

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: July 21, 2017

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Authority to Issue Requests for Proposal or Take Other Action Regarding Qualcomm Property Pending Vote on Initiative

INTRODUCTION

As the San Diego River Park and Soccer City Initiative (Initiative) has qualified for the ballot, this Office has received questions from Councilmembers about the City of San Diego's ability to take various actions regarding property that is the subject of the Initiative:

- Councilmember Bry asked this Office to review and opine on a private law firm's assertion that the City Council (Council) "has exclusive authority to authorize the sale or long-term lease of City-owned real property," including through the issuance of a Request for Proposal.¹
- Councilmember Gomez asked whether the City is precluded from issuing a Request for Proposals, Request for Information, or Request for Qualifications (collectively RFP) for the Qualcomm Stadium site.
- Councilmember Kersey asked whether the City may implement part of the Initiative, e.g., build a stadium on the site, consistent with any applicable parameters in the Initiative, while the public vote is still pending. If so, the Councilmember asked, could the Council accomplish this without the Mayor's involvement?

The questions asked require analysis of two complex legal issues: (1) the scope of the Council's legislative authority under the Charter considering the Mayor is chief executive and administrative officer; and (2) whether the City, through the Mayor or Council or both, may take actions with respect to the Qualcomm site, now that the Initiative is pending before the voters.

¹ See memorandum dated June 1, 2017, from Jeffrey Chine of Allen & Matkins, attached as Exhibit A.

QUESTIONS PRESENTED

1. Does the Council have the authority to lease City property through the issuance of an RFP without Mayoral input or action?
2. May the City issue an RFP for the Qualcomm Stadium site prior to the vote on the Initiative, currently designated to appear on the November 2018 ballot?
3. May the City take actions to partially implement the Initiative prior to the vote, such as by building a stadium on the Qualcomm Stadium site? If so, may the Council do so without the Mayor's involvement?

SHORT ANSWERS

1. No. The Council may not issue an RFP for a real property transaction without Mayoral involvement. The Charter gives the Council legislative authority to enact ordinances and policies regarding the disposal of City property, but gives the Mayor the power to enforce and carry out those ordinances and policies. To maintain the balance of power between the legislative and executive branches of City government, the Charter gives the Mayor veto authority over ordinances and resolutions adopted by the Council, except in very limited circumstances.
2. Yes. The City could issue an RFP for the Qualcomm Stadium site before the Initiative is adopted. However, the City cannot enter into any binding agreement that would be inconsistent with the terms of the Initiative. The City may also, put an alternative measure before the voters.
3. The City arguably could take actions consistent with the Initiative prior to the vote without infringing on voters' constitutional power. Any actions must be consistent with the City's existing laws and policies and reviewed under the California Environmental Quality Act (CEQA) and other applicable law. Any proposal would require legal review to ensure it did not violate campaigning restrictions. The Council may not act without Mayoral involvement.

BACKGROUND

The Initiative proposes the development and use of approximately 233 acres of City-owned real property at and near Qualcomm Stadium, and 20 acres of City-owned real property and improvements on Murphy Canyon Road, which was previously the San Diego Chargers' practice facility. As discussed in greater detail in prior memoranda, the Initiative is a comprehensive proposal for the redevelopment of City property that includes the Qualcomm Stadium site. The Initiative includes zoning changes, land use plan amendments, a specific plan, a development agreement, and a San Diego Municipal Code (Municipal Code or SDMC) amendment to allow for a long-term lease of the subject property. The Initiative excludes the proposed lease from any inconsistent Municipal Code or Council Policy provisions, and purports

to take Council out of the lease approval process, unless required by the Charter. Initiative, pp. 29-30 (proposed SDMC § 61.2805(e)). In addition, as described in prior memoranda, the Initiative is exempt from state environmental laws.²

ANALYSIS

I. THE ROLES OF MAYOR AND COUNCIL REGARDING REAL PROPERTY TRANSACTIONS.

A. The Council has Legislative Authority and the Mayor has Administrative and Executive Authority.

The San Diego Charter vests all legislative authority in the Council. San Diego Charter § 11. Legislative action sets policy, whereas executive and administrative acts execute and enforce adopted policy. 2A McQuillin Mun. Corp. § 10:6 (3d ed. 2017). The Council may adopt laws and policies governing the purchase, sale, and lease of City property, including addressing the process by which those transactions occur. However, the Charter does not provide the Council with administrative authority to execute and enforce those laws and policies.³ Rather, the execution and enforcement of Council-adopted laws and policies is the responsibility of the Mayor as the chief executive officer under Charter section 265(b)(2).

The issuance of an RFP for the proposed sale or long-term lease of City property touches on both legislative and administrative authority. The Council cannot lease City property through the issuance of an RFP without the Mayor's involvement. For example, the Council votes to authorize a sale or lease of City property pursuant to certain laws and policies, while the Mayor, exercising his administrative authority, issues the RFP, engages in negotiations, and takes other actions necessary to complete the authorized transaction.

B. Current Legal Framework for Real Property Transactions.

The Charter contemplates a cooperative government with the Mayor managing the City's real property and bringing forward to Council, either on his own initiative or as requested by the Council, analysis and recommendations with respect to the disposition of City real property. In specific transactions, the Council exercises its legislative authority in considering the Mayor's recommendations. This cooperative legislative and administrative relationship is further reflected in the Municipal Code provisions and Council Policies the City has adopted to address the disposition of City real property.

1. The Municipal Code Requires the Council to Approve the Sale or Lease of City-Owned Real Property in Many Instances.

The disposition of City-owned real property, whether by lease, sale, or exchange, is generally governed by the regulations in Chapter 2, Article 2, Division 9, of the Municipal Code.

² See City Att'y MS 2017-6 (Mar. 21, 2017).

³ See City Att'y Report 2016-1 (Jan. 8, 2016), which attached numerous City Attorney opinions and memoranda dating back several decades, addressing the question of Council authority in administrative affairs.

The Mayor may lease property without obtaining Council approval, without advertising, notice, or competitive bidding, and on whatever terms the Mayor deems proper if: (1) the lease is for three years or less; (2) the lease is for a wireless communication facility and is for ten years or less; or (3) the lease is a month-to-month lease for residential housing or Brown Field Airport Incubator Industries (even if the occupancy exceeds three years). SDMC § 22.0901. Council approval is required for all other leases, and for sales of City-owned real property.

Id. §§ 22.0901, 22.0902. Council approval of a lease or sale of real property is subject to Mayoral veto. San Diego Charter § 280.

2. Council Policies Provide a Framework for the Lease or Sale of City-Owned Real Property and Guide the Mayor's Selection of the Appropriate Marketing Method.

The Council has provided direction in Council Policies 700-10 and 700-41 to guide the lease or sale of City-owned real property.⁴ Neither policy contemplates the Council, on its own, developing and issuing an RFP for City property. Council Policy 700-10 states: "The Mayor will review City-owned real estate not used for municipal purposes and determine the appropriate use of the property. Those properties not needed for either City or public use within the foreseeable future, may be made available for lease or sale." This Mayoral review is incorporated in the City's Portfolio Management Plan presented to the Council annually.⁵

Council Policy 700-10 authorizes a number of methods for marketing and advertising properties for sale or lease. The overarching goal of the policy is to ensure competition and the widest possible exposure to the open marketplace. The Council has established a preference that leases of City-owned real property be advertised to the open market through the RFP process. Council Policy 700-41. "When particularly complex or sensitive issues are involved, the RFP should be brought to the appropriate Council Committee for review and approval prior to its issuance." *Id.* While this policy anticipates that the Council would be asked for direction once the Mayor has made the decision to issue an RFP for the lease or sale of real property that is particularly sensitive or complex, the policy does not contemplate the Council unilaterally preparing and directing the Mayor to issue an RFP.

C. Options to Change the Current Framework.

The Council may change the current laws and policies for the sale or lease of City property by amending the Municipal Code or amending existing Council Policy to, for example,

⁴ There are also a number of sub-policies which apply to specific properties such as property in Balboa Park (Council Policy 700-04), leases to specific types of entities such as non-profit entities (Council Policy 700-12), or leases for specific purposes such as wireless communication facilities (Council Policy 600-43).

⁵ The FY17 Portfolio Management Plan (PMP) currently states:

Subsequent to the original publishing of this report the Chargers Football Club terminated their lease at Qualcomm Stadium. Future uses of the stadium facility and the surrounding property are under consideration. In the meantime, stadium staff will continue to keep the facility in a safe operating condition until future uses are determined.

The PMP was provided to the Mayor and Council via memorandum dated March 14, 2017.

require the Mayor to bring to Council proposed RFPs for property meeting established criteria prior to issuance. Any proposed amendment would need to be reviewed to ensure it is legally appropriate, and does not overstep the Council's legislative authority and impermissibly invade the Mayor's administrative and executive authority under the Charter. *See* City Att'y Report 2016-1 (Jan. 8, 2016). However, the Council would likely impermissibly interfere with the Mayor's managerial authority if it were to unilaterally develop and direct the issuance of an RFP for a proposed real property transaction. Charter §§ 28, 260, 265.

II. CITY ACTIONS RELATED TO THE SUBJECT PROPERTY PRIOR TO THE PENDING INITIATIVE VOTE.

A. Any City⁶ Actions Prior to the Vote on the Initiative May Not Infringe on the Voters' Power of Initiative Reserved to Them by the State Constitution.

The power of initiative is a fundamental constitutional right reserved to the voters under the state Constitution and liberally construed in favor of its exercise. *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 41 (1979); *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 591 (1976). The Initiative petition received sufficient voter signatures to qualify for the ballot and the Council has acted as required, voting to place the Initiative on the next general election ballot in November 2018, unless the Council acts to place it on an earlier ballot. San Diego Resolution R-311183 (Jun. 19, 2017). It is now before the voters to decide.

The law addresses a number of instances in which the legislative body of a jurisdiction is limited to act when the voters have spoken. When presented with a qualified initiative petition, the legislative body has no authority to make changes to the initiative, only to adopt it outright or to put it before the voters. *See Native Am. Sacred Site & Envtl. Protection Ass'n v City of San Juan Capistrano*, 120 Cal. App. 4th 961 (2004) (city's duty to adopt qualified voter-sponsored initiative or place it on ballot, is ministerial and mandatory). Similarly, once an initiative measure has been approved by the voters, the legislative body may not make any substantive change to the measure, without going back to the voters, unless specifically authorized in the measure itself. Cal. Const. art. II, § 10(c); *Franchise Tax Bd. v. Cory*, 80 Cal. App. 3d 772, 776 (1978). Because the City has *no* legal authority to change the Initiative, either before it is voted on or after it is approved, it defies logic to suggest that the City could have the authority to, in effect, amend the Initiative by taking action while the vote is pending that would thwart its implementation. Any such City action would certainly draw litigation and would likely be found to violate the state Constitution's reservation of the power of initiative to the voters.

Nevertheless, the City's hands are not completely tied. City officials must be able to govern, and that could include the creation of parallel processes. Short of entering into contracts or making legally enforceable commitments, the City may be able to issue an RFP for the Qualcomm Stadium property before the Initiative is adopted without infringing on voters' constitutional power. Any solicitation should be carefully worded to ensure that the City does not

⁶ Consistent with Section I of this Memorandum, the use of "City" in this section assumes that the RFP is issued in accordance with the City's laws and policies.

use City resources to campaign for or against the Initiative.⁷ However, if the Initiative is adopted, it will govern the use of the property and any alternative proposal would become moot. If the Initiative fails or is invalidated by the courts, the City would be free to move forward with an alternative proposal for use and development of the subject property.

In addition, the City could propose an alternative measure for voter consideration. *See Concerned Citizens v. City of Carlsbad*, 204 Cal. App. 3d 937 (1988) (discussing citizens' initiative and subsequently proposed competing City measure, citing California Elections Code section 4107, now codified as section 9222). Unlike the Initiative, any City proposed measure would be subject to CEQA review, the Meyers Milias Brown Act, and any other applicable laws. The general rule for competing measures is that if both pass, the measure with the highest number of votes prevails. Cal. Const. art. II, § 10(b). In some circumstances, the court may try to reconcile measures that are not wholly inconsistent. This Office can provide legal guidance as needed to the Mayor and Council should an alternative ballot measure be under consideration.

B. City Actions Consistent with the Initiative are Theoretically Feasible, but Would Require Further Facts for Legal Review.

Any City proposal to move forward with a potential action "consistent" with the Initiative would need further legal review to ensure the action would be consistent with the Initiative, existing City laws and policies, and any other applicable law, including CEQA and campaigning rules.⁸ *See* City Att'y MS 2017-6 (Mar. 21, 2017).

CONCLUSION

The disposition of City real property includes the exercise of both legislative and administrative authority. The Council has adopted legislation, both as law in the Municipal Code and as Council Policies, governing the sale and lease of City property. This legislation grants the Mayor the right to issue RFPs. If desired, the Council can amend the laws and policies, but not in a way that would violate or impede the Mayor's administrative authority.

The City, consistent with existing laws and policies, may explore alternative uses for the subject property before November of 2018. It may issue an RFP for the Qualcomm Stadium site before the Initiative is adopted, so long as it does not violate campaigning prohibitions. Entering into any contract inconsistent with the development and use of the property as provided in the Initiative would likely be a violation of the state constitutional reservation of initiative power to the voters. However, nothing in the law requires City officials to refrain from taking any actions during the 16 months until voters act on the Initiative. The City could, for example, propose an alternative measure for voter consideration or issue an RFP consistent with the Initiative.

⁷ See City Att'y MS 2017-6 (Mar. 21, 2017) and its attachments for an extensive discussion of the rules applicable to city resources and campaign activity.

⁸ This memorandum does not otherwise address the City's authority to continue to manage and use the property identified in the Initiative pending the public vote.

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Any proposed action consistent with the Initiative would have to be evaluated to ensure that it would not violate campaigning prohibitions. It would also have to be consistent with City law and policies and would be subject to review under CEQA and other applicable laws. This Office can provide more detailed review if and when it receives a more detailed proposal.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Prescilla Dugard
Prescilla Dugard
Chief Deputy City Attorney

PD:MA:sc:cm

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Attachment

cc: Andrea Tevlin, Independent Budget Analyst

Allen Matkins

Memorandum

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
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To: Kari Prevost

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Date: June 1, 2017

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File Number: 376764-00001/SD855729.01

Subject: City Council Procedures to Agendize Request for Proposals

This memorandum briefly summarizes the authority of the San Diego City Council to sell or lease City-owned land, and the rules applicable to placing a request for proposals to sell or lease such land ("RFP") on the City Council ("Council") agenda.

I. Council Authority to Direct Staff to Issue RFP for Sale or Lease of Land

The City Council has the exclusive authority to authorize the sale or long-term lease of City-owned real property. (San Diego Municipal Code ["SDMC"] §§ 22.0901 and 22.0902.) The City can dispose of its real estate assets through negotiated sales, public auctions, sealed bids and leasing. (SDMC §§ 22.0901 and 22.0902; Council Policy 700-10.) One of the methods that the City may use to sell or lease a City-owned real property includes issuing a RFP. (Council Policy 700-10.) As such, inherent in the City Council's authority to authorize the sale or long-term lease of City-owned land is the power to direct City staff to issue a RFP for such a sale or lease.

II. Procedure to Place RFP on the Council Agenda

A City Councilmember may ask the Council President to place a matter on the agenda. (SDMC § 22.0101, Rule 2.4.3(a) [Council President has the discretion to place matters on the agenda].) If the Council President does not agree to do so, any Councilmember has the following options:

- The City Council, by majority vote, may direct the City Clerk to place a matter on the Council agenda, (Id. at Rule 2.9.1(a).); or
- The Council President will directly place a matter on the Council agenda, if so requested in writing by four councilmembers. (Id. at Rule 2.9.2.)

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From: Jeffrey Chine
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As such, one of the above-mentioned options can be used to place the RFP on the Council agenda.

Please feel free to contact us if you have any questions or comments.