



Agenda Item #:



Staff Report

City of Manhattan Beach

TO: Honorable Mayor ~~Montgomery~~ and Members of the City Council

FROM: Robert V. Wadden Jr., City Attorney; Richard Thompson, Director of Community Development

DATE: September 2, 2008

SUBJECT: Review and Discuss Title 10 Appeal Process

RECOMMENDATION:

Staff recommends that the City Council review and discuss the Title 10 appeal process and provide direction to staff regarding any code revisions the Council desires to make.

FISCAL IMPLICATION:

There are no fiscal implications associated with the recommended action.

BACKGROUND:

The Manhattan Beach Zoning Code, Title 10 of the Municipal Code, contains provisions permitting the City Council to appeal decisions of the Planning commission or Director of Community Development. Over the years some ambiguities regarding these provisions and uncertainty regarding the entire appeal process have emerged. What follows is a brief review of the appeal issues which have proven problematical.

DISCUSSION:

a. What is An Appeal?

The Manhattan Beach Municipal Code provides for several ways that a commission or staff decision may be reviewed by the Council. The traditional method, common to virtually every City, is for an applicant or opponent to file an appeal application within the specified time. A second way is for the City Council to formally pull an item and set it for an appeal hearing. The third method is for the Council to pull a matter and hear it at the same meeting. Although the term "appeal" is not formally defined in the municipal code or Title 10, Black's Law Dictionary defines it as the removal of a matter from a body of lesser jurisdiction for purposes of review and rehearing. Each of the foregoing methods is thus an "appeal" because it involves a review of a decision from an authority of lesser jurisdiction (i.e., staff or a commission) and a complete rehearing of the matter.

b. Public Hearing vs. Non-Public Hearing Items

State law provides that certain items (e.g., use permits, variances, zone or general plan changes) be heard at a noticed public hearing. (Government Code sections 65090, 65353) This usually requires

at least 10 day prior publication of the notice in the local adjudicated newspaper and mailed or delivered notice to the owners of all properties within at least 300 feet of the subject property. (Government Code section 65091.) When such an item appears on the City Council's consent agenda it has not been noticed for a public hearing. The council may pull such an item and discuss whether or not it wishes to appeal the item in which case notice will be published and mailed and the matter will be scheduled for a formal public hearing. However, there are many issues heard by the Planning Commission and PPIC which are not covered by State law and do not legally require a noticed public hearing (e.g., minor exceptions, tree permits, sign permits, parking issues). These may be pulled from the consent agenda and heard by the Council immediately. The appeal sections of the zoning code make accommodation for this distinction by noting "An appeal shall be heard at a public hearing if the decision being appealed required a public hearing. Notice of such a public hearing shall be given in the same manner required for the decision being appealed." (Manhattan Beach Municipal Code section 10.100.050B.) Generally, staff will point out to the Council which type of matter is before them and whether it needs to be rescheduled for public hearing if appealed or can be heard immediately.

c. Council Appeals

i. *Who May Appeal.*

For many years the Council voted as a body on whether or not to appeal items with a majority vote being required for a successful appeal (although single council members could pull nonpublic hearing items from consent). Manhattan Beach Municipal Code section 10.100.040B clearly allows a single council member to appeal a public hearing item without majority support. Recently this has become the Council's practice.

ii. *Certification of NonBias*

When this language was added to the code there had been several cases holding that the fact of a councilmember having appealed an item could, by itself, be considered evidence of a predisposition against a project. Since most planning items require an adherence to the standards of due process the presence of a quasi-adjudicative officer hearing a matter who had such a predisposition could invalidate the decision by failing to provide a neutral, unbiased decision maker. In order to counter this presumption that an appealing council member who also served as a hearing officer was biased language was added to the code requiring that any council member appealing an item must certify their nonbias by stating that the purpose of the appeal is in the public interest and general welfare not due to a predisposition against the project by the appellant. Without this certification the appellant is not permitted to vote. For a while I reminded appealing council members to make the certification but in recent years have let it slip as no one has ever challenged a decision based on the failure to certify. However, if the language is to remain in its present form the certification should be made for any type of appeal under Title 10. A language change might clarify that no council member can appeal an item if they are predisposed against it or for the purpose of reversing it but not requiring any specific certification from the appealing member.

d. Rehearing Appeals

i. *Robert's Rules of Order*

Robert's Rules of Order has very specific time constraints against reconsidering an item previously decided. However, the section imposing Robert's as the governing parliamentary procedure for the Council (Manhattan Beach Municipal Code section 2.010.080) provides that:

“the proceedings of the Council shall be governed by Robert's Rules of Order. It shall be the duty of the Mayor or Mayor tempore to reasonably adhere to and enforce such rules, provided, however, that a failure to observe or enforce such rules shall in no manner affect the regularity, validity or legality of any action or proceeding taken by the Council.” (Emphasis added.)

The obvious purpose of this language is to avoid having the Council reversed for inadvertent failure to adhere to the rigid parliamentary procedure in Robert's (as a practical matter the Council often acts informally and cooperatively without invoking the formal procedures of Robert's). It is doubtful that the language was intended to allow the Council to deliberately violate Robert's whenever it chooses, but that is the effect of the language. We would recommend making a revision to the language of this section to provide that an action by the Council cannot be invalidated by an inadvertent failure to comply with Robert's but that if the Council wishes to deliberately violate Robert's Rules of Order it must do so by a four fifths vote.

ii. *The Two Year Rule*

Manhattan Beach Municipal Code section 10.100.070 is intended to prevent an appeal from being reasserted for two years. This is a sensible rule. As we have seen there are individuals who will continue to petition for what they want even when rejection is clear. However, the language of this section is badly drafted and appears to apply only to appeals which are denied. We doubt this was the original intent. In the case of the tree permit, the appeal, which was not by the applicant but by a councilmember, was actually upheld not denied. Any appeal which challenges a project approval and is upheld might encourage an applicant to try to reopen the application. We recommend a clarification to this language so it applies to all appeals whether upheld or denied.

RECOMMENDATIONS:

The following code amendments are suggested. Upon direction from the Council we can bring them back at a future meeting in ordinance form.

10.100.040 Initiation of appeals.

A. An appeal filed by the applicant or interested party may be initiated by delivering to the City Clerk a written notice of appeal and any required appeal fee. The notice of appeal shall specify the basis for the appeal.

B. The [Mayor or any member] A majority of the City Council may appeal any matter by requesting a public hearing on the appeal within the time limit set forth in Section 10.100.030. The Mayor or City Council member appealing any matter shall only do so if the appeal is made in the public interest or welfare and the appealing council member has no predisposition for or against the matter being appealed.

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C. Decisions that are appealed shall not become effective until the appeal has been resolved or withdrawn

2.01.080 Parliamentary procedure.

Except as may be otherwise provided by law, the proceedings of the Council shall be governed by Robert's Rules of Order. It shall be the duty of the Mayor or Mayor tempore to reasonably adhere to and enforce such rules, provided, however, that an inadvertent failure to observe or enforce such rules shall in no manner affect the regularity, validity or legality of any action or proceeding taken by the Council. However, should the Council desire to intentionally or knowingly violate the provisions of Robert's Rules of Order a four fifths majority vote shall be required.

10.100.070 New appeal.

Following a decision on, an appeal, any matter that is the same or substantially the same shall not be considered by the same body within two (2) years, unless the denial is made without prejudice.

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