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April 4, 2019

City Attorney Mara Elliott
Civic Center Plaza
1200 Third Ave., #1620
San Diego, CA 92101

RE: Legal Concerns with Structure of City of San Diego's Community Planning Groups

Dear City Attorney Mara Elliott:

On behalf of Circulate San Diego, whose mission is to create excellent mobility choices and vibrant, healthy neighborhoods, we are writing to identify several legal concerns with the current structure and governance of the City of San Diego's community planning system.

Community engagement is an indispensable component of smart planning decisions. Community Planning Groups (CPGs) are vital for how the City receives public input about transportation and planning policy.

As Circulate San Diego demonstrated from our report "Democracy in Planning," elections and governance of CPGs do not meet the standards we ordinarily expect for fairness and access to governmental decisionmaking. Similarly, both the County Grand Jury and the San Diego City Auditor have recently found that CPGs require reform.

The attached memorandum further details a number of ways in which the City of San Diego's current approach to CPGs may run afoul of both the City Charter and the California Political Reform Act.

- **City Charter:** The City Charter requires that advisory committees created by the City Council may only include members appointed by the Mayor and confirmed by the City Council. The current practice of CPG elections does not appear to be in accord with the City Charter.

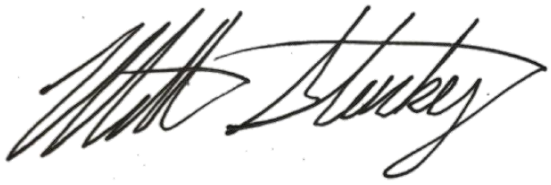
- **Political Reform Act:** The City has not followed Fair Political Practices Commission advice to demonstrate that CPGs are exempt from the Political Reform Act. If the City cannot meet this burden, or it chooses not to undertake that effort, then the Political Reform Act requires CPG members to file statements of economic interest.

We are raising these issues to your office to help you advise the City of San Diego for how to consider the ongoing structure and any reforms related to CPGs. The Mayor and City Council should make needed reforms to San Diego's community planning process, and they should do so in a way that is in accordance with both state and municipal law.

We look forward to helping your office with this effort in any way you may find useful.

Sincerely,

Colin Parent, Esq.
Circulate San Diego, Executive Director and General Counsel



Matt Stucky, Esq.
Circulate San Diego, Policy Committee Member

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Mayor Kevin Faulconer
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Memo: Legal Concerns with Community Planning Group Structure

I. Introduction.

Starting in the 1960s, the City of San Diego ("City") adopted policies "that established and recognized community planning groups as formal mechanisms for community input in the land use decision-making processes."[1] Today, as described by the City itself:

> Community planning groups (CPGs) provide citizens with an opportunity for involvement in advising the City Council, the Planning Commission, and other decision-makers on development projects, general or community plan amendments, rezonings and public facilities. The recommendations of the planning groups are integral components of the planning process and are highly regarded by the City Council and by staff.[2]

As originally envisioned, CPGs were privately created groups that the City occasionally consulted for community input. However, over time, the relationship between the City and CPGs has become formalized and more heavily regulated, resulting in a recognition that CPGs have shifted towards a more public role. This gradual change and resulting realization, however, has left CPGs sitting in a peculiar position: no longer merely private groups but also not fully integrated into the traditional positions of public bodies under municipal government. As the relationship between the City and the groups evolved over the past several decades, the City has not consistently addressed the legal effects of that changing relationship, changes to state law, and formal advice that other jurisdictions have received. The lack of focus on ensuring CPGs comply with all applicable laws leaves the City in a vulnerable position.

The purpose of this memo is to identify some of the potential gaps in the City's current half-embrace of CPGs as public advisory bodies. Continuing the trend toward recognition of CPGs as formal advisory bodies created by the City, the City should take additional steps concerning the actions of CPGs to ensure the public's interests are adequately protected and represented.

II. Background.

The City first recognized the earliest form of CPGs in 1966 when it adopted Council Policy 600-05.[3] Under that policy, the City indicated that it intended to develop community plans "on a cooperative basis between community citizen organizations and City staff forces."[4] Policy 600-05 asked that the community organizations develop a formalized structure, but was silent on the details of that structure. This policy was the impetus for the formation of these groups: before 1966, no community planning

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[1] *Community Planning Groups*, SANDIEGO.GOV, https://www.sandiego.gov/planning/community/cpg (last visited Jan. 27, 2019).
[2] *Id.*
[3] CITY OF SAN DIEGO, CAL., RESOLUTION No. 186589 at 1 (Feb. 7, 1966), http://docs.sandiego.gov/council_reso_ordinance/rao1966/R-186589.pdf ("Prior to this date, no formal policy regarding community planning programs had been officially adopted.").
[4] *Id.* at 2.

groups existed. In the years immediately following the enactment of Policy 600-05, several neighborhoods created planning groups. In 1974, Policy 600-05 was amended by Resolution No. 211232 to create a slightly more formal relationship between the City and community organizations, but the relationship was still tenuous and largely undefined.[5]

In 1976, the City took its first step toward directing the structure of CPGs when it adopted Council Policy 600-24.[6] The first version of Policy 600-24 bears many similarities to the current version. As originally envisioned, the role of CPGs was limited to advising the City on community plans. In 1982, Policy 600-24 was amended to acknowledge the CPGs were also tasked with reviewing individual development projects.[7] In 2005, major revisions to Policy 600-24 were enacted in an apparent intent to further formalize the structure of CPGs while still characterizing CPGs as "private organizations."[8]

This tension between formalized public recognition and private autonomy, however, proved to be untenable. Most significantly, this tension manifested itself in the City's consideration of whether the Brown Act applied to CPGs. Generally, the Brown Act requires public meetings by "legislative bodies" of government and imposes several requirements to ensure governmental decisions are made in an open and transparent manner. In 2000, the City Attorney discussed the application of the Brown Act to CPGs and concluded it did *not* apply.[9] Under the City Attorney's analysis at that time, CPGs were merely private organizations whereas the Brown Act applied to "legislative bodies," which included a "commission, committee, board or other body of a local agency . . . created by charter, ordinance, resolution or other formal action of the legislative body."[10] The City Attorney concluded that although the City Council officially recognized CPGs, it did not "create" them.[11]

In 2006, however, the City Attorney revisited the issue and determined that the Brown Act *did* apply to CPGs.[12] In a 2006 memorandum, the City Attorney explained that under established case law, "a City Council creates an advisory body under section 54952(b) if the Council's formal action or resolution 'plays a role' in the creation of the advisory body, it is 'involved in' bringing the advisory body into

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[5] CITY OF SAN DIEGO, CAL., RESOLUTION No. 211232 (Aug. 1 1974), http://docs.sandiego.gov/council_reso_ordinance/rao1974/R-211232.pdf.
[6] CITY OF SAN DIEGO, CAL., RESOLUTION No. 216888 (Sep. 29, 1976), http://docs.sandiego.gov/council_reso_ordinance/rao1976/R-216888.pdf.
[7] CITY OF SAN DIEGO, CAL., RESOLUTION No. R-257382 at 2 (Oct. 25, 1982), http://docs.sandiego.gov/council_reso_ordinance/rao1982/R-257382.pdf (providing that a CPG reviewing individual development projects should focus on conformity with adopted community plans or general plans).
[8] CITY OF SAN DIEGO, CAL., COUNCIL POLICY No. 600-24 *Final CPC Subcommittee Revisions* (Feb. 28, 2005), http://docs.sandiego.gov/reportstocouncil_attach/2005/05-145%20Att%202.pdf.
[9] City Att'y Memo 2000-5 at 1 (Mar. 7, 2000), http://docs.sandiego.gov/memooflaw/ML-2000-5.pdf ("Local Planning Groups do not fit the statutory definition of a 'legislative body'").
[10] *Id.* at 2.
[11] *Id.*
[12] City Att'y Memo 2006-26, at 2 (Oct. 27, 2006), http://docs.sandiego.gov/memooflaw/ML-2006-26.pdf (providing that CPGs are created by the City Council's policy that governs it and are subject to the Brown Act).

existence, or it creates the *raison d'être* for the advisory body."[13] Considering CPGs, the City Attorney reasoned:

> By creating a sub-set of community planning groups that are officially recognized by the City Council in this Council Policy, the City Council provided their *raison d'être.* When it gave Council Policy 600-24, the 'legal breath of life,' the City Council also breathed legal life into the CPGs as 'legislative bodies' within the meaning of section 54952(b).[14]

The 2006 Brown Act memo proved to be a watershed in the recognition of CPGs as boards created by the City. Since the 2006 memo, the City has openly and continuously acknowledged that CPGs are "legislative bodies" "created by" the City Council. As written and adopted by the City in 2014, Policy 600-24 recognizes that "Community planning groups are advisory bodies created by an action of the City Council."[15] The policy reiterates that CPGs "have been formed . . . by the City Council to make recommendations . . . on land use matters."[16] The City Council must approve the bylaws of each CPG and those bylaws "must remain in conformance" with the policies promulgated by the City Council.[17] Recognizing the official role of CPGs, the policy states that the City shall indemnify, and the City Attorney shall defend, members of the CPGs in legal actions arising from their performance of official duties. The policy recognizes that CPGs are subject to the Brown Act, requiring open meetings in conformance with state law.

Under the current version of section 600-24, CPGs have evolved from their original limited role as private organizations tasked with assisting in the creation of community plans to fully-integrated components of the City's planning process. The groups are now tasked with reviewing community plan updates, individual development projects, capital improvement projects, park general development plans, and capital improvements within a park. Section 600-24 also threatens that a CPG's "consistent failure to respond to the City's request for input . . . or failure to review and reply to the City in a timely manner on development projects shall result in the forfeiture of rights to represent its community for these purposes."[18]

While the City resolved one legal issue in its 2006 memo by concluding that CPGs are advisory bodies created by the City Council, this conclusion leads to unanswered legal issues.

III. Questions.

A. Does the City Charter permit the City Council to mandate community planning groups elect their own members?

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[13] *Id.* at 4.
[14] *Id.*
[15] CITY OF SAN DIEGO, CAL., COUNCIL POLICY No. 600-24 at 1 (Nov. 14, 2014), http://docs.sandiego.gov/councilpolicies/cpd_600-24.pdf.
[16] *Id.*
[17] *Id.* at 2.
[18] *Id.* at 6.

As with all other charter cities in California, San Diego's adopted City Charter "represents the supreme law of the City."[19] "'[B]y accepting the privilege of autonomous rule the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter.'"[20] Accordingly, "[a]ny act that is violative of or not in compliance with the charter is void."[21]

The City's realization that CPGs are advisory bodies created by the City Council calls into question whether the way the City Council created these groups runs afoul of the limitations imposed by the City Charter. Undoubtedly the City Charter vests the City Council with the discretion to create advisory bodies. Specifically, section 43 of the Charter permits the City Council to "create and establish advisory boards."[22] Given the City's express acknowledgment in Council Policy 600-24 that CPGs "are advisory bodies created by an action of the City Council," the only logical conclusion is that CPGs fall within the City Council's authority under section 43 of the City Charter to "create and establish advisory boards." This language mirrors the legal analysis by the City Attorney in the 2006 memorandum that opines the City Council "legally created" CPGs and concludes that "[p]lainly, the CPGs…are advisory bodies to the City Council and to other City Departments."[23]

Section 43, however, also includes a critical limitation on the scope of the City Council's authority to create advisory bodies. Under Section 43, "all members of such boards shall be appointed by the Mayor with Council confirmation."[24] By using the verb "shall," the Charter appears to leave the City Council with no discretion to use a different method to select CPG board members.[25] Policy 600-24, however, implicitly precludes the Mayor from making such appointments and instead expressly directs that residents and business owners elect CPG members. Similarly, the Community Planners Committee (CPC) is an advisory body created by the City Council,[26] but its members are automatically determined as the chairperson of each CPG.[27]

The City Charter does not appear to vest the City Council with any authority to create advisory bodies elected by residents. Indeed, no other such bodies created by the City Council exist in the City. No public memorandum or opinion from the City Attorney has considered whether Council Policy 600-24 is void for being in violation of the City Charter.[28] Although not directly addressing the issue presented

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[19] *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161, 170 (Cal. 1994).
[20] *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595, 598 (Cal. 1949).
[21] *Domar Electric,* 9 Cal.4th at 171.
[22] CITY OF SAN DIEGO, CAL., CHARTER art. 5, § 43.
[23] City Att'y Memo 2006-26, *supra* note 12, at 3.
[24] CHARTER, *supra* note 22, art. 5, §43.
[25] *See, e.g.*, *First Street Plaza Partners v. City of Los Angeles*, 65 Cal.App.4th 650, 663 (Cal. Ct. App. 1998) (providing that "the classic mandatory verb 'shall'" in the City of Los Angeles Charter precludes the exercise of discretion).
[26] *See* CITY OF SAN DIEGO, CAL., COUNCIL POLICY No. 600-09 (Feb. 20, 1975), http://docs.sandiego.gov/councilpolicies/cpd_600-09.pdf.
[27] COUNCIL POLICY No. 600-24, *supra* note 15, at 6.
[28] As some may argue, Section 43 requires advisory boards to be created by "ordinance" whereas CPGs are created by "resolution." This is largely a distinction without a difference. "For many purposes resolutions and ordinances are equivalent terms." *Cent. Mfg. Dist., Inc. v. Bd. of Supervisors*, 176 Cal.App.2d 850, 860 (Cal. Ct. App. 1960). And it has been held that even where the statute or municipal

regarding CPGs, the City Attorney previously opined that a City Council action "that transfers the authority to make [advisory body] appointments to someone other than the Mayor would conflict with the Charter and be void."[29] To avoid a potential violation of the City Charter, a new legal analysis should be completed to determine whether CPGs may elect their own members.

B. *Does the California Political Reform Act apply to CPGs?*

Regardless of how members of a city advisory body are selected, state law imposes a burden on the City to monitor how those members make decisions. In the aftermath of the Watergate scandal, a broad coalition of Californians pushed for the adoption of the California Political Reform Act ("Act") to prevent corruption in government.[30] The Political Reform Act has several parts, including strict conflict of interest laws, campaign disclosure requirements, and the creation of a new entity to enforce the Political Reform Act, the Fair Political Practices Commission (FPPC).

The Political Reform Act requires "public officials" to, among other things, file statements of economic interest and recuse themselves from decisions on which they have a conflict of interest. A "public official" is defined as a "member, officer, employee or consultant of a state of local governmental agency."[31] Under the applicable regulations, a "member" includes members of "a committee, board, commission, group, or other body" that has decisionmaking authority.[32]

Although the FPPC enforces the Act at the state level, local municipalities and other entities are tasked with enforcing the Act locally by creating conflict of interest codes and determining which officials must comply with those codes.[33] As the "code reviewing body," the City of San Diego is tasked with determining which officials have "decisionmaking authority." This authority is reflected in the San Diego Municipal Code, which acknowledges that the City Council shall serve as the "code reviewing body" to implement the Political Reform Act.[34] As such, the City Council commits to "review and [adopt] conflict of interest codes for boards and commissions created by City Charter, ordinance, resolution, or formal action of the City Council."[35] Section 26.0105 of the Municipal Code recognizes that boards that are "solely advisory" are not required by state law to have a conflict of interest code.[36] This code section

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charter requires the municipality to act by ordinance, if a resolution is passed in the manner and with the statutory formality required in the enactment of an ordinance, it will be binding and effective as an ordinance. *Id.* There is no evidence that the resolution adopting Council Policy 600-24 lacks the formality associated with an ordinance.

[29] City Att'y Memo 2009-14, at 4 (Sept. 10, 2009), http://docs.sandiego.gov/memooflaw/ML-2009-14.pdf (providing that City Council may not amend the ordinance establishing the Ethics Commission to allow a panel of retired judges to make appointments).

[30] *History of the Political Reform Act*, FPPC.CA.GOV, http://www.fppc.ca.gov/about-fppc/about-the-political-reform-act.html (last visited March 3, 2019).

[31] CAL. GOV'T CODE § 82048 (1974, amended by stats. 2004, ch. 484, § 3 effective Jan. 1, 2005).

[32] CAL. CODE REGS. tit. 2, § 18700(c)(2)(A) (Barclays Feb. 8, 2019).

[33] CAL. GOV'T CODE §§ 87300 - 87314.

[34] CITY OF SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, § 26.0104(a) (Apr. 2002).

[35] CITY OF SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, § 26.0104(a) (Apr. 2002).

[36] CITY OF SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, § 26.0105 refers to the definition of "solely advisory" found in CAL. GOV'T CODE § 87100. That statute, however, does not discuss "solely advisory" groups. The phrase "solely advisory" instead is found in CAL. GOV'T CODE § 82019(b)(1).

mirrors the requirements of the Political Reform Act: case law and FPPC guidance clearly establish that a group is "solely advisory" when it has no decisionmaking authority.[37] Thus, under state law and the local code, the relevant question is whether a group has decisionmaking authority.[38]

The test to determine whether public officials that are members of a board have decisionmaking authority is outlined in regulations promulgated by the FPPC. Under these regulations, a board has such authority if it makes final governmental decisions or can compel or prevent these decisions.[39] However, the standard also includes what it sometimes referred to as the "rubberstamping" test, which applies when a board "makes substantive recommendations and, over an extended period of time, those recommendations have been regularly approved without significant amendment or modification by another public official or governmental agency."[40] Under this test, an advisory board may nevertheless gain "decisionmaking authority" if its recommendations are regularly adopted by another governmental body that makes final decisions.

This "rubberstamping test" dictates that some boards that are deemed "advisory" are nevertheless subject to a conflict of interest code under the Political Reform Act. In San Diego, nearly every "advisory" board created by the City Council has its own conflict of interest code.[41] Thus, even though CPGs are considered "advisory bodies" by the City, they may be subject to the Political Reform Act. Recognizing the potential application, the City Attorney has repeatedly analyzed whether the Political Reform Act's conflict of interest laws applied to CPGs.[42] In its most recent analysis in 2010, the City Attorney applied the "decisionmaking" standard to determine whether CPG board members are "members" of the city with decisionmaking authority. Undisputedly, CPGs do not make final governmental decisions and do not have the authority to compel or prevent decisions. As the City Attorney recognized, however, this does not end the inquiry. Regarding the "rubberstamping" test, the City Attorney concluded that:

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[37] *Comm'n on Cal. State Gov't Org. and Econ. v. Fair Political Practices Comm'n*, 75 Cal.App.3d 716, 721 (Cal. Ct. App. 1977) ("The presence or absence of decision-making power is thus an important factor in identifying the wielder of a solely advisory function"); *see* Letter from Hyla P. Wagner, Gen. Counsel, Fair Political Practices Comm'n, to David E. Kendig, Woodruff, Spradlin & Smart, at 4 (Oct. 16, 2015), http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2015/15182.pdf.

[38] However, even if a group is solely advisory, and therefore the requirements of the Political Reform Act would not apply, CITY OF SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, § 26.0105 specifically excludes from the exemption groups that fall under the next section, § 26.0106, which involves groups that "deal with land use issues." Section 26.0106 addresses the City's concern that "unique and serious potential conflicts of interest arise by virtue of participation" in groups dealing with land use issues. Thus, the Municipal Code requires these groups, even if they are solely advisory, to adopt a conflict of interest code and make certain disclosures. Given that community planning groups deal almost exclusively with land use issues, § 26.0106 almost certainly applies even though the City has apparently never addressed the issue.

[39] CAL. CODE REGS. tit. 2, §§ 18700(c)(2)(A)(i) - (ii) (Barclays Feb. 8, 2019).

[40] CAL. CODE REGS. tit. 2, § 18700(c)(2)(A)(iii) (Barclays Feb. 8, 2019).

[41] *See Conflict of Interests Codes*, SANDIEGO.GOV, https://www.sandiego.gov/city-clerk/elections/eid/codes (last visited March 3, 2019).

[42] *See, e.g.*, City Att'y Memo 2010-12 (Oct. 8, 2010), http://docs.sandiego.gov/memooflaw/MS-2010-12.pdf.

> while comments and recommendations by the CPG are usually taken into consideration by the final decisionmaker or even by an applicant prior to a project reaching the decisionmaker, there is no history that CPG recommendations have been 'regularly approved without significant amendment or modification by another public official or governmental agency' over an extended period of time. Therefore, members of CPGs are not public officials under the Political Reform Act.[43]

Although the City Attorney considered the correct standard in 2010, its application of that standard appears to conflict with how it has been applied to other bodies. Most interestingly, the FPPC provided advice to the County of San Diego ("County") in 2013 regarding County community planning groups. In its advice letter, the FPPC applied the same analysis as the City Attorney to determine whether the County planning group members were public officials subject to the Political Reform Act.[44] The County groups are similar to the City planning groups in that they do not make final decisions; they only advise the governing body. In that sense, they do not have direct decisionmaking authority.

But the FPPC's analysis continued by applying the "rubberstamping" test in a manner distinguishable from the analysis conducted by the City Attorney. Rather than finding no evidence of rubberstamping, the FPPC warned the County that the Political Reform Act imposed the burden on the County itself to conduct this analysis to avoid a violation of state law.[45] In other words, the County itself must review each individual group's history of recommendations to see how often they are adopted by the County Board of Supervisors. The FPPC stated that if there is a "history or track record of the decision-maker 'rubber stamping' an advisory body's recommendations, the advisory body will be considered to have decision-making authority."[46] The FPPC advised the County that whether this final test applied was highly "fact dependent" and "requires examining a planning group's history."[47] Moreover, "[e]ach planning group has its own history, and, therefore, a determination must be made for each individual planning group."[48]

Since this advice letter, the County concluded that the Political Reform Act applies to its community planning groups.[49] The County requires its community planning board members to file economic interest statements, recuse themselves when a conflict arises, limit and disclose campaign contributions, and attend rigorous ethics trainings.[50]

The FPPC's advice letter to the County reveals a possible omission in the City Attorney's analysis. In the 2010 memorandum, the City Attorney points to an absence of any evidence regarding a history of City

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[43] *Id.* at p. 3, emphasis added.
[44] Letter from Zackery P. Morazzini, Gen. Counsel, Fair Political Practices Comm'n, to Paul J. Mehnert, Senior Deputy Counsel, Cnty. Admin. Ctr. (Oct. 16, 2015), http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2012/12102.pdf.
[45] *Id.*
[46] *Id.* at 4.
[47] *Id.* at 5.
[48] *Id.*
[49] *Community Planning Group and Sponsor Group Training*, SANDIEGOCOUNTY.GOV, at 60-74, https://www.sandiegocounty.gov/content/dam/sdc/pds/Groups/Chair_Resources/CPSGAnnualTraining2019.pdf (last visited March 3, 2019)
[50] *Id.*

decisionmakers "rubber stamping" the recommendations of a CPG.[51] The memorandum does not discuss any analysis completed by the City itself to reach this conclusion. As discussed in a recent report by the City Auditor, it does not appear that the City is actively tracking whether the City ultimately adopts the recommendations of the planning groups.[52]

If such an analysis was completed, it is unclear why it would not be discussed in the memo or otherwise shared with the public. Indeed, if the planning groups' recommendations are routinely ignored by the Planning Commission or City Council, the utility of these groups is questionable.

On the other hand, if the City reached its conclusion without conducting its own review of the groups' recommendations, its analysis is at odds with the FPPC's direct advice regarding how to apply the standard. If there was no review, the City Attorney's memorandum fails to recognize that the City itself is tasked with conducting a factual review of the history of each of the 42 planning groups to determine whether their recommendations are regularly adopted. Without conducting such a review, the City cannot comply with its delegated duties under the Political Reform Act. The required review is intensive, with no bright-line rules, and requires an ongoing, dynamic review of each group on an individual basis. It is possible that some groups may meet the standard while others do not.

Other advice by the City Attorney reveals that the office is aware of the correct analysis and knows how to apply it. In 2006, the City Attorney analyzed whether members of the City's Airports Advisory Committee (AAC) were subject to the Political Reform Act.[53] Applying the same standard discussed above, the City Attorney recognized that "AAC members do not make final governmental decisions, nor do they compel or prevent governmental decisions."[54] Applying the "rubberstamping test," the City Attorney did not simply point to an absence of evidence to declare the AAC outside the scope of the Political Reform Act. Instead, the memorandum contains a chart reviewing the past 10 years of AAC minutes to determine whether the AAC's recommendations were routinely adopted by the City. Finding that a "high percentage" of the recommendations were followed, the City Attorney concluded that the Political Reform Act applied, recommended that the City adopt a conflict of interest code for the AAC and require its members to file statements of economic interest.[55]

It is unclear why the City Attorney applied the standard one way as to the AAC but another way for the planning groups. A complete analysis may compel a different conclusion leading to a new conflict of interest code for planning groups. Additionally, as discussed above, planning groups are unlike other advisory bodies created by the City Council because their members are elected. The Political Reform Act contains provisions concerning conflicts of interest, but it also regulates the manner in which elections

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[51] City Att'y Memo 2010-12, *supra* note 42, at 3 ("[T]here is no history that CPG recommendations have been 'regularly approved without significant amendment or modification by another public official or governmental agency' over an extended period of time").
[52] *Performance Audit of Comty. Planning Grps.*, Office of the City Auditor, City of San Diego, Cal., at 60 (Dec. 2018), https://www.sandiego.gov/sites/default/files/19-013_community_planning_groups.pdf, at pp. 35-36.
[53] *Report to the Comm. on Land Use and Hous.*, City Att'y Report 2006-22 (May 26, 2006), http://docs.sandiego.gov/cityattorneyreports/RC-2006-22.pdf.
[54] *Id.* at 2.
[55] *Id.* at 4-5, 9.

of public officials are conducted.[56] Any analysis by the City concerning CPGs should also address the effect of the Act on the elections of planning group members. In the County, planning group board members are elected at the same general elections as Board Supervisors and must comply with campaign disclosure requirements.[57] If CPG members continue to be selected through elections, a deeper analysis by the City may conclude the same election laws apply to CPGs.

IV. Conclusion.

The City's realization that Community Planning Groups were created by the City Council gave rise to important, unanswered questions that should be addressed. If the City ultimately concludes that the City Charter precludes the board members from being elected and that those members are subject to the Political Reform Act, the policies that apply to the groups must be reformed. Following the recent audit by the City Auditor, the City's planning department committed to substantially revising Council Policy 600-24.[58] These upcoming revisions provide an opportunity to address any legal issues that arise following further analysis by the City Attorney.

To avoid a potential conflict with the City Charter, the City could amend the Charter to expressly permit the recognition and election of the groups. Los Angeles followed this approach when it created its Neighborhood Councils.[59] Such formal recognition, however, would likely engender additional challenges regarding the election process.[60] Alternatively, the City could reform the groups to conform with the City Charter by permitting the Mayor to appoint members to the board in the same manner

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[56] *See* CAL. GOV'T CODE §§ 84200-84225 (providing for, among other things, the requirement to file campaign financing statements).

[57] CNTY. OF SAN DIEGO, CAL., BD. OF SUPERVISORS POLICY No. I-1 (Dec. 14, 2016), https://www.sandiegocounty.gov/content/dam/sdc/cob/docs/policy/I-1.pdf.

[58] *Performance Audit of Comty. Planning Grps.*, Office of the City Auditor, City of San Diego, Cal. at 60 (Dec. 2018), https://www.sandiego.gov/sites/default/files/19-013_community_planning_groups.pdf.

[59] CITY OF LOS ANGELES, CAL., CHARTER art. IX.

[60] For example, many of the planning groups employ voting mechanisms that would violate the principle of one person, one vote. *See, e.g.*, *Hadley v. Junior College Dist.*, 397 U.S. 50, 52 (U.S. 1970). Some groups entirely disenfranchise certain voters. In the University Community Planning Group, UCSD students living on campus are entirely disenfranchised, unable to vote or serve on the board other than a single appointed representative. (*University Community Planning Group Bylaws*, Art. III, § 2 ["UCSD students, faculty, and staff who reside on UCSD property do not qualify as eligible members of the community for either voting or for elected UCPG positions"].) As detailed in a recent Voice of San Diego opinion piece, the Tierrasanta Planning Group entirely disenfranchises members of the military and their families that live in military housing. (Dustin Paredes, Eric Peoples, and Shawn VanDiver, *Tierrasanta Community Planning Group Shouldn't Deny Votes for Military Families*, Voice of San Diego, Sept. 24, 2018, https://www.voiceofsandiego.org/topics/opinion/tierrasanta-community-planning-group-shouldnt-deny-votes-for-military-families/.) Other groups adopt unequal voting rights by district. Additionally, many CPGs give business owners a certain number of seats on the Board, with these members elected by other business owners. Although there may be no counts available, it seems self-evident that there are more residents in a given community than commercial property owners. It is also unclear whether such elections would have to occur at the same time that other city elective officers are on the ballot. Any attempt to reform and formalize CPG elections would have to address these concerns.

that other advisory board members are appointed. Although the topic is indirectly addressed in the agreed-upon reforms emanating from the audit, the City should also commit to reviewing the recommendations of each planning group on an ongoing basis to determine whether those recommendations are adopted by the final decisionmaker. Alternatively, the City could forgo this burdensome analysis by preemptively considering CPGs to be governed by the Political Reform Act, and to require economic disclosures by all CPG members.

The future of community planning groups has been a frequent subject of debate in the past few years. As the recent Grand Jury report,[61] City Audit, and the report by Circulate San Diego[62] reveal, there are issues to be resolved with the groups beyond those discussed in this memo. By addressing all these issues concurrently, the City can ensure it is complying with state and local law and protect the interests of all San Diegans.

[61] *San Diego City Community Planning Groups,* Grand Jury Report (Apr. 18, 2018), https://www.sandiegocounty.gov/content/dam/sdc/grandjury/reports/2017-2018/SanDiegoCommunityPlanningGroups.pdf.
[62] *Democracy in Planning*, Circulate San Diego (Feb. 12, 2018), http://www.circulatesd.org/democracyinplanning.