



City of Sunnyvale

Agenda Item-No Attachments (PDF)

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REPORT TO COUNCIL

SUBJECT

Introduce an Ordinance to Amend Title 19 (Zoning) Regarding the Appeal Process for Land Use Projects (Study Issue, CDD 14-15); Repeal Council Policy 1.1.4 on Appeals; and make a Finding that the Proposed Project is Exempt from the Requirements of the California Environmental Quality Act (CEQA) Pursuant to CEQA Guidelines 15061(b)(3) - Continued from November 11, 2014 (Planning File: 2014-7434)

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BACKGROUND

The City Council sponsored and ranked study issue CDD 14-15 to examine the current regulations and procedures regarding appeals of decisions on planning applications (Attachment 1). The goal of this study is to consider and clarify the regulations and procedures concerning how appeals are made and processed.

The current zoning code (Title 19 of the Sunnyvale Municipal Code) prescribes several different appellate procedures, depending on the type of application or entitlement being sought (Attachment 2). For most discretionary permits, the zoning code allows any aggrieved person, including members of the Planning Commission or City Council, to appeal a decision to a higher decision-making body. Councilmembers and Commissioners who wish to appeal a decision are required to file an appeal in substantially the same manner as a member of the public; the appeal must be filed within 15 days of the decision date, and the request must be in writing stating the grounds for the appeal (appeal letter). By practice, City officials are not required to pay a fee when they file an appeal; however, the current zoning code does not address this issue. Similarly, the zoning code does not address the scope of appeals, procedures for hearing appeals, or whether appellants can withdraw appeals. This lack of clarity in the code has led to confusion and some inconsistencies in practice over the years. Additionally, the requirement for Councilmembers and Planning Commissioners to state reasons for an appeal raises due process concerns.

The Planning Commission considered this item at a public hearing on October 13, 2014 (see minutes in Attachment 7) and voted unanimously to recommend that Council find that the project is exempt from CEQA, introduce the Ordinance to amend Title 19 of the Sunnyvale Municipal Code (Attachment 4, Draft Ordinance) and repeal Council Policy 1.1.4. This is consistent with the staff recommendation.

This item was formally continued from the City Council meeting of November 11, 2014 to the meeting of November 25, 2014.

EXISTING POLICY

COUNCIL POLICY: 7.2.1-Community Engagement

7.2.1.B.2: Simplify processes and procedures to make it easy and convenient for community members to participate in City activities and programs.

COUNCIL POLICY: 7.3.1-Legislative Management

7.3B.3: Prepare and update ordinances to reflect current community issues and concerns in compliance with state and federal laws.

GENERAL PLAN: Land Use and Transportation Chapter

LT-6.6: Support a seamless development review process (DPIC) and expand the One-Stop Permit Center.

SUNNYVALE MUNICIPAL CODE: Section 19.98.070. Appeals

Attachment 3 is a copy of the current SMC Section 19.98.070, Appeals.

ENVIRONMENTAL REVIEW

Although amendments to the municipal code are generally considered a project under the California Environmental Quality Act (CEQA), staff has concluded that adopting the proposed ordinance is exempt from CEQA under Guideline 15061(b)(3) because it can be seen with certainty that it will not have a significant effect on the environment. Projects that are subject to the requirements of the amended chapters will be environmentally evaluated on an individual basis.

DISCUSSION

The City continually reviews and amends the zoning code to address community issues. Some issues are focused on new standards and others on the process for considering planning permits. This study is focused on the process for appeals of decisions on planning applications and looks at the following aspects of the process:

- Call for Review vs. Appeal by Decision-Makers
- Scope of Appeal/Review Hearing
- Withdrawal of Appeal

Staff is recommending the Council adopt revised procedures, as set forth in Attachment 4, the draft proposed ordinance.

Call for Review vs. Appeal by Decision-Makers

The City's current code provides that Councilmembers and Planning Commissioners can appeal certain decisions of the Community Development Director or Planning Commission by following the same procedures that the applicant or an aggrieved third party would follow. This includes stating the grounds for appeal. Depending on how a Councilmember or Planning Commissioner describes his or her grounds for appeal, it may appear that they are biased, or have "prejudged" an issue, which could violate the due process right of the applicant to a fair and impartial decision-maker, and therefore require the Councilmember or Planning Commissioner to recuse him or herself.

In order to give Councilmembers and Planning Commissioners an opportunity to request review of certain applications which they consider to have significant community import, and to ensure that an applicant's due process rights are protected, many cities have adopted a "call for review" process by the City Council and/or Planning Commission that is distinct from an appeal. A call for review is similar to an appeal process where the request is required to be made within the 15-day appeal period, and suspends the original decision. The process differs in that it is more of a mechanism for

policy-makers to review applications that involve broader policy interpretations or are of significant community interest. The process serves more as a check-in on procedures or policy interpretations between decision-making bodies, versus an appeal process where the appellant has already taken a position on the matter and has stated that position in writing. The call for review process presumes impartiality, and that the Councilmember or Planning Commissioner making the request has determined that as a matter of policy, or because of a question of interpretation of City policy, or because of a significant community interest, the Council or Commission should hear the matter. For these reasons, no reason need be stated for such review and no fee is required.

Cities that have a call for review process in place appear to utilize it in either one of two ways. They allow any *one* member of the city council to request a call for review of a planning commission decision, and any *one* member of the planning commission to request a call for review of a decision by the director. Or, they require at least *two* councilmembers to request a call for review of a planning commission decision and at least *two* commissioners to request a call for review of a decision by the director.

The second approach - requiring at least two councilmembers or planning commissioners to request review - may be preferable because it addresses both goals of giving council and the commission the opportunity to review important projects, and protecting an applicant's due process rights. The two-member requirement is consistent with the City's current practice regarding sponsoring study issues and budget issues, and demonstrates significant interest in the matter.

Scope of Appeal Hearing

The zoning code is silent as to how appeal hearings are to be conducted, but the City's practice is to conduct them as de novo hearings, in which all aspects of a project are open for consideration and not limited to those raised by the appellant. This is common practice in most jurisdictions, and allows the reviewing body to affirm, modify or reverse a decision. Staff is recommending that the de novo review standard be included in the code.

Withdrawal of Appeal

The code does not address withdrawal options in cases where more than one person files an appeal, or whether an appellant can withdraw their appeal prior to hearing. The City's practice has been to notify other interested appellants when one appeal has been filed, and suggest that they attend the hearing to voice their concerns. Under this practice, the City does not allow an appellant to withdraw their appeal because others may be relying on it. This situation often leads to uncertainty. To address this uncertainty, staff is recommending that the ordinance be revised to allow withdrawal of appeals by the appellants. Under this rule, staff would not notify others when an appeal has been filed until the 15-day appeal period has run, to ensure that anyone interested will in fact file their appeal. Any appellant could withdraw their appeal any time prior to the hearing date. The appeal hearing would not be held if all requests are withdrawn. This could help reduce time and costs associated with preparation for the appeal hearing and conducting the hearing in cases where interested parties are no longer aggrieved.

Other Cities' Regulations

Attachment 5 shows a survey of neighboring and similar-sized cities' appeal procedures and fee requirements. Most of the surveyed cities accept multiple appeal requests for the same project, but vary in allowing appeal requests to be withdrawn. Like Sunnyvale, most cities do not limit the scope of the appeal hearing to those issues raised by the appellant. In Attachment 5, only Redwood City

prescribes a call for review process. Staff has surveyed other California cities with call for review processes, including Pleasant Hill, Clovis, Santa Clarita, Rosemead and Oceanside. These cities' regulations have been incorporated in the discussion of options in this report.

“Retooling” the Appeal Process

Consistent with the City's efforts to rewrite the zoning code to be more accessible and to streamline permit procedures (Retooling the Zoning Code, RTC 11-260 and 13-047), staff recommends restructuring SMC Section 19.98.070 (Appeals) to better accommodate future amendments and to limit the variations between projects or permit types. This includes allowing any discretionary decision by the director (including Miscellaneous Plan Permits, Design Reviews and Minor Use Permits) to be appealed only to the Planning Commission, whose decision is final. Allowing decisions to be appealed once to a higher decision-making body reinforces the hierarchy of the decision-making bodies and the scale of projects reviewed at those levels, and avoids multiple appeal hearings which could result in a prolonged review and approval process. Recently adopted provisions through previous studies are proposed to remain, such as allowing only the applicant, property owner and owners of property with the required noticing radius to appeal a decision on a Design Review application for a second-story addition to a single-family home or duplex (note that this radius was recently increased from 200 feet to 300 feet as part of the study issue on Noticing and Outreach).

Council Policy 1.1.4-Council and Planning Commission Review of Land Use Decisions and Opportunity to Appeal

This is a Council Policy, initially adopted in 1985, and amended from time to time, creating a procedure to transmit paper copies of agendas and minutes of action to the City Council and Planning Commission (Attachment 6). This policy is outdated and no longer necessary; the agendas and actions of lower decision-making bodies are available electronically.

FISCAL IMPACT

State law enables a city to establish fees for services. The fee cannot exceed the amount it costs to provide the service; however it is not required by state law to cover the entire costs. Full cost includes direct staff time (typically the staff members from Planning and other departments contributing to the review and analysis of Planning Applications); indirect staff time (e.g., Office of the City Manager, Office of the City Attorney, Human Resources Department, Finance Department), as well as costs for non-personnel items such as rent, furniture, supplies, copying, etc.

Historically, appeal fees have not covered the entire costs of the service. The current fee for an appeal is \$157 (\$139 plus an \$18 technology surcharge). In a 2010 analysis of costs for services it was determined that the total average costs of appeals ranged from about \$4,000 to \$6,000, with the higher costs for decisions appealed to the City Council. It has generally been the Council philosophy that the general public should not be prevented from appealing a decision due to a high appeal fee. On the other hand, if the fee is too low, appeals may be more frivolous in nature. Currently, only members of the public are charged an appeal fee. If a Councilmember appeals a decision, as a Councilmember, there is no fee.

Staff intends to bring a new fee structure for Planning Permits to City Council with the final phase of the Retooling the Zoning Code effort. The Retooling will likely involve the creation of new permit types and associated fees - it would be appropriate at that time to consider adjusting the appeal fees as well. In setting the appeal fees, the following issues should be considered:

- Set the fees reasonably low to avoid creating a barrier or impediment for filing appeals, or set the fees higher to achieve full or greater cost recovery; and
- Set graduated fees based on the hearing body for the appeal (e.g., higher fee for items appealed to the Council), or charge a different fee for the applicant versus a member of the public.

PUBLIC CONTACT

Public contact was made through posting of the Planning Commission agenda on the City's official-notice bulletin board, on the City's website, a notice in the newspaper, and the availability of the agenda and report in the City of Sunnyvale's Public Library. Notices were emailed to neighborhood associations and interested parties.

Staff held a study session with the Planning Commission on July 28, 2014. The study session was conducted more as an overview of current regulations and practice. Some Commissioners were open to allowing multiple appellants and some expressed concerns regarding allowing appeals to be withdrawn.

The Planning Commission considered this item at a public hearing on October 13, 2014 (see minutes in Attachment 7) and voted unanimously to recommend the Council adopt the staff recommendation.

ALTERNATIVES

1. Find that the project is exempt from CEQA pursuant to CEQA Guideline 15061(b)(3).
2. Introduce an ordinance to amend Sunnyvale Municipal Code Section 19.98.070, regarding appeals of land use decisions, as set forth in Attachment 4, which:
 - Creates a call for review process that requires a minimum of two Council Members or Planning Commissioners to request City Council or Planning Commission review of a decision;
 - Clarifies and simplifies the appeal process consistent with the City's continuous efforts to "Retool the Zoning Code";
 - Formalizes the current practice of conducting appeals as de novo hearings; and
 - Allows an appellant to withdraw their appeal.
3. Repeal Council Policy 1.1.4.
4. Introduce the ordinance with modifications to the staff recommendations.
5. Make no changes to current regulations and policies.

STAFF RECOMMENDATION

Alternatives 1, 2 and 3: 1) Find that the project is exempt from CEQA pursuant to CEQA Guideline 15061(b)(3); 2) Introduce the Ordinance to amend Title 19 of the Sunnyvale Municipal Code (Attachment 4, Draft Ordinance); and 3) Repeal Council Policy 1.1.4.

The recommended changes reflect best practices, formalize existing practices, and ensure the integrity of the appeal process. They clarify the ambiguities in the current appeal procedures and regulations, particularly those requests filed by members of the Planning Commission or City Council. The proposed ordinance amendments protect appellants' rights while at the same time simplify and streamline processes.

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ATTACHMENTS

1. Study Issue Paper
2. Examples of Current Permit Types and Current Appeal Provisions
3. Current Zoning Code Text on Appeals
4. Draft Proposed Ordinance
5. Other Cities' Appeal Procedures
6. Council Policy 1.1.4
7. Planning Commission Minutes from October 13, 2014