



# *STUDY SESSION STAFF REPORT*

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MEETING DATE: 11-8-05

ITEM NO.:

**SUBJECT:** Appeal, Rehearing and Review Procedure

**DATE:** November 3, 2005

**FROM:** City Attorney's Office

**PRESENTATION BY:** Kimberly Hall Barlow

**FOR FURTHER INFORMATION CONTACT:** Kimberly Hall Barlow, City Attorney, (714)  
446-1400

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## **RECOMMENDED ACTION:**

To review the current ordinance regarding the appeal, rehearing and review procedures to determine if ordinance changes should be made.

## **BACKGROUND:**

The City's municipal code, Title II, Chapter IX, contains several provisions relating to Appeals, Review and Rehearing of various items. A complete copy of the Chapter is attached for your reference as Attachment 1. The purpose of this item is to discuss each of the three processes provided for in Chapter IX, their differences, and to determine whether any change in these processes should be considered.

## **DISCUSSION:**

The first process addressed in Chapter IX is the City Council Review process. See Section 2-302. Under that process, the City Council as a whole, or any individual Council Member, may request a review of any decision of a subordinate body or employee be conducted. The person or body who reviews that decision depends upon what kind of decision it is. For example, under this process, a Council Member could seek to have a decision of the Building Official reviewed by the Access, Building, Fire and Housing Board of Appeals. If it is a Zoning Administrator decision, it gets reviewed by the Planning Commission. If the decision sought to be reviewed was made by the Planning Commission or Parks and Recreation Commission, the review would be conducted by the City Council. It is important to remember that although many of the procedural rules for a "review" are the same as those for an "appeal," a request for review initiated by the City Council or a Council Member is not an appeal. Neither the Council nor the Council Member who sought review need demonstrate that the decision being reviewed should be overturned, and in fact, taking that position in advance of any applicable review could lead someone to argue that the Council Member or Members who advocate a particular position have a bias and may not participate in any review or appeal that ultimately reaches the Council. Thus, it is usually best for an individual Council Member or the Council as a whole, in seeking review, simply to indicate why review by a higher officer or body would be appropriate, rather than indicating a particular outcome desired from that

review. This ensures that the decision making process will be fair and impartial, regardless of who is reviewing the item in question.

Appeals (see Section 2-303), on the other hand, are normally generated by an applicant or a member of the public who is unhappy with the granting or denial of an application for a permit, license or other entitlement. The appeal hearing is a de novo (like new) review of the decision appealed from, and allows evidence to be submitted at the appeal hearing and consideration of the subordinate individual's or body's findings. Regardless of who appeals, the applicant retains the burden of proving that the application should be granted. Generally speaking, Council Members should not resort to the Appeal process unless they are the applicant seeking the permit, license or entitlement or if they have a personal stake in the matter and appear before the appeal body as a citizen and not as a Council Member. Obviously, in this situation, the Council Member should follow all applicable conflict of interest rules and not participate in any decision making process other than as permitted by law.

Finally, the Rehearing procedure set out in section 2-304 is different from either a review or an appeal process. This procedure may be used by any Council Member or any affected person who wishes to have a matter reheard by the same person or body which originally decided it. The code requires that a rehearing should only be granted if there is new, relevant evidence which could not have been produced or was improperly excluded at the original hearing, or that there was a failure to comply with the law at the original hearing. If the rehearing request is granted, a rehearing is scheduled for the next regular meeting following any required notice period. Thus, for every "rehearing" item, there are potentially three hearings before the same person or body if the code is read to apply to all decisions.

We believe that the rehearing section should be construed to apply only to those decisions which involve a permit, license, entitlement or land use issue, or the rights of a third party, but should not apply where the Council is making a purely policy or legislative decision. It appears to us that this is consistent with the code requirement for the showing justifying a rehearing; new factual information may change an adjudicatory decision and should be considered in that context where it could not have been previously produced. However, in the purely policy or legislative functions of the Council, the Council should have the flexibility to "change its mind" even if no new facts are brought forward. As the policy maker of last resort in the City, the Council should not be unduly constrained in changing direction if after further reflection a majority of the Council believes that to be appropriate as a matter of policy. Certainly, the Council has the right to impose restrictions on its own powers, but we believe that in this area, the Council should retain for itself the flexibility to make policy without unnecessary procedural hurdles. This kind of flexibility is already reflected in CMMC § 2-72, which restricts reconsideration of an item at the same meeting, but does not preclude the item being addressed at a subsequent meeting by any member of the Council, regardless of how each member voted on the item originally. The Council can, of course, place reasonable restrictions on this right to consider matters of policy or legislation in a number of ways, including by way of revision to the ordinance, adopted Council policy or by means of parliamentary rules.

Thus, we would recommend that the Council confirm that the Procedures for Rehearing section of the code be deemed inapplicable to purely policy or legislative functions of the Council, as opposed to items which involve individual property owners or applicants. Not only would this retain the flexibility any legislative body needs, but would also streamline the policy making process of the Council, as it would allow the Council to change

direction without holding multiple hearings and meetings on the same item. Thus, the procedure whereby the Council would decide whether to rehear a matter that is purely policy or legislative in nature, and then hold any rehearing at a subsequent meeting would not be required. The Council could simply address anew any properly agendaized matter, assuming all notice and hearing requirements which apply have been met, and take new or different action on the item without the necessity of scheduling an agenda item on the matter in question at a third meeting. This could also assist the public, by reducing the number of appearances they must make to address a matter of purely policy or legislation, as opposed to an entitlement matter.

Depending on the approach the Council would prefer to take, we would recommend that some minor language changes be made to Section 2-304 to reflect Council's desires in this regard. Once the Council determines the scope of the Rehearing Procedure, we would prepare appropriate revisions to the language of the code to bring back for formal action.

**ALTERNATIVES CONSIDERED:**

The Council could elect to leave the code language as it is and determine on a case by case basis whether an item is subject to section 2-304. We do not recommend this alternative, as we believe it could confuse some members of the public as to which items were subject to the rehearing process and which are not.

**FISCAL REVIEW:**

There is no fiscal impact on the City relating to this item.

**LEGAL REVIEW:**

The City Attorney prepared this report. No additional review is necessary.

**CONCLUSION:**

It is anticipated that any changes the City Council might entertain will be brought back to a Regular City Council meeting for appropriate action.

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KIMBERLY HALL BARLOW  
City Attorney

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ALLAN L. ROEDER  
City Manager

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Attachments: 1) Chapter IX of Title 2, CMMC

Distribution: Allan Roeder, City Manager