

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: November 7, 2016

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Responses to Questions Raised at City Council regarding the Proposed Agreements with Civic San Diego

INTRODUCTION

At the October 18, 2016 City Council meeting, Council voted to adopt the ordinance authorizing an Operating Agreement and an Agency Agreement, each for a term of five years, between the City of San Diego (City) and Civic San Diego (Civic). The motion included a request to this Office to respond to suggested changes to the Operating Agreement proposed by Councilmember Emerald (District 9 Proposal, attached) during the course of the Council's discussion.

I. ADDING AN APPEALS PROCESS FOR "ECONOMIC DEVELOPMENT PROJECTS"

The District 9 Proposal would add a right of appeal to section 2.1.4.4 of the Operating Agreement. Section 2.1.4.4 currently requires Civic to keep the Mayor and Council apprised of "the progress of its economic development activities and projects." These "activities and projects" are described in terms of creating business and employment opportunities. The Proposal would add: "All economic development projects over 50 units of residential/hotel, or 25,000 square feet of commercial space, shall be appealable to the City Council by any public member."

A. What Actions Would Be Appealable?

It is unclear from the proposed language what approvals, actions or projects this language is intended to cover. The Operating Agreement acknowledges that Civic, as a separate nonprofit public benefit corporation, may pursue economic development activities. Operating Agreement § 2.1.4. Civic may implement economic development programs at the request of the City within the Downtown Community Plan area or within the former Southeastern Economic Development Corporation (SEDC) area, or it may pursue such work on its own. Id. § 2.1.4.1. To the extent that Civic is implementing a program for the City, it must be reflected in the budget and work plan. Id. § 2.1.4.2. Accordingly, in the context of section 2.1.4.4, the proposed language appears to refer to development projects in the downtown or former SEDC area that include the required

residential/hotel or commercial space and that Civic is involved with because of the project's potential economic development benefits to the community.

To the extent the intended appealable actions are decisions on permits issued for a project or other decisions governed by the City's Land Development Code, the process for appeal of those decisions is contained in the City's laws.¹ In that respect, the proposed language is similar to language that was contained in Assembly Bill 504 (2015-2016 Reg. Sess.) which was vetoed by Governor Brown on October 8, 2015. AB 504 would have created a right to appeal "any planning function approved by a nonprofit public benefit corporation" to the City Council for a project that includes at least 50 residential units, or at least 50 hotel units, or at least 25,000 square feet of commercial space, and provided the project is not exempt from CEQA. "Planning function" was broadly defined and included the issuance of development permits.

By seeking state legislation on this local topic, the proponents of AB 504 sought to override the local permitting and appeal process created by the City, and insert an appeal process for permitting actions taken by Civic on certain projects. In vetoing the measure, the Governor noted that AB 504 would create a statewide rule to address a local dispute that should be addressed at the local level.²

The Agency Agreement authorizes Civic to process applications for downtown development permits pursuant to the delegation of permitting authority contained in the City's Planned District Ordinances for the Centre City, Gaslamp Quarter, and Marina Districts. SDMC Ch. 15, Art. 6, 7, 11. In doing so, Civic must comply with the City's laws.³

B. Adding an Appeal Process Requires a Municipal Code Amendment

A change by the City to the existing legal process requires amendment of the Municipal Code. The existing procedures include necessary due process protections for decisions that affect property rights, including any appeals. While the Operating Agreement includes obligations Civic must follow in performing services for the City, the Council cannot—through the Operating Agreement—create a different legal process for the processing of development permits. Any change to the process must continue to afford due process to the property owner and other interested persons, and must not violate equal protection principles.

If the proposed right of appeal is not intended to apply to permitting or other land use decisions, but to some other type of decision made by Civic, we require more information about the nature

¹ See, e.g., San Diego Municipal Code (SDMC or Municipal Code) Ch. 11 (Land Development Procedures), Ch. 12 (Land Development Reviews), Ch. 13 (Zones), Ch. 14 (General [Development] Regulations), Ch. 15 (Planned Districts) (collectively, the Land Development Code). The Land Development Code includes processes for approval of land uses and development, including permits, maps, and other approvals. SDMC § 111.0102.

² http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160AB504

³ The Land Development Code establishes different processes for different levels of decision-making ranging from Process One (lowest level of review) to Process Five (highest level). SDMC §§ 112.0501-112.0509. The type of development proposed in the application determines the level of approval and the procedure that applies. SDMC § 112.0501.

of the decision and Civic's role in the decision and project, before we can analyze the ability of the City to impose requirements on such decisions. It is likely, however, that for the City to require Council review of a Civic decision, the decision would need to be tied to services being provided by Civic for the City.

II. REQUIRING APPLICATION OF PREVAILING WAGES TO NEW MARKETS TAX CREDITS PROJECTS

The District 9 Proposal would add a new section 2.1.4.6 to the Operating Agreement requiring that Civic "require all recipients of New Markets Tax Credits to comply with the City's Prevailing Wage Ordinance (SDMC § 22.3019) in the required Community Benefits Agreement." The New Markets Tax Credits (NMTCs) program is a separate program not covered by the Operating Agreement.

The NMTCs program is a federal program governed by federal laws and regulations. The City Council amended Civic's Bylaws to specifically permit Civic to pursue and handle NMTCs. Consistent with federal rules for NMTCs, Civic created a Community Development Entity (CDE), the Civic San Diego Economic Growth and Neighborhood Investment Fund, as a nonprofit subsidiary corporation to review applications and make decisions on allocation of NMTCs for projects. This Office does not advise Civic or the CDE on NMTCs.

It is our understanding that the CDE uses Community Benefits Agreements (CBAs) to fulfill federal requirements that NMTC investments directly benefit low-income residents and the surrounding communities over a seven-year compliance period, and that the CDE uses the information and reporting required by the CBAs to document community benefits in its annual reporting.

The Operating Agreement mentions NMTCs as an activity pursued by Civic, but that work is not addressed in the Operating Agreement as a service to be provided to the City. *See, e.g.,* Operating Agreement, Recital E. Nonetheless, at the October 18 meeting, the Council was presented with new language pertaining to NMTCs approved by Civic's Board. This language adds a new subsection under section 2.1.4, Economic Development Functions, and states:

2.1.4.5 New Markets Tax Credits. The parties acknowledge that pursuant to existing requirements, applicants seeking a New Markets Tax Credit allocation for projects that devote 15,000 to 60,000 square feet of floor area to the sale of goods and merchandise primarily for personal or household use, and devote 10% or more of sales floor area to the sale of goods not subject to California State sales tax must include compliance with the City's Living Wage Ordinance (SDMC §§ 22.4201-4245) in the required Community Benefits Agreement.

This language acknowledges a requirement adopted by the CDE to compel the payment of living wages, as defined by the City's Living Wage Ordinance, on certain projects. This language does

not impose a requirement on the NMTCs; it acknowledges that the CDE has done so. This acknowledgment is not an amendment to the City's Living Wage Ordinance. An amendment to the Living Wage Ordinance would require separate notice and Council adoption of an amendment.

The District 9 Proposal to require payment of prevailing wages for NMTCs presents the same issue. Civic does not administer the NMTC program on behalf of the City; if new requirements are to be imposed on NMTCs, those would need to be adopted by the CDE.

Note, however, that Civic is required by the Operating Agreement at sections 7.5 and 8.5 to comply with the Living Wage Ordinance and the Prevailing Wage Ordinance and with all applicable laws.

III. REQUIRING LOCAL AND SKILLED WORKFORCE HIRING CRITERIA

The District 9 Proposal would add another new section to the Economic Development Functions part of the Operating Agreement, to require that all Community Benefits Agreements (CBAs) include hiring requirements for all building and construction work.

Exhibit D to the Operating Agreement includes language on local hiring as part of the negotiating guidelines for projects that receive a "City Subsidy." Such projects should "include a plan for making a good faith effort to ensure 50% of the construction work is performed by" local businesses or local low-income residents. The proposed new language would require local hire language that includes additional metrics in CBAs, would not be limited to projects receiving a City Subsidy, and would appear to apply in any situation in which Civic participates in the negotiation of a CBA. Inclusion of this language as a CBA requirement not tied to the receipt of City funding raises legal issues both as a CBA-term imposed by local government and as local hiring criteria imposed by local government.

Generally, the legal and policy considerations raised by government-involvement in a CBA 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 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. Depending on how a CBA is negotiated, documented and enforced, the involvement of local government raises legal issues of equal protection, unlawful exactions, and enforcement.⁴ These policy considerations are beyond the scope of the Operating Agreement, which is intended to set forth the terms and conditions for

⁴ For citations, see the Memorandum from this Office to the Mayor and City Council dated September 15, 2016 entitled "Civic San Diego: Update and Issues Regarding Proposed Agreements." City Att'y MS 2016-28 (Sept. 15, 2016).

Civic's performance of services to the City, including compliance with City laws and policies, but is not the vehicle for creation of those laws and policies.

Should the Council desire to create a CBA policy or require CBAs with broader application than as a condition to the receipt of a City Subsidy, the Council should address the matter separately using the public process typically employed by the Council as a legislative body for the creation and adoption of City policy.

Local hiring requirements, in particular, raise constitutional issues that deserve careful consideration. These issues are discussed in several legal memoranda previously issued by this Office. *See, e.g.*, 2010 City Att'y Report 599 (2010-15; Apr. 22, 2010; "Local Hire Program: Legal Issues and Draft Ordinance") and 2011 City Att'y Report 464 (2011-27; June 29, 2011; "Ability of City Council to Require Local Preference or Prevent Outsourcing in City Contracts"). Generally, local hire programs risk violating the Privileges and Immunities Clause of the United States Constitution and the right of non-residents to seek employment from private employers.

A local hire program can avoid these issues if the stated goal is advisory and the contractor has ultimate decision-making authority in hiring. Such a program would include goals for outreach and referrals rather than hiring quotas. A local hire program that is voluntary may also avoid these issues. A local hire program should be carefully considered and crafted to avoid these legal pitfalls. City Att'y Report 2010-15.

IV. ADDITIONAL QUESTIONS RELATING TO MMBA AND RFPS

In addition to the questions raised by the District 9 Proposal, Council President Lightner asked for clarification as to whether the proposed agreements raise issues under the Meyers Milias Brown Act (MMBA) or San Diego Charter section 117(c), or must be awarded through a competitive request for proposals (RFP) process as consultant contracts. In raising these questions, Council President Lightner cited a City Attorney Report issued April 17, 2014.

The MMBA question was addressed in a Memorandum of Law dated April 23, 2015. On page 19 of that Memorandum, we stated:

In the April 17, 2014, City Attorney Report, "Proposed Employment of Civic San Diego to Provide Certain Services Related to Former Redevelopment Agency Properties Proposed to be Transferred to the City of San Diego," this Office advised on rules related to contracting out City services and collective bargaining. [Citations omitted.]

As explained in [] prior opinions and memoranda, if the City transfers work of represented employees to CivicSD, the City must comply with state collective bargaining laws, and if the City employs CivicSD as an alternative to Civil Service employees, the

City must comply with Charter section 117(c). Compliance with these laws must take place prior to any transfer of City work or functions.

* * *

Compliance with section 117(c) is not required if the work of classified employees is not being transferred (for example, work transferred to CCDC and SEDC (now operating as CivicSD) occurred prior to adoption of section 117(c)). Under Charter section 28, the Mayor has the power to hire experts or consultants to provide advice or perform services when necessary in connection with the Mayor's oversight of the City's administrative service. It is only the transfer to an outside contractor of the work of classified employees' performing City services that triggers compliance with section 117(c).

City Att'y MOL No. 2015-7 (Apr. 23, 2015).

The proposed Operating and Agency Agreements authorize Civic to continue providing the services and performing the work covered by the existing agreements between Civic and the City, and do not expand that work or transfer work being performed by City employees. This is expressly stated in the agreements in several places, including in the Operating Agreement at Recital L and section 2.7. The purpose of the proposed agreements is to replace the existing agreements that the City has with Civic with agreements that "clarify CivicSD's activities, build in transparency and financial oversight, provide for delegation of permitting authority by separate agency agreement, and include appropriate termination provisions." Id. at 23.

For both questions, it is important to understand that Civic San Diego is the successor corporation to the Centre City Development Corporation (CCDC). In 2012, CCDC's name was changed to Civic San Diego, and SEDC was merged into Civic. *See* City Att'y MOL 2015-7 for the complete history and citations. Although the name, functions, and mission of the corporation have changed to meet the changes in state redevelopment laws and the needs of the City, Civic is the entity that was formerly called CCDC.

The City created the nonprofit public benefit corporation that is now Civic, and the City established its purposes in the articles of incorporation and bylaws. The Operating and Agency Agreements, and the existing Consultant Agreements, carry out the first stated purpose of Civic to:

(i) engage in economic development, land use permitting and project management services which under California law, can be done by contract with or delegated by the City of San Diego ("City"), or the City solely in its capacity as the designated

successor agency to the Redevelopment Agency of the City of San Diego ("Successor Agency").

The bylaws and articles establish the City's purposes for the corporation, and the various agreements over the years between the City and CCDC, SEDC, or Civic, along with the City's policies and laws, enable the corporation to carry out the first stated purpose. The decisions to create the corporation and charge it with performing certain functions were made by the City beginning with the formation of CCDC in 1975 and revisited by the City Council many times since. The proposed Operating and Agency Agreements replace existing agreements, enable Civic to continue to perform the work for which it was created by the City, but do not expand upon the work being performed. In entering into an operating agreement and an agency agreement with Civic, the City is utilizing the corporation it created for its intended purpose.

The competitive process contained in Chapter 2, Article 2, Division 32 of the Municipal Code sets forth the City's process for awarding contracts for goods, services, and consultants to external vendors. This law does not contemplate an operating agreement or an agency agreement with a corporation created by the City, and those agreements do not fit within the definitions of "consultant contract" or "contract for services" contained in section 22.3003. If the Council no longer desires to use Civic to fulfill the purposes for which it created Civic, the Council can make that policy decision and take steps to dissolve the corporation.

CONCLUSION

Should the City Council desire to establish new policies that address the topics included in the District 9 Proposal, the Council should adopt new policies or amendments to the Municipal Code, as required, which policies and laws can then be implemented. The Operating Agreement includes language for Civic's compliance with new City policies (section 2.3.2), and of course, both agreements include language requiring compliance with all applicable City laws, including laws that are adopted during the term of the agreements.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Carrie G. Townsley
Carrie G. Townsley
Chief Deputy City Attorney

CGT:jdf:hm
MS-2016-32
Doc. No.: 1386779
Attachment

OPERATING AGREEMENT BETWEEN CIVIC SAN DIEGO
AND THE CITY OF SAN DIEGO
AMENDMENTS TO DRAFT VERSION 10-14-2016

A. Limit the term of the Operating Agreement to 4 years. (page 5)

- 1.1 Effective Date and Term. This Operating Agreement shall become effective upon execution by authorized representatives of both parties, and approval of the City Attorney (Effective Date) and ~~continue in effect until terminated by City.~~ shall have a term of four (4) years from the anniversary of its effective date.

B. Appeals Process (page 9)

2.1.4.4 Economic Development Projects. Civic shall update the City Council as part of its annual performance report, or more frequently if requested by the Mayor or City Council, on the progress of its economic development activities and projects. All economic development projects over 50 units of residential/hotel, or 25,000 square feet of commercial space, shall be appealable to the City Council by any public member.

C. Requiring Prevailing Wage Compliance for Economic Development Projects (page 9)

2.1.4.6 Prevailing Wages. Civic shall require all recipients of New Market Tax Credits to comply with the City's Prevailing Wage Ordinance (SDMC §§ 22.3019) in the required Community Benefits Agreement.

D. Local Hire and Skilled Workforce (page 9)

2.1.4.7 Local Hire and Skilled Workforce. Civic shall include in all Community Benefits Agreements the following provision:

"All building and construction work on the project will be performed at all tiers by contractors which (a) are licensed by the State of California; (b) shall make a good-faith effort to ensure that at least 50% of all their respective workforces' construction workers' hours of Project Work shall be performed by residents of the City of San Diego or veterans residing in San Diego County, of which at least 10% of all their respective workforces' construction workers' hours of Project Work shall be performed by workers whose primary place of residence is within the Qualified Low-Income Communities; (c) employ only construction workers which possess all licenses and certifications required by the State of California; and (d) have at least 60% of their respective construction workforces on the project from workers who have graduated from an apprenticeship training program approved by the State of California, or have at least as many hours of on-the-job experience in the applicable craft which would be required to graduate from such a state-approved apprenticeship training program."