

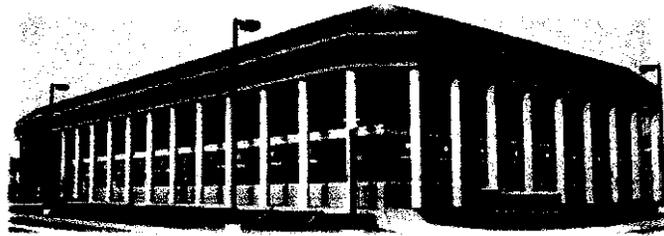
AGENDA

**FORT SMITH BOARD OF DIRECTORS
STUDY SESSION**

JANUARY 25, 2011 ~ 12:00 NOON

**FORT SMITH PUBLIC LIBRARY
COMMUNITY ROOM
3201 ROGERS AVENUE**

1. Review of proposed ordinance amending Chapter 4, Article I, of the Fort Smith Code of Ordinances regulating animals (mandatory spay/neuter ordinance)
~ *Continued from September 28, 2010 study session* ~
2. Review proposed ordinance amending Chapter 4, Article V, Section 4-116 of the Fort Smith Code of Ordinances regulating animals (fencing requirement for dogs)
~ *Continued from September 28, 2010 study session* ~
3. Consider establishing Animal Advisory Committee ~ *Requested at the October 5, 2010 regular meeting* ~
4. Review proposed agreement with the Advertising and Promotion Commission for operation of the convention center ~ *Requested at the January 11, 2011 study session* ~
5. Review preliminary agenda for the February 1, 2011 regular meeting



Fort Smith Police Department

Kevin Lindsey, Chief of Police

INTERDEPARTMENTAL MEMORANDUM

To: Ray Gosack, City Administrator

From: Kevin Lindsey, Chief of Police

Subject: Running At Large / Spay and Neuter Ordinance Amendment

Date: January 14, 2011

The purpose of this memorandum is to present changes to the Animal Ordinance by amending Section 4-1 (Definitions), Section 4-116 (Running at Large), and Section 4-11 (Spay / Neuter) of the Fort Smith Municipal Code, as requested by the Board of Directors at their September 28, 2010 Study Session. Each of the listed changes has come about in response to specific complaints brought before the Board. At the Board's request, research which was conducted by staff that included a review of the existing Animal Ordinance and how it might be affected by these changes in code.

This review was to address the feasibility of changing fence height requirements for dog owners to six (6) feet in height, as requested by Ms. Tammy Trouillon. Ms. Trouillon has been a witness to two separate vicious dog attacks, both against her own dogs. Ms. Trouillon had one dog severely injured in an attack and one dog was killed in an attack. In both cases, the offending dog was a Pit Bull or Pit Bull mix. In early June, 2010, staff spoke with Ms. Trouillon in reference to the current vicious animal ordinance. During this conversation Ms. Trouillon indicated that she would like to see the fence height requirement correlate with the height of a dog, specifically mentioning the Pit Bull breed of dogs to be included.

In addition, the Board of Directors was asked to consider enacting an ordinance requiring dogs and cats to be spayed / neutered. Staff also conducted research on this topic.

A review of Section 4-1, Definitions, of the Fort Smith Municipal Code revealed the need to add definitions for the terms "spay" and "neuter". It was also determined that the definition of "city pound" found in Section 4-1 was inaccurate. The following changes to Section 4-1 are proposed:

- Add *Spay* which shall mean to remove the ovaries of a female dog or cat in order to render the animal unable to reproduce.

- Add *Neuter* which shall mean to render a male dog or cat unable to reproduce.
- Change *City pound* to identify the place specified by the City of Fort Smith Board of Directors for the impounding of dogs and other animals.
- Change *Owner* to provide that this term is not applicable to veterinarians or kennel owners.

Research was conducted by staff in reference to the plausibility of adding fencing requirements to Section 4-116 (Running at Large) of the Fort Smith Municipal Code for citizens whose dogs are seized under the provisions of this ordinance. The revisions to the Running at Large ordinance would target problem animals in lieu of a mandatory fencing requirement for all dog owners. Tammy Trouillon made these requests based upon past experiences with her dogs being attacked. Because of these complaints, research was completed in regards to our existing Vicious Animal ordinance (Section 4-7) and it was determined to be sufficient and effective. Staff also researched the possibility of requiring fencing for all dog owners but found this to be an arbitrary requirement as the size of the dog would most likely play a significant role in determining the height of the fence.

In order to enforce any fencing requirements under the Running at Large ordinance, the owner or harborer of a dog which is seized must first be identified. Secondly, there must be sufficient evidence that the dog climbed over or under existing fencing, or by some other means left the confines of the premises. A third party who witnesses a dog leave the owner's or harborer's premises would be considered as sufficient evidence to require additional fencing. Without a witness present, it would become necessary for an animal warden to inspect the premises in order to determine if there is sufficient evidence to require additional fencing requirements.

In researching the legal aspects of fencing requirements for dog owners or harborers in violation of the Running at Large ordinance it was determined that there may be Constitutional considerations in authorizing an animal warden to inspect the fence. Assistant City Attorney Rick Wade brought to light the possible infringements on a property owner's Fourth Amendment rights when an animal warden, absent consent by the property owner or a search warrant, enters the confines of the property to inspect a fence.

City Prosecuting Attorney John Settle also acknowledged the same concerns. In speaking further with Mr. Settle it was determined that absent a search warrant or consent to search the property, it would be reasonable for an animal warden to visually inspect the fence from any vantage point where the animal warden has a lawful right to be. This would include alleys, sidewalks or streets, or even adjacent properties with the permission of a property owner. Mr. Settle suggested in-service training for animal wardens, making them aware of Fourth Amendment considerations when enforcing this ordinance.

Assistant City Attorney Rick Wade also expressed concerns in regards to addressing instances where the owner or harborer of a dog does not own the property but is merely a tenant at said property. There are concerns as to who will be responsible for the addition to, or repairing of, fencing. Other issues that arose out of this research include:

- Can the word “knowingly” be removed from the ordinance?
- How will subdivision covenants affect the ability to enforce the proposed ordinance insofar as fencing height and composition requirements?
- How would the City’s Uniform Development Ordinance (UDO) be affected should the additional fencing requirement be mandated as a result of a violation of the ordinance? What would be the effect if the fence was located in the front yard of the residence?

After consulting with Rick Wade it was determined that the owner or harborer of a dog is ultimately the one responsible for the dog, even if the owner or harborer rents the property. The owner or harborer would be the person cited for a violation of this ordinance and the one responsible for complying with the requirements of this ordinance. However, Mr. Wade shared concerns that a owner or harborer who rented property might not be able make the necessary changes in fencing without landlord approval. Rick Wade also recommended that the word “knowingly” be removed from the ordinance. As far as subdivision covenants are concerned, City ordinance supersedes any subdivision covenant which might already exist. Research was then conducted in reference to the UDO and how a fencing requirement might affect any other ordinances the city has in place. At this time the city has no other ordinances that address fencing other than the setback requirement. This setback requirement regulates how far the fencing must be set back from the roadway.

Under the proposed ordinance owners or harborers of dogs in violation of the Running at Large Ordinance, at the discretion of the Animal Control Supervisor and upon the second violation of the ordinance, are required to:

- Add on to, or construct, a fence so that the fenced enclosure is at least six (6) feet in height if there is sufficient evidence the dog climbed over an existing fence; or
- Construct a pen as defined in Chapter 4, Article I, Section 4-1 of the Fort Smith Municipal Code if there is sufficient evidence the dog climbed over an existing fence of six (6) feet or more in height; or
- Add on to, or construct fencing so that the fence is buried a minimum of eighteen (18) inches into the ground if there is sufficient evidence the dog left the confines of the premises by crawling under or digging under an existing fence; or
- Repair any existing fencing or gates that may be deemed inadequate.

This amendment to the existing Running at Large ordinance may improve public safety by targeting problem animals and owners of said animals, without enacting arbitrary regulations on all pet owners.

While doing research it was discovered that our current Running at Large ordinance is very similar to most other running at large ordinances across the nation. Specifically, there were two other ordinances referenced at the request of the Board of Directors and Ms. Trouillon. A running at large ordinance from Los Angeles, CA was studied and the only fencing requirements noted were specifically directed at dogs trained to attack persons or other animals. The fencing requirement for attack dogs is very vague, only specifying that the fence be five feet in height. The other ordinance referenced was one from Nashville, TN. The Nashville Running at Large ordinance requires fencing for the animal as a penalty upon the third violation of the ordinance but does not set a height or any other requirements. The fourth violation requires the fencing to be verified as secure but gives no other requirements. Upon the fifth violation the animal is seized and destroyed under the Nashville ordinance.

Under our current Vicious Animal Ordinance (Section 4-7) if a dog is running at large, and its actions are deemed to be dangerous or vicious (i.e. attacking or biting), the owner is required to pay an annual license fee of either \$250.00 or \$1,000.00, build a secure "pen" to house the dog when outside the walls of the home. If outside the "pen", the dog is required to be muzzled and on a leash and the owner or harbinger must carry annual liability insurance in the amount of one million dollars. This ordinance, which is already in place, will most likely mitigate some of the issues surrounding the fencing and animal at large issue.

In reviewing Spay / Neuter Ordinances, staff determined that a majority of Ordinances included provisions for licensing animals, issuing "intact" permits and licensing of breeders of animals. Staff concluded that the best course of action would be to enact a Spay / Neuter Ordinance which could be enforced when a dog or a cat is picked up for violating ordinances already in existence. If a dog is seized in violation of Section 4-116 (Running at Large) of the Fort Smith Municipal Code, the owner or harbinger of the dog, upon the second violation of this ordinance, will be required to have the animal spayed or neutered within thirty (30) days or face a fine, unless the owner or harbinger can provide proof that the animal has already been spayed or neutered, or meets the exemptions set forth in the Ordinance. The same will apply for cats seized in violation of Chapter 4, Article VI, of the Fort Smith Municipal Code. This Ordinance provides exemptions for dogs that are trained and being used for law enforcement activities, search and rescue operations, service animals and dogs or cats certified by a licensed veterinarian as being unfit for being spayed or neutered due to health reasons. This ordinance will not be enforced retroactively.

There are also other concerns to consider with a mandatory Spay / Neuter Ordinance. Some of those considerations should include animal owners who may want to breed their animal for the following reasons: animals that are registered with a nationally recognized club or organization, animals bred for hunting, or animals bred for other purposes. The draft ordinance offers an appeals process and, if necessary, determinations as to whether an animal will be allowed to remain intact could be made on a case by case basis.

The intention of this Ordinance is to promote responsible pet ownership. Animals which have not been spayed or neutered and allowed to run at large present a risk to public safety and an unnecessary monetary burden to the City of Fort Smith.

Article I. In General
Sec. 4-1. Definitions.

The following words and phrases shall, for the purpose of this chapter, have the following meanings:

Animal shall mean any animal which may be affected by rabies.

Animal warden shall mean the person who shall be, from time to time, duly authorized by the board of directors as the agent of the city for the purpose of providing the services and fulfilling the responsibilities of the animal warden as herein set out.

Cat shall mean animals of all ages, both female and male, which are members of the feline, or cat family.

City pound shall mean the place specified by the City of Fort Smith Board of Directors and operated by the animal warden for the impounding of dogs and other animals.

Dangerous dog means any dog which displays or has a tendency, disposition or propensity to:

(1) Bare its teeth or approach in a menacing manner a person or domestic animal that is not provoking the dog, or

(2) Attack, chase, charge or bite a person or domestic animal in a menacing manner, or attempt to do so.

Dog shall mean animals of all ages, both female and male, which are members of the canine or dog family.

Has been bitten shall mean that a person has been seized with teeth or jaws by an animal, so that the skin of the person or things seized has been nipped or gripped, or has been wounded or pierced and includes contact of saliva with any break or abrasion of the skin.

Licensed veterinarian shall mean a practitioner of veterinary medicine who holds a valid license to practice his profession.

Muzzle, when required, shall mean an apparatus of appropriate material with sufficient strength to restrain the dog from biting; provided, that no such muzzle employed shall be made from any material or maintained on the dog in any manner so as to cut or injure the dog.

Neuter shall mean to render a male dog or cat unable to reproduce.

Owner shall mean every person having a right of property in a dog or other animal or who keeps or harbors a dog or other animal, or has it in his or her care, or acts as its custodian, or knowingly permits a dog or other animal to remain on or about any premises occupied by him or

her, provided that this term should not apply to veterinarians or kennel owners temporarily maintaining on their premises animals owned by others.

Pen shall mean an enclosure for domestic animals meeting the following requirements:

(1) The minimum pen size shall be four (4) feet by six (6) feet or twenty-four (24) square feet for one dog under fifty (50) lbs. For dogs over fifty (50) lbs., the minimum pen size shall be five (5) feet by ten (10) feet or fifty (50) square feet.

(2) In all pens, each dog housed therein shall have room to stand, lie down, turn around and sit normally away from its own waste; this requires a minimum of four (4) feet by six (6) feet. A pen five (5) feet by ten (10) feet shall hold no more than one (1) large, or two (2) medium, or three (3) small breed dogs.

(3) All pens shall be a minimum of six (6) feet in height.

(4) All pens surrounded on all sides and top by chainlink fencing of at least no. 9 gauge, with steel ties, maximum two and one-half-inch mesh, with concrete or similar flooring or with side fencing buried eighteen (18) inches into the ground, and with gates padlocked.

Run at large shall mean the state of freedom of any dog not confined on the premises of the owner within an enclosure, house or other building, or not restrained on the premises of the owner by a leash sufficiently strong to prevent the dog from escaping and restricting the dog to the premises, or not confined by leash or confined within an automobile when away from the premises of the owner. In relation to unspayed female dogs while in season, "run at large" shall further be defined as the state of freedom of any such dog not confined inside an enclosure of such a substantial construction so as to prevent such dog from attracting other dogs to the near vicinity of the confined dog.

Spay shall mean to remove the ovaries of a female dog or cat in order to render the animal unable to reproduce.

Vaccination shall mean the injection, subcutaneously or otherwise, of canine antirabic vaccine, as approved by the United States Department of Agriculture or the state veterinarian and administered by a licensed veterinarian.

Vaccination certificate shall mean a written or printed certificate showing on its face that the owner described thereon has received an inoculation or antirabic vaccine in an amount sufficient to produce immunity in the described animal and bearing the signature of a licensed veterinarian.

Vicious animal shall mean any animal which:

(1) When unprovoked, approaches in a manner of attack any person upon the streets, sidewalks, or any other public ground or place;

(2) Has a known propensity, tendency or disposition to attack, without provocation, human beings or domestic animals;

(3) Without provocation, bites or attacks a human being or domestic animal on public or private property;

(4) Is owned or harbored primarily or in part for the purpose of animal fighting or is an animal trained for animal fighting.
Notwithstanding the above definition, no animal shall be declared vicious if the person attacked or bitten by the animal was teasing, tormenting, abusing, or assaulting the animal, or was committing or attempting to commit a crime. Furthermore, no animal shall be declared vicious if a domestic animal which was bitten or attacked was teasing, tormenting, abusing, or assaulting the animal. Additionally, no animal shall be declared vicious if the animal was protecting or defending a human being within the immediate vicinity of the animal from an unjustified attack or assault.

Vicious dog means any dog which has:

(1) Caused a life-threatening injury, broken bone, multiple sutures, or any injury requiring medical attention to a person or domestic animal, without provocation, on public or private property; or

(2) Killed a domestic animal, without provocation, on public or private property; or

(3) Is owned or harbored primarily or in part for the purpose of dog fighting or is a dog trained for fighting.

Article I. In General

Sec. 4-11. Mandatory Spay/Neuter for Dogs and Cats

(a) When a dog is seized under the provisions of Chapter 4, Article V, Section 4-116, of the Fort Smith Municipal Code (Running at Large), it shall become mandatory for the owner or harbored of said animal, if known, to cause the animal, at the owner or harbored's expense, to be spayed or neutered as a condition of the release of the animal to the owner or harbored upon the 2nd cited offense.

(b) When a cat is seized under the provisions of Chapter 4, Article VI, of the Fort Smith Municipal Code, it shall become mandatory for the owner or harbored of said animal, if known, to cause the animal, at the owner or harbored's expense, to be spayed or neutered as a condition of the release of the animal to the owner or harbored after the 2nd cited offense.

(c) This ordinance will not be enforced retroactively for offenses occurring prior to the effective date of this ordinance.

(d) If it is not immediately obvious that the animal has already been spayed or neutered, the owner or harbinger shall be required to provide a letter or certificate to the animal warden, signed by a licensed veterinarian, certifying that the animal has previously been spayed or neutered.

(e) In the event that the animal was not spayed or neutered at the time of the seizure, the owner or harbinger of the animal will be given thirty (30) days to have the animal spayed or neutered and to provide proof to the animal warden of such procedure in the form of a letter or certificate of spay or neuter signed by a licensed veterinarian of their choosing.

(f) If no written proof has been provided within the thirty (30) day period, the owner or harbinger of the animal may be found in violation of this ordinance and will, upon conviction, be subject to a fine in accordance with Section 1-9 of the Fort Smith Municipal Code.

(g) Certain dogs that are exempt from the mandatory spay/neuter ordinance include the following:

- (1) Dogs documented as having been appropriately trained and actually being used by public law enforcement agencies for law enforcement activities;
- (2) Dogs documented as having been appropriately trained and actually being used by search and rescue agencies for search and rescue activities;
- (3) Dogs documented as having been appropriately trained and actually being used as a service animal (e.g., seeing eye dog); and
- (4) Dogs or cats whose owner is in possession of a certification signed by a licensed veterinarian stating that such animal is unfit to be spayed or neutered because such procedure would endanger the life of the animal.

(h) Notice of Spay / Neuter requirements shall be in writing and shall be served on the owner or harbinger personally, or by certified mail to the owner's or harbinger's last known address.

(i) Appeal of determination. Any person who has received notice that he/she must comply with the subsections set forth above, and whose animal(s) does not meet the exemptions set forth in subsection (f) above, may appeal such decision to the Animal Control Supervisor. The appeal must be in writing and made within five (5) business days of the day the notice was provided in accordance with this section.

- (1) The supervisor shall schedule and hold a hearing, within five (5) business days after receiving the written appeal, to determine whether the animal will be Spayed / Neutered. The supervisor's decision shall be considered the final decision of the city as to whether the animal will be Spayed / Neutered.

- (2) If the initial requirement is not appealed or if the right to appeal is waived, the initial requirement shall be considered the final decision of the city as to whether the animal will be Spayed / Neutered.
- (3) An appeal from the decision of the supervisor may only be made to a court of competent jurisdiction.



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Fort Smith Police Department

Kevin Lindsey, Chief of Police

INTERDEPARTMENTAL MEMORANDUM

To: Ray Gosack, City Administrator

From: Kevin Lindsey, Chief of Police

Subject: Running At Large / Spay and Neuter Ordinance Amendment

Date: January 14, 2011

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This review was to address the feasibility of changing fence height requirements for dog owners to six (6) feet in height, as requested by Ms. Tammy Trouillon. Ms. Trouillon has been a witness to two separate vicious dog attacks, both against her own dogs. Ms. Trouillon had one dog severely injured in an attack and one dog was killed in an attack. In both cases, the offending dog was a Pit Bull or Pit Bull mix. In early June, 2010, staff spoke with Ms. Trouillon in reference to the current vicious animal ordinance. During this conversation Ms. Trouillon indicated that she would like to see the fence height requirement correlate with the height of a dog, specifically mentioning the Pit Bull breed of dogs to be included.

In addition, the Board of Directors was asked to consider enacting an ordinance requiring dogs and cats to be spayed / neutered. Staff also conducted research on this topic.

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- Add *Neuter* which shall mean to render a male dog or cat unable to reproduce.
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- Change *Owner* to provide that this term is not applicable to veterinarians or kennel owners.

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In order to enforce any fencing requirements under the Running at Large ordinance, the owner or harborer of a dog which is seized must first be identified. Secondly, there must be sufficient evidence that the dog climbed over or under existing fencing, or by some other means left the confines of the premises. A third party who witnesses a dog leave the owner's or harborer's premises would be considered as sufficient evidence to require additional fencing. Without a witness present, it would become necessary for an animal warden to inspect the premises in order to determine if there is sufficient evidence to require additional fencing requirements.

In researching the legal aspects of fencing requirements for dog owners or harborers in violation of the Running at Large ordinance it was determined that there may be Constitutional considerations in authorizing an animal warden to inspect the fence. Assistant City Attorney Rick Wade brought to light the possible infringements on a property owner's Fourth Amendment rights when an animal warden, absent consent by the property owner or a search warrant, enters the confines of the property to inspect a fence.

City Prosecuting Attorney John Settle also acknowledged the same concerns. In speaking further with Mr. Settle it was determined that absent a search warrant or consent to search the property, it would be reasonable for an animal warden to visually inspect the fence from any vantage point where the animal warden has a lawful right to be. This would include alleys, sidewalks or streets, or even adjacent properties with the permission of a property owner. Mr. Settle suggested in-service training for animal wardens, making them aware of Fourth Amendment considerations when enforcing this ordinance.

Assistant City Attorney Rick Wade also expressed concerns in regards to addressing instances where the owner or harborer of a dog does not own the property but is merely a tenant at said property. There are concerns as to who will be responsible for the addition to, or repairing of, fencing. Other issues that arose out of this research include:

- Can the word “knowingly” be removed from the ordinance?
- How will subdivision covenants affect the ability to enforce the proposed ordinance insofar as fencing height and composition requirements?
- How would the City’s Uniform Development Ordinance (UDO) be affected should the additional fencing requirement be mandated as a result of a violation of the ordinance? What would be the effect if the fence was located in the front yard of the residence?

After consulting with Rick Wade it was determined that the owner or harborer of a dog is ultimately the one responsible for the dog, even if the owner or harborer rents the property. The owner or harborer would be the person cited for a violation of this ordinance and the one responsible for complying with the requirements of this ordinance. However, Mr. Wade shared concerns that a owner or harborer who rented property might not be able make the necessary changes in fencing without landlord approval. Rick Wade also recommended that the word “knowingly” be removed from the ordinance. As far as subdivision covenants are concerned, City ordinance supersedes any subdivision covenant which might already exist. Research was then conducted in reference to the UDO and how a fencing requirement might affect any other ordinances the city has in place. At this time the city has no other ordinances that address fencing other than the setback requirement. This setback requirement regulates how far the fencing must be set back from the roadway.

Under the proposed ordinance owners or harborers of dogs in violation of the Running at Large Ordinance, at the discretion of the Animal Control Supervisor and upon the second violation of the ordinance, are required to:

- Add on to, or construct, a fence so that the fenced enclosure is at least six (6) feet in height if there is sufficient evidence the dog climbed over an existing fence; or
- Construct a pen as defined in Chapter 4, Article I, Section 4-1 of the Fort Smith Municipal Code if there is sufficient evidence the dog climbed over an existing fence of six (6) feet or more in height; or
- Add on to, or construct fencing so that the fence is buried a minimum of eighteen (18) inches into the ground if there is sufficient evidence the dog left the confines of the premises by crawling under or digging under an existing fence; or
- Repair any existing fencing or gates that may be deemed inadequate.

This amendment to the existing Running at Large ordinance may improve public safety by targeting problem animals and owners of said animals, without enacting arbitrary regulations on all pet owners.

While doing research it was discovered that our current Running at Large ordinance is very similar to most other running at large ordinances across the nation. Specifically, there were two other ordinances referenced at the request of the Board of Directors and Ms. Trouillon. A running at large ordinance from Los Angeles, CA was studied and the only fencing requirements noted were specifically directed at dogs trained to attack persons or other animals. The fencing requirement for attack dogs is very vague, only specifying that the fence be five feet in height. The other ordinance referenced was one from Nashville, TN. The Nashville Running at Large ordinance requires fencing for the animal as a penalty upon the third violation of the ordinance but does not set a height or any other requirements. The fourth violation requires the fencing to be verified as secure but gives no other requirements. Upon the fifth violation the animal is seized and destroyed under the Nashville ordinance.

Under our current Vicious Animal Ordinance (Section 4-7) if a dog is running at large, and its actions are deemed to be dangerous or vicious (i.e. attacking or biting), the owner is required to pay an annual license fee of either \$250.00 or \$1,000.00, build a secure "pen" to house the dog when outside the walls of the home. If outside the "pen", the dog is required to be muzzled and on a leash and the owner or harbinger must carry annual liability insurance in the amount of one million dollars. This ordinance, which is already in place, will most likely mitigate some of the issues surrounding the fencing and animal at large issue.

In reviewing Spay / Neuter Ordinances, staff determined that a majority of Ordinances included provisions for licensing animals, issuing "intact" permits and licensing of breeders of animals. Staff concluded that the best course of action would be to enact a Spay / Neuter Ordinance which could be enforced when a dog or a cat is picked up for violating ordinances already in existence. If a dog is seized in violation of Section 4-116 (Running at Large) of the Fort Smith Municipal Code, the owner or harbinger of the dog, upon the second violation of this ordinance, will be required to have the animal spayed or neutered within thirty (30) days or face a fine, unless the owner or harbinger can provide proof that the animal has already been spayed or neutered, or meets the exemptions set forth in the Ordinance. The same will apply for cats seized in violation of Chapter 4, Article VI, of the Fort Smith Municipal Code. This Ordinance provides exemptions for dogs that are trained and being used for law enforcement activities, search and rescue operations, service animals and dogs or cats certified by a licensed veterinarian as being unfit for being spayed or neutered due to health reasons. This ordinance will not be enforced retroactively.

There are also other concerns to consider with a mandatory Spay / Neuter Ordinance. Some of those considerations should include animal owners who may want to breed their animal for the following reasons: animals that are registered with a nationally recognized club or organization, animals bred for hunting, or animals bred for other purposes. The draft ordinance offers an appeals process and, if necessary, determinations as to whether an animal will be allowed to remain intact could be made on a case by case basis.

The intention of this Ordinance is to promote responsible pet ownership. Animals which have not been spayed or neutered and allowed to run at large present a risk to public safety and an unnecessary monetary burden to the City of Fort Smith.

Article V. Dogs

Sec. 4-116. Running at large.

(a) It shall be unlawful for any dog owner or harborer knowingly to allow such dog to run at large within the corporate limits of the city.

(b) An animal warden, upon identifying the owner or harborer of a dog running at large, is authorized in the performance of his or her duties to inspect the yard or fence or pen, if any, but not enter into a private residence, whereat the dog is maintained to determine how the dog may have left the confines of the premises. If there is sufficient evidence that the dog climbed over, jumped over, or crawled under an existing fence, or there is sufficient evidence to indicate that the means by which the animal was maintained on the premises is deemed inadequate, and violation of this ordinance is the second cited offense, the owner or harborer of the dog, at the discretion of the Animal Control Supervisor, shall be required to:

- 1) Add on to an existing fence, or construct a fence, if one does not exist, so that the fenced enclosure is at least six (6) feet in height if there is sufficient evidence the dog climbed over an existing fence or left the confines of a yard where no fence exists; or
- 2) Construct a pen as defined in Chapter 4, Article I, Section 4-1 of the Fort Smith Municipal Code if there is sufficient evidence the dog climbed over or jumped over an existing fence of six (6) feet or more in height; or
- 3) Construct a pen as defined in Chapter 4, Article I, Section 4-1 of the Fort Smith Municipal Code, or add on to, or construct fencing so that the fence is buried a minimum of eighteen (18) inches into the ground if there is sufficient evidence the dog left the confines of the premises by crawling under or digging under an existing fence; or
- 4) Repair any existing fencing or gates that may be deemed inadequate.

(c) Notice of the inadequacy of the means by which an animal is maintained on the premises, and of any requirements related to fencing or other enclosure, shall be in writing and shall be served on the owner or harborer personally, or by certified mail to the owner's or harborer's last known address.

(d) Appeal of determination. Any person who has received notice that he/she must comply with one or more of the requirements set forth in subsection (b) above may appeal such decision to the Animal Control Supervisor. The appeal must be in writing and made within five (5) business days of the day the notice was provided in accordance with this section.

- (1) The supervisor shall schedule and hold a hearing, within five (5) business days after receiving the written appeal, to review the initial requirement(s). The supervisor's decision shall be considered the final decision of the city as to whether additional fencing or enclosure requirements are necessary.

(2) If the initial requirement(s) is not appealed or if the right to appeal is waived, the initial requirement(s) shall be considered the final decision of the city as to whether additional fencing or enclosure requirements are necessary.

(3) An appeal from the decision of the supervisor may only be made to a court of competent jurisdiction.

(e) This ordinance will not be enforced retroactively for offenses occurring prior to the effective date of this ordinance.

(e) All other provisions of this article notwithstanding, any vicious dog, for which an order of compliance has been issued, but which is thereafter found outside the walls of the owner's or harborer's home or pen, shall be humanely destroyed five (5) days from the time of notification of the owner or harborer as set forth in section 4-7 of the Fort Smith Municipal Code.



Fort Smith Police Department

Kevin Lindsey, Chief of Police

INTERDEPARTMENTAL MEMORANDUM

To: Ray Gosack, City Administrator
From: Kevin Lindsey, Chief of Police
Subject: Animal Services Advisory Board
Date: January 14, 2011

At the direction of the Board of Directors, staff conducted research in regards to the creation of an Animal Services Advisory Board. It was specifically requested that we include information from Austin, TX and Fayetteville, AR in our research of this issue. Staff has completed the necessary research and our findings are included in this memo.

Staff found that creation of an Animal Services Advisory Board by both cities was very similar. In both Austin, TX and Fayetteville, AR, the Animal Services Advisory Board was created by city ordinance and / or resolution. More specifically, Fayetteville's board was created by resolution. The resolution / ordinance would outline the make-up of the board, how persons are nominated, how often the board will meet and what their responsibilities will include. The Austin, TX ordinance specifies that the board be comprised of one licensed veterinarian, one city official, one animal shelter representative, one animal welfare organization representative, one representative nominated by the county, and two other unspecified seats. Fayetteville's board is of a similar make-up but has a total of nine seats on the board. In Austin's ordinance the mayor and each city council member is to nominate a specific seat on the advisory board (i.e. one licensed veterinarian, nominated by the mayor; one city official, nominated by the Place 2 council member; etc...).

The duties of an Animal Services Advisory Board may generally include:

- Advising on animal welfare policies
- Advising on budget priorities (except on issues related to administration of the Animal Services Division)
- Promote collaboration between the City and private citizens, institutions and agencies interested in conducting activities relating to animal welfare in the city

- Identify proactive, creative approaches to engage and facilitate communication within the animal welfare community
- Foster and assist the development of animal welfare programs in the community
- Study, advise and report on policy recommendations it deems effective to promote animal welfare outcomes consistent with availability of funding and City goals and objectives as outlined by the Board of Directors
- Ensure that the programs, goals and objectives of the City are consistent with community needs and desires by stimulating and encouraging communication with all members of the community

Should the Board of Directors choose the option of an Animal Services Advisory Board it would be necessary to create a board for this purpose. A review of current Boards and Commissions was completed and there are no existing Boards or Commissions, including the Sebastian County Humane Society, which might be suited for these tasks. The Sebastian County Humane Society is a separate entity which already does business with the City, thus creating a conflict of interest.



MEMORANDUM

January 12, 2011

TO: Mayor and Board of Directors

FROM: Ray Gosack, City Administrator

SUBJECT: Convention Center

Attached are the following documents in response to the board of directors' discussion at the January 11th study session:

- ▶ Draft ordinance enacting a 1% prepared food tax.
- ▶ Draft agreement between the City and the Advertising and Promotion Commission for the operation of the convention center with the prepared food tax revenue.

The staff looks forward to the board's continued discussion of ensuring a stable revenue source for the future success of the convention center and the benefits it brings to the community.

A handwritten signature in cursive script, appearing to read "Ray".

Attachment

Draft

ORDINANCE NO. _____

AN ORDINANCE PROVIDING FOR THE LEVY OF A SALES AND USE TAX ON THE GROSS RECEIPTS OR GROSS PROCEEDS RECEIVED BY RESTAURANTS, CAFES, CATERING, CAFETERIAS, DELICATESSENS, DRIVE-IN RESTAURANTS, CARRY-OUT RESTAURANTS, CONCESSION STANDS, CONVENIENCE STORES, AND GROCERY STORE-RESTAURANTS FROM THE SALE OF PREPARED FOOD AND BEVERAGES FOR ON-PREMISES OR OFF-PREMISES CONSUMPTION; AND PRESCRIBING OTHER MATTERS PERTAINING THERETO.

BE IT ORDAINED AND ENACTED by the Board of Directors of the City of Fort Smith, Arkansas that:

Section 1: As authorized by Act 185 of the 1965 Acts of Arkansas, as amended, specifically that portion of the Act codified at A.C.A. § 26-75-602(c)(2) (Supp. 2009), there is hereby levied a sales and use tax at the rate of one percent (1%) upon the gross receipts or gross proceeds received by restaurants, cafes, cafeterias, delicatessens, drive-in restaurants, carry-out restaurants, concession stands, convenience stores, and grocery store-restaurants from the sale of prepared food and beverages for on-premises or off-premises consumption within the City of Fort Smith, Arkansas, to be effective _____.

Section 2: All taxes, interest, penalties, and costs derived from said one percent (1%) sales and use tax shall be deposited in the Fort Smith Advertising and Promotion Fund for purposes permitted by Act 185 of the 1965 Acts of Arkansas, as amended.

Section 3: This Ordinance and the tax levied herein are subject to referendum in the manner prescribed in Amendment 7 to the Arkansas Constitution.

Section 4: If any provisions of this Ordinance or the application thereof to any person, entity, or circumstance is held invalid, such invalidity shall not affect other provisions or

applications of the Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 5: The codifier of the Fort Smith Code of Ordinances is instructed to codify Sections 1 and 2 within Chapter 13, Article V, of the Fort Smith Code of Ordinances.

This Ordinance adopted this ____ day of _____, 2011.

APPROVED:

Mayor

ATTEST:

City Clerk

*Agreed to join
Publish 1 Time*

TO: Mayor and Board of Directors

FROM: Claude Legris, Executive Director
Fort Smith Advertising and Promotion (A & P) Commission

COPY: A & P Commissioners

DATE: January 20, 2011

REGARDING: Draft Lease Agreement 1/18/11

As requested at the January 11 Study Session, attached for your review is an initial Lease Agreement drafted by the A & P Commission's attorneys for the lease of the Fort Smith Convention Center to the A & P Commission by the City of Fort Smith. This initial document was drawn up by the law firm of Mitchell Williams, on behalf of the Fort Smith Advertising and Promotion Commission. The firm is the established expert on Arkansas Advertising & Promotion law.

This document has been sent to the City Attorney and distributed to A & P Commissioners for their consideration at this afternoon's regular A & P monthly meeting. This document should be regarded as a first draft of a proposed agreement between the parties. It will require close review and discussion in the weeks to come.

I feel this represents solid progress in the process, and appreciate your continued work to resolve the Convention Center funding issue quickly and responsibly in the best interests of the City of Fort Smith.

Thank you.

Attachment

LEASE AGREEMENT

LANDLORD: City of Fort Smith, Arkansas
TENANT: Fort Smith Advertising and Promotion Commission
PREMISES: Fort Smith Convention Center
55 South 7th Street, Fort Smith, Arkansas

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EXHIBIT A PROPERTY DESCRIPTION

LEASE AGREEMENT

City of Fort Smith, Arkansas

Landlord

and

Fort Smith Advertising and Promotion Commission

Tenant

LEASE AGREEMENT

This **Lease Agreement** (hereinafter sometimes referred to as the "*Lease*") is made and entered into as of _____, 2011 (the "*Commencement Date*"), by and between **City of Fort Smith, Arkansas**, a city of the first class located in Sebastian County, Arkansas (hereinafter sometimes referred to as the "*Landlord*" or the "*City*") and **Fort Smith Advertising and Promotion Commission**, a commission of the City of Fort Smith (hereinafter sometimes referred to as the "*Tenant*" or the "*Commission*").

WITNESSETH:

For valuable consideration, the receipt and sufficiency of which each party acknowledges, Landlord and Tenant, intending to be legally bound, hereby agree with each other as follows:

ARTICLE I DEFINITIONS AND FUNDAMENTAL PROVISIONS

The following terms shall have the meanings set forth below when used in this Lease, except as may otherwise be specifically provided. The Rent shall be as set forth below subject to adjustment as provided in the Section cross referenced therewith.

1.1. Addresses.

Landlord: City of Fort Smith, Arkansas
Attn: _____

Fort Smith, Arkansas 72901

Tenant: Fort Smith Advertising and Promotion Commission
Attn: Mr. Claude Legris, Executive Director
2 North B Street,
Fort Smith, Arkansas 72901

or such other address or addresses as a party may designate by written notice to the other party.

1.2. Permitted Use. The Premises shall be used for the following purposes and for no other purpose whatsoever: operation of a multi-purpose civic center for meetings and conventions, exhibitions, entertainment events and related uses, including without limitation the serving of food and drink, including alcoholic beverages.

1.3. Premises. The lands situated in the City of Fort Smith, Sebastian County, Arkansas more particularly described on Exhibit A attached hereto (the "*Lands*"), all buildings, structures and other improvements now or at any time hereafter erected and installed on the Lands (the "*Improvements*"), and all easements, rights of way and other appurtenances belonging or related to the Lands of Improvements.

1.4. Rent. From and after the Commencement Date for the Primary Term and for any Extension Term, Tenant shall pay to Landlord as rent hereunder the sum of One Dollar (\$1.00) per year. All Rents shall be payable in advance beginning on the Commencement Date and on each anniversary thereof during the Primary Term or any Extension Term.

1.5. Term. Ten (10) years (the "Term" or "Primary Term"), to begin on the Commencement Date, subject to earlier termination as hereinafter provided and subject to Tenant's option to extend the Term as set forth in Section 13.16 hereof. This Lease shall expire at midnight on the tenth (10th) anniversary of the Commencement Date (hereinafter sometimes referred to as the "Expiration Date"), subject to Tenant's option to extend the Term as set forth in Section 13.16 hereof.

ARTICLE II DEMISED PREMISES

2.1. Demise of Premises. Landlord hereby leases to Tenant for the Term and Permitted Use specified herein and Tenant rents from Landlord the Premises, subject to the terms and conditions herein contained, and subject to all encumbrances, easements, restrictions, zoning laws, and governmental or other regulations affecting the Premises.

ARTICLE III RENT AND OTHER CHARGES

3.1. Payment of Rent. During the Term, Tenant covenants and agrees to pay to Landlord at the address set forth in Section 1.1 above, without demand, deduction or setoff, except as specifically provided elsewhere in the Lease, all Rent and other charges as defined in Section 1.5.

3.2. Utilities. The utilities for the Premises are separately metered. Landlord shall provide Tenant without charge all water (including water for domestic uses and for fire protection), sanitary sewer service and garbage collection services necessary for the operation of the Premises. Tenant shall pay for, and be solely responsible for all other utilities required, used or consumed in the Premises, including, but not limited to gas, telephone, electricity, or any similar service (herein sometimes collectively referred to as the "Utility Services").

3.3. Real Estate Taxes, Personal Property Taxes and Rent Tax. Landlord and Tenant hereby acknowledge and that the Premises are currently shown as "Exempt" on the books of the Sebastian County Assessor and that no real estate, personal property or other ad valorem taxes are assessed or paid on the Premises. In the event the Premises cease to be deemed exempt from ad valorem taxes and those taxes are levied against the Premises, Tenant shall be responsible for the payment of such taxes and assessments and Landlord shall cooperate with Tenant in any efforts to cease the levy and collection of those taxes.

3.4. Insurance. Tenant, at its sole cost and expense, shall maintain fire and extended coverage insurance on the Premises with a limit no less than the full insurable value of the Improvements including any leasehold improvements constructed by Tenant. Landlord shall be named as an additional insured party under the insurance policy. Tenant shall provide insurance

coverage for the contents, furniture, fixtures and equipment from whatever source as Tenant may elect.

ARTICLE IV
USE OF PREMISES

4.1. **Tenant's Use.** Tenant shall use the Premises solely for the Permitted Use specified in Section 1.3. Tenant will at all times operate the Premises as a convention center within the requirements of the Advertising and Promotion Commission Act, Ark. Code Ann. §§ 26-75-601 through 606 so as to permit the use of revenues received from any tax levied under such Act for the benefit of the Premises.

4.2. **Legal Operation of Premises.** Tenant shall not use or suffer or permit the Premises, or any part thereof, to be used for any purpose or use in violation of the Lease or applicable law. Tenant shall have the right to contest any alleged violation of law provided that the interest of Landlord in the Premises is not at unreasonable risk as the result of such contest or from any adverse judgment in Landlord's reasonable discretion.

4.3. **Alterations to Premises.** Tenant shall have the right from time to time during the Term to make non-structural additions, alterations and changes in or to the Improvements at its sole cost and expense. Tenant may make structural modifications to the Improvements and construct additional improvements only with the prior written consent of Landlord, which shall not be unreasonably withheld, conditioned or delayed. Tenant shall submit to Landlord plans and specifications for any structural modifications or additional improvements. All work by Tenant on the Premises shall be performed in a workmanlike manner with high quality materials and shall be prosecuted diligently to completion. All such permanent alterations shall remain upon and become a part of the Premises and shall become Landlord's property upon the termination of this Lease. Tenant shall have no obligation to remove any such modifications or improvements or restore the Premises to its original condition at the expiration of the Term.

4.4. **Liens.** Tenant will not create or permit to be created or to remain, and will discharge (or bond over, within sixty (60) days following notice of the filing thereof), as provided below), any lien (including, but not limited to, the liens of mechanics, laborers or materialmen for work or materials alleged to be done or furnished in connection with the Premises), encumbrance or other charge upon the Premises or any part thereof, except for any such liens attributable to the acts or omissions of Landlord. If Tenant fails to discharge or bond over any such liens, encumbrances or charges as may be placed upon the Premises, Landlord may, but shall not be obligated to, remove any such lien, whereupon Tenant shall reimburse Landlord upon written demand for all sums so expended by Landlord, including attorney's fees in connection therewith, and interest thereon from the date of Landlord's payment, until reimbursement at the rate of four (4%) percent over the then Prime Rate as published daily under the heading "Money Rates" in The Wall Street Journal, unless such rate be usurious as applied to Tenant, in which case the highest permitted legal rate shall apply (the "Interest Rate"). Tenant will pay, protect and indemnify Landlord promptly upon demand therefor, from and against all liabilities, losses, claims, damages, costs and expenses, including reasonable attorney's fees, incurred by Landlord by reason of the filing of any lien and/or the removal of the same.

4.5. Exclusive Use. To the extent it may lawfully do so, Landlord shall not permit the use of or lease or rent any space other than the Premises owned by it for the principal purpose of operating a convention center or meeting hall. The prohibitions set forth in this section shall not apply to or prevent Landlord from leasing space to Tenant or any affiliate thereof.

ARTICLE V
REPAIRS AND MAINTENANCE

5.1. Maintenance and Repair Obligations of Tenant. Tenant shall, at Tenant's expense, at all times maintain the Premises, including the roof, foundation, exterior walls of the Premises, gutters and water spouts, utility services extending to the service connections within the Premises and all interior wiring, plumbing, pipes, conduits and other utilities and sprinkler fixtures, all interior non-structural portions of the Premises (specifically including the storefront, windows and doors of the Premises) and the HVAC systems serving the Premises in good order and repair. In the event Tenant fails to perform any of its obligations as required hereunder within thirty (30) days after receipt of written notice, Landlord may, but shall not be required to, perform and satisfy same with Tenant hereby agreeing to reimburse Landlord, as additional rent, for the cost thereof promptly upon written demand, together with interest thereon at the Interest Rate from the date of payment by Landlord to the date of reimbursement.

ARTICLE VI
INSURANCE AND INDEMNIFICATION

6.1. Tenant Insurance. Tenant shall maintain at its sole expense during the Term commercial general liability insurance covering the Premises and the adjoining streets, sidewalks and passageways in an amount not less than \$1,000,000.00 for injury or death to any one person and \$2,000,000.00 for injury and/or death to any number of persons in any one accident and property damage insurance in an amount not less than \$500,000.00 in companies licensed and in good standing in the State of Arkansas. Tenant will cause such insurance policies to name Landlord and its agents as additional insureds and to be written so as to provide that the insurer waives all right of recovery by way of subrogation against Landlord in connection with any loss or damage covered by the policy. In addition, Tenant shall keep in force workman's compensation or similar insurance to the extent required by law. Tenant shall deliver certificates of such insurance to Landlord upon written request. Should Tenant fail to effect and maintain the insurance called for herein, Landlord may, at its sole option after ten (10) business days prior written notice to Tenant and Tenant's failure to procure same and provide proof thereof to Landlord within said ten (10) business days, procure said insurance and pay the requisite premiums, in which event, Tenant shall pay all sums so expended to Landlord, as additional rent following invoice, together with interest thereon at the Interest Rate from the date of Landlord's payment until reimbursement. Each insurer under the policies required hereunder shall agree by endorsement on the policy issued by it or by independent instrument furnished to Landlord that it will give Landlord ten (10) days prior written notice before the policy or policies in question shall be altered or canceled.

6.2. Indemnification. Tenant hereby agrees to indemnify and hold Landlord wholly harmless from any and all claims, damages, liabilities or expenses (including, without limitation, reasonable attorney's fees and the costs of defending any action) arising out of (i) Tenant's use

of the Premises, (ii) any and all claims by third parties arising out of or due to the acts or omissions of Tenant, its agents, contractors, employees or licensees after the expiration of any notice and cure period, (iii) the negligence or willful acts or omissions of Tenant, its agents, contractors, employees or licensees, regardless of whether or where such negligence, acts or omissions occurred or (iv) the injury to, or death of, any persons or damage to, or destruction of any property occurring in the Premises. Tenant further releases Landlord from liability for any damages sustained by Tenant, or any other person claiming by, through or under Tenant, due to the Premises or any part thereof, or any appurtenances thereto, becoming out of repair, or due to the happening of any accident, including, but not limited to, any damage caused by water, snow, windstorm, tornado, gas, steam, electrical wiring, sprinkler system, plumbing, heating and air conditioning apparatus. Landlord shall not be liable for any damage to, or loss of, Tenant's personal property, inventory, fixtures or improvements from any cause whatsoever, unless caused by the negligence or willful misconduct of Landlord or its agents, contractors, employees or licensees and then only to the extent not covered by insurance to be obtained by Tenant in accordance with this Article. The foregoing indemnity obligation of Tenant shall include reasonable attorney's fees, investigation costs, and all other reasonable costs and expenses incurred by Landlord and shall survive the termination of this Lease.

6.3. Subrogation. Landlord and Tenant each waive any rights each may have against the other on account of any loss or damage occasioned to Landlord or Tenant, as the case may be, to the Premises or its contents arising from any liability, loss, damage or injury caused by fire or other casualty for which property insurance is required to be carried pursuant to the Lease (to the extent of receipt of proceeds pursuant to such policies of insurance). The insurance policies obtained by Tenant pursuant to this Lease shall contain endorsements waiving any right of subrogation which the insurer may otherwise have against the non-insuring party. The foregoing release and the foregoing requirement for waivers of subrogation shall be operative only so long as the same shall neither preclude the obtaining of such insurance nor diminish, reduce or impair the liability of any insurer.

ARTICLE VII DAMAGE TO PREMISES AND CONDEMNATION

7.1. Fire, Explosion or Other Casualty. If the Premises is damaged by fire, tornado or other casualty covered by the insurance policies maintained hereunder, and such damage cannot be fully rebuilt or repaired within ninety (90) days after the date of the casualty, then Tenant shall have the right to terminate this Lease upon written notice to Landlord and this Lease shall terminate upon the date set forth in such notice and neither party shall have any further obligations hereunder except that any obligation to indemnify the other for pre-termination events shall survive. If Tenant elects not to terminate this Lease or the damage may be repaired in less than the ninety days, then the Premises shall be promptly repaired and restored by Tenant to not less than substantially the same condition in which it was immediately preceding the casualty, but Tenant shall not be obligated to spend in excess of any insurance proceeds actually received by Tenant as a result of such damage or casualty. Landlord shall release any interest in the insurance proceeds to fund such work.

7.2. Condemnation. In the event that the Premises, or any part thereof, shall be appropriated or taken under the power of eminent domain by any public or quasi-public

authority, then the Lease shall, at the sole option of Tenant, forthwith cease and terminate. If Tenant does not elect to terminate this Lease following any such condemnation, Tenant shall, as soon as reasonably practicable following such condemnation, restore the Premises to an integrated whole, but Tenant shall not be obligated to spend in excess of any condemnation award actually received by Tenant as a result of such condemnation and receipt of any compensation awarded for any taking. All compensation awarded for any taking (or sale proceeds in lieu thereof) shall be the property of Tenant, and Landlord shall have no claim thereto, the same being hereby expressly waived by Landlord, provided however that if this Lease is terminated by Tenant as a result of any condemnation, Landlord shall be entitled to claim from the condemning authority, such compensation as may be awarded or recoverable by Landlord on account of any and all damage to Landlord's interest in the Premises, or for any other damages compensable separately to Landlord

ARTICLE VIII
ASSIGNMENT AND SUBLETTING

8.1. **Assignment and Subletting.** Tenant shall not have the right to assign this Lease, sublease the Premises except as set forth in this section, or pledge or hypothecate its interest in the Premises or Lease without Landlord's prior written consent, which shall not be unreasonably withheld, conditioned or delayed. Any assignment, unauthorized sublease, pledge or hypothecation executed without Landlord's consent shall be void. Tenant may sublease all or any part of the Premises in the ordinary course of operating the Premises except that the term of any such sublease or exclusive use with any one party shall not exceed ninety (90) consecutive days in one year.

ARTICLE IX
SUBORDINATION AND ATTORNMENT

9.1. **Attornment.** Tenant shall attorn and be bound to any of Landlord's successors under all the terms, covenants and conditions of this Lease for the balance of the remaining Term (including any Extension Term) provided such successor recognizes this Lease and Tenant's rights thereunder.

9.2. **Estoppel Certificate.** Within thirty (30) days after request therefor by Landlord, or upon a request associated with any sale, assignment or hypothecation of the Premises by Landlord, Tenant hereby agrees to deliver an estoppel certificate to Landlord or any proposed mortgagee or purchaser of the Premises certifying that this Lease is unmodified and in full force and effect (or, if there have been modifications, stating the modifications and that the Lease is in full force and effect as modified), that there are no defenses or setoffs thereto (or stating those claimed by Tenant), the dates to which rent and other charges hereunder have been paid and such other matters as Tenant may be required to provide Landlord pursuant to the Lease.

9.3. **Tenant's Lender Requirements.** Landlord does, if requested, likewise agree to execute estoppel letters containing the information described in Section 9.2 above and other reasonable instruments for the benefit of Tenant's lender(s), if any, within thirty (30) days of written request therefor. No such instrument shall function as a material modification of this Lease or the waiver of any material right on the part of Landlord or impose any new material

obligation on Landlord. Landlord may refuse to execute any estoppels letter that includes terms prohibited by the preceding sentence.

ARTICLE X
DEFAULT, REMEDIES AND BANKRUPTCY

10.1. **Default of Tenant and Remedies of Landlord.** In the event of default by Tenant hereunder, Landlord may at its option invoke all of the remedies set forth in this Article X or otherwise available (in law or equity) to Landlord under the laws of the United States or the State of Arkansas. In the event Tenant shall not commence and proceed diligently to effectuate any actions required by Landlord and which Tenant is obligated to effect under the terms of the Lease, as specified in any notice given Tenant hereunder provided said notice period is at least equivalent to that set forth in this Lease, Landlord may at its sole discretion do such things as are specified in said notice, and Tenant hereby grants to Landlord access to the Premises if same is required by Landlord in furtherance thereof. Landlord shall have no liability to Tenant for any loss or damage whatsoever (except for the negligence or willful act of Landlord, its agents or employees) resulting from such entry or such action by Landlord, and Tenant hereby agrees to pay as Rent, within ten (10) days after written demand, any reasonable expenses incurred or paid by Landlord in taking such action. Each of the following shall be deemed a default by Tenant and a breach of this Lease (each, a "default"). In the event that Tenant: (i) fails to pay all or any portion of any sum due from Tenant hereunder for Rent within ten (10) days after written notice that same is due; (ii) fails to reimburse Landlord for sums advanced by Landlord on Tenant's behalf hereunder or pursuant to any exhibit hereto within ten (10) business days following written notice to Tenant that such payment is overdue; (iii) fails to immediately cease all conduct prohibited hereby within thirty (30) days after receipt of written notice by Tenant; (iv) fails to take such actions within thirty (30) days after written notice from Landlord as are required by Landlord to remedy Tenant's failure to perform any of the terms, covenants, and conditions hereof; (v) is adjudged as bankrupt or insolvent or files any debtor proceeding or if Tenant shall take or have taken against Tenant any petition of bankruptcy which is not vacated within ninety (90) days, or if Tenant shall take action or have action taken against Tenant for the appointment of a receiver for all or a portion of Tenant's assets which is not vacated within ninety (90) days, or shall make an assignment for the benefit of creditors or if in any other manner Tenant's interest hereunder shall pass to another by operation of law (it being understood that any or all of such occurrences shall be deemed a default on account of bankruptcy for the purposes hereof and that such default on account of bankruptcy shall apply to and include any guarantor of this Lease); (vi) commits waste to the Premises or is otherwise in default hereunder, and such default shall not have been cured within thirty (30) days following written notice from Landlord (it being agreed that in the event such default shall not be curable by the payment of money and shall be of such a nature as to reasonably require more than thirty (30) days to cure, then Tenant shall not be deemed in default provided Tenant commences the cure of such default within said thirty (30) day period and thereafter continuously prosecutes said cure to completion within ninety (90) days), then and in such event, Landlord may at its option and upon ten (10) days notice to Tenant, reenter and resume possession of the Premises. Notwithstanding such reentry with legal process by Landlord, and except for the negligence of Landlord, Tenant hereby releases Landlord from and against any and all loss or damage which Tenant may incur by reason of the termination of this Lease and/or Tenant's right to possession hereunder pursuant to the terms of this Lease or as a matter of law.

10.2. Remedies Cumulative. All rights and remedies of either party herein created or remedies otherwise existing at law or equity are cumulative and the exercise of one or more rights or remedies shall not be taken to exclude or waive the right to the exercise of any other. All such rights and remedies may be exercised and enforced concurrently and whenever and as often as the exercising party shall deem desirable. The failure of Landlord to insist upon strict performance by Tenant of any of the covenants, conditions, and agreements of this Lease shall not be deemed a waiver of any of said rights and remedies concerning any subsequent or continuing breach or default by the other of any of the covenants, conditions, or agreements of this Lease. No surrender of the Premises shall be affected by Landlord's acceptance of Rent or by any other means whatsoever unless the same be evidenced by Landlord's written acceptance of such as a surrender.

10.3. Remedies of Tenant. Landlord agrees that with respect to any default by Landlord hereunder, Tenant may invoke all rights and remedies available at law or equity to Tenant under the laws of the United States or the State of Arkansas.

ARTICLE XI SURRENDER OF PREMISES

11.1. Surrender of Premises, Holding Over and Abandonment of Tenant's Trade Fixtures. Tenant, upon expiration or termination of this Lease, either by lapse of time or otherwise, agrees peaceably to surrender to Landlord the Premises, including the alterations, additions, improvements, changes, and fixtures other than Tenant's trade fixtures, in broom-clean condition and in good repair, ordinary use, wear, damage by fire or other casualty excepted. Tenant agrees to remove Tenant's sign and/or trade fixtures upon such expiration or termination (which shall not include carpet or any floor coverings) and to repair all damage to the Premises caused by or resulting from such removal. Tenant's failure to remove all or part of Tenant's sign and/or trade fixtures (or if requested by Landlord, Tenant's other alterations, improvements, additions and fixtures) and restore the Premises within thirty (30) days after such expiration or termination shall be deemed an abandonment to Landlord of such sign and/or trade fixtures (and if applicable, Tenant's other alterations, improvements, additions and fixtures) and, if Landlord elects to remove all or any part of said sign and/or trade fixtures (and if applicable, Tenant's other alterations, improvements, additions and fixtures), such removal, including the cost of repairing any damage to the Premises caused by or resulting from such removal, shall be paid by Tenant.

ARTICLE XII ACCESS TO PREMISES

12.1. Access to Premises. Tenant agrees that Landlord, its agents, employees, or servants or any person authorized by Landlord may enter the Premises during normal business hours to inspect the condition of same and to make such repairs to the Premises as Landlord may elect to make in accordance with the terms and provisions of this Lease (Landlord agreeing to repair any damage to the Premises occasioned by such entry and to provide two (2) days' written notice to Tenant of its intent to make repairs to the Premises, except in the case of an emergency where no such prior notice shall be required). Nothing in this Article XII, however, shall be

deemed or construed to impose upon Landlord any obligation or liability whatsoever for care, supervision, repair, improvement, addition, change, or alteration of the Premises.

ARTICLE XIII
MISCELLANEOUS

13.1. **Successors and Assigns.** All covenants, promises, conditions, representations, and agreements herein contained shall be binding upon, apply, and inure to the parties hereto and their respective heirs, executors, administrators, successors, and permitted assigns.

13.2. **Entire Agreement.** This Lease and any Exhibits attached hereto constitute the sole and exclusive agreement between the parties with respect to the Premises. No amendments, modifications of or supplements of this Lease shall be effective unless in writing and executed by Landlord and Tenant.

13.3. **Late Charges.** If Tenant shall fail to make any payment of Rent within ten (10) days after notice that the same is past due, such amount shall bear interest at the Interest Rate, and Tenant shall pay a late fee equal to five percent (5%) of the amount past due, it being understood that said amounts shall constitute liquidated damages and shall be for the purpose of reimbursing Landlord for additional costs and expenses which Landlord presently expects to incur in connection with the handling and processing of late Rent payments. The payment of the above listed amount is in addition to any other remedy provided in this Lease.

13.4. **Time is of the Essence.** The time of the performance of all of the covenants, conditions, and agreements of this Lease is of the essence of this Lease.

13.5. **Recording of this Lease.** A short form or memorandum of this Lease may be recorded by Tenant upon review and approval and execution of the same by Landlord.

13.6. **Relationship of Parties.** Nothing herein shall be construed so as to constitute a joint venture or partnership between Landlord and Tenant.

13.7. **No Presumption Against Drafter.** Landlord and Tenant understand, agree, and acknowledge that: (i) this Lease has been freely negotiated by both parties; and (ii) that, in the event of any controversy, dispute, or contest over the meaning, interpretation, validity, or enforceability of this Lease, or any of its terms or conditions, there shall be no inference, presumption, or conclusion drawn whatsoever against either party by virtue of that party having drafted this Lease or any portion thereof.

13.8. **Force Majeure.** In the event that either party shall be delayed or hindered in, or prevented from, the performance of any work, service, or other act required under this Lease to be performed by the party and such delay or hindrance is due to strikes, lockouts, acts of God, governmental restrictions, enemy act, civil commotion, unavoidable fire or other casualty, or other causes of a like nature beyond the control of the party so delayed or hindered, then performance of such work, service, or other act shall be excused for the period of such delay and the period for the performance of such work, service, or other act shall be extended for a period equivalent to the period of such delay. In no event shall such delay constitute a termination or

extension of this Lease. The provisions of this Section shall not operate to excuse Tenant from the prompt payment of Rent as due under any provision hereof.

13.9. Governing Law. This Lease shall be construed under the laws of the State of Arkansas.

13.10. Partial Invalidity. If any provision of this Lease or the application thereof to any person or circumstance shall to any extent be held invalid, then the remainder of this Lease or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby, and each provision of this Lease shall be valid and enforced to the fullest extent permitted by law.

13.11. Interpretation. In interpreting this Lease in its entirety, the printed provisions of this Lease and any additions written or typed thereon shall be given equal weight, and there shall be no inference, by operation of law or otherwise, that any provision of this Lease shall be construed against either party hereto.

13.12. Survival of Obligations. The provisions of this Lease with respect to any obligation of either party to pay any sum in order to perform any act required by this Lease after the expiration or other termination of this Lease shall survive the expiration or other termination of this Lease.

13.13. Headings, Captions and References. The section captions contained in this Lease are for convenience only and do not in any way limit or amplify any term or provision hereof. The use of the terms "hereof," "hereunder" and "herein" shall refer to this Lease as a whole, inclusive of the Exhibits, except when noted otherwise. The use of the masculine or neuter genders herein shall include the masculine, feminine and neuter genders and the singular form shall include the plural when the context so requires. All Exhibits attached to this Lease are by this reference incorporated herein.

13.14. Consents and Approvals. Whenever any provision of this Lease requires approval or determination by a party, the party shall promptly exercise its judgment and promptly communicate its decision to the other party.

13.15. Hazardous Materials. Tenant shall not cause or permit any Hazardous Material (as defined herein) to be brought, kept or used in or about the Premises by Tenant, its agents, employees, contractors or invitees except for Hazardous Material used by Tenant, its agents, employees, contractors or invitees in connection with activities permitted by this Lease and in accordance with applicable law. Tenant hereby indemnifies Landlord from and against any breach by Tenant of the obligations stated in the preceding sentence, and agrees to defend and hold Landlord harmless from and against any and all loss, damage, cost and/or expenses (including, without limitation, diminution in value of the Premises, damages for the loss or restriction on use of rentable or usable space or of any amenity of the Premises, and sums paid in settlement of claims, attorneys' fees, consultant fees, and expert fees) which arise during or after the Term as a result of such breach. This indemnification of Landlord by Tenant includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal, or restoration work required by any federal, state, or local

governmental agency or political subdivision because of Hazardous Material present in the soil or ground water on or under the Premises which results from such a breach. Without limiting the foregoing, if the presence of any Hazardous Material in the Premises caused or permitted by Tenant results in any contamination of the Premises Center, Tenant shall promptly take all actions at its sole expense as are necessary to return the Premises to the conditions existing prior to the introduction of such Hazardous Material to the Premises; provided that the Landlord's approval of such actions, and the contractors to be used by Tenant in connection therewith, shall first be obtained.

As used herein, the term "*Hazardous Material*" means any hazardous or toxic substance, material, or waste which is or becomes regulated by any local governmental authority or the United States Government. The term "*Hazardous Material*" includes, without limitation, any material or substance which is (i) defined as a "hazardous waste", "extremely hazardous waste", or "restricted hazardous waste" or similar term under the law of the jurisdiction where the property is located, or (ii) designated as a "hazardous substance" pursuant to Section 311 of the Federal Water Pollution Control Act (33 U.S.C. § 1317), (iii) defined as a "hazardous waste" pursuant to Section 1004 of the Federal Resource Conservation and Recovery Act, 47 U.S.C. § 6901 *et seq.* (42 U.S.C. § 6903), or (iv) defined as a "hazardous substance" pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* (42 U.S.C. § 9601).

As used herein, the term "*Laws*" means any applicable federal, state, or local laws, ordinances, or regulation relating to any Hazardous Material affecting the Town Center, including, without limitation, the laws, ordinances, and regulations referred to in Section 13.10 above.

Landlord and its employees, representatives and agents shall have access to the Premises during reasonable hours and upon reasonable notice to Tenant in order to conduct periodic environmental inspections and tests of Hazardous Material contamination of the Premises, provided that Landlord and its employees, representatives and agents shall use all reasonable efforts to not interfere with Tenant's business in the Premises in exercise of such rights.

13.16. Option to Renew. Tenant shall be afforded the opportunity of renewing the Lease for five (5) extension terms of five (5) years each (herein sometimes referred to as the "*Extension Term*") by giving written notice of its intent to renew the term of the Lease to Landlord at least ninety (90) days prior to the expiration of the Primary Term or any applicable Extension Term, as the case may be. If such option is duly exercised, the Term of the Lease shall be automatically extended upon all of the same terms, conditions and covenants as are set forth in the Lease with Rent being payable for the Extension Terms as set forth herein. Any Extension Term shall commence on the day immediately succeeding the date of expiration of the Primary Term or any applicable Extension Term, as the case may be, and shall expire on the fifth (5th) anniversary following such commencement of such Extension Term. Should Tenant fail to exercise its option as provided in this Section 13.16, the option privilege shall be extinguished and the Term of the Lease shall end upon the expiration of the Primary Term or the applicable Extension Term, as the case may be, of the Lease.

13.17. Counterparts. This Lease may be executed in one or more counterparts, each of which may be deemed an original, and all of such counterparts together shall constitute one and the same Lease.

13.18. Notice. Any notice permitted or required to be delivered under this Lease may be delivered either personally, by mail, or by express delivery service. If delivery is made by mail, it will be deemed to have been delivered and received three business days after a copy of the notice has been deposited in the United States mail, postage prepaid, with the address set forth in Section 1.1 above, or if to Tenant, at the Premises. If delivery is made by express delivery service, it will be deemed to have been delivered and received one business days after a copy of the notice has been deposited with an "overnight" or "same - day" delivery service, properly addressed. A party's address for notice may be changed from time to time by notice in writing to the other party. A true copy of any notice given under this Lease shall also be transmitted by email or facsimile machine, but the recipient's failure to receive the notice transmitted in that manner shall not invalidate the notice.

[Signatures follow on next page]

IN WITNESS WHEREOF this Lease has been executed under seal as of the day and year first above written.

LANDLORD:

City of Fort Smith, Arkansas
a city of the first class

By: _____

Print Name: _____

Title: _____

By: _____

Ward Davis, Managing Consultant

TENANT:

**Fort Smith Advertising and Promotion
Commission**

By: _____

Print Name: _____

Title: _____

EXHIBIT A

PROPERTY DESCRIPTION

[[CONFIRM DESCRIPTION]]

All of Blocks 522 and 533 and part of abandoned Garland Street, City of Fort Smith, Sebastian County, Arkansas

City A & P	Lodging Tax	Prepared Food Tax	When Enacted	Vote or Ordinance	Notes
Alma	1%	1%	1997	Vote	
Benton	1.50%	1.50%		No reply	
Bentonville A & P	2%	1%	1996	Ordinance	This tax covers hotels, meeting spaces and Food.
Brinkley	2%	2%	1993	Vote	
Cabot	1.50%	1.50%	1992	Ordinance	
Camden	3%	1%	2001	Ordinance	
Clarksville	1%	1%	1997	Ordinance	
Conway	2%	2%	2005	Ordinance	State law 26-75-601
Dumas	2%	2%	1995	Ordinance	
Eureka Springs	3%	3%	2007	Vote	Gift shop tax was removed in 2007.
Fayetteville	2%	2%	1977	Ordinance	
Fort Smith	3%	0%	1993 ****	Ordinance	**** In '93 the lodging tax was enacted by the city directors at 2%. Increased in 2001 to 3%.
Forrest City	1%	1%	1989	Ordinance	
Greenwood	0%	1%	2007	Ordinance	
Harrison	3%	1%	Hotel- 1976		
Helena/West Helena	2%	2%	Food-1987	Ordinance	
Hope	1%	1%	1986	Ordinance	
			1975	Ordinance	
Hot Springs	3%	3%	1965- 1%/1976- 2%/1981-3% *	Ordinance	
Jacksonville	2%	2%	Hotel -2003		
			Food-2007	Ordinance	

City A & P	Lodging Tax	Prepared Food Tax	When Enacted	Vote or Ordinance	Notes
Little Rock	2%	2%	Hotel- 1% in 1970; 1978 up to 2%; Food 2% 2004 **	Ordinance	** The passage of the lodging and prepared food taxes (both together) in the years indicated was by city ordinance in Little Rock. There was a public vote in 1986 due to the refinancing of bonds to dedicate the tax for the construction of the Statehouse Convention Center. As in Hot Springs, the tax itself was not challenged, only how the funds would be utilized. Public vote is required when bonds are to be sold.
Lonoke	2%	2%	2006	Vote	
Mena	4%	1%	2003	Ordinance	
North Little Rock	3%	3%	Hotel-1975	Ordinance	
Ozark	1%	1%	Food- 1979 1991	Ordinance Ordinance	
Pine Bluff	3%	2%	1980***	Vote & Ordinance	*** January '79 a 1% tax on both lodging and prepared food together was approved by a vote of the citizens. In January '82 an ordinance was passed on both the lodging and prepared food tax to increase both from 1% to 2% each. In July of '93 the city council enacted an ordinance that raised the hotel tax to 3%.
Sherwood	2%	2%	1990	Vote	
Texarkana	3%	1%	1970	Ordinance	Ordinance H-123
Van Buren	1%	1%	1989	Ordinance	
West Memphis	2%	2%	1977	Ordinance	

AGENDA ~ *Summary*

FORT SMITH BOARD OF DIRECTORS STUDY SESSION

JANUARY 25, 2011 ~ 12:00 NOON

FORT SMITH PUBLIC LIBRARY COMMUNITY ROOM 3201 ROGERS AVENUE

1. Review of proposed ordinance amending Chapter 4, Article I, of the Fort Smith Code of Ordinances regulating animals (mandatory spay/neuter ordinance)
~ *Continued from September 28, 2010 study session* ~
The Board concurred to further review the proposed spay/neuter ordinance to include tiered penalties and bring back at a later date. Review of licensing and no tethering of animals was also requested.

Directors Merry and Weber volunteered to assist in the additional review of the mandatory spay/neuter ordinance, as well as ordinances regarding licensing and no tethering requirements.
2. Review proposed ordinance amending Chapter 4, Article V, Section 4-116 of the Fort Smith Code of Ordinances regulating animals (fencing requirement for dogs)
~ *Continued from September 28, 2010 study session* ~
No action taken
3. Consider establishing Animal Advisory Committee ~ *Requested at the October 5, 2010 regular meeting* ~
No action taken
4. Review proposed agreement with the Advertising and Promotion Commission for operation of the convention center ~ *Requested at the January 11, 2011 study session* ~
In order to allow review of minor revisions to the proposed agreement, the Board concurred to continue discussion at the February 8, 2011 study session.
5. Review preliminary agenda for the February 1, 2011 regular meeting