



Office of the City Manager

ACTION CALENDAR
June 7, 2011

To:  Honorable Mayor and Members of the City Council
From:  Phil Kamlarz, City Manager
Submitted By: Dan Marks, Planning & Development
Subject: Proposed Modification of Fees for Filing Appeals of Land Use Matters to the Zoning Adjustments Board and Council

RECOMMENDATION

Conduct a public hearing and upon conclusion adopt a Resolution amending the fee schedule for the Permit Service Center Fund to modify the fees for filing appeals to the City Council regarding land use matters as follows:

1. Appeal of Zoning Officer decision (Administrative Use Permits) to Zoning Adjustments Board (ZAB): \$200; fee reduced to \$75 if appeal is signed by persons who lease or own at least 35 percent of the parcels or dwelling units within 300 feet of the project site, or at least 20 such persons (not including dependent children), whichever is less.
2. Appeal of ZAB decisions to City Council: \$500; fee reduced to \$100 if appeal is signed by persons who lease or own at least 50 percent of the parcels or dwelling units within 300 feet of the project site, or at least 25 such persons (not including dependent children), whichever is less.
3. All appeals by Applicant: \$2500.
4. Appeals of affordable housing projects (defined as projects which qualify under section Government Code Section 65589.5 for "Approval of Affordable Housing)": \$500, no reduction available.
5. Permit the City Manager to reduce or waive appeal fees when an appeal is based on an acknowledged staff error.

FISCAL IMPACTS OF RECOMMENDATION

The fee increase will allow for additional cost recovery and some reduction in costs due to reductions in appeals with little community support. Staff estimates that the proposed revised appeal fees would reduce the number of appeals by approximately one-third. Assuming 26 ZAB appeals and 18 appeals to Council per year, the reduction would be about 8 ZAB appeals and 6 Council appeals. Assuming an average cost of a ZAB appeal at \$4,000, and an average cost of a Council appeal at \$15,000, the savings to the City would be approximately \$122,000 annually – or roughly .7 FTE Planner (fully

loaded). Staff is not expecting that the fees will affect appeals by applicants where the appeal cost is likely to be a relatively small cost of a project.

CURRENT SITUATION AND ITS EFFECTS

Staff is recommending that the City Council modify appeal fees to allow for increased cost recovery and some reduction in unrecovered costs due to reductions in appeals with little community support.

Discretionary land use appeals include the following:

- Appeal of a Zoning Officer's decision approving or denying an Administrative Use Permit (AUP) to the Zoning Adjustments Board (ZAB). An appeal of an approval is almost always by non-applicants; appeals of denials are almost always by an applicant.
- Appeal of the ZAB decision on an AUP or Use Permit by either an outside party (appeal of an approval) or by the applicant (either appealing a denial or appealing a condition of approval).
- Appeal of the ZAB decision on a Variance application.

Currently non-applicants may appeal an AUP to the ZAB, or a ZAB decision to the City Council for \$95, applicants may appeal land use decisions for \$1,734. The Council has increased these fees three times in the past few years as a part of overall increases in the land use entitlement fees, but the fee for non-applicants remains a tiny fraction of the cost of processing an appeal.

Appealing a land use decision to higher authorities is an important right, allowing for land use decisions to be considered by appointed and elected representatives of the community. However, charging the actual City costs of processing an appeal would be prohibitively expensive for most people in the community. Appeal costs vary from project to project. For an AUP appeal to the ZAB, the range is typically between \$3,000 and \$5,000. The costs for an appeal to Council tends to be considerably higher: between \$5,000 and \$30,000, depending on the complexity of the appeal, the size of the administrative record, the number of notices and a variety of other factors. Besides the staff costs to prepare the Staff report, City costs include time dedicated by the City Clerk to provide notice and maintain the record, and for the City Attorney's office to advise Planning staff and review reports. The City Attorney's review becomes more detailed at the Council level because it is the end of the process and there is an increased potential for follow up action by an unhappy appellant or applicant. The City Manager also reviews all City Council reports. The cost to the City of appeals is therefore quite high relative to current (or proposed) appeal fees. Overall, the Land Use Planning Division recovers a little more than half of the cost of its operations. The proposed modification in appeal fees would slightly increase overall cost recovery for this Division. A reduction in the number of appeals would free staff time to complete other land use entitlement applications more quickly.

In addition to the costs to the City, appeals have high costs for applicants. An appeal of an AUP to the ZAB requires a minimum of two months. An appeal of a ZAB decision to

the City Council requires a minimum of three months; more complex Council appeals can require four months and often much longer. In other words, an AUP that can normally be processed in less than two months can require a minimum of seven months if appealed all the way to the Council. A Use Permit appealed all the way to Council can require a minimum of nine months to well over a year. During this time, the applicant is often holding or leasing property which often cannot be used for other purposes, costing thousands of dollars. To address an appeal, many applicants hire professional assistance, adding additional costs often in the thousands of dollars.

Although it is not possible to know how much the risk and costs associated with land use decisions discourages businesses from locating in Berkeley, anecdotal evidence is that it is a consideration for prospective business owners. A discretionary permit appealed all the way to Council can require a minimum of six to nine months, while costing the non-applicant appellant either \$190 (appeal of an AUP to the ZAB and then Council) or \$95 (appeal of Use Permit from ZAB to Council). People trying to make improvements to their home can face similar delays and often have a significant investment in plans and contractors at risk. The appellant need not have any reasonable justification for the appeals and need not show up at the hearings.

BACKGROUND

When the Council adopted the fees for the Planning and Development Department in June of 2010, several Council members voiced concern regarding the appeal fee structure. Some were concerned that the very low cost of appeals relative to its impacts on an applicant was an incentive to appeal. Several Council members were especially concerned by appeals filed by one or two individuals who were not directly affected by a project. Several Council members suggested that the appeal fees should be structured to have a lower cost when there were a significant number of affected neighbors concerned by a project, and somewhat higher fee for others.

In calendar year 2010, of the 14 appeals of AUP's acted on by the ZAB, the Zoning Adjustment Board acted 8 times to affirm without a hearing, and set the matter for hearing 6 times. The ZAB did not over-turn the Zoning Officer's decision on any appeal. Of the 14 AUP appeals, 8 were appealed to Council. Of those 8, 3 are still pending, 1 was remanded and 1 was withdrawn, while 3 were denied. Of the 6 Use Permit appeals, 5 were denied without a public hearing, and 1 was reversed. Of the 16 separate appeals on which there was final ZAB or Council action in 2010, one was withdrawn, and one was reversed; the Zoning Officer or ZAB action was affirmed 14 times.

Other Jurisdiction appeal fees. In a survey conducted in 2005, the City found that appeal fees varied significantly from jurisdiction to jurisdiction, with no apparent pattern. Some cities charged the full cost of an appeal, regardless of appellant (usually over \$1,000), while others charged nominal fees for non-applicants similar to Berkeley. Staff is not proposing full cost-recovery, but does recommend that sufficient fees be charged to discourage appeals with little merit, and a reduced fee when there is substantial neighborhood concern.

RATIONALE FOR RECOMMENDATION

In making its recommendation, staff considered balancing the objective of allowing for appeals at reasonable cost, while not encouraging appeals that have little community support. Staff responded to the direction heard from several Councilmembers to reduce appeal fees when there is concern by a significant number of concerned nearby neighbors who are likely to be most affected by the land use decision. Staff is recommending the following:

1. Appeal of AUP to ZAB: \$200

Fee reduced to \$75 if appeal is signed by persons who lease or own at least 35 percent of the parcels or dwelling units within 300 feet of the project site, or at least 20 such persons (not including dependent children), whichever is less.

Discussion: Appeals of the Zoning Officer's decision on an AUP to the ZAB are more common than appeals to Council, and issues that arise as part of these types of appeals are often resolved at the ZAB. Accordingly, staff is recommending some increase in cost for appeals by non-applicants, but reducing the cost of an appeal to less than the current fee when there is concern by a number of nearby residents or business owners. In order to address situations where there are not many parcels within 300 feet, staff is recommending that the number of appellants needed for the lesser fee be based on a percentage of nearby parcels or a set number of residents.

2. Appeal of ZAB decisions to City Council: \$500

Fee reduced to \$100 if appeal is signed by persons who lease or own at least 50 percent of the parcels or dwelling units within 300 feet of the project site, or at least 25 such persons (not including dependent children), whichever is less

Discussion: Staff is proposing a somewhat higher fee level for appeals of ZAB decisions to Council. Staff believes this is appropriate for at least two reasons. First, appellants will have already had an opportunity to present their issues to an appointed review body in a public forum. Second, the costs and time involved in a Council appeal are much greater than a ZAB appeal.

3. Appeal by Applicant: \$2500.

Staff is proposing to raise all appeal fees by applicants to come closer to reflecting the actual costs to the City of such an appeal. This increase is appropriate as such appeals are very rare and often reflect recalcitrant applicants. Staff works closely with applicants during the project review process to revise and condition a project so that staff can recommend approval. The vast majority of projects that are brought forward as an AUP or Use Permit to the ZAB are recommended for approval. Staff generally recommends denial only when an applicant has not worked closely with staff to arrive at a project that meets minimum reasonable standards for staff and neighborhood concerns. Under these circumstances, staff believes it is appropriate to charge a

significant fee, recognizing that even this fee does not reflect the full costs of processing an appeal.

4. Appeal of Affordable Housing Project; this would be an appeal to Council as all such projects require a Use Permit: \$500; no fee reduction.

Staff is recommending that all appeals of affordable housing projects be raised to \$500 with no opportunity to reduce to a lower cost. This was suggested to the Council in a June, 2010 staff report as a means to encourage affordable housing projects. Staff is recommending the definition of "affordable housing project" consistent with that used in Government Code Section 65589.5 for housing projects to receive consideration under State law as affordable. The City Council could establish other thresholds for this reduction (e.g., only projects that are 50 or 100 percent affordable).

5. Waiver of appeal fees for processing error. It is occasionally necessary to process an appeal to address an error by staff. This provision allows the City Manager to waive appeal fees in this instance.

California Environmental Quality Act

This change in fees is not considered a "Project" under the California Environmental Quality Act Guidelines Section 15378 (b) (4) and (5)) and is therefore not subject to environmental review.

ALTERNATIVE ACTIONS CONSIDERED

The range of appeal fee options is large and various alternatives were considered by staff during this process, both in terms of the cost and in terms of how and whether costs should be reduced for neighbors (and how many neighbors, etc.). Staff's recommendation is our best guess as to what may be effective in balancing the competing objectives of allowing for the right of appeal, while discouraging appeals with little merit that can have significant impacts on the City's business climate and on appropriate development. If the Council believes that this is not appropriate goal or that staff has not achieved that balance with this proposal, then it should provide further direction.

CONTACT PERSON

Dan Marks, Director, Department of Planning and Development; 981-7400

Attachments:

- 1: Resolution
- 2: Public Hearing Notice

RESOLUTION NO. ##,###-N.S.

LAND USE DECISION APPEAL FEES

WHEREAS, the ability to appeal a land use decision to an appointed and/or elected body is an important right, especially for neighbors who are generally most affected by that land use decision; and

WHEREAS, the costs of processing such appeals is considerable and charging the full cost of such appeals effectively reduces the public's opportunity to take advantage of the right of appeal; and

WHEREAS, the length of the land use appeal process can be a significant discouragement to businesses wishing to locate in Berkeley, to affordable housing projects, and to other development activity which can add to the City's revenue base and provide needed housing and jobs; and

WHEREAS, the vast majority of appeals are denied, indicating that they may have little community support or merit while still leading to a significant cost to the City for processing those appeals; and

WHEREAS, the City Council wishes to balance the public interest in providing for a reasonable and affordable appeal process, with encouragement of appropriate business and development within the City.

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley hereby amends Exhibit A of Resolution No. 64,918-N.S. to delete Section VI: "Appeals of Zoning and Landmarks Discretionary Actions", and substitute the following:

VI: Appeals of Zoning & Landmarks Discretionary Actions

A. Non-applicant appeals to the Zoning Adjustments Board: \$200; fee reduced to \$75 if appeal is signed by persons who lease or own at least 35 percent of the parcels or dwelling units within 300 feet of the project site, or at least 20 such persons (not including dependent children), whichever is less.

B. Non-Applicant Appeals to City Council: \$500; fee reduced to \$100 if appeal is signed by persons who lease or own at least 50 percent of the parcels or dwelling units within 300 feet of the project site, or at least 25 such persons (not including dependent children), whichever is less

C. Appeals filed by Applicant: \$2500.

D. Non-applicant appeals of all affordable housing projects (defined as projects which qualify for State Density Bonus under Government Code Section 65589.5): \$500 with no fee reduction available, VI A-C notwithstanding.

BE IT FURTHER RESOLVED that the City Manager may waive appeal fees when there is an acknowledged error in processing the application that requires an action on appeal to correct the error.

NOTICE OF PUBLIC HEARING - BERKELEY CITY COUNCIL

Proposed Modification of Fees for Filing Appeals of Land Use Matters to the Zoning Adjustments Board and Council

NOTICE IS HEREBY GIVEN THAT ON JUNE 7, 2011 THE BERKELEY CITY COUNCIL WILL HOLD A PUBLIC HEARING ABOUT THE FOLLOWING PROPOSED FEE CHANGES:

	Current Fee	Proposed Fee
1. Appeal of Zoning Officer decision (Administrative Use Permits) to Zoning Adjustments Board (ZAB) NOTE: <i>fee reduced to \$75 if appeal is signed by a specified number of neighbors</i>	\$95	\$200
2. Appeal of ZAB decisions to City Council: NOTE: <i>fee reduced to \$100 if appeal is signed by a specified number of neighbors</i>	\$95	\$500
3. Appeals by Applicant	\$1,734	\$2,500
4. Appeals of affordable housing projects (defined as projects which qualify for a State Housing Density Bonus), no reduction available	\$95	\$500
5. Appeal fees may be waived by City Manager if appeal is due to acknowledged staff error		

Date of hearing: June 7, 2011

Time: 7:00 p.m.

Location: City Council Chambers, 2134 Martin Luther King Jr. Way

For further information, please contact Wendy Cosin at 510-981-7402.

Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet. Comments received no later than Monday, -----will be included in Council agenda packets. Comments received thereafter will be submitted to Council as supplemental communications at the meeting. For further information, call Deanna Despain, City Clerk, 981-6900. FAX: (510) 981-6901. TDD: (510) 981-6903.

If you challenge the above in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the City of Berkeley at, or prior to, the public hearing. Background information concerning this proposal will be available at the City Clerk Department and posted on the City of Berkeley webpage at least 10 days prior to the public hearing.

Deanna Despain, City Clerk

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