Memorandum

To: City Clerk's Office

From: Office of The Council President

Date: 11/15/2017

Re: Agenda Reports

Please accept the attached letter of response from Council President Reid to the Grand Jury which is scheduled to be voted upon on the November 28th 2017 City Council Agenda.

CITY OF OAKLAND

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Honorable Morris D. Jacobson, Presiding Judge
Alameda County Superior Court
1225 Fallon Street, Department One
Oakland, CA 94612

RE: City's Response to 2016-2017 Alameda County Grand Jury Report on Developing City-Owned Property in Oakland

Dear Judge Jacobson:

The City Council thanks the Grand Jury for its work on this issue. First, the City Council assures the Grand Jury that it takes transparency and open government seriously. In this spirit, the City Council adopted a Sunshine Ordinance in 1997 that greatly expanded open government practices in Oakland beyond those required by state law. Second, the Grand Jury should know that City staff is in the process of discussing a "public lands" policy with community stakeholders that could significantly change the process for disposition of City real property for development. The discussions involve possible establishment of a stronger policy for competitive solicitations for City real property, which would include providing more opportunities for public input early in the land disposition process. Third, we remind the Grand Jury that sound public policy requires us to balance the City's commitment to open government and transparency against the public's interest in protecting the confidentiality of real property negotiations so that the City is able to effectively negotiate development deals on behalf of the community that put the needs of the community first.

Finally, we take issue with the Grand Jury's characterization of the Council's actions as "backroom dealing". The term "backroom dealing" used in the context of closed session implies that the City negotiated development deals with developers in closed session. To the contrary, the City Council used closed session, in the manner contemplated by the open meeting laws, i.e., as a vehicle to provide the City's negotiators guidance in negotiations with the developers. Discussion of the City's negotiating strategy and Council's authorization in open session would disadvantage and undermine the City's interests in negotiating the best price and payment terms for the City and community. Of course, while actual negotiations never take place in open session settings, the public had, and always has, the opportunity in open session meetings to provide input at various stages of the project negotiation. For example, the Council notices, discusses and approves Exclusive Negotiating Agreements, Lease Disposition and Development Agreements and Disposition Development and Agreements in open session; and the public provides input before the Council votes to approve such agreements.

We respond to each of the Grand Jury's findings and recommendations below.

FINDINGS

Finding 17-1

The Oakland City Council misapplies the real estate negotiation exception to the open-meeting requirements of the Brown Act and the Oakland Sunshine Ordinance, thereby shielding the deliberative processes – including discussions and debates regarding project vision, project scope, feasibility issues, community benefits, and the ultimate selection of a developer – from public scrutiny.

The City Council disagrees with this finding. The City Council conducts its closed sessions on real estate matters in full compliance with the Brown Act and Sunshine Ordinance. The City agrees that the Brown Act limits closed session discussions on real estate matters to the "price and terms of payment" for the proposed transaction; however there is no consensus within the legal community on the exact parameters of this standard. Given that the City seeks to pursue many goals beyond simply maximizing monetary return when it conveys real property – goals such as creating jobs, increasing the supply of affordable housing, promoting environmental sustainability, eliminating blight, and providing neighborhood-serving uses – the City must ensure that the terms of conveyance will result in development projects that meet these goals and benefit the community as a whole. Therefore, in the context of public lands (as opposed to private real estate transactions), "price and terms of payment" must include any consideration that is provided to the City in exchange for the land, including community benefits and development covenants that the prospective purchaser/developer offers. And any discussion of consideration on a deal necessarily includes a discussion regarding whether a particular purchaser/developer has the means -- such as the development experience and financial capability -- to actually deliver the consideration. Non-monetary considerations are often central topics of negotiations; accordingly to conduct effective negotiations, the City Council must be able to discuss these matters and direct its negotiators in a confidential setting, consistent with the intent of the real estate exception. Although there is a difference of opinion among California public agencies, the City's view is consistent with the views of some other agencies.[1]

The City Council does agree with the Grand Jury, however, that the real estate exception does not permit the Council to discuss all aspects of a proposed transaction or project in closed session, and that many matters should be discussed in open session with full public participation. Consistent with the real estate exception, the City agendized all three of the transactions cited in the Grand Jury report as open session items, and discussed those transactions in open session numerous times at various stages of the development process. See the discussion on Finding 17-3 below. Council never makes final decisions on real estate matters in closed session – any final decision to choose a purchaser/developer or project requires legislation that must be noticed,

[1] See, League of California Cities "Open & Public V: A Guide to the Ralph M. Brown Act", revised April 2016, Ch. 5, p. 45.

discussed and acted upon in open session; accordingly there are no final votes or decisions to report out of closed session.

Finding 17-2

The city's closed session agendas for discussions of the 1911 Telegraph and 12th Street Remainder projects did not comply with disclosure requirements in the Brown Act and the Oakland Sunshine Ordinance.

The omission of the words "of payment" from the closed session agendas for these two projects was an oversight. The City will ensure going forward that closed session agendas on all real estate items refer to "price, terms of payment, or both." A review of the Council's agendas over the years shows that the City's longstanding practice has been to notice price, terms of payment or both.

Finding 17-3

The Oakland City Council violates the city's Sunshine Ordinance by failing to discuss publicly the advisability of selecting particular developers for projects on city-owned property before making final decisions (section 2.20.120(B)) and failing to disclose the parts of closed session discussions that were not confidential (section 2.20.130).

The City Council disagrees with this finding. As noted above, the City agendized all three of the transactions cited in the Grand Jury report at numerous open session meetings, and Council discussed them in open session many times at various stages of the development process before it made the final decisions to select particular developers. Those discussions occurred at both the Council committee level and at full Council. In all three projects, Council first considered and authorized exclusive negotiating agreements ("ENAs") with prospective purchaser/developers in open session. The ENA actions occurred well before the City committed to a final project. Council subsequently held open session meetings before authorizing the actual disposition and development agreements ("DDAs") that committed the City to a particular project.

On the 12th Street Remainder project, the City held no fewer than nine open session meetings of Council and Council committees on the project before the Council ultimately approved the project developer.[2] Council considered the 1911 Telegraph project at three open

[2] Approval of an ENA with the UrbanCore-Integral team was heard at Council's Community and Economic Development Committee ("CED") on 6/25/2013 and full Council on 7/2/2013. The proposed DDA with UrbanCorp-Integral was heard at CED on 4/14/2015 with first reading of the DDA ordinance on 6/17/2015. After Council directed a new competitive process for the site, the respondents to the RFP were presented at CED on 2/29/2016, and an ENA with the new development team of UrbanCorp and EBALDC was authorized by full Council on 3/5/2016. The DDA with UrbanCorp-EBALDC was considered by CED on 6/28/2016, first reading of the DDA ordinance was considered at full Council on 7/5/2016, and second reading of the ordinance was considered on 7/19/2016. This summary does not include instances where the project was on a Council open session agenda but never discussed, nor does it include several subsequent open sessions where a substitution of development partners was considered.

sessions,[3] and the 2100 Telegraph project at four open sessions.[4]

The City staff reports for each of these actions, which were made publicly-available at least 10 days in advance of the meeting per the Sunshine Ordinance, included a detailed and extensive analysis of the advisability of selecting the recommended developers, which typically included a summary of the developer's track record of past projects and access to sources of capital. The City afforded members of the public full opportunity to give their input on proposed transactions to Council prior to and at these Council meetings.

The Grand Jury acknowledges that the City held multiple open sessions on each of these projects, but nevertheless appears to be concerned about the level of discussion among Councilmembers at these meetings. Please note that the Sunshine Ordinance does not set any minimum level of Councilmember back-and-forth that must occur at open session. Nonetheless, the public record clearly shows that Councilmembers engaged in vigorous discussions with City staff and with each other during open sessions for all three of these projects.

Finding 17-4

Unauthorized closed sessions prevent the public from witnessing council deliberations, preclude public input into planning, and restrict public participation in the selection of appropriate developers for city-owned property.

The City Council agrees with the above as a statement of principle. However, for the projects in question, interested members of the public had numerous opportunities to witness Council deliberations and participate themselves in giving input into the selection of these particular developers.[5]

Finding 17-5

The city of Oakland unfairly applied the requirements of its RFP for 1911 Telegraph by allowing the successful proposer to wait until after it was chosen to provide required financial information.

It is important to preface this with the observation that the process for selecting a developer and project under a competitive Request for Proposals ("RFP") process is very different from a formal competitive bidding process, such as the process the City follows to procure a public works contract, for example. In a development RFP, the City needs to retain the flexibility to modify the process as needed, with the goal of getting the best possible project on the best possible terms for the City. For instance, the City reserves the unilateral right to

[3] Project proposals were presented at CED on 12/1/2015. The ENA was considered by CED on 2/23/2016 and full Council on 3/1/2016.
[4] The ENA was considered by CED on 10/14/2014 and full Council on 10/21/2014. Assignment of the ENA was heard at CED on 6/28/2016 and full Council on 7/5/2016.
[5] The citation in the Grand Jury report to the number of times the projects were agendized for closed session is potentially misleading. It is common for the City to list pending projects on closed session agendas as placeholders or standing items so that they can be discussed should a project update be necessary; but those projects are not always discussed at each of these meetings.

negotiate changes to RFP submissions with a proposer, or to waive submission requirement when necessary. Prospective proposers are put on notice in the RFP that the City reserves the right to make these changes.[6] Proposals submitted in response to a development RFP are simply the starting point for negotiating a final development deal, with those negotiations usually occurring during a protracted ENA negotiating period.

For the 1911 Telegraph project, the successful proposed developer was in fact penalized by the selection committee for its failure to submit financial information. Council eventually selected this developer for an ENA, based on the superior project it proposed – particularly the greater amount of much-needed retail space it proposed -- but this selection was contingent on the developer making the required financial information available to staff for verification during the ENA period. The developer eventually did make the required information available to staff.

Finding 17-6

A developer was allowed to change the scope of its proposal for 1911 Telegraph at the last minute. This put the other proposers at a disadvantage, and resulted in the city choosing that developer without the benefits of staff analysis of the new proposal.

Once again, the development RFP process should not be seen as a formal competitive bidding process. Nothing prohibits any proposer from modifying its proposal during the process, and all proposers were put on notice in the RFP that proposals could be modified or negotiated during the selection process. The City in fact welcomes any project modifications that make the project better for the City.

For the 1911 Telegraph project, the selected developer did decide to modify its proposal to greatly increase the amount of retail space, the number of affordable housing units, and the

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[6] For instance, the RFP for 1911 Telegraph included the following language:

> **F. Right to Modify or Suspend RFP**
> The City's issuance of this RFP is not a promise or an agreement that the City will actually enter into any contract. The City reserves the right at any time and from time to time, and for its own convenience, in its sole and absolute discretion, to do the following:
> - Modify, suspend, or terminate any and all aspects of the selection process, including, but not limited to this RFP and all or any portion of the developer selection process from the date on which this RFP is issued until the City Council approves an ENA, in its sole and absolute discretion;
> - Waive any technical defect or informality in any submittal or submittal procedure that does not affect or alter the submittal's substantive provisions;
> - Reject any and all submittals;
> - Request some or all Respondents to revise submittals;
> - Waive any defects as to form or content of the RFP or any other step in the selection process;
> - Reject all proposals and reissue the RFP;
> - Procure the desired proposals by any other means or not proceed in procuring the proposals;
> - Negotiate and modify any and all terms of an agreement;
> - Accept or reject any respondent for exclusive negotiations.
>
> The City may modify, clarify, and change this RFP by issuing one or more written addenda. Addenda will be posted on the City's website, and notice of the posting will be sent by electronic mail to each party that attended the pre-bid meeting and sign in at the pre-bid conference. The City will make reasonable efforts to notify interested parties in a timely manner of modifications to this RFP but each Respondent assumes the risk of submitting its submittal on time and obtaining all addenda and information issued by the City. Therefore, the City strongly encourages interested parties to check the City's web page for this RFP frequently.

amount of community space, in response to feedback from City staff and the community. Other proposers were free to modify their proposals as well, so no one was placed at a competitive disadvantage. Staff had ample opportunity to analyze the modified proposal during the ENA period.

Finding 17-7

Oakland City Councilmembers privately discuss projects with developers whose proposals are pending, and the communications are not disclosed publicly before one developer is selected. This compromises public scrutiny of the selection process because citizens have no ability to assess the strength or weakness of private arguments made by developers in support of their proposals.

It is a common and entirely legal and acceptable practice for individual Councilmembers to meet privately with proposed developers, as well as neighbors, community groups, project opponents and other stakeholders. Councilmembers need to be accessible to all parties interested in providing input on specific proposals so as to be fully-informed before making decisions regarding development projects in which the City has a proprietary interest. None of the open meeting laws limit or restrict private discussions between public officials and members of the public on development proposals, nor do they require disclosure of such discussions.

RECOMMENDATIONS

Recommendation 17-1

The city of Oakland must comply with the Brown Act and city of Oakland Sunshine Ordinance provisions relating to the real estate exception. The city must limit closed session discussions concerning proposed real estate development projects to price and terms of payment, and ensure that deliberations on matters such as project vision, project scope, feasibility issues, community benefits, and selection of a developer are conducted openly, allowing the public to be informed about and comment intelligently upon proposals for use of city-owned property.

See the discussion on Finding 17-1 above. The City Council believes that it complies with the Brown Act and Sunshine Ordinance provisions related to the real estate exception. The real estate exception allows Council to give guidance to its negotiators concerning matters of consideration offered in exchange for City real property that affect price and terms of payment, which could include a variety of issues beyond monetary payment. Council must be able to direct its negotiators in a confidential setting on these matters to ensure that the City does not negotiate at a disadvantage and prospective purchaser/developers deliver projects that benefit the community and meet the City's economic development goals. We recognize that other matters not related to the consideration for the transaction, such as site selection or design, are properly reserved for open session. Council will continue to hold open sessions with full opportunity for public participation before final approval of any property dispositions.

Recommendation 17-2

The city of Oakland must follow its Sunshine Ordinance by conducting open meetings in which councilmembers discuss publicly the advisability of any proposed disposition of city-owned property before making final decisions.

See the discussion on Finding 17.3 above. Council will continue to hold open sessions in compliance with open meeting laws with full opportunity for public participation before final approval of the disposition of City-owned property, including public discussion of the advisability of any proposed development.

Recommendation 17-3

The city of Oakland must update its training for public officials on open meeting laws to prevent the city from misapplying the real estate negotiation exception.

The City has provided and will continue to provide ongoing training to Councilmembers and City staff on open meeting laws, including proper closed session procedures.

Recommendation 17-4

The city of Oakland must enforce requirements of its RFPs even-handedly to create a level playing field for all proposers, and to allow city staff a full record with which to vet competing proposals.

The City is committed to a fair and open competitive process when it disposes of City land, while recognizing the need for flexibility and discretion in conducting negotiations over development proposals. In order to keep the process fair, the City will continue to follow its policy of posting an RFP addenda on the City's website, and sending notice of the posting by email to each prospective proposers, whenever RFP requirements change.

Recommendation 17-5

The city of Oakland must treat developers who respond to an RFP equitably by informing all RFP respondents whether changes to proposals after the submission date are permitted.

City development RFPs are abundantly clear that the City reserves the right to negotiate changes to RFP submissions, or to waive submission requirement when necessary. Prospective proposers are put on notice in the RFP that the City reserves these rights, and are notified when RFP requirements change. That is and will continue to be the policy and practice of the City whenever it conducts a competitive process for development projects.

Recommendation 17-6

The city of Oakland must adopt rules to address private communications between councilmembers and proposing developers before a developer is selected.

The City Council disagrees that the City "must" adopt rules governing such communications. However, the City Council accepts this as a policy suggestion and thanks the Grand Jury for its input.

Very truly yours,

LARRY REID
President of the Oakland City Council

cc: Cassie Barner, Alameda County Grand Jury
Oakland City Council