

**INDEMNIFICATION AND DEFENSE AGREEMENT**

THIS INDEMNIFICATION AND DEFENSE AGREEMENT (“Agreement”) is entered into this 11th day of December, 2018, by and between the COUNTY OF FRESNO, a political subdivision of the State of California, (“COUNTY”) and Fresno Humane Animal Services, a California nonprofit corporation (“APPLICANT”), located at 760 West Nielsen Avenue, Fresno, California 93706, each a “Party” and together the “Parties” to this Agreement.

**RECITALS**

WHEREAS, APPLICANT has applied to COUNTY for certain Land Use Approvals, defined below, for the Project, defined below; and

WHEREAS, litigation challenging the granting or issuance of land use approvals by governmental bodies is proliferating, and such litigation exposes COUNTY to potential liability for damages, costs, and attorney’s fees; and

WHEREAS, in such litigation, the person or entity receiving land use approvals is named as a real party in interest and is the party that primarily and directly benefits from the granting or issuance of the land use approvals; and

WHEREAS, COUNTY’s Board of Supervisors is an objective decision-making body and, therefore, has no special interest in the approval or denial of land use applications, or the outcome of litigation arising from such grant or denial, except as to those which promote important public policy; and

WHEREAS, COUNTY could incur great expense in the active defense of such litigation and, if unsuccessful, may also be required to pay the attorney’s fees and costs of a challenger, if the court determines that the challenger is the prevailing party; and

WHEREAS, fairness and sound fiscal policy require that the person or entity receiving the benefits of a land use approval should also bear the burden of the liability for potential injuries and the expense of such litigation; and

WHEREAS, APPLICANT and COUNTY mutually desire to enter into this Agreement, by which APPLICANT shall indemnify, (at COUNTY’s request) defend, save and hold harmless

the “Indemnified Parties” (as defined herein) as required herein, in order that the Indemnified Parties shall bear no fiscal or financial burden whatsoever resulting from any litigation challenging COUNTY’s grant or issuance of certain Land Use Approvals, defined below, to APPLICANT; and

WHEREAS, COUNTY received notice on November 16, 2018 of Petitioners’, Forgotten Fresno, Gonzalo Arias, Jr., Roger Day, and Elisa Bilios, intention to file a Petition of Writ of Mandate in Fresno County Superior Court to challenge COUNTY’s grant of certain Land Use Approvals, defined below, to APPLICANT pursuant to the California Environmental Quality Act (“CEQA”) and California planning law.

NOW, THEREFORE, in consideration of APPLICANT’s request for COUNTY to process an application for certain Land Use Approvals for the Project and other consideration the receipt and sufficiency of which is hereby acknowledged, COUNTY and APPLICANT agree as follows:

**1. EFFECTIVE DATE**

The Effective Date of this Agreement shall be \_\_\_\_\_, 2018.

**2. INCORPORATION OF RECITALS**

The Recitals set forth above are incorporated herein by this reference and are made a part of this Agreement as if set forth in their entirety.

**3. DEFINITIONS**

a) “APPLICANT” means the person or entity to whom the Land Use Approvals have been, or will be, granted or issued, and his, her, or its heirs, assigns or successors in interest.

b) “Business Day” means the business day of the Party required to perform an obligation herein, provided however, a business day of Party who is an individual shall mean Monday through Friday, inclusive. If this Agreement specifies a day or date by which a certain action is to be taken or notice to be given, then the action to be taken or notice to be given must be completed by 5:00 p.m. (Pacific time) on such date.

1                   c)       “COUNTY” means the County of Fresno, a political subdivision of the  
2 State of California.

3                   d)       “COUNTY Business Day” means Monday through Friday, inclusive, but  
4 excluding any day which is recognized as a legal holiday by COUNTY.

5                   e)       “Day” means a calendar day unless specified to the contrary in this  
6 Agreement or the Escrow Agreement, as applicable.

7                   f)       “Director” means the Director of COUNTY’s Department of Public  
8 Works and Planning.

9                   g)       “Final Disposition” means a dismissal with prejudice of a Legal Action  
10 or a final judgment in a Legal Action.

11                  h)       “Land Use Approvals” shall include any benefit arising from any of the  
12 following: the grant of an amendment to COUNTY’s general plan or a rezoning; the issuance of  
13 a variance, a conditional use permit, a review and approval permit issued by the Director (also  
14 known as a “director’s review and approval”), or other discretionary land use permit; the approval  
15 of a parcel, tentative, or final subdivision map; and any other document prepared pursuant to the  
16 California Environmental Quality Act (“CEQA”). “Land Use Approvals” does not include a  
17 ministerial permit.

18                  i)       “Legal Action” means a lawsuit, petition, claim, action, cause of action,  
19 or other legal proceeding initiated in a court, including an appeal(s) and/or writ(s) to a court of  
20 higher jurisdiction, which seeks to attack, set aside, void, remand to a lower jurisdiction, or annul  
21 any or all Land Use Approvals and/or the Project.

22                  j)       “Project” means the use of the land authorized by the following Land Use  
23 Approvals: General Plan Amendment Application No. 552 and Amendment Application No.  
24 3825, described in Exhibit “A” to this Agreement, the Mitigated Negative Declaration prepared  
25 for Initial Study Application No. 7359 including the Mitigation Monitoring and Reporting  
26 Program prepared for General Plan Amendment Application No. 552 and Amendment  
27 Application No. 3825, County Ordinance No. R-483-3825, and the Board of Supervisors’  
28 Resolution No. 18-381, amending the Fresno County General Plan by re-designating two-

1 adjacent parcels totaling 4.15 acres from Rural Residential to Limited Industrial and rezoning the  
2 subject 4.15-acre site from R-R(nb) (Rural Residential, Neighborhood Beautification Overlay)  
3 Zone District to M-1(c) (Light Manufacturing, Conditionally limited to animal shelter) Zone  
4 District, all of which is on file with COUNTY's Department of Public Works and Planning.

5           **4.     APPLICANT's INDEMNIFICATION, DEFENSE AND HOLD**  
6           **HARMLESS OBLIGATIONS**

7           a)     APPLICANT hereby agrees to save, indemnify, hold harmless and, at  
8 COUNTY's request, defend COUNTY, its officers, agents, and employees, the Fresno County  
9 Board of Supervisors, each member of the Fresno County Board of Supervisors, the Fresno  
10 County Planning Commission, and each member of the Fresno County Planning Commission  
11 (each an "Indemnified Party," and collectively, the "Indemnified Parties"), from and against any  
12 and all demands, liabilities, causes of action, claims, losses, expenses, costs (including but not  
13 limited to court costs, attorney's fees and costs, and fees and costs of any experts or consultants  
14 engaged by such attorney), or damages of any nature or kind whatsoever asserted against, or  
15 occurring or resulting to, any of the Indemnified Parties, including, but not limited to, attorney's  
16 fees and costs of the persons, organizations or entities bringing any Legal Action, or their  
17 respective officers, agents, and employees, arising, from resulting from, or in connection with  
18 any COUNTY action in granting, issuing, or approving any Land Use Approvals for the Project.

19           b)     When defending any or all of the Indemnified Parties as required herein,  
20 APPLICANT shall be solely responsible to retain the attorney(s) who will defend the  
21 Indemnified Parties and shall be solely responsible to pay all attorney's fees and costs (including  
22 but not limited to court costs, and fees and costs of any experts or consultants engaged by such  
23 attorney) related to the defense in any Legal Action brought against any or all of the Indemnified  
24 Parties, except for any fees and costs directly incurred by COUNTY in its own defense of the  
25 Legal Action, as provided in Section 7 of this Agreement. Prior to entering into the fee agreement  
26 with the attorney(s) to be retained to represent the Indemnified Parties, APPLICANT shall inform  
27 such attorney(s) to be retained of APPLICANT's foregoing payment obligations under this  
28

1 Section 4(b). Within five (5) COUNTY Business Days after the execution of this Agreement,  
2 APPLICANT shall deliver a copy of the fully-executed fee agreement between the APPLICANT  
3 and the attorney retained to represent the Indemnified Parties to the COUNTY at the address set  
4 forth in Section 11 of this Agreement.

5 c) APPLICANT understands and acknowledges that there shall be no limit  
6 whatsoever on the amount of attorneys' fees and costs (including but not limited to court costs,  
7 and fees and costs of any experts or consultants engaged by such attorney) it may be required to  
8 pay to satisfy its obligations under this Agreement.

9 d) APPLICANT's obligations under this Agreement shall apply whether or  
10 not there is concurrent, active, or passive negligence, or other liability, on the part of the  
11 Indemnified Parties, or any of them. APPLICANT's obligations under this Agreement shall be  
12 effective regardless of whether any or all Land Use Approvals issued by COUNTY regarding the  
13 Project remain valid or are invalidated, or are modified, in whole or in part by any court.

## 14 5. DEFAULT

15 For purposes of this Agreement, the occurrence of any one or more of the  
16 following events shall constitute an "Event of Default" by APPLICANT under this Agreement:

17 a) If a court makes one or more orders that COUNTY pays any attorney's  
18 fees and costs (including but not limited to any court costs, and/or fees and/or costs of any experts  
19 or consultants engaged by such attorney) of any parties challenging any or all of the Land Use  
20 Approvals, and/or the Project, and/or any other amounts to such parties, and APPLICANT fails  
21 to reimburse COUNTY within seven (7) Business Days for such attorney's fees and/or costs,  
22 and/or amounts upon COUNTY's written request for payment thereof;

23 b) APPLICANT fails to promptly defend, indemnify, and hold harmless the  
24 Indemnified Parties, as required under this Agreement;

25 c) APPLICANT fails to timely pay any amount due or owed by  
26 APPLICANT to COUNTY under this Agreement;

27 d) The breach or default in the performance of any other obligations in this  
28 Agreement, or falsity of any representations or warranties, of APPLICANT in this Agreement

1 for a period of thirty (30) days after COUNTY provides written notice to APPLICANT, stating  
2 the obligation APPLICANT has failed to perform, or the apparently false representation or  
3 warranty of APPLICANT, provided however, if the nature of the breach or default or false  
4 representation or warranty is such that APPLICANT cannot reasonably cure the breach or  
5 default, or correct the false representation or warranty within thirty (30) calendar days,  
6 APPLICANT shall have an additional reasonable time to cure or correct, as applicable, subject  
7 to APPLICANT commencing to cure or correct, as applicable, within the thirty (30) day period  
8 and diligently pursuing the cure or correction, as applicable, to completion and completing the  
9 cure or correction, as applicable, not later sixty (60) days from the date of COUNTY's notice of  
10 such failure to perform or apparently false representation or warranty. Notwithstanding anything  
11 to the contrary in this Agreement, this subsection 5(d) shall not apply to any of APPLICANT's  
12 obligations under Section 4 of this Agreement; or

13 e) Bankruptcy, liquidation, arrangement, insolvency, receivership or  
14 conservatorship proceedings, or other proceedings for relief under any bankruptcy or similar law  
15 or laws for the relief of debtors, are instituted by or against APPLICANT, and are not dismissed  
16 within ninety (90) days of institution, or there is an assignment by APPLICANT for the benefit  
17 of creditors, or any similar action taken by or against APPLICANT, or APPLICANT is insolvent.

18 Upon occurrence of an Event of Default, COUNTY shall have the right to declare  
19 that APPLICANT is in material breach of this Agreement, and (unless COUNTY is otherwise  
20 relieved herein of the necessity of providing such notice to APPLICANT, in which case  
21 COUNTY shall be entitled to immediately proceed in enforcing its remedies herein) deliver  
22 written notice thereof to APPLICANT.

23 The occurrence of an Event of Default shall entitle COUNTY to all any and all  
24 remedies available under this Agreement and under the law, including but not limited to, specific  
25 performance and damages. Moreover, and without limiting COUNTY's remedies hereinabove,  
26 APPLICANT's failure to promptly defend, indemnify, and hold harmless the Indemnified  
27 Parties, as required under this Agreement, shall constitute grounds upon which the COUNTY  
28 decision-making body may rescind the issuance of the Land Use Approvals for the Project in

1 accordance with COUNTY's adopted ordinances and procedures, and a waiver by Applicant of  
2 any right to proceed with the Project or any portion thereof.

3       **6. NOTIFICATIONS AND COOPERATION BY COUNTY**

4               COUNTY received notice of pending Legal Action to challenge COUNTY's  
5 grant of certain Land Use Approvals to APPLICANT. Receipt of the notice of this pending  
6 Legal Action requires APPLICANT indemnify, defend, and hold harmless, the Indemnified  
7 Parties pursuant to the COUNTY's rights under this Agreement. COUNTY shall notify  
8 APPLICANT in writing within ten (10) COUNTY Business Days of its receipt of any further  
9 demand, claim, action, proceeding, litigation, notice, and pleading related to the noticed Legal  
10 Action. In the event COUNTY provides such notice later than such ten (10) COUNTY Business  
11 Days, COUNTY's rights under this Agreement shall not be defeated, but, shall be preserved as  
12 of such date. COUNTY shall cooperate in such defense.

13       **7. COUNTY PARTICIPATION IN DEFENSE**

14               Nothing contained herein shall prohibit COUNTY, in its sole discretion, from  
15 participating in the defense of any Legal Action. If COUNTY elects to also so defend, it shall  
16 do so in good faith and COUNTY shall bear its own attorney's fees and costs. In no event shall  
17 COUNTY's participation in the defense of any Legal Action affect the obligations imposed upon  
18 APPLICANT in Section 4 of this Agreement.

19       **8. REIMBURSEMENT OF COST OF ADMINISTRATIVE RECORD**

20               COUNTY acknowledges that it will make reasonable efforts to look to any party  
21 which has initiated a Legal Action challenging the Project for payment of costs associated with  
22 preparation of administrative record as provided by law. However, if a party that has initiated a  
23 Legal Action challenging the Project refuses to pay on or before the date judgment is entered by  
24 the superior court, APPLICANT agrees to reimburse COUNTY for its actual cost and expenses  
25 incurred, including, but not limited to, COUNTY staff and attorney time expended and/or  
26 COUNTY-engaged contractor's time expended, for certifying and/or preparing the  
27 administrative record in connection with any proceeding or Legal Action related to the subject  
28 matter of this Agreement.

1           **9.       RELEASE AND COVENANT NOT TO SUE**

2           In consideration for the agreements contained herein, APPLICANT for itself, and  
3 its successors, assigns, heirs, executors, administrators and representatives, and any other person  
4 or entity claiming (now or in the future) to be acting through or on behalf of APPLICANT (each  
5 a "Releasor," and collectively, the "Releasors"), hereby fully and finally release and forever  
6 discharge the Releasees (hereinafter defined) from any and all demands, liabilities, causes of  
7 action, claims, losses, expenses, costs (including but not limited to court costs, attorney's fees  
8 and costs, and fees and costs of any experts or consultants engaged by such attorney), or damages  
9 of any nature or kind whatsoever whether known or unknown related in any way to the Land Use  
10 Approvals and covenants not to sue the Releasees. Each Indemnified Party is a "Releasee" and  
11 the Indemnified Parties are collectively the "Releasees" under this Agreement. APPLICANT  
12 acknowledges and affirms that it is familiar with Section 1542 of the California Civil Code, which  
13 provides that:

14           **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**  
15           **WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT**  
16           **EXISTS IN HIS OR HER FAVOR AT THE TIME OF EXECUTING**  
17           **THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST**  
              **HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT**  
              **WITH THE DEBTOR.**

18           APPLICANT hereby knowingly and voluntarily waives the provisions of Section  
19 1542 of the California Civil Code with respect to any cause of action or claim alleged or which  
20 could have been alleged in a Legal Action, and acknowledges and agrees that this waiver is an  
21 essential and material term that led to this Agreement.

22           As of the Effective Date, Releasors, hereby absolutely, unconditionally and  
23 irrevocably, covenant and agree with and in favor of the Releasees that Releasors will not bring,  
24 file, charge, claim, sue or cause, assist, or permit to be brought, filed, charged or claimed any  
25 action, cause of action, or proceeding (at law, in equity, in any regulatory proceeding or  
26 otherwise) against the Releasees on the basis of any matter released, surrendered, or discharged  
27 by the Releasors pursuant to this Agreement. If any Releasor violates the foregoing covenant,  
28 such Releasors, jointly and severally agrees to pay, in addition to such other damages as any

1 Releasee may sustain as a result of such violation, all reasonable attorney's fees and costs  
2 incurred by any Releasee as a result of such violation.

3 APPLICANT acknowledges and agrees that this release applies to all causes of  
4 action and claims that APPLICANT may have against COUNTY arising out of any and all Land  
5 Use Approvals for injuries, damages, or losses to APPLICANT's person and property, real or  
6 personal, whether those injuries, damages, or losses are known or unknown, foreseen or  
7 unforeseen, or patent or latent. APPLICANT acknowledges and warrants to COUNTY that  
8 APPLICANT's execution of this release is free and voluntary, and that this release was separately  
9 bargained for and a key element of this Agreement of which such release is a part.

10 This release pertains to a disputed claim and does not constitute an admission of  
11 liability by COUNTY for the Land Use Approvals.

12 The provisions of this Section 9 shall survive the termination of this Agreement.

13 **10. SEVERABILITY**

14 If any provision of this Agreement is determined to be invalid in a final judgment  
15 by a court of competent jurisdiction, each and every other provision hereof shall remain in full  
16 force and effect.

17 **11. NOTICES**

18 All notices, consents, approvals, requests, correspondence, documents, reports,  
19 demands and other communications (collectively, "Notice") which the Parties are required or  
20 desire to serve upon or deliver to one another shall be in writing and shall be sent by any of the  
21 following methods: (a) personal delivery, in which case notice is effective upon delivery; (b)  
22 certified or registered United States mail, return receipt requested, in which case notice shall be  
23 deemed delivered upon receipt if delivery is confirmed by a return receipt; or (c) nationally  
24 recognized overnight courier, with charges prepaid or charged to the sender's account, in which  
25 case notice is effective on delivery if delivery is confirmed by the delivery service addressed in  
26 the appropriate manner for the method of service, as set forth below:

**COUNTY:**

County of Fresno  
**ATTENTION:** Director of Public Works and Planning  
2220 Tulare Street, Sixth Floor  
Fresno, CA 93721

Copies of notices to COUNTY shall also be given to:

Office of the Fresno County Counsel  
**ATTENTION:** Deputy County Counsel Assigned to Land Use Matters  
2220 Tulare Street, Suite 500  
Fresno, California 93721

**APPLICANT:**

Fresno Humane Animal Services  
760 West Nielsen Avenue  
Fresno, California 93706

Copies of notices to APPLICANT shall also be given to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For all claims arising out of or related to this Agreement, nothing in this Section 11 establishes, waives, or modifies any claims presentation requirements or procedures provided by law, including but not limited to the Government Claims Act (Division 3.6 of Title 1 of the Government Code, beginning with section 810).

**12. MODIFICATION**

This Agreement may not be altered, amended, or modified in any respect, except by a writing duly executed by the Parties.

**13. NON-ASSIGNMENT**

Neither party shall assign, transfer or sub-contract this Agreement nor their rights or obligations under this Agreement without the prior written consent of the other party.

**14. AUTHORIZATION TO EXECUTE**

Each Party represents, covenants, and warrants to the other Party that such Party is duly authorized and empowered to execute, enter into, and perform its obligations set forth in this Agreement, and that the individual signing this Agreement on behalf of such Party has been

1 duly authorized to execute this Agreement on behalf of such Party, and will, by signing this  
2 Agreement on such Party's behalf, legally bind such Party to the terms and conditions of this  
3 Agreement. Each Party further represents, covenants, and warrants to the other Party that no other  
4 person or entity is required to give its approval or consent to this Agreement in order for such  
5 Party to authorize, enter into, and perform its obligations under this Agreement, or that if such  
6 approval or consent to this Agreement is required, that such approval or consent has been  
7 obtained.

8 **15. AUTHORITY OF DIRECTOR**

9 The Director is hereby authorized by COUNTY to give any Notices on behalf of  
10 COUNTY, make any determinations or declarations on behalf of COUNTY including with  
11 respect to any Event of Default or material breach of this Agreement, or to take any action, or  
12 enforce any right, on behalf of COUNTY under this Agreement, and any other actions  
13 necessary or appropriate in the administration or enforcement of this Agreement, on behalf of  
14 COUNTY.

15 **16. HEADINGS; CONSTRUCTION; STATUTORY REFERENCES;**  
16 **TIME IS OF ESSENCE**

17 The headings of the sections and paragraphs of this Agreement are for  
18 convenience only and shall not be used to interpret this Agreement.

19 This Agreement is the product of negotiation between the Parties, as assisted by  
20 their respective attorneys. The language of this Agreement shall be construed as a whole  
21 according to its fair meaning and not strictly for or against any Party. Any rule of construction to  
22 the effect that ambiguities are to be resolved against the drafting party shall not apply in  
23 interpreting this Agreement. All references in this Agreement to particular statutes, regulations,  
24 ordinances or resolutions of the United States, the State of California, or County of Fresno shall  
25 be deemed to include the same statute, regulation, ordinance or resolution as hereafter amended  
26 or renumbered, or if repealed, to such other provisions as may thereafter govern the same subject.

27 It is understood that time is of the essence in APPLICANT's performance of all  
28 of his obligations under this Agreement.

1           **17.    GOVERNING LAW AND VENUE**

2           This Agreement shall be deemed to have been entered into in Fresno County, and  
3 shall be interpreted under, and enforced by the laws of the State of California. The Agreement  
4 and obligations of the parties are subject to all laws, orders, rules, and regulations of the  
5 authorities having jurisdiction over this Agreement (or the successors of those authorities). Any  
6 suits brought pursuant to this Agreement shall be filed and heard in courts having jurisdiction  
7 and located in the Fresno County, State of California.

8           **18.    NO THIRD PARTY BENEFICIARIES**

9           Notwithstanding anything else to the contrary herein, the Parties acknowledge and  
10 agree that no other person, firm, corporation, or entity shall be deemed an intended third-party  
11 beneficiary of this Agreement.

12           **19.    COUNTERPARTS**

13           This Agreement may be executed in two or more counterparts, each of which shall  
14 be deemed to be an original, and all of which taken together shall constitute one and the same  
15 instrument.

16           **20.    INTEGRATED AGREEMENT**

17           This Agreement contains the sole, complete, and entire agreement and  
18 understanding of the Parties concerning the matters contained herein and may not be altered,  
19 modified, or changed in any manner except by a writing duly executed by the Parties, stating that  
20 such writing is by its express terms an amendment to this Agreement. Except as stated herein,  
21 none of the Parties are relying on any representations by any other Party in executing this  
22 Agreement.

23                           [The remainder of this page left intentionally blank.]  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN WITNESS WHEREOF, APPLICANT and COUNTY hereby execute this Agreement.

**APPLICANT:**  
**FRESNO HUMANE ANIMAL SERVICES,**  
**a California nonprofit corporation**

**COUNTY OF FRESNO**

By Brenda Mitchell

By Sal Quintero  
Sal Quintero, Chairperson of the  
Board of Supervisors of the  
County of Fresno

Print Name: Brenda Mitchell  
Print Title: President  
Date: 11/20/18

Date: 12-11-18

BERNICE E. SEIDEL,  
Clerk of the Board of Supervisors  
County of Fresno, State of California

By Susan Bishop

Date: 12-11-18