

Memorandum

To: Nick Green, City Manager

From: City Attorney's Office, Bryant, Lovlien & Jarvis, P.C.

Date: March 16, 2021

Re: Formation of Cooperative – Greenhouse Operations

City of John Day ("City") owns and operates a certain greenhouse located on City-owned property (the "Greenhouse"). The purpose of this memorandum is to identify the steps to form a cooperative for purposes of operating the Greenhouse. Please note that this memorandum is not intended to be an exhaustive discussion of the formation and/or operation process. Rather, this is intended to provide an introductory, high-level perspective of the formation process.

Background

1. City purchased the structure and constructed the Greenhouse in 2018. Currently, City grows produce in the Greenhouse and sells the produce to local vendors (e.g., restaurants and grocery stores). City uses City employees and resources to fund, operate, and maintain the Greenhouse. Due to the expenditure of and strain on City resources to maintain and operate the Greenhouse, City desires to transfer operation of the Greenhouse.
2. City desires to "partner" with local vendors to form a cooperative for the operation of the Greenhouse, including, without limitation, for purposes of growing produce and selling the produce at local grocery stores and restaurants (i.e., the member users).
3. A cooperative is a type of corporation that is owned and controlled by those who use its services. Members finance and operate the business for the benefits of the members. In establishing the cooperative, the member must agree on the duties, responsibilities, rights, and obligations of each cooperative member. Under the proposed structure, City would initially serve as the "principal agent" for purposes of establishing the cooperative. However, as the cooperative develops, City may transition from such role. Finally, City intends to lease the Greenhouse to the cooperative.
4. There is no federal law governing cooperative incorporation. Rather, state law (i.e., ORS Chapter 62) imposes requirements for incorporation. The following describes the formation process under Oregon law.

Formation Process

1. Planning.
 - a. The first step is often the formation of a steering committee. The steering committee should be comprised of the prospective members or representatives from the prospective members. The steering committee and/or common members need to develop, among other things, a strategy, review the feasibility of the organization, determine responsibilities of the members, and develop a business plan.
 - b. The parties will need to identify the purpose(s) of the cooperative and the general authority of the cooperative. Under Oregon law, cooperatives may be formed for various purposes. ORS 62.125 provides the general powers of a cooperative corporation, including, without limitation, perpetual existence, the authority to purchase, lease, and/or improve personal or real property, and to make contracts and incur liabilities.

c. Finally, the parties should consider developing a term sheet or memorandum of agreement to guide the drafting of the formation documents and related legal documents. These documents should address the rights and responsibilities of each member, including, without limitation, member contributions and equity considerations. Included in this discussion should be voting rights of the members.

2. Formation Documents. Under Oregon law, a cooperative must have articles of incorporation and bylaws that govern the entity's actions. The articles are intended to describe the organization and basic structure. The bylaws are a detailed listing of the organization's structure and internal operations.

a. Articles.

1. The incorporators must file articles of incorporation with the secretary of state in accordance with ORS 62.025 and ORS 62.513. Per the statutes, the articles must include, without limitation, the following information: (a) the name of the cooperative; (b) the purposes for which the cooperative is formed (which may include that the purpose(s) of the cooperative is to engage in any lawful activity for which cooperatives may be organized under ORS Chapter 62); (c) whether the cooperative is organized with, or without membership stock; (d) the number of directors constituting the board; (e) the name of each incorporator; and (f) the duration of the cooperative. ORS 62.513 contains a list of additional information that may be included in the articles.

2. After approval by the secretary of state, the cooperative continues to have annual reporting obligations.

3. After the secretary of state issues the certificate of incorporation, the cooperative must hold an organizational meeting of the board. At the organizational meeting, the board must adopt the bylaws, elect officers, and transact such business as may come before the meeting.

b. Bylaws.

1. As noted above, the bylaws govern the administration and regulation of the organization. The bylaws include details concerning, among other things, membership qualifications and rules for admission, suspension, and termination of membership. Additional provisions concern regular and special member meetings, voting rights, quorums, capital structure, rules for distribution, as well as the rules for amending the bylaws and dissolving the cooperative.

2. As discussed below, the bylaws also contain provisions concerning the board of directors, including, without limitation, qualifications, duties, and rules for election and/or appointment of the directors. The bylaws may also contain provisions concerning the "manager" or, in this instance, the principal agent. More discussion regarding management of a cooperative is contained below.

3. Membership.

a. Membership in the cooperative is conditional on ownership of a share of membership stock or payment of a membership fee. Membership stock shares are authorized only for members. Usually, each individual member may have only one single share. The issuance fee is set by the board of directors. The shares may be divided into more than one class with such designations, preferences, limitations, voting rights and restrictions, and other relative rights as state in the articles. The cooperative may require subscription agreements and/or membership agreements.

b. ORS 62.265 generally governs the voting rights of the members of a cooperative. However, the bylaws may provide alternative voting rights of the members, which may allow member voting based on actual, estimated, or potential patronage. The term "patronage" refers to an individual member's contribution to the

cooperative's business, as opposed to the amount of capital interest a member may own in the cooperative corporation.

c. A cooperative may also issue capital stock in the number of shares stated in the articles. In general, shares of stock do not have voting power except where any amendment to the bylaws may adversely affect the capital stockholders' rights.

d. The cooperative must hold at least one annual meeting of the members.

4. Board of Directors; Management

a. The corporate powers of the cooperative are exercised by and under the authority of the board of directors. The board sets policy such as credit, pricing, purchasing, and marketing. It is also responsible for relationships with the members, management, employees, and public. Each director, at all times during the director's term of office, must be a member or a representative member of a member (if such member is other than a natural person). The bylaws may prescribe additional qualifications.

b. Ordinarily, a cooperative is managed by professionals (e.g., a manager). The manager is responsible for the day-to-day affairs of the cooperative business, including, without limitation, personnel, facilities, equipment, and accounting. Like a city manager or other professional administrator, the manager implements and administers the board's policies.

Post-Formation Considerations; Additional Considerations

1. Oregon law provides that a cooperative may enter into an agreement with any member. In this instance, the parties will need to determine the lease/use structure of the Greenhouse (and related equipment) given ownership will remain with City.

2. The cooperative will need to consider whether to employ or contract with individuals to manage and operate the Greenhouse and cooperative business. Currently, City employees have the expertise to operate the Greenhouse.

3. The cooperative will need to, among other things, obtain applicable insurances, establish bank accounts, and research, review, and understand taxation issues.

4. Additional cooperative resources may be accessed through the Northwest Cooperative Development Center, a nonprofit 501(c)(3), which is organized and devoted to assisting new and existing cooperative businesses.