



Office of the City Manager

ACTION CALENDAR

May 26, 2015

*(Continued from April 28, 2015)*

To: Honorable Mayor and Members of the City Council

From:  Christine Daniel, City Manager

Submitted by: Zach Cowan, City Attorney

Subject: City Manager Referral: Update Administrative Hearing Procedure Regulations

RECOMMENDATION

Adopt a Resolution authorizing the City Manager to promulgate guidance to City hearing officers for fair hearing procedures and rescinding Resolution No. 47,053-N.S. and Resolution No. 48,354-N.S.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

The City of Berkeley has adopted ordinances and regulations that prohibit and/or regulate various activities that have the potential to impair the public health, safety, and welfare. Administration and enforcement of these ordinances and regulations can take many forms, from terminating businesses because they are public nuisances, to revoking permits, to temporarily suspending permits, to requiring modest remedial measures for discrete ordinance violations, to issuing administrative citations for amounts as little as \$50.

In many cases the City allows persons who are subject to enforcement actions to appeal those actions to administrative hearing officers. Hearing officers must employ fair procedures in considering appeals. In general, the greater the impairment that would result from a City action under appeal, the more procedural protections are appropriate to ensure that an appeal hearing is conducted fairly.

In 1975, the Berkeley City Council adopted Resolution No. 47,053-N.S., establishing administrative hearing procedures for appeals of permit denials or revocations. Although initially intended to govern the actions of just the Finance Department in its decisions to grant, deny, or revoke business licenses, the language was amended to broaden its application. However, in 1976, Resolution No. 48,354-N.S. clarified that Resolution No. 47,053-N.S. only applied to hearings already authorized by another

ordinance, if the original ordinance did not specify the specific procedures to be used. The resolutions have not been amended since and are out of date.

### BACKGROUND

The existing City of Berkeley procedures for administrative appeals are out of date. Accordingly, this resolution rescinds the existing administrative procedure resolutions and grants the City Manager the authority to develop new regulations for hearing officers to follow in conducting administrative appeal hearings. If applicable ordinances specify procedures beyond those set forth in the regulations, those additional procedures would also be required. In the event of a conflict, the procedures that offer more expansive fair hearing procedures must be utilized.

Both state and federal law require that when the City conducts administrative hearings that could result in some impact on property rights, it provide certain procedural protections to ensure that hearings are fairly conducted. The extent of the procedural protections to which individuals are entitled depends mainly on the extent of the potential impact on property rights.

At a minimum, an individual must be provided with notice and an opportunity to be heard. (See *Goss v. Lopez* (1975) 419 U.S. 565.) Beyond that, the procedural rights to which appellants are entitled is determined by a balancing test between the burden to the City and the alleged harm to the individual. (*Matthews v. Eldridge* (1976) 424 U.S. 319.) Accordingly, it is appropriate for the City to develop explicit regulations to ensure fair hearings.

Although the process that is required for a fair hearing is often a case-specific determination, the administrative appeals the City conducts tend to fall into two basic categories: those that have the potential for a significant impairment of a property interest, and those that do not. Accordingly, the attached City Manager directive would require certain procedural standards for all hearings, with additional procedures for hearings that could result in a significant impairment of a property right. City hearing officers would also be required to conduct the appeal hearing in accordance with any additional procedural requirements set forth in the ordinance under which the appeal is being brought, and to consult with the City Attorney in case of uncertainty.

With this Resolution, the City will update its administrative hearing procedures to reflect current case law and the newer provisions of the Berkeley Municipal Code. The new regulations will also clarify which actions necessitate additional procedural protections. This will improve the consistency and clarity of the City's administrative hearings.

### ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

The proposed resolution would update and standardize the City's fair hearing procedures in order to comply with current case law and provide for a clear, uniform system of procedure in administrative hearings that the hearing officers and appellants can understand.

ALTERNATIVE ACTIONS CONSIDERED

City hearing officers could be allowed to develop and use their own procedures on a case-by-case basis, but this would lead to inconsistency and potentially legal problems. Adopting new procedures by City Manager directive provides the flexibility to change the regulations quickly in the future to adapt to new case law.

CONTACT PERSON

Zach Cowan, City Attorney (510) 981-6998

Attachments:

- 1: Resolution
- 2: Draft Administrative Hearing Procedure Regulations

RESOLUTION NO. ##,### – N.S.

DIRECTING THE CITY MANAGER TO PROMULGATE REGULATIONS FOR CONDUCTING ADMINISTRATIVE HEARINGS AND RESCINDING RESOLUTION NO. 47,053-N.S. AND ALL AMENDATORY RESOLUTIONS

WHEREAS, in 1975 the Council adopted Resolution No. 47,053-N.S., establishing administrative hearing procedures for appeals of permit denials or revocations; and

WHEREAS, in 1976 the Council adopted Resolution No. 48,354-N.S., clarifying that Resolution No. 47,053-N.S. only applied to hearings already authorized by an ordinance, if the ordinance did not specify the specific procedures to be used; and

WHEREAS, in 2002 the Council adopted Berkeley Municipal Code Chapter 1.28, authorizing the use of administrative citations in accordance with Government Code section 53069.4; and

WHEREAS, the City may seek abatement of certain violations as public nuisances under the Berkeley Municipal Code and pursue civil and equitable relief against the violators, or act to abate the nuisance itself and recover the costs from the violator via a lien or an assessment; and

WHEREAS, other chapters of the Code grant certain City officials the authority to enforce particular ordinances, grant or deny permits, and take other adjudicative actions that may be subject to administrative appeals; and

WHEREAS, such appeals must comply with the requirements of the Due Process Clause of the California and United States Constitutions and accord a fair hearing under Code of Civil Procedure Section 1094.5(b).

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that Resolution No. 47,053-N.S., and all amendatory resolutions are hereby rescinded.

BE IT FURTHER RESOLVED that the Council of the City of Berkeley hereby directs the City Manager to promulgate regulations governing all administrative hearings held by City employees or contractors, and to update them from time to time.



Office of the City Manager

## CITY OF BERKELEY FAIR HEARING PROCEDURES

### Introduction

The City of Berkeley has adopted ordinances and regulations that prohibit and/or regulate various activities that have the potential to impair the public health, safety or welfare. Administration and enforcement of these ordinances and regulations can take many forms, for example:

- terminating businesses because they are public nuisances;
- revoking permits;
- temporarily suspending permits;
- requiring modest remedial measures for discrete ordinance violations;
- issuing administrative citations for amounts as little as \$50.00.

In many cases the City allows persons who are subject to enforcement actions to appeal those actions to administrative hearing officers. Hearing officers must employ fair procedures in considering appeals. In general, the greater the impairment that would result from a City action under appeal, the more procedural protections are appropriate to ensure that an appeal hearing is conducted fairly.

While no two City enforcement actions have identical impacts on the persons or entities subject to them, such actions nevertheless tend to fall into two categories: those that may significantly impair property interests and those that do not. The purpose of these procedures is to specify fair hearing procedures that will be used by hearing officers in each type of situation. Some cases will not clearly fall into either category. Whenever a Hearing Officer is uncertain as to the appropriate procedures to be used, he or she should consult the City Attorney.

This memorandum describes the City's fair hearing procedures for hearings conducted by Hearing Officers. It begins with the procedures that will be used in *all* cases, and then describes the *additional* procedures that will be used in cases involving potential significant impairment of property rights.

### Fair Hearing Procedures Applicable in All Cases

Administrative hearings conducted by Hearing Officers shall be conducted using the following procedures. If the applicable ordinance specifies procedures beyond those set

forth in this memorandum, those additional procedures shall also be employed.<sup>1</sup> In the event of a conflict, the more expansive fair hearing procedures shall be utilized. In the event of uncertainty as to the exact procedures to be used, Hearing Officers should consult the City Attorney.

1. Appeals shall be promptly scheduled for hearing, which shall not be unduly delayed.
2. The Hearing Officer shall be fair and impartial, without any personal interest in the outcome of the appeal.
3. The City shall provide notice of the hearing in substantially the following form, but may include other information:

You are hereby notified that a hearing will be held before (name of Hearing Officer) at [LOCATION] on [DATE] at [TIME]. You may be, but need not be, represented by counsel. You may present any relevant evidence.

4. At least 10 days prior to the date set for the hearing, the notice shall be served by first class mail, postage prepaid or by electronic mail, addressed to the appellant as the appellant's name and address appears on the appeal form, as well as to any real parties in interest. The failure of the City to serve any person required herein to be served shall not invalidate any proceeding hereunder as to any person duly served or relieve any such person from any duty or obligation imposed by the provisions of the applicable ordinance.
5. Only those matters or issues specifically raised in the appeal shall be considered in the hearing of the appeal.
6. Hearings need not be conducted according to the technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the type of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions in courts of competent jurisdictions in this state. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions in courts of competent jurisdiction in this state, or the party against who it is offered does not object. Irrelevant and unduly repetitious evidence may be excluded.
7. The Hearing Officer may take official notice of any fact that may be judicially noticed by the courts of this state or of official records of the boards, commissions, departments, and ordinances of the City. Parties present at the hearing shall be informed of the matters to be noticed, and these matters shall be

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<sup>1</sup> For instance, sworn testimony and cross-examination must be allowed in any administrative appeal concerning nuisance abatement under BMC Section 1.24.100.

noted in the record. Parties shall be given a reasonable opportunity, on request, to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the Hearing Officer.

8. If relevant, the Hearing Officer adjudicating the appeal may inspect any building or premises involved in the appeal during the course of the hearing, provided that notice of such inspection shall be given to the parties before the inspection and they are given an opportunity to be present during the inspection. In such cases, the Hearing Officer shall state for the record upon completion of the inspection of the material facts observed and the conclusions drawn therefrom. Each party then shall have a right to rebut or explain the matters so stated by the Hearing Officer.
9. Each party may call and examine witnesses on any matter relevant to the issues of the hearing; introduce documentary and physical evidence; impeach any witness regardless of which party first called the witness to testify; rebut the evidence; be represented by anyone who is lawfully permitted to do so.
10. The Hearing Officer may consider the credibility of witnesses. If a decision is based on a determination as to credibility, such determination and the reason(s) therefor shall be stated in the decision.
11. The Hearing Officer may not discuss the facts of any matter pending before him or her, or receive information about any such matter, outside of the hearing except as provided for in Section 8 above.
12. Because of the possibility of undue influence on Hearing Officers City staff who occupy positions superior to the Hearing Officer and Members of the City Council may not attend hearings unless they are percipient witnesses, and may only attend for as long as necessary to provide testimony.
13. A record of the entire proceedings shall be made by tape recording, or by any other means of permanent recording determined to be appropriate by the Hearing Officer.
14. The Hearing Officer shall proceed with reasonable dispatch to conclude any matter under consideration, with due regard for the convenience of any parties or their representatives. The Hearing Officer may continue the hearing for good cause, and should generally be continued if either party wishes to submit additional material evidence. The Hearing Officer should render a decision as soon as practicable after a hearing is concluded, but in no event later than 30 days thereafter.
15. The decision shall be in writing and shall contain findings of fact, a determination of the issues presented, the requirements to be complied with, and the reasoning for each. A copy of the decision shall be sent by first class mail, postage prepaid to the appellant and all real parties in interest, or by electronic mail.

## **Additional Fair Hearing Procedures Applicable Where City Actions May Result in Significant Impairment of Property Rights**

Where a City enforcement action has the potential to cause a significant impairment of a property interest, a higher level of procedural protections is appropriate. Examples of such actions are:

- Orders to demolish buildings
- Orders to vacate buildings
- Revocations of a permits or licenses to operate a business
- Determinations that dangerous animal require destruction;
- Declarations of public nuisance that require termination or cessation of a use;
- Administrative penalties greater than \$2500;
- Any other action that the hearing officer determines, after advice from the City Attorney, may result in a significant impairment of a property interest.

In such cases, the following *additional* procedures shall apply. If the applicable ordinance specifies procedures beyond those set forth in this memorandum, those additional procedures shall also be employed. In the event of a conflict, the procedures most protective of an appellant's rights shall be utilized. . In the event of uncertainty as to the exact procedures to be used, Hearing Officers should consult the City Attorney.

1. The City shall provide notice of the hearing in substantially the following form, but may include other information:

You are hereby notified that a hearing will be held before (name of Hearing Officer) at [LOCATION] on [DATE] at [TIME]. You may be, but need not be, represented by counsel. You may present any relevant evidence, may require that testimony be under oath, and will be given an opportunity to cross-examine all witnesses testifying against you.

2. The Hearing Officer shall have the power to administer oaths and affirmations, and all testimony shall be given under oath if requested by any party. The Hearing Officer may administer the oath to all witnesses at the same time.
3. Each party may call and examine witnesses on any matter relevant to the issues of the hearing; introduce documentary and physical evidence; cross-examine opposing witnesses on any matter relevant to the issues of the hearing; impeach any witness regardless of which party first called the witness to testify; rebut the evidence; be represented by anyone who is lawfully permitted to do so.
4. Upon request by any party, the Hearing Offer may, but is not required to, open the hearing to the public, who may observe but not participate in the proceedings. If he or she deems it appropriate, the Hearing Officer may order any or all members of the public to be excluded from the hearing room. Because of the possibility of undue influence on Hearing Officers, City staff who occupy positions superior to the Hearing Officer and Members of the City Council may

not attend hearings unless they are percipient witnesses, and may only attend for as long as necessary to provide testimony.

5. A record of the entire proceedings shall be made by tape recording, or by any other means of permanent recording determined to be appropriate by the Hearing Officer. An appellant may elect to have the hearing transcribed at his or her own expense by a certified court reporter.

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