



Board of Directors Agenda Report

MEETING DATE: JUNE 11, 2020 ITEM NUMBER: 6A

SUBJECT: Discuss May 20, 2020 Letter from Spectra Regarding Termination of OC Market Place Rental Agreement and Vote on Whether to Take Specific Action Including Enforcement, Termination or Renegotiation of OC Market Place Agreement

DATE: June 5, 2020

FROM: Michele Richards, CEO

PRESENTATION BY: Michele Richards, CEO

RECOMMENDATION

At the Board of Directors' discretion.

BACKGROUND

Following is a timeline and summary of events related to the operation of the OC Market Place, including the assignment from Tel-Phil Enterprises to Spectra, the extension of the food service management agreement between the District and Spectra, and the letter of termination from Spectra and the District's response.

Timeline and Summary of Facts

1969 to August 1, 2014 – The OC Market Place was owned by Tel Phil Enterprises, Inc. (Tel Phil) and operated at the OC fairgrounds through a revenue share agreement with the District. During its peak years of 1997-2006, the OC Market Place generated an average of \$4-6 million in revenues to the District each year.

Beginning in 2006, public attendance and the number of vendors at the OC Market Place began to decline, and as a result the revenue to the District declined to less than the agreement's base amount of \$2 million in 2014.

August 1, 2014 – The District and Tel Phil entered into a 10-year rental agreement (with one ten-year option) for operation of the outdoor OC Market Place (marketplace). The rental agreement included a reduction in the annual base rent to \$1.7 million to start. (See Schedule 5 of the agreement) The rental agreement also included several requirements, including for example, required rent payments (base rent and rent shortfall payments), operation, management and maintenance of the marketplace, and assignment prohibition (unless approved in writing by the District). Most significantly, Section U.5. of the rental agreement provides that "if

either party is unable to perform for any cause beyond its reasonable control for a period in excess of ninety (90) days, then either party may terminate this Agreement upon thirty (30) days written notice to the other party without further liability." (See Attachment #1)

October 1, 2015 – The District and Tel Phil entered into the first amendment to the rental agreement making certain changes regarding the provision of security services at the marketplace. (See Attachment #2)

February 18, 2016 – Because of Tel Phil's failure to make all required payments under the rental agreement, the District served Tel Phil with a 3-Day Notice to Pay Rent or Quit due to Tel Phil's failure to pay (1) base rent payments due as set forth in Paragraph F.1 of the rental agreement, (2) fees, costs, and expenses of security services as set forth in Paragraph X.4 of the rental agreement, and (3) Rent Shortfall Payments as set forth in Paragraph F.3 and Schedule 15 of the rental agreement. As of the date of the notice, Tel Phil owed the District \$335,703.16.

February 19, 2016 – After receiving the 3-Day Notice to Pay Rent or Quit, counsel for Tel Phil contacted the Office of the California Attorney General advising that Tel Phil and Spectra were in negotiations for the sale of the OC Market Place (e.g., assignment of rights under the existing rental agreement). Counsel proposed a payment schedule for the amounts due and owing to the District, including (1) Rent Shortfall Payments, which would continue as set forth in the rental agreement; and (2) all Base Rent Payments after completion of Tel Phil – Spectra transaction. The Office of the Attorney General expressed significant concern regarding the proposal and confirmed that they had no authority to agree to anything. They also confirmed that Tel Phil's failure to timely pay as demanded in the 3-day notice would provide the District with the right – but not the obligation – to file a complaint in superior court.

February 22, 2016 – Tel Phil delivered a check to the District in the amount of \$335,703.16, the total amount due and owing under the rental agreement.

March 14, 2016 – The District advised Tel Phil in writing that unless it removed all personal property from the District's premises, the Board would not approve the assignment of the rental agreement from Tel Phil to Spectra.

March 15, 2016 – Tel Phil confirmed that it would remove all personal property from the District storage areas by April 1, 2016.

March 25, 2016 – During the District Board Meeting, the Board of Directors approved several agreements, including: (1) the Assignment and Assumption Agreement between Tel Phil and Spectra (Assignment Agreement); and (2) Consent to Assignment of Rental Agreement (Consent to Assignment).

- Under the Assignment Agreement, Tel Phil transferred to Spectra all rights under the rental agreement. (See Attachment 3a)
- Under the Consent to Assignment, the District consented to Tel Phil's assignment of its rights and obligations under the rental agreement to Spectra. The consent to assignment was expressly conditioned upon: (1) The execution by Spectra and the District of the Amendment to Food Service Management

Agreement; (2) Tel Phil's payment of the total outstanding balance due and owing by Tel Phil to the District under the rental agreement by the close of business on March 30, 2016; (3) Tel Phil's removal of all personal property from the District's property by March 30, 2016; (4) Tel Phil and Spectra's execution of the Assignment Agreement; (5) Written approval of the Assignment by the California Department of Food and Agriculture; and (6) Written approval of the District, which approval may be granted or withheld by the District in its sole and absolute discretion. (See Attachment #3b)

During the March 2016 Board meeting, the Board of Directors also approved an amendment to the Food Service Management Agreement. The amendment: (1) revised Section C.1 of the rental agreement, extending the term's end date from December 31, 2017 to August 1, 2024; and (2) added a new Section D.1 to the rental agreement, which required Spectra to make a new capital investment \$1.5 million over the course of the Seventy-Nine (79) month period commencing on January 1, 2018. (See Attachment #4)

July 14, 2016 – The rental agreement between Spectra and the District for operation of the OC Market Place was amended to change the due date of base rent payments to the 15th of each month, or if such day is not a business day, on the immediately preceding business day. (See Attachment #5)

June 21, 2019 – At the June, 2019 Board of Directors meeting, the Board considered a proposal from Spectra requesting financial support from the District for a new business model to drive business to the OC Market Place. The proposal involved an operational and financial plan which included \$100,000 for marketing and promotion and \$500,000 for event production. The allocated funds would come out of the rent revenue paid annually to the District by Spectra. The Board voted unanimously to table the discussion.

June 27, 2019 – The District approved Amendment No. 2 to the Food Service Management Agreement. This amendment added a new Section B.2., which provided the District with the sole and absolute authority to allow Spectra to operate additional beer sale locations under certain limited circumstances. (See Attachment #6)

May 22, 2020 – The District received by email a letter from Spectra notifying the District that it was terminating its rental agreement, effective June 20, 2020. The fully-signed hard copy of the letter arrived by certified mail on May 26, 2020. In addition, on May 22, the District received by email a letter from Nick Nicora, Spectra's Vice President Business Development, requesting to start a conversation with the District about how the marketplace can reopen in the future. (See Attachments #7 and #8)

May 27, 2020 – The District sent a letter by email and overnight mail to Spectra in response to Spectra's letter of termination. The letter acknowledged that the District had provided Spectra with the California Department of Public Health industry guidance for the reopening of swap meets on May 13 and indicated that Orange County was approved to accelerate local businesses into Stage Two, which would allow the OC Market Place to begin operating again after meeting the industry guidelines. The letter also indicated that Spectra was not authorized to terminate the

rental agreement under Section U(5) and is obligated to make all rent payments required under the agreement. (See Attachment #9)

June 4, 2020 – The District received by email a letter from Spectra stating that it is still prevented from operating the OC Market Place because the OC Health Care Agency has not yet approved the operation of the concessions related to the marketplace. The letter also states that a follow-up email from the OC Health Care Agency advising that it may be permissible to permit vendors to operate at the marketplace, provided that no food or beverage service would be permitted. The letter further stated that with the ability to operate the swap without the ability to sell or beverage would prevent Spectra from utilizing the premises for the intended purpose. The letter concluded that Spectra will, as previously advised, terminate the rental agreement on June 20, 2020 and that Spectra looks forward to working with the District to discuss a different arrangement under which Spectra would continue to service the marketplace. (See Attachment #10)

The last base rent payment received from Spectra was on March 16, 2020. Prior to that date, Spectra was current on all base rent payments. Spectra has not yet paid the capital contribution of \$100,000 required for Year 7 (August, 2020 to August 2021).

In calendar year 2019, Spectra generated \$6,938,599.74 in revenue to the District -- \$2,005,849.12 from the OC Market Place rental agreement, \$4,832,750.62 from food and beverage commissions, and \$100,000 from the annual capital contribution.