

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: September 30, 2019
TO: Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: Roles of Mayor and City Council in the Granting of Franchises

INTRODUCTION

On October 1, 2019, the City Council is scheduled to hear Item 333, which seeks authorization for two agreements for gas and electric franchise consultant services. The current gas and electric franchises were granted for a term of 50 years in 1970, and will expire January 17, 2021. The Office of the City Attorney has received questions about the City Council's (Council) authority with respect to the new franchises. This memorandum explains the respective roles of the Mayor and Council in granting the new franchises.

QUESTION PRESENTED

What are the respective roles of the Mayor and Council in granting the new franchises?

SHORT ANSWER

The Mayor, in his administrative capacity as Manager under the "Strong Mayor" form of government, has sole authority to (1) develop the terms of a request for proposal (RFP) for the new franchise agreements, and (2) to make recommendations to the Council that a franchise be granted to the proposer who is responsive, responsible, and submits the most competitive proposal. After the competitive process concludes, and upon the recommendation of the Manager, the Council may either disapprove or grant the franchises by ordinance approved by a two-thirds vote. Nothing prohibits the Mayor from seeking Council input on RFP terms prior to advertisement or from updating the Council throughout the competitive process.

DISCUSSION

The granting of franchises is governed by San Diego Charter section 103, which in relevant part provides:

Such grants shall be made by ordinance adopted by vote of two thirds (2/3) of the members of the Council and only after recommendations thereon have been made

by the Manager and an opportunity for free and open competition and for public hearings have been given.

The words “only after recommendations thereon have been made by the Manager” mean that the Council may not vote on an ordinance to grant a franchise until after the Manager makes his initial recommendations.¹ This is consistent with separation of powers recognized elsewhere in our City Charter: it is the administrative branch’s role to develop and advertise requests for proposals for contracts, and the legislative role to ultimately approve or disapprove those contracts. City Charter § 103; *see also* City Att’y MS 2019-1 (Jan. 7, 2019), attached hereto as Attachment 1, which notes that while the Council could not participate in contract negotiations, it did have the ultimate authority to decide whether or not to approve the resulting contract.

Nothing prohibits the Mayor from recommending and seeking Council input on proposed franchise terms before advertising the RFP for the franchise agreements, and this is in fact consistent with the City’s approach during the previous competitive process. When the existing franchises were granted in 1970, the City Manager developed the terms of the proposed franchises and sought Council approval of those terms before advertising the RFP. This approach was consistent with the form of government that existed in 1970 (i.e., the City Manager reported to the Mayor and to the Council. That reporting structure has since been replaced by a Strong Mayor-Strong Council form of government). Thus, although the Council may provide input on key terms through this public process, it may not direct or usurp the Mayor’s administrative functions by, for example, engaging in the actual drafting of the RFP.

If, after a “free and open competition” and public input (Charter section 103), the RFP results in what the Manager deems to be a prevailing responsive and acceptable bid or bids, the Manager may then recommend to the Council that it grant the franchises by ordinance. An ordinance with an affirmative two-thirds Council vote is required to grant the franchises.

Finally, nothing prohibits the Mayor from keeping the Council apprised by informational updates and briefings throughout the process, provided that all city officials comply with the open meeting requirements of the Ralph M. Brown Act.

CONCLUSION

The Manager (i.e., the Mayor), as the City’s chief administrative officer, has exclusive authority to recommend the terms and award of proposed franchises. The development of recommended franchise terms, and selection of a bidder, is an administrative function that rests with the Mayor. The Council’s legislative function is to approve or disapprove the grant of franchises. Approval of the franchise agreements requires an ordinance passed by a two-thirds vote. Nothing prohibits the Mayor from soliciting Council input on RFP terms prior to advertisement, or providing

¹ The reference to the “Manager” refers to the administrative functions of the City, powers which now reside in the Mayor under San Diego’s “Strong Mayor” form of government. *See* Charter §§ 11, 11.1, 11.2, 12, 28, 260, and 265.

Hon. Mayor and Councilmembers

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informational updates, before the recommendation is brought to Council for its approval or disapproval.

MARA W. ELLIOTT, CITY ATTORNEY

By/s/ Frederick M. Ortlieb

Frederick M. Ortlieb

Deputy City Attorney

FMO:als

MS-2019-23

Doc. No.: 2186515

Attachment: Memorandum to Hon. Mayor Faulconer dated Jan. 7, 2019

cc: Aimee Faucett, Chief of Staff, Office of the Mayor

Kris Michell, Chief Operating Officer

Andrea Tevlin, Independent Budget Analyst

Elizabeth Maland, City Clerk

ATTACHMENT

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: January 7, 2019

TO: Honorable Mayor Kevin L. Faulconer

FROM: City Attorney

SUBJECT: Councilmember Participation in SDSU West Negotiations

INTRODUCTION

Local voters approved Measure G – the SDSU West citizens’ initiative – in the citywide election on November 6, 2018. Measure G contemplates that the City of San Diego and San Diego State University (SDSU) will negotiate the terms of a purchase and sale agreement, and potentially other agreements, related to the City’s sale of the Mission Valley stadium site, consisting of approximately 132 acres of real property (Site), to SDSU or its affiliate. Measure G allows the City to sell the Site only if the San Diego City Council approves the City’s sale of the Site “at such price and upon such terms as the Council shall deem to be fair and equitable and in the public interest.” San Diego Municipal Code (Municipal Code or SDMC) § 22.0908(a).¹

The City and SDSU are commencing negotiations related to implementation of Measure G. Your office has asked whether a Councilmember may participate in those negotiations as part of the City’s negotiating team. As discussed below, a Councilmember’s participation in contract negotiations violates the San Diego Charter (Charter). Individual Councilmembers and Council District staff may not participate in the City’s negotiations with SDSU to sell the Site. Rather, and in accordance with Measure G, the Council will serve as the “check and balance” by reviewing the proposed sale terms before deciding whether to approve the sale of the Site.

DISCUSSION

City officers and employees must comply with the Charter, which is the City’s constitution. *See Miller v. City of Sacramento*, 66 Cal. App. 3d 863, 867 (1977). “A city charter is like a state constitution but on a local level; it is a limitation of, not a grant of power.” *Id.* “Any act that is violative of or not in compliance with the charter is void.” *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994) (city council cannot act in violation of its city charter).

¹ The main substance of Measure G’s provisions will be codified in Municipal Code section 22.0908.

Under the Charter, the Council is the City's legislative body, responsible for making public policy decisions, and the Mayor is the City's chief executive officer and chief budget and administrative officer. *See* Charter §§ 11, 11.1, 11.2, 12, 28, 260, 265. The Charter establishes a separation of authority between the Council (legislative authority) and the Mayor (executive and administrative authority), including a system of checks and balances, similar to the separation of powers among the three branches of government under the state and federal constitutions. City Att'y MOL No. 2015-13 (Aug. 24, 2015); 2007 Op. City Att'y 347 (2007-1; Apr. 6, 2007). "The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." *Carmel Valley Fire Prot. Dist. v. State of Cal.*, 25 Cal. 4th 287, 297 (2001) (citations omitted). The separation of powers doctrine is intended to prevent the basic or fundamental powers of the government from being combined in the hands of a single person or a group. *Id.*

The Charter dictates that the Mayor will supervise administration of the City's affairs and make recommendations to the Council regarding the City's affairs. *See* Charter §§ 28, 260, 265(b)(3). "The Mayor holds all of the City's administrative power, and is solely responsible for the day-to-day operations of the City." 2010 City Att'y Report 808 (2010-30; July 26, 2010). Accordingly, the Mayor's office, or a City department acting under the Mayor's direction, conducts the City's contract negotiations, including real property negotiations.

A Councilmember's participation in contract negotiations would intrude upon the Mayor's exclusive authority under the Charter to conduct the City's administrative affairs and would violate the Charter's mandate for a separation of authority between the legislative and executive branches of City government.² If a City department presents a negotiated contract for the Council's approval, and if an individual Councilmember disfavors the negotiated terms, the Councilmember may exercise his or her legislative prerogative by voting to deny the contract or requesting that the Mayor renegotiate contract terms. A Councilmember's legislative function under the Charter does not extend to negotiating contract terms directly with a third party at the outset. Moreover, we believe a Councilmember's direct involvement in contract negotiations, followed by that same Councilmember's vote on the negotiated contract, would undermine the Charter's system of checks and balances for City government.

The Mayor may keep the Council apprised of ongoing contract negotiations without implicating a Charter violation. The Council may ask the Mayor to provide informational updates regarding negotiations, and the Mayor "shall inform the Council of any material facts or significant developments related to all matters under the jurisdiction of the Council." Charter § 32.1. Also, the Council may provide limited direction on real property negotiations through Closed Session discussions. The Ralph M. Brown Act (Brown Act) permits the Council to hold a Closed Session

² We are informed that Measure G proponents have interpreted Measure G to require the involvement of one or more Councilmembers in negotiations for sale of the Site. As mentioned above, Measure G requires that, before the City's sale of the Site can occur, the Council must approve the sale terms. SDMC § 22.0908(a). However, nothing in Measure G requires, or even envisions, that a Councilmember will participate in Site-related negotiations. Indeed, consistent with the Mayor's role under the Charter, Measure G states: "Nothing in this section abrogates, or is intended to abrogate, the Mayor's administrative and executive authority, particularly with regard to engaging in good faith contract negotiations, including purchase and sales agreements for the City." *Id.* § 22.0908(z).

with its real property negotiators, before the City's sale of the Site, to allow the Council to grant authority to its negotiators regarding the "price and terms of payment" for the sale transaction.³ See Cal. Gov. Code § 54956.8. However, the "price and terms of payment" clause is narrowly construed and, in the current context, would encompass only the amount of consideration to be paid for the Site, the form, manner, and timing of how that consideration would be paid (e.g., lump sum payment, installment payments, or other payment arrangement), and items that are essential to arriving at the price and payment terms, such as methods of valuation for the Site. See *Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904, 924 (2002) (Council's closed session discussion exceeded scope of Brown Act exception for real property negotiations, in part because discussion extended far beyond specific buying and selling decision); 94 Op. Cal. Att'y Gen. 82 (2011). The "price and terms of payment" clause would not encompass non-price terms of the sale transaction that will need to be negotiated in accordance with Measure G.

CONCLUSION

The Charter, which serves as the City's constitution, clearly delineates between the Council's legislative authority and the Mayor's executive and administrative authority. In light of this separation of authority, it is improper for an individual Councilmember – or the Council as a whole – to become involved in the City's administrative affairs, including contract negotiations, although the Mayor may keep the Council apprised of such negotiations.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Kevin Reisch

Kevin Reisch
Senior Chief Deputy City Attorney

KJR:nja
MS-2019-1
Doc. No.: 1891582_4

cc: Honorable City Councilmembers
Kris Michell, Chief Operating Officer
Aimee Faucett, Chief of Staff, Office of the Mayor
Andrea Tevlin, Independent Budget Analyst

³ Any future Closed Session discussions regarding the City's sale of the Site would be strictly confidential. Any breaches of confidentiality could not only jeopardize the City's negotiating position, but also result in criminal charges and other serious consequences.