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June 18, 2024

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RE: Suggestions for Updates to the Fort Collins Appellate Rules & Regulations

Dear Mayor Arndt & Attorney Daggett:

On November 14, 2023, I attended the City's Work Session where possible improvements to the City's appellate process was discussed. Having served as an Assistant City Attorney in Fort Collins, as counsel for private parties attempting to navigate Fort Collins' appellate procedures, and as a law clerk for the Colorado Court of Appeals, I have a unique perspective from which to offer suggestions for improvement of the City's appellate process. Fort Collins' mission of "exceptional service for an exceptional community" and values of partnership and integrity should be the guiding pole stars for any code revisions. Unfortunately, because Fort Collins' current appellate procedures are convoluted, extraordinarily expensive to the taxpayers and readily susceptible to abuse, the current appellate code drafting does not support Fort Collins' mission or values.

As the Work Session demonstrated, the majority of appeals brought before City Council arise from land use entitlement approvals/denials and Historic Preservation Commission decisions. As such, I will focus my suggestions for appellate procedure improvement in these two areas. Specifically, I suggest City Council improve the fundamental fairness of its appellate procedures by reviewing its code drafting related to: 1) Standing; 2) the Form of the Appellate Review; 3) the Duplicative Avenues of Appeal; 4) Financial Impacts on Private Land Owners of Involuntary Landmark Designations; and 5) Reframing Overarching Policy Considerations of Appellate Review.

**1) Standing.**

Standing determines who can bring an appeal.

A. Relevant Fort Collins Municipal Code (the "Code") and the Land Use Code (the "LUC") provisions.

- Code Section 2-46 and LUC Section 5.1. "Party-in-interest" shall mean a person who or organization that has standing to appeal the final decision of a board, commission or other decision maker. Such standing to appeal shall be limited to the following:
  - The applicant;
  - Any party holding an ownership or possessory interest in the real or personal property that was the subject of the decision of the board, commission or other decision maker whose action is to be appealed;
  - Any person to whom or organization to which the City mailed notice of the hearing of the board, commission or other decision maker;
  - **Any person who or organization that provided written comments** to the appropriate City staff for delivery to the board, commission or other decision maker prior to or at the hearing on the matter which is to be appealed;
  - **Any person who or organization that appeared before the board, commission or other decision maker at the hearing on the action which is to be appealed**;
  - The City Council as represented by the request of a single member of the City Council.
- Code Article III: Landmark Designation Procedure:
  - Section 14-23(b). Appeal of determination. Any determination made by staff regarding eligibility may be appealed to the Commission by the applicant, **any resident of the City**, or owner of property in the City.
  - Section 14-31 – Initiation of designation procedure which is inextricably linked with who can ultimately appeal these decisions.
    - (a) The Fort Collins landmark or Fort Collins landmark district designation process may be initiated at the written request of any Councilmember, by motion of the

Commission, upon application of the owner(s) of the resource(s) to be designated, or **of any three (3) or more residents of the City**.

B. Policy Considerations. Standing and Fairness. Council should begin this analysis by considering if it is "fair" for any person to participate in a land use entitlement appellate process or move to landmark a private property? Current Code drafting would answer this question in the affirmative, and the policy benefits of this position are described below. But has Council considered the unintended consequences of the current drafting? These are also discussed below.

- Benefits of Current Drafting.
    - As the Code and the LUC are currently written, any person can be heard on any issue.
    - By allowing any resident who provided minimal input on a matter the right to appeal that decision, City Council has ensured that the minimum effort by a citizen has maximum impact upon shaping the City's future.
    - This position provides political cover for Councilmembers during election season.
    - Allows a vocal contingent (whether representative of the majority or minority opinion) to shape City policy and decisions without otherwise having to engage in City policy development.[1]
    - Allows any resident to seek to have any building in Fort Collins landmarked and preserved according to the Secretary of the Interior Standards. Thereby relieving the City of any duty to provide funding to proactively survey buildings that could be landmarked.
- Consequences of Current Drafting.
    - Chaotic, expensive and unpredictable results. While at first blush it sounds democratic to state that anyone can have a say in Fort Collins' appellate process for land use entitlements and landmarking historic sites, there are consequences to this policy. Without parameters around standing, Fort Collins essentially allows a person not directly impacted by an issue (by proximity, financially or legally) to interfere with fundamental

[1] Such was the case in the drafting of the previously repealed Land Use Code. Residents who did not contribute or engage in the City's extensive outreach process summarily demanded the repeal of the LUC at the eleventh hour costing the City thousands in Staff time and consultant fees. The City's current appellate process encourages the same form of resident engagement.

property rights and fundamental liberties of another. In other words, it elevates one person's opinion to the same level as another's rights.

- The Colorado Supreme Court has long held that "standing" to bring suit, or to be made part of a suit, is a threshold issue that must be satisfied before a court may decide a case on the merits.[2] To establish standing under Colorado law, the courts employ a two-part test requiring that: 1) the person bringing the suit suffered an "injury in fact" and 2) that the injury was to a legally protected interest as contemplated by statutory (or in this case Municipal Code) provisions.[3]

  - Injury in fact is established by alleging "physical damage or economic harm, or intangible harm such as the deprivation of civil liberties." [4] However, an injury that is overly indirect and incidental will not convey standing.[5]

- In the United States courts, a person must show that they have (or will) suffer real and remediable harm as a result of someone else's conduct in order to have "standing" to come before a court and be heard on a matter.

  - Example. In a property dispute between Neighbor A and Neighbor B over a fence line, either A or B could bring their case before a court.

    - However, person C, who lives two miles away and has strong opinions on the parties' dispute but is not impacted financially or legally by it, could not bring a suit.

    - Under the current Fort Collins appeals process, persons C-Z could bring a suit against the Neighbors A or B even if they lived three states over and were only interested in being part of the suit to harass Neighbor A.

- Such a broad interpretation of "standing" brings into question the fairness and integrity of the current Fort Collins process. As a consequence of this "free-for-all" approach to standing, the voices of those directly impacted by the appeal become diluted, the issues at hand confused, and the impacted parties' positions' are not given sufficient time for consideration or weight. The process also becomes extremely expensive for both the City and the primary parties which is a fiscally irresponsible use of taxpayer money, and

[2] *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008); *citing Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004).
[3] *Barber*, 196, P.3d at 245.
[4] *Id*.
[5] *Id*. at 245-46.

disproportionately fiscally impacts proponents of development projects and property owners challenging designation or decisions regarding landmarked properties.

C. Suggested Standing Modification. Consider objectively limiting standing.

- For land use matters, this would mean limiting standing to the applicant, anyone holding an ownership or possessory interest in the land, and those receiving mailed notice from the City due to proximity to the project.

- For Historic Preservation matters consider limiting landmark designation of private homes to the owners of the residences. Consider limiting landmark designation of commercial or non-residential buildings to a motion brought by a two-thirds majority of the Historic Preservation Commission or the property owners.

D. In further considering standing, Council should consider the weight given to each "party-in-interests'" position.

- Is it fair for everyone's position to be considered as equally weighted?

- Should motive be considered?

- Should people's positions that do not align with the City's core values (partnership, service, safety and wellbeing, sustainability, integrity and belonging) be weighted as heavily as those that are in alignment?

- Proposed Modification.

  - Greater weight should be given to the property owners' wishes and those directly physically and financially impacted by the decision affecting the property than to people tangentially impacted by a project.

  - Motive or bias should also influence the weight given to a party's position and credibility.

  - Parties whose positions align with the City's core values should be provided greater weight.

2) Form of the Appellate Review.

In reviewing the efficiency and efficacy of the Fort Collins' appellate procedure, Council is urged to consider the "form" of appeal. Traditionally, in appellate courts, the parties are not afforded an

entirely new hearing. Rather, the court reviews the underlying record and hears limited argument from those with standing. The idea being that the trial courts are in the best position to weigh the evidence and assess the credibility of witnesses (the "facts"), and the appellate courts are present to ensure the law was correctly applied to the facts. To allow for repeated hearings does not necessarily get a reviewing court closer to the truth, it just adds to the expense and locks the parties in extended conflict. It has often been said that to avoid these consequences, the appellate court will not sit as the "thirteenth juror" of a district court case.

A. True Appeal. (Review of the record – no new Hearing).

- A true appeal would mean that a reviewing body would look solely to the record before it and allow a limited time for each side to make argument regarding the application of the facts to the law in writing. No new hearing would be held. Instead, a written decision from the reviewing body would be issued and serve as the final decision in the case. A majority of the reviewing body would need to agree on the outcome and the minority could still express their "dissent" in writing. This approach significantly limits the cost and time spent on appeals, and ultimately streamlines the review process.

- This would look like a full hearing before the Administrative Hearing Officer for Type 1 Reviews and an appellate review by Planning Commission. Or a full hearing before the Planning Commission for Type 2 reviews and an appellate review by City Council.

B. Full Rehearing. (Full New Hearing).

- Council could continue to require full hearings on appellate matters. In doing so, Council may consider the cost to staff and appellants in terms of time and money to see a matter have full hearings before as many as two reviewing boards.

- From a land use/entitlement perspective and a historic preservation perspective, the cost to the private parties to prepare multiple hearings, and delay financing projects can be catastrophic. For those development projects that include affordable housing, such delay certainly increases the housing cost to the end user and in many circumstances often becomes the death knell as "time kills all deals."

- Council was wise to ask Staff to determine the exact cost in Staff time to prepare for multiple levels of appeal. It would behoove City Council to understand the cost to the private parties involved also to engage in multiple hearings.

C. Proposed Modification. Hybrid Approach. (Review of the record and a brief oral/written presentation from the Parties).

- If Council is not comfortable with a fully paper review of the record, then a "hybrid" approach may be the solution. In this model, there is no new hearing of the evidence.

- Instead, the parties with standing summarize the relevant parts of the record and file a written statement with the reviewing body ("Planning Commission (P&Z) or City Council"). Then, the matter is set on a public meeting agenda and the Parties are allowed to make limited oral presentations to the reviewing body.

- The reviewing body then discusses and votes publicly on the matter and issues a written decision with the guidance of the City Attorney's Office based on the record and the oral argument.

3) Multiple Avenues for Appeals of Land Use Projects due to Poor Code Drafting.

Another major area of concern is that the City's Code and LUC provide for multiple avenues of appeal for the same matter.

A. Policy Considerations. Is it the intent of City Council that the same issue be subject to appeal multiple times?

- Did Council intend for issues to take years and thousands of dollars to resolve? There are significant costs in a direct appeal, but also indirect costs (carrying costs of financing the project) that can become fatal to the project.

- Has Council considered the unintended negative consequences on affordable housing that its lengthy appellate procedure has for land use approvals? How does this align with the City's policy of allowing for expedited review of affordable housing projects?

- Does a lengthy appellate process align with the City's Comprehensive Plan and Housing Strategic Plan? Appeals related to housing projects risk financially ruining projects (as mentioned above) and ensure significant delays in access to housing.

- Specifically, how does allowing for multiple rounds of appeal on each phase of a Planned Unit Development ("PUD") meet/achieve affordable and attainable housing objectives?

B. Proposed Modification.

- Consider eliminating the multiple forms of appeal for land use projects, especially those previously approved through the PUD process. As currently written, those phases that are approved administratively through the Basic Development Review process can be appealed to the Planning Commission for a full hearing, appealed to City Council for a full hearing, and appealed to District court three different times on a Rule 106(a)(4) appeal.
    - Thus, for a PUD (which has already gone through Staff, Planning Commission, City Council and been subject to a Rule 106(a)(4) review) that has five phases, it could be appealed **twenty-five (25)** more times under the current LUC and Code drafting.
    - See PUD Phasing Flow Chart that demonstrates what each Phase of a PUD under Basic Development Review is subject to in terms of appeals.
- Consider eliminating duplicative triggering events for Rule 106(a)(4) appeals. Currently, the LUC allows for a party to appeal the Director's approval of a BDR three times. (After exhaustion of administrative remedies, after recording of the PUD documents, and after publication in the newspaper).
- Consider making P&Z the final administrative body to hear land use appeals that do not include initial PUD approvals. Thus, phasing approvals under a PUD that has been previously approved by City Council could only be appealed to P&Z.
    - In doing so, these matters could proceed directly to District Court on a Rule 106(a)(4) after P&Z has rendered a decision and eliminate months of cost and delay.

4) Consideration of the Housing Strategic Plan and Financial Impacts to Private Residents of Landmark Designation.

Currently, the Historic Preservation portions of the Code do not explicitly require the Historic Preservation Commission to weigh the costs of compliance with the Secretary of Interior Standards against the City's Strategic Housing Plan objectives or the imposition of financial burden on private property owners. This leads to the absurd result of a quasi-judicial body of the City's government failing to even consider overarching housing policy or fundamental property rights in the vacuum of landmark designation decisions.

- Proposed Modification.

- The Historic Preservation Commission should be charged with considering the objectives of the City's Strategic Housing Plan and support for affordable and attainable housing when deciding if involuntary landmark designations are appropriate.

- At this time, there is no requirement that the Historic Preservation Commission weigh the cost to the individual property owners of landmarked or landmark eligible properties into their decision-making procedure. This should be changed. The private property owners should be allowed to put forth evidence regarding why the cost or the landmark designation outweighs the benefits in their particular case.

    - Failure to consider this critical information leads to the absurd results of private property being landmarked over the objection of private property owners regardless of the financial implications to the private property owner and thereby prioritizing the Secretary of Interior's Historic Standards over private property rights and housing affordability considerations.

5) Overarching Policy Considerations: Are all residents being treated equally and fairly in the appellate process?

Finally, I will end with a request that City Council review and consider the following policy considerations when considering appropriate appellate code updates.

A. Are all residents being treated fairly in the appellate process or are there inherent biases that favor one-side over the other?

- Proposed Recommendations for updated Code drafting:

    - Motive and bias must be considered when weighing the positions of respective parties.

    - Impact of the decision (cost and on fundamental rights) must also be weighed proportionately. This is especially important for matters involving the involuntary landmark designation of private residences.

B. Are legitimate concerns being resolved during appellate procedures?

- Could the average citizen read the City Codes and understand what a hearing would entail? Could the average citizen read the City Codes and understand how many appeals are involved with a particular issue? (Please refer to flowchart diagram).

    - Proposed Recommendations for updated Code Drafting:

- Consider having one or two clearly defined processes for appeals rather than multiple cross-references throughout the Code and LUC that piecemeal a process that ultimately leads to conflicting results.

- Consider having the appellate process diagramed in flow-chart form within the Code to provide for clearer understanding of the procedural steps.

C. Is the appellate process being used as a platform by a minority of residents to undermine the Planning & Zoning Commission, City Council and the rights of private property owners?

  - Is the manner in which the apportionment of cost for appellants contributing to this unbalanced system?

    - Proposed Recommendations:

      - As Council directed Staff in November, collect data on the actual cost, Staff and City Attorney time spent preparing for appeals.

      - Survey private parties who have had to utilize the City's appellate process in the last five years to ascertain private citizen costs for appeals.

      - Make appropriate comparisons. Take into consideration Council's duty as stewards of public funds and weigh the total cost of appeals against the benefit to the residents who bring appeals but who have tenuous standing.

Conclusion.

Refining and streamlining the appellate process should not be viewed as curtailing public input into local government proceedings. Instead, a broader review of policy considerations must be undertaken to ensure that any updated code drafting serves to meet the City's mission and values. Clarifying the appellate process provides greater access to those availing themselves of appellate procedures, refining standing ensures that those most impacted by the appeal have their voice heard and their position appropriately weighted, and considerations of financial impacts of appeals and landmark designations are part of Council's duty as fiduciaries of public funds.

**SENT VIA REGULAR MAIL AND EMAIL**



Thank you for your time and attention to this matter,

Claire N.L. Havelda

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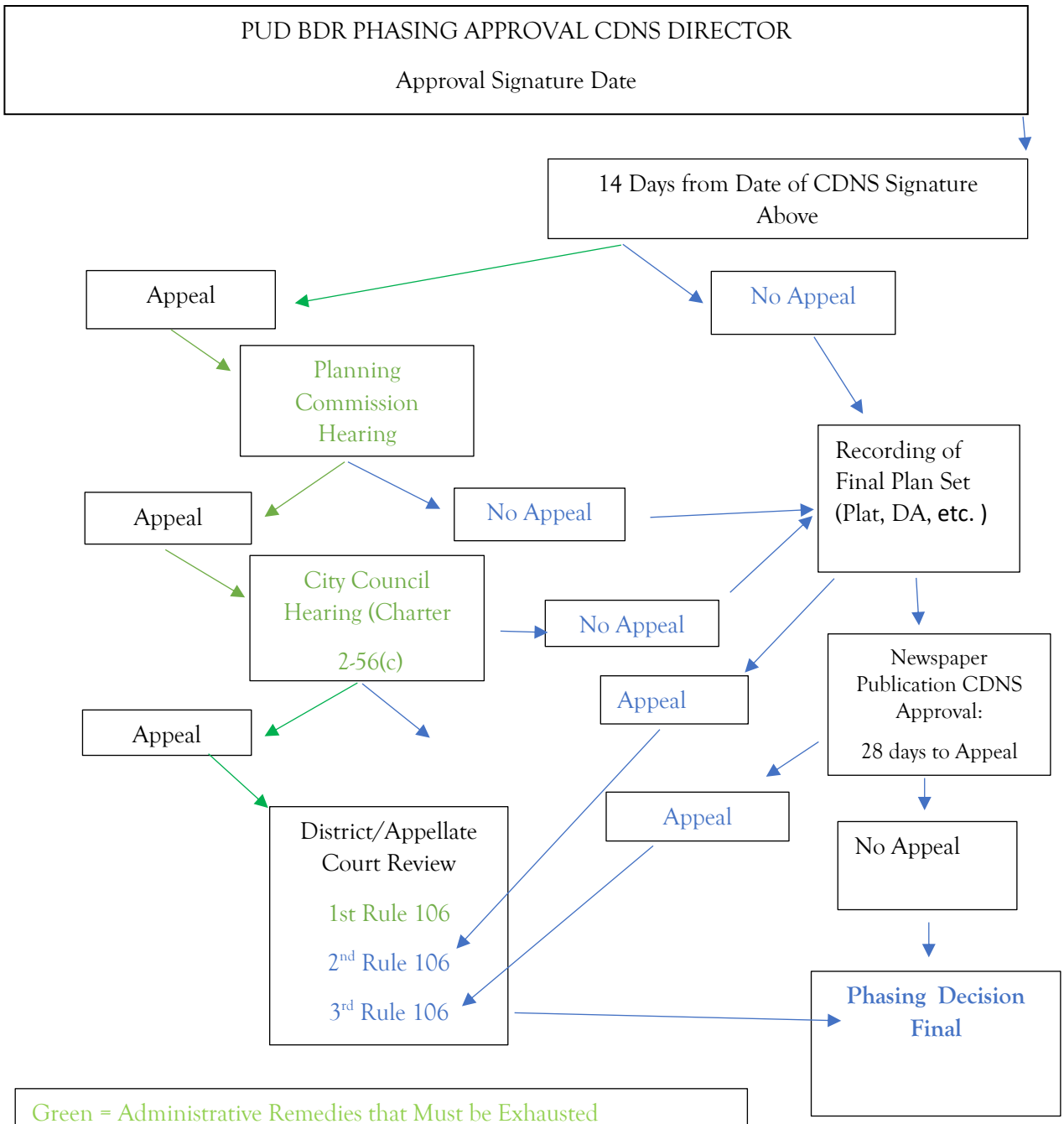
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