Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

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DATE: October 27, 2009

TO: Mary Wright, Planning Division Deputy Director, City Planning & Community Investment

FROM: City Attorney

SUBJECT: Community Planning Groups Review of CEQA Documents

INTRODUCTION

The City Planning & Community Investment Department has requested an opinion as to whether Community Planning Groups [CPGs] must consider California Environmental Quality Act [CEQA] documents prior to making recommendations on development projects. Two CEQA Guidelines sections govern the duties of advisory bodies to review and consider environmental documents prior to making recommendations on projects, CEQA Guidelines sections 15025 and 15074.[1] Some have argued that CEQA Guidelines section 15074 requires that CPGs review CEQA documents before making recommendations on development projects.

QUESTION PRESENTED

Must CPGs review CEQA documents prior to making recommendations on development projects?

SHORT ANSWER

CPGs are not required by law to review CEQA documents prior to making recommendations on development projects.

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[1] All references to CEQA Guidelines are to the current California Code of Regulations, title 14, sections 15000-15387. The CEQA Guidelines are afforded "great weight" by the courts. *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal. 3d 376, 391 n. 2 (1988).

BACKGROUND

I. CEQA

The first CEQA Guidelines section to treat advisory body review of CEQA documents is section 15025, which is found within Article 2, entitled "General Responsibilities." This Guidelines section governs what specific functions the City may delegate to its staff to administer CEQA. CEQA Guidelines section 15025 states that "[w]here an advisory body such as a planning commission is required to make a recommendation on a project to the decisionmaking body, the advisory body shall also review and consider the EIR or Negative Declaration in draft or final form." CEQA Guidelines § 15025(c).

The second CEQA Guidelines section concerning advisory body review is found in Article 6, which governs the negative declaration process. There, CEQA Guidelines section 15074 states that "[a]ny advisory body of a public agency making a recommendation to the decisionmaking body shall consider the proposed negative declaration or mitigated negative declaration before making its recommendation." CEQA Guidelines § 15074(a).[2] Note that this CEQA Guidelines section concerns only negative declarations; it does not mention EIRs.

II. COUNCIL POLICY 600-24

City Council Policy 600-24 recognizes CPGs and governs their conduct. The Policy's Background statement reads:

> Community planning groups have been formed and recognized by the City Council to make recommendations to the City Council, Planning Commission, City staff, and other governmental agencies on land use matters, specifically, concerning the preparation of, adoption of, implementation of, or amendment to, the General Plan or a land use plan when a plan relates to each recognized community planning group's planning area boundaries. Planning groups also advise on other land use matters as requested by the City or other governmental agencies.

See Council Policy 600-24 Background. This statement establishes that the primary purpose of CPGs is to assist the City with community plans and other planning activities. It also demonstrates that reviewing a development project is a secondary function of CPGs that they perform "as requested by the City." *Id.* Furthermore, the Council Policy does not require CPGs to make recommendations on all development projects. The Policy's language only states that CPGs "*advise* on other land use matters *as requested* by the City or other governmental agencies." *Id.* (emphasis added).

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[2] Neither CEQA Guidelines section treats exemptions from CEQA. Therefore, there is no basis for asserting that CPGs are required to review determinations that a project is exempt from CEQA.

That the primary purpose of CPGs is to assist the City with planning issues, rather than development project review, is further demonstrated by the duties imposed by the Policy on CPGs and their members. According to the Policy: "It shall be the duty of a recognized community planning group to cooperatively work with the Mayor's staff throughout the planning process, including but not limited to the formation of long-range community goals, objectives and proposals or the revision thereto for inclusion in a General or Community Plan." Council Policy 600-24 art. VI, section 1. This section, governing the duties of CPGs, makes no mention of development project review.

ANALYSIS

I. CEQA GUIDELINE SECTION 15025 DOES NOT REQUIRE THAT CPGS REVIEW CEQA DOCUMENTS PRIOR TO MAKING RECOMMENDATIONS ON DEVELOPMENT PROJECTS.

The mandates of CEQA Guidelines section 15025 do not apply to CPGs. Two elements of CEQA Guidelines section 15025 renders its requirement that advisory bodies review CEQA documents prior to making recommendations on projects inapplicable to CPGs. First, CEQA Guideline section 15025's requirement applies only to an "advisory body such as a planning commission . . . ." CEQA Guidelines § 15025(c). As discussed below, CPGs are not advisory bodies like planning commissions. Second, CEQA Guidelines section 15025 requires CEQA review only "[w]here an advisory body . . . is required to make a recommendation on a project." *Id.* As mentioned above, and discussed below, CPGs are not required to make recommendations on all development projects.

A. <u>CEQA Guidelines Section 15025 Does Not Apply Because CPGs Are Not Advisory Bodies Under this Section.</u>

CEQA Guidelines section 15025 qualifies an "advisory body" to which its requirements apply with the phrase "such as a planning commission." CPGs, while they may be advisory bodies, differ from a planning commission in a number of important respects. These significant differences render the requirements of CEQA Guidelines section 15025 inapplicable to CPGs.

CPGs have no delegated authority to take actions on behalf of the City. Council Policy 600-24 Background. In contrast, the City's Planning Commission, as with most other planning commissions throughout the state, has been delegated significant decision making authority. Cal. Gov't Code § 65101; San Diego Charter § 41(c); SDMC § 111.0202. Not only does the City's Planning Commission decide many land use matters outright, it also hears appeals of matters decided by City staff, and is required to make recommendations to City Council on other matters. San Diego Charter § 41(c); SDMC § 112.0507 ("An application for a permit, map, or other matter acted upon in accordance with Process Four may be approved, conditionally approved, or denied by the Planning Commission."); SDMC § 112.0506 ("The Hearing Officer's decision may be appealed to the Planning Commission"); SDMC § 112.0509 (b) ("Before the City Council decision, the Planning Commission shall hold a public hearing to consider the

application . . . . At the conclusion of the public hearing, the Planning Commission shall make a written recommendation to the City Council to approve, conditionally approve, or deny the application.").

CPGs differ from an "advisory board such as a planning commission" for the additional reason that they are not created by law. The Planning Commission was created via the City Charter. San Diego Charter § 41(c). In contrast, CPGs are a creation of city policy only and "are voluntarily created and maintained by members of communities within the City." Council Policy 600-24 Background. Therefore, the requirements of CEQA Guidelines section 15025, which concern the delegation of authority within a local agency such as the City, do not apply to CPGs.

B. <u>CEQA Guidelines Section 15025 Does Not Apply For the Additional Reason that CPGs Are Not Required to Make Recommendations on All Development Projects.</u>

Even if CPGs were advisory bodies "such as a planning commission," CEQA Guidelines section 15025 would not require that they review CEQA documents before making recommendations on all development projects. CEQA Guideline section 15025 requires that an advisory body review EIRs and negative declarations only if the body is required to make a recommendation on the project for which those documents have been prepared. As stated above, Council Policy 600-24 does not require that CPGs make recommendations on all development projects. Rather, it states that CPGs make recommendations on specific projects at the request of the City.[3] Accordingly, even if CEQA Guidelines section 15025 applied to CPGs as advisory bodies, they would be required to review CEQA documents only if their recommendations were sought by the City.

This conclusion is supported by the only published case to examine the requirements of CEQA Guidelines section 15025(c). *See Tracy First v. City of Tracy*, 177 Cal. App. 4th 1 (2009) ("*Tracy First*"). In *Tracy First*, the court examined whether the City of Tracy's planning commission had complied with the requirement that it review an EIR associated with a zoning action before making a recommendation to the Tracy city council. In conducting this analysis, the court noted that "because the City's municipal ordinances required the planning commission to review zoning decisions and make a recommendation to the city council before the city council could act," CEQA Guidelines section 15025(c) applied. *Tracy First*, 177 Cal. App. 4th at 9. In contrast, nowhere does the San Diego Municipal Code require CPGs to make recommendations on development projects before City Council can act. Therefore, under this

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[3] There are three exceptions. The Centre City, San Ysidro, and Southeastern San Diego Planned District Ordinances [PDOs] require certain community planning groups to provide recommendations concerning certain development permits. *See* SDMC § 156.0303(e)(1)(B)(ii) (requiring the Centre City Advisory Committee to make recommendations on projects of greater than 100,000 ft^2 gross floor area or 50 dwelling units requiring Centre City Development Permits); SDMC § 1518.0202(e) (requiring the San Ysidro Community Planning Committee to provide recommendations on San Ysidro Development Permits); SDMC § 1519.0204 (requiring that the "recognized planning group with responsibility for the area in which the project is proposed" in the Southeastern San Diego Planned District review discretionary permits).

case, CPGs would not be required to review CEQA documents prior to making a recommendation under CEQA Guidelines section 15025 unless requested to do so by the City.

II. CEQA GUIDELINE SECTION 15074 DOES NOT REQUIRE THAT CPGS REVIEW CEQA DOCUMENTS PRIOR TO MAKING RECOMMENDATIONS ON DEVELOPMENT PROJECTS.

A. The Language of CEQA Guidelines Section 15074

CEQA Guidelines section 15074 states that "[a]ny advisory body of a public agency making a recommendation to the decisionmaking body shall consider the proposed negative declaration or mitigated negative declaration before making its recommendation." CEQA Guidelines § 15074(a). This CEQA Guidelines section does not qualify advisory bodies, as does CEQA Guideline section 15025, as those "such as [] planning commission[s]" and those that are required to make recommendations on projects.

This difference in the language between the Guidelines sections presents a question as to what advisory bodies are covered by CEQA Guidelines section 15074. Neither CEQA nor its Guidelines provide a definition of advisory body. Cal. Pub. Res. Code §§ 21060 to 21072 (statutory definitions); CEQA Guidelines §§ 15350 to 15387 (CEQA Guidelines definitions). No court has squarely addressed the issue of what constitutes an advisory body for purposes of CEQA Guidelines section 15074. Nor has the California Resources Agency provided guidance regarding what advisory bodies are covered by CEQA Guidelines section 15074.

B. Rules of Statutory Construction Determine that CEQA Guidelines Section 15074 Does Not Apply to CPGs.

Given that CEQA, the CEQA Guidelines, and the courts have not defined the term "advisory body" for purposes of CEQA, we turn to principles of statutory construction to determine whether CPGs should be considered advisory bodies for purposes of CEQA Guidelines section 15074. *Head v. Civil Service Comm'n of San Diego County,* 50 Cal. App. 4th 240, 243 (Cal. App. 4 Dist. 1996) ("'Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies.'") (quoting *Cal. Drive-In Restaurant Assn. v. Clark,* 22 Cal. 2d 287, 292 (1943)).

Interpretation of "advisory body" in the CEQA Guidelines begins with the fundamental principle that "[t]he objective of statutory construction is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent." *Fitch v. Select Products Co.,* 36 Cal. 4th 812, 818 (2005) (citing *Hassan v. Mercy American River Hospital,* 31 Cal. 4th 709, 715 (2003)). To ascertain that intent, one "turn[s] first to the words of the statute, giving them their usual and ordinary meaning." *Nolan v. City of Anaheim,* 33 Cal. 4th 335, 340 (2004) (citing *People v. Trevino,* 26 Cal. 4th 237, 240 (2001)).

In the face of ambiguity, however, the usual and ordinary meaning of the words is not enough. "[T]he purpose of statutory construction is not merely to declare the plain meaning of the words used; the purpose is to understand the intent of the lawmakers, and the goal of that inquiry, in turn, is to give maximum effect to that intent." *Rossi v. Brown*, 9 Cal. 4th 688, 716 (1995) (Mosk, J. dissenting). To effectuate this goal, "[s]tatutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1386-1387 (1987) (citing *California Mfrs. Assn. v. Public Utilities Comm'n*, 24 Cal. 3d 836, 844 (1979)). Furthermore, "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) (quotations and citations omitted); *see also Williams v. Superior Court of San Bernardino County*, 5 Cal. 4th 337, 357 (1993) ("An interpretation that renders statutory language a nullity is obviously to be avoided.").

These rules require that the term "advisory body" be given the same meaning in both CEQA Guidelines sections 15025 and 15074. This is required to harmonize the CEQA Guidelines sections. CEQA Guidelines section 15025 covers both EIRs and negative declarations. CEQA Guidelines section 15074 covers negative declarations. Thus, interpreting the term advisory body consistently in both CEQA Guidelines sections is necessary to prevent an impermissible conflict with respect to the same subject. *Dyna-Med, Inc.,* 43 Cal. 3d at 1386-1387 ("Statutes or statutory sections relating to the same subject must be harmonized . . . with each other, to the extent possible.").

The rules of statutory construction also mandate that the term "advisory body" be interpreted consistently with its meaning in CEQA Guidelines section 15025; *i.e.*, an advisory body such as a planning commission that is required to make a recommendation. This is required to avoid nullifying the language of CEQA Guidelines section 15025. Interpreting "advisory body" for purposes of both CEQA Guidelines sections to mean *any* advisory body, whether or not like a planning commission and whether or not required to make a recommendation, would render those qualifying phrases in Guidelines section 15025 superfluous, which is forbidden. *TRW Inc.,* 534 U.S. at 31; *Williams*, 5 Cal. 4th at 357. The advisory bodies required to review CEQA documents for purposes of *both* Guidelines sections 15025 *and* 15074 are therefore advisory bodies such as planning commissions that are required to make recommendations on projects. It necessarily follows that CPGs are not required by CEQA Guidelines sections 15025 or 15074 to review CEQA documents prior to making recommendations on development projects.

The only case to mention CEQA Guidelines section 15074 in reference to an advisory body supports this conclusion. The court in *Nasha L.L.C. v. City of Los Angeles* stated in its recitation of the facts, without analysis, that the Mulholland Design Review Board [Mulholland DRB] was an "advisory body" to which CEQA Guidelines section 15074 applied for purposes of its review of a proposed project. *Nasha L.L.C.,* 125 Cal. App. 4th 470, 475 (2004).

This decision did not expand the boundaries of the term advisory body in CEQA Guidelines section 15074 beyond that in CEQA Guidelines section 15025. The City of Los Angeles established the Mulholland DRB via ordinance as an official advisory board. The Los Angeles City Council empowered the Board to review projects falling within the Mulholland Scenic Parkway Specific Plan, and required that the Mulholland DRB make recommendations concerning those projects. *See* Mulholland Scenic Parkway Specific Plan *at* <http://cityplanning.lacity.org/complan/specplan/sparea/mulholpage. htm> (click on "Text" link) (visited June 19, 2009). The City of Los Angeles' formal creation of the Mulholland DRB and delegation to it of responsibilities for project review are attributes of advisory bodies such as planning commissions that are required to review CEQA documents under Guidelines section 15025. The requirement that the Mulholland DRB make recommendations on development projects puts it squarely within the bounds of CEQA Guidelines section 15025 as well. As discussed above, CPGs share none of these attributes.[4]

CONCLUSION

For the reasons stated above, CPGs are not required by law to review CEQA documents prior to making recommendations on development projects.

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By
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MS-2009-11

cc: Christine Rothman, Community Planning Program Manager, City Planning & Community Investment
Cecilia Gallardo, Assistant Deputy Director, Development Services Department

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[4] This opinion counsels that the La Jolla Shores Advisory Board [LJSAB], in contrast to CPGs, may be required to review CEQA documents before making recommendations on development projects. The LJSAB is similar to the Mulholland Design Review Board in that the LJSAB was established by ordinance of the City of San Diego. SDMC § 1510.0105. On the other hand, the LJSAB differs from the Mulholland DRB in that the La Jolla Shores PDO requires that the LJSAB make recommendations only on permits referred to it by the City. SDMC § 1510.0105 (b).