

Office of  
The City Attorney  
City of San Diego

MEMORANDUM  
MS 59

(619) 533-5800

**DATE:** October 13, 2009

**TO:** David Jarrell, Deputy Chief, Public Works  
James F. Barwick, Director, Real Estate Assets Director

**FROM:** City Attorney

**SUBJECT:** When Does a Current Lessee's New Lease Require City Council Approval

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**QUESTION**

May Real Estate Assets Department [READ] enter into a new lease with a proposed lessee without City Council approval under the following circumstance: (1) the proposed lessee is currently the lessee (under a current lease or on holdover status under an expired lease) of the premises proposed to be leased; and (2) the proposed lessee has leased the leasehold premises from the City of San Diego [City] for the previous three or more years.

**SHORT ANSWER**

If READ properly evaluates all the circumstances surrounding the particular leasehold premises and the proposed lease terms and conditions for the leasehold tenancy, READ may offer a newly negotiated lease [New Lease], with a term of less than three years, to the current lessee of the premises without seeking City Council approval for the New Lease. A mere "renewal" of a previous lease's terms without Council approval would violate San Diego Municipal Code section 22.0901 and Council Policy No. 700-10.

**ANALYSIS**

The City of San Diego's leasing regulations and policies are set forth in Municipal Code section 22.0901 and Council Policy No. 700-10, respectively. Specifically, Municipal Code section 22.0901(b) states: "The City Manager, at all times, shall have power, without advertising, notice, or competitive bidding, and upon such terms as he may deem proper, to lease any of the real property of the City of San Diego for a term of three years or less provided, however, that no

such lease, so made, shall be renewed without the approval of the Council.” Section “J,” under the heading “Short-Term Lease,” on page 10 of 13 of Council Policy No. 700-10, states that: “A short-term lease may not be renewed without approval of the City Council.”

A plain-meaning review of Municipal Code section 22.0901 and Council Policy No. 700-10 indicates that the intent of the Municipal Code section and Council Policy is to ensure that the City Council has the right to review all leases that will commit the use of a City asset for a long period of time (over three years), and to ensure that leases originally let for a period of three years are not automatically renewed for an additional time period without having first received proper review or approval. A lease renewal without proper review or approval would presumably preclude the City from performing a re-evaluation of the current use of the property, the lease’s terms and conditions, and could preclude new/other lessees from having the opportunity to lease the subject property.

There are discussions within legal treatises and case law pertaining to “renewals” and “extensions” of leases. These discussions arise primarily in the areas of “options” and “holding over.” However, all of the discussions reviewed arrive at the same determinations regarding the use of these terms. Both a renewal and an extension result in a lessee remaining in possession of a leasehold under the same terms and conditions (excepting a new termination date in the case of a renewal) as the lessee had previously let the property. More specifically, an “extension” allows a lessee to remain in its current tenancy for an extended time period beyond the original term, in what is regularly referred to as “hold over” status. Whereas, a “renewal” creates a new and distinct tenancy wherein the lessee remains in possession of the premises for a new term of occupancy. See *Burroughs v. Ben’s Auto Park, Inc.*, (1945), 27 Cal. 2d 449, 454. This usage of the term “renewal” is also consistent with that found in *Black’s Law Dictionary*, (6<sup>th</sup> ed. 1990) pp. 1296-97 which defines “renewal” as:

The act of renewing or reviving. A revival or rehabilitation of an expiring subject; that which is made anew or re-established. The substitution of a new right or obligation for another of of the same nature. A change of something old to something new. To grant, or obtain extension of; to continue in force for a fresh period, as commonly used with reference to notes and bonds importing a postponement of maturity of obligations dealt with. An extension of time in which that obligation may be discharged; an obligation being “renewed” when the same obligation is carried forward by the new paper or undertaking, whatever it may be. [Emphasis added]

A distinction must be made between the creation of a new “tenancy” and the creation of a New Lease. As stated above, a renewal creates a new and distinct tenancy. A tenancy, however, is merely an interest in realty, along with possession rights thereto, that a tenant receives via a lease (i.e., by entering into or renewing a lease, a tenancy is created which gives the lessee certain

rights in respect to that individual leasehold). The rights or terms of that tenancy are guided by the terms of the individual lease. Accordingly, a new "tenancy" is created in both a renewal and in a New Lease situation. As Municipal Code section 22.0901 and Council Policy No. 700-10 are concerned with the act of renewing a lease (not the mere creation of a tenancy), in order to avoid violating the code section and policy, a determination must be made whether a lease renewal, or the creation of a New Lease, is contemplated.

Based on the accepted definition(s) of "renewal," if READ allowed an existing lessee to continue to occupy a certain leasehold premises under the same terms and conditions as were in the original/previous lease - with no re-evaluation of the terms and conditions - excepting the substitution of a new lease termination date, that action would be a renewal of the lease. And, if that lease renewal extended the term of that lessee's occupancy of the leasehold premises beyond a time period of three years, the renewal would be in violation of Municipal Code section 22.0901 and Council Policy 700-10 if it was not first approved by the City Council.

Alternatively, if READ was to propose a New Lease which would allow an existing lessee (whether that lessee's lease is about to expire or has already expired) to lease the same leasehold area, that New Lease would not be a "renewal" of that lessee's previous lease and, as long as its term does not exceed three years, the New Lease would not violate Municipal Code section 22.0901 or Council Policy 700-10.

For each New Lease, this Office suggests that, in order to conduct a thorough and complete evaluation of the circumstances of a particular leasehold property and the lease terms and conditions to be offered, READ's evaluation should be conducted independent of any consideration of the existing lessee and that READ should: (1) determine the advantages/disadvantages of continuing a short-term leasing situation verses entering into a long-term lease between the City and this or other lessees; (2) determine whether the current "use" of the subject property should remain the same or whether the property would be better utilized by a different "use"; (3) determine whether it would be beneficial or economically feasible to utilize a RFP/RFQ to determine the interest of other parties with/for the subject property; (4) consider the past performance of the current lessee; (5) ensure that all up-to-date required terms and conditions (e.g., insurance, water, best management protections, etc.) are included in any New Lease; and (6) ensure proper rental rates and/or escalators are included in any New Lease. This Office suggests that this information be documented. As long as the term of such a New Lease is for less than three years, the New Lease would not have to be approved by the City Council.

### CONCLUSION

If a thorough and complete evaluation of the circumstances of a particular leasehold premises and the lease terms and conditions to be offered is conducted prior to issuing a New Lease, a New Lease with a term of less than three years would not violate Municipal Code section

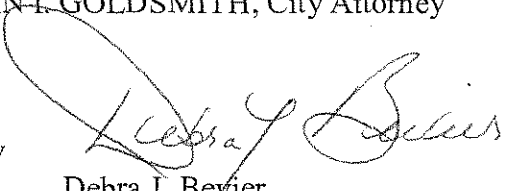
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22.0901 or Council Policy 700-10 even if: (1) the proposed lessee is currently the lessee (under a current lease or on holdover status under an expired lease) of the premises proposed to be leased; and (2) the proposed lessee has leased the leasehold premises from the City of San Diego in excess of the previous three-year period.

It is recommended that READ consider taking formal action to clarify Municipal Code section 22.0901 and Council Policy No. 700-10 to reflect the opinions discussed in this memorandum.

JAN-L GOLDSMITH, City Attorney

By



Debra J. Bewier  
Deputy City Attorney

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