



AGENDA MEMORANDUM

City Council Meeting Date: October 3, 2023

To: City Council
From: John Agnew, City Attorney
Date: August 29, 2023

SUBJECT: Direction and recommended hearing procedures for the appeal of Planning Commission Resolution No. 23-24.

BACKGROUND:

At the October 3, 2023 City Council meeting, the City Council is scheduled to hear an appeal of the Planning Commission's approval of Applications DP-2021-001803 (Development Application) and SPLT-2022-000074 (Major Subdivision Plat Application). These applications, filed by Ensite, Inc. on behalf of property owner Buckingham 225 Development, Inc., seek to allow a Unified Residential Housing Development (Cluster Housing), including six parcels for single-family residential use and associated improvements, known as "Coastal Creek" subdivision. The Planning Commission approved the applications by a 4-1 vote. Attorney Ralf Brookes timely filed the appeal included in your agenda package, which appeal was filed on behalf of the Heron's Landing Homeowners Association of Sanibel, Inc. and six Sanibel residents who participated in the underlying proceeding before the Planning Commission. The purpose of this memorandum is to provide direction relevant to the appeal process, as well as a recommended procedure for the appeal hearing.

STANDARD OF REVIEW:

Section 82-98(d) of the Land Development Code sets forth the standard of review for the City Council in this type of appeal and provides as follows:

The City Council's consideration on appeal shall be limited to whether the Planning Commission has properly interpreted and applied the provisions of this Land Development Code, based upon the application and evidence presented to the Planning Commission.

Thus, the City Council's appellate review of a Planning Commission decision is not a new hearing, in the sense that the City Council will not take new testimony or evidence regarding the applications. Rather, the City Council will base its decision on the appellate record (the

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record established before the Planning Commission) and arguments of the parties to the appeal regarding that appellate record. The City Council is not prohibited from independently weighing, interpreting, and applying that record evidence as it sees fit, without deference to the Planning Commission's weight, interpretation, and application of the evidence; however, only "competent, substantial evidence" should be relied upon in making a decision. Competent, substantial evidence is evidence that is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. In summary, the City Council is charged with determining whether the Planning Commission has properly interpreted and applied the provisions of the Land Development Code based upon the application submitted and the competent, substantial evidence presented to the Planning Commission.

HEARING PROCEDURE:

In terms of the appellate procedure at the City Council meeting, I recommend the following:

1. Since no new witnesses or new evidence can be entered into the record, there is no need for an oath to be administered to anyone, nor is it necessary or appropriate for speaker introductions for the respective parties to state information beyond their name and who they represent.
2. Each Councilmember will make *ex parte* disclosures, if any, in accordance with City Council Resolution 23-012 (attached).
3. I will provide an overview of this memo, so that all participants in the proceeding and those listening are informed on the record of the procedure.
4. Regarding appellate arguments, attorney Ralf Brookes, as representative of the appellants, will proceed first and present appellate arguments on behalf of his clients.
5. Next, planning staff will have an opportunity to make an argument to the City Council in support of the Planning Commission approving the applications, followed by attorney Sawyer Smith, on behalf of the Appellees.
6. Thereafter, the Appellants, through Ralf Brookes, will be provided an opportunity to briefly summarize their position and make any rebuttal arguments.
7. City staff and Mr. Smith then will be provided an opportunity to briefly respond to the rebuttal.
8. The City Council will then deliberate and consider the arguments that have been made by the parties, the original application and the record established by the Planning Commission, and the City Council will render its decision on the appeal. No party will be permitted to make further argument to the City Council unless it is in response to a question asked by a City Council member.

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I suggest that the City Council establish maximum speaking times for each party, with the Appellants being allotted a total of 40 minutes, and City Stall and Appellees being allotted a combined total of 40 minutes to be allocated between them how they see fit. Thus, the order of speakers would be as follows:

1. Appellant argument by Mr. Brookes
2. Staff argument
3. Appellee argument by Mr. Smith
4. *Summary/rebuttal by Mr. Brookes
5. *Staff summary/response to rebuttal
6. *Appellee response to rebuttal

*Time allotments for 4, 5, and 6 above are only to the extent, if any, that some of the 40 minutes allotted per side has not been fully used.

If the Councilmembers question the parties during their arguments, the City Council will have to use its discretion in determining how much additional time, if any, will be provided to a party in the event that a significant amount of time is spent answering questions. Alternatively, City Council could elect to hold questions until the conclusion of all arguments.

FINAL DECISION:

Regarding the City Council's final decision on the appeal, Section 82-98(e) of the Land Development Code provides as follows:

On any appeal, the City Council shall have authority to uphold, reverse or modify the Planning Commission's decision; or to remand the application to the Planning Commission for re-hearing, a new hearing, or for the consideration of additional evidence. In reversing or modifying the decision of the Planning Commission and approving an application, the City Council shall have the same authority as the Planning Commission to place conditions on such approval.

At the conclusion of the hearing, a motion will be in order to approve one of these options—upholding, reversing, modifying, or remanding. Because the decision of Council is limited to what is already in the record, the typical opportunity for public comment received between a motion and vote would not be proper in this instance. Once a deciding motion carries, the decision of City Council will be memorialized by Resolution passed at either the current meeting or a subsequent meeting.

If you have any questions on these considerations or proposed procedures, I am available to discuss at your convenience.

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