

Date February 28, 2012

Item No. 10 & 11
File No. 11050

SUNSHINE ORDINANCE TASK FORCE
AGENDA PACKET CONTENTS LIST

ITEMS

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Complaint submittal
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Completed by: Andrea Ausberry Date February 22, 2012
Completed by: _____ Date _____

*An asterisked item represents the cover sheet to a document that exceeds 25 pages.
The complete document is in the file.



et
07/07/2011 10:57 AM

To sotf@sfgov.org
cc
bcc

Subject Re: Sunshine Complaint Received: #11050_Barbara
Thompson v Board of Appeals

Mr. Rustom:

I appreciate the very prompt processing and scheduling you have given my Complaint. Regrettably, I will not be available to present my matter to the Sunshine Ordinance Task Force at its July or August meetings as I will be not be in San Francisco on the dates of those meetings. I respectfully request that the Task Force re-calendar my matter for its September meeting when I can be in attendance.

Thank you for your attention to my matter and for bringing this request to the attention of the Task Force.

Barbara J. Thomson



<complaints@sfgov.org>
06/23/2011 11:23 AM

To <soft@sfgov.org>
cc
bcc
Subject Sunshine Complaint

To:soft@sfgov.orgEmail:complaints@sfgov.orgDEPARTMENT:Board of Appeals
CONTACTED:

PUBLIC_RECORDS_VIOLATION:No

PUBLIC_MEETING_VIOLATION:Yes

MEETING_DATE:June 22, 2011

SECTIONS_VIOLATED:SEC. 67.15. PUBLIC TESTIMONY (c) and (d)

DESCRIPTION:At the June 22, 2011 meeting of the San Francisco Board of Appeals, Vice President Michael Garcia--who was officiating the meeting in the absence of the President of the Board-interrupted by ability to provide public comment and directed that I must be "sworn in" by Board of Appeals staff prior to making my comments. It was clear that Vice President Garcia was going to deny me that opportunity unless I accepted the swearing in, so I did so to voice my opinion-even though I took offense at the inference that I would not otherwise be truthful and that I should not have to "take an oath" to be afforded the opportunity to express my opinion to a public board. I believe that this is my civil right-guaranteed to me by the California Constitution and the Charter of San Francisco. The San Francisco Board of Appeals Agenda--as published, for its June 22, 2011 meeting--Item (1) PUBLIC COMMENT states: "With respect to agenda items, your opportunity to address the Board will be afforded when the item is reached in the meeting with one exception.Each member of the public may address the Board for up to three minutes." There is nothing in the Agenda that states that a member of the public must be "sworn in" to address the Board with a public comment. And, it is important to note I was not an appellant, representative, or a witness. Further, Rules of the City & County of San Francisco Board of Appeals, Section 6. (d) Public Comment (i) and Section 7. General Public Comment do not stipulate that a member of the public is required to be "sworn in" prior to making public comment at a Board meeting. It is noteworthy that at previous meetings of the Board I was not required to be "sworn in" to make public comment, but this requirement was imposed only after I provided the Board with written comments of my May 25, 2011 statement regarding its failure to adhere to San Francisco Charter, Article V.Sec.4.104(b), City & County of San Francisco Board of Appeals, Rules of the Board of Appeals, Article V., Section 12, or Roberts Rules of Order because it does not poll each member for a "yes" or "no" vote on any item. I have never been required to be "sworn in" by any other Board or Commission, nor have I observed in the past thirty years such a practice by any other San Francisco Board or Commission. Because this is not the practice of the City--and because this requirement was only imposed after I have made prior public comments at Board of Appeals meetings, wherein I voiced my concerns and criticism that the Board of Appeals fails to adhere to its own Rules and the San Francisco Charter--I believe that I was subjected to this requirement in violation of SEC. 67.15. (d), and in retaliation for the voicing of my opinion and criticism of the conduct of the Board and its members in the performance of their responsibilities as Commissioners.

HEARING:Yes

PRE-HEARING:Yes

DATE:June 23, 2011

NAME:Barbara J. Thomson

ADDRESS:█ Gladys Street

CITY:San Francisco

ZIP:94110

PHONE:415 █ █

CONTACT_EMAIL:█@comcast.net

ANONYMOUS:

CONFIDENTIALITY_REQUESTED:Yes



Edwin M. Lee
Mayor

Cynthia G. Goldstein
Executive Director

June 29, 2011

Complaint Committee of the Sunshine Ordinance Task Force
Office of the Clerk, Board of Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2011 JUN 29 PM 4:30
BGC

Re: Complaint #11050 – Barbara Thomson v. Board of Appeals

Dear Task Force Members:

This letter responds to Complaint #11050 ("Complaint") filed by Barbara Thomson against the Board of Appeals ("Board") on June 23, 2011. The Board received the Complaint on June 24, 2011.

With the qualification noted below, the Board does not contest that the Task Force has jurisdiction to hear the Complaint. But the Board believes the Complaint is without merit. Because Ms. Thomson has requested a preliminary hearing before the Complaint Committee, the Board is providing an initial response to the Complaint through this letter. We reserve the right to supplement this letter with additional submissions to the Complaint Committee and/or the Task Force.

Because Ms. Thomson's complaint appears to arise out of a misunderstanding regarding the Board's hearing process, we provide some background on the Board's unique role and responsibilities as an adjudicatory body, before addressing the specifics of the Complaint.

Board of Appeals Hearing Process

The Board of Appeals is an adjudicatory body created under the City Charter to provide the public with a final administrative review process for appeals relating to a wide range of City determinations. The Board hears and decides appeals involving the grant, denial, suspension, or revocation of permits, licenses, and other use entitlements by various City commissions and departments.

In deciding appeals, the Board holds evidentiary hearings to determine the facts upon which to render its decisions. The Board considers both written evidence in the form of briefs, declarations and exhibits, and oral evidence presented in oral argument and testimony at the public hearing. Although the formal rules of evidence do not apply in these hearings, the Board's procedures must comport with the requirements of due process, and the evidence upon which the Board bases its decisions must be relevant and reliable.

City law authorizes the Board to consider the effect of a proposed license or permit upon "the public interest" and "upon surrounding property and upon its residents, and inhabitants thereof" in hearing appeals. (S.F. Charter § 4.106(b); S.F. Bus. & Tax Reg. Code Art. 1, § 26.) Further, the Board hears appeals *de novo*; it is not limited to considering only the evidence that the department below considered in making its decision regarding the permit. Accordingly, when hearing an appeal, the Board often considers testimony from members of the public regarding the potential effects of a project as "evidence" for purposes of making the factual findings upon which the Board bases its decisions. And this testimony will form part of the official administrative record in court if a disappointed party files suit seeking to undo the Board's decision.

In an effort to ensure the veracity and reliability of any testimony that the Board considers as evidence, the Board has had a long-standing practice of asking persons who intend to give *evidentiary* testimony at the hearing to do so under oath. A swearing in process takes place at the beginning of each meeting where the Clerk states: "If you intend to *testify* at any of tonight's hearings, please stand, raise your right hand, and say 'I do' after you have been sworn in or affirmed." (emphasis added).

The request to take the oath applies only to those persons who wish to have the Board consider their testimony as *evidence* in the Board's adjudication of a particular appeal. Persons simply wishing to exercise their right of public comment under the Sunshine Ordinance, and who do not wish for the Board to give their comment evidentiary weight, are not required to take the oath. The oath also does not apply to persons giving comment unrelated to an agenda item under General Public Comment. Indeed, Ms. Thomson herself spoke under General Public Comment without being asked to take an oath at two recent Board meetings (May 18, 2011 and May 25, 2011).

The Board has exclusive authority to determine the rules of evidence that will govern its hearings of adjudicative matters. Thus, while the Task Force has jurisdiction to hear Ms. Thomson's complaint insofar as it alleges a violation of the right of public comment, the Task Force does not have authority to dictate to the Board rules of evidence for the Board to employ at its hearings.

Ms. Thomson's Testimony At The June 22, 2011 Hearing

The Complaint arises from Ms. Thomson's testimony at the June 22, 2011 meeting of the Board of Appeals. It is our understanding that at the commencement of the June 22, 2011 hearing, when the Clerk asked persons wishing to testify to take the oath, Ms. Thomson did not take the oath.

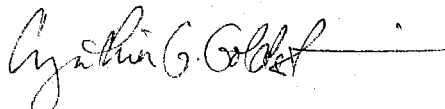
Later in the meeting, Ms. Thomson spoke under public comment for an agenda item concerning a rehearing request for an appeal of the suspension of a tobacco sales permit. Because the presiding officer anticipated that Ms. Thomson intended to give evidentiary testimony about the appeal, he asked that she take the oath. Ms. Thomson did not object or otherwise indicate that she did not wish to take the oath. Rather, she took the oath and proceeded to give her testimony which included, among other things, allegations regarding the veracity of testimony from a city official involved in the appeal.

Had Ms. Thomson raised a concern at the time of the hearing, the presiding officer could have explained that she was not required to take the oath simply to give public comment, but only if she wished for the Board to give her comments evidentiary weight. Had she wished to simply exercise her public comment rights under the Sunshine Ordinance, it would have been incorrect for the presiding officer to require her to take the oath. Unfortunately, she did not object or seek clarification at the time of the hearing. Accordingly, the presiding officer did not realize that Ms. Thomson had an objection to testifying under oath.

Although the Board has not violated the Sunshine Ordinance in requiring an oath of witnesses who intend to provide evidence in an adjudicatory proceeding, Ms. Thomson's complaint does suggest that the Board could make the voluntary nature of the oath clearer to the public. As a result, the Board plans to add a statement to its meeting agendas explaining that persons who wish to have their comments considered as testimony with evidentiary weight are asked to take an oath, but any member of the public may speak without taking an oath pursuant to their rights under the Sunshine Ordinance. In addition, the Board's Clerk will make an announcement to this effect at the beginning of each meeting. We hope that such a clarification will serve to avoid any similar misunderstandings in the future. We are also hopeful that this upcoming change in the Board's hearing process will satisfy Ms. Thomson's concerns and obviate the need for a Task Force hearing on the Complaint.

If I can be of further assistance to the Task Force with respect to the Complaint, please do not hesitate to contact me.

Sincerely,



Cynthia G. Goldstein
Executive Director

