

STAFF REPORT*CITY OF OCEANSIDE*

DATE: December 3, 2014

TO: Honorable Mayor and City Councilmembers

FROM: Property Management

SUBJECT: **APPROVAL OF A FUND AGREEMENT WITH THE SAN DIEGO FOUNDATION TO ESTABLISH AN ENDOWMENT FOR THE FUNDING OF THE MANAGEMENT OF A PORTION OF CITY-OWNED TULEY CANYON HABITAT AND APPROVAL OF A BUDGET APPROPRIATION**

SYNOPSIS

Staff is requesting that the City Council approve a Fund Agreement with The San Diego Foundation to establish an endowment to fund the annual cost of the maintenance and administration of 7.3 acres of habitat mitigation land at Tuley Canyon that was a condition of the Mission Cove Affordable Housing Project; approval to appropriate \$125,000 in the Home Grant Fund and authorization for the City Manager to execute the agreement.

BACKGROUND

On February 5, 2014, the City Council conceptually approved the use of City-owned land in Tuley Canyon as habitat land available for mitigation. Additionally, the City Council approved setting aside 7.3 acres of land in Tuley Canyon ("Property") to satisfy the habitat mitigation condition of the Mission Cove Affordable Housing Project ("Project") to be developed by National Community Renaissance of California and Community Housing Works (collectively "National Core").

As a part of establishing the maintenance obligations for the Property as a habitat mitigation site for the Project, a Property Analysis Record and a Vegetation Mapping Report were prepared for the Property (collectively "Reports"). After analyzing the Reports, a maintenance cost was developed for the initial five-year start-up period as well as for each year thereafter, continuing in perpetuity. Maintenance costs include items such as signage, trash removal, invasive species removal, habitat assessment reports, biological surveys and administration.

As part of the conditions for the development of the Project by National Core, an amount of \$40,701 was provided for the initial five-year start-up maintenance cost. Inasmuch as the habitat maintenance obligations subsequent to the initial five-year start-up period are in perpetuity, an endowment was identified by the wildlife agencies as the preferred funding vehicle to establish a source of revenue for the annual cost of the habitat maintenance of the Property. Accordingly, per the conditions for the

development of the Project, the amount of \$125,000 was also provided through National Core to fund the endowment.

ANALYSIS

The San Diego Foundation ("TSDF") is an organization that was established in 1975, and manages more the \$660 million in assets including over \$26.5 million held in 78 funds for the preservation of land and species in California. TSDF is an organization that specializes in establishing long-term funding needs for businesses, organizations and public institutions in such fields as the environment, science & technology, the arts, and education.

By entering into a Fund Agreement with TSDF, the City is able to generate a significantly higher rate of return than what the City is currently getting on its investments. This is based on the restrictions that apply to investments by a governmental entity that does not restrict an organization such as TSDF. A higher rate of return reduces the amount needed for an endowment, which in turns provides more funds for the development of the Project.

The endowment amount needed is based on the desire to generate sufficient revenue to pay for the annual habitat maintenance of the Property after the initial five-year start-up period, which will be administered and managed by the Property Management Division. Annual expenses include maintenance of the site (e.g., signage, trash removal, etc.), invasive species removal, conducting biological studies, and an administrative cost.

The endowment amount was determined after numerous meetings with TSDF analyzing the annual amount of \$5,000 needed to maintain the Property. Staff and TSDF took into consideration the annual cost associated with the management of the Property after the initial five-year period based on the Reports, inflation factors, and TSDF's average annual rate of return of four percent, to determine the \$125,000 endowment amount.

FISCAL IMPACT

As a condition of the development of the Project by National Core, the initial five-year start-up cost amount of \$40,701 and the endowment amount of \$125,000 were recorded into the Home Grant Fund Loan Receivable account no. 277.1216.0029. Said funds are to be appropriated into the Mission Cove Phase (B) account no. 823131900277.5395.0001 for payment to TSDF in the amount of \$125,000 to establish the endowment per the terms of the Fund Agreement.

During the initial five-year start-up period of maintenance, staff will also expend \$40,701 from said account no. 823131900277.5395.0001 to pay for the associated costs incurred during the period. During the initial five-year start-up period, the annual rate of return earned on the endowment amount in the City's account with TSDF, will accrue to

the account. This will build up a reserve to cover potential unforeseen circumstances, until such time as TSDf begins distributing the \$5,000 needed annually by the City to maintain the Property after the initial five-year start-up period.

INSURANCE REQUIREMENTS

Not applicable.

COMMISSION OR COMMITTEE REPORT

Does not apply.

CITY ATTORNEY ANALYSIS

The referenced documents have been reviewed by the City Attorney and approved as to form.

RECOMMENDATION

Staff is requesting that the City Council approve a Fund Agreement with The San Diego Foundation to establish an endowment to fund the annual cost of the maintenance and administration of 7.3 acres of habitat mitigation land at Tuley Canyon that was a condition of the Mission Cove Affordable Housing Project; approval to appropriate \$125,000 in the Home Grant Fund and authorization for the City Manager to execute the agreement.

PREPARED BY:



Douglas E. Eddow
Real Estate Manager

SUBMITTED BY:



Steven R. Jepsen
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Assistant City Manager



Marisa Lundstedt, City Planner



Michele Lund, Treasury Manager

James R. Riley, Financial Services Director





**FUND AGREEMENT
for the**

**Tuley Canyon/Mission Cove Mitigation Endowment
(a Mitigation Endowment fund)**

THIS AGREEMENT is made and entered into as of December 3, 2014, by and between THE SAN DIEGO FOUNDATION, a California nonprofit public benefit corporation described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended ("TSDF") and the CITY OF OCEANSIDE (hereinafter, "Founder").

1. NAME OF FUND

Founder irrevocably transfers assets to TSDF to establish in TSDF the Tuley Canyon/Mission Cove Mitigation Endowment (the "Fund"). TSDF may receive additional irrevocable gifts of property acceptable to TSDF from time to time from Founder and from any other source to be added to the Fund, all subject to the provisions hereof.

2. PURPOSE

Founder is an organization described in Section 170(c)(1) or 170(c)(2) of the Internal Revenue Code of 1986, and the primary purpose of the Fund shall be to support Founder for habitat, land and species management on the 7.3 acres in the Tuley Canyon/Mission Cove area in accordance with the City of Oceanside Subarea Plan. In the event that Founder should (i) no longer be described in Sections 170(c)(1) or (2) of the Internal Revenue Code of 1986, (ii) become subject to bankruptcy proceedings under state or federal law or (iii) liquidate and dissolve or otherwise cease to exist, then the assets of the Fund shall be applied as described in paragraph 6 below.

3. INVESTMENT OF FUNDS

TSDF shall have all powers necessary or desirable to carry out the purposes of the Fund, including, but not limited to, the power to retain, invest and reinvest the Fund in any manner within the "prudent person" standard and the power to commingle the assets of the Fund with those of other funds for investment purposes, subject however, to the requirements of Sections 5231 and 5240 of the California Corporations Code. TSDF may accept investment recommendations from the Fund Advisor, if any, provided that such recommendations from the Fund Advisor shall be solely advisory, and TSDF may accept or reject them, consistent with the standards of this paragraph.

4. DISTRIBUTEES

Subject to paragraph 6, earnings allocated by TSDF to the Fund shall be distributed exclusively for charitable, scientific, literary or educational purposes or to organizations of the type to which an individual taxpayer may make deductible charitable contributions, gifts, and bequests under the income, gift and estate tax provisions of the Internal Revenue Code of 1986, as amended, and of the Revenue and Taxation Code of California. It is intended by the foregoing that at the time a distribution is made from the Fund, the distribution must be made for a charitable, scientific, literary or educational purpose as described in, or to an organization which is described in, Sections 170(c)(1) or (2), of the Internal Revenue Code of 1986, as amended, and Section 17201 of the Revenue and Taxation Code of California. Distributions from the Fund shall be within the purposes and procedures of TSDF as contained in its Articles of Incorporation and its Bylaws.

5. RECOMMENDATIONS FOR DISTRIBUTION

The Fund shall be administered in accordance with the Uniform Prudent Management of Institutional Funds Act, California Probate Code Section 18501, *et. seq.*, as amended. Distributions from the Fund may be made from income and so much of the net appreciation (realized and unrealized) in the fair value of the assets of the Fund as is prudent under the standard established by Section 18504 of the California Probate Code. Distributions shall be made to permissible distributees and at such times and in such amounts as may be determined by the Board of Governors of TSDF. There shall be no requirement that income be distributed each year; provided, however, that any income not distributed shall be accumulated and added to principal, and shall not later be available for distribution. Distributions shall be made to such distributees of the type described in paragraph 4 as may be designated by the Board of Governors of TSDF; provided, however, that the Fund Advisor of the Fund, if any, may from time to time submit to TSDF the names of distributees to which it is recommended that distributions be made, which distributees shall not be other than those described in paragraph 4. All recommendations from the Fund Advisor shall be solely advisory, and TSDF may accept or reject them, applying reasonable standards and guidelines with regard thereto. If any gifts to the Fund are received and accepted subject to Founder's restriction on the use of income, such restrictions will be honored, subject, however, to the powers of modification set forth in paragraph 7 hereof.

6. CONTINUITY OF THE FUND

The Fund shall continue so long as assets are available in the Fund and the purposes in the Fund can be served by its continuation. If the Fund is terminated for either of the above reasons, TSDF shall devote any remaining assets in the Fund exclusively for charitable purposes that (i) are within the scope of the charitable purposes of TSDF's Articles of Incorporation, and (ii) most nearly approximate, in the good faith opinion of the Board of Governors, the original purpose of the Fund.

7. NOT A SEPARATE TRUST

The Fund shall be subject to the Articles of Incorporation and Bylaws of TSDF. All money and property in the Fund shall be assets of TSDF, and not a separate trust, and shall be subject only to the control of TSDF. Pursuant to Treasury Regulations, the Board of Governors of The San Diego Foundation has the power “to modify any restriction or condition on the distribution of funds for any specified charitable purpose or to any specified organization if, in the sole discretion of the Board of Governors, such restriction or condition becomes unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community or area served.” Treas. Reg. §1.170A-9(e) (11) (v) (B) and (E).

8. COSTS OF THE FUND

A fair portion of the total administrative costs of TSDF shall be paid by the Fund. The administrative cost annually charged against the Fund shall be determined in accordance with the then current Fee Policy identified by TSDF as the fee structure applicable to Funds of this type. Any costs to TSDF in accepting, transferring or managing property donated to TSDF for the Fund shall also be paid from the Fund.

9. ACCOUNTING

This Fund shall be accounted for separately and apart from other gifts to TSDF.

10. PROGRAM POLICIES

Founder acknowledges that he/she has reviewed and is familiar with the attached “Program Policies” and that the Fund will be administered in accordance with such policies.

11. ATTACHMENTS

If checked below, the attachment(s) so designated shall be incorporated by reference herein and hereby made a part of this Agreement as if fully set forth in this Agreement (provided that the applicable attachments are executed by Founder).

Addendum to Fund Agreement for Tuley Canyon/Mission Cove Mitigation Endowment

Endowment Distribution Election for Tuley Canyon/Mission Cove Mitigation Endowment

12. CERTIFICATION

Pursuant to California Government Code section 65968(e), TSDF certifies that it meets all of the following requirements:

- a. TSDF has the capacity to effectively manage the Fund;
- b. TSDF has the capacity to achieve reasonable rates of return on the investment of the Fund similar to those of other prudent investors for endowment funds and

shall manage and invest the Fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances, consistent with UPMIFA;

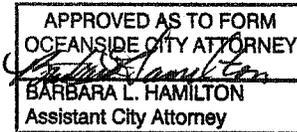
- c. TSDF uses generally accepted accounting practices (GAAP) as promulgated by the Financial Accounting Standards Board or any successor entity;
- d. TSDF will be able to ensure that the Fund is accounted for, and tied to, the Property; and
- e. TSDF has an investment policy that is consistent with UPMIFA.

IN WITNESS WHEREOF, we execute this agreement on _____, 2014.

Founder:

City of Oceanside

By: _____
Steven R. Jepsen, City Manager



Approved by the President & CEO of The San Diego Foundation on _____, 2014.

The San Diego Foundation

By: _____
B. Kathlyn Mead, President & CEO

Attachment: The San Diego Foundation Program Policies



ADDENDUM TO FUND AGREEMENT

for

Tuley Canyon/Mission Cove Mitigation Endowment

THIS ADDENDUM TO FUND AGREEMENT is dated as of the same date as the Fund Agreement by and between THE SAN DIEGO FOUNDATION ("TSDF") and the CITY OF OCEANSIDE and amends and supplements the Fund Agreement as follows:

13. DISPUTE RESOLUTION

A. Mediation. The City of Oceanside and TSDF agree to mediate any dispute or claims arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action. Mediation fees, if any, shall be divided equally among the parties involved. If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or before commencement of an action, refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney's fees, even if they are otherwise available to that party in any such action. Exclusions from this mediation agreement are specified in paragraph 15C below.

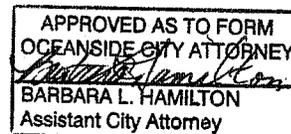
B. Arbitration of Disputes. The City of Oceanside and TSDF agree that any dispute or claim in law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be submitted for neutral, non-binding arbitration. The arbitrator shall be a retired judge or justice, or an attorney with at least 20 years of experience, unless the parties mutually agree to a different arbitrator. The parties shall have the right to discovery in accordance with the Code of Civil Procedure Section 1283.85. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part 3 of the Code of Civil Procedure. Exclusions from this arbitration provision are specified in paragraph 15C below.

C. Exclusions. Any matter that is within the jurisdiction of any bankruptcy court shall be excluded from mediation and arbitration.

IN WITNESS WHEREOF, we execute this agreement on _____, 2014.

City of Oceanside

By: _____
Steven R. Jepsen, City Manager



Approved by the President & CEO of The San Diego Foundation on _____,
2014.

The San Diego Foundation

By: _____
B. Kathlyn Mead, President & CEO



ENDOWMENT DISTRIBUTION ELECTION
for

Tuley Canyon/Mission Cove Mitigation Endowment

Allocation of earnings are made semi-annually to each Fund in March and September. Earnings are available for distribution semi-annually, annually, or on request after an allocation period. Distributable earnings will remain distributable unless it is requested that the earnings be reinvested. Earnings reinvested become a part of principal and cannot be accessed in the future for distribution.

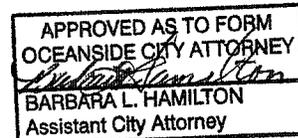
Please check one of the following: (If no selection is made earnings will be held until distribution is requested by founder(s) or advisor(s).)

- Please distribute the earnings semi-annually. (March and September)
- Please distribute the earnings annually.
Circle one: March or September
- Please hold the earnings until distribution is requested.
Please note distributable balance earnings are not credited to the fund.
- Please reinvest the earnings.

(This selection can be changed at any time, but becomes effective on July 1 and January 1.)

City of Oceanside

By: _____
Steven R. Jepsen, City Manager





PROGRAM POLICIES

1. **The San Diego Foundation.** The San Diego Foundation (“TSDF”) is a California nonprofit public benefit corporation exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (“IRC”). TSDF is recognized as a public charity under IRC Sections 509(a)(1) and 170(b)(1)(A)(vi) and operates as a “community trust” under U.S. Treasury Regulations Section 1.170A-9T(f)(11). All contributions to and assets of TSDF are subject to its Articles of Incorporation, Bylaws and Program Policies. TSDF reserves the right to modify the terms and conditions of its Articles of Incorporation, Bylaws and Program Policies at any time.

2. **Donor Advised Funds.** As a community foundation, TSDF may establish for its donors a “donor advised fund,” which is separately identified by reference to the donor or donors. The fund is owned and controlled by TSDF and the donor or persons appointed by the donor have the privilege of providing advice with respect to the fund’s investments or distributions. TSDF has final authority over the distribution of all grants from its donor advised funds, and reserves the right to decline or modify a grant recommendation that is not consistent with these policies or TSDF’s charitable purposes. Gifts to a donor advised fund are irrevocable.

3. **Other Funds.** In addition to donor advised funds, TSDF also establishes scholarship funds (discussed below), agency funds (for the benefit of a specified charity), field of interest funds (for a specified charitable purpose) and habitat funds (to administer funds set aside to maintain ecological preserves). Gifts to these funds are irrevocable.

4. **Fund Minimums.** Generally, a minimum of \$50,000 is required to establish an agency fund and \$25,000 for all other funds.

5. **Providing Grant Advice to Donor Advised Funds.** Once a donor advised fund has been established and funded, and as long as it maintains a fund balance of at least \$10,000, the advisor(s) named in the agreement may recommend distributions to qualified charitable organizations. (TSDF staff will perform due diligence to verify that the organization is a current, qualified charity.) The following rules govern grant recommendations:

- a. **Minimums.** Each recommended grant should be for at least \$250.00.
- b. **Procedure.** Unless otherwise restricted as an endowment, grants may be recommended out of the original principal, as well as accumulated investment earnings, if any. Grant recommendations can be made at any time during the year, except for designated endowment funds, which make distributions in March and/or September. Recommendations can be submitted by mail, facsimile or electronic mail. Forms and instructions for making grant recommendations will be provided upon creation of a fund, as part of an advisor orientation process.
- c. **Grant Restrictions.** The following restrictions apply to grants:
 - i. **No Indirect Benefit.** Grants from donor advised funds may not be used to secure any benefit from the grantee for the donor, the advisor or any persons related to them.
 - ii. **Enforceable Pledges.** Grants from donor advised funds may not be used to discharge or satisfy a charitable pledge or obligation that is legally enforceable against the donor or any other person.
 - iii. **Event Tickets.** Grants from donor advised funds may not be used to pay for goods or services of value received by the donor, advisor or their family members. For example, grants may not be used to support any charitable event, including fundraising dinners, concerts, auctions, or other benefit functions when the donor would receive a return benefit, such as the benefit of being able to attend a fundraising dinner or event. Further, no grants may be used to pay for any portion of a split or bifurcated disbursement to a charity. A split or bifurcated payment refers to the splitting of a payment to a charity, such as for tickets to an event, into two parts: the deductible portion and the non-deductible portion.
 - iv. **Giving to Individuals.** Donors may not choose a specific individual to receive a benefit from a grant from a donor advised fund.

v. Prohibited Loans & Compensation. Donors, advisors or any related parties may not receive grants, loans, compensation or similar payments (including expense reimbursements) from donor advised funds.

d. Restricted Organizations and Purposes. TSDF will not approve grant recommendations that are for non-functionally integrated Type III supporting organizations; supporting organizations that provide support to organizations controlled by the donor, advisor or related persons; supporting organizations that are controlled by the donor, advisor, or related persons; private non-operating foundations; lobbying, political campaigns or other political activities; or any purpose that is not entirely charitable.

e. Remedial Action. TSDF will take remedial action if it discovers that grants have been made for improper purposes. Remedial actions may include, but are not limited to, a requirement that the recipient charity return the grant and/or termination of the donor's advisory privileges.

f. Anti-Terrorism Provisions. As part of the grant review process, TSDF checks all recommended grant recipients against the Treasury Department's List of Specially-Designated Nationals, other U.S. and foreign government watch lists, and the IRS list of organizations whose tax exemption has been suspended under IRC Section 501(p). TSDF will not approve grant recommendations to organizations that appear on such lists.

6. Scholarship Funds. Scholarship funds may have a scholarship advisory committee. All scholarship advisory committee members must be approved by the TSDF's Board of Governors prior to making the first scholarship awards and thereafter annually. The founder may participate on the scholarship advisory committee, provided that neither the founder nor the founder's designees (related parties) may chair the scholarship advisory committee or in any way control the selection process or constitute a majority of the scholarship advisory committee members. In the event the scholarship advisory committee shall cease to be in existence, the Board of Governors of TSDF shall serve as the advisor of the scholarship fund. All scholarships shall be awarded on an objective and nondiscriminatory basis using procedures that have been approved in advance by the Board of Governors of TSDF and that have been designed to ensure that all such grants meet the requirements of paragraphs (1), (2), or (3) of Section 4945(g) of the Internal Revenue Code of 1986.

7. Income and Estate Tax Deductions. TSDF does not provide any advice or assurance to its donors as to the income tax treatment of amounts deposited in a fund. Donors are advised to seek independent advice as to such income tax treatment.

8. Investments. The fund advisors for endowment funds will have the assets invested in TSDF's Endowment pool. The fund advisors for non-endowment funds with assets in excess of \$25,000 may recommend that the assets of the fund be invested in one of three investment pools (subject to liquidity requirements); information regarding the composition of each investment pool will be provided to the donor at the time the fund is established. Such recommendations are advisory, and TSDF has final authority over the investment of assets in its funds.

9. Fees and Costs. Each fund established at TSDF shall share a fair portion of the total administrative costs of TSDF. The administrative cost annually charged against each fund shall be determined in accordance with the then current fee policy of TSDF as the fee structure applicable to funds of its type. Administrative fees for charitable expenses will be negotiated and incurred based upon the complexity of the transaction. Charitable expenses apply exclusively to Field of Interest or Special Project Funds. In addition, upon receipt of assets upon the death of a donor, a onetime estate fee will be assessed in accordance with the then current fee policy of TSDF. Any costs to TSDF in accepting, transferring or managing property donated to TSDF for a fund shall also be paid from such fund.

10. Provision for Governing Law. These Program Policies, all fund agreements, and any program-related agreement executed by a Donor shall be governed by California law. All gift agreements are deemed to be entered into in the State of California, and all contributions to the TSDF are intended to be administered and managed in the State of California.