

# WORK SESSION AGENDA ITEM SUMMARY

City Council



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## SUBJECT FOR DISCUSSION

**Water Adequacy Determination Regulations.**

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## EXECUTIVE SUMMARY

The purpose of this item is to discuss a draft Ordinance to amend the Fort Collins Land Use Code to include regulations for water adequacy determinations for new development and redevelopment. The draft 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 (C.R.S. Section 29-20-301, et seq.) 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.

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## GENERAL DIRECTION SOUGHT AND SPECIFIC QUESTIONS TO BE ANSWERED

1. Is the determination being made at the optimal time during the development review process?
2. Would Council like a high level review of the water resources of established potable water suppliers prior to allowing them to continue submitting will serve letters to determine adequacy?

3. Would Council like to require new, other privately-owned potable water supply entities to exclude or gain consent from an established potable water supplier, if the new entity is proposing to operate within their service area?

## **BACKGROUND / DISCUSSION**

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### Relevant Past Council Discussions

- Water Adequacy Code Update – July 12, 2022
  - 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 (which includes both new development and re-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, in part, 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 privately-owned 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 formalized 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 pending and future 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 (C.R.S. Section 29-20-301, et seq.), 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 time 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 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 and other pending non-potable water supply proposals that are outside the bounds of the current system and need 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.

### **Public Outreach**

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 draft 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 potable 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, 2023, and April 24, 2023. 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 about 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 points of contentions expressed included:

- Requirement for new, other privately-owned potable water 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.

### **Planning Commission Recommendation**

Staff met with the Water Commission on April 20, 2023, and the Planning and Zoning Commission on April 14, 2023, and April 26, 2023, for the public hearing on the proposed code update. During the Planning and

Zoning Commission hearing on April 26, 2023, 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 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.

Staff believes the concern about the timing of the determination could be alleviated with a better understanding of how the development review process already incorporates feedback from established potable water supply entities early on in the review process. Referrals are sent to entities for review and comment when applications are received within their service areas. This gives both the applicant and the established potable water supply entities ample opportunity to work together to address the water resources needed for the project so that once it becomes time for the City to make a determination, there should be confidence with both parties in gaining approval. Staff is also adding language to conceptual review letters reminding potential applicants to work with their water suppliers early on in the process.

As for the concerns about Section 3.13 5(C)(5) concerning the requirement for new, other privately-owned potable water supply entities to petition out of the boundaries of existing potable water supply entities or seek permission from the existing potable water supply entity, Staff was able to confirm that there is indeed an appeal process, if an established potable water supplier were to deny an applicant's petition to exclude from their service area. The decision is appealable to the Board of County Commissioners and then that decision is further appealable to District Court. Staff believes this clarification is what the Planning and Zoning Commission requested.

### **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 has been driven by a desire to have the code in place, or nearly in place, prior to or shortly after a June status conference for a related water court case. The City (along with other parties) previously requested a stay in this case to get this process in place. The stay was requested around the same time (May 2022) that the City had a 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 2023, 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 were able to meet with all stakeholders who requested a meeting and discussed the code update with all established potable 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.

### **Summary of Proposed Changes**

The proposed Land Use Code changes are attached 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 C.R.S. Section 29-20-301, et seq.

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 privately-owned water supplies or metro districts.
- Non-potable water supply entities, such as irrigation water supplied by ditch companies and managed 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): Timing of Water Adequacy Determination**

This section outlines the timeline for when the water adequacy determination is made and aligns it with a milestone 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.
  - Pros: Provide assurance that water supply issues are being addressed earlier in the development review process so that unrealistic projects don't waste resources.
  - Cons: Projects can change, potentially significantly, as they go through the development process and those impacts could change the amount of water the development ultimately needs to be successful. For example, a commercial space could change from a retail store to a restaurant or brew pub, all having different water supply requirements.

- Move the determination timing for any or all the three entity types to later in the development review process such as at building permit.
  - Pros: Gives Staff the most accurate and detailed information on the water supply requirements to make the determination.
  - Cons: Allows projects with unrealistic water supply proposals to move through the development review process to the point of having created detailed construction drawings and incurred those design expenses.

## **Staff Analysis**

Colorado state statute (C.R.S. Section 29-20-301, et seq.) 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): City Council Information Only Review of Established Potable Water Supply Entity Water Supply Resource Information**

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

## **Alternatives**

- Remove this requirement from both subsections (a) and (b).
  - Pros: Allows established potable water supply entities to continue submitting will serve letters, as they have previously done with minimal changes to the current process.
  - Cons: There is a missed opportunity for education for both parties on how these established potable water supply entities provide services within the City and how these services impact the community.
- 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.
  - Pros: Allows for greater dialogue and understanding on how water resources are provided to all parts of the Fort Collins community.
  - Cons: Established potable water supply entities would likely feel that this infringes on their quasi-governmental entity's rights to serve their established purpose and could create a misunderstanding that the City has some oversight over the districts, when the City does not.

## **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 existing 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, work session that Council wanted additional information on the water supplies of established potable waters supply entities.



Feedback from established potable water supply 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): Require New Potable Water Supply Entities Within the Service Area of an Established Potable Water Supply Entity to Be Excluded from the Service Area or Receive Consent to Operate**

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 (such as service areas of Fort Collins Utilities' or the East Larimer County of Fort Collins-Loveland water districts), the new entity must either: 1) be excluded from the boundaries of the established potable supply entity; or 2) get consent from the established potable 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. Under state law, this exclusion / consent requirement effectively already applies to new potable water supply entities that are publicly-owned (like metro districts, special districts, and municipalities). This proposed provision in the Land Use Code would expressly extend this requirement to new potable water supply entities that are privately-owned (like by corporations or limited liability companies).

**Alternatives**

- Remove this requirement from the proposed code.
  - Pros:
    - Removes the City from the middle of the issue of whether privately-owned potable water supply entities should or must also be excluded / get consent from established potable water supply entities.
    - Potentially allows new, privately-owned water supply entities to innovate, provide cheaper water supply alternatives, and supply water in a manner that makes denser development in accordance with the vision of City Plan possible where it might not otherwise be economically feasible.
  - Cons:
    - From the perspective of the established potable water providers, including the City, removing this requirement would allow the potential for new, privately-owned potable water supply entities to operate within the established potable water provider's service area. Various policy concerns are raised by the prospect of small potable water supply entities in the GMA.
    - This more easily allows additional water providers in the Growth Management Area (GMA), adding additional complexity for water supply, including regional coordination on various issues, including drought response, and fees and rates. That some new potable water supply entities could be small and privately-owned, thus perhaps lacking economies of scale and elected representation adds potential additional considerations.

See Council Work Session: Water Resources Matters in the Fort Collins Growth Management Area: Study Report Results, January 24, 2023:

<https://mccmeetings.blob.core.usgovcloudapi.net/fortcollco-pubu/MEET-Packet-044c02ace41c4f9c9121400e25470558.pdf>

- This could harm the established potable water supply providers and their ratepayers by eliminating service in areas where service was already planned for and where expenses such as infrastructure or other less obvious costs such as treatment capacity have already been

accrued by the established potable water supply entity. In some instances, bonds may have been issued based, in part, on this service area. This could affect future rates and fees.

- Offers less certainty and transparency regarding where and when privately-owned water supply entities can operate.
- Alter the code requirement.
  - Pros: Staff was unable to find a reasonable compromise that would satisfy all parties with the concerns of this proposed code provision; however, staff would be open to exploring alternative language if there is a desire to do so.
  - Cons: The proposed language is based on an existing municipal code provision (Sec. 26-4) that gives general policy direction with the respect to the City respecting the service area boundaries of established potable water supply entities. The current language achieves the desired purpose as written.

## 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 investment 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 provider 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 City's Water Utility has also expressed support for this provision.

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. However, this argument has been questioned in discussions with certain water districts and may be disputed.

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

## **NEXT STEPS**

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Staff will make any updates to the proposed code, as suggested, then draft an ordinance for first reading.

## **ATTACHMENTS**

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1. Ordinance No. 074, Postponed Indefinitely on May 16, 2023
2. Redlined Code Language Comparison
3. Best Practices from Other Jurisdictions
4. Water Adequacy Public Comments
5. Draft Planning and Zoning Commission Meeting Minutes, April 26, 2023
6. Water Adequacy Presentation