



## AGENDA ITEM SUMMARY

City Council

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### STAFF

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Clay Frickey, Interim Planning Manager  
Eric Potyondy, Legal  
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### SUBJECT

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**Second Reading of Ordinance No. 121, 2023, Amending the Land Use Code to include Regulations for Making Water Adequacy Determinations.**

### EXECUTIVE SUMMARY

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This Ordinance, adopted by a vote of 6-1 (Nays: Peel) on First Reading on September 5, 2023, adopts Land Use Code provisions to add specific regulations outlining how the City will make water adequacy determinations for development. The proposed regulations are divided into three different categories for: (1) established potable water supply entities; (2) new, or other potable water supply entities; and, (3) non-potable water supply entities. The goals of these changes include: complying with Colorado state statutory requirements (Section 29-20-301, et seq., C.R.S.); ensuring development has an adequate water supply; providing City staff with guidance to make these determinations and applicants with certainty on the requirements; and ensuring that growth and development in the City occur in a planned and coordinated manner. Other than minor, non-substantive clarifications, the proposed regulations are the same as those discussed at the June 6, 2023, Work Session. The Planning & Zoning Commission has recommended adoption of the proposed regulations (4-2 vote).

### STAFF RECOMMENDATION

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Staff recommends adopting the Ordinance on Second Reading.

### BACKGROUND / DISCUSSION

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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. Currently, development within the City only occurs within the boundaries of existing City (Fort Collins Utilities) and special district water supply entities, such as Fort Collins-Loveland Water District and East Larimer County Water District, and the water adequacy determination is made through the issuance of a "will serve" letter from the established water supply entity.

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 water (potable and non-potable) 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 resources is the Montava Planned Unit Development (PUD), which proposes a tributary 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 development costs

Because the City does not currently have a review process or criteria for “non-standard” water service models, including non-potable systems and groundwater-based systems, new policy and code are needed to confirm that future residents are adequately served. While the Montava project has generated the immediate need for this type of review, City staff believes a comprehensive program will have benefits for reviewing all new developments moving forward, regardless of the proposed water source, water supply entity, or other details of the proposed system.

### **Relevant Past Council Discussions**

#### Water Adequacy Determination Regulations – June 6, 2023

Work Session Summary:

<https://records.fcgov.com/CityCouncil/DocView.aspx?id=17610114&dbid=0&repo=FortCollins>

#### 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>

## 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 the proposed regulations, 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.”

## Summary of Proposed Regulations for the Land Use Code

The proposed Water Adequacy Determination regulations for the Land Use Code include changes 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:

### 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 Utilities, Fort Collins-Loveland Water District, and East Larimer County Water District.
- Other potable water supply entities, such as new or proposed private water suppliers or metro districts.
- Non-potable water supply entities, such as new or proposed private water suppliers or metro districts providing irrigation water to a development.

### *Established Entities*

For established potable water supply entities, the proposed regulations provide an applicant 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 Entities*

A more detailed process is proposed for other potable water supply entities and City staff 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 City's existing municipal utility (Fort Collins Utilities).

### *Non-potable Entities*

The criteria for non-potable water supply entities looks to make sure the supply has enough quantity and quality to support the associated uses such as irrigation for landscape.

### 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.

*Adequate* shall mean 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 lifetime of the type of development proposed, and may include reasonable conservation measures and water demand management measures to account for hydrologic variability.

*Established Potable Water Supply Entities* shall mean the City of Fort Collins, the East Larimer County Water District, the Fort Collins-Loveland Water District, the Sunset Water District, and the West Fort Collins Water District.

*Non-Potable Water* shall mean water that has not been treated to state and federal standards safe for human consumption, but can be placed to beneficial uses, including irrigation, dust suppression, toilet and urinal flushing, or make-up water for mechanical equipment.

*Non-Potable Water Supply Entities* shall mean the water supply entities, either Established Potable Water Supply Entities or other water supply entities that provide water that does not meet the state and federal standards for human consumption to developments for the beneficial uses of Non-Potable Water.

*Other Potable Water Supply Entities* shall mean the water supply entities other than the Established Potable Water Supply Entities that provide potable water service, including new proposed water supplies.

*Potable Water* shall mean water, also known as drinking water, that is treated to levels which meet state and federal standards for human consumption.

*Water Adequacy Determination* shall mean a determination that the proposed water supply for a development is adequate.

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

*Water Rights Portfolio* shall mean all rights to water, including water rights, contracts, and agreements associated with water supplies that are used to meet demands. A water rights portfolio that includes non-renewable or non-perpetual water supplies does not mean that the entire portfolio is not renewable and/or sustainable.

*Water Supply System* shall mean all infrastructure planned or used to divert and deliver water to a development.

### **Status of the Three Decision Points Discussed at the June 6, 2023 Work Session**

At the June 6, 2023, City Council work session, City staff presented three decision points. The third decision point remains the key issue lacking consensus and was a focus of the discussion at the Planning & Zoning Commission hearing on August 17, 2023, as discussed below.

#### **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. Currently, the proposed regulations place the timing of the water adequacy determination at the time of Final Plan or Basic Development Review per Council's direction at the work session. It is City staff's understanding that this is not controversial.

#### **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. Currently, the proposed regulations require existing water providers to supply Council with their water supply plan per Council's direction at the work session. It is City staff's understanding that this is not controversial.

#### **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 of the proposed regulations 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 or Fort Collins-Loveland water districts), the new entity must either: 1) be excluded from the boundaries of the established potable supply entity pursuant to existing statutory procedures; 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, which mirrors language in City Code Section 26-4.

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). There is some uncertainty whether this requirement applies to privately-owned water supply entities under existing law. This provision in the proposed regulations 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 regulations.
  - Pros:
    - Removes the City from the middle of the issue of whether privately-owned potable water supply entities should 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 supply entities, 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 supply entity's service area. Various policy concerns are raised by the prospect of small potable water supply entities in the Growth Management Area (GMA), including costs for customers and the long-term viability of such a small system.
    - This more easily allows additional water providers in the 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 entities 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 requirement in the proposed regulations.
  - Pros: Staff was unable to find a reasonable compromise that would satisfy all parties with the concerns of this proposed code provision.
  - 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 and is supported by Fort Collins Utilities staff. The current language achieves the desired purpose as written.



## Staff Analysis

This is the most contentious issue of the proposed regulations and staff does 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 City 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 this language in the proposed regulations provides greater transparency and eliminates confusion.

The regulation, 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.

## CITY FINANCIAL IMPACTS

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None.

## BOARD / COMMISSION / COMMITTEE RECOMMENDATION

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### Planning & Zoning Commission Recommendation

The Planning & Zoning Commission considered the proposed Water Adequacy Determination regulations for the Land Use Code on August 17, 2023. The Commission voted 4-2 to recommend that City Council

adopt the regulations (Nays: Katz and Sass). The discussion focused on Decision Point 3 – Section 3.13.5(C)(5)(c), and the following items:

- Whether the City is enhancing the authority of established potable water supply entities by giving them a say in the exclusion of private service providers
- Explanation from the Assistant City Attorney that this is an unclear area of law
- The importance of compensation to established potable water supply entities, balanced against the burden of a developer needing to go through an exclusion process, and potentially a subsequent appeal of the decision on an exclusion
- Concern for provisions that refer to a “reasonable level of service” that is not currently defined
- The importance of natural monopolies in delivering essential utility services like water, and the need for water providers to have security in their investment in order to provide services
- The rationale for why the draft includes language that requires the establish potable water supply entity to agree to exclusion of all new potable water supply entities (both private and public)

Related to the third bullet point above, the exclusion process as outlined in State statute requires water districts to consider the economic impact of excluding property from their service territory. What this means is that financial compensation to water districts in exchange for excluding property from their service territory is a common point of negotiation and water districts can seek financial compensation to offset their investments to serve all of their service territory. Due to this, the City’s proposed Water Adequacy Determination process does not include an additional or redundant mechanism to analyze financial compensation for water districts in the event of an exclusion so that there is no duplication of processes.

City staff also clarified the appeal process for decisions made by Title 32 districts, such as the Fort Collins-Loveland Water District and the East Larimer County Water District. Commissioners inquired at the previous hearing what body hears appeals for decisions made by water districts. City staff clarified that, pursuant to Colorado statutes, the Board of County Commissioners would hear appeals for decisions related to excluding property from the service territory of existing water providers. City staff further clarified that legal recourse exists for virtually any decision a water district makes and that the recourse depends on the action taken by the water district.

Note: If draft minutes are available prior to the September 5 Council meeting, they will be provided as a ‘read before the meeting’ memo to Council.

## **PUBLIC OUTREACH**

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This proposed Water Adequacy Determination regulations in the Land Use Code 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. City 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

City 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 points of contentions expressed included:

- Ability of established providers to “veto” new systems. 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 supply entities.
- Concerns on not duplicating review efforts between other 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.

Fort Collins Utilities staff has also expressed support for the current draft regulations.

### **Engagement Since the June 6, 2023 Work Session**

City staff met with the following stakeholders since the work session on June 6, 2023:

- Fort Collins Loveland Water District
- East Larimer County Water District
- Montava

All stakeholders appreciated the opportunity to continue to weigh in on the proposed regulations. All stakeholders also welcomed the additional time to analyze the proposed Water Adequacy Determination regulations for the Land Use Code. Comments from the stakeholders above focused on the following:

- Disagreement on the ability for established potable water supply entities to veto new potable water supply entities
- Updates to the Code to increase clarity
  - Consistency with State statute
  - Provision of water supply plans by existing water potable water supply entities is purely informational (i.e., City Council will not “approve” water supply plans of existing water providers)
- Suggestions on how to achieve outcomes of State statutory requirements without implementing Water Adequacy Determination Review process

The Montava team has also provided comments stating generally that the City already the authority for the proposed regulations, and that the proposed regulations could be replaced with a simple sentence or two requiring City staff to make water adequacy determination. However, City staff does not agree that clear authority exists for water adequacy determinations of non-potable systems and non-standard potable systems. City staff also sees value in the detail of the proposed regulations, which provide a framework of analysis and certainty for both City staff and applicants regarding what information is needed and how determinations will be made.

Written comments were received from many of the stakeholders outlined above and are included in the packet.

## **ATTACHMENTS**

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First Reading attachments not included.

1. Ordinance for Consideration