

Attachment 5

**CITY MANAGER'S POLICIES AND PROCEDURES
FOR ADMINISTRATIVE HEARINGS
CONDUCTED UNDER CHAPTER ONE OF THE
SAN DIEGO MUNICIPAL CODE**

July 19, 2010

1. PURPOSE

The purpose of this document is to establish policies and procedures for conducting administrative enforcement hearings as allowed for or required under Chapter 1 of the San Diego Municipal Code (SDMC).

2. SCOPE OF DOCUMENT

This document applies to those administrative enforcement hearings that arise out of the enforcement of the SDMC and that are specifically authorized or required by the municipal ordinances contained in Chapter 1 of the SDMC that govern administrative enforcement actions.

3. POLICIES

3.1 Due Process

Administrative hearings shall be conducted in a manner that ensures the protection of due process and rights of the appellant including adequate notice, an opportunity to participate in the hearing process a fair and orderly hearing, and adequate explanation of the reasons justifying the administrative action.

3.2 Impartiality of Hearing Officer

It is the City Manager's intent to guarantee the impartiality of Enforcement Hearing Officers by restricting contact between the Hearing Officers and City department staff and/or appellants and their representatives, and to clearly establish Hearing Officers' authority.

3.3 Qualification of Hearing Officers

3.3.1 Generally

Hearing Officers shall be qualified to conduct administrative hearings by virtue of their education, profession, or experience with administrative hearings and arbitrations. Hearing Officers may not be City employees and shall have no personal or financial interest in any case for which they serve as the Hearing Officer. The Consultant shall consider the complexity and nature of the issues involved and the qualifications of the Hearing Officer to ensure that a person will be assigned who possesses adequate knowledge, ability and skill to effectively conduct the hearing.

3.3.2 Certain Cases

The City Manager may specify that certain cases be heard by members of the California State Bar or those with particular expertise, as necessary.

3.3.3 Rotation

One or more panels of qualified persons will be maintained and hearings will be rotated amongst them. Hearing Officers will be called upon by the Consultant on a rotating basis, provided however, that if their schedule does not permit a hearing within 14-21 calendar days, the Consultant may go on to the next name on the list. If the Consultant is unable to locate a Hearing Officer from the available list who has the appropriate expertise, the City Manager may contract with someone outside of the panel of Hearing Officers who has the proper qualifications and expertise to effectively conduct the hearing.

3.4 Disqualification of Hearing Officers

Hearing Officers are expected to be able to conduct fair and orderly hearings and to issue findings and orders within 10 days of the date of the hearing. Failure of the Hearing Officer to function in the above manner may result in the City Manager removing that person's name from the panel of qualified Hearing Officers. Hearing Officers who exceed their authority or address issues beyond the scope of those presented to them may be removed from the panel by the City Manager with or without cause.

3.5 Conflict of Interest

3.5.1 Self-Disqualification

There are occasions when Hearing Officers may be required to disqualify themselves from serving as the Hearing Officer for a particular case if it is determined that they have a personal or financial relationship, or any other type of relations, with any of the involved parties which might cause them to have a conflict of interest, bias or prejudice in regard to the case to be heard.

In the event that the Hearing Officer believes that a conflict of interest does not exist but might be perceived, he or she is required to disclose to both the City Manager and the appellant/respondent the nature of any relationship that might cause such a perception. Either of the parties may then request that a new Hearing Officer be selected, provided that such request be made known to the Hearing Officer within three (3) business days of such notification.

3.5.2 Statement of Economic Interest, Form 700

Because Hearing Officers are deemed to be Public Officials under the Political Reform Act of 1974, they are required to comply with the provisions of that Act found in California Government Code Section 81.000 et seq. These requirements include filling out and filing a copy of Form 700, Statement of Economic Interest, with the City Manager. The Hearing Officer will disqualify them if required by Government Code Section 81.000 et seq.

3.5.3 Request for Disqualification

In the event that the Hearing Officer does not disqualify themselves (as requested in 3.5.1) or does not disclose a relationship that might be perceived as a potential conflict of interest and either party believes that a conflict of interest may exist, that party may request that a different Hearing Officer be selected. Such requests must be made in writing to the Consultant. The Consultant shall determine whether to take such action based on the evidence presented of a relationship, prejudice, or bias that would result in an unfair hearing.

Any party may request the Consultant to disqualify a designated Hearing Officer after receipt of a notice indicating the identity of the Hearing Officer or upon discovering facts which establish grounds for a disqualification. The request must be filed with the Consultant within five (5) days of the receipt of notification.

The Consultant shall determine whether to grant the request for disqualification. A written statement of the facts and reasons for the determination shall be incorporated into the administrative record for the hearing.

3.5.4 Substitutions

If a substitute is required for a Hearing Officer due to disqualification or unavailability, a substitute shall be assigned by the Consultant in accordance with these policies and procedures.

3.6 Hearing Officer Authority

3.6.1 General

The Hearing Officer has the authority to conduct and direct administrative hearings, within the scope of authority of these policies and procedures, and to make findings and issue orders which are binding on both the City and the appellant. Except as provided in SDMC section 12.0407(c), the Hearing Officer must relinquish authority over a case when those issues presented to the Hearing Officer are resolved, settled, or the parties have complied with an administrative order.

3.6.2 Evidence

The Hearing Officer shall consider only evidence which he or she determines to be relevant to proving the existence of a code violation, or, in the case of an abatement hearing, the Hearing Officer shall only consider evidence which he or she determines to be relevant to the existence of a public nuisance.

Upon a party's objection or upon his or her own motion, the Hearing Officer may exclude evidence that is irrelevant or unduly repetitious. The Hearing Officer shall not impose formal rules of discovery or evidence; however, the Hearing Officer may require the parties to informally exchange documentation or evidence.

3.6.3 Pre-hearing Conference

The Hearing Officer may conduct a pre-hearing conference to deal with such matters as exploration of a settlement, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proposed evidence, and other such matters as will promote an orderly and efficient hearing.

3.6.4 Subpoena

At the request of a party to the hearing, the Hearing Officer has the power to subpoena both witnesses and documents.

3.6.5 Continuance

The Hearing Officer has the authority to continue the hearing, for good cause (as defined in Section I.01), either on his or her own initiative or at the request of either party. Continuances may also be granted if it is determined that an interpreter is required.

3.6.6 Ex-Parte Communication Prohibited

The Hearing Officer shall not have ex-parte communications with any party.

3.6.7 New Hearing

The Hearing Officer has the authority to grant a new hearing based on good cause as defined in Section I.01.

3.6.8 Decision Final

Pursuant to SDMC section 12.0411 the findings and decisions of the Hearing Officer shall be the final administrative decision. Time limits for judicial review of a decision shall be governed by California Code of Civil Procedure section 1094.6.

3.7 Legal Representation

Both the City and the person whose actions are the subject of the hearing are entitled to representation by legal counsel. If the person whose property or actions are the subject of the hearing are to be represented by an attorney, written notification of the attorney's name, address and phone number must be provided to the City department involved in the hearing at least seven (7) calendar days prior to the hearing. Upon notification by the appellant/respondent of legal representation, the City department may contact the City Attorney's Office to request representation at the hearing. Thereafter, if either party is represented, all contacts should be made by and through their attorneys.

3.8 Failure to Appear at Hearing

Pursuant to SDMC sections 12.0410 and 12.0503, failure of the appellant to appear or send a representative to the hearing shall be deemed a waiver of the right to a hearing, provided that proper notice of the hearing (as determined by the Hearing Officer) has been given by the City. In this event, the Hearing Officer shall issue an order stating that the hearing is waived and decided in the City's favor. Written declarations, signed under penalty of perjury, may be accepted by the Hearing Officer in lieu of personal appearance and testimony.

3.9 Scheduling the Hearing

It shall be the Department Director's responsibility to determine when a hearing is necessary (either because of an appeal or because a hearing is required by the Municipal Code) and to notify the Consultant. The Consultant shall select a Hearing Officer as soon as practicable and schedule a hearing on the earliest possible date so as to allow for proper noticing. The Consultant shall be responsible for obtaining a hearing room and sending appropriate notice of the hearing to all parties.

3.10 Requests for Continuance of Hearings

One request made by the appellant/respondent for continuance of a hearing may be granted by the City provided that it is made at least seven (7) calendar days before the scheduled hearing. A request for continuance after this time frame may be considered by the City for good cause (as defined in Section I.01), if the request is substantiated. Any requests for continuance made within 24-hours of the scheduled hearing will be denied by the City and referred to the Hearing Officer at the scheduled hearing time. The intent of this policy is to ensure that the Consultant provides fair and reasonable accommodation of an appellant's needs but does not allow unwarranted and expensive delays. It also respects the Hearing Officer's time and schedule.

3.11 Notice of Enforcement Hearing

Written notice of the date, time and place of the hearing shall be served by the Department Director according to the requirements of SDMC section 11.0301. This written notice must be served at least ten (10) calendar days prior to the date of the hearing to the designated Hearing Officer and the parties to the hearing. The notice must include:

- a. the names and mailing addresses of all persons to who notice is being given;
- b. The name, official title, mailing address and telephone number of any counsel or employee who has been designated to appear at the hearing on behalf of the City;
- c. the official file or other reference number, the name of the proceeding, and a general description of the subject matter of the hearing;
- d. a statement of the date, time, place, and nature of the hearing; and
- e. Hearing Officer's name and official title.

Along with the Notice of Hearing and except as provided in 3.12 (a), the City Department shall provide to the Hearing Officer and all parties a summary report of the case and all notices, correspondence, and similar documents relevant to the case.

The Notice of Hearing and related documentation shall be served on all parties by any of the methods of service listed in SDMC section 11.0301.

3.12 Provision of Discovery

It is the City Manager's policy that both the Hearing Officer and the appellant be provided a package of information relevant to each particular case and type of hearing, which will be used to substantiate the City's case. This information is provided to facilitate the hearing process and to ensure that the appellant or responsible party has advance notice of the City's position.

Requests for discovery shall be made in the following manner:

- a. All case information which is or may be related to the issues pertinent to the hearing will be produced upon written request of the responsible party or his or her representative except the following:
 - (1) any notes regarding staff conversation with City Attorneys;
 - (2) any correspondence, memos, or similar documents between City staff and City Attorneys; and

- (3) information about the complainant (which shall be redacted from a document that is otherwise to be produced).
- b. The appellant's request for additional information must be made in writing prior to the hearing and must specify what information is requested. A request for the entire file need not be granted. The appellant shall be given the opportunity to request a rescheduling if he or she needs additional time to review the additional information.
- c. If the request is not made beforehand but is made at the time of the hearing, the Hearing Officer can determine the appropriateness of the request based on the guidelines above and the relevancy of the requested information to the issues. If the request is deemed appropriate and relevant, and staff can produce the requested information immediately, the Hearing Officer may allow a recess in order for the information to be produced and may then decide, based on the amount or complexity of the information, whether or not a continuance is necessary. If substantial time is needed to research the case file or make copies, the Hearing Officer may grant a continuance. In this event, the Hearing Officers should establish deadlines for the production of the requested information by the City and should schedule a new hearing date.

3.13 Public Nature of Hearings

All administrative hearings are considered public. Tapes of the proceedings, if available, may be obtained upon request.

Notwithstanding the above, at the request of either or both parties, the Hearing Officer may conduct all or part of a hearing by telephone, closed-circuit TV or other electronic means. To the extent that a hearing is conducted by telephone, closed-circuit TV, or other electronic means, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear or inspect the City's records, and to inspect any transcript obtained by the City.

The Hearing Officer is responsible for recording the hearing by audio tape at the City's expense. The City is not required to prepare a transcript. Any party, at their expense, may hire a licensed reporter to prepare a transcript from the audio tape recording, or cause additional recordings to be made during the hearing if the making of the additional recordings does not cause distraction or disruption.

3.14 Subpoenas

All costs related to the subpoena of a witness, document or other evidence (including witness and mileage fees) shall be borne by the party requesting the subpoena. This shall be explained to the party requesting the subpoena prior to the issuance of the subpoena. Witness and mileage fees shall be the same as those in San Diego Superior Court civil actions. City employees shall not be entitled to witness fees or mileage fees but shall be entitled to their normal salaried time for the time spent in and traveling to and from a hearing.

The subpoena shall be issued on a form approved by the City Manager. Failure to obey a subpoena issued by a Hearing Officer constitutes contempt and may be prosecuted as a misdemeanor pursuant to SDMC section 12.0409.

3.15 Administrative Enforcement Order By Stipulation

The City and the appellant/respondent may reach a lawful agreement prior to a scheduled hearing regarding compliance, penalties, and/or costs. When such an agreement is presented at the hearing, the Hearing Officer may issue an order based on the agreement. This stipulated order must be signed by both parties and the Hearing Officer.

4. GENERAL GUIDELINES FOR ADMINISTRATIVE HEARINGS

- 4.1 The Hearing Officer is in charge of the hearing and is responsible for ensuring that order is maintained and that due process is provided.
- 4.2 The City has the burden of proof and must prove its case by a preponderance of the evidence.
- 4.3 Each party may present evidence through the testimony of witnesses and/or the introduction of photos, documents, records, or other written material.
- 4.4 Each party shall have an opportunity to question the other party's witnesses.
- 4.5 The Hearing Officer shall allow each party to present rebuttal evidence.
- 4.6 Formal rules of evidence shall not apply. Any evidence which the Hearing Officer determines to be relevant shall be allowed.
- 4.7 Hearsay evidence may be admissible if the Hearing Officer determines that it is reliable.
- 4.8 The rules of privilege shall be effective to the same extent that they are recognized in civil actions.
- 4.9 All information to be considered by the Hearing Officer must be presented and entered into the record at the hearing. There shall be no ex-parte communication regarding the case by the Hearing Officer with either party.
- 4.10 The Hearing Officer shall consider the scope of the hearing when determining what evidence is relevant to each case. See Section C for relevant Municipal Code sections.

5. PROCEDURES FOR ADMINISTRATIVE HEARING

- 5.1 The order of administrative hearings shall generally be as follows:
- a. The Hearing Officer will read the date and the title of the case and shall ask for appearances from all parties. This information shall be recorded in the official file of the hearing. The Hearing Officer will inquire if all parties are ready to proceed and will record the names of all witnesses and parties who are present.
 - b. The Hearing Officer will inquire if both parties understand the hearing process and the nature of the case. If so, the Hearing Officer will then note and/or mark for identification only, and not as evidence, all papers in the official file of the hearing, which should include:
 - (1) the City's administrative orders;
 - (2) request for appeal, if applicable;
 - (3) the hearing notice;
 - (4) all reports and materials upon which the Department Director relied in proposing administrative action; and
 - (5) all reports and materials upon which the appellant/respondent intends to rely as part of the defense to the Department Director's proposed administrative actions.
 - c. The Hearing Officer shall swear in all potential witnesses and parties (and their interpreters) who intend to testify.
 - d. Each party will present evidence and testimony concerning the facts of the case in the order determined by the Hearing Officer. Time will be allowed for any necessary translation.
 - e. Each party will be allowed to cross-examine the other's witnesses.
 - f. Each party will be given an opportunity to present rebuttal evidence.
 - g. The Hearing Officer may ask questions of either party as necessary to clarify testimony and evidence.
 - h. If necessary, the Hearing Officer may allow both parties an opportunity to summarize their position.
 - i. The Hearing Officer will then close the hearing.

- j. After consideration of all the evidence and testimony, the Hearing Officer shall submit a written decision entitled Administrative Enforcement Order (Order) which includes the following: description of case, date of hearing, findings of fact, and decision/administrative order. The Order shall be submitted by the Hearing Officer to the Consultant within ten (10) calendar days of the hearing date along with a bill, or invoice, for services rendered. Failure to issue findings within this time frame may result in removal from the list of designated Hearing Officers, but shall not invalidate the Hearing Officer's decision.

5.2 Conduct at Confirmation of Costs Hearings

Confirmation of Costs Hearings varies slightly from other Administrative Enforcement hearings. Special procedures for these Hearings are listed below:

- a. The Hearing Officer shall review the Director's report and ask the parties to submit orally (or in writing) their objections or protests to the Director's report and itemized account of costs.
- b. The Hearing Officer shall limit his or her scope of review to the Director's report describing the abatement and the itemized costs of abatement.
- c. The Hearing Officer shall not consider evidence regarding the merits of the previous Abatement Hearing or review the decision ordering the abatement.
- d. The Hearing Officer may make changes to the itemized costs as may be deemed just in light of any objections or protests raised at the hearing.
- e. The Hearing Officer shall also decide the manner by which the costs of abatement shall be recovered, i.e., personal obligation or special assessment.
- f. The Hearing Officer shall submit a decision in writing to the City Manager within ten (10) calendar days from the Confirmation of Costs hearing, which outlines:
 - (1) what protests and objections were made at the hearing;
 - (2) the basis for confirming or modifying the itemized costs of abatement; and
 - (3) the method by which the abatement costs shall be recovered, i.e., personal obligation or special assessment.

5.3 Hearing Officer's Decision

The Order shall be issued in writing, to both parties, no later than ten (10) calendar days after the City Manager receives the Order from the Hearing Officer. The decision shall be considered final on the date of service. To determine how to structure his or her decision, the Hearing Officer shall refer to the ordinance governing the administrative remedy which has been used by the Director. In those cases where the ordinance does not specify how the decision may be structured, the Hearing Officer has the authority to issue an order which:

- a. compels the responsible party to correct all code violations;
- b. reduces or waives fines;
- c. conditionally reduces fines upon the responsible party's compliance by specific deadlines; and
- d. assesses administrative costs of the hearing against the responsible party, where appropriate. Administrative costs may include City staff time and compensation for the Hearing Officer and may be assessed when violations have been corrected prior to the hearing date or are still outstanding.

5.4 Contents of Record

The Director shall ensure that the following items become part of the legal record:

- a. any pre-hearing order;
- b. any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
- c. all evidence received or considered;
- d. a statement of matters officially noticed;
- e. any proposed findings and requested orders;
- f. any tape or transcript of the hearing; and
- g. any order, request for new hearing, decision granting or denying a new hearing, and final order.

5.5 Request for New Hearing

The Hearing Officer shall follow the procedures outlined in the San Diego Municipal Code.

New hearings may be granted only if extraordinary circumstances exist, including but not limited to, the inability of a party for good cause to attend the first administrative hearing or the discovery of new material evidence which a party could not, with reasonable diligence, have discovered and produced at the first hearing.

REFERENCE:

SDMC Section 11.0301, Sections 12.0401-12.0413, and Sections 12.0501-12.0503.

Section I.01
Good Cause Defined

Good cause to continue a hearing shall be limited to: Death of a representative or attorney of a party, or a witness to an essential fact when it is not feasible to substitute another person because of the proximity of the hearing date; incapacitation illness of a party or incapacitating illness or death of a party's family member; lack of proper notice of the hearing to the parties as required by the SDMC Section 11.0301; substitution of the representative or attorney of a party upon showing that the substitution is required; the unavailability of a party, representative, attorney or material witness due to an unavoidable emergency.

Evidence of good cause to continue the hearing shall be of the sort that responsible persons would rely on in the conduct of serious affairs, i.e., in the case of an illness, the party requesting a continuance may be required to provide a written statement by a physician attesting to the nature and duration of the illness.