



MEMORANDUM

TO: Rodney Gonzales, President, Waller Creek Local Government Corporation

FROM: Kimberly McNeeley, CPRP, Director, Parks and Recreation Department
Jorge Morales, P.E., CFM, Director, Watershed Protection Department

DATE: July 28, 2020

SUBJECT: **Council Delegation of Authority to the Waller Creek Local Government Corporation for City Contracts**

This memo provides information about the proposed request for Council action to explicitly delegate authority to the Waller Creek Local Government Corporation (LGC) to authorize City of Austin (City) contracts for design and construction of public improvements consistent with the Council-approved Waller Creek District design plan. The City departments that sponsor and oversee work in the Waller Creek District (District) support this request. The goal is to provide the LGC with this information as the board considers supporting the corresponding recommendation for Council action.

BACKGROUND

On April 28, 2011, Council approved Resolution No. 20110428-014 creating the LGC under Subchapter D, Chapter 431, Texas Transportation Code to act on behalf of the City in its efforts to revitalize the Waller Creek District. Section 431.101 provides: "A local government corporation may be created to aid and act on behalf of one or more local governments to accomplish any governmental purpose of those local governments." On June 20, 2013, Council approved Resolution No. 20130620-21 authorizing negotiation and execution of the Agreements between the Waller Creek Local Government Corporation, City of Austin and Waller Creek Conservancy (Conservancy, now known as the Waterloo Greenway Conservancy). The Agreements define the role of each party, the steps for project approval, procurement requirements, construction standards, operational considerations, and reporting requirements. The LGC approved the Agreements on April 16, 2014.

In subsequent years, Council has authorized additional funding for the District where it is consistent with the Design Plan approved by Council. Council also authorized negotiation and execution of amendments to the Agreements, and the parties are still negotiating those amendments. This action will aid in finalizing those amendments.

Below is a list of key Council actions supporting this effort to date:

- June 20, 2007: Council created Waller Creek Tax Increment Financing Reinvestment Zone (TIRZ) No. 17 to finance the construction of the Waller Creek Tunnel Project.
- September 23, 2010: Council approved a resolution directing the City Manager to explore a public-private partnership with the Conservancy for the development, management, and operation of the District.

- April 28, 2011: Council approved the Memorandum of Understanding between the City and the Conservancy and created the LGC.
- October 18, 2012: Council approved a resolution affirming the selection of Michael Van Valkenburgh Associates (MVVA)/Thomas Phifer & Partners (TPP) as chosen by Waller Creek Design Competition Jury relating to the revitalization of the District.
- June 20, 2013: Council authorized negotiation and execution of the Agreement and related documents between the City, Conservancy, and the LGC concerning the revitalization of the District and approved the Waller Creek Design Plan as developed by MVVA/TPP.
- May 24, 2018: Council approved Ordinance No. 20180524-012 approving Amendment No. 2 to the Project and Financing Plan for TIRZ No. 17 to update current project design and project cost estimates, to extend the length of time in which the TIRZ operates, and to provide the most recent estimates of underlying funding sources that are anticipated to pay for the construction of projects within the District. The projects are proposed to be expanded to include parks and stream and trail improvements to enhance the developed land in the District.
- May 24, 2018: Council approved Ordinance No. 20180524-013 authorizing negotiation and execution of an amendment to the Agreements concerning the revitalization of the District; approving the amended Design Plan; and waiving certain City Code provisions relating to the naming of features and new facilities within the District in furtherance of the Agreements between the parties.
- May 24, 2018: Council approved Resolutions Nos. 20180534-014, 016, and 017 authorizing funding for improvements for the projects within the District, adding an additional City Manager designee to the LGC and authorizing amendments to the LGC Bylaws and Articles of Incorporation.
- May 24, 2018: Waller Creek Tax Increment Finance Zone Board approved resolutions related to the Council items being considered on that date.

COUNCIL DELEGATION OF AUTHORITY TO THE LGC FOR CITY CONTRACTS

Currently, a City-held contracting method is being evaluated for the construction of the Waller Creek District | Creek Delta Project (Creek Delta) and may be considered for future projects. All previous projects within the District, including Waterloo Park, have been delivered with the Conservancy as contract holder but this option is being explored because of the technical strength of the City to oversee and manage work requiring specific watershed and sustainable design and construction expertise to successfully deliver the project.

Legal Review and Outcome

Council must expressly approve and authorize any contract between the City and a third party (City contract) involving an expenditure exceeding what is referred to as the “City Manager’s administrative-authority” threshold (currently \$61,000). For every contract that the City enters into with a third party, Council not only reviews and approves of the contract and project going forward in a general sense, but it also “authorizes” the contract. That is, Council specifically authorizes the City Manager to enter into negotiations for a contract, to award a contract, and to execute a contract. If the City creates a local government corporation and desires that the corporation have the specific power of authorizing that City’s contracts with third parties, the law requires Council to make a clear and express delegation of this power via resolution or ordinance.

Along those lines, City staff reviewed the ordinances and resolutions relating to the work within the District. Staff knew that the ordinances and resolutions provided authority for the LGC to approve of District projects and phase plans. But staff needed to determine if Council had clearly delegated to the

LGC the power to authorize the City Manager to negotiate, award and execute a contract necessary for the design and construction of the projects within the District. The review was performed by the Law Department with the assistance of the Watershed Protection Department (WPD) and Parks and Recreation Department (PAR), co-sponsors for the district improvements.

City staff found upon review that Council has not explicitly delegated to the LGC the power to authorize City contracts. If it is Council's intent, when the City is manages the projects, to allow the LGC to authorize the City contracts necessary to complete the work for a District project, then Council will need to make an express delegation to that effect. Otherwise, after the LGC has approved of the project and/or phase plan going forward, Council will still need to authorize the actual negotiation, award and execution of each City contract.

For City projects, in addition to authorizing City contracts, Council also makes certain determinations related to the use of alternate delivery methods. Texas law allows governmental entities to use a method other than the traditional competitive sealed bidding method, provided that the governing body, before advertising, determines which method provides the best value for the governmental entity. The law also provides that the governing body may delegate its authority to a designated representative, committee, or other person.

Along those lines, City staff also reviewed the ordinances and resolutions relating to the work within the District to determine if Council had clearly delegated to the LGC the power to make these best value determinations for District projects. City staff found upon review that Council did not explicitly delegate to the LGC the authority to make the legal determinations necessary for the use of alternative methods for City contracts.

If it is Council's intent, when the City is the party managing the projects, to allow the LGC to make the statutorily required best value determination and thereby authorize the use of one of the alternative delivery methods available by law, then Council will need to make an express delegation to that effect. Otherwise, after the LGC has approved of the use of an alternate delivery method for a given project, Council will still need to make a determination as to whether the delivery method provides the City with the best value for that specific project.

Recommended Legal Clarification

When the City is the party managing the District project, in order for the LGC to perform these functions, legal clarification is needed. The proposed request for Council action will include the following:

- Authorize the negotiation, award and execution of City contracts necessary for the design and construction of the improvement projects within the District and
- Authorize procurement determinations (alternative project delivery methods) to ensure best value for the City.

Support for Legal Clarification

This action would be consistent with the spirit of the public-private partnership and would allow the team to continue seamless delivery of these innovative world-class projects while optimizing the strengths of each partner for nimble workflow. When projects within the district align with areas of expertise held by the City, it is preferable for the City to hold contracts within the District to allow for quick and efficient delivery of the projects within the Council-approved design plan, while being responsive to upcoming procurement and contracting needs. The continuation of work within the District, considering the significant impacts the pandemic continues to have on the city, is particularly important and has the capability of providing an economic driver during these uncertain times. In addition, the proposed Council action would leverage the LGC's ability to support Council by balancing its originally intended management and oversight purpose for each of the parties within the partnership.

This memo formally acknowledges departmental support from PARD and WPD, as co-sponsors in the District, for providing legal clarification of implicit authority already understood in the Agreements. As such, PARD and WPD also request the LGC to consider formally approving a recommendation to support this action at the LGC meeting currently scheduled for Wednesday, August 5, 2020.

Should you have any questions, please contact Kimberly (512-974-6722) or Jorge (512-974-3438).

cc. **Rey Arellano, Assistant City Manager**
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