



CITY OF PACIFIC GROVE
300 Forest Avenue, Pacific Grove, California 93950

AGENDA REPORT

TO: Honorable Mayor and Members of the City Council

FROM: Anastazia Aziz, AICP, Principal Planner
Ben Harvey, City Manager

MEETING DATE: November 28, 2018

SUBJECT: Local Coastal Program Update - Land Use Plan and Implementation Plan

CEQA STATUS Statutory Exemption, CEQA Guidelines Section 15265, Adoption of Coastal Plans and Programs

RECOMMENDATION

Adopt resolution approving the Local Coastal Program (Land Use Plan and Implementation Plan) and authorize submission to California Coastal Commission for certification.

BACKGROUND

The Local Coastal Program Update was initiated in April 2014 when the California Coastal Commission (Coastal Commission or CCC hereafter) awarded a grant of \$130,000 to assist the City in achieving Local Coastal Program (LCP) certification. The City has undertaken the update with care and measured consideration of a wide variety of voices and perspectives. The process encompassed thousands of hours and effort of the Planning Commissioners, City Council Subcommittee, stakeholders, the public, Coastal Commission staff, various other Committee and Board members and City consultants.

One of the fundamental goals of the Coastal Act is to provide maximum public access to the coast. This includes protecting existing and providing new public access. The Coastal Act also recognizes that the provision of public access needs to take into account public safety concerns and the protection of natural resources from overuse along with private property rights. The proposed LCP continues to provide exceptional public access to the City's shoreline and protection of natural resources, while also allowing for improvements to public and privately-owned properties located within the Coastal Zone consistent with the Coastal Act.

DISCUSSION

The attached documents reflect the direction of Council at the [October 17, 2018 meeting](#) and include further clarifications to aid implementation. Changes include the following:

Definition of Redevelopment Conformance Trigger

The definition remains a critical path issue for certification. The definition remains focused on properties located within hazardous shoreline areas or sensitive habitat areas. Properties located outside of those areas are not subject to the redevelopment provisions in the LCP. Properties that are not located in hazardous shoreline areas or sensitive habitat continue to be subject to the Municipal Code. The intent of the LCP is to restrict development that may be prone to frequent flooding and susceptible to erosion and to avoid or minimize significant disruption of habitat value or biological resources in

environmentally sensitive habitat areas (ESHA). Coastal Commission staff has stated that it is not the intention to affect legal non-conforming historic resources; nevertheless, historic resources that are located within hazard zones will need to provide an analysis of explored alternatives as cited in the draft hazard policies if any changes are proposed that require a Coastal Development Permit.

The definition was further updated to delineate that redevelopment consists of alteration of 50% or more of the major exterior structural components and does not include replacement of structural components due to termite damage and foundation repairs. Additionally, application of additive alterations was broken down further to make plain how the City will calculate the percentage of total alterations.

Redevelopment Conformance Trigger: For development located within potentially hazardous shoreline areas or ESHA, a structure shall be considered redeveloped, whereby the entire structure and all development on the site must be made to conform with all applicable LCP policies, when such development consists of:

- A. Alteration of 50% or more of the major exterior structural components, including exterior walls and roof structure of such development. (Replacement of structural components due to termite damage and foundation repairs required to bring existing structures up to current building code shall not count toward the calculation of alterations.)
- B. Additions and alterations to such development that lead to more than a 50% increase in floor area for the development.

Alterations are not additive between individual major exterior structural components, whereby the percentage of alteration of one type of structural component (e.g. roof) shall not be added to the percentage of alteration of another type of structural component (e.g. exterior wall framing) when calculating the percentage of total alteration. however; Alterations changes to individual major exterior structural components are cumulative over time from the date of certification of the LCP.

Development that does not meet the Redevelopment Conformance Trigger shall be subject to the rules in effect in the municipal code.

Legal nonconforming structures

The term nonconforming building or structure means a building or structure that does not conform because of its size, type or construction, location on the land, proximity to other buildings on the site or its lot coverage. Nonconforming structures that were lawful before certification of the Local Coastal Program continue to be lawful. Ordinary maintenance and repair to keep the structure in a state of repair and protecting the structure from failure or decline is allowed.

If demolition and reconstruction involving nonconforming structures is proposed, both the City's Municipal Code and the LCP "Redevelopment Conformance Trigger" will be used as the standard of review to assess whether the structure must be brought into conformance with existing regulations.

Asilomar Dunes Neighborhood

The Asilomar Dunes residential area (bounded by Lighthouse Avenue, Asilomar Avenue and Asilomar State Beach and Conference Grounds has long been considered by the Coastal Commission to be ESHA

because it includes plant and animal life and related habitats that are rare, especially valuable, and easily disturbed and degraded by human activities and developments.

Again, it has been clear from the beginning of the LCP update process that the policies related to this area play a critical path role in the City's certification.

The current drafts did not change the simplified, yet more restrictive policies that were included in the October 2018 draft for serious consideration by the Council. The revised policies are an effort to simplify the policies to one that applies to all lots and to reduce the likelihood of infractions of gradual expansion of the area Outdoor Use Area, consistent with the manner in which permits have been considered by the Coastal Commission in recent years. The drafts include one policy that allows a Primary Coverage Area of up to 15 percent, regardless of lot size and up to 750 square feet of Outdoor Use Area (previously referred to as "immediate outdoor living area") that is permitted to be enclosed with perimeter fencing that meets certain parameters. Driveway areas in setbacks and eaves are excluded from the coverage calculation.

Accessory Dwelling Units (ADU)

State law regulates the development of second units on single family residential lots. The State has declared that ADUs are a valuable form of housing. Increasing the locations where ADUs are allowed could potentially contribute to the City's housing stock.

Allowance of accessory dwelling units (ADUs) in the Asilomar Dunes Neighborhood was added to the biological policies. The policy allows ADUs which are attached to or contained within the primary residence if they do not result in additional adverse impacts to sensitive resources. The maximum coverage requirements still apply. The City's ordinance regulating ADUs would need to be updated if this policy is retained in the certified LUP.

- BIO -23 f. Second residential units and other detached accessory structures shall be prohibited.

Accessory dwelling units which are attached to, or contained within, the primary residence may be allowed if they do not result in additional adverse impacts to sensitive resources and do not exceed maximum coverage requirements.

Sunset Service Commercial Uses

Coastal Act policies reflect many Smart Growth principles including new development be concentrated in areas able to serve it. The expansion of uses in the Sunset Service Commercial area reinforces measures to concentrate commercial and related development within an existing developed area. Tools and policies to promote and incentivize sustainable urban development allow the City to continue to provide public access and protection of sensitive habitat and other coastal resources.

Policy LUD-9 was augmented to spell out that uses within this Land Use Designation are treated equally and that no allowable use shall be considered a higher priority than another. Under the proposed LCP, allowable uses will continue to include the types of uses allowed today, including lumber yards, building supply centers, home design centers, indoor and outdoor storage facilities and fabrication and light manufacturing. Visitor-commercial uses will also be permitted, such as overnight lodging, eating and drinking establishments, visitor-serving retail and event venues, institutional uses oriented to tourism and public and private parking facilities. The policy clarification spells out that the uses as they exist

today cannot be considered legal non-conforming, nor can they be subverted by any other use that may be considered a higher priority.

LUD-9. Allowed uses for the Coastal Zone areas designated SSC:

- a. heavy commercial uses such as lumber yards, building supply centers, home and design centers, business service centers, hardware stores, and indoor and outdoor storage facilities;
- b. industrial uses such as fabrication and light manufacturing;
- c. retail and services uses;
- d. offices;
- e. uses allowed in the areas designated V-C;
- f. uses accessory to the above listed uses.

Within areas designated SSC in the Coastal Zone, no allowable use shall be considered a higher priority than another.

Natural Resources Protection and the Black Oystercatcher

The Coastal Act sets standards for the protection of natural resources including sensitive species and habitats. The policies and management measures drafted strike a balance between protecting natural resources while still providing coastal access. Sometimes these goals conflict. Limiting access to protect sensitive species may still be possible by a thorough vetting of solutions through the Coastal Development Permit (CDP) process. The City's Shoreline Park remains a publicly accessible open space park that provides a habitat for a diversity of species. The City remains committed to providing public coastal access while simultaneously protecting and managing coastal resources.

A policy addressing Black Oystercatchers was reintroduced and included in the Biological Resources section (see policy BIO-12). The policy addresses the rocky intertidal habitat along the City's shoreline and the use of measures to promote public understanding of the sensitive nature of the habitat and the importance of not disturbing breeding pairs. Impacts to public access from conservation measures shall be minimized and implemented through a CDP.

BIO-12 The City will protect Black Oystercatchers and their rocky intertidal habitat along the City's shoreline.

Protective measures may include an education program, using interpretive signage, outreach material, temporary barriers, wildlife monitoring cameras and trained volunteer docents to promote public understanding of the sensitive nature of the Black Oystercatcher habitat and the importance of not disturbing breeding pairs. Impacts to public access from such measures shall be minimized.

Mobile Home Park

Mobile home parks are located up and down the California's coast in the Coastal Zones of many different municipalities. Pacific Grove is *not* unique in this respect, and one mobile home park, Monarch Pines, is located within the City's Coastal Zone. The Coastal Act and Mobile Home Parks Act work in tandem, and if a proposed project at a mobile home park constitutes development under the Coastal Act, a CDP is required, unless the project is deemed exempt. The language regarding exemptions to CDPs in

the attached Implementation Plan is consistent with the Coastal Act and California Code of Regulations, and no further changes are recommended.

Additionally, property ownership governs access. The mobile home park is under private ownership, including the former Union Pacific railroad right-of-way. Language was added to the draft document to clarify that the property is inaccessible for public trail use. The draft plans recommend an alternative alignment of the Recreation Trail from Lovers Point to Spanish Bay be further studied. No changes to the Zoning Map are proposed as part of the LCP process.

Hopkins Marine Station (HMS)

Stanford University's Hopkins Marine Station is a coastal dependent use located seaward of Ocean View Blvd. The general mission of HMS is to generate and make long-term data available in order to build a valuable foundation to evaluate the ecological health of the marine ecosystem. The station has operated at this location for approximately 100 years.

Minor changes to the Design Standards for Hopkins Marine Station are included in the Implementation Plan to preserve public views by siting and designing new buildings in a manner that maintains view corridors to the water and does not extend above the silhouette of the existing buildings. Additionally, public access text changes were included to clarify access improvements associated with any new development do not conflict with the education and research mission and that any changes to the property perimeter fencing must provide comparable protection of harbor seals from human activities as the existing chain link fence

American Tin Cannery

The American Tin Cannery site, located on the eastern edge of the City to the south of HMS remains designated Visitor-Serving Commercial and is subject to the Design Standards for Visitor-Serving Uses cited in the Implementation Plan. Due to the property's premier location and proximity to both the highly popular Monterey Bay Aquarium and successful Cannery Row District in Monterey, additional standards related to site coverage remain in the IP and are not changed.

Shoreline Management Plan (SMP)

The SMP is underway and on track for submittal to the California Coastal Commission in 2020. The SMP will include a vulnerability assessment that evaluates how sea level rise will impact the shoreline, a comprehensive alternatives analysis, implementation recommendations, and an analysis of the impacts to coastal resources from retaining the existing armoring structures along the City's shoreline. Hazard and Infrastructure policies related to the development of the SMP were updated to reflect the specific scope and focus of the SMP as required by the Coastal Development Permit. The SMP will function as a stand-alone document and will not be part of a Coastal Parks Plan update.

Use of Shall, Will, May

The words shall, will and may have significant legal difference, and are subject to settled principles of statutory construction. The section describing the rules of interpretation is removed as it is a subject of settled law. To assure consistency with the enforcement of mandatory provisions of the IP, the word "shall" is used only when meant to regulate conduct enforceable by the court. Likewise, to distinguish when the City intends to act under a set of circumstances the use of the word "will" is used. Please see Attachment 5 for more information.

Next Steps

Based on Council comments at the November 28th meeting, staff and City consultants will revise the Land Use Plan and Implementation Plan for submission to the Coastal Commission for consideration and certification.

FICAL IMPACT

There are no projected impacts for this fiscal year FY 18-19. Fiscal impacts resulting from a certified Local Coastal Program include increased permitting activity and new permit fees for the Community and Economic Development Department. Increased development activity and reinvestment in coastal development may result from a streamlined one point of contact permit consolidation.

The establishment of a new paid parking district would provide welcome and needed additional revenue to help defray costs in the City's extensive Coastal Zone. The funds would be dedicated to City maintenance and coastal access projects in the coastal zone. The many parks, beaches, roads and recreational facilities would benefit tremendously from an additional revenue source.

City fees for processing of coastal development permits are included in the Master Fee Schedule to help defray the costs of outside consultant expertise and potentially an additional Associate Planner. Staff will assess CDP volume and complexity within the first 12-18 months of certification to determine if any additional staffing or on-call contract consultant assistance is necessary.

GOAL ALIGNMENT

Environment – Adopt the Local Coastal Plan. City Council Goal 5 addresses the Council's desire to preserve the community's unique natural assets and resources through appropriate environmental stewardship. Specifically, Goal 5.a lists adoption of the Local Coastal Plan as a measure to achieve the broader environmental goal. The LCP was crafted with protection of the City's uniquely accessible and natural resource rich coastline and is the culmination of over four and one half years of work in order to achieve this goal.

RESPECTFULLY SUBMITTED:

REVIEWED BY:

Anastazia Aziz



Anastazia Aziz, AICP
Principal Planner

Ben Harvey,
City Manager

ATTACHMENTS:

1. Resolution
2. [Draft Land Use Plan November 2018](#)
3. [Draft Implementation Plan November 2018](#)
4. CEQA Exemption
5. Best Best & Kreiger supplemental

RESOLUTION NO. 18-_____

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PACIFIC GROVE
AUTHORIZING THE SUBMISSION OF THE LOCAL COASTAL PROGRAM TO THE
CALIFORNIA COASTAL COMMISSION FOR CERTIFICATION**

FINDINGS

1. A Local Coastal Program (LCP) is comprised of a certified Land Use Plan and Implementation Plan. This LCP, once formally adopted and certified, will replace the 1989 certified Land Use Plan and constitute the City's first implementation plan. When a certified LCP is in effect coastal development permitting authority transfers to the City. The proposed Local Coastal Program is the culmination of a thorough public engagement and review process coupled with extensive consultation with other public agencies, especially the Coastal Commission.
2. The City has a Local Coastal Program Land Use Plan (LUP) that was certified in 1989, but does not yet have a certified Local Implementation Plan (IP).
3. In April 2014, the Coastal Commission awarded the City a grant in the amount of \$130,000. The goal of the grant was to develop an updated LCP in conformance with the California Coastal Act and which reflects current circumstances and new scientific information, including new understandings and concern for the effects of climate change. The City has augmented the grant with additional City funds.
4. The LCP incorporates guidance provided in the California Coastal Commissions' Sea Level Rise Policy Guidance document, the Coastal Commission Land Use Plan Update Guidance document, and gained through public outreach.
5. Drafts of the Land Use Plan were released for comment in May 2015, January 2016, May 2016, and October 2016, February 2017, April 2017, October 2018 resulting in the Final Draft November 2018. Drafts of the Implementation Plan were released in January 2016, June 2016 and October 2016, February 2017, November 2017, January 2018, October 2018 resulting in the Final Draft November 2018.
6. The City conducted various outreach methods and venues to engage the community in developing the Local Coastal Program including but not limited to: a [Local Coastal Program](#) webpage; community meetings and workshops, presentations at local high schools and other educational institutions, multiple Planning Commission and Council meetings, an email distribution list and an online survey.

7. A series of stakeholder community meetings commenced in November 2014 to solicit community comments and included coastal walks, archeology talks, and ESHA tours at Asilomar State Park. Two well publicized Community Workshops were held in October 2015 and February 2016 respectively. In addition a joint meeting of the City's Planning Commission with the City of Monterey Planning Commission on Sea Level Rise was held in October 2015. A Community meeting was held in October 2018. Noticed Planning Commission meetings were held in November 2016 and January 2018. Planning Commission recommendations were received and considered by Council and noticed Council meetings were held in February 2017, February 2018 and November 2018.
8. The Land Use Plan conforms to the Coastal Act requirements.
9. The Implementation Plan implements the policies in the Land Use Plan in conformance with the Coastal Act.
10. The City intends to carry out the Local Coastal Program in a manner fully in conformity with the California Coastal Act.
11. In accordance with the California Environmental Quality Act, Public Resources Code Section 21080.9, CEQA does not apply to activities and approvals by the City as necessary for the preparation and adoption of an LCP. The LCP does not take effect unless and until certified by the Coastal Commission.

NOW, THEREFORE, BASED ON THE FOREGOING, THE CITY COUNCIL OF THE CITY OF PACIFIC GROVE FINDS, ORDERS, AND RESOLVES AS FOLLOWS:

1. The City Council certifies that the local coastal program is intended to be carried out in a manner fully in conformity with Coastal Act.
2. The City Council approves the Local Coastal Program for submittal to the California Coastal Commission for certification and authorizes the City Manager to make such submittal.
3. The LCP approved and submitted for certification by this Resolution will require formal adoption after Commission certification. The LCP will take effect only if certified by the Coastal Commission and then after subsequent action by the City Council.

PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF PACIFIC GROVE
this 28th day of November 2018, by the following vote:

AYES:

NOES:

ABSENT:

APPROVED:

BILL KAMPE, Mayor

ATTEST:

SANDRA KANDELL, City Clerk

APPROVED AS TO FORM:

DAVID C. LAREDO, City Attorney

Notice of Exemption

Appendix E

To: Office of Planning and Research
P.O. Box 3044, Room 113
Sacramento, CA 95812-3044

County Clerk
County of: Monterey County

From: (Public Agency): City of Pacific Grove
300 Forest Ave.
Pacific Grove, CA 93950
(Address)

Project Title: Local Coastal Program

Project Applicant: City of Pacific Grove

Project Location - Specific:
Pacific Grove coastal zone.

Project Location - City: Pacific Grove Project Location - County: Monterey

Description of Nature, Purpose and Beneficiaries of Project:

Name of Public Agency Approving Project: California Coastal Commission and City of Pacific Grove

Name of Person or Agency Carrying Out Project: City of Pacific Grove

Exempt Status: (check one):

- Ministerial (Sec. 21080(b)(1); 15268);
- Declared Emergency (Sec. 21080(b)(3); 15269(a));
- Emergency Project (Sec. 21080(b)(4); 15269(b)(c));
- Categorical Exemption. State type and section number: _____
- Statutory Exemptions. State code number: 15265

Reasons why project is exempt:
Preparation of Local Coastal Program by the City of Pacific Grove for Coastal Commission certification..

Lead Agency
Contact Person: Anastazia Aziz, AICP, Principal Area Code/Telephone/Extension: 831-648-3192

If filed by applicant:

1. Attach certified document of exemption finding.
2. Has a Notice of Exemption been filed by the public agency approving the project? Yes No

Signature: _____ Date: _____ Title: _____

Signed by Lead Agency Signed by Applicant

Authority cited: Sections 21083 and 21110, Public Resources Code.
Reference: Sections 21108, 21152, and 21152.1, Public Resources Code.

Date Received for filing at OPR: _____



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Memorandum

To: Ben Harvey, City Manager
Anastazia Aziz, Principal Planner
File No.: 65288.00001

From: Christi Hogin

Date: November 13, 2018

Re: Language notes in draft LCP regarding (1) shall and will (2) and/or

Thank you for the opportunity to serve Pacific Grove as it prepares and adopts its local coastal program and implementation plan in compliance with the Coastal Act. Part of the purpose of my review is to evaluate whether the documents are drafted in a manner that creates effective regulations and accomplishes their intended purposes (while avoiding unintended consequences). In that regard, two drafting issues reoccur throughout the document that I felt warranted a brief written explanation.

1. **“Shall” applies to the LCP’s mandates to staff and applicants; “will” applies to statements relating to the City’s future actions or intentions.** In reviewing the land use plan and implementation plan, I suggest several edits relating to the use of the verbs “shall” and “will.” The choice of words makes a legal difference. Traditionally, “shall” indicates an obligation and “will” connotes volition. In various places, the draft LCP expresses both (a) what the City will do because it has adopted these policy directions and (b) what the City requires of applicants and staff as part of the implementation of the City’s LCP. From the City Council’s point of view, the LUP and IP are adopted as the City’s plans and laws regulating land use. In its own plans and regulations, the City, for the most part, should use language that declares its own intention (“The City will encourage...”) and requires action by others (“The applicant shall provide...”). There are some exceptions, such as when the Director is delegated a task (“The Director shall make a written determination...”).

Generally speaking, where an aggrieved party could seek a court order to compel an action, the word “shall” is appropriate. When drafting legislation, the City must choose its language with consistency so that those implementing and interpreting the documents will understand the City’s intent. In that regard, the City should be mindful of the rules that courts will rely on to construe the LCP’s provisions and abide by the accepted rules of drafting to avoid later misapplication or misinterpretation. Under settled principles of statutory construction courts construe the word “may” as permissive and the word “shall” as mandatory absent any indicia of contrary legislative intent.¹

¹*RSL Funding, LLC v. Alford* (2015) 239 Cal. App. 4th 741, 745; *Kabran v. Sharp Memorial Hospital* (2017) 2 Cal. 5th 330, 340. Although in the context of the Clean Water Act, the Ninth Circuit Court of Appeal analyzed the structure and legislative history and concluded that “shall”

65288.00001\31610163.1



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The best way to assure that courts enforce those mandatory provisions of the IP is to conscientiously use the word “shall” only when meant to regulate conduct enforceable by a court. To distinguish when the City intends to act under a set of circumstances, it should use the term “will.” One concerning example of an incorrect use of “shall” in the draft IP involved enforcement of violations. Ordinarily, the goal of enforcement efforts is compliance (not punishment). Different situations call for different mechanisms to achieve the goal of compliance. Sometimes after-the-fact permits may be sought and other times criminal prosecution is warranted. There is a range of options between those two options and the City enforcement officers will use discretion to determine effective courses of action. If a case is referred for prosecution, the prosecuting attorney must exercise independent judgment to determine whether to file a criminal complaint. With the panoply of options available to obtain compliance, a provision of law that states that the City “shall” prosecute violations is not advisable or practical. By using the term “will,” the City creates a defense to any mandate action attempting to compel unwarranted prosecutions and still clearly states its policy and intention.

2. **“And/or” is inherently ambiguous.** A fundamental tenant of ordinance drafting and legal writing is to state requirements so they can be easily understood by those who must comply.² And/or was used throughout the IP. These two conjunctions – and, or – have different meanings. Generally speaking, in most cases, the drafter knows which is meant and that is which should be used in the document. In those instances where the drafter is unsure whether the requirement should be conjunctive or disjunctive, the determination should be made at the time of enactment by the legislative body. It is never wise to defer determination of the meaning of a statute until later applications.

Vague or ambiguous provisions of law are sometimes held to be unenforceable altogether because they do not sufficiently inform those who must comply what is expected of them (due process). Vague laws are also susceptible to being administered differently by different administrators making them vulnerable to claims of being arbitrary or violating equal protection.

Courts as far back as 1932 realized and highlighted the confusion resulting from use of “and/or”³ and have dubbed “and/or” taboo in legislative drafting.⁴ Use of the term can lead to

is sometimes the equivalent of “may.” *Sierra Club v. Whitman* (9th Cir. 2001) 268 F.3d 898, 904. Go figure. The point remains that the document should be deliberate with its verb choices.

²See *The Redbook: A Manual on Legal Style* (St Paul, MN: West Group, 2002), Rule 1.80 at 43.

³See *Putnam v. Indus. Comm'n*, 80 Utah 187, 14 P.2d 973, 982 (1932) (“We must condemn the use of the words “and/or” because they tend to confuse and mislead.”); *Underhill v. Alameda Elementary Sch. Dist. of Alameda County* (1933) 133 Cal.App. 733, 736 (finding use of and/or in complaint too confusing to be reliable factual allegation).

⁴*California Trout, Inc. v. State Water Res. Control Bd.* (1989) 207 Cal. App. 3d 585, fn. 8.



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ambiguity and uncertainty when clear language is the goal. While typically meant to inclusively suggest both or either, “and/or” is problematic because it may also be read to present a choice. For example, stating “all applicable state and/or federal regulations must be complied with” leaves room for ambiguity because it is susceptible to being interpreted to mean that if either federal or state regulations have been complied with the provision is satisfied. If it is not read to mean that, the “/or” becomes surplus. The rules of statutory construction seek to avoid surplus by giving meaning to each word. Consequently, I suggest the Council determine which conjunction applies and only use one in the IP.