

TOWN OF SAN ANSELMO
STAFF REPORT
May 23, 2013

For the Meeting of June 11, 2013

TO: Town Council

FROM: Rob Epstein, Town Attorney

SUBJECT: Adoption of Ordinance Providing for Appointment of an Independent Hearing Officer to Conduct and Decide the Appeal Concerning 711 Sir Frances Drake Blvd.

RECOMMENDATION:

Staff recommends that the Town Council introduce and read by title only Ordinance ___ providing for appointment of an independent hearing officer to conduct and decide the appeals concerning Councilmember Ford Greene's property at 711 Sir Frances Drake Blvd. and waive further reading of the ordinance.

BACKGROUND:

On February 14, 2013, Councilmember Greene filed an appeal of (a) the Town Planning Commission's decision on February 4, 2013, that denied his appeal of an administrative determination made by the Town Planning Department on August 14, 2012, concerning Greene's real property located at 711 Sir Francis Drake Blvd; and (b) the determinations of the Town's Building Official on March 29, 2012 and January 22, 2013 declining to classify the California Building Code occupancy of Greene's building as R-2 ("the Greene Appeals"). The San Anselmo Municipal Code provides that the Town Council hears appeals of Planning Commission decisions. (San Anselmo Municipal Code § 10-1.06). The California Building Code provides that the Town Council hears appeals of decisions made by the Town Building Official. (California Building Code § 1.8.8.2) Therefore, without adoption of the attached ordinance, the Town Council would hear and decide the Greene Appeals.

DISCUSSION:

The unique circumstance presented by the Greene Appeals requires a unique solution. Mr. Greene is a member of the Town Council and he will continue to serve on the Council through at least 2015. If the Greene Appeals were to be

heard and decided by the Town Council, it could adversely impact the Council's ability to collectively govern San Anselmo in the future. Also, the result could be a decision that the community could perceive as biased either for or against Mr. Greene, or for or against the Town staff.

Councilmember Greene and the Town Attorney have agreed that these problems can be obviated by the Town Council adopting an ordinance to enable the Greene Appeals to be decided by an independent hearing officer from the State Office of Administrative hearings, a decision that will be subject to judicial review under Code of Civil Procedure section 1094.5 and not appealable to the Town Council.

The California State Office of Administrative Hearings ("OAH") provides neutral independent hearing officers and administrative law judges to more than 1,400 local agencies in California. If the Town Council approves the attached ordinance, the Town will enter into a Local Agency Agreement with OAH for the purpose of hearing and deciding the Greene Appeals. Any hearing conducted by OAH will be open and noticed in accordance with the Town Municipal Code and state law. The public will have the opportunity to be heard at the hearing. The OAH hearing on the Greene Appeals will replace the hearing that otherwise would be conducted by the Town Council.

The OAH hearing officer's decision will be final and cannot be appealed to the Town Council. The hearing and decision by the Greene Appeal Hearing Officer shall constitute exhaustion of Mr. Greene's administrative remedies concerning the subject of the Greene Appeal.

Councilmember Greene has stipulated to the procedure outlined in the attached ordinance and described above.

As a condition of stipulation to this procedure, Councilmember Greene demanded to carve out and retain the potential of a future lawsuit by him against the Town in state and/or federal court concerning his land use applications and appeals. Therefore, the attached stipulation provides that "Greene specifically reserves all state and federal rights and remedies against the Town."

Conclusion

Staff recommends that the Town Council introduce and read by title only Ordinance ____ providing for appointment of an independent hearing officer to conduct and decide the appeals concerning Council member Ford Greene's property at 711 Sir Frances Drake Blvd. and waive further reading of the ordinance.

Respectfully submitted,

Robert Epstein
Town Attorney

Exhibit A – Proposed Ordinance with stipulation attached

**STIPULATION TO APPOINTMENT OF INDEPENDENT HEARING OFFICER
FOR APPEAL CONCERNING 711 SIR FRANCIS DRAKE BLVD.**

IT IS HEREBY STIPULATED by and between Ford Greene ("Greene") and the Town of San Anselmo ("the Town") as follows:

1. On February 14, 2013, Greene filed an appeal of (a) the Town Planning Commission's decision on February 4, 2013, that denied his appeal of an administrative determination made by the Town Planning Department on August 14, 2012, concerning Greene's real property located at 711 Sir Francis Drake Blvd; and (b) the determinations of the Town's Building Official on March 29, 2012 and January 22, 2013 declining to classify the California Building Code occupancy of Greene's building as R-2 ("the Greene Appeals").

2. Pursuant to section 10-1.06 of the San Anselmo Municipal Code, the Greene Appeals would be heard and decided by the Town Council of the Town at a public hearing. Pursuant to California Building Code section 1.8.8, the Town is required to establish a process to hear and decide appeals of decisions and determinations made by its Building Official. If an independent housing appeals board is not established, then the Town Council exercises such jurisdiction. (California Building Code, § 1.8.8.2) Any person who is adversely affected by a decision, order or determination by a city relating to the application of building standards may appeal the issue for resolution. (California Building Code, § 1.8.8.3)

3. Greene is an elected member of the Town Council.

4. The Town Attorney is concerned that if the Town Council were to hear and decide the Greene appeals, which directly affect their fellow Council member, it could adversely impact the Town Council's ability to collectively govern San Anselmo in the future.

5. The Town Attorney also wishes to ensure that under these unique circumstances neither Greene nor the public incorrectly perceive the Town Council to be biased either for or against their fellow Council member, Greene, or for or against the Town staff.

6. Greene and the Town Attorney have agreed that these problems can be obviated by the Town Council adopting an ordinance to enable the Greene Appeals to be decided by an independent hearing officer from the State Office of Administrative hearings, a decision that will be subject to judicial review under Code of Civil Procedure section 1094.5 and not appealable to the Town Council.

7. The Town Attorney has agreed to recommend to the Town Council that it adopt the attached Ordinance that would amend the Town's Municipal

Code to permit such a proceeding in this unique case in light of the mutual benefit to Greene and the Town under the procedures set forth therein.

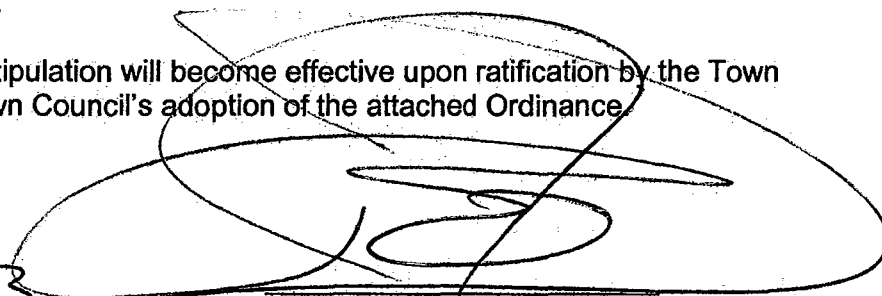
8. Greene will be provided a reasonable opportunity to review and comment upon the Local Agency Agreement contemplated by the attached Ordinance prior to its presentation to the Town Council for approval.

8. Except as set forth herein, Greene waives all objections to the procedures set forth in the Ordinance if the Ordinance is adopted by the Town Council. Notwithstanding the foregoing, Greene specifically reserves all state and federal rights and remedies against the Town. It is the Town Attorney's position that the only available judicial review of the hearing officer's decision would be pursuant to Code of Civil Procedure Section 1094.5, as set forth in paragraph 6, above.

9. This stipulation will become effective upon ratification by the Town Council and the Town Council's adoption of the attached Ordinance.

Dated:

6/5/13



Ford Greene, Appellant

Dated:

Robert F. Epstein, Town Attorney

AN ORDINANCE OF THE TOWN OF SAN ANSELMO PROVIDING FOR THE APPOINTMENT OF AN INDEPENDENT HEARING OFFICER TO CONDUCT AND DECIDE THE APPEAL CONCERNING 711 SIR FRANCIS DRAKE BLVD.

Whereas, section 10-1.06 of the San Anselmo Municipal Code ("SAMC") provides that the Town Council hears and decides appeals of Planning Commission decisions;

Whereas, on February 14, 2013, Council member Ford Greene filed an appeal of (a) the Planning Commission's decision on February 4, 2013, that denied his appeal of an administrative determination made by the Town Planning Department on August 14, 2012, concerning certain real property owned by Mr. Greene located at 711 Sir Francis Drake Blvd.; and (b) the determinations of the Town's Building Official on March 29, 2012 and January 22, 2013 declining to classify the California Building Code occupancy of Greene's building as R-2 ("the Greene Appeals");

Whereas, it is in the best interest of the Town, the public, and Councilmember Greene to have the Greene Appeals heard by an independent hearing officer subject to judicial review as more particularly set forth in the attached stipulation between the Town Attorney and Mr. Greene;

Whereas, the California State Office of Administrative Hearings provides independent hearing officers and administrative law judges who are relied upon by more than 1400 local agencies in California, including for land use and zoning-related decisions;

Whereas, Mr. Greene has stipulated to the appointment of an independent hearing officer for the hearing and decision of the Greene Appeals, and to the procedures set forth in this Ordinance; and

Whereas, the Greene Appeals hearing will be noticed and open to the public in accordance with the Town of San Anselmo Municipal Code and the laws of the State of California;

Now, therefore, let it be resolved that the Town Council of the Town of San Anselmo does hereby ordain as follows:

1. Notwithstanding anything in SAMC section 10-1.6 to the contrary, the Town will enter into the Local Agency Agreement provided by the California State Office of Administrative Hearings ("OAH") for the sole purpose of enabling an independent hearing officer from OAH to hear and make a final decision on the Greene Appeals.

2. Following execution of the Local Agency Agreement, the Town will request OAH to appoint an independent hearing officer with experience in the interpretation and application of zoning and building codes to serve as the hearing officer for the Greene Appeals ("the Greene Appeals Hearing Officer").

3. The Greene Appeals Hearing Officer will conduct the hearing of the Greene Appeals and render a final decision concerning the Greene Appeals.

4. OAH and the Greene Appeals Hearing Officer will apply all applicable law, including, but not limited to, the applicable rules and procedures concerning local land use appeal hearings, including, but not limited to, the provision of substantive and procedural due process.

5. The Greene Appeals Hearing Officer will apply all applicable rules and procedures set forth in the San Anselmo Municipal Code (except that the Greene Appeals hearing officer will hear and decide the appeals, instead of the San Anselmo Town Council). At the direction of the Greene Appeals Hearing Officer, Town staff will make the Town Council chambers available for the appeals hearing and will provide all legal notices as required for appeals hearings before the Town Council.

6. The procedures set forth in this ordinance for use of an independent hearing officer, and the use of the Greene Appeals Hearing Officer in particular, are solely for purposes of the hearing of, and decision on, the Greene Appeals, and will be applicable to no other land use appeals in San Anselmo, unless the Town Council, by adoption of a separate ordinance, decides to use such procedures in the future for other matters.

7. The hearing to be conducted by the Greene Appeals Hearing Officer will replace the appeals hearing that would otherwise be conducted by the Town Council. The decision to be rendered by the Greene Appeals Hearing Officer will not be appealable to the Town Council. The hearing and decision by the Greene Appeals Hearing Officer shall constitute an exhaustion of Mr. Greene's administrative remedies concerning the subjects of the Greene Appeals.

8. Should any section or provision of this ordinance be declared by a court of competent jurisdiction to be invalid, that decision shall not affect the validity of the ordinance as a whole or any part thereof, other than the part so declared to be invalid.

//
//
//
//

THE FOREGOING ORDINANCE was introduced at a regular meeting of the San Anselmo Town Council on the 11th day of June, 2013 and was adopted at a regular meeting of the Town Council on the 25th day of June, 2013 by the following vote:

AYES:
NOES:
ABSENT:

Kay Coleman, Mayor

ATTEST: