



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** Agreement for Downtown  
Property and Business  
Improvement District Services  
and Other City Services

**DATE:** January 10, 2008

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## SUPPLEMENTAL MEMO

### BACKGROUND

On August 7, 2007, the City Council and the Redevelopment Agency Board approved the formation of the Downtown Property-Based Business Improvement District (PBID) and directed assessments to be levied and collected from the property owners within the boundaries of the PBID. Council also made findings that the Downtown Association was uniquely situated to provide oversight and management of the enhanced services to be funded by the PBID assessments as well as the baseline services (i.e. street and sidewalk cleaning and maintenance services) already being provided by the City. The Council further authorized the City Manager to begin negotiations with the Downtown Association to provide oversight and management of those services. Subsequent to this authorization, the PBID formed its own "Owners' Association" to be fully responsible for the management of the PBID assessments and the delivery of the PBID enhanced services. The Owners' Association then advised the City that they, in turn, would negotiate with the Downtown Association for the actual management of the PBID assessments and delivery of the enhanced services.

In light of the above, the City has negotiated an agreement with the Owners' Association for the management of the PBID assessments and the provision of the PBID enhanced services; and, the Downtown Association for the management and provision of the City's baseline services. During negotiations, the City requested the Owners' Association and the Downtown Association (collectively, "Associations") to agree that they would each defend, indemnify and hold harmless the City, its officers, employees and agents (collectively, "City") against any claim, loss or liability arising out of or resulting from the willful or negligent acts or omissions by the Associations during their performance of the work done pursuant to the agreement. However, the Associations requested mutual indemnification requiring the City to also agree to defend, indemnify and hold harmless the Associations against any such claim, loss or liability.

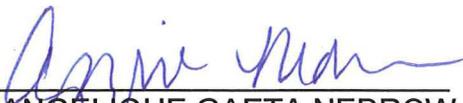
This Office recommends the Council not approve a mutual indemnification clause and instead, approve an agreement with the Associations containing no indemnification language.

**ANALYSIS**

Normally, when contracting with other parties for the delivery of goods and services, the City requires those parties to agree to unilaterally indemnify, defend and hold harmless the City against any claim, loss or liability. The exception is when the City is contracting with other government agencies. In those instances, the City will sometimes agree to a mutual indemnification provision where each party to the contract agrees to defend, indemnify and hold harmless the other party for the negligent party's willful or negligent acts.

In the instant matter, while this Office understands the request by the Associations to include a mutual indemnification provision, this Office does not recommend agreeing to such a provision for the following reasons. First, under federal and state law, the City, as well as its officers, employees and agents, enjoy certain immunities which allow them to engage in the daily functions of their jobs and exercise discretion in those functions with the knowledge that that they cannot be held liable for damages caused by that exercise of discretion provided that it is reasonable and within the realm of their duties. If the City were to agree to indemnify the Associations for any claims arising out of the work that they perform on behalf of the City and in the public right-of-way, the City could potentially lose these immunities. As such, this Office recommends approval of the agreement as drafted, with no indemnification provision. With no indemnification provision, in the event that a person brings a claim against the City or the Associations, each would be liable for its own negligence and the decision of which party is actually negligent would be left to the trier of fact, should the claim make its way to the courts.

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By   
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