ATTACHMENT 2

Exhibit 2 to Amended Opening Brief

2018civil01 Sutherland v. City Council

Notice of Appeal

- Notice of Appeal filed by Eric Sutherland and Paul Patterson, February 1, 2018

For City Clerk's Use Only: Date Filed: 2/1/2018 Initials: CJM

NOTICE OF APPEAL

Action Being Appealed: PDP 170034 Johnson Dr. Apartments	Date of Action: 1/18/2018
Decision Maker (Board, Commission, or Other): Planning + Zoning	

Appellant/Appellant Representative (if more than one appellant): Name, address, telephone number(s), and email address of an individual appellant authorized to receive, on behalf of all appellants, any notice required to be mailed by the City to the appellants.

Name: Eric Sutherland	Phone #: 970 224 4509
Address: 3520 Golden Currant	Email: Sutherix@Yahoo.com

GROUNDS FOR APPEAL

The Decision Maker committed one (1) or more of the following errors (check all that apply):

[X] Failure to properly interpret and apply relevant provisions of the City Code, the Land Use Code, and Charter. List relevant Code and/or Charter provision(s) here, by specific Section and subsection/subparagraph: See Grounds for Appeal #1-5 attached, Pages 1-4

(Attach additional sheets as necessary)

[ ] Failure to conduct a fair hearing in that:

- [ ] The Board, Commission, or Other Decision Maker exceeded its authority or jurisdiction as contained in the Code or Charter;
- [ ] The Board, Commission, or Other Decision Maker substantially ignored its previously established rules of procedure;
- [X] The Board, Commission, or Other Decision Maker considered evidence relevant to its findings which was substantially false or grossly misleading. Describe any new evidence the appellant intends to submit at the hearing on the appeal in support of these allegations[2]: Illustrations did not adequately represent building and obstruction of viewscape from park; these will be provided. ; or
- [ ] The Board, Commission, or Other Decision Maker improperly failed to receive all relevant evidence offered by the appellant.
- [ ] The Board, Commission, or Other Decision Maker was biased against the appellant by reason of a conflict of interest or other close business, person or social relationship that interfered with the decision maker's independence of judgment. Describe any new evidence the appellant intends to submit at the hearing on the appeal in support of these allegations[2]: ______.

Instructions:

1. For *each allegation* marked above, please attach a separate summary of the facts contained in the record which support the allegation. Each summary is limited to two pages, Times New Roman 12 point font. Please restate allegation at top of first page of each summary.
2. No new evidence will be received at the hearing in support of these allegations unless it is either described above or offered in response to questions presented by Councilmembers at the hearing.

APPELLANTS

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Signature: W.E. Sutherland	Email: SUTHERIX@YAHOO.COM
Address: 3520 GOLDEN CURRANT BLVD.	Phone #: 970 224 4509
Please describe the nature of the relationship of appellant to the subject of the action of the Board, Commission or other Decision Maker: PARTY IN INTEREST	

Name: Paul Patterson	Date: 2/1/2018
Signature: Paul L Patterson III	Email: plpatterson3@earthlink.net
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Please describe the nature of the relationship of appellant to the subject of the action of the Board, Commission or other Decision Maker: Party of Interest	

Name:	Date:
Signature:	Email:
Address:	Phone #:
Please describe the nature of the relationship of appellant to the subject of the action of the Board, Commission or other Decision Maker:	

Name:	Date:
Signature:	Email:
Address:	Phone #:
Please describe the nature of the relationship of appellant to the subject of the action of the Board, Commission or other Decision Maker:	

ATTACH ADDITIONAL SIGNATURE SHEETS AS NECESSARY

Addendum to Notice of Appeal for the Appeal of PDP 170034: Johnson Dr. Apartments.

The grounds for the appeal are as such.

1) The entire concept of the Planning and Zoning Board (P&Z) 'deferring' a determination of the sufficiency of any aspect of a development controlled by the LUC runs counter to the legislative intent of the Code and creates an absurd result. Imposing conditions that purport to require compliance at some later time runs contrary to the entire framework for the quasi-judicial determinations that are required of the P & Z board by the LUC.

In particular and as it applies to this matter, the P&Z failed to properly apply Section 2.4.2 (H), which states:

***Step 8** (Standards): Applicable. A project development plan shall comply with all General Development Standards applicable to the development proposal (Article 3) and the applicable District Standards (Article 4); and*

The P & Z Board approved the PDP with two conditions. From the staff packet, which was only 891 pages long (128 Mbytes), see page 510

Staff recommends that the Planning and Zoning Board approve The Johnson Drive Apartments Project Development Plan PDP170034 based on the findings of fact and two conditions of approval included in this staff report, subject to the following conditions:

1) The applicant shall provide, no later than Final Plan approval, a detailed trash and recycling enclosure design, including truck access and circulation, compactor and/or dumpster locations, in a manner substantially compliant with the Planning and Zoning Board approval and in accordance with adopted Engineering Standards and Trash and Recycling Standards in Section 3.2.5 of the Land Use Code.

2) The applicant shall provide, no later than Final Plan approval,material samples and colors to ensure compliance with Section 3.10.5(C) of the Land Use Code.

It is axiomatic that the PDP did not meet all the standards of the LUC if conditions must be imposed to bring the design into compliance at some later date and time. This is precisely the sort of issue that an attorney paid to advise staff and the P&Z should identify as a clear deficiency in process. The LUC requires that the decision maker find that the PDP meets ***all*** of the development standards. Not ***almost all***. An approval with conditions that certain standards that were not met by the application be complied with by some sort of soon-to-be-forthcoming design modification is a de facto recognition and finding that the application did not meet the standards. Period. It could not get more idiotic than this.

Furthermore, by delaying the disclosure of what the ultimate design will be, the P & Z and staff have effectively removed the ultimate enforcers of the LUC ... the citizens ... from the development review process. Rights of appeal will lapse before we have any idea what-so-ever whether or not the proposed design modifications actually meet the standards of the LUC.

If this departure from the legislative intent of the development review process is allowed to stand, what's next? Will applicants start showing up with half completed PDP's and the expectation that P & Z will simply approve them with a suite of conditions that "require' all deficient or non-existent details be fleshed out at some point in the future?

2) The PDP is not in compliance with the requirements of the General Commercial Zone. The standards for General Commercial, 4.21 of the LUC, has this to say:

While some General Commercial District areas may continue to meet the need for auto-related and other auto-oriented uses, it is the City's intent that the General Commercial District emphasize safe and convenient personal mobility in many forms, with planning and design that accommodates pedestrians.

General Commercial is required to have infrastructure to allow pedestrian access. The PDP failed to provide a pedestrian/bicycle pathway to the commercial areas to the South, even though such a pathway is completely within the realm of possibility.

The area of the parcel to be developed immediately to the South of the building has the Sherwood Lateral canal located on a small hillside. The canal could easily be run through a pipeline for this short stretch and a park-like environment with a sloping trail that cuts diagonally from the southern end of Spring Court up to the commercial area to the south could be constructed. The construction of this trail would create a direct access from the Spring Creek trail to the Spring Creek Max station and everything else that is proximity to the station, including two grocery stores. The trail could be ADA compliant and handle bike and pedestrian traffic.

The PDP that was approved did not even have a dedication of a right of way for the trail/pathway to the South. The failure to include a dedication of right of way as a condition of approval is an unacceptable failure of the PDP to comply with the intent and specific standards of the LUC. No one appears to understand the most basic concepts of urban landscape architecture. Making connections like that is the essence of urban planning. There is absolutely no reason in the world why the trail should not be part of the plan. The best and highest use of that area is for a trail. The development has absolutely no other costs associated with a new street network. The developer can and should pay to put that trail in, but even if that is not going to happen the City should be granted an easement to the property to build something in the future. A trail might come close to paying for itself just for transportation of workers and light materials during construction if it were done right. The only difficulty is that a culvert can't be installed when there is water in the ditch, which makes the timing of the appeal and everything else that much more problematic if the applicant was contemplating construction this summer.

In the packet for the meeting, the potential of a trail was discussed several times. In one section, the applicant seemed to state that some sort of pedestrian access to the South was part of the application. In another part of the packet, the applicant seems to suggest that the area adjacent to the Sherwood Lateral is a 'natural area'. If it is a natural area, then the PDP is deficient in terms of the buffers required and other aspects of the LUC. But it is not a 'natural area'. It is an area capable of conveying both water and people in a landscaped open space that is equivalent if not far superior to what exists there now in terms of wildlife or other ecological value.

3) The P&Z failed to properly apply Section 3.4.1 (I) (2) of the LUC in accordance with the plain and simple meaning of the standard and the precedent that had been established upon appeal to City Council of a previous appeal of a major amendment that proposed a parking garage on the opposite side of creekside park. In the precedent action, a previous Council determined that a four story parking garage on the North side of Creek side park was not acceptable under the LUC. Here is the relevant text from the findings resolution of Council after the Cunniff appeal of the parking garage:

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF FORT COLLINS that, pursuant to Section 2-57(g) of the City Code, the City Council hereby makes the following findings of fact and conclusions:

1. That the grounds for appeal as stated in the Appellants' Notices of Appeal conform to the requirements of Section 2-48 of the City Code.

2. That the Hearing Officer did not fail to conduct a fair hearing.

3. That the Hearing Officer failed to properly interpret and apply Sections 3.4.1(I)(2) and 3.5.1(J) of the Land Use Code with regard to the impact of the major amendment upon Spring Creek.

The Resolution can be found here:
http://citydocs.fcgov.com/?cmd=convert&vid=72&docid=2267616&dt=&doc_download_date=JUN-03-2014&ITEM_NUMBER=

Here is 3.4.1(I), which is cited in the Resolution
(I)***Design and Aesthetics.***

(2) *Visual Character of Natural Features.* Projects shall be designed to minimize the degradation of the visual character of affected natural features within the site and to minimize the obstruction of scenic views to and from the natural features within the site.

In a previous appeal, a precedent was set that is applicable to the 3.4.1(I) in general but is also specific to this specific area. In that appeal, Council required that a plan for 4 story parking garage be downsized to a 3 story garage. It is unquestionable that applying this precedent to the instant PDP requires that a finding that the design as proposed is incompatible with the standard. Not only is the proposed apartment building taller and wider than the parking garage, but it is: 1) closer to the park, 2) much closer to the visited areas of the park, 3) not buffered by the creek and unvisited areas on the north side of the creek, and 4) in between the park and the sun during the day, i.e. solar access is impaired.

4.) The P&Z failed to properly apply section 3.10.5 (F)(3). This standard is applicable to all is an important standard that is not complied with in this development.

(3) Buildings greater than two (2) stories in height shall also be designed so that upper portions of the building are stepped back from the base. The adequacy of upper floor step-backs shall be determined by the extent to which they advance the following objectives:
(a) providing pedestrian scale along sidewalks and outdoor spaces;
(b) enhancing compatibility with the scale and massing of nearby buildings;
(c) preserving key sunshine patterns in adjacent spaces; and
(d) preserving views.

There is no question about the applicability of this section to the LUC. It simply was not considered or applied. All four objectives are applicable here and the proposed building is insufficient in all four categories.

The desire for increased density at this location is understandable. However, considering the failings of this project to create sufficient pedestrian and bicycle access, this standard must be applied. Note the similarity of this ground for the appeal to #3 above.

5) The 'mitigation strategies' claimed in this PDP to effect a reduction in the number of parking spaces are inherently unenforceable and inconsistent with the framework of the Land Use Code. This Grounds for the Appeal asserts that these provisions of the LUC are the equivalent of an unconstitutional law and must be deemed a nullity when considering the sufficiency of the PDP.

The Land Use Code provides for a means of establishing mandatory design standards for development. Unfortunately, the purpose and legislative intent of the LUC is, at times, a mystery to staff and decision makers. One such source of confusion arises when staff or decision makers are tempted to use the LUC to control the business activities of property after a certificate of occupancy (CO) is issued by the city. Of course, the general development standards of the LUC control only what gets built with the understanding that the city has the right to deny CO to any development that is not constructed in accordance with a PDP. While it is true that

the district standards (chapter 4) prescribe use and are enforceable long after the CO is issued, the district standards themselves are codified by Ordinance of Council.

Against the backdrop of the basic realities of our system of development review including the enforcement powers of the city, applying a condition to a PDP that prescribes that a certain business practice or other regulation be applied is fundamentally incompatible with the purpose and enforcement of the LUC. Similarly, a standard within the LUC that prescribes a business practice or, as in this case, allows a certain standard to be relaxed if a business practice is followed is fundamentally incompatible with the purpose and enforcement of the LUC.

It is unquestionable that no party including the city has any right or authority to enforce a condition, for example, that all residents of the proposed residential housing project be provided with transit passes at any given time or in perpetuity. Consequently, allowing a reduction in the number of parking spaces required by the applicant because some sort of unenforceable and problematic "promise" has been made simply contravenes the legislative intent and operation of the LUC. Such a 'mitigation' strategy was imprudent in its origins and is, unfortunately, characteristic of the lack of understanding that attends the Planning Department as a whole.

As a consequence of the above discussion, both mitigation strategies proposed by the applicant must be construed to be nullities. The parking proposed is insufficient to meet the standards required in the TOD.

As an additional complication pertaining to the sufficiency of the parking proposed by the applicant, there were three 'mitigation' strategies proposed by the applicant to justify providing fewer parking places than required by the LUC for a development in the TOD. 1. Car sharing, 2. Transit passes, and 3. High Level of Service (LOS) grades for pedestrian and bicycle mobility and access. Somehow, those three strategies were reduced to only the first two strategies in staff's analysis of the PDP. Regardless, all three 'mitigation' strategies are unacceptable because the third strategy is clearly not met as discussed in the 2nd Grounds for Appeal above. (Indirect and cumbersome pedestrian access to the commercial areas to the South.)

To make things even worse, the applicant , through his consultant, admits that the LOS for bicycle access is not sufficient because of the insufficiency of the street network in the area. This insufficiency is claimed to be overcome by the presence of the two major bike trails in the area, Spring Creek and Mason. This claim obviously has merit. Yet, under the plain and simple meaning of the LUC, a request for a modification of the standard to allow bike trails to be substituted for streets should have been forthcoming, but wasn't. This is just another example of the inattention to procedure that is characteristic of the Planning department.

From a practical standpoint, it should be recognized that the requirements for parking in the TOD and all other areas of the City were created in large part to eliminate the effect of spill over parking. In this regard, transit passes cannot be shown to achieve the desired result. Car sharing probably can. However, the enforcement of a car sharing plan must be something that can be verified at the time a CO is issued. The City should look at securing easements within the parking facilities of any project that wishes to reduce the number of otherwise required parking spaces. However, such an easement is not part of this PDP and, consequently, Council has no other choice but to overrule P& Z.

ATTACHMENT 3

Staff Report (with attachments) Provided to the Planning and Zoning Board,

Hearing held January 18, 2018