

**City of Piedmont
COUNCIL AGENDA REPORT**

DATE: March 7, 2005
FROM: George Peyton, City Attorney
SUBJECT: **Planning Appeals Ordinance**

RECOMMENDED ACTION

Have the second reading of the attached Ordinance dealing with Planning Appeals, Remand, and Review.

BACKGROUND

On January 3, you considered and discussed at some length the attached Ordinance and had a first reading after making certain changes. Attached is a copy of the Ordinance showing the changes you made. Also attached is a copy of my original Council Agenda Report to you for the January 3 meeting explaining the Ordinance.

The Ordinance subsequently was sent to the Piedmont Planning Commission for its consideration and comments, and they heard the matter at their meeting on February 14. After considering the Ordinance, it was unanimously approved by the Planning Commission without further change.

Unless the City Council feels additional changes should be made, the Ordinance is ready for a second and final reading at your meeting tonight.

ORDINANCE NO. 652 N.S.

AN ORDINANCE OF THE CITY OF PIEDMONT AMENDING
CHAPTER 17 OF THE PIEDMONT CITY CODE RELATING TO APPEALS, REMAND,
AND REVIEW

The City Council of the City of Piedmont hereby ordains as follows:

SECTION 1

The intent of the City Council in enacting this Ordinance is to clarify the standards of review governing appeals ~~on matters called on review, as well as from Planning Commission Actions, Staff Design Review or Administrative Design Review~~, to change the standard of review for such appeals from de novo to a more restricted review based on specified grounds, modifying the Review provisions to be governed by de novo standard, and finally adding a section to allow matters to be remanded in whole or in part to the Planning Commission.

SECTION 2

Section 17.25.5 is hereby amended to read as follows:

"17.25.5 Action. Upon conclusion of the hearing, the appeal body shall act upon the appeal. The standard of review governing the appeal shall not be a de novo review, but instead shall be governed by the provisions of Section 17.25.6 hereafter. Subject to the foregoing, the appeal body may sustain, modify, add to, or overrule any recommendations or rulings of the decision maker and make such other findings which are consistent with the provisions of this chapter, including the right to require or modify the requirements for story poles, surveys, time periods for completion or extension thereof, and any other conditions relating to the project for which approval is sought, whether or not the decision maker has made any such requirements; provided that in the event there is not a majority of three members of the appeal body who vote for any of the foregoing actions, then the matter automatically shall be continued to the next meeting, but if no such majority vote can be obtained at the next meeting, the appeal shall be deemed denied and the action of the decision maker affirmed. The appeal body shall report its decision to the appellant, the original applicant for variance or design review, and the decision maker. (Ord. No. 488 N.S., 10/87)"

SECTION 3

Section 17.25.6 shall hereby be added to the Piedmont City Code to read as follows:

"17.25.6 Appeals – Standard of Review. The standard of review which applies to the hearing of an appeal from a Planning Commission decision by the City Council or of a Staff Design Review decision by the Planning Commission shall not be de novo, and shall be governed by the following:

(a) Deference. Due deference shall be given to the actions of the Planning Commission in light of the substantial number of planning applications heard by them and the major accumulated group experience that those actions represent.

(b) Grounds for Overruling Decision. The following will serve as *the exclusive* grounds for overruling all or part of a Planning Commission decision:

(1) If findings made by the Planning Commission as a basis for its action are not supported by the weight of the evidence ~~[alternative wording: “substantial evidence”]~~.

(2) If there is ~~clear~~ *significant* error in the application of the provisions of Chapter 17 that is important to sustaining the action by the Planning Commission.

(3) If there is significant error in the application of the Design Review Guidelines as approved by the City Council from time to time.

(4) If it is determined that there is a significant violation of the notice provisions of Section 17.28 of the Piedmont City Code relating to the hearing(s) leading to the Planning Commission action.

(5) If significant errors are discovered after the Planning Commission hearing on which its action was taken in the application, plans, drawings or other materials provided to the Planning Commission as a basis of its decision.

(6) If there is a ~~clear~~ *significant* error in the application of approved City policies (such as the story pole and site visit policies) that is important to sustaining the action taken by the Planning Commission.

(c) Appeals from Staff Design and Administrative Design Review Decisions. The same grounds as set forth in Section 17.25.6.b. shall apply for overruling part or all of a Staff Design Review decision or Administrative Design Review decision appealed to the Planning Commission.

(d) Burden of Proof. In all appeals pursuant to Sections 25.5 and 25.6 the burden of proof shall be on the appellant.

SECTION 4

Section 17.25.7 shall hereby be added to the Piedmont City Code to read as follows:

“17.25.7 Remand. Notwithstanding the provisions of Section 17.25.5, the City Council acting as the appeal body shall have the option to remand the matter to the Planning Commission for further consideration, which remand shall include either specific issues to be considered alone or to open the entire application for the Planning Commission to decide de novo. Unless

the City Council determines otherwise, the remand hearing before the Planning Commission shall *be scheduled take place at the next a* Planning Commission Meeting, *occurring which is* at least ~~twenty (20)~~ *fifteen (15)* calendar days after the *date of* remand action of the City Council, *but no later than 75 days after the date of remand.* Unless the City Council affirmatively acts to the contrary, no additional fees shall be charged to the applicant or appellant relating to the remand. The decision of the Planning Commission on the remand shall be deemed final unless appealed pursuant to Section 17.25, or unless the City Council retains appeal jurisdiction over the entire matter at the time of the remand and requests only an advisory opinion on specific issues from the Planning Commission. *The burden of proof on remand shall be on the applicant.*”

SECTION 5

Section 17.26 of the Piedmont City Code is hereby amended to read as follows:

“SEC. 17.26 REVIEW

Within ten (10) *calendar* days of the date of any action by the Director of Public Works, a member of the City Council, a member of the Planning Commission or City Administrator may initiate proceedings for review by the Planning Commission of the action in the manner set forth in Section 17.25 for appeals. Within ten (10) *calendar* days ~~after of~~ the date of *any* action by the Planning Commission, a member of the City Council or the City Administrator may initiate proceedings for review by the City Council of the Planning Commission action in the manner set forth in Section 17.25 for appeals. The standard of review governing proceedings under Section 17.26 shall be a de novo hearing. *The burden of proof shall be on the applicant. In the event that an appeal and review apply to a specific application, then review shall apply and the appeal shall be moot and of no effect.* (Ord. No. 488 N.S., 10/87; Ord. 615 N.S. 3/20/00; 620 N.S. 3/19/01)”

SECTION 6

This ordinance shall be posted at City Hall after its second reading by the City Council for at least thirty (30) days and shall become effective thirty (30) days after the second reading.

CITY OF PIEDMONT
PLANNING COMMISSION AGENDA REPORT

TO: Piedmont Planning Commission
FROM: George Peyton, City Attorney
SUBJECT: Planning Appeals Ordinance
MEETING DATE: February 14, 2005

RECOMMENDED ACTION

Review and approve the attached Ordinance dealing with Planning Appeals, Remand, and Review, for consideration by the City Council in connection with the second reading of such Ordinance.

BACKGROUND

As you are well aware, there have been discussions going on, both formal and informal, for many months, relating to various aspects of Appeals from Planning Commission decisions to the City Council, as well as some related items. In recent months, various City Council Members have mentioned in connection with specific items being appealed various things they felt could be improved in the overall system of the City Council reviewing matters from the Planning Commission. Attached you will find the Council Agenda Report that I prepared for the City Council for their January 3, 2005 meeting, which explains the basic changes made in the current provisions of Chapter 17.

CITY COUNCIL MEETING

At their meeting on January 3, the City Council approved much of the Ordinance as prepared by the staff, but did fine tune a series of provisions, which are now included as part of the Ordinance that is before you for your review and action. The items which the City Council wanted modified were a more detailed explanation of what was being carried out in Section 1, consistency in the terminology in Section 17.25.6(b) on Grounds for Overruling Decision, so that the term “significant error” is now used in many of the provisions, as compared to various terms which had previously been included in the staff version of the Ordinance, inclusion of a statement on Burden of Proof as a new subsection (d) on Section 17.25.6, as well as at the very end of Section 17.25.7 and at end of Section 17.26, and changes relating to scheduling and Notice on Section 17.25.7 on Remand and Section 17.26 on Review. The vast majority of the provisions of the Ordinance were left as presented by the staff.

STANDARDS OF REVIEW

Among the most important parts of this Ordinance are changes in the Standards of Review. Currently the provisions of Section 17.25 provide for “De Novo Review”, while the new Standards of Review of Planning Commission Decisions are more in the line of “Judicial Review”, although the grounds set forth do not use normal judicial terminology, but instead try to deal with specific items which are relevant to Planning Commission decisions.

REMAND

Another major new change in Chapter 17 is the addition of Section 17.25.7 on Remand. This allows the City Council to remand either an entire matter for Planning Commission consideration from scratch, or allows the City Council to remand certain aspects of an application to the Planning Commission for further review and decision by the Planning Commission. It is specifically worded to allow reasonable flexibility so that if the City Council really wants a decision to be made in full by the Planning Commission, rather than on some small matter, they could decide to simply remand the whole matter to the Planning Commission, without having it automatically come back to the City Council, unless it was further appealed.

REVIEW

Section 17.26 on Review has been modified to make clear that any matter brought up by a City Council Member or the City Administrator will be heard under a de novo standard of review, with the burden of proof on the applicant. It also makes clear that if someone appeals the Planning Commission decision, and also a Council Member or City Administrator requests review of the same Planning Commission decision, then the review will prevail, and the appeal will not apply.

SUMMARY

I will be in the South on February 14 when you have your hearing on this matter, so I wanted to wish you a Happy Valentine’s Day, and hopefully a somewhat abbreviated meeting so you can get home to your loved ones at a reasonable hour.

City of Piedmont
COUNCIL AGENDA REPORT

Date: January 3, 2005

From: George S. Peyton, Jr., City Attorney

Subject: **Ordinance Amending Chapter 17 Regarding Appeals, Review and Remand**

RECOMMENDATION

Approve the first reading of the attached ordinance dealing with planning appeals, remand, and review.

BACKGROUND

Going back some months, the Council raised questions about how our current Planning Appeals and related Ordinance sections work, and requesting possible changes of its procedures. I previously provided you information relating to certain legal considerations and Standards of Review, specifically that the current ordinance requires a de novo standard of review. Working with the City Administrator and the City Planner, I have prepared an Ordinance that would carry out some of the concepts that had been discussed over the past several months. One of the key concerns had to do with the above mentioned fact that the current wording of Section 17.25 of the Piedmont City Code involving Planning Appeals has a de novo standard of review rather than any more restricted types of review. I was instructed to prepare new wording that would provide more restricted review standards on normal Planning Commission Appeals, and also would provide the ability to review a decision by the Planning Commission at the initiative of a City Administrator or City Council Member, which review would be based on a de novo standard of review, and finally to provide new wording that would allow matters to be remanded from the City Council to the Planning Commission. The attached Ordinance attempts to accomplish all of these three goals.

NEW ORDINANCE PROVISIONS

The following is a brief summary of the changes proposed:

1. Section 17.25.5 has been modified by a new second sentence which indicates that the normal review standard will not be a de novo review, and instead will be governed by the provisions of Section 17.25.6 which is an entirely new section.

2. Section 17.25.6 is divided into 3 separate parts. The first part requires that the City Council on hearing appeals from Planning Commission actions would provide due deference to the decisions of the Planning Commission. The second part establishes six specific grounds for overruling Planning Commission decisions. After conferring with the City Administrator, it was decided that instead of trying to adopt legal language for judicial review, which often seems inappropriate in dealing with appeals from Planning Commission decisions, it was better to deal with specific items that make sense in the context of the actions being taken by the Planning Commission. These grounds are proposed based on discussions with the City Administrator and the City Planner. Finally, there is a short provision in Subsection c. involving appeals of Staff Design Review decisions and Administrative Design Review decisions, to which the same basic grounds would apply. It is possible that the Council may want different grounds to apply to appeals of such Design Review decisions. You will note in Subsection b.1 on Page 2 of the proposed new Ordinance, I have inserted in brackets alternative wording of “substantial evidence” that the Council may want to consider putting in place of “...the weight of the evidence....”.
3. On Page 3 of the proposed ordinance you will see wording for a new Section 17.25.7 on Remand. This sets forth the procedures to use in remanding a matter back to the Planning Commission that has been appealed to the City Council and sets forth a series of options to allow the Council some flexibility in how it wishes to remand the matter. For instance, the Council can indicate it wants only one aspect of the Planning Commission decision to be considered on Remand, or it can open up the entire application for consideration de novo. It also allows the Council to have the Planning Decision decision automatically come back to the Council for a final decision or to instead allow the Planning Commission decision to stand unless it is appealed further back to the Council. There is a provision that indicates that under normal circumstances no additional fees would be charged to the Appellant based on the Remand, although the Council can decide to the contrary by taking affirmative action requiring either partial or total fees to be charged again.
4. Section 17.26 on Review is very similar to the current wording that exists, although a new sentence has been added at the end requiring a de novo hearing, and old language that involved a required recusal of a Council Member who might request review of a Planning Commission decision has been removed. The latter language has been removed because it is no longer required by law as it was at the time it was originally adopted.

Council should conduct a first reading of the proposed Ordinance and instruct the staff on any modifications that the Council may desire.

ORDINANCE NO. 652 N.S. (First Draft)

AN ORDINANCE OF THE CITY OF PIEDMONT AMENDING
CHAPTER 17 OF THE PIEDMONT CITY CODE RELATING TO APPEALS, REMAND,
AND REVIEW

The City Council of the City of Piedmont hereby ordains as follows:

SECTION 1

The intent of the City Council in enacting this Ordinance is to clarify the standards of review governing appeals on matters called on review, as well as adding a section to allow matters to be remanded in whole or in part to the Planning Commission.

SECTION 2

Section 17.25.5 is hereby amended to read as follows:

"17.25.5 Action. Upon conclusion of the hearing, the appeal body shall act upon the appeal. The standard of review governing the appeal shall not be a de novo review, but instead shall be governed by the provisions of Section 17.25.6 hereafter. Subject to the foregoing, the appeal body may sustain, modify, add to, or overrule any recommendations or rulings of the decision maker and make such other findings which are consistent with the provisions of this chapter, including the right to require or modify the requirements for story poles, surveys, time periods for completion or extension thereof, and any other conditions relating to the project for which approval is sought, whether or not the decision maker has made any such requirements; provided that in the event there is not a majority of three members of the appeal body who vote for any of the foregoing actions, then the matter automatically shall be continued to the next meeting, but if no such majority vote can be obtained at the next meeting, the appeal shall be deemed denied and the action of the decision maker affirmed. The appeal body shall report its decision to the appellant, the original applicant for variance or design review, and the decision maker. (Ord. No. 488 N.S., 10/87)"

SECTION 3

Section 17.25.6 shall hereby be added to the Piedmont City Code to read as follows:

"17.25.6 Appeals – Standard of Review. The standard of review which applies to the hearing of an appeal from a Planning Commission decision by the City Council or of a Staff Design Review decision by the Planning Commission shall not be de novo, and shall be governed by the following:

- (a) Deference. Due deference shall be given to the actions of the Planning Commission in light of the substantial number of planning applications heard by them and the major accumulated group experience that those actions represent.

(b) Grounds for Overruling Decision. The following will serve as grounds for overruling all or part of a Planning Commission decision:

- (1) If findings made by the Planning Commission as a basis for its action are not supported by the weight of the evidence [alternative wording: “substantial evidence”].
- (2) If there is clear error in the application of the provisions of Chapter 17 that is important to sustaining the action by the Planning Commission.
- (3) If there is significant error in the application of the Design Review Guidelines as approved by the City Council from time to time.
- (4) If it is determined that there is a significant violation of the notice provisions of Section 17.28 of the Piedmont City Code relating to the hearing(s) leading to the Planning Commission action.
- (5) If significant errors are discovered after the Planning Commission hearing on which its action was taken in the application, plans, drawings or other materials provided to the Planning Commission as a basis of its decision.
- (6) If there is a clear error in the application of approved City policies (such as the story pole and site visit policies) that is important to sustaining the action taken by the Planning Commission.

(c) Appeals from Staff Design and Administrative Design Review Decisions. The same grounds as set forth in Section 17.25.6.(b). shall apply for overruling part or all of a Staff Design Review decision or Administrative Design Review decision appealed to the Planning Commission.

SECTION 4

Section 17.25.7 shall hereby be added to the Piedmont City Code to read as follows:

“17.25.7 Remand. Notwithstanding the provisions of Section 17.25.5, the City Council acting as the appeal body shall have the option to remand the matter to the Planning Commission for further consideration, which remand shall include either specific issues to be considered alone or to open the entire application for the Planning Commission to decide de novo. Unless the City Council determines otherwise, the remand hearing before the Planning Commission shall take place at the next Planning Commission Meeting, which is at least twenty (20) days after the remand action of the City Council. Unless the City Council affirmatively acts to the contrary, no additional fees shall be charged to the applicant or appellant relating to the remand. The decision of the Planning Commission on the remand shall be deemed final unless appealed pursuant to Section 17.25, or unless the City Council retains appeal jurisdiction over the entire

matter at the time of the remand and requests only an advisory opinion on specific issues from the Planning Commission.”

SECTION 5

Section 17.26 of the Piedmont City Code is hereby amended to read as follows:

“SEC. 17.26 REVIEW

Within ten (10) days of the date of any action by the Director of Public Works, a member of the City Council, a member of the Planning Commission or City Administrator may initiate proceedings for review by the Planning Commission of the action in the manner set forth in Section 17.25 for appeals. Within ten days after the date of an action by the Planning Commission, a member of the City Council or the City Administrator may initiate proceedings for review by the City Council of the Planning Commission action in the manner set forth in Section 17.25 for appeals. The standard of review governing proceedings under Section 17.26 shall be a de novo hearing. (Ord. No. 488 N.S., 10/87; Ord. 615 N.S. 3/20/00; 620 N.S. 3/19/01)”

SECTION 6

This ordinance shall be posted at City Hall after its second reading by the City Council for at least thirty (30) days and shall become effective thirty (30) days after the second reading.

Passed and adopted this ____ day of _____, 2005.

AYES:

NOES:

ABSENT OR ABSTAINING: