

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: November 8, 2016
TO: Honorable Mayor and City Council
FROM: City Attorney
SUBJECT: The Plaza de Panama Committee Cooperation Agreement

The Plaza de Panama Committee (Committee) is a non-profit public benefit corporation formed for the purpose of fundraising and implementing improvements in Balboa Park, specifically to return the Plaza de Panama, Plaza de California, Prado, and Esplanade to pedestrian use by building a bypass bridge for vehicles, other improvements for vehicles and pedestrians, and a below-grade parking garage behind the Organ Pavilion which will include a ground-level rooftop park (Project). In 2012 the San Diego City Council (Council) adopted amendments to the Balboa Park Master Plan, and the Central Mesa Precise Plan, to incorporate the Project, as well as a certified Environmental Impact Report (No. 233958) for the Project. At that time Council also approved the Plaza de Panama Improvement Agreement (Improvement Agreement) between the City and the Committee. The Improvement Agreement memorialized the duties and obligations of the Committee and the City, specifically that the Committee would be responsible for the design and construction of the Project. The City would issue bonds to fund the portion of the construction for the parking garage only. City staff costs and City permit fees were waived in the Improvement Agreement.

The Project was delayed due to litigation over the entitlements approved for the Project. The Court of Appeal ruled that the Project approvals were properly granted and the California Supreme Court declined to hear further appeals.

After the final court ruling, the City and the Committee then started discussions to consider possible alternatives to re-start the Project. A new Plaza de Panama Cooperation Agreement (Agreement) was negotiated to capture the new roles and responsibilities of the Committee and

the City. This Agreement is unique; a negotiated arrangement where both the City and the Committee will have roles in delivering the Project. The purpose of this memorandum is to explain the responsibilities of the Parties under the Cooperation Agreement.

Under the Agreement the Committee is responsible for providing the design for the Project, including design assistance during construction, at their own expense. The Committee will endeavor through private philanthropy to raise \$30 million to pay for the design to be completed, provide design assistance through construction, and pay for a portion of the hard construction costs for the Project. In the Agreement the Committee also agrees that they will pay for any and all Project costs over the City contribution, which includes differing site conditions, delays, design errors or omissions, change orders, contractor claims and fees by public agencies (other than City fees). This obligation may require the Committee to pay more than the anticipated \$30 million contribution.

In the Agreement the City will have control and oversight of the construction contract for the Project. The City agrees to contribute \$45 million to the hard construction costs for the parking garage and other Project elements. The City is also allocating \$4 million to cover City soft costs (City staff costs and City permit fees) through Project completion. If those City soft costs exceed the \$4 million allocated, the City will need to find additional funds to cover those expenses. The Committee is not responsible for City soft costs. The City is responsible for cost overruns caused by City negligence, change orders that are not approved by the Committee, and all City staff costs regardless of the amount.

Additionally, the Agreement requires the Committee to demonstrate to the City that it has commitments or donations for at least 25% of the Committees contribution prior to the City advertising the construction contract. Based on the bids received, there are a few provisions under the Agreement in which either Party may terminate the Agreement. First, if bids come in too high; second, if either Party is unable to secure the funds needed to complete the Project; and third, the Agreement allows both Parties to re-evaluate the Project and their desire to proceed after bids come in, if they are slightly higher than the estimate. After a construction contract is awarded, neither the Committee nor the City can terminate the Agreement for convenience.

Prior to the City awarding the construction contract, the Committee must provide the City with an irrevocable commitment for a sum necessary to bridge the gap between the City's contribution and the construction contract amount. The irrevocable commitment(s) will be a guarantee by one or more members of the Committee that if the Committee is unable to raise the full amount needed through donations to complete the Project, they will personally guarantee the funds.

Prior to award of the construction contract the Committee shall deposit with the City 25% of the Committee's anticipated share of the construction contract costs to create a contingency fund. This will provide the required cash flow to pay invoices from the contractor as they come due. Monthly, the Committee shall deposit funds with the City necessary to maintain a balance of 25% of the Committee's share of the construction contract balance, until the outstanding construction contract balance is at or below the amount in the contingency fund.

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The Committee has the right at each invoice interval to review the appropriateness of the invoices submitted by the contractor. The Committee's approval is not required for the City to pay invoices, with one exception. Construction contract change orders (including change orders for design errors or unforeseen conditions), will require mutual agreement by the Committee and the City. If for any reason the Committee and the City cannot agree on the appropriateness of a change order (scope of work and/or amount), the dispute will be elevated to the Deputy Chief Operating Officer for Infrastructure/Public Works to hear both sides and try to facilitate mutual agreement. If that is not achieved the Committee and the City will submit the dispute to non-binding mediation. If after non-binding mediation the Parties are still at impasse, the change order would be an outstanding contractor claim. At the end of the Project that contractor claim would need to be resolved with the contractor through mediation under the construction contract. The Committee would be involved in that mediation process as well, where all the parties will endeavor to settle the dispute without resorting to litigation.

Our Office will be available to address any legal questions regarding the Agreement prior to or at the City Council Meeting, if needed.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/Christina L. Rae
Christina L. Rae
Deputy City Attorney

CLR:cw

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