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May 9, 2018

REPORT TO RULES COMMITTEE

STATUS REPORT ON CHARTER REVIEW COMMITTEE ITEMS DEFERRED FOR LATER CONSIDERATION

INTRODUCTION

At its meeting of March 7, 2018, the Rules Committee requested a status report from the City Attorney on the following five proposals considered by the Charter Review Committee during the 2015 to 2016 timeframe.

- 1) Proposed reorganization of all San Diego Charter (Charter) sections related to legislative activity by moving these sections Charter Article III: Legislative Power;
- 2) Proposed reorganization to create a new Charter Article to consolidate independent, non-mayoral departments that provide administrative service;
- 3) Proposed reorganization of Charter Articles IV: The Mayor and XV: Strong Mayor Form of Governance, by moving sections that address primarily executive and mayoral authority to Article IV;
- 4) Proposed amendments to Charter section 41(c): Planning Commission, by providing for duties, membership and terms to be placed in the San Diego Municipal Code (Municipal Code); and
- 5) Proposed amendment to Charter Section 41(d): Ethics Commission, by changing the name of the Ethics Commission to the San Diego Fair Political Practices Commission.

Upon expiration of the temporary Charter Review Committee in May 2016, these items were referred to the Rules Committee for consideration. The items appear in the Charter Review Committee Final Report¹ as items for future consideration, approved by the Rules Committee on November 14, 2016. The City Attorney is prepared to work with staff to bring back amendments related to each of these proposals, if requested by the Rules Committee.

¹ See 2015-2016 Charter Review Committee Final Report, Attachment 1.

For any of the proposals that the City Council ultimately determines to put on the ballot, this Office would prepare an impartial analysis and other ballot materials, which provide explanatory information for the record and educate voters on the purpose of the proposed change. Therefore, if the Rules Committee moves forward, we request direction regarding the purpose to be achieved with the proposed amendment.

We have summarized the status of the proposed amendments in three categories below:

I. Reorganization Proposals for Charter Articles III, IV, V, and XV

The Office of the City Attorney met with legislative staff on the proposed reorganization amendments on several occasions in 2015. At the time, multiple amendments were under consideration, some substantive and some, as those noted above, calling for reorganization of the sections affected by the substantive proposals. We suggested that overlapping amendments could lead to unnecessary complications in drafting (e.g., Charter section 290 was the subject of a measure unrelated to the reorganization). Ultimately, organizational edits were delayed, pending outcome of votes on substantive amendments.

The current Charter addresses Legislative Power in Article III, The Mayor in Article IV, Executive and Administrative Service in Article V, and Strong Mayor Form of Governance in Article XV. The first two reorganization proposals would divide the Article XV provisions between the Mayor and Council, moving provisions to Articles IV and III, respectively. The third proposal would create a new Article to separate the independent departments and commissions from Mayoral departments.

If the Rules Committee moves forward, we request clarification as to the purpose of the proposed Article V amendments. The initial Charter Review Committee report on this item² proposed the amendment to move the independent departments and commissions to a separate Article. The staff report indicated that this change would clarify the independence of these departments and commissions from the departments and administration under the Mayor.

While the proposed amendment may have some of the effect identified in the staff report, certain provisions of current Article V will continue to govern the independent departments and the commissions. The Article is not cleanly divided into “independent” and “Mayoral” departments, and some sections address all departments. For example, Charter section 28 addresses the City Council’s authority to establish City departments and duties, and Charter section 30 addresses appointing authority (whether Mayoral or independent) to remove employees. The proposed reorganization may create confusion if the reader overlooks applicable sections from Article V based upon the mistaken assumption that the new Article regarding independent departments and commissions is self-contained.

² See Report to Council No. 16-022 (Mar. 2, 2016), attached as Exhibit A.

Finally, because the portion of the Article V reorganization proposal relating to Charter section 41 is also subject to proposals for substantive amendments, discussed below, we recommend leaving the commissions provisions in Article V.

II. Planning Commission, Charter section 41(c)

At the Charter Review Committee on December 3, 2015,³ staff proposed a Charter amendment that would repeal much of the Charter language regarding the Planning Commission, and leave its duties to be determined by the City Council by ordinance. Municipal Code amendments to reflect the duties of the Planning Commission were not part of the Charter Review Committee action.⁴

III. Ethics Commission, Charter section 41(d)

If the Council and Ethics Commission wish to make the proposed change, it would be a simple ballot measure limited to changing one section of the Charter. Charter section 41(d) would be amended to change the words “Ethics Commission” to “San Diego Fair Political Practices Commission” in three places. The Council would then have to make more extensive, corresponding changes, through ordinance, to the Municipal Code, wherever that name appears.

We do have some concern that this could be potentially confusing, as voters may believe that the renamed San Diego Fair Political Practices Commission is a municipal branch of the California Fair Political Practices Commission (FPPC), even though this entity is not affiliated with or legally part of the state entity. We often cite to opinions of the FPPC at the state level, which should not be confused with opinions of the Ethics Commission. Therefore, we suggest clarifying that this is a uniquely San Diego entity and not a bureau office of a state agency.

Finally, as noted above, this Office is responsible for preparing ballot material, including an impartial analysis. Therefore, our Office requests input from the Rules Committee regarding the purpose of the name change to explain to voters.

³ See Charter Review Committee Agenda, Item 2(A) and backup materials (Dec. 3, 2015), attached as Exhibit B.

⁴ This Office provided a copy of our February 6, 2012 Memorandum of Law, “CIP Conformance Review by the Planning Commission,” which discusses the powers and duties of the City Planning Commission under the City Charter and state law. 2012 City Att’y MOL 85 (2012-2; Feb. 6, 2012).

CONCLUSION

We are prepared to work with assigned Mayoral or Council staff to continue moving the items forward. We do not recommend proceeding with overlapping proposals.

MARA W. ELLIOTT, CITY ATTORNEY

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

PMD:jdf
RC-2018-2
Doc. No. 1741337_4
Attachment



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: March 2, 2016

REPORT NO: 16-022

ATTENTION: Charter Review Committee

SUBJECT: Creation of a Charter Article for Independent, Non-Mayoral Departments and Offices.

REFERENCE:

REQUESTED ACTION: Move the following independent, non-mayoral administrative services from Article 5 to a new Article: Sections 37 - Personnel Director, 38 – City Clerk, 39.1 - Audit Committee, 39.2 - Office of City Auditor, 39.3 - Independent Budget Analyst, 40 - City Attorney, 40.1 – Concurrent Jurisdiction of City Attorney with District Attorney and 41 – Commissions.

STAFF RECOMMENDATION: Approve the requested action.

SUMMARY:

The requested action helps better communicate to the Charter's readers the separation of powers that exists in our City's governance.

Every student in American civics class learns that democracy works in large part because the Federal government operates as a "three-legged stool" of shared authority among the Executive, Legislative and Judicial branches. The third branch, Judicial/courts, does not play an immediate role in the governance of local cities like it does in the federal government. The third, independent, daily voice of checks and balances for city government resides not in one institution, but in a cluster of independent departments and offices. The City of San Diego's independent departments and offices are described in Charter Article 5.

From 1931 when the Charter was first approved until 2006 when the Strong Mayor form of government was implemented, all departments and offices in Article 5 – Executive and Administrative Service were independent of the Mayor and City Council. The Article 5 departments were under the direction of the City Manager and the independent offices described there were directed by their respective head. (e.g. City Attorney, City Clerk, etc.) San Diego's "three-legged stool" consisted of a Mayor, Council and City Manager.

EXHIBIT A

With the implementation of the Strong Mayor form of government in 2006, many of the departments listed in Article 5 came under the direction of the Executive branch/Mayor for the first time. The City of San Diego continues to work in a triangle of shared authority; Mayor, Council and the independent offices listed in this requested action. However, the independent departments/offices are still described in Article 5 and may appear to the Charter's readers to also come under the direction of the Mayor when in fact they do not.

The requested action to move these independent department/offices to their own Charter Article will reaffirm their independence, accurately depict the City's governance by separation of powers, and more clearly distinguish the independent departments from Mayoral departments.

FISCAL CONSIDERATIONS: None

PREVIOUS COUNCIL and/or COMMITTEE ACTION: None

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: None

KEY STAKEHOLDERS AND PROJECTED IMPACTS: The Departments/Offices involved are the only stakeholders and should not be impacted negatively by the action.

Originating Department: Council District 1



**THE COMMITTEE ON CHARTER REVIEW
OF THE CITY COUNCIL OF THE CITY OF SAN DIEGO**

Special

**Council President Sherri S. Lightner, Chair
Councilmember Chris Cate, Vice Chair
Councilmember Marti Emerald
Councilmember Mark Kersey**

**AGENDA FOR THE COMMITTEE MEETING OF
THURSDAY, DECEMBER 3, 2015 at 2:00 P.M.
CITY ADMINISTRATION BUILDING
COUNCIL COMMITTEE ROOM – 12TH FLOOR
202 “C” STREET, SAN DIEGO, CA 92101**

**For information, contact Steven Hadley, Council Committee Consultant
Email: charterreview@sandiego.gov Phone: (619) 533-5906**

This information will be made available in alternative formats upon request, as required by the Americans with Disabilities Act (ADA), by contacting the Committee Liaison at (619) 533-3984 or MWallace@sandiego.gov. Requests for disability-related modifications or accommodations required to facilitate meeting participation, including requests for auxiliary aids, services or interpreters, require different lead times, ranging from five business days to two weeks. Please keep this in mind and provide as much advance notice as possible in order to ensure availability. Assistive Listening Devices (ALDs) are available in Council Committee Room upon request.

ROLL CALL

APPROVAL OF COMMITTEE ACTIONS

The Committee Record of Actions of the following meetings will be approved by Unanimous Consent unless pulled for discussion:

**October 8, 2015, Revised
November 4, 2015**

NON-AGENDA PUBLIC COMMENT This portion of the agenda provides an opportunity for members of the public to address the Committee on items of interest within the jurisdiction of the Committee. (Comments relating to items on today's docket are to be taken at the time the item is heard.) Per Section 22.0101, Rule 2.6.2, of the San Diego Municipal Code, comments are limited to two (2) minutes and are non-debatable. To exercise this right, members of the public must submit a Public Comment Request form prior to the meeting. At the conclusion of the comment, the Committee Chair has the discretion to determine appropriate disposition of the matter. Pursuant to open meeting laws, no discussion or action, other than a referral, shall be taken by the Committee on any issue brought forth under Non-Agenda Public Comment.

COMMITTEE MEMBERS, MAYOR, INDEPENDENT BUDGET ANALYST, CITY ATTORNEY, CITY CLERK, DIRECTOR OF LEGISLATIVE AFFAIRS COMMENT

REQUESTS FOR CONTINUANCE

DISCUSSION AGENDA :

Current Charter language considered or referenced in the following items can be found in the CITY CHARTER.

- ITEM-1: Consideration of proposed preamble language for the Charter. ([Click here to read proposed language](#))
- ITEM-2: Consideration of proposed changes to the following Article V – Executive and Administrative Service provisions and related Charter sections in response to prior Committee discussion.
- A) § 41(c) City Planning Commission
Consideration of language formalizing the Planning Commission in the Charter, but placing the duties, membership composition, selection and terms of the Commission in the Municipal Code. ([Click here to read proposed language](#) and [click here to read the City Attorney's February 6, 2012, Memorandum](#).)
- B) § 41(d) Ethics Commission
Consideration of language formalizing the Ethics Commission in the Charter. ([Click here to read the Ethics Commission's November 16, 2015, Memorandum and proposed language](#).)
- ITEM-3: Consideration of proposed changes to the following Article VII – Finance provisions and related Charter sections in response to prior Committee discussion.
- A) § 77A Provisions for Zoological Exhibits
Consideration of no action from the Environment Committee.

- B) §103.1A Environmental Growth Fund
Consideration of recommendation(s) from the Environment Committee.

ITEM-4: Consideration of proposed changes to the following Article VIII – Civil Service and related Charter sections in response to prior Committee discussion.

- A) §118 Rules
Consideration of language amending the section to comply with state law. ([Click here](#) to read the City Attorney’s February 5, 2014, Report to the City Council, San Diego Legal Charter Review)

- B) §129.1 Removal of Striking Employees
Consideration of language conforming the section to state law. (*Mayor’s Office*)

ITEM-5: Consideration of proposed changes to the following Article IX – The Retirement of Employees and related Charter sections in response to prior Committee discussion.

- A) §141 City Employees’ Retirement System
Consideration of language in a newly created sub-item (e) to allow an employee’s reciprocal service between SDCERS and CalPERS to count toward vesting to establish eligibility for benefits, and broad, timeless language that does not reference specific entities other than the Board of Administration. ([Click here to read proposed language.](#))

- B) §141.2 Full and Fair Employee Contributions for the Defined Benefit Pension Plan
Consideration of an analysis of whether the City should pay SDCERS all or any portion of overpayment of benefits or underpayment of contributions caused by the negligence of a City employee, and whether doing so could be addressed through the meet and confer process with the municipal employee unions or contractually with the San Diego City Employees’ Retirement System. ([Click here to read the City Attorney’s Memorandum. San Diego City Employees’ Retirement System](#))

- C) §144 Board of Administration (SDCERS Board)
1. Consideration of proposed Municipal Code language clarifying the staggering of 4-year terms for the seven inaugural Board of Administration appointments. (*San Diego City Employees Retirement System*)
 2. Consideration of timeless language referencing in sub-section (f) regarding who should serve as the City management employee Board member, and changing the appointing, directing and reporting authority to the Mayor instead of the City Manager. (*Mayor’s Office*)
 3. Consideration of City Attorney Report regarding the following Charter section 144 proposed amendments by the San Diego City Employee Retirement System. ([click here to read the City Attorney’s December 3, 2015, Report](#))

- a. Proposal to amend section 144 to give the Board of Administration all powers and duties provided in the Declaration of Group Trust for the SDCERS Group Trust effective July 1, 2007, and naming specific trusts in the Charter.
 - b. Proposal to amend section 144 to give the Board of Administration the sole authority to invest in classes or types of investments it deems prudent beyond those investment options already established or authorized by General Law.
 - c. Proposal to amend section 144 to answer the question whether Unified Port District and Regional Airport Authority members can run for Board of Administration seats.
4. Consideration of adding a new sub-item (g) to the section codifying the Board of Administration's authority to hire and retain its own independent legal counsel.
(City Attorney)

Sherri S. Lightner
Chair

Proposed language for Charter section 41(c).

There shall be a City Planning Commission, 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 facilities and such other improvements as the Council may by ordinance determine.

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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

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

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.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Shannon M. Thomas
Shannon M. Thomas
Deputy City Attorney

SMT: als
ML-2012-2