



City of Long Beach
Working Together to Serve

Office of the City Attorney

DATE: June 17, 2020

To: Honorable Mayor and City Council

FROM: Michael J. Mais, Assistant City Attorney *MJK for*
Monica J. Kilaita, Deputy City Attorney *MJK*

SUBJECT: City of Long Beach and spcaLA Lease and Lease-Back Agreements
Regarding Animal Control Facilities (7700 E. Spring Street)

Per the City Council's request on January 21, 2020, the City Attorney's Office has prepared this memorandum providing an overview of the current lease and lease-back, and related agreements, between the City of Long Beach and spcaLA, including the historical background, what agreement violations (if any) currently exist, and whether those violations or other factors would allow the City to modify or terminate any of the agreements or pursue operational or additional agreements with spcaLA.

I. HISTORICAL BACKGROUND

On April 7, 1998, the Director of Health and Human Services (who at that time had responsibility for the City's animal control operations) recommended that the City Council request the City Attorney to prepare, and authorize the City Manager to execute, all necessary agreements with spcaLA for the construction of a new animal shelter and education facility at 7700 East Spring Street. These agreements were to include a Lease of approximately 6.5 acres of City-owned land to spcaLA for development of the project, a Lease-Back of a portion of the facility for use by the City's Animal Control Bureau (hereinafter referred to as "Animal Care Services" or "ACS"), and an agreement regarding the construction and joint financing of the overall facility to be occupied by spcaLA and the City.

The need for these agreements was declared as follows in the 1998 request to the Council:

The Long Beach Animal Control Shelter, located at 3001 Willow Street, is outmoded, undersized and desperately in need of replacement. After nearly ten years of unsuccessful attempts to identify an acceptable site and adequate funding, a set of circumstances developed which facilitated the structuring of a viable proposal. Presently, the Department has formed a public/private partnership with the SPCA-LA, one of the oldest humane

society organizations in California. The partnership will allow for the construction and operation of an animal shelter and educational facility for the benefit of the City of Long Beach and its residents and animals.

The April 7, 1998 Council letter set forth the following key terms and conditions:

- The partnership would be structured around lease/leaseback documents;
- City would lease 6.5 acres of available property at the old City Tree Farm, south of El Dorado Park, to the spcaLA as the site for the new facility;
- \$500,000 from the Fleet Services Fund would be used as commitment to support the development of the new facility;
- The City would additionally contribute \$1,000,000 in proceeds from the sale of property to the Water Reclamation District;
- The spcaLA would manage the design and construction phases of the project and provide a financial match of \$1,500,000 (cash or in-kind goods and/or services);
- Once completed, a portion of the new facility would be "leased back" to the City for use as an Animal Control Shelter;
- Both spcaLA and ACS would provide animal control services and animal welfare and education services to the community as a public/private partnership; and
- City would receive the benefit of educational services and support to ACS at no additional cost to the City.

Prior to the City Council approving this request, the Planning Commission had approved a General Plan Amendment and Conditional Use Permit for the approximately 21,000 square-foot facility to be constructed and certified an Environmental Impact Report for the project, which Council upheld on January 20, 1998.

II. RELEVANT AGREEMENTS

Following the approval by the City Council, the City entered into three separate (3) agreements with spcaLA: Agreement No. 25914, Lease No. 25915, and Lease-Back No. 25916, all of which were fully executed by the parties in late September and early October 1998. Pursuant to the executed agreements, the termination of either the Lease or Lease-Back agreements would result in the termination of the remaining two agreements.¹

¹ Agreement No. 25914 already terminated on December 31, 2000. This did not result in termination of the Lease and Lease-Back per language contained in those agreements.

A. Agreement No. 25914 (Executed by City September 28, 1998):

This Construction Agreement was contingent on execution of the Lease and Lease-Back and centered around funding and financing the construction of the new facility to serve as spcaLA's administrative offices to provide for the care and treatment of animals as described in the Lease. The Agreement obligated the City to deposit \$1,500,000 into an interest-bearing account for spcaLA to use from time to time during the term of the Agreement for costs and expenses incurred by spcaLA in connection with the development of the facility. The Agreement also obligated spcaLA to contribute \$1,500,000 toward the project. The spcaLA was to pay any construction costs exceeding the \$3,000,000 estimated construction costs, provided that the debt service on those costs would be paid in accordance with the terms of the Lease-Back Agreement.

The construction and funding Agreement only permitted the spcaLA to use the funds to pay for costs related to the development of the property, including spcaLA's investigation and analysis of the property (not including salary or administrative costs), and costs related to permits, applications, and other fees and charges owed to governmental agencies, entities, and public utilities in connection with the project. A First Amendment to this Agreement (executed by City on April 5, 2000) simply extended the term by one year, causing the Agreement to be terminated by its own terms on December 31, 2000.

B. LEASE NO. 25915 (EXECUTED BY CITY SEPTEMBER 28, 1998):

General Provisions

The Lease became effective August 1, 1998, and by its terms will end on July 31, 2053 (fifty-five (55) year lease period). At the end of the term, or in the event of a sooner termination, all improvements constructed on the property become the property of the City at no cost.

The leasehold consists of approximately 6.5 acres and the property is located at 7700 E. Spring Street. spcaLA is obligated to pay annual rent to the City in the amount of one hundred twenty dollars (\$120.00). As additional consideration, "in lieu of rent payments," spcaLA was obligated to construct the animal care facility in accordance with the terms set forth in Agreement 25914 (the Construction Agreement). spcaLA is also required to pay any "possessory interest" taxes that may be due annually because of its use and occupation of the property. spcaLA is further required to procure annually general liability insurance aggregating five-million dollars (\$5,000,000.00) that names the City and its officials as "additional insureds."

The Lease requires spcaLA to obtain written permission from the City to undertake any additional improvements to the property beyond the initial construction of the facility as contemplated in the Lease and the Construction Agreement (Agreement 25914).

spcaLA Uses of Property Pursuant to Lease

The Lease permits spcaLA to construct a facility “providing for the adoption, care, treatment and disposition of animals; education relating to the care of such animals; administrative offices and facilities; the operation of day and overnight kennels; and such other activities and projects consistent with the operation of a society for the prevention of cruelty to animals.”

The Lease required the City and spcaLA to mutually agree during the design phase of the construction project as to the “capacity of the kennels operated by spcaLA on the Premises.” After the initial agreement, spcaLA is not permitted to increase the size of the kennel capacity by “more than 15%” without the consent of the City, or in an emergency situation and only for the temporary “housing of animals.”

The Lease terms specifically prohibit spcaLA from “assign[ing] or transfer[ing] or subleas[ing]” any portion of the facility to anyone other than the City.

Utilities and Maintenance

The Lease requires spcaLA to install all utilities for the facility, including, but not limited to, gas, electricity and trash disposal. The Lease obligates the City to pay for the ongoing costs of “water and sewer services to the Facility.” Each party is required to pay for its own “telephone installation and use.”

The Lease requires spcaLA to maintain the property (including all common areas) “at its cost and to the satisfaction of the City.” spcaLA’s duty to maintain the property includes “the duty to repair and replace improvements as needed.” If spcaLA fails to properly maintain the property after being provided a thirty (30) day notice from the City, the City has the right to effect the necessary maintenance/repairs and recover from spcaLA all costs expended by the City. The Lease does not specifically obligate the City to maintain any portion of the property except as specifically provided in the “Lease-Back” as will be discussed further, below.

Signage

City and spcaLA Requirements:

The Lease provides that spcaLA and City will “mutually agree to place, affix, maintain, or permit any sign, advertisement, name, insignia, logo, descriptive material, or similar item (collectively “sign” or “signs”) on the Property.” Elsewhere in the Lease, the term “Property” is defined to include the entirety of the “approximately 6.5 acres.” The City and spcaLA are required to erect “appropriate signs” that identify “spcaLA’s portion of the Property as separate from the portion of the Property that is leased back to the City.”

spcaLA Signs:

Signs identifying spcaLA are required to be maintained by spcaLA at its own cost. Any sign erected by spcaLA that has not been "mutually agreed to" **may be removed by the City** at spcaLA's cost.

Default and Early Termination

The Lease may be terminated by the City if spcaLA fails to pay rent when due (after three days' notice from the City); if spcaLA "abandons" the property or fails to operate the facility for thirty (30) consecutive days; if spcaLA attempts to assign or otherwise transfer its interest in the lease without approval by the City; or if spcaLA fails to pay for necessary permits, business licenses or applicable taxes. Other than failing to pay rent, abandoning the property, bankruptcy, or attempting to assign or transfer spcaLA's interest in the property, the City is obligated to provide spcaLA with a thirty (30) day written notice of default and opportunity to cure any alleged default on spcaLA's part before City can attempt to terminate the Lease agreement.

C. LEASE-BACK NO. 25916 (EXECUTED BY CITY SEPTEMBER 28, 1998):

General Provisions

In the Lease-Back agreement, the City agreed to lease-back a portion of the larger approximately 6.5-acre premises from spcaLA, "together with the right, in common with spcaLA...to use the Common Areas." The term of the Lease-Back commenced when spcaLA received a Certificate of Occupancy for the larger parcel (after completion of construction), and the Lease-Back terminates by its own terms on May 31, 2053. The Lease-Back agreement obligates the City to pay spcaLA sixty dollars (\$60.00) annually as "rent," together with additional "expenses," as discussed below.

Lease-Back Area and "Common Areas"

The original Lease-Back agreement did not precisely define the extent of the City's lease-back area, or the areas that were to be shared "in common" with spcaLA. However, on October 12, 2009, the City did execute a "First Amendment to Lease-Back" agreement with spcaLA (Agreement No. 25916), which, among other things, did define both the City's lease-back area as well as the areas to be shared "in common" with spcaLA. Both areas were depicted in Exhibit "A" to the First Amendment to Lease-Back, and a copy of that Exhibit is attached hereto and incorporated herein by this reference.

The "Common Areas" are defined as "all areas and facilities that **are traditionally for the general nonexclusive use of lessees** [their employees, customers, invitees, and others], plus exterior doors and entrances, **lobbies, public restrooms, parking areas**, loading and unloading areas, service ways, trash areas, roadways, sidewalks, walkways, parkways, stairs, ramps, driveways, bumpers, landscaped areas, **veterinary theater, classrooms, conference rooms, and rooms for employee breaks**, exterior walls, the

roof, the foundation fences, gates, and exterior windows and plate glass, and overhead lighting facilities" (emphasis added). The "Common Areas" also include the Property's parking lot, as depicted in Exhibit "A" to the First Amendment to Lease-Back agreement executed October 9, 2009.

Regarding the City's right to access the Common Areas, the Lease (and not the Lease-Back) states that the spcaLA "shall provide to City master keys for all exterior doors, gates and other locked enclosures which are part of or lead to the Common Areas."

City Uses of Lease-Back Property

The Lease-Back allows the City to use the Lease-Back area (together with the "Common Areas") "**solely in connection with its animal control program**" (emphasis added).

The Lease-Back required the parties to agree on the number of animals that the City could house in its Lease-Back area at the time of the design phase of the initial construction. The Lease-Back prevents the City from increasing its initial kennel capacity by more than fifteen percent (15%) without the consent of spcaLA, or in the event of a temporary emergency.

Under the terms of the Lease-Back, neither party has the right to "assign or transfer" its Lease-Back interest, and the City does not have the ability to unilaterally sublease any part of the Lease-Back premises.

Operating Costs, Utilities, and Maintenance

The Lease-Back requires the City to pay spcaLA "as additional rent...fifty percent (50%) of all operating expenses." Operating Expenses are defined to include "all costs incurred by spcaLA under the Lease for the operation, repair, replacement, and maintenance **of the Lease-Back Premises**, including expenses related to the "Common Areas," "all heating, air conditioning, plumbing, and electrical systems and facilities (**excluding those which are controlled exclusively by spcaLA or City**)", "fire protection systems (including sprinkler system maintenance and repair)", and "irrigation systems" (emphasis added).

In addition, the Lease-Back requires the City to pay fifty percent (50%) of costs in the Lease-Back area for things such as trash disposal, janitorial and security services, the cost of gas and electricity and the replacement of equipment or improvements that have a "useful life" of five (5) years or less. The Lease-Back also obligates the City to pay "all water and sewer services for the property and the Facility," as well as the cost of the premium for an "all-risk property insurance for the Facility...".

The Lease-Back requires the City "at its own expense" to "keep, maintain, repair and replace" all or any portion of the Lease-Back premises (excluding the Common Areas) in "good condition" and "free from trash, garbage and litter." In all other respects,

maintenance of the entire premises is governed by the Lease rather than the Lease-Back agreement.

Recordkeeping and Audits

The Lease-Back requires spcaLA to maintain books and records “relating to operating expenses” for “the term of [the] Lease-Back and for one (1) year thereafter[.]” The City has the right to audit the books and records of spcaLA during the entire life of the Lease-Back term.

Signage

The Lease-Back requires the parties to “mutually agree” to “place, affix, maintain, and permit any sign, advertisement, name, logo, descriptive material, or similar item on the Lease-Back area”; and requires the parties to “erect appropriate signs identifying the Lease-Back premises as separate from the premises of spcaLA.” Signs identifying the City shall be maintained by the City at its cost and “in good condition.”

Default and Early Termination

The City can be “in default” of the Lease-Back agreement for, among other things, failure to pay rent, abandonment of the Lease-Back premises, any attempted assignment, or attempted sublease of the Lease-Back premises.

As is the case with the Lease to spcaLA, other than such things as failing to pay rent, abandoning the property, or an attempted sublease or assignment of the City’s interests in the property, spcaLA is obligated to provide City with a thirty (30) day written notice of default, and an opportunity to cure any alleged default on City’s part before spcaLA attempts to terminate the City’s Lease-Back agreement.

III. ISSUES NOT COVERED BY THE LEASE AND LEASE-BACK

The Lease and Lease-Back agreements do not include certain items of significance, as discussed herein.

“Common Areas”

Neither the Lease nor the Lease-Back agreements contain any specific operating regulations governing the conduct or operations of the City or spcaLA with respect to the overall Lease area, the City’s Lease-Back area, or any of the “Common Areas.” The Lease-Back agreement did contemplate the formulation of “Rules and Regulations” for the conduct of the parties (including their “employees, agents, and invitees) in the Common Areas, but no such “Rules or Regulations” were ever drafted or agreed to by the parties. Although certain space (e.g., office space) in the “Common Area” is used exclusively by spcaLA or the City *in practice*, there is no “official” written agreement for division or assignment of any “Common Area” space as between the parties.

Hours of Operation

There are no written provisions regulating the hours of operation for either the City or spcaLA for any facet of either party's operation at the premises.

Transfer of Animals and Reporting

The agreements do not prohibit the City from operating its own animal rescue adoption program. The agreements also do not contain any "rules or regulations" regarding how either party conducts its pet adoption operations. For instance, there are no provisions regarding either party's right to the "first selection" of animals rescued by the City for their respective adoption programs.

The agreements also do not obligate spcaLA to accept animals rescued by the City for spcaLA's adoption program, nor do the agreements require spcaLA to only house animals rescued within the City of Long Beach; or to alternatively designate a certain percentage of spcaLA's space to Long Beach rescue animals. Additionally, the existing agreements do not obligate the spcaLA to collect or report data regarding the intake and outcome of the animals in their care located at the Village, including the outcomes for animals transferred from the City's care into the care of spcaLA.

IV. CURRENT ISSUES OF CONCERN

Signs and Signage

The Lease and Lease-Back agreements both contain provisions relating to signage (see para. 25 Lease; para. 23 Lease-Back). City and spcaLA are required to "mutually agree" to the placement of any sign within the entire 6.5-acre lease area. This would include the common areas, as well as the City's Lease-Back area. Any sign "identifying" spcaLA is required to be maintained by them at their cost and any sign identifying the City is required to be maintained by City at its cost. The Agreements do not specify who is required to pay for the production or installation of any sign; however, a reasonable presumption would be that the party requesting a sign would be required to pay for both production and installation. There is nothing in any agreement that would prevent the City from erecting any sign outside of the lease area (e.g., near the entrance to the facility on Spring Street, or on other appropriate non-lease areas).

If spcaLA fails to obtain "mutual agreement" prior to erecting any particular sign anywhere on the lease area, the sign can "be removed by City at spcaLA's cost and the cost of removal shall be additional rent" (see Lease para. 25). There is no similar provision in either the Lease or Lease-Back agreements that would permit spcaLA to unilaterally remove any sign posted by the City without "mutual agreement." Signs can take the form of an "advertisement, name, insignia logo, descriptive material or similar item." The Agreements require the erection of signs to identify which property is under the control of City (i.e., the Lease-Back area), and which property is under the control of

spcaLA (all the remaining property under the direct control of spcaLA that is not common area).

Keys

The Lease (see para. 2) requires spcaLA to use “master locks” and to provide City with “master keys for all exterior doors, gates and other locked enclosures which are part of or lead to the Common areas.” City has the right to access the property (this would include the entire 6.5 acres) “at all reasonable times and, in emergencies, at any time and, if spcaLA is not present to give access during emergencies, then City may forcibly enter the property...” (see para. 24 Lease). Caution should be exercised in entering areas under the exclusive use and possession of spcaLA without express permission from spcaLA, or in the case of a demonstrated emergency.

Direction or Control of City Employees, Personnel or City Volunteers by spcaLA or its Agents

There is nothing in either the Lease or Lease-Back agreements that would permit spcaLA staff, employees or volunteers to in any manner direct the conduct of any City employee, staff member or volunteer. Likewise, there is no provision in either agreement that permits spcaLA to direct or control any aspect of the City’s “animal control program.” It should be noted that neither the Lease nor the Lease-Back agreement specifically defines or limits what specific activities can constitute the City’s “animal control program.”

V. ENFORCEMENT AND OTHER OPTIONS

Before the City could declare the spcaLA to be in default of the Lease Agreement, the City must first provide spcaLA with a 30-day written notice of default and opportunity to cure any alleged default on spcaLA’s part. If the default cannot be reasonably cured by spcaLA within such 30-day period, spcaLA is not in default if it begins to cure within the 30-day period and “diligently prosecutes such cure to completion.”

If spcaLA fails to cure any default after being provided the requisite opportunity to cure, the City may issue a notice of default and termination of the Lease Agreement to the spcaLA. Since the Lease and Lease-Back agreements are mutually dependent on one another, termination of one agreement would result in the automatic termination of the other agreement. As with any contract, the spcaLA would be able to challenge such termination through the Los Angeles County Superior Court if it believed the City terminated either the Lease or Lease-Back agreement without cause.

Additionally, the Lease and Lease-Back agreements as originally written speak to the establishment of an operational agreement, or “rules and regulations,” of the facility, including the “common areas,” that the parties contemplated entering into at the time the original lease and lease back agreements were executed. However, these operational documents were never entered into by the parties. The City and spcaLA could cooperatively enter an operational agreement to cover some of the issues that have

arisen between them. Such agreement or agreements may be completed through an amendment to the existing Lease and Lease-Back Agreements, a letter of understanding, or the like.

VI. CONCLUSION

The City and spcaLA have a long history serving the City of Long Beach, its residents, and its animals. Complexities may understandably exist when two separate, independent entities are operating on a single parcel. Both the City and spcaLA are subject to certain legal obligations per the agreements, as outlined above. If there is any alleged breach of such obligations, each party must generally provide an opportunity for the other to cure the breach prior to attempting to terminate the agreement(s). Therefore, when a party fails to comply with its contractual obligations, termination of any agreement is always considered a last resort. The City should thus ensure it has made reasonable effort to gain compliance from spcaLA prior to attempting to terminate either of these agreements in order to withstand any legal challenge.

The City's animal control program and spcaLA often struggle to effectively operate independently of one another as was originally intended in the Lease and Lease-Back agreements. In order to engender more clarity and efficacy in the City's animal control program, and to facilitate full implementation of the City's Compassion Saves model adopted by the City Council in 2019, an operational agreement that addresses issues such as both parties' use of and access to common areas, operational hours, and transfer of animals to spcaLA including reporting, should be established between the City and spcaLA.

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Attachments:
Exhibit "A" to the First Amendment to Lease-Back

Cc:
Charles Parkin, City Attorney
Thomas B. Modica, City Manager
Linda Tatum, Assistant City Manager
Teresa Chandler, Deputy City Manager
Kevin Jackson, Deputy City Manager
Rebecca Garner, Administrative Deputy City Manager
Brent Dennis, Director of Parks, Recreation and Marine
Stephen Scott, Deputy Director of Parks, Recreation and Marine

