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March 9, 2010

REPORT TO HONORABLE MAYOR, AND CITY COUNCIL

CCDC/SEDC OPERATING AGREEMENTS, BYLAWS AND AMENDED AND RESTATED ARTICLES OF INCORPORATION

On September 8, 2009, the Council approved the conceptual changes to the CCDC/SEDC Operating Agreements, Bylaws and Articles of Incorporation (Resolution) which were compiled by the Independent Budget Analyst (IBA) in her August 17, 2009 report. The Council also included direction to the City Attorney in the Resolution to include standard legal provisions/recommended revisions to these documents as recommended by this Office in our August 14, 2009 memorandum (Memo) that is attached hereto.

The SEDC and CCDC Operating Agreements (Operating Agreements) were drafted in 1981 and 1982, respectively. The Operating Agreements are out-dated, do not contain the standard and customary legal provisions of similar agreements, and do not include necessary and appropriate legal provisions to protect the Agency or to limit its liability. Likewise, the SEDC Bylaws were amended in 1996 and while the CCDC Bylaws were amended in 2008, they are both out-dated, lack standard and customary provisions to protect the City and do not conform to current best practices. Accordingly, the changes that we made to the Operating Agreement and the Bylaws address the issues raised in our Memo.

During our review of the Operating Agreement and the Bylaws, we determined that it was necessary to amend the Articles of Incorporation (Articles). The revisions to the Articles are intended to simplify and shorten the Articles and provide broader authority to CCDC and SEDC to accomplish their business purposes.

The proposed revisions have been reviewed by City Staff, CCDC and SEDC and their counsel. CCDC's and SEDC's comments have been reviewed and incorporated in these documents as appropriate.

The Operating Agreement and the Bylaws are red-lined to reflect the changes from the original documents. Please note that the old Bylaws were replaced in their entirety. Also, the Operating Agreement is virtually a completely new document with exception of Section 2.06 "Performance of Services" which remains from the prior document but has been substantially amended.

Operating Agreement

The following summarizes the major legal changes to the Operating Agreement. These changes were either specifically included in the recommendations in our Memo or are designed to update the Operating Agreement and provide standard and customary protections to the Agency and to limit the liability of the Agency in accordance with the Resolution:

Section 2. Representations and Warranties of CCDC/SEDC. In our Memo, we recommended that the Operating Agreements include standard and customary representations and warranties regarding CCDC and SEDC. These representations and warranties are found at Sections 2.01 to 2.04 and track the recommendations in our Memo. We believe these representations are necessary and appropriate to protect and safeguard the interests of the Agency and to limit its liability.

Section 2.06. Performance of Services. This section contains substantial revisions to Section 2.06 of the Operating Agreement which summarized the services originally provided by SEDC and CCDC in 1981 and 1982. We believe it is necessary to revise the description of these services to provide a more accurate description that reflects the current range of services to be provided by SEDC and CCDC and that makes them more accountable.

Section 2.10. Contracts, Agreements and Adoption of Purchasing and Contracting Policies. This section is based on the IBA's August 17, 2009 Report. Also, this section includes a number of changes that we believe are necessary and appropriate to protect and safeguard the interests of the Agency and limit its liability in connection with the contracting process of CCDC and SEDC.

Section 2.21. Insurance. This section includes customary provisions regarding the insurance of CCDC and SEDC. A recommendation to add insurance language was included in our Memo since insurance is a critical factor in risk management. CCDC and SEDC had been solely responsible for their own insurance. This section also includes representations and warranties regarding the prior insurance coverage of CCDC and SEDC that is designed to protect the interests of the Agency and the City and to limit their liability.

Section 2.26. Intellectual Property. The Operating Agreement did not have any modern provisions regarding the ownership and protection of the intellectual property of CCDC and SEDC which is all owned by the Agency. The Memo recommended that language be included to provide intellectual property protection to the Agency. This section now includes standard and customary language regarding the ownership and protection of intellectual property.

Section 2.27. Confidential Information. The Memo recommended we include standard and customary provisions regarding confidential information. These provisions are included and are designed to protect the interests of the Agency and the City and to limit their liability.

Section 3.04. Reimbursement of Eligible Expenses. This section contains the requirements that are required to be met before any expenses of CCDC and SEDC may be reimbursed by the Agency. In any agreements where one party provides all of the operating capital to another party, these are standard and customary provisions. These requirements include that such expenses must be reasonable, actual and necessary to the performance of their duties under the Operating Agreement.

Section 4. General Legal Provisions. Section 4 of the Operating Agreement includes a number of general legal provisions. These legal provisions are standard, customary and are designed to protect and safeguard the interest of the Agency and to limit its liability.

Section 4.12. Indemnification. This section provides that CCDC and SEDC indemnify the Agency, the City and their officers, directors, agents, attorneys and employees against any claims, losses, liabilities, costs and expenses incurred in the business and operations of CCDC and SEDC. These provisions are standard and customary and track the recommendations in the Memo.

Bylaws

In summary, the Bylaws are completely new. The Bylaws are designed to reflect current best practices in nonprofit public benefit corporations and include standard legal provisions to limit the liability of the City in accordance with the Memo and the Resolution. The Bylaws are standard except for the provisions unique to the City as the sole member. The following highlights some of the major provisions of the Bylaws.

Article 6. Membership. This section sets forth the rights and privileges of the sole member, the City. It also describes the requirements for regular and special meetings of the member and related rights of the member including the requirement that regular and special meetings of the member must be in compliance with the Brown Act.

Article 7. Board of Directors. This section sets forth the powers, number of directors, election and nomination procedures, vacancies and meetings of the Board of Directors including the requirements for regular and special meetings of the Board of Directors. It also provides that all directors serve for a 3 year term and may not serve more than two consecutive 3 year terms.

Article 8. Standard of Care. This section provides the standard of care for performing the duties of directors and states that no person serving on the Board of Directors may be an interested person as defined in Article 8. It provides that the compensation of the officers, the two highest compensated employees and the two highest compensated independent contractors must be reviewed and approved by disinterested directors. Also, it provides that the Board of Directors must review the compensation of the Chief Financial Officer on the occurrence of certain events. This section also provides for a limited review by the Board of Directors of the compensation of the President which is set by the Mayor.

Article 9. Corporate Governance. This Article contains the corporate governance provisions that were requested in the IBA's report. These include, for example, adoption of purchasing and contracting policies, performance audits, adoption of finance, budget, reimbursement of expenses, ethics, fiscal policies, public disclosures, etc.

Article 10. Committees. Section 4 - Audit Committees. This section requires that the Audit Committee comply with the requirements of Government Code Section 12586(e)(2) regarding the general requirements and the membership of the Audit Committee.

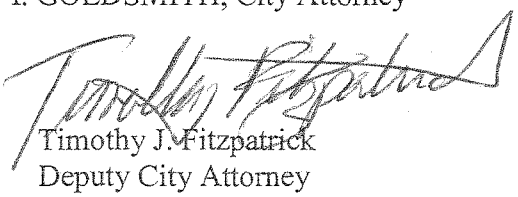
Article 11. Officers. Section 4 - President. This section contains all the requirements for the candidate selection and nomination committee for the President. It also contains the Mayor's right to perform the annual performance review of the President and to set the compensation for the President. Finally, it contains the requirements relating to the Mayor's authority to suspend and terminate the President.

Article 13. Record and Reports. Sections 4 and 5 - Annual Audited Financial Statement and Monthly Unaudited Financial Statements. This section contains requirements that track the Operating Agreement for the annual audited financial statements and monthly unaudited financial statements.

In conclusion, the changes to the Operating Agreement, Bylaws and the Articles have been updated to conform to what we believe are standard and customary provisions for similar agreements and reflect current best practices of non-profit public benefit corporations. Our Office is available to discuss the proposed changes and answer questions related to these matters.

Sincerely yours,

JAN I. GOLDSMITH, City Attorney

By 
Timothy J. Fitzpatrick
Deputy City Attorney

TJF:jdf
Attachment
RC-2010-10

ATTORNEY TO CLIENT
CORRESPONDENCE

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Office of
The City Attorney
City of San Diego

MEMORANDUM

DATE: August 14, 2009

TO: Andrea Tevlin, Jeff Sturak, Tom Haynes, Jay Goldstone, Mary Lewis, Mary Jo Lanzafame, Elisa Cusato, Janice Weinrick

FROM: Timothy J. Fitzpatrick, Deputy City Attorney

SUBJECT: Operating Agreements and Bylaws for CCDC and SEDC

This Memo will briefly summarize my suggestions for changes to the Operating Agreements and Bylaws for CCDC and SEDC. These suggested changes are in addition to the current proposals set forth in the IBA's recent draft of "Proposed Revisions to SEDC and CCDC Operating Agreements /Bylaws (8/10/09)."

In summary, the changes to the Operating Agreements propose to add various legal provisions that are standard in these kinds of agreements. Likewise, the suggested changes to the Bylaws propose to add standard provisions for the Bylaws of non-profit public benefit corporations and bring the Bylaws up to date and comply with the current Corporations Code. The changes to the Operating Agreements and the Bylaws are designed to limit the liability and to increase the legal protections of the City and the RDA.

Operating Agreements

1. Insurance: Currently the insurance required is only $500,000 for general liability. Insurance is considered to be the front line of defense to protect against problems which could cause possible exposure to liability in corporate entities. I suggest that Risk Management conduct a comprehensive review of the insurance requirements for both CCDC and SEDC and recommend the types, minimum amounts and the other insurance terms and conditions required by the City. I note that we require our suppliers to have a full range of insurance coverage including general liability, workers compensation, employers' liability, errors and omissions, etc. Regardless of the types and amounts of insurance they each have, the types, minimum amounts and other insurance requirements should be set forth in the Operating Agreements to protect the City.

2. Hold Harmless: As is typical in these kinds of agreements, I recommend we add provisions that CCDC and SEDC agree to hold the City and RDA, its agents, employees, etc. harmless from damages, claims, expenses, etc that arise from the performance of the services provided by CCDC and SEDC in the Operating Agreements and otherwise.
3. Conflicts of Interest: This section should be revised and restated to include or reference the Conflict of Interest provisions that I propose in the revised Bylaws which reflect the requirements of the Corporations Code.
4. Indemnification: I suggest they be revised and restated to include, for example, provisions that provide that a minimum standard of care must be met before officers, directors, agents are eligible for indemnification including different standards for derivative and non-derivative actions, give the Board or the member the right to limit the advancement of expenses in certain cases; require that CCDC and SEDC have and maintain minimum amounts of Directors and Officers Liability insurance, etc.
5. Confidentiality: The current confidentiality provisions do not adequately protect the City and RDA to ensure the information and data produced by CCDC and SEDC on behalf of RDA will be treated and remain confidential. I suggest the confidentiality language be revised and restated to include more comprehensive confidentiality provisions designed to protect the City and RDA.
6. Protection of Intellectual Property: The current provisions do not adequately address the issue of who owns the intellectual property produced by CCDC and SEDC when they each are directed by the RDA to undertake certain tasks on behalf of the RDA. I suggest the current provisions be amended and restated to adequately address this issue.
7. Representations and Covenants of CCDC and SEDC: In a search of Attorney General filings for CCDC and SEDC, the AG's website says that SEDC (and SDDPC) are not current in their required filings. To ensure CCDC and SEDC are current in their filings, are in good standing in California and have timely filed all reports and tax returns required under federal and state law applicable to non-profit public benefit corporations in California, I recommend we add representations and covenants to that effect. Also, I suggest we add standard representations that would be contained in similar agreements such as: i) no provisions of the Articles or Bylaws or of any agreement to which CCDC and SEDC is a party has been or will be violated by the execution and delivery of the amended Operating Agreements, ii) that they have duly obtained all corporate and other authorizations necessary for the execution, delivery, performance and satisfaction of the amended Operating Agreements, iii) that they have timely prepared all minutes of the proceedings of the Board of Directors and committees thereof through the dates of the execution of the amended Operating Agreements, iv) that they are not in default in the performance, observance or fulfillment of any of the terms and conditions of their Articles or Bylaws, v) that upon the execution and delivery thereof, the amended Operating Agreements are legal, valid and binding agreements, enforceable in accordance with their terms and, vi) that to the best of their knowledge they are in compliance with all material laws and regulations and all requirements of insurance carriers applicable to their respective businesses, affairs, properties or assets. All of these would be fairly standard representations in similar agreements.

8. Independent Contractor: I suggest we add standard provisions that CCDC and SEDC are independent contractors and not agents, employees and the Operating Agreements do create a partnership, joint venture, etc.
9. Distributions: I suggest we review the sections of the Operating Agreements that provide for the transfer of unspent amounts to the RDA in view of Corporations Code Section 5410 which prohibits distributions.
10. Procedural Matters: I suggest we add a number of standard legal provisions to the existing provisions in this section.
11. Termination: I suggest the termination provisions be restated and expanded to provide RDA with more specific rights and remedies.
12. Bylaw Provisions: I suggest we add the changes that the IBA proposes to be added just to the Operating Agreement at Items 4, 6, 7, 9, 10, 11, 12, 15, 19, 20 and 21 also be added to the Bylaws.

Bylaws

I suggest the Bylaws for both CCDC and SEDC be amended and restated in their entirety. The existing Bylaws are outdated and should be brought up to the current standards for non-profit public benefit corporations and to reflect the provisions in the current California Corporations Code. My suggestions below only address the sections where significant issues are raised that merit discussion for the proposed changes in the Bylaws.

1. Article II, "Purposes and Limitations." I suggest this section be restated and updated to discuss its general charitable purposes and powers. Also, I suggest the current sections on members be moved to a separate more detailed section on "Membership."
2. Article III, "Directors." I suggest this section be restated and updated in its entirety, including changes that reflect the fact that the Board of Directors will no longer have the authority to select and remove the President.
3. I suggest a new section entitled "Standards of Care" be added. This is a standard section in public benefit Bylaws. This section would discuss the standards of care for directors in performing their duties, prohibit loans to officers and directors, and contain restrictions on "interested directors." In addition, it would include a detailed set of rules for "Conflict of Interest" transactions, including definitions, procedures for addressing conflicts of interest and actions for violations of the conflicts rules and records requirements for conflict transactions including minutes of the Board of Directors. Also, it would include detailed requirements regarding "Compensation" policies for officers, directors and independent consultants.
4. Article V, "Board Committees." I suggest this section be restated and updated and include specific reference to the Audit Committee requirements, including the duties of the Audit Committee, the restrictions on membership and the requirements for CCDC and SEDC to have annual audited financial statements.
5. Article VII, "Miscellaneous." I suggest the "Indemnification" section be restated and updated and include the provisions discussed above for indemnification. The provisions

for Indemnification in the Operating Agreements and Bylaws should be identical or cross reference the other.

6. I suggest a new section be added entitled "Record and Reports." This section would discuss maintenance and inspection rights of the Articles and Bylaws and the federal tax exemption application and annual information returns as well as all other corporate records. In addition, this section would detail all the budgets, financial statements and other reports required by the IBA so such requirements are also stated in the corporate organizational documents.
7. I suggest a new section be added entitled "Execution of Corporate Instruments." This section would determine the method and designate the officer designated to sign all corporate documents. It would also include any signature or approval, etc requirements for contracts over specific dollar amounts and any additional procedures for such contracts or other special items, etc.
8. Article IX, "Amendments" should be restated and updated and include specific language that only the member may amend the Bylaws for any reason.

Please don't hesitate to contact me with any questions or comments.

JAN I. GOLDSMITH, City Attorney

By
Timothy J. Fitzpatrick
Deputy City Attorney

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