

MEMORANDUM

TO: Steven C. Carter, City Manager
Deb Feinen, Council Member
Richard Schnuer, Finance Director

FROM: Frederick C. Stavins, City Attorney

DATE: December 13, 2010

SUBJECT: UC2B Structure

You asked me to put together a list of possible operational structures for UC2B. I made certain assumptions:

1. That the UC2B Board will continue to function as an overall policy board.
2. That the operational structure will report to the UC2B Board.
3. A differentiating aspect of all of the operating structures that are possible will be how the UC2B Policy Board answers the following question:

How much accountability to a governmental entity ought there be with respect to operations? (i.e. Where should the operational entity be on a sliding public/private scale?)

I say this because Home Rule Units have very wide latitude in the creation of entities. Even the University has exhibited a wide variety of entity creation which in some cases are more private in nature and in other cases more public in nature so that is part of the continuum on which the discussion concerning the entity should be based in part.

There are two legal concepts that provide authority to undertake the alternatives listed:

- A. Constitutional Home Rule Authority, which under the 1970 Illinois State Constitution (Art. 7, §7) provides Champaign and Urbana, both home rule units, broad grants of authority to create and operate intergovernmental entities. The University has similar, though perhaps more limited authority under its governing statutes.
- B. Intergovernmental Cooperation, which is provided for both under the 1970 Illinois State Constitution (Art. 7, §10), and also under the Intergovernmental Cooperation Act (5 ILCS 220/1 et. seq.) which again provides broad grants of authority for the University, Champaign & Urbana to agree among themselves to undertake matters relevant to their

“governmental affairs” The Intergovernmental Cooperation Act amplifies the powers under the constitution and in some cases provides intergovernmental organizations separate authorizations to issue bonds (e.g. the Act provides for creation of water agencies, trash agencies, Economic Development Commissions, Sewage Treatment Agencies, Risk and Insurance Pools)

The following are typical forms of operating entities that have either been used by Champaign and Urbana or are contained within the State statutes:

- A. Board Utilizes Lead Agency (i.e. staff of one of the signatories to the intergovernmental agreement performing the operations).

Examples

- METCAD
- GIS Consortium

- B. Board Employs Its Own Staff

Example

- ISWDA (Governing Board (Intergovernmental) & Executive Director Plus Staff)

- C. Board Contracts with Another Body – Which is Separate Legal Entity and Not a Party to the Intergovernmental Agreement

- 1) Contract with a Not-For-Profit Entity Created by the Board
- 2) Contract with an Independent Not-For-Profit Entity (could be another governmental body)
- 3) Contract with For-Profit-Entity* Created by Board
- 4) Contract with Independent For-Profit-Entity* (i.e. one not created by the Board)

- D. Create Broadband District (like the Sanitary District) in an amendment to the Intergovernmental Cooperation Act

Various Types of For Profit Entities

- A. General Partnership (Governed generally in Illinois by the Uniform Partnership Act of 1997)
 - Combination of entities (could be individuals, corporations, or other legal entities)

- B. Limited Partnership (In Illinois governed by Uniform Limited Partnership Act of 2001)
 - General partner or partners operate, limited partners more like Investors
- C. Corporation (Governed generally in Illinois by the Business Corporation Act of 1983)
 - Close Corporation – limited number of shareholders
- D. Limited Liability Company (Cross between Corporation & Partnership)
 - Limits liability, limited life, prohibition against transfer of management or membership rights without unanimous or majority approval, deference to an operating agreement, dissolution when a member retires, resigns, is bankrupt – unless remaining members elect to continue

Some Considerations for Selecting an Entity

- A. Ultimate Ownership and Control of Assets
- B. Tax Treatment
- C. Liability* of Managers
- D. Liability* of Investors
- E. Potential to Profit
- F. Control of Policy Decisions
- G. Control of Operational Decisions
- H. Administrative Requirements and Filings

*(Contract and Tort Risk)

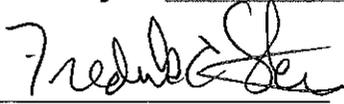
Conclusion

The Board must make certain business decisions before it decides on an entity – this is the reason the group of attorneys concluded that the first priority should be to decide, in post initial construction, what UC2B wants to accomplish in the longer term and make some estimates of cost to attach to those goals, i.e. develop a business plan, of which the type of entity would be a part certainly, but not the driving force. The business plan must include:

- A. Core Undertakings
- B. The Cost of Those Undertakings
- C. The Revenue Derived from the Undertakings
- D. Who Controls Policy and Assets

Then the decision will come as to who will provide the capital to underwrite and provide the undertakings.

I have attached that part of the Grant Application where the future operations are discussed as well as the agreement and two memo's drafted by law clerks for the City. For an excellent text on broadband, see the Public Technology Institute's 2008 publication entitled **Municipal and Utility Guidebook to Bringing Fiber Optics to Your Community** at www.pti.org/docs-cio/Municipal&UtilityGuidebook.PDF.



Frederick C. Stavins
City Attorney

cc: Trisha Crowley
Laura Clower
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