

INVESTIGATIVE REPORT



CITY OF OAKLAND
Office of the City Auditor

DATE: August 24, 2023

TO: Mayor Thao, City Council President Bas, Members of the City Council, City Administrator Johnson, City Attorney Parker, and Oakland Residents

FROM: City Auditor Courtney Ruby, CPA, CFE

SUBJECT: **SUBSTANTIATED WHISTLEBLOWER ALLEGATION:** Community Concerns Regarding the Chinatown Community Benefit Business Improvement District Lead to Recommendations for Oakland's Community Benefit Business Improvement Districts

BACKGROUND

Community Benefit Districts

Community Benefit Districts (CBDs), also known as Business Improvement Districts, are partnerships between government agencies and community members of a specific geographic area. CBD members, primarily property and business owners, vote to pay special tax assessments to fund additional services over and beyond those already provided by the government agencies that have jurisdiction over the areas. Public safety, marketing, beautification, and maintenance are examples of additional services funded by CBDs. Local governments collect assessments for CBDs through the property tax collection process and remit the collected assessments to the CBDs.

The amounts of assessments charged to specific properties vary, and may depend on the characteristics of the properties, including zoning (e.g., commercial vs. residential), linear frontage, parcel size, and building square footage.

In California, CBDs are subject to State and local laws and operating requirements.

Forming Community Benefit Districts in Oakland

Two separate laws authorize local governments to establish CBDs in California: The Parking and Business Improvement Area Law of 1989 (Streets & Highways Code §36500 et seq.), and the Property and Business Improvement District Law of 1994 (Streets & Highways Code §36600 et seq.). Both laws authorize cities, counties, and joint powers authorities to establish CBDs and levy annual assessments within their boundaries.

Community Benefit Districts

Oakland Ordinance No. 12190, C.M.S. codified the City of Oakland Business Improvement Management District Ordinance, which allows the formation of CBDs in Oakland. Establishing CBDs in Oakland requires the City Council to first consider the “management plans”¹ for new CBDs, and mail notices of intention to each property owner in the proposed districts, and to each local chamber of commerce and business organization located within the proposed districts. Next, the City Council must conduct public hearings to vet the proposed assessments at least 45 days after mailing the notice of the proposed assessment to property owners. At least seven days before the public hearing, the City must also publish the Resolution of Intention in a newspaper of general circulation in the City. At the public hearing, the City Council shall consider protests against the proposed assessment and tabulate votes. If the majority objects, assessments cannot be levied on the district properties. If there is no majority protest and property owners who cumulatively account for at least 30 percent of the total assessments to be collected from the proposed district return written petitions in favor of the CBD, then after the public hearing, the City Council must proceed in reviewing and approving the final district.

Pursuant to State Streets & Highways Code §36500, and represented in the City’s Municipal Code as well, an advisory board designated by the City Council will review CBD district budgets and policies annually within the limitations of the management plan and must ensure annual reports are filed with the City of Oakland. More information is provided below in the section on the administration of the CBD.

Forming the Chinatown Community Benefit District

In 2020, the Oakland Chinatown Chamber of Commerce (OCCC) led resident and merchant outreach, a feasibility study, and the development of a management plan which laid the groundwork for a CBD for Chinatown. To drive this effort, the OCCC hired a consultant, New City America, a company that specializes in forming and managing CBDs. New City America worked with OCCC and an Oakland Chinatown CBD Steering Committee to lead the development of the CBD and finalize the management plan. The Steering Committee was formed through outreach by the OCCC and other community

¹ Management plans are the official documents that show the boundaries of proposed districts, including lists of affected parcels, amounts of proposed assessments; summaries of activities, improvements, and/or services to be funded by the proposed assessments; the proposed durations of the proposed districts; the amount of proposed annual assessment increases and any annual caps; and the proposed first-year budgets to pay for proposed activities, improvements, and/or services to be provided.

organizations and was made up of Chinatown community members including property owners, residents, businesses, and members of the OCCC and community organizations.

The Steering Committee, working with New City America, provided structure, direction, budget, and goals for the CBD. Its purpose was to engage stakeholders in the study process, promote the concept, define CBD boundaries, services, and improvements, and develop the assessment formula. According to New City America, the Steering Committee met at least ten times between November 2020 and March 2021.

The City's Workforce and Economic Development Department provides technical assistance to the formation effort and ongoing administration of the citywide CBD program. On June 1, 2021, the Workforce and Economic Development Department presented the Chinatown CBD to the City Council. The City Council ultimately adopted Resolution No. 88666 C.M.S., a Resolution of Intention to: 1) form the Chinatown CBD; 2) grant preliminary approval of the Chinatown CBD Management Plan; 3) direct filing of the proposed Chinatown CBD 2021 assessment district boundary description; 4) direct distribution of a ballot to all affected property owners whereby they could vote "In Favor Of" or "Against" the proposed Chinatown CBD and assessment to determine whether a majority protest exists; and 5) schedule and notify property owners of a public hearing.

On July 26, 2021, the City Council considered and ultimately approved the formation of the Chinatown CBD, its management plan, and the special assessment revenues of approximately \$1,309,837 per year for a period of 10 years, or up to approximately \$16 million over the life of the CBD. Effective dates of the assessment were July 1, 2021 through June 30, 2031, with related special benefit services provided January 1, 2022, through December 31, 2031 (Resolution No. 88781 C.M.S). The geographic boundaries of the CBD include approximately 52 square blocks consisting of 1,293 parcels (1,277 assessed) owned by 1,033 property owners.

At the July 26, 2021 meeting, the City Council also: 1) authorized the City Administrator to enter into a contract with any nonprofit corporation comprised of the assessed themselves and designated by the affected property owners to conduct or contract for the cleaning, security, marketing and promotions, or other activities and improvements for the Chinatown CBD, and 2) designated the Board of Directors for the designated nonprofit to serve as the Advisory Board as well. The Council resolution also stated the Advisory Board must include at least one business licensee in the district that was not also a property owner, and one member of a community-serving nonprofit within the district.

The Advisory Board is responsible for ensuring a report is filed each year for which assessments are to be levied. The report should describe cost of improvements and activities and may include proposed changes to the boundaries, the method of levying assessments, and any changes in the classification of properties. The City Council may approve the report as filed by the Advisory Board or may modify it within the limitations described in the Oakland Municipal Code.

According to its online description, the Chinatown CBD is "...laser focused on helping Oakland Chinatown small businesses, residents, and greater Chinatown community. The main goal of [the CBD] is to make Oakland Chinatown cleaner, safer, and more vibrant for the community." The Chinatown CBD celebrates having "a diverse Board of Directors made up of Oakland Chinatown community

members which includes property owners, small business owners, nonprofits, residents, volunteer patrol members, and both English-speaking and Chinese speaking community members.”

The Administration of the Chinatown Community Benefit Business Improvement District 2021 (Chinatown CBD)

Per the Oakland Municipal Code, the City Administrator manages the CBD by either conducting services funded by the assessment, or by contracting with a designated nonprofit comprised of the assessed themselves. For the Chinatown CBD, the City contracted with the Oakland Chinatown Improvement Council (OCIC), a California nonprofit corporation to perform CBD services identified in the management plan. Additionally, pursuant to Section 36650 of the California Streets and Highway Code, the City Council designated the OCIC to also serve as the CBD Advisory Board, responsible for reviewing the district’s budgets and policies annually within the limitations of the management plan, and ensuring required reports are filed each fiscal year. Required reports include financial reports, any proposed changes to the district’s boundaries, any proposed increases or decreases in services, and the corresponding financial impacts from any such proposed changes. As stated above, each year, the City Council may approve the report as filed by the Advisory Board or may make modifications and approve a modified report.

On January 26, 2022, the City of Oakland entered into a disbursement agreement with the OCIC in which this new nonprofit would be fully responsible for developing, implementing, directing, and executing the district’s management plan. The agreement outlines the City’s responsibilities to include general administration to coordinate the regular collection of the annual assessment with the County, provide general assistance and clarification to the OCIC, direct the disbursement of funds to the OCIC, and act as a liaison with various City agencies and departments.

As stated above, the City Council authorized the Chinatown CBD on July 26, 2021. On September 24, 2021, OCIC, the nonprofit designated to operate the CBD, called a meeting with the intention of forming a Board of Directors for the new nonprofit. At this meeting individuals were asked to self-nominate and then self-appointed themselves to the Board with the only stated requirement to have “some connection to Chinatown,” attend meetings, and join a Board committee. Articles of incorporation for the new nonprofit were filed with the California Secretary of State on September 28, 2021.

Investigation History and Allegations

Beginning January 2022, the City Auditor’s Office received numerous allegations about the formation and operation of the Chinatown CBD. Allegations focused on the formation of the Chinatown CBD Board of Directors, and voting by the Chinatown CBD Board of Directors, as summarized below.

- Allegations related to the formation of the Board of Directors:
 - The formation of the Board of Directors lacked transparency and a defined, fair, and objective process and deviated from best practices for nonprofit board development.
 - The self-appointed Board of Directors were not verified to ensure its members had an interest in the Chinatown CBD, and its composition met requirements outlined in the Chinatown CBD bylaws.
- Allegations related to the integrity, transparency, and recording of votes by the Board of Directors:
 - Some votes may have been cast by people not on the Board of Directors yet counted as official votes.
 - Some votes may not have been accurately counted and recorded.
 - Some activities and expenditures occurred without documented approval.

Investigation Objectives

The objectives of the investigation were to substantiate or refute the allegations by answering the following questions:

- Questions related to the formation of the Board of Directors:
 - Was the formation of the Board of Directors a defined, fair, and objective process that aligned with best practices for nonprofit board development?
 - Was the composition of the Board of Directors sufficiently verified to determine if members had an interest in the CBD and that membership met the requirements outlined in the Chinatown CBD bylaws?
- Questions related to the integrity, transparency, and recording of votes by the Board of Directors:
 - Were some votes cast by people not on the Board of Directors counted as official votes?
 - Were some votes inaccurately counted and recorded?
 - Did some activities and expenditures occur without documented approval?

To meet these objectives, we completed work summarized in the “Methodology” section of this report on page 20.

This investigation is important because the City of Oakland owns properties within the CBD and as such is a direct stakeholder of the Chinatown CBD. Furthermore, the City is the host jurisdiction of the Chinatown CBD. Lastly, the City has an interest in ensuring its residents, businesses, and property owners are fairly and equitably served by the City’s CBDs.

Investigation Conclusions

The Investigation Substantiated Five Allegations

- The investigation substantiated two allegations related to the formation of the Board of Directors.
 1. The formation of the Board of Directors was not based on authoritative standards, such as organizational best practices or bylaws, and was misleading.
 2. The Board of Directors was not verified to ensure its members had an interest in the Chinatown CBD. The defined composition requirements outlined in the Chinatown CBD bylaws were passed two months after the self-appointment and self-confirmation of Board members.
- The investigation substantiated three allegations related to the integrity, transparency, and recording of votes by the Board of Directors.
 3. The investigation substantiated that some votes may have been cast by people not on the Board of Directors and counted as official votes. Additionally, there was a lack of controls to ensure the integrity, transparency, and recording of votes.
 4. The investigation substantiated the allegation that some votes may have been inaccurately counted and recorded.
 5. Some CBD activities and expenditures occurred outside of authorized Board processes (or without appropriately defined and documented Board approval).

The Investigation Results section below details the basis of these investigation conclusions.

Investigation Results

The Formation of the Board of Directors Was Not Based on Authoritative Standards, Such As Organizational Best Practices or Bylaws

The Formation of an “Interim” Board of Directors Was Misleading

The Chinatown CBD consultant, New City America held a meeting on September 24, 2021 for both in-person and virtual participants to form an interim Board of Directors. At the meeting, New City America stated it was imperative to form a Board of Directors as soon as possible to ensure expedient implementation of the CBD, and the expedient collection of property assessments needed to deliver the services outlined in the CBD’s management plan. Even though New City America specified this limited purpose of the Board of Directors, this expectation was not binding because there is no such “interim” designation in nonprofit law. Once formed, the Board of Directors would be empowered to make decisions on behalf of the businesses, residents, and property owners that pay assessments to the CBD within the limitations of the management plan.

Despite its Early Involvement in Key Aspects of the CBD, the Steering Committee Did Not Inform the Formation of the Board of Directors, and the Consultant Did Not Follow its Scope of Services

As described in the Background section above, a Steering Committee led the development of the CBD and finalization of its management plan. Essentially, the Steering Committee created the CBD and established its future activities in accordance with the City requirements to establish a CBD.

Given the crucial role of the Steering Committee on the CBD, and the potential value of leadership continuity, it would have been reasonable to require a certain number of Board seats for Steering Committee members. However, New City America did not solicit Steering Committee members’ involvement in seating the initial Board of Directors. We believe this lack of continuity impacted the ability of the initial Board to meet its responsibilities more fully and transparently and created a significant division in the community between those who worked to initially to form the CBD, and many of those who became responsible for governance and the day-to-day management of the CBD. Furthermore, as part of its scope of services, New City America was to work with the OCCC and CBD leadership to identify large and small property owners, along with other critical community members, and invite them to serve on the Board. This did not occur.

The Board of Directors was Formed through the Consultant’s Self Appointment Process vs. Common Nonprofit and CBD Practices, and the Board Was Too Large

Instead of turning to common CBD practices (see information later in the report), or nonprofit best practices to guide the formation of the Board of Directors, New City America implemented a self-appointment procedure whereby interested stakeholders were invited to the September 24, 2021

meeting. At the September 24, 2021 meeting, New City America facilitated a process whereby 48 meeting attendees individually introduced themselves, stated their affiliations, self-nominated themselves, and then immediately self-appointed themselves as members of the Board of Directors. New City America verbally stated the only requirements to be a member of the “interim” Board of Directors was to have “some connection to Chinatown,” attend meetings, and join a board committee.

New City America used this method to form other CBD Boards in Oakland. However, according to New City America, it had never seen a Board established that was as large as the Chinatown CBD’s self-appointed Board.

At the September 24, 2021 meeting where New City America was leading the self-appointment process to establish the Board of Directors, some participants expressed a desire to have property owners well-represented on the Board. Some participants expressed a desire to ensure inclusion of merchants and residents, without specifying property owners. Others expressed the desire to ensure more proportionate representation of major property owners. New City America attempted to assuage participants by stating that more substantive actions for changing the direction of the Board could be pursued by a permanent Board at a later date. New City America did not address the Board composition proposals.

The process ultimately used for selecting Board members was misleading, haphazard, and occurred without defining a structure aligned with best governance practices, failed to consider the experience of the Steering Committee, and created or exacerbated division in the community—the same community the CBD was established to serve. The main purpose of this initial Board was to get the nonprofit up and running, accept the distribution of funds, and execute an already defined and authorized district management plan. Such responsibilities did not necessitate a large Board, and it is unclear why the process which led to such a large Board was allowed to occur.

The Self-Appointed Members of the Board of Directors Were Not Validated

Anonymous witnesses expressed concern that the self-appointment process did not include validation to ensure the self-appointed members met even the lax requirements set by New City America (i.e., have some connection to Chinatown, attend meetings, and join a Board committee). It was also noteworthy that while it appeared they met the requirements of the aforementioned July 26, 2021 City Council Resolution that stated the Advisory Board must include at least one business licensee in the district that was not also a property owner, and one member of a community-serving nonprofit within the district, there was no process in place to ensure that the Advisory Board met those requirements.

Furthermore, as part of this investigation, we reviewed the rosters of the Chinatown CBD Board members. We found multiple issues with the membership, including incomplete or unknown Board member names, affiliations, and addresses. We also found some reported Board members’ addresses were outside the district.

According to New City America, validating the eligibility of the self-appointed Board members would be important when the permanent Board was established. New City America’s minimizing the importance

of properly validating Board members further undermined the community’s trust in the CBD or the governance process, and again was based on a false premise that the “interim” Board had fewer fiduciary responsibilities.

Bylaws and Requirements for Members of the Board of Directors Were Not Approved Until Two Months After the Board of Directors Was Established

As stated earlier, the CBD management plan defines the details of the CBD, but it does not provide specific information on how the CBD will operate. For organizations, including CBDs, “bylaws” fulfill this role. Bylaws are written rules adopted by an organization’s Board of Directors, that govern how an organization is run, and outline important procedures for voting and decision-making. The bylaws endure beyond individual Board members’ tenures.

The Board of Directors approved the Chinatown CBD bylaws at its November 18, 2021 meeting – nearly two months after the establishment of the Board of Directors at the September 24, 2021 meeting; therefore, the bylaws were not binding at the time the Board members self-appointing themselves. This emphasizes that no roles, responsibilities, or requirements were considered in advance of creating the Board.

New City America drafted the Chinatown CBD bylaws, which specify the Board of Directors shall have a minimum of 7 and a maximum of 50 members. The bylaws further specify that at least two-thirds of the Board should be “property owners,” and state the balance of seats shall be filled by “community at large” members which should be individuals or designees of individuals who own and operate a business located within the CBD boundaries, and/or are community members who reside within the boundaries of the district, and/or are individuals who “show a high degree of interest and concern for the welfare” of the CBD and understand its connection to the community and who may assist in meeting CBD goals.

The size of the Board of Directors that was established at the September 24, 2021 meeting, and continued to be in place at the November 18, 2021 adoption of the bylaws, met the terms outlined in the bylaws related to the number of Board members. However, New City America did not implement any review process or check to ensure members met the requirements outlined in the bylaws.

It was also noteworthy that at the November 18, 2021 meeting, which was conducted both in-person and virtually, Board members expressed a desire to substantively amend the bylaws. Some members were dissatisfied with existing elements of the bylaws, and some wanted new provisions. New City America attempted to assuage participants by stating that more substantive actions for changing bylaws could be pursued later by a Board subcommittee. The Board ended up not formally considering amendments to the bylaws. Typically, Board officers – not a consultant – would lead the process of creating and amending bylaws. New City America’s role appeared to extend beyond that of consultant and influenced matters of governance.

Leading with a sense of urgency, without first identifying the organizational needs of the initial Board, New City America bypassed best practices and contributed to a chaotic process, ongoing confusion,

and dissatisfaction by various Board members and community members. Best practices for nonprofits are highlighted later in the report.

Voting Problems within the Board of Directors

The CBD Bylaws Established Rules for Voting by the Members of the Board of Directors

The Chinatown CBD bylaws state that a quorum of fifty percent plus one of sitting Board members is required for the Board to consider business. The bylaws also specify “each Director shall have one vote on each matter presented to the Board of Directors for action...”

The CBD Held Meetings With In-Person and Virtual Participation

We witnessed meetings of the Board of Directors at which key decisions were made. Most meetings allowed participants to attend both in-person and virtually. At these meetings, the Board of Directors presented and considered key items at meetings through a roll call vote. In some cases, it was unclear if members were actually present at the meetings. We also observed other irregularities, including unclear motions and instances of unknown individuals potentially voting on behalf of named Board members. These concerns were exacerbated by virtual participation. OCIC did not establish adequate processes to address the inherent issues in managing meetings with virtual participation. The meetings were highly disorganized, and at times, chaotic.

Some Votes May Have Been Inaccurately Counted and Recorded

At the December 13, 2021 meeting of the Board of Directors, the Chair of the Board of Directors announced an anonymous donor would give \$75,000 to the Chinatown CBD for sponsoring drones for the Oakland Police Department’s (OPD) use. During the meeting, a vote was held to determine if the Chinatown CBD would accept the money and sponsor the drones for OPD.

At the virtual meeting, a roll call vote was rife with irregularities, including unclear motions and multiple instances of unknown individuals voting on behalf of named Board members. The meeting minutes from the meeting show the Board of Directors voted 20-14 to “accept the private donations for the purchase of the drones,” but the actual events of the meeting, as recorded on the meeting video, do not clearly reflect that stated outcome. Furthermore, there appeared to be multiple instances of unknown individuals verbally voting on behalf of named Board members. These questionable votes were cast through a virtual meeting platform. There were no controls in place to ensure validity of votes.

Additionally, members shared their concerns that these drones were for citywide use. It appears that the CBD Board members were either being asked to operate outside of their prescribed role, or their understanding of their role. The Chair and a member of the Executive Committee of the Board should

have adequately addressed the concerns, but instead, the meeting proceeded, with members confused and dissatisfied, and a vote being called.

A nonprofit Board is the internal authority on governance, and as such, should have a proper system in place to record, track, and verify Board motions and votes. We recommend OCIC establish such a system.

Board Members Voting on Their Own Self Appointments Presented An Appearance of Conflict of Interest

Another vote by the Board of Directors was noteworthy not because of the lack of transparency and clarity on who was voting and for what, but because there was not a vote at all. Besides being the forum for establishing the Board of Directors, the September 24, 2021 meeting was also noteworthy because the process for individuals self-appointing as members of the Board of Directors was followed by the same members confirming their own self-appointments. This arrangement gives the appearance of a conflict of interest. Additionally, given the lack of bylaws and absent any other authoritative document establishing the self-appointments, it is unclear why and under what authority the self-appointments and subsequent voting to authorize the self-appointed Board occurred. Later in this report, we discuss how this self-appointment process is unusual and counter to nonprofit and CBD best practices.

In addition to the voting irregularities we observed, the validity of some of Board of Directors' votes are in doubt.

The CBD Is Subject to the Brown Act and Transparent Meeting Requirements

From our review of agendas and minutes, it appears the OCIC did not comply with State Laws and transparent meeting requirements.

The Ralph M. Brown Act (California Government Code 54950 et seq. or "Brown Act") is a California law that formalizes the public's right to attend and participate in public meetings and informs parameters for how public meetings are to be conducted.

The City Council's approval of the Chinatown CBD on July 26, 2021 required and prioritized that the CBD adhere to the Brown Act. Specifically, the management plan states: *"There are no specific rules and regulations prescribed for the proposed Oakland Chinatown Community Benefit District Management Corporation except that it will adhere to the open meeting and open records provisions of the Ralph M. Brown Act and will seek to be as open and transparent to the CBD assesses and the public at large as is reasonably possible."*

The Brown Act outlines specific requirements for virtual meetings. For example, meeting agendas must provide remote locations, and a quorum of members must be within the boundaries of the district during meetings. It appeared the CBD did not ensure compliance with these requirements.

The Brown Act did not contemplate “hybrid” meetings whereby attendees participate in Board meetings both in-person and virtually, except under the traditional teleconference rules in which the remote locations were published and the agenda posted at each remote location.

During the time period of key actions highlighted throughout this report – calendar years 2021 and 2022 – there were amendments to State law affecting public meetings arising from the COVID-19 pandemic. These include Executive Order N-29-20, which was effective March 17, 2020, through September 30, 2021, and AB 361 that took effect on October 1, 2021, and is due to sunset on December 31, 2023. These amendments allowed for relaxed and streamlined rules for participating in meetings virtually, however, meetings were still expected to be publicly accessible and transparent.

After AB 361 took effect on October 1, 2021, the Board was required to make regular emergency findings justifying the legal basis to continue virtual meetings without publishing the remote locations of the members of the Board. From our review of the CBD meeting agendas and minutes, it appears the CBD did not follow AB 361. Furthermore, the State law did not contemplate hybrid meetings with some attendees participating in-person and some participating virtually. If the rules were not followed – the votes conducted virtually since AB 361 took effect in October 2021 – would be invalid. With the termination of the state of emergency in the State of California, effective February 28, 2023, and the passage of AB 2449, the rules regarding remote (teleconference) appearance are even more limited.

Some CBD Activities and Expenditures Occurred Outside of Authoritative Standards (Or Without Appropriately Defined and Documented Board Approval).

The CBD entered into a contract with the San Diego law firm, Devaney Pate Morris & Cameron, LLP. As part of the investigation, we requested copies of all meeting notices and agendas of the Chinatown CBD Board of Directors, with specific attention drawn to those meetings at which contracts were approved. When we reviewed the meeting materials, there was no documented record of the Board of Directors’ consideration and approval of this arrangement. Documentation of a competitive process for selecting the law firm was also lacking.

CBD Boards should document their consideration and approval of major contracts that use CBD funds. It is a best practice that Boards of public entities including CBDs, follow their bylaws and local and State ethics laws. For example, CBDs should publicly disclose all major contracts. While reviewing the CBD’s website reserved for contracts, only the one for Safety, Cleaning, and Community Building Ambassador Services, was publicly posted.

Improving Oakland's Community Benefit Districts

The City and its residents rely on CBDs in many parts of Oakland to provide much needed additional services. While this report identifies areas of improvement for the Chinatown CBD, taken in greater context, this report can assist the City in improving the City's overall CBD process and inform policy makers on some CBD best practices.

There Are Best Practices for Selecting Nonprofits to Administer CBDs

As stated above, designated nonprofits for CBDs are responsible for developing, implementing, directing, and executing the districts' management plans. The success of the Chinatown CBD to deliver services to residents, merchants, and visitors depends on the proficiency of the designated nonprofits; therefore, the selection of the nonprofit is key.

The City of San Diego has a City Council policy that outlines the following requirements for selecting nonprofits to administer CBDs:

- Selection of a designated nonprofit to administer the CBD shall be based upon its involvement in small business affairs within the district, demonstrated track record, and representation of business.
- The designated nonprofit shall be a legally formed California nonprofit corporation whose membership shall include all businesses within the district.
- The designated nonprofit shall elect its Board at an annual meeting of the membership called for that purpose and shall take affirmative measures to ensure its Board reflects the ethnic and business diversity of the community. Notice of the meeting and ballots shall be provided to all eligible member businesses.

In its code of regulations, Washington, D.C. similarly outlines requirements for nonprofits administering its business improvement districts:

"Each BID shall be organized as a nonprofit corporation under the laws of the District and shall be subject to all applicable District and federal laws and regulations. Each owner of a taxable property and each commercial tenant within a BID, whether such owner or commercial tenant is an owner or commercial tenant at the time the BID is established or at any time thereafter when the BID is in existence, shall be a member of the BID corporation from such time as the BID corporation becomes registered pursuant to this subchapter and until such time as such member's ownership or tenancy within the BID area is terminated or the BID corporation is terminated or dissolved."

Additionally, Washington, D.C. requires the CBD application to include:

- A list of the initial members of the Board who must satisfy established criteria to qualify as a Board member.

- The adopted articles of incorporation and the adopted bylaws of the nonprofit corporation seeking to be registered as the CBD corporation, which articles of incorporation or bylaws must include: *“The names and addresses of the initial directors and a provision stating that the term of the initial directors shall expire at such time as new directors are elected pursuant to DC’s code of regulations. Such terms shall in no event exceed 120 days after the BID is registered by the Mayor...”*

The Oakland Municipal Code does not establish such criteria for the nonprofits administering CBDs. The issues highlighted in this report, and the importance of CBDs in the success of Oakland’s commercial districts, both today and going forward, suggest the City must consider placing greater requirements on nonprofits designated to administer CBDs within the City.

Best Practices Are Available to Inform Nonprofit Board Creation

Boards of Directors for nonprofit organizations have three primary legal duties known as the “duty of care,” “duty of loyalty,” and “duty of obedience.” The duty of care requires Board members to take care of the nonprofit assets. The duty of loyalty requires members to ensure their activities and decisions are toward advancing the nonprofit’s mission first and foremost; the duty of obedience requires adherence to organizations’ missions, bylaws, and legal regulations.

Many professional organizations have best practices for establishing Boards of Directors. An example is the U.S. Chamber of Commerce’s Institute of Organizational Management, which has the following best practices for recruiting members of nonprofit Boards:²

- Seek specific perspectives and skills.
- Develop a recruitment packet with important information.
- Outline expectations of members.
- Ensure against conflicts of interest.
- Train and orient members on their roles and responsibilities, including legal and fiduciary ones.

Furthermore, nonprofit best practices call for considering the commitment, group dynamic, familiarity with constituents, skills, and expertise of prospective Board members.

As stated above, Washington, D.C. outlines requirements of its CBD Boards and their members in its code of regulations, including membership requirements and qualifications. In Oakland, such

² The Institute for Organization Management was designed to enhance individual performance, elevate professional standards, and recognize association, chamber of commerce, and other nonprofit professionals who demonstrate the knowledge essential to the practice of nonprofit management. It is the professional development program of the U.S. Chamber of Commerce.

requirements are determined within the CBDs themselves, meaning that the City has no assurance of consistent standards across the CBDs.

It is unclear that New City America drew on any of these best practices during or prior to facilitating the self-appointment of the Board of Directors. Instead, New City America expressed their primary focus for establishing a self-appointed board was expediency to ensure the timely execution of the disbursement agreement with the City of Oakland. As stated above, the only requirements to be a member of the Board of Directors was to have “some connection to Chinatown,” attend meetings, and join a Board committee.

According to a September 2017 article sponsored by Diligent Corporation,³ nationally, *“nonprofit organizations with budgets over \$10 million have an average of 18 board members, whereas nonprofit organizations with budgets less than \$1 million have about 14 board directors.”* Size must be a consideration for designing a CBD’s Board that can be both effective and operate within the limited means of the organization.

As stated earlier, New City America, the consultant that facilitated the development of the Chinatown CBD, claimed that the Chinatown CBD’s self-appointed, 48-member Board of Directors was the largest one it had ever seen. Furthermore, our review of other Oakland CBDs determined that only the Chinatown CBD had a Board with more than twenty members.

Best Practices Are Available to Inform Community Benefit Districts

As part of a research study by University of Minnesota researcher Carol J. Becker titled, “Democratic Accountability and Business Improvement Districts,” a national survey of 1,741 CBDs was conducted in 2008 and 2011. Survey respondents identified methods for forming Boards of Directors. The most common way of selecting CBD Board members, according to survey respondents, was an election within the CBD district (86 out of 213). The survey states, *“this makes for a powerful method of accountability. Democratic accountability comes not through the government but directly from the BID members.”*

Self-nomination and self-appointment can lead to concerns among the CBD community that the CBD is self-serving and self-interested instead of interested in the good of the community. General information reviewing the challenges of CBDs nationally states self-interests and self-serving to be concerns in utilizing CBDs, and recommend accountability mechanisms to guard against such occurrences, which are discussed later in this report.

³ Diligent Corporation (Diligent) is a software as a service company that enables board members of corporations, government organizations, and not-for-profit groups to share and collaborate on information.

The survey referenced above identified other methods for forming CBD Boards:

- Selection by organization’s existing governing boards (80 out of 213).
- Appointment by mayors (49 out of 213).
- Appointment by city councils (47 out of 213).
- appointment by other levels of government (19 out of 213).
- filled by elected officials (17 out of 213); and
- Recommendations by CBDs and ultimately approved by local governments (28 out of 213).

Self-appointment – which is what the Chinatown CBD used – was notably not identified in the survey as a method of appointment.

Mechanisms to Ensure Accountability among Community Benefit Districts

The intention of the previously referenced survey was to study democratic accountability and CBDs. The report recommends a number of mechanisms that provide strong incentives for CBDs to remain accountable to the community. This is important because the City relies on the nonprofit to both operate and oversee the CBD. Nonprofits are not under the discipline of the private market, nor are they directly controlled by government. Instead, they are a public-private partnership, and their creation needs thoughtful consideration to ensure the appropriate mix of controls so that the organizations managing the CBDs can deliver necessary services while remaining accountable to those who established them and those who fund them.

The cited study recommended mechanisms of accountability include (**current situation within the Chinatown CBD and/or the City of Oakland is underlined**):

- Governing CBD Board members are either elected directly by the CBD membership or appointed by government. The Chinatown CBD Board was self-nominated and self-appointed which is neither a nonprofit nor CBD best practice.
- CBD reauthorization processes. Many CBDs are required to periodically have either their contracts or their funding sources reauthorized. The City Council authorized the Chinatown CBD for 10 years, and the City Administration contracted with the Chinatown CBD for a period of ten years contingent upon the review and approval of the annual report submitted to the City.
- CBD scale. CBDs are community programs right at the feet of the constituency group. Businesses who see something go awry can quickly talk to their CBD Board members about their concerns. Several examples in the report identify times when concerns of Chinatown CBD

Board members or community members were not being addressed, were minimized, or the consultant wielded a level of authority that appeared inappropriate.

- CBD reporting to government. CBDs are required to provide performance information, financial reports, financial audits, and budgets to government. The Chinatown CBD is required per Oakland OMC to provide this information annually to the City.
- Government levying taxes on behalf of the CBD. The City of Oakland authorized the annual assessment amount, defines the maximum annual increase per year (5 percent), and any proposed changes must be presented to the City Council for authorization prior to the submission of the CBD's annual budget.

Recommendations

Given the investigation results noted in the report and the importance of CBDs to support the safety and success of Oakland's vital commercial districts, we recommend the City Council amend OMC 4.48 to provide greater guidance for the administration of CBDs by designated nonprofits, and increased accountability by the appointed advisory boards for CBDs (typically the Board of Directors of the nonprofit designated to operate the CBD).

We recommend the City Council:

1) Amend the contracting process for designating nonprofits to administer CBDs to include more guidance, such as what is required by the City of San Diego and Washington, D.C., by requiring the following of designated nonprofits to:

- a) Demonstrate track record of involvement in small business and community affairs within their respective districts.
- b) Demonstrate status as legally formed California nonprofit corporations, whose memberships include all assessed parties within the CBDs.
- c) Provide notices of all meetings and ballots to all members (assessed parties within CBDs).
- d) Include copies of adopted articles of incorporation and adopted bylaws in their CBD applications.
- e) Adopt bylaws that include the names and addresses of the initial Directors including terms of service with expiration dates, and timeframes when new Directors should be formally elected (such as within 120 days).
- f) Establish requirements for Board members and qualifications.
- g) Elect Board members at annual meetings called for that purpose and provide the names and addresses of elected CBD Board members filed with the Economic & Workforce Development Department.
- h) Demonstrate affirmative measures to ensure the Boards reflect the ethnic and business/community diversity of their districts.
- i) Demonstrate adequate governance systems to accurately account for and record all Board actions, and ensure votes can be publicly validated, in compliance with the Ralph M. Brown Act and other applicable State and local laws and regulations.

- j) Provide annual formal attestations of compliance with all requirements of the disbursement agreement, as well as the Ralph M. Brown Act, and other applicable State and local laws and regulations.
- k) Notify the Economic & Workforce Development Office of changes in Board membership.

2) Limit the size of CBDs' designated nonprofit Boards to no more than 20 Board members given the limited CBD district budgets, and their prescriptive responsibilities included in City Council-authorized district management plans.

3) Require the Chinatown CBD's current designated nonprofit, OCIC, to:

- a) Formally elect its Board members and limit the Board size to no more than 20 members.
- b) Provide a list of Board members' names and addresses and notify the City of changes in Board memberships.
- c) Verify and document that the Board of Directors complies with composition requirements outlined in its bylaws.
- d) Ensure it is compliant with competitive selection requirements when selecting contractors, and that all major contracts are publicly posted.

We recommend the City Administration work with the City Attorney's Office to:

4) Develop and implement training for all Oakland CBD Board members to ensure a clear understanding of their roles and responsibilities, State and City requirements the CBD must follow (including ethics laws), and their relationship between the CBD and the City.

Next Steps

The City Council should consider the recommendations in this report at a public meeting in the near term. After the City Council has determined its course of action, the City Administration should provide a written report on the development of training for Oakland CBDs and a proposed implementation schedule. The Office of the City Auditor will publicly report on the status of the recommendations within a year, thus affording time for action by the City Council and the City Administration.

Methodology

The Office conducted an investigation to arrive at the findings and conclusions in this report. The following work was completed:

- Attending and reviewing Chinatown CBD board meetings
- Reviewing Chinatown CBD records
- Reviewing Chinatown CBD board members
- Reviewing City legislative records
- Reviewing CBD and nonprofit best practices
- Interviewing witnesses
- Interviewing current City staff members
- Interviewing affected parties and witnesses
- Reviewing the Oakland Municipal Code
- Reviewing California Nonprofit law
- Consulting legal professionals
- Reviewing witness-provided files
- Interviewing Chinatown CBD board members
- Researching leading practices



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