



STAFF REPORT TO THE CITY COUNCIL

DATE: Regular Meeting of February 12, 2019

TO: Members of the City Council

SUBMITTED BY: Holly Smyth, AICP, Planning Director
Patrick Tang, City Attorney

SUBJECT: Review of City's Appeal Policy Related to Planning Decisions

RECOMMENDED ACTION:

Discuss staff policy recommendations related to Council's "Call-Up" appeals process, and consider directing staff to prepare a Zoning Ordinance Amendment if desired.

FISCAL IMPACT OF RECOMMENDATION:

There may be fiscal impacts in the form of additional staff time required, depending on how the appeals process is amended.

BACKGROUND:

A staff report regarding the appeal process for planning decisions was presented and discussed by City Council at the September 25, 2018 regular Council meeting. After discussion, Council directed staff to bring recommended changes back to Council for further review and discussion prior to preparation and presentation of a draft Ordinance.

DISCUSSION:

Since the discussion at the September 25, 2018 Council meeting, staff has reached out to other agencies to determine the extent to which other jurisdictions allow for City Council "call-up" of planning decisions. What staff found is that while many other jurisdictions provide a process for a Councilmember to call up a planning decision, the procedure for doing so varies from one jurisdiction to another. The information obtained from other jurisdictions is summarized in the table below.

City	Appeal of Director Decisions	Appeal of Planning Commission Decisions
Citrus Heights	10 calendar days after decision to Commission	10 calendar days after decision by aggrieved person or by any member of the Council if there was public hearing required (This means that administrative decisions would not be subject to CC appeal).
Emeryville	15 calendar days from decision noted in the approval letter. PC review info if appeal called to affirm, set a date for hearing, or remand the matter to the director to cure a deficiency. PC decision final and may not be appealed to the CC.	Within 15 days from Commission decision, with Council needing majority to call for review in the same manner as an appeal by any other person. Such action shall not require any statement of reasons and shall not represent opposition to or support of an application or appeal.
Monterey	Appeal in writing within 10 days of decision by either City Manager or City Councilmember to call up without paying a fee. Basis for call up must be that the determination affects, impacts, or deals with matters of general policy in the City or may have significant impact on City facility or service.	Appeal in writing within 10 days of decision by either City Manager or City Councilmember to call up without paying a fee. Basis for call up must be that the determination affects, impacts, or deals with matters of general policy in the City or may have significant impact on City facility or service.
Pinole	10 calendar days from date of decision of Community Development Director or Zoning Administrator. Any appeal considered de novo.	Within 10 calendar days from date of decision of Planning Commission, with the Councilmember paying the standard \$500 appeal fee plus a \$2,500 deposit (refundable only if a Council majority agrees) and follow same process as from a member of the public. Any appeal considered de novo.
Pleasant Hill	Any decision of the zoning administrator may be called up for review by a planning commissioner, architectural review commissioner, or city Councilmember must be submitted in writing stating the reasons for appeal within 10 days of the mailed notice of decision with public hearing held within 45 days.	Any decision of the planning commission or architectural review commission may be called up for review by a member of the city Council in writing stating the reasons for appeal within 10 days of the mailed notice of decision with De Novo public hearing held in 45 days.
Redding	No Council call up provision	No Council call up provision
Redwood City		2 of 7 City Councilmembers must file written request to City Council within 15 days of notice of decision without filing fee to be heard at the next available City Council meeting.
San Pablo	Within 10 days of decision, administrative decisions can be called	Within 10 days of decision, a City Councilmember can call up a PC decision.

	up by Planning Commission or City Councilmember. There is a presumption that the reason for the review is that the action has significant and material effects on the quality of life within the city. No inference of bias shall be made or implied due to such a request for review being filed. De novo public hearing must occur within 30 days of appeal filing.	There is a presumption that the reason for the review is that the action has significant and material effects on the quality of life within the city. No inference of bias shall be made or implied due to such a request for review being filed. De novo public hearing must occur within 30 days of appeal filing.
Santa Clarita	A “certification of review” may be initiated for a decision on any discretionary application by one (1) or more of the members of the next level of designated review authority. For decisions of the Director or Hearing Officer a certification of review may be requested by any one (1) member of the Commission submitted no later than one (1) day prior to the day on which an appeal of the decision is due (15 days after decision) Certification shall not require any statement of reasons, and shall therefore not represent opposition to or support of an application. No fee shall be required.	Decisions of the Commission would require a “certification of review” requested by any one (1) member of the Council no later than one (1) day prior to the day on which an appeal of the decision is due (15 days after the decision). Certification shall not require any statement of reasons, and shall therefore not represent opposition to or support of an application. No fee shall be required.
Tiburon		City Council can call up decision with 2 members of Council.
Winters	Place on next PC agenda within 10 days of the decision so the PC confirms the zoning administrator decision	No special Council call up provisions in code, just regular public appeal process.

In addition to compiling the above information from other jurisdictions, staff also reviewed various materials discussing the appeals process, including a manual provided by the Institute for Local Government (“ILG”) called, [“An Ounce of Prevention: Best Practices for Making Informed Land Use Decisions”](#), wherein Chapter 9 discusses appeals policy. The City Attorney and Assistant City Attorney also conducted research and provided feedback to staff on the legal requirements for planning appeals.

Based on the survey results, discussions with counsel, and a study of best practices, staff makes the following recommendations for Council consideration:

1. Consider as a threshold matter whether the Council wants to retain the “Council call up” process. While many jurisdictions have a process to allow for Councilmembers to appeal a planning decision, a few jurisdictions, such as Pinole and Redding, have no Council call up procedure, instead requiring a Councilmember to follow the same appeal process required of any member of the public, including payment of an appeal fee. The result of this limitation is that a Councilmember does not have the prerogative of calling a matter up, without being subject to the same rules and procedures required of a member of the public, including payment of appeal fees. On the other hand, a Councilmember, utilizing the same process as a member of the public (which may include paying appeal fees), could bring a planning matter before the full Council for review, without needing the approval of a quorum of his or her Council colleagues.
2. If the Council call up procedure is retained, staff recommends limiting the Council call up to major administrative approvals, with no Council call up for minor administrative approvals. Such minor approvals not subject to Council call up could include approval of business uses in existing buildings, zoning compliant signage, home-occupations, patio/accessory structure/home additions, temporary use permits, and the like. Similar to the appeal process in many cities that distinguishes between minor and major approvals, staff recommends that minor approvals made by the Planning Director be made appealable to the Planning Commission only and not City Council. Currently, any decision of the Planning Director or Planning Commission can be called up by the City Council. Under the current call up process, an applicant cannot act upon a staff approval until the Council appeal and call up timeframes have lapsed. The ILG manual referenced above suggests that the scope of an appeal “be limited to key decisions along the process, to avoid a result where every small determination may be appealed.” The practical reason for adopting a limited call up process for minor administrative approvals is to avoid excessive delay for minor administrative approvals, and encourage economical use of staff resources.
3. If the Council call up procedure is retained, staff recommends modifying the current process whereby a matter is called up by the Council “at the meeting at which the notice of decision is presented to it” (PC 44.500). As discussed at the September 25, 2018 Council meeting, the current process is confusing, as the manner in which the notice of decision is to be presented is not specified. In the alternative, staff recommends requiring a Councilmember to call the matter up in the same manner as any member of the public, by filling out and submitting an appeal request form. This should be required whether or not the appeal fee is waived or reduced for an item called up by a Councilmember. The request can then be placed on the published agenda by the City Clerk for consideration at the next Council meeting, in full compliance with the Brown Act. By publishing the call up request in the Council agenda, the full Council as well as the public would be provided at least 72 hour notice of the upcoming discussion regarding the call up.

4. If the Council call up procedure is retained, staff recommends that the Council call up period be ten (10) calendar days from when the decision is posted, consistent with the time frame for members of the public as provided for in PC 44.600. Having a separate time frame for an appeal by a Councilmember is confusing, and to avoid confusion and promote consistency, staff recommends that a Councilmember be subject to the same process and time frame for call up as a member of the public is required to follow for an appeal. This is not to suggest that the discussion whether to approve the call up request must be heard within ten (10) calendar days; only that the call up request (appeal request) should be submitted within that time frame. The actual Council discussion would take place at a subsequent Council meeting that may or may not be convened within ten (10) calendar days from when the planning decision in question was posted.

5. If the Council call up procedure is retained, staff recommends requiring less than a Council quorum to approve a request to call up a planning decision. Staff discovered that very few call-up proceedings by other jurisdictions require a majority vote of the Council. Counsel has expressed concern that the current process requiring a quorum to approve a Councilmember's request to review a lower decision might create the appearance of bias if the Council as a body discusses in any detail the merits of the underlying decision that is subject to review. This is likely the reason that many jurisdictions that have Council call up procedures require less than a quorum of Councilmembers to schedule an appeal of a planning decision. The ILG manual states that a Council review of a lower decision must not create the appearance that the governing body is prejudging the matter by assuming jurisdiction and must avoid unconstitutional commingling of functions in an adversarial proceeding. This can be avoided by providing that less than a quorum (either a single Councilmember or two Councilmembers) be required for call up.

6. If the Council call up procedure is retained, staff recommends that Council review of a planning decision should be de novo. While the reasons for requesting an appeal can be required to be stated on the appeal form developed by staff, the appeal hearing should be de novo (not limited to the reasons stated on the appeal form). Having a de novo hearing eliminates potential due process issues, as staff and Council would not be in a position of having to determine, in the course of an open discussion, that certain evidence will not be heard.

7. If the Council call up procedure is retained, staff has no recommendation whether to require the Councilmember requesting the appeal to pay the appeal fee. Based on Council's direction during the last discussion, it appeared that Council did not want to have a Councilmember pay the appeal fee. Pinole seems to be an outlier as it is the only jurisdiction staff polled that specifically requires a Councilmember who calls up a planning matter to pay an appeal fee.

CONCLUSION:

Staff makes the above recommendations for Council consideration based on practical concerns with the current process, a review of the appeal process in other jurisdictions, best practices as advised by the Institute for Local Government (ILG) and other sources, and advice of counsel. Staff notes that any amendment to the planning appeal process would first require Planning Commission review and recommendation, pursuant to Section 52.200 of the Hercules Zoning Regulations.

ATTACHMENTS:

1. September 25, 2018 Staff Report – Appeals Process