

May 16, 2023



## AGENDA ITEM SUMMARY

City Council

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### STAFF

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### SUBJECT

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**First Reading of Ordinance No. 074, 2023, Amending the Land Use Code to Include Regulations for Making Water Adequacy Determinations.**

### EXECUTIVE SUMMARY

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The purpose of this ordinance is to amend the Fort Collins Land Use Code to include water adequacy determinations for new development and redevelopment. The regulations are divided into three different categories: one for established potable water supply entities, one for new potable water supply entities, and one for non-potable water supply entities. The goal is to comply with Colorado state statute (Section 29-20-301, et seq., C.R.S.) and to make sure development has the necessary water supply.

Water is a crucial and constrained resource, and the City strives to ensure that development meets the community's vision and expectations for responsible resource management. City Plan includes policies to ensure water is used wisely and our community is prepared for a changing climate. Currently, development within the City only occurs within the boundaries of existing City (Fort Collins Utilities) and special district potable water supply entities, such as Fort Collins-Loveland Water District and East Larimer County Water District. A project is determined to have an adequate water supply through the issuance of a "will serve" letter from the established potable water supply entity at the time of development plan or building permit approval.

The necessity for an updated water adequacy review program stems from the limited supply and high cost of water resources, which have resulted in developers pursuing more creative ways to provide both potable and non-potable water to their proposed developments, particularly projects striving to provide affordable housing or the denser development patterns called for in City Plan.

### STAFF RECOMMENDATION

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Staff recommends adoption of the Ordinance on First Reading.

## **BACKGROUND / DISCUSSION**

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### **Relevant Past Council Discussions**

- Water Adequacy Code Update – July 12, 2023
  - Work Session Summary:  
<https://records.fcgov.com/CityCouncil/DocView.aspx?id=15514959&dbid=0&repo=FortCollins>
- Northeast Fort Collins Planning and Projects Overview - August 31, 2021
  - Work Session Summary:  
<https://records.fcgov.com/CityCouncil/DocView.aspx?id=15319767&dbid=0&repo=FortCollins>
- Montava Development: Overview of Proposed Potable Water Supply Relying on Groundwater - February 9, 2021
  - Work Session Summary:  
<https://records.fcgov.com/CityCouncil/DocView.aspx?id=13049288&dbid=0&repo=FortCollins>
- Approval of Montava PUD Overlay and Master Plan - February 18, 2020
  - Agenda Item Summary:  
<https://records.fcgov.com/CityCouncil/DocView.aspx?id=3487541&dbid=0&repo=FortCollins>
- Northeast Fort Collins Planning and Projects Overview - September 24, 2019
  - Work Session Summary:  
<https://records.fcgov.com/CityCouncil/DocView.aspx?id=3247255&dbid=0&repo=FortCollins>
- Rural Scenario Assessment and reconfirmation of the Mountain Vista subarea framework plan - June 9, 2015.
  - Work Session Summary:  
<https://records.fcgov.com/CityCouncil/DocView.aspx?id=3481555&dbid=0&repo=FortCollins>

### **Background**

Water is a crucial and constrained resource, and the City strives to ensure that development meets the community's vision and expectations for responsible resource management. City Plan includes policies to ensure water is used wisely and our community is prepared for a changing climate. The plan also supports managing water resources in a manner that enhances and protects long-term water quality, supply, and reliability for current and future residents.

The necessity for an updated water adequacy review program stems from the limited supply and high cost of water resources, which have resulted in developers pursuing more creative ways to provide potable and non-potable water to their proposed developments, particularly projects striving to provide affordable housing or the denser development patterns called for in City Plan. One development contemplating a more unique and potentially innovative approach to supplying water is the Montava Planned Unit Development (PUD), which proposes a groundwater-based water supply for both potable and non-potable water service. The developer believes this system will improve the overall resiliency of the water supply for the area while also reducing the cost.

Because the City does not currently have a review process or criteria for “non-standard” water service models, including groundwater systems, new policy and code are needed to confirm that future residents are adequately served and in a manner consistent with City policies. While the Montava PUD project has,

to some degree, generated the immediate need for this type of review, staff believes a comprehensive program could have benefits for reviewing all new developments moving forward, regardless of the water source.

### **Requirement for Water Adequacy Review**

This review process is being proposed to further effectuate a Colorado state statute (Section 29-20-301, et seq., C.R.S.), which states:

*A local government shall not approve an application for a development permit unless it determines in its sole discretion, after considering the application and all of the information provided, that the applicant has satisfactorily demonstrated that the proposed water supply will be adequate. A local government shall make such determination only once during the development permit approval process unless the water demands or supply of the specific project for which the development permit is sought are materially changed. A local government shall have the discretion to determine the stage in the development permit approval process at which such determination is made.*

For this regulation, the Colorado state statute defines some key terms, including the following:

*Adequate means a water supply that will be sufficient for build-out of the proposed development in terms of quality, quantity, dependability, and availability to provide a supply of water for the type of development proposed and may include reasonable conservation measures and water demand management measures to account for hydrologic variability.*

*Water supply entity means a municipality, county, special district, water conservancy district, water conservation district, water authority, or other public or private water supply company that supplies, distributes, or otherwise provides water at retail.*

Currently, development within the City only occurs within the boundaries of existing City (Fort Collins Utilities) and special district potable water supply entities, such as Fort Collins-Loveland Water District and East Larimer County Water District, and the adequacy determination is made through the issuance of a “will serve” letter from the established potable water supply entity. The City receives a will serve letter from the established potable water supply entity during the building permit process for the new development. A will serve letter states that the entity has the infrastructure and capacity to provide water service to the proposed development project and commits to providing that service.

Pursuant to state statute, “will serve” letters meeting certain requirements may satisfy the water adequacy determination for future developments to be served by these established potable water supply entities, but staff will soon be faced with the Montava PUD proposal that is outside the bounds of the current system and needs a more robust and transparent process to evaluate its more complex proposal. It is the responsibility of the City to ensure that future residents are well served by an adequate system.

### **Summary of Proposed Changes**

The proposed Land Use Code changes may be found in Attachment 1, and include an amendment to Article Three, adding Division 3.13, and adding nine new definitions to Article Five, Section 5.1.2 Definitions. A summary of the proposed changes include:

## 1. Article Three, Division 3.13 – Water Adequacy Determinations

The proposed new division is to establish the standards and procedures by which the adequacy of proposed water supplies for development are reviewed and determined pursuant to Section 29-20-301, et seq., C.R.S.

The subsequent sections outline the applicability, application, and procedures and standards for the three different review types:

- Established potable water supply entities, such as Fort Collins-Loveland Water District and East Larimer County Water District.
- Other potable water supply entities, such as new private water suppliers or metro districts.
- Non-potable water supply entities, such as irrigation water supplied by metro districts.

### Established Potable Water Supply Entities

For established potable water supply entities, the code provides options for compliance through review of water supply plans or letters from engineers detailing how the water supply system functions. Once an initial approval is completed, the process would move forward similarly to what the City does now with will serve letters.

### Other Potable Water Supply Entities

A more detailed process is proposed for other potable water supply entities and the City has identified the following characteristics for evaluation criteria:

- Water Quality
- Quantity of Water
- Dependability of Supply and Supplier
  - Supply Resiliency
  - System Redundancy
  - Maintenance and Outages
- Availability of Supply
- Financial Sustainability of Supplier Capitalization

In general, the standards compare the new proposed system to the existing municipal utility.

### Non-potable Water Supply Entities

The criterion for non-potable systems ensures the supply has enough quantity and quality to support the associated uses such as irrigation for landscape.

## 2. Article Five, Division 5.1.2 – Definitions

The proposed change to Division 5.1.2 is to add the following definitions that relate to the water adequacy determination review process and provide additional clarity on specific terms used in that section.

Those terms are:

- Adequate
- Established potable water supply entities
- Non-potable water
- Non-potable water supply
- Other potable water supply entities
- Potable water
- Water adequacy determination
- Water rights portfolio
- Water supply entity
- Water supply system

### **CITY COUNCIL DECISION POINTS**

Based on the feedback received from Planning and Zoning Commission and other stakeholders, staff suggest Council consider the following three decision points. In all cases, staff is recommending no changes to the proposed code.

#### **Decision Point 1 - Section 3.13.3 (A)**

This section outlines the timeline for when the water adequacy determination is made during the development review process.

- For established potable water supply entities, the process would occur at final plan or basic development review but can be deferred to building permit as it occurs now.
- For other potable water supply entities, the process would occur at final plan or basic development review too but could be deferred to development construction permit. If the other potable water supply entity was planning to serve a development with an overall development plan or that is part of a planned unit development overlay, the project could be reviewed in its entirety with the first phase of development, subject to the provisions outlined in Section 3.13.5 (A)(8).
- New non-potable water supply entities would also be reviewed at final plan or basic development review, but could be deferred to development construction permit.

#### **Alternatives**

Move the determination timing for any or all the three entity types to earlier in the development review process such as at the project development plan.

- Move the determination timing for any or all the three entity types to later in the development review process such as at building permit.

#### **Staff Analysis**

Colorado state statute (Section 29-20-301, et seq., C.R.S.) states that a municipality can only make a water adequacy determination once unless the development is materially changed. Staff balanced the desire

from development stakeholders to complete the determination earlier in the development review processes with concerns about duplicated efforts from other regulatory agencies as well as staff desire to make the determination with enough information on the proposed development to make an accurate assessment.

Development projects can evolve and change through the process and by delaying the determination until later in the process, staff believe it can be made with more certainty. This does not mean, however, that staff is encouraging applicants to leave water decisions on development to the end of the process. Staff reminds applicants to work with their water supply entity early, and often, in the development review process and is adding language to conceptual review comment letters to further this point.

### **Decision Point 2 - Section 3.13.4 (A) (1)**

Subsections (a) and (b) both require documents from the established potable water supply entities regarding their water supplies to be provided to City Council for information only.

#### **Alternatives**

- Remove this requirement from both subsections (a) and (b)
- Require a greater level of review for these documents such as a presentation before Council, or another City Board or Commission, during a meeting or work session.

#### **Staff Analysis**

This would be a new, high-level review of supply resource information for established potable water supply entities to provide prior to being able to continue with the typical process of submitting a will serve letter at the time of building permit. This step in the process was included based on feedback received from Council during the July 12, 2022, Water Adequacy work session that Council wanted additional information on the water supplies of existing potable water supply entities.

Feedback from established entities indicated that they do not want Council to approve any documents related to their special district and would prefer to not complete any type of review.

### **Decision Point 3 - Section 3.13.5(C)(5)(c)**

This provision would require that if a new potable water supply entity is proposing to locate within the service area of an established potable supply entity, the new entity must either: (1) be excluded from the boundaries of the established potable supply entity; or (2) get consent from the established supply entity to operate within their service area. There is an exception provided for circumstances where the established potable water supply entity is incapable of providing a reasonable level of service to the proposed development.

#### **Alternatives**

- Remove this requirement from the code.
- Alter the code requirement.

## Staff Analysis

This is the most contentious issue of the proposed code update, and staff do not believe an alternative exists that would resolve all stakeholder concerns. Staff based the proposed language, in part, on the following section of the municipal code:

*Sec. 26-4. - Dual supply of water and wastewater service.*

*If a property located within the City is in an area not supplied with both water and wastewater service from the City but is capable of receiving both water and wastewater service from the one (1) or more duly established quasi-municipal utility service districts, then the City shall not extend or provide either service to the property. The City may, however, extend either or both services to such property if the utility service district becomes incapable of providing a reasonable level of service to the property. Upon the review of the Water Board and the City administration, the City Council may waive any part or all of this Section.*

*(Ord. No. 164, 1986, § 1(112-7), 11-4-86; Ord. No. 117, 1996, § 5, 9-17-96; Ord. No. 28, 1998, § 4, 3-17-98)*

Staff relied on this code language as evidence of a general policy direction the City has historically taken to respect the service areas of other established potable water supply entities. Staff believes this is a reasonable middle ground to respect established potable water supply entities, as well as their investments and planning, and to allow for innovation. There are also existing laws that could require a new potable water supply entity to exclude from the service area of an established potable water supply entity regardless of the inclusion of Section 3.13.5(C)(5)(c), however staff believes that including the code provision provides greater transparency and eliminates confusion.

The code, as proposed, would require the new potable water supply entity to either exclude from the established entities' special district or seek consent from the established entity. There is an existing formal process to exclude property from a special district, roughly comparable to the de-annexation (or disconnection) process and that decision is appealable to the Board of County Commissioners and then District Court.

East Larimer County, Fort Collins Loveland, and West Fort Collins water districts have all expressed support for the inclusion of this code language and significant concern if the code provision is altered or removed.

The team representing the Montava Development has expressed significant opposition to the proposed code language in this section and Section 3.13.6.(A)(5) because they believe it would give an established potable water supply entity more authority than it would otherwise legally have over future development within the city. They have also argued that, if a new potable water supply entity is a private entity (as opposed to a governmental entity), they are not otherwise required to be excluded or get the consent for the established potable water supply entity.

Specific feedback and proposed redline changes from all parties are included in the packet.

## **CITY FINANCIAL IMPACTS**

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A Request for Proposal (RFP) will be issued shortly after the adoption of the Code for an on-call contractor to provide review services for water adequacy determinations of new other potable water supplies and new non-potable water supplies. Prior to the City reviewing any applications for these types of determinations,



the applicant shall agree in writing to reimburse the City for all costs associated with reviewing the application and associated materials, including costs associated with consultants hired to assist the Director's review. No water adequacy determination shall be issued unless and until all such costs have been paid to the City. The fee assessed by the City shall not exceed the cost of the review and administration of the review process.

No new fees are proposed as part of the established water supply entity reviews as those are being done currently and the code language proposes to continue those reviews in a similar manner.

## **BOARD / COMMISSION / COMMITTEE RECOMMENDATION**

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Staff met with the Water Commission on April 20 and the Planning and Zoning Commission on April 14 and April 26 for the public hearing on the proposed code update. During the Planning and Zoning Commission hearing on April 26, the Commission unanimously adopted the recommendation below:

*The Planning and Zoning Commission recommend that City Council NOT ADOPT the proposed water adequacy determination code update in order to allow additional time to consider the impacts of the timing of the determination, and to allow staff to further study section 3.13.5C(5) to fully understand implications for both applicants and supplier, particularly for an applicant's ability to appeal the decision of a district.*

This recommendation could require that more time be allowed between first and second readings. This decision is based upon the agenda materials, the information and materials presented during the work session and the public hearing, and the Commission discussion on this item.

## **PUBLIC OUTREACH**

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This proposed Land Use Code change did not include specific public outreach meetings for the general public, however information on the code update was provided on the website, including an educational video. A press release on the update was also issued.

The specific water adequacy regulations were released to the public in the April 14, 2023, work session packet on April 7, 2023, and emailed directly to all established water supply entities, known stakeholders and interested parties on April 11, 2023. An updated draft was released on April 25, 2023, that incorporated changes based on feedback from the Planning and Zoning Commission work session, Water Commission meeting, stakeholder meetings and public feedback received between April 7 and April 24. This was the draft that the Planning and Zoning Commission recommendation was based on. The attached code draft incorporates further feedback from the aforementioned groups, including specific redlines received.

Staff met with representatives from the following groups to present the draft code updates as well to solicit feedback:

- West Fort Collins Water District
- East Larimer County Water District
- Fort Collins Loveland Water District
- Hartford Homes/Bloom
- HF2M/Montava
- Polestar Gardens/Polestar Village



Staff also received a call from the Sunset Water District expressing they did not have concerns about the update based on their perceived lack of development in their district boundary which they state is entirely in an unincorporated area. Save the Poudre also stated they had no concerns with the proposed update.

In general, the stakeholder feedback included an appreciation to discuss the proposed code and a better understanding of the intent after the meetings. The main point of contentions expressed included:

- Requirement for new potable supply entities to petition out of the boundaries of existing potable water supply entities or seek permission from the existing potable water supply entity. There was both support and concern over this concept.
- The disparity between review criteria for established and new potable water supply entities.
- The perception that the City was trying to regulate special districts through the review of a water supply plan or letter establishing the district's resources.
- A desire for more cooperation and consistency between all water suppliers.
- Concerns about duplicative review processes, especially for non-potable systems.
- Concerns over review costs
- Feedback that some metrics were vague.
- Feedback on the review timing proposed (FDP versus DCP) with a desire to complete the determination sooner.
- Feedback that there is a desire to be able to review new service for an entire development and then true up each phase at the time of final plan or BDR.
- Concerns on tight review timing for code update.

Written comments were received from many of the stakeholders outlined above and are included in the packet. Staff believes many of these concerns were addressed in the attached code draft.

### **Code Update Timing**

As noted above, there were concerns about the limited review time for the update for outside parties. The timeline for the code update review process is being driven by a desire to have the code in place, or nearly in place, prior to a June status conference for a related water court case. The City (along with other parties) previously requested a stay in this case in order to get this process in place. The stay was requested around the same time (May 2022) that the City had an request for proposals (RFP) out to obtain a consultant to complete this code update work. The RFP did not result in the City finding a consultant to complete this work and so the project fell back to staff to complete, which was not anticipated as part of staff's workplan. While staff completed the initial draft for the code update late last summer (after the July work session) into the fall, competing priorities and resource limitations caused the outreach and detailed drafting work to be delayed over the late fall and winter.

Based on feedback from the Judge in the water court case in early March, priorities shifted to complete this work and this was the schedule that made it possible to complete this task in that timeframe. While the timeline was compressed, staff was able to meet with all stakeholders who requested a meeting and discussed the code update with all established water supply entities within the City's GMA.

Staff is also committed to re-evaluating this code, with our stakeholders, as part of the Land Use Code Phase 2 update which will hopefully kick off sometime this fall.

## **ATTACHMENTS**

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1. Ordinance for Consideration
2. Redlined Code Language Comparison
3. Best Practices from Other Jurisdictions
4. Public Comments
5. Planning and Zoning Meeting Minutes, April 26, 2023 (excerpt)
6. Presentation