

February 27, 2018

COUNCIL OF THE CITY OF FORT COLLINS, COLORADO

Council-Manager Form of Government

Adjourned Meeting – 12:00 AM

● ROLL CALL

PRESENT: Martinez, Stephens, Summers, Overbeck, Troxell, Cunniff, Horak

STAFF PRESENT: Atteberry, Daggett, Coldiron

1. **Consideration of an Appeal of the Planning and Zoning Board Decision Regarding Johnson Drive Apartments Project Development Plan PDP 170034. (Decision Upheld)**

*The purpose of this item is to consider an appeal of the Planning and Zoning Board decision to approve Johnson Drive Apartments Project Development Plan. On February 1, 2018, an appeal was filed challenging the Planning and Zoning Board Decision made at the January 18, 2018 hearing.*

Mayor Troxell explained the quasi-judicial role Council will be playing in this hearing.

City Attorney Daggett reviewed the appeal process.

Parties-in-interest on both sides of the appeal identified themselves.

Mayor Troxell outlined the time allotments for presentations and rebuttals.

Tom Leeson, Planning Director, stated the proposed project is a 5-story, mixed-use building containing 192 rent-by-the-bedroom units. The 2.5-acre site also includes 261 off-street parking spaces and is located within the General Commercial zone in the Transit-Oriented Development overlay zone. Leeson outlined the assertions of the appeal and staff responses thereto.

Mayor Troxell noted there was no organized site visit. He asked if there are any general procedural issues or concerns to be addressed.

Eric Sutherland, appellant, stated his slide presentation includes a graphic, which is new evidence, to illustrate the view of the proposed project from a person who might be in the park. He stated the section of the Municipal Code that controls appeal proceedings states that written materials are not to be presented to Council prior to or during the appeal. He suggested Council proceed with consideration of this deficiency in the process by adopting, by vote of Council, an agreement that written materials such as the presentation that City staff just made and other materials that the applicant or the appellant wish to present shall be accepted into the hearing record. City Attorney Daggett replied the parties-in-interest and Council can confirm there is no objection to the Agenda Item Summary's inclusion in the record.

Mr. Sutherland requested the inclusion of slides as part of the record in the event of a future appeal. City Attorney Daggett replied any of those materials would be included in producing a record of this proceeding.

Mr. Sutherland stated he erroneously misidentified a Land Use Code section in his appeal and discussed a previous appeal in which he claimed the City Code was not followed.

Craig Russell, Russell Mills Studios and applicant, objected to Mr. Sutherland's request to enter a new photo into evidence, noting Mr. Sutherland himself requested no new evidence be entered into the record.

Mayor Troxell sustained the objection and asked Mr. Sutherland to remove the slide in question.

Mr. Russell accepted the inclusion of all written materials as part of the standard procedure and objected to the consideration of the misidentified Code section.

Mayor Troxell sustained the objection.

Mr. Sutherland cautioned Council to avoid failures of due process.

City Attorney Daggett suggested the applicant be given the opportunity to view the slide in question.

(Secretary's Note: The Council took a brief recess at this point in the proceeding.)

Mr. Russell stated he was not offered appropriate time to rebut the photo in Mr. Sutherland's presentation and maintained his objection.

Councilmember Cunniff made a motion, seconded by Councilmember Summers, to accept all written materials, including the AIS and the slide presentations, less the objected slide, as part of the record of this proceeding. Yeas: Overbeck, Horak, Troxell, Stephens, Martinez, Summers and Cunniff. Nays: none.

**THE MOTION CARRIED.**

### **APPELLANT PRESENTATION**

Paul Patterson stated the PDP is not in compliance with the zone requirements accommodating pedestrians.

Mr. Russell objected to Mr. Patterson's showing of the slide in question as he was skipping past it. Mayor Troxell overruled the objection and requested Mr. Patterson remove the slide at this point in the meeting.

(Secretary's Note: The Council took a brief recess at this point in the proceeding.)

Mayor Troxell stated, upon review of the notice of appeal, he will overrule the objection and allow for the slide to be shown.

(Secretary's Note: The Council took a brief recess at this point in the proceeding.)

Mr. Patterson showed the slide in question and described the image which indicates the mass of the building. He stated it is difficult to see how the upper floors of the project will be set back far enough to preserve the viewscape from the park.

Mr. Sutherland stated the crux of the appeal deals with the fact the Planning and Zoning Board granted conditions that allowed for the entire procedure to be amended on the spot. He stated the

Board applied conditions which changed the procedure and discussed applicable case law. He stated erroneous arguments were made by staff in the AIS.

Tom Pierce, appellant, stated this plan should return to the original plan of providing the pedestrian connection to the MAX and local shopping.

Brian Dwyer, Fort Collins Muffler and Automotive, stated this project will likely be the downfall of his business due to its impact on parking. He requested the City allow his business to purchase additional permitted parking spaces for his employees.

### **APPLICANT PRESENTATION**

Mr. Russell discussed the proposed project and stated the site was chosen partially because of the connectivity presented by the Spring Creek Trail and Mason Trail, and access to campus. He stated the project did not request any modifications, but did request one alternative compliance to utilize motion-sensor lighting. He discussed connections and related levels of service and noted there is a 25-foot grade change from the building to the top of the bank.

In terms of Land Use Code Section 3.4.12, *Visual Character within Natural Areas*, Mr. Russell stated the natural area buffer standards were met through the performance standard criteria. The ecological characterization study concluded this is a highly degraded resource without much natural habitat present. The buffer distance requirement is being met and extensive work has been done to augment and enhance the natural habitat features with native plantings. Mr. Russell stated the finished floor of the building has been raised to get it out of the floodplain and above the base flood elevation.

Mr. Russell stated the project has dedicated right-of-way required to create a local connector street. He discussed step backs, recessed windows, precast cornices, and other architectural features of the building.

Mr. Russell stated parking for the project is provided per Land Use Code requirements.

(Secretary's Note: The Council took a brief recess at this point in the proceeding.)

Councilmember Martinez stated the applicant mentioned Elevations Credit Union in his presentation and he wanted to make it known he sits on the Board of Directors for that organization; however, there is no connection between the Credit Union and the project other than a nearby location.

### **APPELLANT REBUTTAL**

Mr. Patterson discussed the trash and recycling enclosure location and noted several comments were made that the project barely meets standards.

Mr. Sutherland discussed the proposed pedestrian connections and stated they are undesirable; however, he stated it is possible for a more quality connection to be created. He stated conditions that change the procedure on the fly cannot be tolerated.

## APPLICANT REBUTTAL

Mr. Patrick Quinn, Next Chapter Properties, reiterated the fact that Next Chapter Properties pursued this site specifically for its connectivity and access to campus. He stated the conditions placed on the project by the Planning and Zoning Board did not modify the procedure.

Mr. Russell stated pedestrian level of service standards are met and noted easement or rights-of-way dedications cannot occur on other properties as part of this project.

Councilmember Overbeck asked if there are fixed, identified spaces for the car share spaces. Mr. Russell replied in the affirmative and stated a specific service provider has yet to be identified.

Councilmember Overbeck asked how the applicant can assure there will not be spillover parking into adjacent neighborhoods. Mr. Russell replied RP3 zones will be established along Spring Court and Johnson Drive; therefore, spillover parking will predominantly be managed through enforcement of the RP3 program.

Councilmember Stephens asked about the transit passes, noting CSU students receive annual passes as part of their student fees. Leeson replied some TOD projects are not student-oriented and notations are made on plans about such requirements.

Councilmember Cunniff asked if the applicants were referencing the Spring Creek buffer. Leeson replied the Code Section applies to the feature on the site, which is the Sherwood Lateral; Spring Creek is not on the site. Some analysis was done regarding the Sherwood Lateral view.

Councilmember Cunniff asked if the conditions of approval would be considered major in terms of the scope of the project. Leeson replied staff would consider the conditions to be minor. The condition related to color was included in the presentation.

Councilmember Cunniff asked if the scope of the condition related to the trash enclosures is similar to the scope of adjustments that may need to be made for any project. Leeson replied in the affirmative and stated these conditions are not unusual.

Councilmember Martinez requested the appellants address their assertion of deceptive arguments made by staff. Mr. Sutherland replied the deceptive arguments stem from the idea that the conditions were not applied to the design parameters of the project; the conditions were applied to the procedure by which the project was approved.

Councilmember Martinez requested a staff response to Mr. Sutherland's comments. Leeson replied he is somewhat confused by the statement. The conditions of approval are similar to the level of other conditions of approval for other projects. These conditions were related to design.

Mayor Pro Tem Horak asked how the City Attorney would respond to this allegation. City Attorney Daggett replied it is clear in the Land Use Code that the decision maker is authorized to impose conditions as part of the approval. In some cases, those conditions relate to assuring the project complies with the Land Use Code. Assistant City Attorney Brad Yatabe agreed with City Attorney Daggett and stated the Land Use Code does provide for the imposition of conditions of approval. If the conditions are accepted by the decision maker, those conditions can be used to satisfy the conditions of the Land Use Code.

Councilmember Martinez stated the law is being followed based on that information. He asked if there is any constitutional issue as asserted by the appellants. Yatabe replied the appellant is reading the Land Use Code to state all standards must be satisfied in order for the decision maker to approve a project; however, he reads the Code to say there is the ability for conditions of approval to be put into place in order to meet those standards.

Mayor Pro Tem Horak requested Mr. Sutherland respond. Mr. Sutherland replied the question of constitutional dimension is the specificity under which the demand mitigation strategies are detailed in the Land Use Code. Reasonable people could not agree upon what those meant, could not conclude they are enforceable, or that there will be a commensurate reduction in spillover parking by virtue of the application of those demand mitigation strategies.

Yatabe stated Mr. Sutherland's response did not relate to the issue of conditions of approval. He stated terms such as car share and transit pass are subject to a reasonable interpretation.

Councilmember Martinez noted the College Avenue sidewalk going south from Johnson Avenue is narrow. He asked if that is related to the scope of this development or if the City will resolve that issue. Leeson replied the sidewalk along College Avenue was part of the evaluation for the level of service standards for the pedestrians that would be leaving or going to the site. Standards are established for five criteria and this project met the level of service standards for both the Mason and College connections. While the College Avenue sidewalk is not ideal and is not an "A" in terms of level of service, it did meet the level of service standards as required by Code. Staff does agree improvements need to be made to the sidewalk, and those improvements will likely be a capital improvement project in the future.

Councilmember Cunniff stated staff found the project was compliant subject to two conditions of approval. He asked if the project was compliant prior to adding the conditions. Leeson replied it is not unusual to have projects at the PDP phase that still need design work and refined details with the final plan phase.

Councilmember Cunniff asked if the original trash enclosure design would have been compliant with the Land Use Code. Leeson replied in the affirmative.

Councilmember Cunniff asked about the condition related to the color. Leeson replied staff was concerned about one of the colors and the applicant made a change which was conveyed to the Planning and Zoning Board at the hearing. It was determined there was no harm in keeping the condition of approval despite the applicant making the change.

Councilmember Cunniff stated he believes Council can find that the intent and belief were that the plan was compliant; however, process improvements are needed in terms of identifying whether conditions can be used to bring a project into compliance. Leeson noted the review of the project does not stop after the Planning and Zoning Board approval.

Councilmember Cunniff suggested a future process improvement to make clear the conditions are either improvements or remands of the project back into the process because of deficiencies in meeting the Land Use Code. However, in this case, that was not the intent of these conditions.

Councilmember Cunniff stated a fair hearing, compatible with usual and customary practices, was conducted; however, process improvements may be helpful for increasing transparency. The

specific allegations raised by the appellant are not compelling evidence the Land Use Code was improperly interpreted.

Councilmember Cunniff asked about the use of the location for wildlife. Rebecca Everette, Senior Environmental Planner, replied the area is not widely used because of the location of the railroad and embankment. The ecological characterization study found the Sherwood Lateral is used as a movement corridor by urban-adapted songbirds, small terrestrial wildlife, and aquatic organisms, but only on a very limited scale because of the embankment, College Avenue, and grated culverts.

Councilmember Cunniff stated, based on that information, he finds the buffer Code has not been violated.

Councilmember Stephens stated there is some vagueness related to the TOD definitions and it would be beneficial to further define terms in the future. She stated a pedestrian connection over the Sherwood Lateral does not necessarily improve the pedestrian connections in the area.

Councilmember Martinez stated there has been no evidence the Land Use Code was improperly interpreted.

Mayor Pro Tem Horak made a motion, seconded by Councilmember Stephens, that the Council find the Planning and Zoning Board conducted a fair hearing in its consideration of the Johnson Drive Apartments Project Development Plan PDP170034, and did not consider evidence relevant to its decision that was substantially false or grossly misleading, and, based on the evidence in the record and presented at this hearing, the appeal alleging the Planning and Zoning Board did not conduct a fair hearing is hereby found to be without merit and is denied.

Mayor Pro Tem Horak stated it was apparent Boardmember Hansen made a motion which stated the project was compliant, not that it came into compliance with the conditions.

Councilmember Summers stated the transcript seemed to show the Boardmembers felt constrained by the Land Use Code.

The vote on the motion was as follows: Yeas: Horak, Troxell, Stephens, Martinez, Summers, Cunniff and Overbeck. Nays: none.

**THE MOTION CARRIED.**

Mayor Pro Tem Horak made a motion, seconded by Councilmember Stephens, to uphold the decision of the Planning and Zoning Board approving the Johnson Drive Apartments Project Development Plan PDP170034 because the Board properly interpreted and applied the relevant provisions of the Land Use Code cited in the appeal notice, and that based on the evidence in the record and presented at this hearing, the appeal is hereby found to be without merit and is denied.

Mayor Pro Tem Horak stated this project meets Land Use Code standards and the decision is not about how much over the standards the project went. He stated it would be difficult for a development to have to comply with something that is not specified, as in the case of the pedestrian connection.

<b>RESULT:</b>	<b>PLANNING AND ZONING BOARD DECISION UPHeld [UNANIMOUS]</b>
<b>MOVER:</b>	Gerry Horak, District 6
<b>SECONDER:</b>	Kristin Stephens, District 4
<b>AYES:</b>	Martinez, Stephens, Summers, Overbeck, Troxell, Cunniff, Horak

● **OTHER BUSINESS**


Councilmember Cunniff requested the City Manager prepare a report on the current or contemplated pedestrian connectivity plans for the area.

Councilmember Stephens requested a report related to the Economic Health Department's assistance for businesses such as Mr. Dwyer's.

Councilmember Overbeck stated Council will be receiving information from the Race Equity and Leadership committee with the National League of Cities.

● **ADJOURNMENT**

The meeting adjourned at 8:55 PM.



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Mayor

ATTEST:



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City Clerk



