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STAFF REPORT BOARD MEETING DATE: March 24, 2015

DATE: February 23, 2015

TO: Board of County Commissioners

FROM: Bob Webb, Planning Manager, Planning and Development Division
Community Services Department, 328-3623, bwebb@washoecounty.us

THROUGH: William H. Whitney, Division Director, Planning and Development
Community Services Department, 328-3617, bwhitney@washoecounty.us

SUBJECT: Introduction and first reading of an ordinance amending the Washoe County Code at Chapter 110 (Development Code) at Article 820, *Amendment of Master Plan*, to clarify Planning Commission procedures for adopting, denying or not taking action on a proposed master plan amendment; to change findings of fact required when the Planning Commission denies a master plan amendment; to establish the procedures, change voting requirements, and clarify possible actions when a decision of the Planning Commission is appealed to the Board of County Commissioners; to clarify procedures and standards for the Board of County Commissioners when adopting, modifying or denying master plan amendments; to provide for conditional resolutions approving master plan amendments pending conformance review by a regional planning commission; and, to change names and titles to reflect the reorganization of the Community Development Department. Recommendations include other matters properly relating thereto.

And, if supported, set the public hearing for second reading and possible adoption of the Ordinance for April 14, 2015, at 6:00 p.m.

(All Commission Districts.)

SUMMARY

Introduction and first reading of an ordinance amending Washoe County Code (WCC) Chapter 110 (Development Code) at Article 820, *Amendment of Master Plan*, to establish and clarify procedures and requirements for Planning Commission consideration of master plan amendments (including a change in findings required), and for the Board of County Commissioners when considering appeals (including a change of voting requirements) of Planning Commission decisions and when considering master plan amendments that have been adopted by the Planning Commission; and also changes definitions and terms to reflect the reorganization of the Community Development

Department as the Planning and Development Division of the Community Services Department. Set the public hearing for second reading and possible adoption of the ordinance for April 14, 2015, at 6:00 p.m.

Washoe County Strategic Objective supported by this item: Economic development and diversification.

PREVIOUS BOARD ACTION

The Washoe County Planning Commission initiated DCA 14-006, changes to Article 820, *Amendment of Master Plan*, on April 1, 2014 by Resolution Number 14-10.

The Washoe County Planning Commission recommended approval of DCA 14-006 on July 1, 2014 by Resolution Number 14-16 (see Attachment A).

BACKGROUND

Changes are required to Article 820, *Amendment of Master Plan*, in order to comply with Nevada law (including some recent Supreme Court rulings) and correct various procedural flaws in the master plan amendment process. The changes proposed to Article 820 are as follows:

1. **Definitions.** Add a new Subsection 110.802.02 to define key words used throughout the Code.
2. **Applications.**
 - a. *Modifications to applications.* Amend WCC Section 110.820.05, *Requirements for applications*, to provide that an application for a master plan amendment may be modified at any time before final action is taken on it by the Planning Commission (PC), but an amended application package (including a new analysis of the impacts and findings) must be submitted. Applications may also be modified during the review by the Washoe County Board of County Commissioners (BCC) but an amended application package (including a new analysis of the impacts and findings) must be submitted and referred to the PC for action or a report if the modification results in a change of, or addition to, the master plan as adopted by the PC.
 - b. *Neighborhood meetings.* Amend WCC Sections 110.820.05 and 110.820.20 to provide that after an application for a master plan amendment has been submitted and deemed complete by the Director of Planning and Development, and before the application is reviewed by the PC, the applicant must hold a neighborhood meeting as required by NRS 278.210(2). However, the Division shall (at applicant's expense) provide notice of that neighborhood meeting in accordance with law. A report must be submitted to the PC indicating notice for the meeting and what happened at the meeting, including a summarization of any remarks made.

3. Procedures and findings required for adopting or denying master plan amendments by Planning Commission. Amend WCC Section 110.820.15 to provide that:

- a. *Public Hearing and Comments by Commissioners.* The PC shall hold at least one public hearing on the proposed amendment and, at the conclusion of public comments, one or more of the Planning Commissioners must comment on the record why he/she believes the proposed amendment should be adopted or denied.
- b. *Adoption* of a master plan amendment must be by resolution approved by a 2/3 vote of the total membership of the PC and conditioned on the future conformance review of the amendment by the Regional Planning Commission (RPC). A person aggrieved by the amendment adoption may either formally appeal to the BCC or appear at the BCC public hearing.
- c. *Denial.* A proposed amendment is deemed denied:
 - (i) if a motion to adopt it fails to get a 2/3 vote, or
 - (ii) if a motion to deny is approved by a simple majority, or
 - (iii) if a motion to adopt or deny results in a tie vote and the applicant chooses not to continue the matter to another meeting in accordance with PC Rules, or
 - (iv) if a motion is not made or seconded.

When a proposed amendment is denied, a reason must be given, including discussion by Commissioners of any findings that cannot be made. Written notice of the denial must be given to the applicant who may appeal the action to the BCC.

- d. *No negative findings.* Eliminate the need to make specific “negative” findings in order to deny a master plan amendment. Under the present code, the PC is required to make at least three (of a possible six¹) “positive” findings before it can adopt the master plan amendment, or three “negative” findings before it can deny an amendment. So what happens if the PC cannot do either, or can do both? It’s a dilemma that may create the appearance of an impossible predicament for County staff, may create the appearance of an unnecessary level of confusion for an applicant, and may rob the BCC of the most optimal level of expert guidance it expects from the PC when considering master plan amendments.

The burden of proof and persuasion is on an applicant who seeks a master plan amendment. The applicant must provide substantial evidence to support at least three required “positive” findings and in doing so will understandably provide to the PC only positive facts and evidence thus making it unlikely that an application will provide any evidence that would support any negative findings. If the applicant falls short of proving three positive findings, the PC cannot adopt the amendment, but it cannot deny the amendment unless someone proves up three negative findings. It is unlikely that the applicant will be so motivated, so the

¹ The six possible findings, stated in both positive and negative format are listed in WCC Section 110.820.15(d) and relate to (1) consistency with the master plan, (2) compatibility with adjacent land uses, (3) response to changed conditions, (4) availability of facilities, (5) desired pattern of growth, and (6) effect on a military installation.

burden falls on staff to present substantial evidence supporting three “negative” findings or the PC becomes deadlocked and unable to do its job as gatekeeper of master plan amendments.

This predicament pits County staff against an applicant even if staff supports the amendment, and obligates the County staff to do investigative work it has little resources to do and in a way that could be perceived to be behind the back of the applicant. If both the applicant and County staff fail in their burdens, the PC becomes paralyzed and the applicant may be frustrated by a perception of delays and possible confusion in the process.

In deciding land use discretionary approvals, the customary rule (supported by the Courts) is to approve them if certain findings can be made, and to deny them if they cannot be made. See *Redrock Valley Ranch v. Washoe County*, 127 Nev. Adv.Op.No. 38 (July 2011) (inability to make a required finding is sufficient grounds to deny a special use permit). Accordingly, the proposed ordinance repeals the requirement for negative findings and retains the required positive findings for approval of master plan amendments so that if three positive findings can be made, then the amendment may be approved. Conversely, if three positive findings cannot be made, the amendment is deemed denied.

4. Appeals to the Board of County Commissioners: Amend WCC Section 110.820.25 to provide as follows:

- a. *Appeal period starts when written notice is given.* The present rule is that appeals must be filed within ten days from the date of the hearing and decision. However, custom is that actions and decisions must be reduced to writing and filed with the deciding body in order to be “final” for purposes of judicial review or appeal. If the County forces the appellant to file an appeal before the decision is written down, the appeal may be based on faulty memories and hearsay. The action should be adequately memorialized before starting the appeal “clock.” For example, NRS 278.0235 provides that the period for filing judicial review of a zoning decision starts when the decision is written and filed with the clerk of the body that took the action. Staff proposes to mirror that language for appeals of PC decisions on Master Plan amendments to the BCC.
- b. *New procedures and standards when BCC considers appeals.* Amend WCC Section 110.820.25 to provide as follows:
 - (i) 60 day time limit. As required by NRS 278.3195, the BCC must render its decision on the appeal within 60 days from the date of appeal.
 - (ii) Procedures. As required by NRS 278.3195, the proposed ordinance establishes a procedure to be followed on appeals. A written appeal is to be delivered to the County Clerk who must schedule a hearing before the BCC within 60 days. The Director prepares a staff report and a record on appeal and opens the hearing with a brief explanation of the matter being appealed. During hearings, the appellant may be represented by counsel and each party may comment on or refute the evidence. The BCC Chair may administer oaths and make rulings regarding evidence. Public comment will be heard

before a decision is made. When the BCC takes action, the Director prepares a written decision, files it with the BCC and mails a copy to the applicant, which starts the time period for judicial review.

- (iii) New evidence. The BCC may consider new evidence and materials presented at the public hearing as well as the record of the PC proceedings, and must (as required by NRS 278.3195) be guided by the principles set out in NRS 278.020.
- (iv) Actions on appeals where Planning Commission denies a master plan amendment. If the PC *denies* a master plan amendment and the denial is appealed to the BCC, the BCC may affirm the denial (which is a final decision subject to judicial review) or may reverse the denial and send the proposed amendment (with or without modifications proposed by the BCC) back to the PC for action or for a report [under NRS 278.220(4)] after which the BCC may take action directly on the amendment.
- (v) Actions on appeals where Planning Commission adopts master plan amendments. If the PC *adopts* a master plan amendment and that adoption is appealed to the BCC, the BCC may:
 - (1) affirm the adoption and, if proper notice was given, proceed to adopt the proposed amendment itself;
 - (2) propose a modification to the amendment and send the modification to the Planning Commission for a report, and after receiving the report, take action on the amendment as modified; or,
 - (3) reverse the adoption, which is a final action subject to judicial review.
- (vi) Eliminate the 2/3 voting requirement to overrule Planning Commission denials. WCC Section 110.820.30(c)(1) currently requires a 2/3 vote for the BCC to override a PC's denial of a master plan amendment. The Nevada Supreme Court struck down a similar provision in the Douglas County Code because the 2/3 vote requirement was not authorized by Nevada statute [see *Falke v. Douglas County* 116 Nev.583, 3 P.3d. 661 (2000) (2/3 super majority requirement for board of county commissioners to approve a master plan amendment conflicts with state statute and cannot stand)]. Thus, this provision is proposed to be removed from the Development Code.

5. Board actions on amendments adopted by the Planning Commission. Amend WCC Section 110.820.30 to provide that when the PC adopts a master plan amendment, it will certify the adopting resolution to the BCC, and the BCC will schedule and notice a public hearing on the adopted amendment, and may take any of the following actions.

- a. *Conditionally adopt* the master plan amendment by resolution approved by a simple majority of the BCC. The resolution would be conditioned on a determination by the RPC that the amendment conforms to the Comprehensive Regional Plan, as explained in item 6 below. If the RPC determines that the proposed amendment conforms to the Comprehensive Regional Plan, the BCC

Chair may execute the resolution and it becomes final. This will solve the “chicken or egg” dilemma caused by the requirement that before certain amendments can be adopted by the BCC, they must be reviewed by the Regional Planning Commission, but before the Regional Planning Commission can review them they must be approved by the BCC. This delayed resolution practice was approved in *City of Reno vs. Citizens for Cold Springs* 126 Nev. Ad. Op. 21 (2010).

- b. *Modify* the adopted master plan amendment. If the BCC desires to modify the amendment adopted by the PC, it must send the proposed modification back to the PC for a report as required by NRS 278.220 (4). The PC must submit the report within 90 days after which the BCC may take action on the amendment as modified.
- c. *Deny* the adopted master plan amendment, by failing to pass a motion to adopt the amendment, approving a motion to deny the amendment, or casting a tie vote. If a tie vote occurs, the applicant for the master plan amendment may ask for a new vote on the amendment at the next regular meeting of the BCC when an odd number of commissioners is present. In all cases of denial, at least one County Commissioner must state for the record the reason for his/her vote.

6. Actions upon conformance review by Regional Planning Commission. Amend WCC Section 110.820.40 to provide what happens when conformance review is completed by the Regional Planning Commission.

- a. *Conformance.* If the RPC determines that the adopted master plan amendment conforms to the Comprehensive Regional Plan, the BCC’s adopting resolution may be executed by the Chair and becomes a final action by the BCC, subject to judicial review.
- b. *Non-conformance.* If the RPC determines that the adopted master plan amendment does not conform to the Comprehensive Regional Plan, the BCC’s approving resolution may not be executed by the Chair, and the BCC may ask for reconsideration and appeal in accordance with the rules of the RPC and the Regional Governing Board.

7. Changes caused by reorganization of the Department of Community Development function. There is no longer a Department of Community Development or a Department of Community Development Director, so the Article is proposed to be changed throughout to state Planning and Development Division and Planning and Development Director, where appropriate.

WCC Section 110.818.35 requires the BCC to affirm, modify or reject the findings of fact made by the PC during the BCC’s final action (i.e., adoption of the ordinance) of any Development Code amendment. The BCC may also add any other findings of fact that they deem to be relevant as part of their final action. The four findings of fact made by the PC during their recommendation for approval of DCA 14-006 are included within Resolution 14-16 (Attachment A). Those findings of fact, and staff’s comments on those

findings as contained in the PC staff report for the July 1, 2014 meeting, are included below:

1. Consistency with Master Plan. The proposed Development Code amendment is in substantial compliance with the policies and action programs of the Washoe County Master Plan.

Staff comment: The proposed ordinance is entirely procedural and deals with subjects not in the master plan, and therefore does not offend any of the policies and action programs.

2. Promotes the Purpose of the Development Code. The proposed Development Code amendment will not adversely impact the public health, safety or welfare, and will promote the original purposes for the Development Code as expressed in Article 918, Adoption of Development Code.

Staff comment: None of the substantive land use provisions in the Development Code are changed by the proposed ordinance. Procedures are changed in order to better comply with state law including court decisions, thereby improving substantive and procedural due process rights of citizens of Washoe County.

3. Response to Changed Conditions. The proposed Development Code amendment responds to changed conditions or further studies that have occurred since the Development Code was adopted by the Board of County Commissioners, and the requested amendment allows for a more desirable utilization of land within the regulatory zones.

Staff comment: The proposed procedural changes respond to statutory requirements and decisions of the Nevada Supreme Court as explained above such as *Falke vs. Douglas County*, *City of Reno vs. Citizens for Cold Springs*, and *Redrock Valley Ranch vs. Washoe County*, and provide for clarified and streamlined procedures to amend the master plan land use plans.

4. No Adverse Affects. The proposed Development Code amendment will not adversely affect the implementation of the policies and action programs of the Conservation Element or the Population Element of the Washoe County Master Plan.

Staff comment: As the ordinance changes procedures only, it does not impact or adversely impact the Conservation or Population Elements of the Washoe County Master Plan.

FISCAL IMPACT

No fiscal impacts are anticipated.

RECOMMENDATION

It is recommended that the Board of County Commissioners introduce and conduct a first reading of an ordinance amending the Washoe County Code at Chapter 110 (Development Code) at Article 820, *Amendment of Master Plan*, to establish and clarify procedures and requirements for Planning Commission consideration of master plan amendments (including a change in findings required), and for the Board of County

Commissioners when considering appeals (including a change of voting requirements) of Planning Commission decisions and when considering master plan amendments that have been adopted by the Planning Commission; and also changes definitions and terms to reflect the reorganization of the Community Development Department as the Planning and Development Division of the Community Services Department.

It is further recommended that the Board set the public hearing for second reading and possible adoption of the ordinance for April 14, 2015, at 6:00 p.m.

POSSIBLE MOTION

Should the Board agree with staff's recommendation, a possible motion would be:

“Move to introduce Bill Number (insert bill number as provided by the County Clerk) and to set the public hearing and second reading of the Ordinance for possible adoption during the meeting of April 14, 2015, at 6:00 p.m.”

- Attachment: A. Planning Commission Resolution 14-16
 B. Working copy, DCA 14-006 (WCC Chapter 110 amendments)