



Land Use

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**Boulder County Planning Commission
Agenda Item #3**

Wednesday, October 19, 2016

**Hearing Room, Third Floor
Boulder County Courthouse**

Staff: Dale Case, AICP, Land Use Director

Discussion of Request for Reconsideration of Planning Commission Decision Received from Members of the Public

Summary

The Twin Lakes Action Group, Inc. (“TLAG”) submitted a written request that the Planning Commission reconsider its vote of September 21, 2016, approving the staff-recommended land use map changes for the properties at 6655 Twin Lakes Road, 6500 Twin Lakes Road, and 0 Kahlua Road. See [Attachment A](#). For the reasons explained below, staff recommends that the Planning Commission take no action on this request.

Background

The September 21 vote of the Planning Commission is considered an official action under the Planning Commission Bylaws.¹ Staff is unaware of the Planning Commission ever itself initiating reconsideration of a final decision. Nor is Staff aware of the Planning Commission ever reconsidering a final decision upon a request from the public or an applicant. Rather, in the absence of a specific process for reconsideration of a decision, Planning Commission has considered its official actions final decisions.

No Standards for Reconsideration

If a public body has not adopted standards governing decisions that may be reconsidered, then factors such as when reconsideration may happen, how a decision for reconsideration should be made, and why reconsideration is appropriate have not been considered in advance by the public body. This could lead to an arbitrary decision to reconsider one docket that undermines the integrity and finality of all future Planning Commission decisions.

¹ The Bylaws require a quorum of no fewer than five members of the Planning Commission for official action. Approval of a vote of the majority of those present and voting is required to pass a motion.

No standards govern a potential decision to reconsider Planning Commission's September 21st decision. The Bylaws of the Planning Commission of Boulder County (the "Bylaws") do not address rehearings or reconsideration.² See Attachment B. Nor do the Guidelines for Reconsideration of BVCP Decisions on Public Requests for Land Use Changes (the "Guidelines for Reconsideration" or "Guidelines") provide for this situation. See Attachment C.

The Guidelines only allow one decision-making body to request reconsideration of another decision-making body's decision. The Guidelines do not provide for members of the public or a decision-making body to initiate such a request.³ Even more important, the Guidelines specify the permissible grounds for reconsideration: new information not previously considered. The Guidelines do not contemplate reconsideration simply because opponents to a proposal have requested it.

Policy

Strong policy reasons indicate the Planning Commission should not open the door to citizen-requested or self-initiated reconsideration of its decisions.

A single request for reconsideration could lead to many other requests on the same docket. For example, if the Planning Commission granted TLAG's request for a second vote and reversed its prior decision, parties or individuals advocating for a different outcome could submit a request to reconsider the second vote. This or any other docket could turn into a back-and-forth battle of reconsideration requests, clogging the Planning Commissions' docket and never truly reaching finality.

Under the circumstances of this docket, the repercussions of reconsideration are even more impactful because another public body has already considered the Planning Commission's action. Subsequent to Planning Commission's action on September 21, the Board of County Commissioners held a public meeting on this docket and, in reliance on the finality of Planning Commission's decision, took its own final action. The City bodies are poised to do the same.

Further, a decision by the Planning Commission to reconsider in a manner not governed by the Guidelines for Reconsideration would disrupt the four-body process. If one decision-making body cannot rely on the decisions made by the other bodies or if there is a lack of adherence to agreed-upon processes, one or more of the bodies may be unwilling to agree to four-body review for future BVCP updates.

TLAG's Request

² Compare the Supplemental Rules and Procedures of the Board of Adjustment (the "BOA's Governing Rules"), which specifically address rehearings. The BOA's Governing Rules set forth standards to determine what types of decisions may be reheard, who may request a rehearing, when decisions are considered final, on what grounds a previous decision may be overturned, procedures for BOA assent to a rehearing, the BOA's discretion to limit the scope of a rehearing, and how such rehearings must be conducted.

³ Even if the Guidelines for Reconsideration could be considered to apply, requests for reconsideration of a Planning Commission decision are to be "routed through the appropriate governing body" (either the Board of County Commissioners or City Council, as applicable).

The Twin Lakes Action Group's request to the Planning Commission to reconsider its vote cites dissatisfaction with procedures, disagreement with the recommendations and clarifications of staff, and the fact that two members of the Planning Commission were not present for the vote.

TLAG had ample opportunity to provide its own responses to the information provided by staff. In fact, TLAG did respond in writing to both the staff recommendation and to staff's memo of September 14, 2016. Following seven hours of public testimony and throughout four hours of debate, the information provided by both staff in its recommendation and memo as well as provided by TLAG in response was thoroughly considered by Planning Commission prior to rendering its decision on September 21st.

Staff has also reviewed the procedural complaints and found no deficiencies that would compromise the integrity of the Planning Commission's decision or of the BVCP process. At the August 30th joint hearing, all individuals who wished to speak were provided the opportunity to do so. Although TLAG disagrees with the recommendations made by staff, this is also not new information.

What is left, then, is dissatisfaction with the composition of the Planning Commission quorum on September 21. Basing reconsideration on the absence or presence of a particular planning commission member or members could result in planning commission members putting the finality of a decision at risk any time they miss a public hearing. This would put unnecessary pressure on planning commission volunteers. Moreover, if the outcome of a vote may be changed due to dissatisfaction with the composition of a quorum, the Planning Commission would have a difficult time ever completing public business. Scheduling a meeting could potentially become subject to gamesmanship where items are requested or withdrawn based on who may be in attendance at a meeting. Residents, staff, and other decision-making bodies must be able to rely on the Planning Commission to support its own decisions regardless of the outcome of a vote, particularly where the decisions are difficult or unpopular.

Recommendation

Because reconsideration would compromise the integrity of the Planning Commission's decisions, staff recommends that the Planning Commission take no action on TLAG's request.

ATTACHMENT A

Twin Lakes Action Group

Dear County Planning Commission Members,

The Twin Lakes Action Group, Inc. formally requests a reconsideration of the votes cast on September 21st for the land-use changes for the Twin Lakes Road properties for the following reasons:

- All parties are entitled to a fair and impartial vote and due process protections by all four bodies in the BVCP Update process. However, for the Twin Lakes parcels:
 - Staff for the County Commissioners actively worked with County staff and other parties to present testimony at hearings and meetings in favor of change requests that would allow development of the parcels – in violation of the due process rights of TLAG and individual requesters of the #36 “Open Space and Environmental Preservation” change requests
 - Subsequent to the Planning Commission vote, the County Commission declined to either 1) recuse themselves based on an obvious conflict of interest whereby they approved the Boulder County Housing Authority requests (#35) in the capacity as BCHA Board members, or 2) formally and publicly disclose the conflicts, and the appearance of conflict, for the record. The County Attorney office’s legal “justification” for not recusing made no reference to recusal standards in the BVCP context, lacked a formal legal opinion, and cited to authority that had nothing to do with the facts of this matter.
 - County Staff actively tampered with the speaking order to give preferential treatment to the “Pro Increased Density” supporters, developers and government insiders while citizens waited until past 11:30 p.m. to speak. Documentation of this item was provided previously to this Commission and can also be found here: <https://www.dropbox.com/home/Inbox/county%20final%20review%20speaking%20order>
- The staff recommendation urging approval of “Medium Density and Environmental Preservation” changes is so misleading and inconsistent with the BVCP as to make action consistent with that recommendation arbitrary and capricious: The BVCP defines Environmental Preservation:

The Environmental Preservation designation includes private lands in Areas I and II with environmental values that the city and county would like to preserve through a variety of preservation methods including but not limited to intergovernmental agreements, dedications, development restrictions, rezonings, acquisitions, and density transfers.

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“Environmental Preservation” under the BVCP means preserving land for their environmental values. Simply acknowledging that setbacks and easements for wetlands, ditches and a trail corridor (likely to be as narrow as 15 feet wide and paved) can’t be developed for housing – while up to 18 acres (80-90%) of the parcels could be developed for structures and parking is wholly inconsistent with the Environmental Preservation designation under the BVCP.

- The fact that TLAG information packets were not readily presented to this Commission by County Staff.
- 3 members of the Planning Commission stated at the hearing they didn’t have time to review or had issues accessing the TLAG material and other public comments that were provided by County Staff.
- Attachment 2 to Staff’s September 14, 2016 packet, the Memo titled “Clarifications following August 30 Hearing” was neither objective nor impartial and violated the due process rights of parties with change requests other than those submitted by the County. The memo sought to dispose of and refute any and all arguments that might question or undercut the recommendation to grant the County’s request, and failed to acknowledge that 1) many components of the Open Space and Environmental Preservation requests were more consistent with the BVCP than #35, or 2) the staff recommendation was inconsistent with the BVCP provision that future annexation of Area II lands in unincorporated Gunbarrel would be negotiated by the city and county in the event of “resident interest in annexation.” If staff recommends an action that is inconsistent with the BVCP, it is incumbent on staff to advise the Commission that the recommendation could be construed as such. Here, by not doing so, Staff’s bias is apparent.
- Additionally, the same noted staff memo contained a number of incorrect or incomplete facts that further emphasize their bias.
- 2 members of the Planning Commission were not present to cast their vote which may change the outcome of the vote. Because of the importance of this vote to the community and the enormous County-wide interest in this vote, citizens are entitled to a vote by the full Planning Commission.

The Boulder Valley Comprehensive Plan sets forth a mechanism for reconsideration of a determining body’s vote and we ask the Planning Commission to exercise this option due to the anomalies in this case.

Thank you for your action,

David L Rechberger

Dave Rechberger
TLAG Chair

ATTACHMENT B

BYLAWS OF THE PLANNING COMMISSION OF BOULDER COUNTY

I. ENABLING AUTHORITY

Enabling authority for the Planning Commission of Boulder County is found in Part 1 of Article 28 of Title 30 of the Colorado Revised Statutes, as amended. Additional authority for the actions of the Planning Commission, as generally set forth in these Bylaws, is found in other provisions of the Colorado Revised Statutes which expressly or impliedly authorize or require the Planning Commission to act (including but not limited to the Planned Unit Development Act of 1972 (Article 67 of Title 24); the Special District Act (Article 1 of Title 32); the Preservation of Commercial Mineral Deposits Act (Part 3 of Article 1 of Title 34); and § 22-32-124 concerning proposed school district site acquisition and development, and in the duly enacted provisions of the Boulder County Land Use Code as it currently exists and may be amended from time to time.

II. MEMBERSHIP, APPOINTMENTS, AND TERMS

- A.** The Planning Commission shall consist of nine members, who shall be appointed by and in the discretion of the Board of County Commissioners.
- B.** All members shall be residents of Boulder County. In choosing members, the Board of County Commissioners shall attempt to establish representation on the Planning Commission from the following areas: Boulder; Erie; Lafayette; Longmont; Louisville; Superior; the mountains; and the plains area of Boulder County.
- C.** Each member's term shall be three years and until a member's respective successor has been appointed.
- D.** The terms of office of all Planning Commission members shall be staggered by making appointments so that approximately one-third of the member's terms expire each year.
- E.** In the event that a member is unable to attend a meeting or meetings of the Planning Commission, no substitute member shall be appointed to act in the absent member's place. However, in the event that the Chair or the Secretary of the Planning Commission has knowledge that a member will be temporarily unable to act for three or more consecutive meetings, owing to absence from the County, illness, interest in any matter before the Commission, or any other cause, the Chair or the Secretary may request that the Board of County Commissioners appoint a replacement member to take the absent member's place during the temporary absence.
- F.** In the event that a member dies or resigns prior to the expiration of that member's

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term, the Board of County Commissioners shall appoint a new member to fill the vacancy.

G. Any member, whether regular or replacement, may be removed at the discretion of the Board of County Commissioners for nonperformance of duty or misconduct.

H. All members, whether regular or replacement, shall serve without pay, except that members are entitled to receive reimbursement for actual expenses incurred as part of their Planning Commission duties.

III. OFFICERS AND COMMITTEES

A. A Chair, First Vice Chair, and Second Vice Chair shall be elected annually by a majority of the entire membership of the Planning Commission. (A vote of five constitutes a majority of the entire membership, which is nine.) The Chair shall be responsible for conducting all meetings of the Planning Commission. The First Vice Chair shall substitute for the Chair in the absence of the Chair. The Second Vice Chair shall substitute for the Chair in the absence of the Chair and the First Vice Chair.

B. The Director of the Boulder County Land Use Department shall serve as the Secretary to the Planning Commission. As Secretary, the Director shall be responsible for providing the appropriate technical staff to assist the Planning Commission, and for maintaining all records of Planning Commission proceedings. The Director shall serve in this capacity by operation of these Bylaws, and need not be appointed by separate action of the Planning Commission for this purpose.

C. The Planning Commission may create and fill such other offices as it may determine to be necessary or appropriate to the conduct of its functions, pursuant to the procedure set forth in Section III. A., above, except that the creation and filling of these other offices do not have to occur at the same time as the annual election of officers in Section III. A., above.

D. The Chair may appoint commission members to standing committees and special committees as needed to study particular topics and to improve coordination of planning throughout the County.

IV. MEETINGS AND VOTES

A. All meetings or hearings of the Planning Commission at which three or more members are present, and at which any public business is discussed or any formal action taken, shall be open to the public at all times, in accordance with the Colorado Open Meetings Law, Part 4 of Article 6 of Title 24, C.R.S., as amended. In addition, in

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accordance with the Boulder County Comprehensive Plan, it shall be the policy of the Planning Commission to solicit public participation at all such meetings or hearings. Chance meetings or social gatherings at which the discussion of public business is not the central purpose shall not be required to be noticed or held in public, as provided in the Open Meetings Law.

B. Upon the affirmative vote of two-thirds of the quorum present, the Planning Commission may hold an executive session at a regular or special meeting or hearing, for the sole purpose of considering any of the matters set forth in § 24-6-402(4)(b), (c), or (g) of the Open Meetings Law (receiving legal advice from the attorney for the Planning Commission on specific legal questions; considering matters required to be kept confidential by federal or state law or rules and regulations; or considering any documents protected by the mandatory nondisclosure provisions of the Colorado Open Records Act. The Chair shall announce the topic of the executive session, and recite the applicable statutory citation for the executive session under the Open Meetings Law, prior to convening the session. No adoptions of any proposed policy, position, resolution, rule, regulation, or formal action shall occur at any executive session which is not open to the public.

The Planning Commission shall keep a record of its proceedings, which record shall be open to inspection by the public during regular County office hours. A recording of any public meeting or hearing at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or could occur shall be taken and shall be available to public inspection.

Written minutes or summaries of action taken at a public meeting or hearing of the Planning Commission, may be approved at a subsequent meeting by a majority vote of the members present at the subsequent meeting, without regard to the identity of the specific members attending both meetings, provided that copies of the proposed written minutes or summary are mailed to all members for their review and comment prior to the meeting at which the vote to approve is taken.

D. Regular meetings of the Planning Commission shall ordinarily be held once a month on a regularly scheduled day and at a regularly scheduled time and place. Additional meetings may be scheduled with the approval of a majority of the Planning Commission or of the Board of County Commissioners, if deemed necessary for the Planning Commission to complete its pending business in a timely manner, provided that at least three days' notice is given to all members, and notice to the public is provided as required by the Colorado Open Meetings Law. Planning Commission meetings or hearings shall be scheduled for the afternoon or evening hours, in order to maximize public attendance and input.

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E. Five members shall constitute a quorum of the Planning Commission for official action. All official actions of the Planning Commission shall be taken by vote, with a majority of those members present and voting needed to approve a vote except as otherwise expressly provided in these Bylaws. Moreover, to approve any action adopting or amending all or part of the County's Comprehensive Plan under C.R.S. §§30-28-106 through-109, not less than a majority of the entire membership of the Planning Commission (five members) shall be required to vote in favor of such action.

F. All requests for approval or other official action by the Planning Commission, and all matters scheduled for public discussion by the Planning Commission, shall be placed on a written agenda of the Planning Commission in accordance with the applicable requirements of the County's Land Use Code, or other applicable regulation, procedure, bylaw, or policy. The Chair shall have the discretion to alter the order of the Planning Commission's consideration or hearing of any of the items listed on an agenda if appropriate in light of the relative anticipated length of items, the presence or absence of interested persons, or other reasonable considerations. In addition, the Planning Commission, by majority vote, shall have the right to amend the agenda to add, delete, or table or continue any matter, provided that no such action shall be contrary to the procedural requirements of the Open Records Law, any statute governing the matter at issue, or the County's Land Use Code.

G. The following hearing procedures are guidelines which can be expected to generally govern hearings before the Planning Commission. The Chair shall have the discretion to enforce or alter the following procedures as necessary to ensure that meetings are conducted in an efficient manner while observing principles of fairness with respect to all interested parties.

1. Ordinarily, the Chair will call for a presentation by the staff, followed by a presentation by the applicant. The hearing will then be opened to the public for comment on any issues relevant to the hearing. Thereafter, the staff, the applicant, and, if appropriate, members of the public, will be given an opportunity to respond. Members of the Planning Commission may ask questions of these persons testifying at any time.

2. Presentations shall generally be limited as follows: staff—10 minutes, applicant—20 minutes, and the public—three minutes per person.

3. With due consideration to the length of the agenda, the nature of the application or docket, the complexity of the evidence, and the findings required, the Planning Commission, at the hearing for any agenda item, may elect to set longer time

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limits for individual speakers, as well as a total time limit within which all those desiring to be heard will be confined.

V. CONFLICTS OF INTEREST

A. No member shall participate in or vote with respect to any quasi-judicial matter pending before the Planning Commission, if that member has a financial, personal, or official interest in, or conflict with, the matter, of such nature that it prevents or may prevent that member from acting on the matter in an impartial manner. Any member having such an interest or conflict shall reveal such fact, to the extent possible, prior to any official Planning Commission hearing of or action on the matter, and shall refrain from sitting and participating with the Planning Commission in its consideration of and decision on such matter. Moreover, no such member shall testify before the Planning Commission as a member of the public on any such matter, in order to avoid any appearance of impropriety.

B. No member shall participate in, or vote or attempt to influence the other members with respect to, any quasi-legislative matter scheduled for a decision or official recommendation before the Planning Commission, if such action directly and substantially affects, to the member's economic benefit, a business or other undertaking in which the member either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent, unless the member, prior to action in any manner on the matter, makes a written disclosure to the Secretary of State in accordance with § 24-18-110, C.R.S., and states the fact and summary nature of the member's interest for the record at the time of the Planning Commission meeting or hearing on the matter.

VI. DUTIES AND AUTHORITIES

The Planning Commission shall have the following duties and authorities:

A. To adopt and amend the County's Comprehensive Plan, including but not limited to a master plan for the extraction of commercial mineral deposits pursuant to § 34-1-304, C.R.S., as provided for in Part 1 of Article 28 of Title 30, C.R.S.

B. To review the location and extent of the authorization or construction of public roads, parks, ways, ground or space, buildings or structures, and public utilities, pursuant to § 30-28-110(1), C.R.S.

C. To develop, propose, review, recommend, and certify to the Board of County Commissioners amendments to the Land Use Code pursuant to Part 1 of Article 28 of Title 30, C.R.S. and any other applicable statutory authority.

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D. To hold public hearings or meetings on applications for approval of special use permits, subdivisions and replats, road and public utility easement vacations, road name changes, and any other actions or requests as may be required or provided through the Colorado Revised Statutes, the County's Land Use Code, or any of the County's other land use regulations or policies.

E. To perform such other express or implied duties and functions pursuant to the Colorado Revised Statutes and the County's land use regulations and policies as they may be amended from time to time.

VI. AMENDMENTS TO BYLAWS

These Bylaws may be amended by a majority vote of the total membership of the Planning Commission.

APPROVED BY A UNANIMOUS VOTE OF THE MEMBERSHIP OF THE PLANNING COMMISSION OF BOULDER COUNTY, AT A REGULARLY SCHEDULED PUBLIC MEETING ON _____, 2006.

PLANNING COMMISSION CHAIR

DATE

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Guidelines for Reconsideration of BVCP Decisions on Public Requests for Land Use Changes

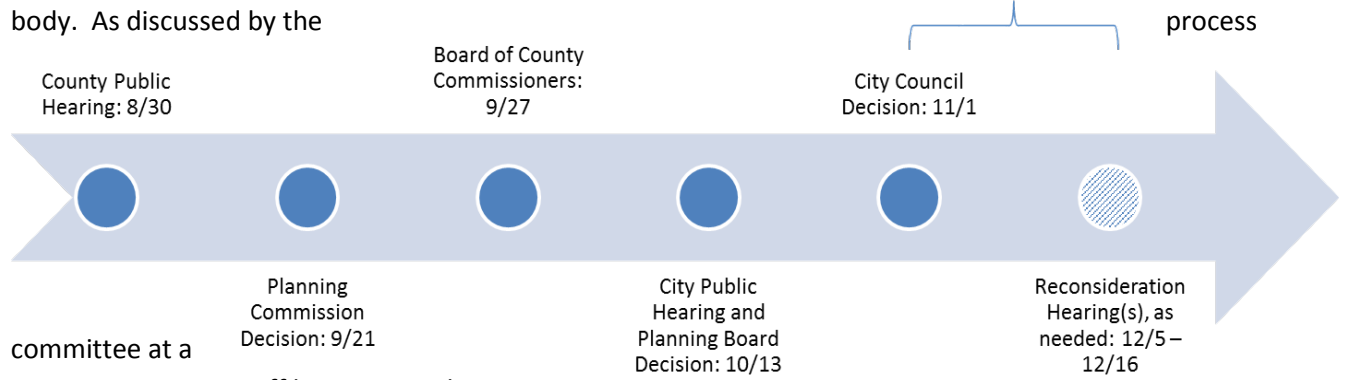
The following is the established sequence of hearings and consideration:

- **County PC and BOCC** will hold a joint Public Hearing on 4-body requests for land use changes on **Aug. 30**; PC will deliberate on **Sept. 21**; BOCC on **Sept. 27**.
- **City PB and CC** will hold a joint Public Hearing on 2-body and 4-body requests of land use changes on **Oct. 13**; PB will deliberate on **Oct. 13** and CC will deliberate on **Nov. 1**.

PC = County Planning Commission
 BOCC = Boulder County Board of County Commissioners
 PB = City Planning Board
 CC = Boulder City Council

In prior processes, if any of the bodies denied a land use change, the request would not be considered by any subsequent body. As discussed by the

Timeframe for any additional requests for reconsideration of decisions: 1 month following CC decision, to allow for request motions to be put forth at regular monthly meetings of the four bodies



committee at a

previous meeting, staff has proposed

clarification below that would allow for public request land use changes to be considered by all approval bodies and any of the four bodies may request reconsideration of a decision. The sequence of consideration requires clarification of possible options if a proposed land use change is denied. For example:

- Since any proposed change could ultimately undergo reconsideration, all four bodies will receive public testimony on all requests at the initial public hearings. City hearing will include items that may not have been approved by county bodies.

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Possible options if a proposed land use change is **denied**:

- Each subsequent body may decide to take a different action on the previously denied requested change or they may not take action on the requested change effectively denying the change.
- If County PC first denies a proposed change, BOCC may still consider the item.
 - Regardless if BOCC agrees or disagrees with PC, city bodies still receive information about the requested change and hold a public hearing on the proposed change. City PB and CC can decide to take action or let the denial stand. If they consider the change and approve, CC would request one or both county bodies to reconsider the item.
- If BOCC denies a proposed change, city bodies may still consider the item, and if approved, CC requests reconsideration by BOCC.
- If PB denies a proposed change that has been approved by both county bodies, CC may consider the proposed change and if approved, ask city PB to reconsider.

All bodies may ask for reconsideration. Any requests for consideration made by Planning Board (PB) or Planning Commission (PC) will be routed through the appropriate governing body (BOCC or CC) in the form of a motion. If approved, the governing body would then make the request for reconsideration to the other governing body. For example, if PB wishes to request reconsideration of a decision by PC or BOCC, PB would need to first make the request to CC, which would then make the request to BOCC.

When making a request, the requesting body shall state the grounds for the request for reconsideration; the grounds should be information that was not previously considered by the body of which the request is made. Each body can only make one request for reconsideration of a particular decision

If there is a requested reconsideration, it would be considered as a continuation of the earlier item and not open a new public hearing.

Order of Items

It is anticipated that there will be many members of the public who will speak about the Twin Lakes proposed change. Therefore, the order in which requests will be addressed at the public hearings is as follows:

Order for County Hearing on Four Body Requests:

1. 3261 3rd Street
2. 2801 Jay Road
3. 6655 and 6500 Twin Lakes Road

Order for City Hearing on Two- and Four-Body Requests:

1. 365 Broadway
2. Table Mesa Shopping Center
3. 3485 Stanford Court

v. Aug. 29, 2016

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4. 3261 3rd Street
5. 2801 Jay Road
6. 6655 and 6500 Twin Lakes Road

Order of activity for a particular agenda item:

1. Request #A – staff presentation
2. Request #A – requestor presentation
3. Request #A – public