

MEMORANDUM

TO: Honorable Mayor and Rivergrove City Council
FROM: City Attorney, William K. Kabeiseman
DATE: May 19, 2023
RE: Staff Report on Scope of Review Determination

INTRODUCTION

An appeal has been filed seeking City Council review of a decision of the Planning Commission. The Council will hold a hearing and determine the merits of the appeal at its June 12, 2023 regular meeting. However, prior to that hearing, the Council must determine the “scope of review” for the hearing, i.e., whether the hearing will be “on the record,” meaning no new evidence will be introduced, or “de novo,” meaning parties can bring forward new evidence for the Council to consider. As discussed below, staff recommends that the Council hear this matter de novo and allow new evidence and testimony to be introduced at the hearing.

BACKGROUND INFORMATION

In March of this year, Lite Rite Electric filed an application for the property located at 4810 Dogwood Drive in order to facilitate the development of a new single-family home on that property. The Rivergrove Planning Commission considered the application and found it incomplete at its meeting on April 6, 2023. The applicant provided additional information and the Planning Commission found the application complete and approved it at their meeting on April 18, 2023, issuing a decision approving tree-cutting permit and a variance with conditions on that application on April 21, 2023.

On May 1, 2023, the City received an appeal from Michael Salch and on May 2, 2023, the City received a second appeal from Billie Cottingham. The two appeals raise a number of issues, including:

- The application of Ordinance No. 89-2018 (the tree-cutting ordinance), which was incorporated into the RLDO at section 5.100.
- The lack of a survey for the property
- The application of Ordinances No. 52 and 53
- Concerns over the number of trees being cut
- Concerns regarding the impact on adjoining properties
- Noise from a generator on the new structure, and
- Difficulty obtaining information from the City.

A copy of the Planning Commission's decision and the two appeals are attached to this memorandum.

DISCUSSION

The appeals will be scheduled for a hearing before the Council in early June of this year; however, before scheduling the hearing on the merits, the Council must determine the "scope of review," or whether the participants at the hearing will be able to introduce new evidence or testimony. That decision is controlled by the provisions of the Rivergrove Land Development Ordinance ("RLDO") and, in particular, RLDO 8.160 – 8.200.¹ RLDO 8.160 allows the Council to "limit its review to a review of the record and oral argument on the record, or it may accept new evidence and testimony." However, RLDO 8.190 and 200 provide that the default outcome is a review on the record (without new evidence), but that the Council may allow in new evidence "if such evidence or testimony could not reasonably have been presented at the earlier hearing." So, the Council should consider whether there may be additional evidence that may not have been reasonably available to the parties.

One element to consider is that the application was filed and resolved in just over a month, meaning there was not much time for interested parties to develop information. Moreover, it appears that the City arborist had an opportunity to submit an initial report, but did not have an opportunity to review the arborist's final report for this application

CONCLUSION

¹ A copy of those sections of the RLDO are attached at the end of this memorandum.

At the hearing on the evening Friday May 26, 2023, the Council should take testimony – limited solely to the question of whether to hear the appeal on the record or if new evidence should be allowed. The Council should then decide how it wants to hear the matter. The City Attorney will be available at that meeting for any questions the Council may have.

Section 8.160. Request for Review.

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(b) A decision of the Commission maybe appealed to the City Council by an affected person by filing an appeal within 10 days of receipt of notice of the decision. Notice of appeal shall clearly indicate the decision that is being appealed.

c) The City Council may limit its review to a review of the record and oral argument on the record, or it may accept new evidence and testimony in which case a hearing shall be conducted pursuant to this Article.

Section 8.180. Scope of Review. The reviewing body shall issue an order stating the scope of review to be one of the following:

(a) Restricted to the record made on the decision appealed.

(b) Limited to such issues as the reviewing body determines necessary for a proper resolution of the matter.

(c) A de novo hearing.

Section 8.190. Review on the Record. Unless otherwise required by this ordinance, review of a decision on appeal shall be confined to the record of the proceeding, which record shall include:

(a) A factual report prepared by the hearing body.

(b) All exhibits, materials, pleadings, memoranda, stipulations and motions.

(c) The transcript of the hearing below, if one was required. The reviewing body shall allow oral argument on the record by the parties.

Section 8.200. De Novo Review.

(a) The reviewing body may hear the matter de novo; or it may admit additional testimony or evidence not previously admitted if such evidence or testimony could not reasonably have been presented at the earlier hearing. In deciding whether to admit such testimony or evidence the reviewing body shall consider all of the following:

- (1) Prejudice to a party;
- (2) Convenience or availability of the evidence at the time of the initial hearing;
- (3) Surprise to other parties;
- (4) The nature and relevancy of the testimony or evidence.

(b) "De novo hearing" shall mean a hearing by the review body as if the action had not been previously heard and as if no decision had been rendered, except that all testimony, evidence and other material from the prior hearing shall be included in the record of the review