Program). I would consider a narrower non-disparagement clause, however, as written, the paragraph was overbroad and would be impossible for the City to enforce. In addition, City employees must be free to express facts and opinions about premises, persons, and businesses located in or affecting the City. The City will not infringe on its employees’ or volunteers’ First Amendment rights as drafted by PetSmart.

- Independent Entities (section 2-C): I have deleted the language related to the waiver of respondeat superior. As drafted, the sentence is confusing as to what PetSmart is attempting to waive. If their intent is to waive the responsibility of PetSmart for the acts, omissions, and negligence of their employees, as I believe they are attempting to do, such is not something this Office agrees the City agree to.
- Indemnification (section 2-D): This section required the City to indemnify PetSmart. Even though there was an exception for certain governmental entities, because the exception was ambiguous, I chose to delete the indemnification language. This Office does not recommend contracts be entered into where the City is required to indemnify other parties.
- Publicity (section 2-F): This section required the City to acknowledge PetSmart’s support in *all* promotional materials. I narrowed the scope and clarified that the City agrees to acknowledge PetSmart’s support only in those promotional materials that are related to the City’s participation in the Adoption Program.
- Governing Law; Legal Fees (section 2-G): As written, the Agreement was governed by the laws of the State of Arizona. This means that if there is an interpretation or enforcement issue, Arizona law would control, and an attorney licensed in Arizona would need to be retained. I removed references to Arizona and entered “Florida” in its place.

I added that venue for any disputes shall be in St. Lucie County.

Last, this section included a “prevailing party” clause which provided that in any breach of contract action the prevailing party would recover its fees from the non-prevailing party. I deleted this provision because it could impose a massive unbudgeted expense on the City.

- Term/Termination (section 2-H): The Agreement as written was perpetual. The Department and PetSmart must agree as to how long the agreement will last and fill in the term. I revised the language in this section, eliminating the perpetual term and leaving a blank for you to fill in the number of years.

- Notices (section 2-J): The standard “notices” language was missing. I added a section and PetSmart will need to fill in the address where notices should be sent to it.
- E-Verify (section 2-K): It is questionable whether this statutory requirement applies, since there is a renumeration of “rewards” and “products” for the animals. Given this, it is prudent to include this term. I have included the required language pursuant to the Section 448.095, Florida Statutes.
- Signature Block: As you indicated that this agreement will be approved by the Commission, I added the Mayor’s signature block.

I would also like to call your attention to the following terms:

- Release Required (section 1-C): The City must have every adopting party sign a Release in the form specified by PetSmart.
- Reporting (section 1-I): The City must submit impact reports related to the Adoption Program when requested by PetSmart.
- Employees and Volunteers (section 1-L): Only City employees and volunteers may participate in the Adoption Program. City employees must be at least 18 years of age and volunteers must be at least 16 years of age.
- Human Trafficking Affidavit: PetSmart will need to sign the Human Trafficking Affidavit, available from Purchasing. Also, please remember it is your responsibility to ensure all procurement requirements have been met for this Agreement.

With the suggested changes, and the completion of “Term” in section 2-H and PetSmart’s Notice information in section 2-J, the Agreement is approved as to form and correctness. If you have any questions about how to proceed, please do not hesitate to contact this office.



TO: PEGGY ARRAIZ, DIRECTOR OF COMMUNITY RESPONSE
FROM: ANDREA H. DUENAS, ASSISTANT CITY ATTORNEY **AHD**
THROUGH: SARA HEDGES, CITY ATTORNEY *SH*
RE: RE-REVIEW PETSMART CHARITIES ADOPTION PARTNER AGREEMENT
CAO RLS FILE: 24-365
DATE: SEPTEMBER 24, 2024

This Request for Legal Services (RLS) asks the City Attorney's Office ("Office") to review and approve an Adoption Partner Agreement between PetSmart Charities Inc. ("PetSmart") and the City of Fort Pierce ("City"). You have indicated that the partnership offers two benefits:

- (1) the Agreement "is vital for us to begin receiving both money and goods donations from PetSmart"; and
- (2) the Agreement "will allow us to begin doing onsite adoptions at local PetSmart store locations."

This is a revised draft of an agreement previously reviewed by this Office (RLS 24-334). Pursuant to that RLS, this Office issued a lengthy memo explaining the reasons certain changes were necessary (attached). This Office also returned a Redline version of the Agreement showing the required changes.

PetSmart has accepted some of this Office's changes and rejected others. I have revised some of problematic wording and attempted to draft language that will be acceptable to both parties as to certain terms. Other terms continue to remain problematic based on PetSmart's responses. Below I will go through the points raised in RLS 24-334 and address how each has been resolved:

- Adoption Policies: The paragraph referred to a Policy Manual which had not been received. For this reason, the City suggested deleting the entire paragraph. The Policy manual has been received, so the City's suggested deletion is no longer necessary.

However, this Office suggests the deletion of the following language:

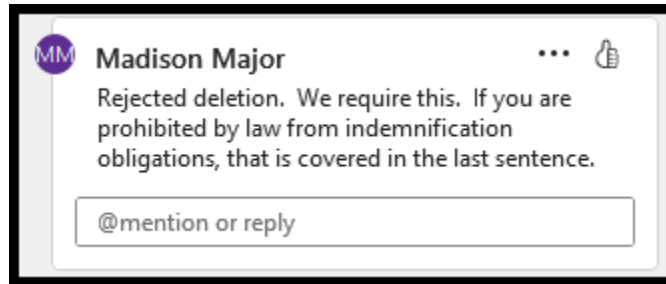
including any future changes to those policies, procedures, and/or manuals.

Neither the City, nor its employees, can currently agree to requirements they do not know. There is also no specific requirement that future changes be provided or agreed to by the City or its employees when the future changes are made.

- Damage to Adoption Center: The City's suggested amendment related to sovereign immunity was accepted by PetSmart.
- Adoption Center Supplies: This paragraph required the City to waive claims and release PetSmart from liability arising from the provision of food and other products. **The City's deletion was rejected by PetSmart.** Upon careful review of this paragraph, this Office

concludes that it applies only to products provided in the Adoption Center. As such, the paragraph is permissible as drafted by PetSmart.

- **Prohibited Conduct:** This section prohibits certain conduct by the City, its employees, volunteers, or agents. PetSmart has rejected most of this Office’s suggestions. Accordingly, the provisions are still overly broad and uncomfortably infringe on the free speech protections of the First Amendment for all City employees.
- **Indemnification:** **The City’s deletion was rejected by PetSmart** with this comment:



The City is not prohibited by Florida law from indemnifying private parties, so the last sentence does not protect the City. In addition, this Office has confirmed:

- i. The City’s insurance carrier provides a legal defense for actions brought against the City – it will not defend actions brought against PetSmart. If the Indemnification language is not deleted, the City could incur substantial attorneys’ fees defending the named parties.
- ii. Likewise, the City’s insurance carrier pays damages that are assessed against the City and will not pay for damages assessed against PetSmart or another party. If the indemnification language is not deleted, the City could be liable to satisfy judgments entered against PetSmart and the other indemnified individuals and entities.

This Office does not recommend entering into an Agreement that requires the City to indemnify or defend another party. This Office would approve the following language in its place to alleviate PetSmart’s concern of them being liable for actions of the City:

Each party shall assume the responsibility and liability for acts and omissions of its own employees, officials, officers, or agents, in connection with the performance of their official duties under this Agreement. Each party to this Agreement shall be liable (if at all) only for the acts or omissions of its own employees, officials, officers, or agents that occur within the scope of their official duties. Nothing herein is intended to or shall be construed to be a waiver of sovereign immunity under Section 768.28, Florida Statutes, nor to increase any limits therein.

- **Publicity:** **City’s suggested changes largely accepted.** This paragraph is now acceptable as written.
- **Governing Law; Venue; Legal Fees:** PetSmart did not agree to venue in St. Lucie County, but did agree to eliminate the legal fee provision and change Governing Law to Florida. The proper venue for this Agreement is in St. Lucie County, as all activities will take place in St. Lucie County. As a matter of practice, the City requires Venue to be specified in its Agreements so there is no question or litigation over the matter at a later point.

- Term/Termination: PetSmart requires that all Partnership Agreements remain in effect until terminated. Such “Evergreen” agreements are not prohibited, however, this Office prefers that contracts be reviewed regularly.

For this reason, the Department should submit this Agreement for review by the City Attorney’s Office no less than every two years to ensure its compliance with current laws and statutes.

- E-Verify: Section 448.095, Florida Statutes, applies to Agreements entered into by the City when a contract is entered into for a “Contractor” to provide labor, supplies, or services to the agency in exchange for salary, wages, or other remuneration. This Agreement can be read in a manner that services will be provided (for example, use of the facilities) in exchange for “other remuneration” (for example, donations and a rewards point program). Therefore, it is this Office’s position the E-Verify should be included to not run afoul of the statutory requirements.

At this point in time, given the legal issues outlined above, this Agreement is **NOT** approved as to form and correctness. It would be much more efficient for PetSmart’s counsel and this Office to speak about the above issues and try to come to a resolution. We would recommend PetSmart’s counsel call this Office or a contact in their legal department be provided for this Office to call.

/ahd



TO: PEGGY ARRAIZ, DIRECTOR OF COMMUNITY RESPONSE
FROM: ANDREA H. DUENAS, ASSISTANT CITY ATTORNEY *AHD*
THROUGH: SARA HEDGES, CITY ATTORNEY *SH*
RE: REVIEW PETSMAST CHARITIES ADOPTION PARTNER AGREEMENT
CAO RLS FILE: 24-334
DATE: AUGUST 28, 2024

This Request for Legal Services (RLS) asks the City Attorney's Office to review and approve an Adoption Partner Agreement between PetSmart Charities Inc (PetSmart) and the City of Fort Pierce. You have indicated that the partnership offers two benefits:

- (1) the agreement will allow our Animal Adoption Center to utilize the adoption centers that are located inside local PetSmart stores; and
- (2) as an approved partner, the City will have the ability to receive both material and monetary grants from PetSmart in support of our adoption efforts.

I made several changes to the agreement and uploaded a redline copy. The substantive changes made by me are:

- Policies, Procedures and Manuals (section 1-B): Based on your representation that you have not received any additional policies, procedures, or manuals, I deleted this paragraph. If PetSmart desires to include this paragraph, all documents referenced must be provided and this RLS resubmitted for review with all documents.
- Damage to Adoption Center (section 1-F/E): This section was amended to reflect that the City is not waiving its right to sovereign immunity or increasing the liability limits set forth in Section 768.28, Florida Statutes.
- Adoption Center Supplies (section 1-H/G): The language related to the waiver and release of all claims for products and pet food supplied by PetSmart has been deleted. While an issue arising that this language would impact is unlikely, it is not impossible. The language goes so far as to waive third party claims, not just the City's claims. This language is too broad, not something the City typically agrees to, and is not recommended by this Office.
- Waiver Agreement (section 1-M/L): The language requiring all employees and volunteers of the City to sign an agreement waiving all claims and liability against PetSmart has been deleted. This is not something we can force our employees or volunteers to agree to. If an individual is severely injured by PetSmart while at their property due to their acts, omissions, or negligence, that person should have the ability to make themselves whole.
- Prohibited Conduct (section 1-O/N): This section prohibits the City (including its employees, volunteers, and agents) from engaging in certain conduct. I deleted language making the section applicable beyond the term of the Agreement. The City cannot agree

to these terms after this Agreement is no longer in place. I changed the opening paragraph so the only prohibited conduct is conduct engaged in while the City employee, volunteer, or agent is participating in the Adoption Program.

With regard to conduct that interferes with PetSmart, its customers, tenants, or the shopping center, I added language prohibiting such conduct only when the City employee, volunteer, or agent is in the Adoption Center or on PetSmart premises.

I deleted a paragraph that prohibited “negative statements” about PetSmart (or any customer, tenant or occupant of the PetSmart store or shopping center, PetSmart’s products, service, employees, representatives, volunteers, or agents, or any other organization participating in the Adoption Program). I would consider a narrower non-disparagement clause, however, as written, the paragraph was overbroad and would be impossible for the City to enforce. In addition, City employees must be free to express facts and opinions about premises, persons, and businesses located in or affecting the City. The City will not infringe on its employees’ or volunteers’ First Amendment rights as drafted by PetSmart.

- Independent Entities (section 2-C): I have deleted the language related to the waiver of respondeat superior. As drafted, the sentence is confusing as to what PetSmart is attempting to waive. If their intent is to waive the responsibility of PetSmart for the acts, omissions, and negligence of their employees, as I believe they are attempting to do, such is not something this Office agrees the City agree to.
- Indemnification (section 2-D): This section required the City to indemnify PetSmart. Even though there was an exception for certain governmental entities, because the exception was ambiguous, I chose to delete the indemnification language. This Office does not recommend contracts be entered into where the City is required to indemnify other parties.
- Publicity (section 2-F): This section required the City to acknowledge PetSmart’s support in *all* promotional materials. I narrowed the scope and clarified that the City agrees to acknowledge PetSmart’s support only in those promotional materials that are related to the City’s participation in the Adoption Program.
- Governing Law; Legal Fees (section 2-G): As written, the Agreement was governed by the laws of the State of Arizona. This means that if there is an interpretation or enforcement issue, Arizona law would control, and an attorney licensed in Arizona would need to be retained. I removed references to Arizona and entered “Florida” in its place.

I added that venue for any disputes shall be in St. Lucie County.

Last, this section included a “prevailing party” clause which provided that in any breach of contract action the prevailing party would recover its fees from the non-prevailing party. I deleted this provision because it could impose a massive unbudgeted expense on the City.

- Term/Termination (section 2-H): The Agreement as written was perpetual. The Department and PetSmart must agree as to how long the agreement will last and fill in the term. I revised the language in this section, eliminating the perpetual term and leaving a blank for you to fill in the number of years.

- Notices (section 2-J): The standard “notices” language was missing. I added a section and PetSmart will need to fill in the address where notices should be sent to it.
- E-Verify (section 2-K): It is questionable whether this statutory requirement applies, since there is a renumeration of “rewards” and “products” for the animals. Given this, it is prudent to include this term. I have included the required language pursuant to the Section 448.095, Florida Statutes.
- Signature Block: As you indicated that this agreement will be approved by the Commission, I added the Mayor’s signature block.

I would also like to call your attention to the following terms:

- Release Required (section 1-C): The City must have every adopting party sign a Release in the form specified by PetSmart.
- Reporting (section 1-I): The City must submit impact reports related to the Adoption Program when requested by PetSmart.
- Employees and Volunteers (section 1-L): Only City employees and volunteers may participate in the Adoption Program. City employees must be at least 18 years of age and volunteers must be at least 16 years of age.
- Human Trafficking Affidavit: PetSmart will need to sign the Human Trafficking Affidavit, available from Purchasing. Also, please remember it is your responsibility to ensure all procurement requirements have been met for this Agreement.

With the suggested changes, and the completion of “Term” in section 2-H and PetSmart’s Notice information in section 2-J, the Agreement is approved as to form and correctness. If you have any questions about how to proceed, please do not hesitate to contact this office.