



REPORT

DATE ISSUED: November 23, 2016

REPORT NO: HCR16-104

ATTENTION: Chair and Members of the San Diego Housing Commission
For the Agenda of December 2, 2016

SUBJECT: Amendment of Amended and Restated Memorandum of Understanding between San Diego Housing Commission (Housing Commission) and Housing Development Partners (HDP) Concerning Reimbursement of Expenses Incurred by the Housing Commission Concerning HDP Matters

COUNCIL DISTRICT: Citywide

REQUESTED ACTION

That the San Diego Housing Commission (Housing Commission) Board Approve the Amendment of the amended and restated Memorandum of Understanding between the Housing Commission and its nonprofit affiliate, Housing Development Partners

STAFF RECOMMENDATION

That the San Diego Housing Commission (Housing Commission) Board take the following actions:

- 1) Approve the amendment of the amended and restated Memorandum of Understanding (MOU), between the Housing Commission and its nonprofit affiliate, Housing Development Partners (HDP), as described in this report;
- 2) Authorize the Executive Vice President & Chief of Staff (EVP), or designee, to execute the amendment of the MOU, as drafted by General Counsel of the Housing Commission; and
- 3) Authorize the EVP, or designee, to execute such documents and to perform such acts as are necessary to implement the approvals referenced within this report.

SUMMARY

Effective January 1, 2013, the MOU between the Housing Commission and HDP was amended. Under the terms of the MOU, the Housing Commission provides staff, equipment, supplies and other services and supplies as necessary to allow HDP to operate as an Internal Revenue Code (IRC) Section 510(c) (3) corporation. Under the terms of the MOU, the amount of accrual of expense is limited to \$100,000 at any one point in time.

It is proposed that the MOU be amended to increase that limit to \$250,000, at any one point in time. In addition, it is proposed that Exhibit 2 of the Reimbursement Schedule attached to the MOU be amended to provide that labor costs and fringe benefits include all forms of performance bonuses, salary increases and performance incentive awards, as permitted under the Housing Commission Personnel Handbook.

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AFFORDABLE HOUSING IMPACT

The amendment of the MOU will allow HDP to continue pursue its Mission Statement to provide low- and moderate-income housing, services and facilities. In addition, it will allow HDP to cooperate with private and public persons or agencies to promote the cause of affordable housing for low- and moderate-income persons, elderly and disabled individuals.

FISCAL CONSIDERATIONS

All accruals under the MOU will be repaid to the Housing Commission within 60 days after the receipt of an invoice from the Housing Commission, as provided for in the MOU.

PREVIOUS HOUSING COMMISSION ACTION

MOU was approved by the Housing Commission in 2013. At the same time HDP also approved the MOU in 2013.

PROJECTED IMPACTS

Actions will allow HDP to continue its work of creating, rehabilitating and operating low- and moderate-income housing, as referenced within its Mission Statement, Exhibit 1 of the MOU.

ENVIRONMENTAL REVIEW

This activity is not a project as defined by the California Environmental quality Act (CEQA) Section 21065 and State CEQA Guidelines Section 15378(b)(5), as it is an administrative activity of government that will not result in direct or indirect physical changes in the environment. The determination that this activity is not subject to CEQA, pursuant to Section 15060(c)(3), is not appealable and a Notice of Right to Appeal the Environmental Determination (NORA) is not required. Processing under the National Environmental Policy Act is not required as no federal funds are involved in this action.

CONFLICT STATEMENT TO BE INCLUDED WITHIN THE RECORD OF THIS MATTER.

Commissioner Gary Gramling, Commissioner Roberta Spoon, and President and Chief Executive Officer (President & CEO) of the Housing Commission, Richard C. Gentry, are each directors and officers of Housing

Development Partners (HDP), a California nonprofit public benefit corporation qualified as an Internal Revenue Code Section 501(c) (3) corporation. Commissioner Gramling, Commissioner Spoon, and President & CEO Gentry receive no compensation for their service on the HDP Board of Directors. Pursuant to the provisions of Government Code Sections 1091.5(a) (7) and 1091.5(a) (8), Commissioner Gramling, Commissioner Spoon, and President & CEO Gentry each have a “non-interest” as described in Government Code Section 1091.5. Furthermore, none of HDP’s board members has a financial interest in this matter that would legally preclude their participation under the provisions of Government Code Sections 1090 and/or 87100, et.seq. [because a 501(c) (3) nonprofit corporation is not a business entity for the purposes of state law and because HDP has been determined to be a public agency by the Ethics Commission for local conflict law purposes] and/or the Housing Commission’s Conflict of Interest Code. As members of the Board of Commissioners of the Housing

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Commission, Mr. Gramling and Ms. Spoon are legally entitled to vote and be counted for quorum purposes. This disclosure shall be and is hereby documented in the official records of the Housing Commission.

Respectfully submitted,

Charles B. Christensen
Charles B. Christensen
General Counsel
San Diego Housing Commission

Approved by,

Jeff Davis
Jeff Davis
Executive Vice President & Chief of
San Diego Housing Commission

Attachment: 1) Memorandum of Understanding

Hard copies are available for review during business hours at the security information desk in the main lobby and at the fifth floor reception desk of the San Diego Housing Commission offices at 1122 Broadway, San Diego, CA 92101 and at the Office of the San Diego City Clerk, 202 C Street, San Diego, CA 92101. You may also review complete docket materials in the "Public Meetings" section of the San Diego Housing Commission website at www.sdhc.org.

**AMENDED AND RESTATED
MEMORANDUM OF UNDERSTANDING**

This Amended and Restated Memorandum of Understanding ("Agreement") is made as of this 1st day of January 2013, by and between the SAN DIEGO HOUSING COMMISSION, (the "COMMISSION") and HOUSING DEVELOPMENT PARTNERS OF SAN DIEGO, formerly known as SAN DIEGO HOUSING DEVELOPMENT CORPORATION, a California nonprofit public benefit corporation (hereinafter "HDP"). The COMMISSION and the HDP are collectively referred to herein as the "PARTIES".

RECITALS

A. HDP is engaged in various activities designed to advance a program (the "Program") to assist low and moderate income residents, who are either working and/or living in the City of San Diego and to purchase, acquire, construct, rent, sell and/or rehabilitate real property within the City of San Diego, either directly or through partnerships or limited liability companies, to the extent permitted by applicable law, to further the goals of the Program and to further the goals of HDP as set forth in the Mission Statement attached hereto as Exhibit "1".

B. HDP has limited resources to fully promote its goals as set forth in the Program and the Mission Statement.

C. The COMMISSION has the staff, expertise and ability to loan staff members, supplies, equipment and administrative capacity to HDP utilizing the COMMISSION's local and/or other eligible funds;

D. The COMMISSION is not willing to provide staff expertise, supplies, equipment and capacity to HDP, unless HDP is willing to reimburse the COMMISSION for the costs incurred.

E. HDP is willing to and shall reimburse the COMMISSION as and when eligible funds are available.

NOW, THEREFORE, in consideration of the Recitals stated above and the mutual covenants set forth below, the PARTIES agree, promise and declare as follows:

**ARTICLE I
STAFFING PROVISIONS**

Section 1.1 - Commission Staffing of HDP.

The COMMISSION will make available to HDP such staff, equipment, supplies, office space but only if and as required, capacity and expertise as is reasonably required by HDP to accomplish its goals for the term and on the conditions hereinafter set forth.

(a) Reimbursement Accrual. During the term of this AGREEMENT, the COMMISSION shall record the total cost of the staffing, overhead and other costs utilized by HDP in accordance with the Reimbursement Schedule attached hereto as Exhibit 2 and invoice HDP for the costs incurred. HDP shall pay such invoices at the earliest possible time, but in no event later than the date that the HDP has generated sufficient net operating revenue, from whatever eligible source to pay such invoices. Payments shall first be applied to the oldest invoices and thereafter to the next oldest until all invoices are paid. The invoices shall bear no interest. HDP will use its best efforts to pay all invoices at the earliest possible time, but in no event later than sixty (60) days after receipt of an invoice.

(b) Reimbursement Invoices. The reimbursement invoices shall be calculated in accordance with the Reimbursement Schedule attached hereto as Exhibit 2, the variables of which may be subject to adjustments annually, effective July 1 of each year, commencing July 1, 2013.

(c) Limitation of Accrual. In no event shall the COMMISSION accrue unpaid and outstanding expenses of more than One Hundred Thousand Dollars (\$100,000.00) at any time within any calendar year under the terms of this Agreement. In the event it becomes evident that more than One Hundred Thousand Dollars (\$100,000.00) of outstanding expenses and unpaid expenses may be accrued at any time within any calendar year, the COMMISSION shall notify HDP that it is anticipated that the limit will be exceeded. In no event shall the COMMISSION render services in any calendar year which accrue, at any time within the calendar year, more than One Hundred Thousand Dollars (\$100,000.00) of outstanding and unpaid expenses without the prior additional consent of the Board of HDP and of the COMMISSION. Nothing contained in this Agreement shall preclude the COMMISSION from accruing up to \$100,000 in unpaid expenses more than one time in any given calendar year, as long as the amount of the outstanding and unpaid expenses never exceeds the amount of \$100,000 at any given time during the calendar year.

Section 1.2 - No Partnership or Joint Venture.

The relationship between the COMMISSION and HDP created by this AGREEMENT shall not be one of partnership or joint venture, but rather shall be one for the acquisition of services, staff, office space [to the extent required by HDP from time to time] and administrative capacity, only. The COMMISSION and HDP are separate and distinct legal entities and shall operate separately and distinctly except as set forth in this AGREEMENT.

Section 1.3 - Indemnification.

HDP agrees to, covenants and promises to protect, defend, indemnify, and hold harmless the COMMISSION, the City of San Diego, the Housing Authority of the City of San Diego, and their respective officers, agents, employees, or representatives, from any and all liabilities, losses, damages, costs or claims in any way arising from this AGREEMENT, any and all other loans, and HDP's operation including, but not limited to, claims for injury or death to any person occurring on any of the properties concerning the HDP's operations. Further, neither the COMMISSION, the City of San Diego nor the Housing Authority of the City of San Diego has any obligation or liability whatsoever regarding toxic contamination or hazardous waste on any

real property owned by HDP and HDP shall indemnify the COMMISSION against any and all claims, liability, losses, and damages and/or costs arising therefrom.

Section 1.4 - Termination.

This AGREEMENT is terminable upon thirty (30) days written notice from either PARTY to the other. The termination shall be effective thirty (30) days after written notice as provided in Section 2.2 of this AGREEMENT.

ARTICLE II

MISCELLANEOUS PROVISIONS

Section 2.1 - Governmental Requirements Superior.

All provisions of this AGREEMENT and all the other documents relating to the AGREEMENT shall be subject and subordinate to any and all federal, state and local statutes, regulations and ordinances and shall be subject to modification to comply therewith.

Section 2.2 - Notice.

Notice under this AGREEMENT shall be deemed given upon actual personal delivery to the notified PARTY or upon the expiration of three (3) days from the insertion of the notice, properly addressed and by certified mail, return-receipt requested, postage prepaid, in a U.S. mail depository within California, or upon the expiration of seven (7) days from the insertion of the notice in a U.S. mail depository outside of California. Notices shall be sent to the addresses for the PARTIES as set forth below or as changed by either PARTY from time to time by written notice to the other PARTY

“COMMISSION”: SAN DIEGO HOUSING COMMISSION
 ATTENTION: Real Estate Department
 1122 Broadway, Suite 300
 San Diego, CA 92101

Copy to: Charles B. Christensen, Esq.
 Christensen & Spath LLP
 550 West C Street, Suite 1600
 San Diego, CA 92101

HDP: HOUSING DEVELOPMENT PARTNERS OF SAN DIEGO
 Attn: Executive Director
 1335 Fifth Avenue
 San Diego, CA 92101

Section 2.3 - Severability.

If any provision of this AGREEMENT is deemed to be invalid or unenforceable by a court of competent jurisdiction, that provision shall be severed from the rest of this AGREEMENT and the remaining provisions shall continue in full force and effect.

Section 2.4 - Exhibits Incorporated.

All exhibits to which reference is made in this AGREEMENT are deemed incorporated in this AGREEMENT whether or not the exhibits are actually attached to this AGREEMENT.

Section 2.5 - Construction of the Agreement.

The provisions contained in this AGREEMENT shall not be construed in favor of or against either PARTY but shall be construed as if both PARTIES contributed equally to its preparation. This AGREEMENT shall be construed in accordance with the laws of the State of California.

Section 2.6 - Attorney Fees.

If either PARTY initiates legal proceedings for the enforcement of or interpretation of this AGREEMENT, the prevailing PARTY shall be entitled to attorneys' fees and costs of suit in addition to any other relief to which such PARTY may be entitled.

Section 2.7 - Assignment.

HDP shall not assign its right nor delegate its duties under this AGREEMENT without the prior written consent of the COMMISSION. Any attempt at the assignment or delegation in violation of this section shall be void. The COMMISSION shall have full right and authority to assign all or a part of its rights and delegate all or a part of its duties under this AGREEMENT.

Section 2.8 - Prior Agreement.

This Agreement shall amend and restate in its entirety the Memorandum of Understanding entered into between the COMMISSION and SAN DIEGO HOUSING DEVELOPMENT PARTNERS dated December 13, 1995 (the "Prior Agreement").

Section 2.9 - Integration.

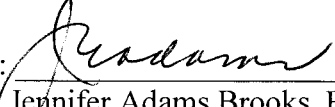
This AGREEMENT, including all Exhibits, represents the entire agreement between the PARTIES of the subject matter of this AGREEMENT and supersedes any other agreements,

promises, or representations, oral or written, pertaining to such subject matter, including without limitation, the Prior Agreement.

IN WITNESS WHEREOF, the PARTIES have executed this AGREEMENT on the date first set forth above.

“COMMISSION”

SAN DIEGO HOUSING COMMISSION,
a public agency

By: 
Jennifer Adams Brooks, Executive
Vice President/Chief of Staff

“HDP”

HOUSING DEVELOPMENT PARTNERS OF
SAN DIEGO, INC., a California nonprofit
public benefit corporation

By: 
Marco Vakili, Executive Director

Approved as to form:

CHRISTENSEN & SPATH LLP


By: 
Charles B. Christensen,
General Counsel for the
SAN DIEGO HOUSING COMMISSION

Exhibit 1

MISSION STATEMENT

1. To provide low and/or moderate income persons, elderly persons, and handicapped persons with affordable housing by acquiring or developing publicly financed low and moderate income housing and renting such housing to these persons;
2. To provide low and/or moderate income persons, elderly persons, and handicapped persons with facilities and services related to housing; and
3. To take such other action, in cooperation with private and public persons or agencies, as may reasonably promote the cause of housing for low and/or moderate income persons, elderly persons and handicapped persons.



Exhibit 2

REIMBURSEMENT SCHEDULE

HDP will reimburse the COMMISSION for all actual direct costs incurred and accrued for, on a GAAP basis, on behalf of HDP. Direct costs include but are not limited to labor, fringe, temporary labor, supplies, program costs, capital expenditures and all other direct costs related to carrying out the business purpose of HDP. In addition, HDP will reimburse the COMMISSION for all overhead allocated to the above mentioned direct costs in accordance with governmental cost principles OMB A-87. Notwithstanding the foregoing, in no case shall HDP reimburse the COMMISSION for overhead cost of COMMISSION operational overhead departments from which HDP did not receive services. Furthermore, if a cost has been charged to HDP as a direct cost, per OMB A-87, such costs shall be excluded from allocation to the applicable overhead pools. In addition, the COMMISSION shall provide HDP with an annual credit of \$25,000 against the overhead allocated to HDP, which credit shall be prorated monthly during each year of this Agreement. The credit shall utilize only local funds of the COMMISSION. The COMMISSION will determine the inclusion or exclusion of applicable costs as direct costs or overhead based on OMB A-87. Nothing contained herein shall preclude the COMMISSION and HDP from changing the method of allocation of overhead to another legal sufficient method, from time to time, as they may agree. The COMMISSION shall endeavor to provide HDP the allocation information at the earliest possible time each year.

