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MEMORANDUM OF LAW

DATE: February 6, 2012

TO: Kelly Broughton, Director, Development Services Department

FROM: City Attorney

SUBJECT: CIP Conformance Review by the Planning Commission

INTRODUCTION

The City of San Diego, a charter city, has a Planning Commission established pursuant to the San Diego Charter. California Planning and Zoning Law requires that certain functions be performed by the planning agencies of general law cities, although no duties are specifically set forth for planning commissions. A question has arisen as to whether the City's Planning Commission must review the City's Capital Improvement Program (CIP) for conformance with the general plan pursuant to state law.

QUESTION PRESENTED

Is the City, as a charter city, required by state law to have its Planning Commission review the CIP for conformance with the general plan?

SHORT ANSWER

No. State law does not require the City's Planning Commission to review the CIP for conformance report with the general plan.

BACKGROUND

Council Policy 000-02, titled Budget Policy, requires the City's CIP budget to be submitted by the Planning Commission to the City Council, pursuant to California Government Code sections 65103(c) and 65401, with "assurance of General Plan conformance." *See* Policy 000-02 at pg. 5. This language was added to Council Policy 000-02 in 2009 when the Budget Policy underwent a significant revision. *See* City of San Diego Memorandum to Members of the Budget & Finance Committee, Re: Proposed City of San Diego Budget Policy (Sept. 15, 2009). Prior to that, the only reference to a role by the Planning Commission in the review of the CIP budget was in Council Policy 800-06, titled Capital Improvements Programming, approved in

1991. Regarding this role, Council Policy 800-06 stated only "[t]he Capital Improvements Program shall be submitted through the Planning Commission to the City Council for adoption." Council Policy 800-06, Implementation 3 (repealed and superceded by Council Policy 000-02 pursuant to San Diego Resolution R-305348 (Mar. 5, 2010)).

The duties of the Planning Commission are generally set forth in the Charter as follows:

> The City Planning Commission shall be organized as provided by the laws of the State and have such powers and perform such duties as are prescribed by such laws. The duties of the Commission shall also include advising upon public buildings, bridges, retaining walls, approaches, park and harbor structures, the improvement of Pueblo lands and such other improvements as the Council may by ordinance determine.[1]

San Diego Charter § 41(c).

ANALYSIS

The California Planning and Zoning Law, Division 1, Chapter 3, Article 1, contains various requirements regarding the establishment of planning agencies, and the duties of the planning agencies. *See* Cal. Gov't Code §§ 65100- 65107. However, with some exceptions not relevant here, charter cities are not subject to the provisions of Chapter 3, except to the extent the charter city adopts them by charter or by ordinance.

I. GENERAL LAW CITIES MUST EITHER ASSIGN TO A PLANNING AGENCY THE DUTY TO CONDUCT AN ANNUAL REVIEW OF THE CAPITAL IMPROVEMENTS PROGRAM OR THE LEGISLATIVE BODY MUST CONDUCT THE REVIEW ITSELF, BUT THERE IS NO REQUIREMENT THAT THE REVIEW BE CONDUCTED BY PLANNING COMMISSIONS

Government Code section 65103, enacted in 1984, requires that planning agencies "[a]nnually review the capital improvement program of the city or county and the local public works projects of other local agencies for their consistency with the general plan, pursuant to Article 7 (commencing with Section 65400)." Cal. Gov't Code § 65103(c). California Government Code section 65401, enacted in 1965 and amended in 1970, requires that government agencies whose functions include "recommending, preparing plans for, or constructing, major public works, shall submit to the official agency, as designated by the respective county board of supervisors or city council, a list of the proposed public works recommended for planning, initiation or construction during the ensuing fiscal year." Cal. Gov't Code § 65401. The agency designated to receive the list "shall list and classify all such recommendations and shall prepare a coordinated program of proposed public works for the ensuing fiscal year." *Id.* Finally, "[s]uch coordinated program shall be submitted to the county or city planning agency for review and report to said official agency as to conformity with the adopted general plan or part thereof." *Id.* Contrary to the language in Council Policy 000-02,

[1]Although not relevant to this discussion, the Planning Commission is also the decision making body for Process Four land use matters, and the appeals of Process Two and Three land use matters. San Diego Municipal Code Chapter 11, Article 2, Division 5.

neither California Government Code section 65103 nor section 6540 state a duty for planning commissions. Instead, they refer to the duties of the planning agencies.

Regarding the creation of planning agencies, the California Government Code states:

> There is in each city and county a *planning agency* with the powers necessary to carry out the purposes of this title. The legislative body of each city and county shall by ordinance assign the functions of the *planning agency* to a planning department, one or more planning commissions, administrative bodies or hearing officers, the legislative body itself, or any combination thereof, as it deems appropriate and necessary. In the absence of an assignment, the legislative body shall carry out all the functions of the planning agency.

Cal. Gov't Code § 65100 (emphasis added).

Regarding the creation of planning commissions, the California Government Code states that the legislative body "*may* create one or more *planning commissions* each of which shall report directly to the legislative body." Cal. Gov't Code § 65101(a) (emphasis added). Therefore, state law does not require that a general law city create a planning commission, nor does it dictate any duties for the *planning commissions*; however, duties are set forth for the *planning agencies*. *See* Cal. Gov't Code § 65103. In addition, California Government Code section 65700 states that, with some exceptions, the provisions of Chapter 3 do not apply to charter cities, except to the extent they are adopted by charter or ordinance of the city.[2]

II. AS A CHARTER CITY, THE CITY IS EXEMPT FROM THESE PROVISIONS OF THE PLANNING AND ZONING LAW, UNLESS OTHERWISE ADOPTED BY CHARTER OR ORDINANCE, AND NEITHER THE CHARTER NOR ANY ORDINANCES ADOPT THESE PROVISIONS

As stated above, California Government Code section 65700 states that, with some exceptions, the provisions of Chapter 3 do not apply to charter cities, except to the extent they are adopted by charter or ordinance of the city. San Diego has not adopted the provisions of Chapter 3 by charter or ordinance.

Section 42 of the 1931 Charter (Freeholder's Charter) stated in part that "[t]he City Planning Commission shall be organized as provided by the laws of the State and have such powers and perform such duties as are prescribed by such laws." [3] When a body of law relating to a specific subject is adopted by reference, the adoption is deemed to include all later amendments to that body of law. 58 Cal. Jur. 3d *Statutes* § 53 (2011).[4] Therefore, when the Freeholder's Charter adopted by reference the "laws of the State" and provided the Planning

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[2] Some exceptions are that charter cities must adopt general plans containing the mandatory elements set forth in Article 5, and the provisions relating to low and moderate income housing within the Coastal Zone set forth in California Government Code sections 65590 and 65590.1 also apply to charter cities.

[3] Although this provision was transferred to section 41 in 1969, the language was unchanged. *See* 1968 Op. City Att'y 1, 3 (Jan. 3, 1968).

[4] When specifically identified statutes are adopted by reference, however, later amendments to that statute are not considered incorporated by reference. *Id.*

Commission with "such powers and duties as are prescribed by such laws," that adoption by reference included all later amendments to the state laws establishing the powers and duties of planning commissions.

Because Charter section 41 adopted a body of law relating to a specific subject, the most recent amendments to the Planning and Zoning Law govern. The current relevant Planning and Zoning Law exempts charter cities from its provisions, except to the extent the charter city has adopted them by charter or ordinance. The City of San Diego does not have a charter section or ordinance that requires its planning agency to conduct an annual review of the CIP for general plan consistency.[5]

The City Council may still wish to ensure that any proposed CIP projects are consistent with the general plan.[6] The standard for a project's consistency with the general plan is not difficult to meet. A project is inconsistent with a general plan only if it conflicts with a plan policy that is fundamental, mandatory, and clear. *Families Unafraid To Uphold Rural El Dorado County v. Board of Supervisors*, 62 Cal. App. 4th 1332, 1341-42 (1998); *see also Corona-Norco Unified School Dist. v. City of Corona*, 17 Cal. App. 4th 985, 994 (1993) ("'[A] . . . project is consistent with a general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.'")(citation omitted). Furthermore, courts afford an agency's consistency determination a "strong presumption of regularity." *Sequoyah Hills Homeowners Ass'n v. City of Oakland*, 23 Cal. App. 4th 704, 717 (1993).

The Council Policy should be revised so that it no longer states that state law sections "require" that the CIP be submitted to the Planning Commission for assurance of conformance with the General Plan. Absent the passage of a charter amendment or an ordinance, the reference to a state law requirement should be deleted entirely.[7]

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[5] The City's various planning functions are performed by the Development Services Department Planning Division staff, the Planning Commission, and the City Council. There is no one entity designated as the City's "planning agency," nor, as a charter city, is the City required to designate a planning agency, for the reasons set forth herein.

[6] Some other charter cities require their planning commissions to conduct an annual review of the CIP budget, *See* Gilroy Charter § 906(b); Modesto Charter § 1107; Modesto Municipal Code § 10-1.102(e). However, upon obtaining charter city status, the City of Carlsbad repealed their requirement that the planning commission conduct an annual CIP conformance review. *See* Carlsbad Ordinance CS-071 (Dec. 22, 2009)

[7] Any department may bring forward an amendment to a Council Policy. Council Policy 000-01, Procedure 1, states "[t]he City Council or any standing committee or member thereof, the City Manager, non-managerial department heads, and City Boards and Commissions may originate draft policy proposals for formal consideration by the Council."

CONCLUSION

The City Planning Commission is not required by state law to conduct an annual review of the CIP budget for conformance with the City's General Plan. As a charter city, the City is not subject to this requirement, absent a requirement in the charter or the passage of an ordinance. Until such time as the City passes such a charter amendment or ordinance, the Council Policy should be revised to delete the reference to a requirement by state law.

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By /s/ Shannon M. Thomas
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