

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: August 10, 2017
TO: Honorable Councilmember Cate
FROM: City Attorney
SUBJECT: Council Authority to Lease and Sell Real Property

SUMMARY

On June 27, 2017, you asked the Office of the City Attorney several questions related to the leasing and selling of City of San Diego-owned real property identified as the Existing Stadium Site and the Murphy Canyon Leased Property, as those terms are defined in the San Diego River Park and Soccer City Initiative. We address each of these questions, in turn, below.

I. WHAT IS THE AUTHORITY GRANTED TO THE CITY COUNCIL UNDER COUNCIL POLICY 700-10, OR OTHER GOVERNING DOCUMENTS, TO DECLARE SURPLUS PROPERTY AND INITIATE A SALE OR LEASE OF THE PROPERTY?

Council Policy 700-10 does not grant any authority to the San Diego City Council (Council) to make the determination that real property is surplus land, or to initiate sales or leases of real property. The Council Policy anticipates that the Mayor will take these steps, which is consistent with the administrative and executive authority granted to the Mayor by San Diego Charter (Charter) sections 28, 260, and 265. *See* City Att’y MS 2017-17 (July 21, 2017). For example, 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.” Further, neither the Charter nor the San Diego Municipal Code (Municipal Code) address whether the Council has the authority to determine that a specific parcel of City-owned real property is surplus land, or to initiate the sale or lease of real property.

The Council may take a more active role in the determination of real property as surplus land if the Municipal Code or relevant Council Policies are amended. However, the Council’s actions must be legislative and policy-based in nature, consistent with the responsibilities of the Mayor and Council set forth in the Charter.¹ The Council would not, for instance, be able to determine

¹ This Office has provided previous memoranda and reports regarding the scope of the Council’s legislative authority, which generally includes developing a policy or plan and does not include any role in the administrative

that certain real property is surplus land and initiate a lease or sale without the Mayor's cooperation. The Mayor manages the administrative affairs of the City and must provide the facts necessary to make a surplus land determination. Additionally, the Mayor would send out the notices required by the Surplus Land Act before any surplus property could be sold, and would negotiate the terms of any potential lease or sale. *See* Cal. Gov't Code § 54222, City Att'y MS 2017-17 (July 21, 2017).

Nor can the Mayor's Office act independently. The Council must ultimately authorize any sale of real property and most leases for more than three years, in accordance with the Municipal Code. *See* San Diego Municipal Code §§ 22.0902, 22.0904, 22.0907, City Att'y MS 2017-17 (July 21, 2017). This Office is available to assist if the Council wishes to change the current process for determining a specific property to be surplus land.

II. IS THERE A REQUIREMENT OF A PUBLIC VOTE SHOULD A DISPOSITION OF SURPLUS PROPERTY EXCEED 80 ACRES?

Yes. Charter section 221, which applies to the sale of surplus land, requires that any sale or exchange of real property owned by the City of San Diego consisting of 80 or more contiguous acres be authorized by an ordinance of the Council that is subsequently ratified by a public vote, subject to limited exceptions. The relevant exception is discussed in Section 5 below.

III. DOES THE PROCESS OUTLINED IN COUNCIL POLICY 700-10 GUARANTEE A REQUEST FOR PROPOSAL (RFP) FOR THE USE OF THE PROPERTIES OUTLINED?

No. Council Policy 700-10 does not guarantee that an RFP process will be used to sell or lease the Existing Stadium Site or the Murphy Canyon Leased Property. Council Policies 700-10 and 700-41 express a preference for using the RFP process, especially in the context of leases. However, both policies also have provisions for exclusively negotiating sales and leases of City-owned real property. Council Policy 700-10 recognizes that there are circumstances under which offering property on the open market for sale or lease is not necessary, or even likely to obtain the highest value. The policies also recognize that the City may have a public purpose for selling or leasing a property for a specific use that is not furthered by competitive bidding. In these situations, Council Policy 700-10 authorizes an exclusively negotiated sale or lease.

IV. DOES THE EXISTENCE OF AN ACTIVE LEASE PROHIBIT THE DETERMINATION OF SURPLUS PROPERTY AND THE INITIATION OF A SALE OR LEASE?

No. The existence of a lease alone does not prohibit the City from determining that real property is surplus land as defined in California Government Code section 54221(b), or from initiating the sale or lease of City-owned real property. The City generally would consider all factors and legal constraints relevant to the current and potential future use of the property, including the existence

of a lease, before determining that real property was surplus land, or initiating the sale or lease of real property.

V. DOES CHARTER SECTION 221 APPLY TO A SALE OF PROPERTY IF THE USE OF THE PROPERTY BY THE GOVERNMENTAL AGENCY DOES NOT QUALIFY AS A “BONA FIDE GOVERNMENTAL PURPOSE”? WHAT USES WOULD QUALIFY AS A “BONA FIDE GOVERNMENTAL PURPOSE”?

Charter section 221 has an exception to the requirement for a public vote for sales to governmental agencies for a “bona fide governmental purpose” that are approved by an ordinance of the Council. The phrase “bona fide governmental purpose” is not defined in the Charter or in California law. To determine the meaning of the phrase, the terms “bona fide” and “governmental purpose” can be examined separately.

“Bona fide” means made in good faith, sincere, or genuine. *Black’s Law Dictionary* 210 (10th ed. 2010). Historical City documents leading to adoption of Charter section 221 (Sale of Real Property) also support the definition of “bona fide” as “genuine.” City of San Diego Charter Review Commission Final Report at 15 (March 1989).

In an unrelated area of California law, “government purpose” has been defined to include traditional government uses, such as roads, school buildings, parks, police and fire stations, libraries, or parking lots dedicated solely to public parking. Cal. Health & Safety Code § 34181(a)(1). While these examples would not control here, they are instructive.

Ultimately, a decision-maker must analyze the specific proposed use in determining whether a proposed sale is for a “bona fide governmental purpose.” If the City were to propose such a sale in the future, this Office is available to assist in analyzing whether it qualified as a “bona fide governmental purpose” at that time.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Leslie FitzGerald for

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Deputy City Attorney

MDA:mm

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cc: Honorable Mayor

Honorable City Councilmembers

Andrea Tevlin, Independent Budget Analyst