

**Applicant Appeal Presentation
Materials
Subject to Review for New
Evidence and Council
Acceptance**



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January 26, 2024

To: Fort Collins City Council

RE: Response to Appeal of PDP220010.

Dear City Councilors,

On behalf of the applicant to PDP220010, Polestar Gardens, Inc. (“Applicant” or “Polestar”), we respectfully submit this response to the appeal of the Planning & Zoning Commission’s approval of the Project Development Plan.

Introduction

Appeals Procedure

Generally, the Notice of Appeal was timely filed but did not include any “specific allegations of error and a summary of facts contained in the record on appeal to support those allegations” as required by Fort Collins Municipal Code sec. 2-49(b)(4). The Appellants then timely submitted their new evidence regarding the fair hearing allegations (“New Evidence”), which contained (1) arguments in support of the Appeal (pp.2-7); (2) citations to existing evidence in the record (pp. 2-7); and (3) some actual new evidence (pp. 8-14). While the Appellants did not timely submit their specific allegations of error or summary of facts, Polestar addresses them here.

City Council Role

The City Council’s role in deciding this Appeal is to uphold, overturn, or modify the decision of the Planning and Zoning Commission (“PZC”). Sec. 2-56(b). If the City Council finds that the Appellants were denied a fair hearing, it shall remand the matter to the PZC. Sec. 2-56(b)(1).

Unless the City Council determines that the PZC misinterpreted the Land Use Code or misapplied its provisions, the **City Council must uphold the PZC decision**. The Appeal is not an opportunity for the Appellants to “re-do” the PZC hearing. The City Council does not have the benefit of being present for the presentation of all evidence, nor to ask questions of the applicant, staff, or neighbors, nor to judge the credibility (including expertise) of those providing evidence and public comment to the PZC. **In the absence of a clear misinterpretation or misapplication of the Land Use Code, the City Council should defer to the PZC.**

Polestar responds to the Notice of Appeal, in the order presented by the Appellants, as follows:

Grounds for Appeal #1: “Failure to properly interpret and apply relevant provisions of the City Code, the Land Use Code, and Charter.”

Appellants’ Notice of Appeal cites to multiple sections of the Land Use Code but does not offer any argument nor reference any evidence in the record regarding how the PZC failed to properly interpret and apply those provisions. Appellants’ New Evidence does not address this Ground for Appeal whatsoever.

Polestar therefore objects to the City’s Council’s consideration of this Ground for Appeal, as it has not been given notice of the basis for this appeal. Polestar should not be required to guess what the Appellants’ concerns or arguments might have been.

Grounds for Appeal #2: “The Board, Commission or other Decision Maker considered evidence relevant to its findings which was substantially false or grossly misleading.”

Appellants argue that the PZC considered substantially false or grossly misleading evidence because: (1) “Polestar used persuasive language during the hearing and presented misleading information as well as non-confirmable statements”; and (2) “Hearing attendees and council members also did not get to hear all the details of the proposal.”

In the context of a criminal prosecution, the ultimate question in determining whether a statement is “grossly misleading” is whether the jury is able to fairly judge the evidence. *U.S. v. Gregory*, 84 F.4th 1183 (10th Cir. 2022). ***Appellants do not identify any evidence submitted to the PZC which was “substantially false” or “grossly misleading.”***

1. *“Polestar leaned on traffic data that was collected to argue that the traffic increase would be lower than the threshold set by the city.”*

Appellants argue that the traffic study wasn’t sufficient: “The Traffic study misled council members when, in fact, it was not conducted in a thorough manner”. This is not evidence that the traffic study was “substantially false” or “grossly misleading”. Rather, it is a disagreement with the applicant, City engineering staff, and the PCZ, about whether the traffic study was sufficient. The City Council cannot overturn the PZC even if they agree with the Appellants. The City Council does not have the benefit of the entire record, entire public hearing, and must defer to the PZC unless it finds that the traffic study was “substantially false” or “grossly misleading”. The Appellants have not submitted **any** evidence of that. The Appellants have not retained a traffic engineer to review the traffic data. They simply point out that some of the streets (Orchard and Plum) were not included in the traffic study. Note that the traffic study was conducted as directed by the City engineering staff. [*Transcript, p. 27, ln. 13-21*].

Further, as described in the attached **Traffic Summary Exhibit**, including Orchard and Plum in the traffic study would actually have made it easier for Polestar to demonstrate that the City’s existing traffic network was sufficient to accommodate the development, because some traffic would be presumed to use those streets, thereby lessening the amount of traffic on the major corridors. The City’s engineering staff required Polestar to exclude Orchard and Plum from the traffic study in order to set a higher standard, which Polestar agreed to follow.

Not only should the City Council defer to the PZC in this matter, the PCZ agreed with City staff – which got it right.

2. *“Polestar claimed throughout their presentation that they have been working closely with the Rogers Park community in planning their development.”*

The Applicant’s statement that the Appellants quote is: “We obviously had our neighborhood meeting. We also had a separate meeting with some of the affected property owners as it relates to transportation and added traffic volume generated by this development.”

But the Appellants only offer argument that “most neighbors were not made aware of the information session held last year by Polestar.” That does not contradict the Applicant’s statement, and the Appellants have offered nothing to support that the actual statement was “substantially false” or “grossly misleading”. Even presuming that the Appellants’ statement is true (that “most neighbors were not made aware of the information session held last year by Polestar”), Polestar’s statement to the PZC was fully accurate.

3. *“Polestar presented itself to the board as a warm, welcoming “intentional community” that aims to seamlessly integrate with the existing Rogers Park community.”*

The Appellants state that: “This is misleading as on their website they also position themselves as an investment opportunity which was not mentioned once during their pitch at the hearing.”

This does not demonstrate that any evidence submitted to the PZC was “substantially false” or “grossly misleading.” This is irrelevant, and has no bearing on the PZC decision.

Even so, we will respond because it is taken out of context. The investment opportunity is truly a model that will increase housing affordability, and so it is fully supported by the City’s plan. It allows residents to own an undivided piece of the whole community, rather than individual condominium units. Importantly, this will allow some residents to have an ownership interest even if they can’t afford to purchase a full condominium. The value of their equity in their home grows, even if they only own a small portion of it. It is a middle ground between renting and 100% home ownership, which is very elusive in Fort Collins right now. So other investors that can afford to purchase the difference (whom we expect will also be residents) will also buy in. It’s a fantastic homeownership model that afford opportunities to those that could not otherwise do so.

4. *“Key details around the development were missed or quickly passed over which resulted in grossly misleading the council and attendees on what the development will entail.”*

Due to the length of the presentation, the PZC directed Polestar to hurry up to complete the presentation, as described by the Appellants. While Appellants claim that “key details were missed or quickly passed over”, the record submitted to the PZC contained the details of the development’s architecture. See pp.7-8, 14-15, and Attachment 5 of the Development Review Staff Report, Planning & Zoning Commission Hearing: November 16, 2023 (the “Staff Report”).

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It's also important to recognize that the PZC approved the Project Development Plan (PDP), not the Final Development Plan (FDP), which will be approved by staff. Staff will ensure that building heights and total bed and breakfast units will actually meet the Land Use Code at the time that they review the FDP for this development, among all other requirements.

The Appellants make conclusory statements about missing details, but do not indicate how any of it is "substantially false" or "grossly misleading."

5. *"During the hearing a big sticking point for the council and residents was extending Orchard Place to Overland Trail."*

Appellants argue that there was some confusion about whether Orchard Place will be extended west to the western property boundary of this development (which is accurate), or further west all the way to Overland Trail. But the Appellants' own statements (citing to Ken Merritt (04:01:37) and Clark Mapes (04:47:13)) clearly show that Orchard Place will not be extended to Overland Trail with this development. City Planner Clark Mapes clearly addressed this.

The Appellants end this argument by concluding that "a connection to a major street is needed," but offer no evidence in support.

6. *"Fatigue due to the timing of the hearing."*

The Appellants infer that the PZC members were too tired to provide a fair hearing due to the lateness of the hearing, but provide no evidence that the members could not make a fair decision. The City Council itself routinely has late public hearings, and without something more to show that the PZC failed in some respect, the fact that they demonstrated fatigue is insufficient by itself to provide a fair hearing.

7. *"It was misleading to create the illusion of support for this development in the Rogers Park neighborhood when those expressing support do not reside in said neighborhood."*

Finally, the Appellants argue that Rogers Park residents do not support the development. In support, they cite to a statement made by PZC member Ted Shepard: "what did surprise me is the overwhelming support of this project." Ted Shepard's comment was not specific to the Rogers Park residents, but rather was reflective of the overall support for this project. The Land Use Code allows anyone to provide public comment on a land use application, not just neighbors. While neighbors may have concerns about a development's impact to the neighborhood which is not impactful to the City as a whole, the City has an interest in development that conforms with the City Plan and the Land Use Code. Ted Shepard was a planner with the City of Fort Collins for over three decades. He most certainly has seen people come out in force to oppose developments, and in this case, there were only seven such persons (according to the Appellants' own "Actual Source of Support" table). Finally, the Appellants do not claim that any particular evidence (or lack thereof) was "substantially false" or "grossly misleading."

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Polestar objects to the admission of any of the New Evidence provided in pages 8-12 of the Appellants' submission. Each email states that either they were not able to attend the PZC hearing, were not aware of it, or had to leave early. The Appellants do not state that Polestar failed in any way to meet the notice requirements of the Land Use Code. In fact, Appellants did meet all such requirements. See Land Use Code, Sec. 6.6.12(D); and p. 4 of the Staff Report.

Grounds for Appeal #3: “The Board, Commission or other Decision Maker was biased against the appellant by reason of a conflict of interest or other close business, personal or social relationship that interfered with the Decision Makers’ independence of judgment.”

The PZC members deserve significant positive recognition for their service to the City. Declaring that any one of them failed to meet their ethical obligation to recuse themselves due to a conflict of interest is rightfully a serious allegation. Luckily, there were no conflict interests in this instance.

Appellants incorrectly conclude that “Two board members shared they had a conflict of interest.” However, neither PZC member Ted Shepard nor York had any conflict of interest. Rather, each of them disclosed being acquainted with the previous owners of the property. Neither said they would have any pecuniary interest in the project, nor that they would be biased. Each of them stated that they did not believe it would affect their impartiality. By disclosing the prior contact with the former owners, each was demonstrating a higher ethical standard than is required by law. In the event that neither of them had made such disclosures, it still would be no violation.

Further, Appellants admit that Ted Shepard “remained seemingly unbiased.” Appellants’ only support for York’s purported bias was a “rude” comment, and another comment in which York’s statement “disregarded” the stop signs and speed bumps on Ponderosa.

These statements fall very far below any potential requirement to recuse themselves from considering Polestar’s application. Additionally, the decision was supported unanimously by five members of the PZC, so recusal (however unnecessary in this instance) would have no effect on the decision.

Conclusion

The City Council must uphold the decision of the Planning & Zoning Commission. The Appellants have failed to provide any argument or evidence that the PZC failed to properly interpret and apply relevant provisions of the Land Use Code. None of the evidence considered by the PZC was “grossly misleading” or “substantially false.” None of the PZC members were biased or had any other conflict of interest.

We respectfully request that the City Council uphold the decision of the Planning & Zoning Commission.

MEMORANDUM

To: Polestar Gardens, Inc. C/O Michael Gornik

From: Eli Farney, PE, PTOE

Date: January 15, 2024

Subject: Polestar Mixed-Use Development TIS – Analysis Clarification

This memorandum provides clarification on how the Polestar Mixed-Use Development Transportation Impact Study was prepared.

The City of Fort Collins standards require that a consultant scope a transportation impact study (TIS) with the City. JR Engineering met with the City on April 18, 2022, to scope the TIS. The City gave directions on the following: type of study; study area boundaries (includes streets to analyze); study years; traffic growth rate; study intersections; time period for study; trip generation rates; and overall trip distribution. These assumptions were documented in a TIS Base Assumptions form, and the City signed the form on April 25, 2022.

The TIS was organized into the following sections: introduction; traffic volumes and distribution; traffic operations analysis; pedestrian, bicycle, and transit analysis; and conclusion. This study layout followed City standards.

Specifically, site-generated traffic volumes were estimated using *ITE Trip Generation Manual*. Site-generated traffic was then distributed onto the existing street system according to the percentages shown in Figure 3 of the TIS. The traffic was oriented as follows:

- 50% to the north towards Mulberry Street
- 50% to the south towards Elizabeth Street

A 50/50 distribution is typically done in a TIS, so one street is not favored over another. It should be noted that Elizabeth Street does not provide regional connectivity. Elizabeth Street ends approximately 1.7 miles to the east at Colorado State University and Shields Street. This reinforces the estimate of 50% of the site-generated traffic being oriented to the north towards Mulberry Street.

JR estimated average daily traffic (ADT) volumes on local streets near the project site. The TIS included the following future ADT volumes:

<input type="checkbox"/> 7200 South Alton Way Suite C400 Centennial, CO 80112 303-740-9393 • Fax 303-921-7320	<input type="checkbox"/> 25188 Genesee Trail Road Suite 110 Golden, CO 80401 303-740-9393 • Fax 303-921-7320	<input type="checkbox"/> 5475 Tech Center Drive Suite 235 Colorado Springs, CO 80919 719-593-2593 • Fax 303-921-7320	<input type="checkbox"/> 2900 South College Avenue Suite 3D Fort Collins, CO 80525 970-491-9888 • Fax 303-921-7320
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- Kimball Road: 1,100 vehicles/day
- Locust Grove Drive: 790 vehicles/day
- Louise Lane: 840 vehicles/day

The ADT volumes are within the threshold of 2,500 vehicles per day for local streets, which is consistent with municipalities in northern Colorado. Steve Gilchrist with the City stated, "The City of Fort Collins does not have definitive thresholds for traffic volumes in LCASS like Loveland. There are definitions in the Land Use Code for anticipated traffic volumes based on street type, but there is no standard that would restrict traffic if it exceeded a threshold."

In summary, the TIS was conducted as directed by the City engineering staff. Please contact me at 303-267-6183 or efarney@jrengineering.com if you have any questions.