

Staff Summary Report



Council Meeting Date: August 14, 2008

Agenda Item Number: 21

SUBJECT: Amendment to the Downtown Tempe Community Enhanced Services District Contract

DOCUMENT NAME: 20080814cdcm02 COMM DEV/REDEVELOPMENT ADM (0403-01)

SUPPORTING DOCS: Yes

COMMENTS: Staff is requesting Council approval for an amendment to the Downtown Enhanced Services District Contract between the City and the Downtown Tempe Community (DTC).

PREPARED BY: Chris Messer, Principal Planner (350-8562)

REVIEWED BY: Chris Salomone, Community Development Manager (350-8294)

LEGAL REVIEW BY: Cynthia McCoy, Deputy City Attorney (350-2187)

FISCAL NOTE: NA

RECOMMENDATION: Approval of the attached contract substantially as submitted.

ADDITIONAL INFO: The Downtown Tempe Enhanced Services District is a special taxing district where the property owners within the district elect to levy an additional property tax or assessment against themselves in exchange for enhanced municipal services.

The Downtown Enhanced Services District was formed in 1993 and provides benefits including enhanced public safety programs, additional maintenance and clean-up of streets, alleys and sidewalks, as well as district promotion and marketing. The City contracts with the Downtown Tempe Community to manage the district and aid in the delivery of the enhanced services.

The current contract, which was last amended in 2004, has expired and needs to be renewed. This version of the contract is largely unchanged from past agreements. The major changes include the latest strategic plan for the DTC / Mill Avenue District and the contract is approved subject to the annual renewal of the assessments.

**AMENDMENT TO THE SPECIAL IMPROVEMENT DISTRICT
CONTRACT FOR THE MILL AVENUE ENHANCED SERVICES
DISTRICT
C08-_____**

This AGREEMENT is made as of this _____ day of _____, 2008 (the "Effective Date"), by and between the CITY OF TEMPE, a municipal corporation (the "City"), and the DOWNTOWN TEMPE COMMUNITY, INC., a non-profit corporation ("DTC").

RECITALS:

- A. **WHEREAS**, Resolution No. 93.35 established the Downtown Tempe Enhanced Services Improvement District (the "District") in the downtown Tempe area; and
- B. **WHEREAS**, on October 11, 1993, the City and Downtown Tempe Community Inc. (DTC) entered into an agreement (C93-166) whereby the DTC agreed to manage the Downtown Tempe Enhanced Services Improvement District ; and
- C. **WHEREAS**, on February 11, 1997 the City and DTC executed Addendum No. 1 to contract C93-166; and
- D. **WHEREAS**, on February 26, 2004 the City and DTC entered into an amended contract for Downtown Tempe Enhanced Services Improvement District (C2004-31); and
- E. **WHEREAS**, on August 5, 2004 the City and DTC entered into an the First Amendment to the Downtown Tempe Enhanced Services Improvement District (C2004-31A); and
- F. **WHEREAS**, the City and DTC desire to continue their contract for the management of the District.

NOW, THEREFORE, in consideration of the recitals and the mutual obligations of the parties hereto, each of them does hereby covenant and agree with the other as follows:

SECTION I

SCOPE OF SERVICES

1.1. Objective. The primary objective of the scope of services provided by DTC shall be to increase the economic and civic value of downtown Tempe through enhanced management

and promotional services for the District, as shown in **Exhibit "A"**, on behalf of the DTC members, the City of Tempe and other stakeholders.

1.2. Description of Services. The DTC will provide the District with the services listed in the Strategic Plan for the Mill Avenue District attached as **Exhibit "B"**, including at a minimum the following:

1.2.1. General Administration. The DTC shall comply with the published DTC bylaws, maintain high ethical standards in the conduct of its internal and external business affairs and shall maintain a high standard of public integrity.

1.2.2. Promotion. The DTC shall promote the District and all of its individual market and geographic segments through the development and implementation of a marketing plan, including but not limited to: publications, the internet and special events, as well as an advertising and public relations campaign.

1.2.3. Business Development. The DTC shall develop a marketing and economic development strategy to reach both existing and potential markets appropriate to the District.

1.2.4. Additional Public Services. The DTC shall:

a. Promote public services provided by the City within the District to ensure cleanliness of sidewalks, alleyways, and public areas, encourage a private, cooperative maintenance program by private property and business owners;

b. Manage a cooperative parking program in accordance with the approved parking agreement between the City and DTC (City contract No. C04-32 and C2004-32a,) which coordinates all parking operations, both public and private in the District;

c. Provide information for and support to property and business owners and residents located within the District and represent their interests as appropriate to the City and other public and private agencies; and

d. Provide supplemental public safety services for the District in cooperation with the Tempe Police Department.

1.2.5. Coordination with the City. The DTC shall:

a. Prepare and submit for City review and approval a work program for the upcoming fiscal year that satisfies the scope of services outlined in **Exhibit "B"**. This program shall be finalized by the DTC and submitted to the City by June 15, preceding each fiscal year covered by this Agreement.

b. Provide written annual progress reports to the City on or before September 1 of each fiscal year covered by this Agreement, covering the immediately preceding fiscal year.

c. Provide the City with a financial review in odd numbered fiscal years prepared by an independent certified public accounting firm and with a certified audit report in even numbered fiscal years prepared and certified by an independent certified public accounting firm, by October 31 of each fiscal year during the term of this Agreement. In addition, the DTC shall allow the City of Tempe and its authorized representatives, access to DTC's financial records at all reasonable times and as often as City may request, and DTC and its chief executive and financial officers shall discuss the affairs, finances and accounts of DTC with City. City may require that DTC retain, at DTC's sole cost and expense, a firm of qualified certified public accountants to conduct an audit of DTC's financial condition at any time during the term of this Agreement.

d. Assist the City in managing Special Improvement District Project No. 28769 including the updating of land use and property ownership information, the development of proposed assessment lists, and the scheduling of events leading to assessment hearings and other appropriate public hearings for each budget year covered by this Agreement.

e. Submit a detailed operating budget for the upcoming fiscal year by June 15 of each fiscal year covered by this Agreement.

SECTION II

EFFECTIVE DATE

2.1. Term. The term of this Agreement shall commence on the Effective Date and continue in perpetuity, unless sooner terminated as provided herein.

SECTION III

COMPENSATION

3.1. Advance. The City advanced to the DTC, the sum of Two Hundred Fifty Thousand Dollars (\$250,000) to begin operations of the District in 1993 and 1994. This advance was used to fund the DTC's operation until proceeds from the District Assessment were received by the City. DTC shall repay the advance at a zero percent (0%) interest rate when the district is terminated.

3.2 Annual Assessment. For the term of the Agreement, the City agrees to cause the Maricopa County Assessor to levy against the property within the District an annual special assessment and to remit to the DTC for the services to be rendered by it, an amount equal to the

annual special assessment for the District. City will pay the assessments in two semi-annual installments consistent with payments of special assessments generally.

The City has agreed that the City-owned property located within the District shall be assessed as if such property were held privately. It is understood that a portion of the City's annual assessment will be assessed by the City against those tenants occupying City property. If the City is precluded by law from assessing any or all of its tenants, the City's assessment will be reduced by an amount equal to such tenant's assessment.

SECTION IV

OTHER CONSIDERATIONS

4.1. **City Services.** The City agrees that so long as the District exists, it will not materially reduce the level of City-provided public services for the District from that level provided on July 1, 2002, including police staffing, field maintenance and landscape maintenance. It is the City's intent to provide services consistent with the levels provided on July 1, 2002, however, the City has the right to change, at any time, the level of services for the District based upon financial priorities or capabilities, changing circumstances such as weather, crowd composition, other operational conditions or the general health, welfare or public safety of the inhabitants of the District or the City of Tempe.

SECTION V

REMEDIES

5.1. **Automatic Termination.** This Agreement shall be terminated automatically if either of the following two conditions apply:

a. This Agreement shall terminate at the end of the fiscal year following City Council's decision not to renew the Improvement District or if the District fails to be renewed by the property owners during the applicable assessment hearings.

b. This Agreement shall be terminated automatically if the DTC ceases to exist, in which case all assets of DTC shall devolve upon the City. Although it is contemplated that the transfer of assets will require no further action on the part of either party, DTC shall execute such documents, instruments and assignments as City may request to evidence or effectuate such transfer.

5.2. **Termination of District.** In any event in which this Agreement is terminated, abandoned, or otherwise ceases to exist, the City agrees that the District shall be terminated immediately upon the completion of the repayments of the advance referred to in Section 3.1.

ARTICLE VI

INDEMNIFICATION

6.1 Liability and Indemnification. DTC shall obtain and maintain the liability and other insurance shown in Exhibit "C" and DTC shall indemnify, protect, defend and hold harmless the City, its Council members, officers, employees, and agents from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or indirectly, in whole or in part, out of the performance of this Agreement by DTC, except to the extent such damages are the result of the sole negligence or willful misconduct of the City.

ARTICLE VII

CONFLICT OF INTEREST

7.1 Conflict of Interest. Pursuant to Arizona law, rules and regulations, no member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested. This Agreement is subject to the provisions of A.R.S. Section 38-511.

SECTION VIII

MISCELLANEOUS PROVISIONS

8.2. Failure to appropriate. If the City's performance under this Agreement depends upon the appropriation of funds by the City Council and if the City Council fails to appropriate the funds necessary for performance, then the City may provide written notice of this to the DTC and cancel this Agreement without further obligation of the City.

8.3. Binding Agreement; Assignment. This Agreement shall be binding upon the successors and assigns of the parties. However, no party shall have the right to assign this Agreement or any interest in this Agreement without the prior written consent of the other parties; City may grant or withhold such consent in its unfettered discretion.

8.4. Notices. Any notice, demand or request provided for in this Agreement shall be in writing and shall be deemed properly served, given or made if delivered in person or sent by registered or certified mail, return receipt requested, pre-paid to the parties as specified below.

If to the City: City of Tempe
PO Box 5002
Tempe, Arizona 85280
Attn: Community Development Manager

If to DTC: Downtown Tempe Community, Inc.
Executive Director
310 S. Mill Avenue Ste. A-201
Tempe, AZ 85281

ARTICLE IX

GENERAL PROVISIONS

9.1 Dispute Resolution. In the event that there is a dispute hereunder which the parties cannot resolve between themselves, the parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by non-binding mediation before commencement of litigation. The mediation shall be held under the commercial mediation rules of the American Arbitration Association. The matter in dispute shall be submitted to a mediator mutually selected by DTC and the City. In the event that the parties cannot agree upon the selection of a mediator within seven (7) days, then within three (3) days thereafter, the City and the DTC shall request the presiding judge of the Superior Court in and for the County of Maricopa, State of Arizona, to appoint an independent mediator. The mediator selected shall have at least five (5) years' experience in mediating or arbitrating disputes relating to improvement districts or enhanced services. The cost of any such mediation shall be divided equally between the City and DTC, or in such other fashion as the mediator may order. The results of the mediation shall be non-binding on the parties, and any party shall be free to initiate litigation subsequent to the moratorium.

9.2 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona.

9.3 Waiver. No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

9.4 Attorneys' Fees. In the event of any actual litigation between the parties in connection with this Agreement, the party prevailing in such action shall be entitled to recover from the other party all of its costs, expenses and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

9.5 Schedules and Exhibits. All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

9.6 **Entire Agreement.** This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

9.7 **Manager's Power to Consent.** The City hereby acknowledges and agrees that any unnecessary delay hereunder would adversely affect the DTC and/or the implementation of the Downtown Parking Plan, and hereby authorizes and empowers the City Manager to consent to any and all requests of the DTC requiring the consent of the City hereunder without further action of the City Council, except for any actions requiring City Council approval as a matter of law, including, without limitation, any amendment or modification of this Agreement.

IN WITNESS WHEREOF, the City has caused this Agreement to be duly executed in its name and behalf by its Mayor and its seal to be hereunto duly affixed and attested to by the City Clerk, and the DTC has executed and sealed the same on or as of the day and year first above written.

ATTEST:

"CITY"

CITY OF TEMPE, an Arizona municipal corporation

City Clerk

APPROVED AS TO FORM:

By _____
Hugh Hallman, Mayor

City Attorney

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this ____ day of _____, 2008, before me, the undersigned officer, personally appeared Hugh Hallman, who acknowledged himself to be Mayor of the CITY OF TEMPE, an Arizona municipal corporation, whom I know personally/whose identity was proven to me on the oath of _____, a credible witness by me duly sworn/whose identity was proven to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument/whose identity I verified on the basis of his _____, and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

Notary Public

"DTC"

Downtown Tempe Community Inc, an Arizona corporation

By _____
Name _____
Title _____

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this ____ day of _____, 2008, before me, the undersigned officer, personally appeared _____ who acknowledged him/herself to be the _____ of the Downtown Tempe Community, an Arizona corporation, whom I know personally/whose identity was proven to me on the oath of _____, a credible witness by me duly sworn/whose identity was proven to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument/whose identity I verified on the basis of his/her _____, and s/he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

Notary Public