

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**DATE:** September 15, 2016

**TO:** Honorable Mayor and City Council

**FROM:** City Attorney

**SUBJECT:** Civic San Diego: Update and Issues Regarding Proposed Agreements

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**I. STATUS OF THE PROPOSED OPERATING AND AGENCY AGREEMENTS  
FOR CIVIC SAN DIEGO**

**A. Background of the Agreements**

On April 23, 2015, this Office issued a Memorandum of Law setting forth the limitations and procedural requirements for the delegation of functions by the City of San Diego to Civic San Diego (Civic). City Att’y MOL No. 2015-7 (Apr. 23, 2015) (Memorandum). The Memorandum reviewed the formation of Civic by the City, and its history as the successor to Centre City Development Corporation and the Southeastern Economic Development Corporation, also City-formed corporations. The City Council provided for the purposes and functions of Civic in its articles of incorporation and bylaws, and for the work to be performed by Civic in its existing agreements with the City. Nonetheless, the Memorandum recommended “that the City revisit the existing agreements to clarify Civic’s activities, build in transparency and financial oversight, provide for delegation of permitting authority by separate agency agreement, and include appropriate termination provisions.”<sup>1</sup>

Consistent with the Memorandum’s recommendation, this Office assisted Mayoral staff in drafting and negotiating an Operating Agreement and an Agency Agreement to address the issues raised and replace the existing agreements between Civic and the City. The proposed agreements establish the contractual basis for Civic to continue the work it performs on behalf of

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<sup>1</sup> The Memorandum concluded that “[t]he Council may delegate administrative authority to enforce the City’s land use policy to Civic in accordance with the City’s established standards and safeguards, and ultimate control.” The delegation of administrative functions would be authorized by the Mayor and Council, and “should include provisions for Mayoral oversight and the ability to end the delegation, if appropriate.” The Memorandum also concluded that the delegation of additional functions that would transfer work from represented employees would require compliance with the state’s collective bargaining laws and, if classified employees are affected, Charter section 117(c).

the City, with emphasis on specific direction and oversight. They document the requirements and procedures for Council approvals; the standards, policies, and laws that apply to Civic's activities; as well as the manner in which the Mayor will oversee and check the work performed.

## **B. Council Committee Review of the Proposed Agreements**

The draft agreements were considered by the City Council's Economic Development and Intergovernmental Relations Committee on June 4, 2015. The draft Operating Agreement contemplated three exhibits: Exhibit A listing the responsibilities of the Downtown Community Parking District Advisory Board; Exhibit B listing Civic policies and City Council policies to be followed in performing the agreements; and Exhibit C listing the types and amounts of required insurance to be maintained by Civic. [http://docs.sandiego.gov/ccagenda\\_edir/edir150604.pdf](http://docs.sandiego.gov/ccagenda_edir/edir150604.pdf)

The Committee voted 2-2 on a motion to forward the item to the City Council without recommendation and with the following requests: (1) revise Exhibit B to reference the City's Small Local Business Enterprise Policy, (2) revise Exhibit B to reference compliance with all City Council policies, (3) for staff to explore opportunities to establish an affordable housing requirement within the operating agreement, and (4) for the exhibits to be included with the agreement for Council. A tie vote in Committee means that the item is forwarded to the Council with no recommendation. Council Rule 6.9.1(c). The Committee's motion did not mention Community Benefits Agreements (CBAs). [http://docs.sandiego.gov/ccaction\\_edir/edir150604\\_actions.pdf](http://docs.sandiego.gov/ccaction_edir/edir150604_actions.pdf).

The proposed Operating Agreement and Agency Agreement were docketed for the City Council's September 13, 2016 meeting, with exhibits A, B, and C. Exhibit B lists all Civic policies and City Council policies that would apply to Civic's performance of the agreements. One City Council policy not listed on Exhibit B is a policy concerning CBAs, because the City Council has not adopted such a policy.

## **C. New Exhibit D: Guidelines for Negotiation of Community Benefits for City-Subsidized Projects**

The proposed Operating Agreement includes a fourth exhibit, Exhibit D, "Guidelines for Negotiation of Community Benefits for City-Subsidized Projects." This exhibit was developed through negotiations between City staff and labor representatives, with review by this Office. Exhibit D would encourage inclusion of certain "community benefits" for projects negotiated by Civic that receive financial assistance from the City of \$100,000 or more from the City's general fund. In other words, any benefits negotiated would be legally tied as conditions to the receipt of City funding, referred to as the "City Subsidy."

As docketed for the City Council's September 13 meeting, the list of "community benefits" in Exhibit D includes affordable housing assurances for residential projects, local and low-income resident hiring efforts, payment of prevailing wages for construction work,<sup>2</sup> and "certainty to timely completion and harmonious operation by developers, contractors and tenants." Civic would be responsible for negotiating with the project developer to include these benefits as conditions to receipt of the City Subsidy.

## **II. NEW CITY POLICY SHOULD BE ADOPTED THROUGH SEPARATE PUBLIC PROCESS, BEFORE IT IS INCLUDED IN A CONTRACT**

The guidelines in Exhibit D are limited to Civic's negotiation of benefits connected to receipt of a City Subsidy in the course of performing the Operating Agreement. Should the Council desire to expand Exhibit D or otherwise change the proposed agreements to create policy with broader application than as a condition to the receipt of a City Subsidy, then the Council should address the matter separately using a public process and procedure typically employed by the Council as a legislative body for the creation and adoption of City policy.

### **A. Community Benefits Agreements Raise Legal and Policy Issues**

In particular, a City policy on CBAs should be carefully considered and reviewed. CBAs are agreements with a developer by which the developer agrees to provide benefits important to the community as part of the pending development. Historically, CBAs have been negotiated between a developer and a community coalition as a private contract, or between a developer and local government as part of a development agreement, or a variation of the two, based upon the impacts of a particular project and the specific needs of the surrounding community. CBAs between the developer and community members often include the agreement of the community members to support and not sue on or seek to derail the project.

Depending upon how they are negotiated and structured, CBAs can raise significant legal and policy issues.<sup>3</sup> These include whether the group pressing for the CBA is representative of the community and its needs, whether the solutions sought by the community in the CBA—often not caused by the project—would be better addressed on a city-wide basis, whether CBA benefits constitute an unlawful exaction, whether there is legal consideration for the commitments made by the developer in the CBA, whether projects with CBAs are treated more favorably in the local government's approval process, whether the push for CBAs may deter appropriate development, whether CBAs are legally enforceable, and the extent to which local government officials can participate in advocating for, negotiating, or obtaining a CBA and then participate in approval of the project. Accordingly, depending on how a CBA is negotiated, documented and enforced, the

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<sup>2</sup> Section 7.5 of the Operating Agreement requires that Civic comply with the City's Living Wage and Prevailing Wage Ordinances. The reference to prevailing wages in Exhibit D would apply to the developer's construction work contracts, based on the contribution of City funds. *See* Cal. Lab. Code § 1771 (definition of "public works" includes work paid for using public funds). Also, since September 13, 2016, a provision has been added to Exhibit D referencing the City's Living Wage Ordinance.

<sup>3</sup> *See* Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. Chi. L. Rev. 5 (Winter 2010), and authorities cited therein.

involvement of local government can raise legal issues of equal protection, unlawful exactions, and enforcement. For these reasons, adoption of a CBA policy by the City Council should be handled with the public process and consideration used by the City Council as the City's legislative body to make City policy.

**B. City Policy Should Be Adopted Through an Open and Public Process**

If the Council adopts a CBA policy, the policy would then apply to Civic's work under the proposed Operating Agreement. The Operating Agreement is a contract between the City and its corporation, laying out the manner and scope of the work the corporation will perform for the City. The Operating Agreement requires Civic to follow its adopted policies, laws, and regulations in carrying out that work. As currently drafted, Exhibit D does not create a City-wide policy, but rather is limited and appropriately tied to the granting of City funds to subsidize a particular project. If the project does not seek a City Subsidy, Exhibit D would not apply. Expanding Exhibit D to more general application means the Council is taking legislative action to enact the policy the Council would like to apply. This policy deliberation and legislative action should be taken through an open and public process.

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