



Discussion of Legal Issues Identified to Park Board by CCAs - Amended April 5, 2017

This document discusses legal issues in the Joint Operating Agreement (JOA) that were identified to the Park Board by the Community Centre Associations (CCAs).

1) Constitution and Bylaws

Legal Issue

- a) The current constitution and bylaws of a CCA may not be consistent with permitting the proposed activities and expenditures under the new JOA. For example, the constitution of some CCAs set out a purpose which does not allow for providing services beyond its neighbourhood boundaries or does not allow funds to be used for any purpose other than in its own neighbourhood.
- b) Certain governance requirements in the JOA (for example, ensuring that the bylaws are not changed or a director who runs for office steps down) are not strictly in the control of the directors of the CCA, there may be situations where members of a CCA vote to make amendments not put forward by the directors.

Discussion

- a) Each CCA has its own constitution and bylaws, and they vary widely in scope and purpose. Under the *Societies Act*, the constitution and bylaws of a Society may be amended by a special resolution of the members of the society. Most CCAs have undertaken this process on many occasions, some update bylaws or constitutions on a regular basis and some do so less frequently. Amendments to bylaws or constitutions must be made by special resolution vote of the membership at a general meeting of the Society. The *Societies Act* requires that between 14 and 21 days' notice is given before a general meeting is held, depending on the number of members and provisions of the bylaws.

The Park Board and the City of Vancouver frequently enter into service delivery agreements with non-profit organizations. Typically, this process requires that the applicable non-profit meet criteria that are determined by the Park Board or City, including showing they have an appropriate purpose and bylaws. Agreements that are entered into then either prohibit the non-profit from changing their constitution or bylaws for the term of the agreement or require that any amendments not conflict with the agreement entered into.

In this case, the Park Board has a long standing relationship with the CCAs and recognizes that some CCAs carry out a scope of activities that are broader than the joint operation of the community centres or may have a constitution that sets their purpose as being only in relation to the centre they operate. The Park Board is seeking to update how the community centres across Vancouver are managed and wish to continue the productive service delivery relationship with the CCAs. This



expansion of the service delivery model to treat the community centers as more of a network requires that the CCAs ensure they are able to carry out the terms of the updated JOA before they sign it. For some CCAs, this may mean updating their constitution or bylaws so they are satisfied that the activities and expenditures contemplated under the draft JOA are authorized by and consistent with the amended constitution and bylaws of the CCA. Due to the change in the *Societies Act*, many CCAs will likely need to update their bylaws and constitution in any event to come into compliance with the new *Act*. For CCAs that are also registered charities, if their purpose is revised, this change will need to be submitted to and approved by the CRA.

The alternative to the CCAs updating their respective constitution and bylaws, if required, is that the Park Board abandons its policy objectives for system-wide services or the implementation of public policy or does not enter into a new joint operating agreement with a CCA that is unable or unwilling to bring their constitution and bylaws into alignment with the new JOA.

- b) The issue of the board of directors of a CCA not being able to bind the membership is of particular concern with organizations that have large memberships. Many non-profit organizations have small memberships or primarily non-voting memberships, which gives the board more ability and power to control the direction of the organization.

This concern has arisen in respect of several requirements set out in section 4 of the JOA, which section includes requirements of the CCA to maintain a certain purpose or prohibits the CCA from changing its governance documents to a form that conflicts with the terms of the JOA. The *Societies Act* does provide a mechanism for members to suggest and vote on motions the directors do not agree with, although there is a high threshold to meet. Accordingly, directors of the CCA cannot covenant that such a change will never happen.

The sections of the JOA at issue include requirements that the Park Board has identified as being important for ensuring good governance, and for preventing the reoccurrence of some problems that currently exist in the system.

Recommendation

- a) Staff recognizes that some CCAs have purposes which do not currently contemplate the scope of activities included in the draft JOA and as such cannot sign the JOA until their constitution and bylaws are amended by a special resolution of the membership to contemplate the activities and expenditures under the JOA. To allow each CCA time to review their constitutions and bylaws and process any changes required to enable the CCA to sign the JOA, staff recommend that the date by which the CCAs must sign the JOA be set as September 30, 2017 and the Effective Date of the Agreement be amended to January 1, 2018.



Staff have recommended the foregoing time period because CCAs will require time to review their bylaws and constitution to consider what changes, if any, are required. We have also heard from CCAs that their boards do not meet during the summer months so it would be challenging to meet a signing deadline that occurs during the summer. Staff are also aware that some CCAs may require this additional time to prepare the changes required to transition under the new *Societies Act* so that all bylaw and constitutions changes can be carried out in the same process.

- b) Legal counsel for Dunbar Community Centre has suggested that the several governance requirements in Section 4 of the JOA be converted into events of default such that that the CCA has an opportunity to attempt to rectify any governance changes that are not in compliance with the JOA. Park Board staff are satisfied that this alternative approach provides certainty around good governance and have made corresponding proposed changes to put into place the suggestions by Dunbar's counsel.

Legal counsel for a group of 15 CCAs (Margaret Mason) suggested that all governance obligations set out in Section 4, other than 4(e) [Conflict of interest with elected officials sitting on the Board], be deleted and that the CCA's only obligation is to comply with its bylaws and constitution and the *Societies Act*. Staff do not recommend this change.

2) Community Centre Investment Fund/Operations Fee

Legal Issue

For Societies that are not registered charities under the Income Tax Act, the legal issue with respect to the Community Centre Investment Fund is addressed by item 1 above: ensuring the Societies purpose (as set out in the constitution) allows for this payment. Section 4 of the *Societies Act* requires that a Society only distributes money or property as allowed under the *Act*, which includes "in furtherance of the purposes of the Society."

For Societies that are registered Charities under the *Income Tax Act*, some societies have expressed a concern with the payment to the Park Board being construed as a "gift" to an entity that is not a qualified donee and therefore that payment may not be allowed under the Income Tax Act rules that pertain to charitable organizations.

Secondly, CCAs have also provided non-legal suggestions regarding the name of the fund and the concerns that payments into the fund may be increased in the future.



Discussion

The Park Board has already obtained a legal opinion that the payment of the Community Centre Investment Fund/Operation Fee amount is not contrary to the rules under the *Income Tax Act* because it is a payment in consideration and falls within the scope of permitted expenditures for charitable organizations under the *Act*. However, the Park Board recognizes that some CCAs still have concerns about this issue because their legal counsel have provided conflicting advice. The fundamental assumption that underlies this conflicting advice is that the Park Board is not a qualified donee under the *Income Tax Act*. This assumption was made because the Canada Revenue Agency (“CRA”) website does not specifically list the Park Board as a qualified donee. Only the City of Vancouver is listed as a qualified donee on the CRA website.

The City of Vancouver, as a municipality, has under the *Income Tax Act* a “qualified donee” status as registered charities have, and can issue official donation receipts. The City can also receive funds from registered charities. Because the Vancouver Park Board is considered an administrative arm of the City of Vancouver for the purposes of the *Income Tax Act* it is also considered a qualified donee under the City of Vancouver status. This is also the case for the Vancouver Police Board. This practice has been ongoing for many years and has been reviewed by the CRA through an audit process.

The CRA has verbally confirmed that, provided the recipient of the funds is a qualified donee, there are no issues with the payment of these funds by the CCAs to the Park Board, regardless of whether they are construed as payments for consideration or payments as a gift.

Recommendation

With respect to non-legal issues, staff is amendable to using terminology to refer to the fund that some CCAs have suggested. Accordingly, staff recommends that the name of the Community Centre Investment Fund be changed to “Operations Fee.”

Staff also recommends that the JOA be amended to specify that payments into the fund may only be increased in excess of 2% upon renewal if approved by the Park Board Commissioners. This will provide some comfort to the CCAs that increases will only be allowed if they can be shown to be necessary and are approved by the elected officials.

Staff also recommends a minor language change in the JOA, which confirms that the Park Board is a “qualified donee”, so that CCAs that hold charitable status can have comfort that their payments are unequivocally in compliance with the *Income Tax Act*.



3) Indemnity

Legal Issue

Some CCAs have expressed concern that the indemnity provided by the City of Vancouver to the CCAs is included in a separate document and is not part of the JOA. It has been requested that the indemnity be added to the JOA and be given for the Term of the JOA.

Discussion

The concerns raised by some CCAs regarding the indemnity do not result from changes proposed under the new JOA. The existing indemnity agreements between the CCAs, the City and the Park Board were entered into around 2001 and the Park Board has prepared the new JOA so the indemnity will continue to exist in its current form.

The indemnity that is provided by the City to the CCAs is very unique. Generally speaking, most arrangements between the Park Board or the City and a non-profit service provider include an indemnity from the non-profit in favour of the Park Board and/or the City. The provision of indemnity by the City to the CCAs is unusual and creates a risk to the City that it does not typically agree to bear. However, because the CCAs are providing a valuable service, City Council previously agreed to the current form of indemnity when it was presented prior to 2001. Any changes to terms of the indemnity must be approved by City Council.

The existing indemnity is a flexible format which allows a variety of programs and services to be indemnified so long as they are approved by the General Manager of the Park Board. Accordingly, any new programs or services that are contemplated under the new JOA can be indemnified under the current construct.

Recommendation

Staff do not recommend any change to the JOA to address this item, but suggest that the current form of indemnity be attached as a new Appendix E to the JOA for ease of reference.

4) Employer Risks

Legal Issues

Some CCAs have requested more clarity on what employer risks are being borne by the CCAs.

Legal counsel for a group of 15 CCAs requested that the indemnity of the CCA to the Park Board for employment issued be deleted in its entirety.



Discussion

The City has required that certain employment risks be addressed and protected against because the CCA is retaining control of CCA contractors and employees. This is different from the protection provided by the indemnity agreement above. Because some instructors or contractors are employed by several CCAs, work in Park Board/City buildings and the Park Board staff often carry out employer functions on behalf of the CCA, there is a risk that employer liabilities will be placed on the City if they were to arise. The Park Board/City are asking the CCA to indemnify the City/Park Board only for risks that are in the CCAs control, and correspondingly, out of the City/Park Board's control. These are:

- “Breaches relating to employment or service contracts with Association Personnel or Association volunteers (for example, improper termination, discipline or human rights complaints); or
- Non-compliance with any statutory or regulatory obligations that Association has in respect of Association Personnel or volunteers (for example, completing and remitting statutory deductions or completing criminal record checks).”

Because some of these functions and responsibilities are often delegated to the Park Board by the CCAs, the Park Board has clarified that it will take full responsibility for any liabilities that arise when those functions are delegated to the Park Board. The Park Board/City has included a reciprocal indemnity to the CCA for this delegation of duties. Currently, most delegation by the CCAs to the Park Board occurs informally or verbally. The draft JOA requires that such delegation must be in writing and accepted by both parties, so responsibilities of each party are clear and documented.

Recommendation

Park Board has clarified the language in Section 12 of the JOA to clarify the items for which the CCAs and the Park Board are responsible to indemnify each other. Wording has been clarified to state that the Park Board takes full responsibility for duties that are delegated to the Park Board.

As part of implementation of the JOA, staff will be preparing:

- (a) a summary of responsibilities and risk document to show how the risk, responsibility and insurance obligations under the JOA apply to common scenarios for the CCAs and the Park Board (for example, relationships with contractors and volunteers, special events etc.); and
- (b) a delegation of responsibility form or agency agreement which will be used to record all employer responsibilities delegated to the Park Board by a CCA, as applicable.



5) Ownership

Legal Issue

Sunset Community Centre Association has continued to assert ownership rights over the community centre building. They do not agree with the statement of ownership in the JOA.

Recommendation

Staff recommend that the Park Board and City maintain the current draft language in the JOA and do not grant ownership rights of public assets to private bodies.

6) Miscellaneous issues

Legal counsel for Dunbar Community Centre provided suggested amendments to section 4 of the JOA to amend certain clauses to reflect powers of the membership vs powers of the directors of the organization. Staff agree with the analysis provided by Dunbar's legal counsel and have incorporated the suggested amendments in the draft JOA.

Legal counsel for 15 of the CCAs has also provided revised language for consideration, but did not differentiate between legal and business issues. Where the revised language clearly addressed a legal issue or touched on another legal issue, staff have considered the language and have incorporated the following suggested amendments into the JOA:

- (a) Change from referring to “registered Society” to “society incorporated under the *Society Act*” (Recital E, Section 4);
- (b) Amendments to section 4 so that it reads “the Association ...will conduct itself at all times in accordance with its constitution and bylaws and the requirements of the *Societies Act*”;
- (c) Deleted requirements that the CCAs have audit and responsible use of funds policies (section 6.1). Staff are satisfied that sufficient transparency exists with other provisions of the JOA;
- (d) Section 6.1 was amended to specify that training sessions on good governance to be offered by the Park Board are *optional*; and
- (e) Wording change to align wording in section 12.4 with suggested wording regarding the Recreation Supervisors role in assisting Boards with their function.



Quasi-Legal Issues

7) Term and Termination

Issue

Term and termination is not strictly a legal issue, but several CCAs have consistently brought up the issue of term and termination as a concern. Most CCAs have requested a single term of 15 years. Some CCAs have also expressed concern about the potential of Park Board staff requesting unreasonable changes to the JOA at each renewal period.

In addition to requesting a single term of 15 years, some CCAs have also requested more certainty with the indemnity agreement and a term that is tied to the JOA. Staff do not recommend a single 15 year term for two reasons: 1) it is important to have opportunities of review during a 15 year period, and 2) staff cannot commit to a term of the indemnity on behalf of the City. The terms of the indemnity agreement are in the City's control.

Recommendation

As a compromise, staff recommends a change to the current term and renewal options to be as follows:

- The initial term will be 7 years, with one 8 year renewal term.
- At renewal, if either party wishes to propose changes to the body of the JOA, the process for considering changes must be established by the Park Board Commissioners, be in a public forum and any changes to the body of the JOA will be subject to the approval of the Park Board Commissioners. If the changes are not finalized before the renewal term commences, the JOA will stay in effect until such time as the changes are finalized or until the end of the renewal term, whichever is first.

Park Board staff have included proposed revised language in the JOA to this effect.

8) Accumulation of Funds and use of Revenue

Issue

Some CCAs object to restrictions placed on the accumulation or use of funds by a CCA, specifically as set out in Section 14.1(c).

Discussion

The wording in section 14.1(c) ensures that funds that are generated using the Community Centre Network are used within the Network. Without this section, CCAs

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are free to use funds generated from the Community Centre for purposes which are outside of the Network. The JOA effectively grants CCAs a non-market licence to use the Jointly Operated Facilities on the terms and conditions set out in the JOA, and a grant in the form of services in kind. These items and services are paid for using public funds. It is critical that the Park Board can ensure that public assets are used for the best interests of the public, and that includes ensuring that funds generated by leveraging these public assets are reinvested into the system which generates them. The JOA does not place any restrictions on funds that are generated outside of the Community Centre Network.

The wording in section 14(c) is not a legal issue, it is contractual language. The requirement that the CCA ensure funds generated in the community centre network are used within the network is a contractual requirement only and does not create any conflict under the *Societies Act*. If a CCA is concerned that a current expenditure of funds does not fit within the scope of this section (for example, WECCA's scholarship program), that exception can be addressed in the Appendices.

Recommendation

Staff recommend that Section 14(c) remain in the JOA, but agree that the first paragraph which reads “As a registered society, the Association acknowledges that its goal and purpose is not to generate and retain large financial surpluses.” can be deleted. Park Board staff are satisfied that the new JOA provides for sufficient transparency into the financial management of the CCA and also provides public accountability as to how the CCA uses their excess funds, without the inclusion of this language.

Staff have made the corresponding proposed edits to the JOA.

9) Financial Statements

Issue

Some CCAs have previously expressed concern about having to provide financial transparency to the Park Board with respect to operations that occur outside of the Community Centre. At the request of some CCAs, language in the JOA was previously amended to require CCAs prepare separate financial statements to ensure that only activities under the scope of the JOA are disclosed to the Park Board. We have now received additional feedback that some CCAs do not want the obligation to prepare a second set of financial statements, and prefer Facility Generated Revenue and revenue generated outside of the Community Centre system are identified separately using notes to the financial statements.

Recommendation

Staff finds either option acceptable and have made a proposed corresponding change to the JOA.

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10) Employment Practices Liability Insurance

Issue

Dunbar's legal counsel requested that the requirement of the CCA to secure Employment Practices Liability Coverage be amended so that the CCA is only required to *use commercially reasonable efforts* to obtain and maintain such coverage *if it can be purchased for a reasonable cost*.

Recommendation

This coverage is required to cover a variety of employer risks, not all of which can be deleted through a delegation agreement with the City. For so long as the CCA is the employer or contracting party, this insurance is required. Since this proposed change may result in that coverage not being provided, staff does not recommend this change be implemented.

Miscellaneous Other Comments

CCAs also submitted some comments which were mainly aimed at business issues. Business issue comments that were implemented because they were sufficiently related to legal issues and considered acceptable by staff were previously discussed in the preceding paragraphs. Additional comments received that were not implemented follow, with the source of each comment shown in parenthesis:

- (a) Delete the concept of "surplus revenue" (Mason);
- (b) Change membership to be opt-in or opt-out at the CCA's choice (Mason);
- (c) Delete the concept of the community centre investment fund (Sunset);
- (d) Remove the requirement to use ActiveNet (Sunset);
- (e) Remove the right of the Park Board to audit the CCA (Sunset);
- (f) Concern about risk to CCA from offering system-wide programs (Sunset);
- (g) Dispute resolution clause is too broad and favours Park board (Sunset);
- (h) Staffing and group one payment section contains unacceptable elements (Sunset);
- (i) Amend Recital K so it does not refer to "Programming and services being offered in support of the overall goals of the Park Board and the Associations" (Mason);
- (j) Delete concept of Community Centre Investment Fund and replace it with Operations Fee paid on a scale previously proposed by WECCA (Mason);



- (k) Add clause that states that if the Park Board enters into a binding agreement with any CCA which alters any provision of the JOA, then any other CCA may require the Park Board to enter into a similar agreement with them (Mason);
- (l) Delete the requirement that the CCAs demonstrate to the community, other CCAs and the Park Board that its operations are conducted in a financially transparent and responsible manner and that the CCA practices good corporate governance (Mason);
- (m) Include a requirement that any new public policy not result in any additional expenditure by the CCAs (Mason);
- (n) Delete clause that states Park Board may use funds from the Community Center Investment Fund for the purposes of paying for costs to offer System-wide Programs for free (Mason);
- (o) Delete requirement for books of account be kept in accordance with sound financial policies and procedures (Mason);
- (p) Delete requirement for CCA to publicly report on anything other than audited financial statements (section 14.3 (d) requires more detailed reporting) (Mason);
- (q) Amend arbitration provision so that matters not subject to arbitration include policies and standards established by the Park Board or City that do not directly contradict this Agreement, instead of do not directly contradict *the express terms of* this Agreement (Mason);
- (r) Amend section 20.1 and 20.3 to remove the clause that says the Park Board may not offer new space, additions or replacement space to a CCA if the Park Board holds reasonable concerns regarding the CCA's ability to operate the new space in a safe, professional and compliant manner (Mason);
- (s) Amend section 20.2 so that the Park Board may not remove space that is "unused by the Association for the purposes contemplated under this Agreement for a sustained period" from the scope of the Jointly Operated Facilities; and
- (t) Amend the breach section of the agreement so that "breach" no longer includes failure to comply with the Public Policy or use of funds for purposes not permitted under the JOA (Mason).

No changes were made to the JOA to reflect these comments.