

City of Scottsbluff, Nebraska

Monday, December 16, 2019

Regular Meeting

Item Reports4

Council to discuss and consider action on the Zoo Support Agreement.

Staff Contact: Nathan Johnson, City Manager

ZOO SUPPORT AGREEMENT

This Zoo Support Agreement (“Agreement”) is made this ____ day of December, 2019, between the City of Scottsbluff, Nebraska, a municipal corporation (“City”) and the Riverside Zoological Foundation, a non-profit corporation, d/b/a the Riverside Discover Center (“Center”).

WITNESSETH:

WHEREAS, the City was the previous owner of Riverside Zoo (“Zoo”) and all of assets related to the Zoo including, without limitation, animals, personal property, facilities, inventory, contracts, programs, plans, and all other assets of any kind or nature (“Zoo Assets”);

WHEREAS, the Zoo and Zoo Assets were transferred to Center under a prior Zoo Transition and Operation Agreement and Lease Agreement, under which the Center became responsible for ongoing operation, maintenance and management of the Zoo and Zoo Assets;

WHEREAS, the parties agree that a quality zoo continue to be maintained and operated within the City for the benefit of the residents of the City, as well as surrounding communities and the Western Nebraska Panhandle and ~~as long as the City’s maintains its current level of sales tax revenue its~~ financial support of the Zoo’s under this Agreement should continue;

NOW, THEREFORE, in consideration of the foregoing premises and mutual covenants and agreements, terms and conditions hereinafter set forth, the parties agree as follows:

1. Possession of Zoo Property: The parties agree the Lease Agreement between the City and the Center shall remain in force and effect.
2. Independent Contractor: The Center is an independent contractor and shall be considered as such. Neither the Center nor the City shall have the right or authority to bind the other party, without the express written authorization of such other party, to any obligation to a third party. Nothing contained in this Agreement shall constitute the parties as partners or joint ventures for any purpose, being the express intention of the parties that no such partnership or joint venture exists and that each party has only those duties to the other as specified in this Agreement.
3. Zoo Operation: The Center shall have the authority to determine, in its sole discretion, the operation, management, customer service performance standards, admission rates, policies, and all other operational matters in relation to the Zoo. The Center will also have complete authority regarding the exhibits, programs, services, and events presented, and all other

matters related to the operation of the Zoo. The Center agrees to provide employees, staff and/or personnel to adequately supervise and oversee all activities at the Zoo and shall operate the Zoo with the good faith intent to maintain accreditation of the American Zoo and Aquarium Association (“AZA”).

4. Funding by the City: The City and the Center agree and acknowledge the Zoo Transaction and Operation Agreement, dated September 13, 2010 was for a period of ten (10) years and will terminate on September 30, 2020. This Agreement shall therefore commence on October 1, 2020 and will provide for funding to the Center until September 30, 2025 (the “Term”), at which time this Agreement will terminate. City agrees to provide ~~a maximum of~~ \$300,000.00 per fiscal year of the City to the Center during the Term of this Agreement (fiscal years of 2021 through 2025) (the “Support Amount”). The Support Amount will be paid in four (4) quarterly installments with the first payment to be made October 1, 2020. Provided, however, the Support Amount and any quarterly installment may be adjusted according to the sales tax revenue received by the City as described below.

The City shall have the right to adjust any quarterly Support Payment in direct proportion to any decrease in the reported sale tax revenue from the prior quarterly payment period, upon the approval of at least three-fourths (3/4ths) of the then sitting City Council. Provided, the City will give the Center written notice of the amount of decrease in received sales tax revenue and the proportional decrease for the quarterly Support Payment. If contributions from the City have decreased as a result of sales tax declines, and sales tax revenues subsequently increase, Zoo shall receive a direct proportional increase in the Support Payment up to the maximum provided in paragraph 4 of this Agreement. In the event sales tax revenue for the quarterly payment period increases, the Support Payment may increase in direct proportion as well, but will not surpass the maximum amount agreed to in paragraph 4. of this Agreement.

5. Fiscal Operation: The Center will retain all revenues earned from the Zoo’s operation, including, but not limited to, all admissions revenues, facilities or property rentals for private functions or use, parking revenues, revenues provided by the State of Nebraska, funds received from any federal or county sources, and all other revenues, funds, grants, donations or pledges in cash or in kind from any private or public sources. The Center will be responsible for compliance with all conditions of any such funds received and responsible for all audit

exceptions and payback of inappropriately spent funds. All funds received by the Center must be used to further and promote the general welfare and interests of the Zoo and Zoo Assets. The Center shall be required to pay and be solely liable for the payment of all utilities, expenses, costs, audits (if any) and claims associated with the operation, management and maintenance of the Zoo and Zoo Assets.

6. Employment and Taxes: The Center will be required to pay all taxes and fees in relation to the operation of the Zoo, and shall obtain the appropriate insurance coverages for the Zoo and Zoo Assets. It is Center's understanding that the Zoo and Zoo Assets will be and remain exempt from real estate and personal property taxes. The Center shall also employ such employees, staff and personnel as Center deems appropriate and be responsible for all salaries, rates of pay, benefits packages, hours of work and other employment related matters.

7. Other Assistance: The Center may, in its sole discretion, enter into partnerships, collaborations or other relationships with other entities or organizations to enhance the Zoo's visitor experience, enhance operations, diversify sources of public or private funding, reduce costs, realize other benefits or operational efficiency. The Center agrees to operate, manage and maintain the Zoo and Zoo Assets with no other assistance from the City, other than the funding obligations undertaken by the City in Paragraph 4 hereinabove.

8. Representation: The Center represents and warrants that it is a Nebraska non-profit corporation and an entity described in Section 501(c)(3) of the Internal Revenue Code, as amended, and that it has the power and authority to execute and deliver this Agreement and to perform its obligations hereunder, and the execution, delivery and performance of this Agreement has been authorized by all necessary action, including the approval and ratification by the Center's governing body prior to the effective date of this Agreement.

The City represents and warrants that it is a Nebraska municipal corporation and it has the power and authority to execute and deliver this Agreement, and to perform its obligations, and the execution, delivery and performance of this Agreement has been authorized by all necessary action, including the approval of this Agreement by the Scottsbluff City Council.

9. Reports: The Center agrees that within sixty (60) days of the expiration of each of the Center's fiscal year, it will furnish an annual report of its activities to the City Council for the City, and other such reports as the City Council may from time to time reasonably require.

Such reports shall be in a form reasonably prescribed by the City and shall include the following subject matters:

Number of visitors during the reporting period; The schedule of hours of operation of the Center during the reporting period, and the average number of hours per week the Zoo was open to the public during the reporting period; and

State the net loss or gain from Zoo operations.

Upon reasonable notification, the Center shall submit to an annual audit performed by an auditor of the City's choice. The cost of any such audit shall be paid by the City. From time to time, the Center shall provide the City with such other information as the City may reasonably request regarding the operation of the Zoo and the Zoo Assets.

10. Indemnification: The Center expressly assumes the risk of and accepts full responsibility for any and all injuries, damages or destruction of the Zoo and Zoo Assets which may occur or be alleged to have occurred as a result of the Center's operation of the Zoo and Zoo Assets. The Center will indemnify, defend and hold the City harmless of and from any and all liability from injuries, including disease and death, to a person, or damage to property of third parties arising or claimed to have arisen out of the Center's operation and maintenance of the Zoo and Zoo Assets. The Center agrees to name the City as an additional insured on all insurance policies concerning the Zoo and Zoo Assets, and shall provide evidence of insurance upon request by the City.

11. Additional Documents: The City and the Center agree that they will execute and deliver any assignment agreements, consents, leases or similar documents which may be necessary to implement this Agreement. The Center will not have any right or authority to bind or obligate the City, nor will the City have any right or authority to bind or obligate the Center without the parties' prior written consent.

12. Default: In the event of a breach of a condition or a default by either party to this Agreement, then the party that is not in default or breach shall give written notice to the other party of such default or breach which party shall have thirty (30) days to cure such default or breach or, if the default or breach is of such a nature that it cannot be cured within such period, good faith attempt to cure has been commenced within such period, and may terminate this Agreement by providing the other party with written notice delivered thirty (30) days prior to the

effective date of the termination. Notices shall be sent via U.S. mail, certified, return receipt requested to the following:

To the Center: Riverside Zoological Foundation
 1600Beltline Highway W.
 Scottsbluff, Nebraska 69361

To the City: City Manager
 2525 Circle Drive
 Scottsbluff, Nebraska 69361

13. Termination: This Agreement shall terminate upon the occurrence of the following events:

- a. The expiration of the Lease Agreement;
- b. The termination of the Lease Agreement pursuant to any default provision within such Lease Agreement;
- c. The loss of the Center's AZA Accreditation For the purposes of determining at which point AZA Accreditation is lost, it shall be limited to an express revocation of Accreditation and shall not include "tabling" or any other postponement to the reissuance of Accreditation.
- d. The Center's cessation of Zoo operation.
- e. A substantial decrease in the reported sales tax revenue of the City for the prior three (3) consecutive quarterly periods. For purposes of this paragraph a substantial decrease shall be at least an average one-third (1/3) decrease in the reported sales tax revenue for the prior three (3) consecutive quarterly reporting periods as compared to the same quarters of the prior year. Termination under this subparagraph e shall only be effective upon the affirmative vote of a majority of the then sitting City Council.

14. Full Agreement: This Agreement is and shall be deemed to be the complete and final express between the parties as to the matters contained herein, and supersedes any previous understandings, dealings and communications, including negotiations, discussions, representations, warranties, information, documents and agreements among the parties pertaining to such matters. This Agreement shall not be modified or amended, except pursuant to a written agreement signed by both parties. Any waiver of any party's rights or obligations under this

Agreement must be made in writing and must be signed by the party against which such wavier is to be enforced. No party's failure to exercise a right or to invoke a remedy in any particular circumstance shall be construed as a waiver of such right or remedy, and no waiver by either party of any right or remedy in one situation shall constitute a waiver of such party's rights or remedies in any other subsequent situation.

15. Governing Law: This Agreement is governed by and will be construed in accordance with the laws of the State of Nebraska.

16. Assignment: The Center shall not assign its rights, interests, or obligations under this Agreement. This is not intended to limit the right of the Center to enter into subcontracts, joint ventures, or joint development agreements for the performance of portions of Center's obligations in this Agreement, but the Center will remain responsible to the City for the performance of all of its obligations under this Agreement.

17. Binding Agreement: This Agreement shall be binding upon the Center, its successors and assigns by merger, sale, transfer, consolidation and lease of either party, and it shall not be modified altered or changed in any respect whatsoever by a change of ownership.

IN WITNESS WHEREOF, the parties hereto have adopted this Agreement as of the date first set forth above.

SIGNATURE PAGE TO FOLLOW

RIVERSIDE ZOOLOGICAL FOUNDATION,
d/b/a The Riverside Discovery Center, a
Non-Profit Corporation,

By:

President

CITY OF SCOTTSBLUFF, a
Municipal Corporation,

By:

Mayor

Attest:

City Clerk (Seal)

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d/b/a The Riverside Discovery Center, a
Non-Profit Corporation,

By:

President

CITY OF SCOTTSBLUFF, a
Municipal Corporation,

By:

Mayor

Attest:

City Clerk (Seal)