

NOTICE OF APPEAL

Action Being Appealed:

AH PDP, #110018

RECEIVED

JUN 19 2012

Board, Commission, or Other Decision Maker:

RICHARD V. LOPEZ
CITY CLERK'S OFFICE

Date of Action:

JUNE 5, 2012

Grounds for Appeal (✓ all that apply):

The board, commission or other decision maker committed one (1) or more of the following errors:

- Failure to properly interpret and apply relevant provisions of the City Code, the Land Use Code and Charter. List Code and/or Charter sections (by section number only) below: L.U.C. 2.1.1, LUC 2.2.7, L.U.C. 2.13.2 CITY CHARTER PART II, SECT. 5 AND RELATED SECTIONS OF CODE AND CHARTER
- 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;
 - The board, commission or other decision maker considered evidence relevant to its findings which was substantially false or grossly misleading; or
 - The board, commission or other decision maker improperly failed to receive all relevant evidence offered by the appellant.

(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.)

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 regarding the City Attorney's review of the notice of appeal (City Code Section 2-50).

Please describe the nature of the relationship of each appellant to the subject of the action of the Board, Commission or other Decision Maker:

ESAL SUTHERLAND IS A CITIZEN
OF FORT COLLINS AND A PERSON
OF INTEREST IN THE ACTION
BEING APPEALED

If appellant has alleged that the decision maker considered evidence relevant to its findings that was substantially false or grossly misleading, describe any new evidence the appellant intends to submit at the hearing on the appeal in support of this allegation. NO NEW EVIDENCE WILL BE RECEIVED AT THE HEARING IN SUPPORT OF THIS ALLEGATION UNLESS IT IS EITHER DESCRIBED BELOW OR OFFERED IN RESPONSE TO QUESTIONS PRESENTED BY COUNCILMEMBERS AT THE HEARING.

THE ENTIRE HEARING WAS
CHARACTERISED BY EVIDENCE THAT
WAS GROSSLY MISLEADING BY PEOPLE
WHO WERE GROSSLY MISLED.

HOWEVER, NO NEW EVIDENCE
IS BEING OFFERED
FURTHER, THE APPEAL IS SUPPORTED
BY A LACK OF EVIDENCE ENTERED @
HEARING.

<p>Appellants:</p> <p>Signature <u>W. E. Sutherland</u> Name <u>ERZE SUTHERLAND</u> Address <u>3520 GOLDEN CURRANT</u> Phone <u>970 224 4309</u> Date <u>7/19/12</u></p> <p>Signature _____ Name _____ Address _____ Phone _____ Date _____</p> <p>Signature _____ Name _____ Address _____ Phone _____ Date _____</p> <p>Signature _____ Name _____ Address _____ Phone _____ Date _____</p> <p>Signature _____ Name _____ Address _____ Phone _____ Date _____</p> <p>Signature _____ Name _____ Address _____ Phone _____ Date _____</p>	<p>Appellants:</p> <p>Signature _____ Name _____ Address _____ Phone _____ Date _____</p> <p>Signature _____ Name _____ Address _____ Phone _____ Date _____</p> <p>Signature _____ Name _____ Address _____ Phone _____ Date _____</p> <p>Signature _____ Name _____ Address _____ Phone _____ Date _____</p> <p>Signature _____ Name _____ Address _____ Phone _____ Date _____</p>
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ATTACH ADDITIONAL SIGNATURE SHEETS AS NECESSARY

*City of Fort Collins
March 2012*

Appeal of AH PDP #110018 by Eric Sutherland

Summary of facts

1) Failure to properly interpret and apply relevant provisions of the City Code, the Land Use Code and Charter. List Code and/or Charter sections.

Be it known that a summary of facts to support this allegation is not a requirement of filing an appeal. In fact, past history would provide strong evidence that providing specific information regarding an appellant's argument is detrimental to the purpose they are trying to achieve. (i.e. City Staff analyzing and taking a position on the substance of an appeal prior to an appeal hearing being heard by Council.)

The existence of this deficiency in the process has been noted by citizens and forwarded into conversations regarding amendments to the City Code with the hope of improvement. No improvements have been forthcoming despite the recent amendment of the City Code by Ordinance of City Council.

That said, the failure of the Hearing Officer to apply relevant provisions of the Land Use Code and Charter are alleged by recognizing the lack of authority of Mr. Richard Lopez to act in that capacity at the public hearing and evidence to be presented at the appeal hearing will be submitted at or before the appeal hearing. It is important to note that part of the record in which representatives of the applicant did state that the applicant would be applying for public assistance in financing this project as motivation for this allegation.

2) 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;

This allegation is tightly coupled and substantially similar to the allegation contained in 1) above. Be it known that a summary of facts to support this allegation is not a requirement of filing an appeal. In fact, past history would provide strong evidence that providing specific information regarding an appellant's argument is detrimental to the purpose they are trying to achieve. (i.e. City Staff analyzing and taking a position on the substance of an appeal prior to an appeal hearing being heard by Council.)

The existence of this deficiency in the process has been noted by citizens and forwarded into conversations regarding amendments to the City Code with the hope of improvement. No improvements have been forthcoming despite the amendment of the City Code by Ordinance of City Council. Disadvantaged by a lack of understanding of the problems with process on the part of City staff and others, the public, including persons of interest need not disadvantage themselves further by getting two specific with the requested specifics of this or any other allegation.

3) Failure to conduct a fair hearing in that:

The board, commission or other decision maker substantially ignored its previously established rules of procedure;

This allegation notes a deficiency in process that is glaring in nature. "Previously established" may very well pertain to the elements, concepts and thought embodied in the Land Use Code. The hearing officer failed to conduct a fair hearing in that these elements and concepts were not accessible to the public he was hearing and he made no attempt to communicate either their importance or their meaning to the public he was hearing.

As in 2) and 3) above, it must be noted that this lack of fairness has frequently been brought to the attention of people tasked with stewarding public resources and organizing our society under rule of law. Such efforts have failed to even acknowledge the nature of the difficulty that is presented.

When one considers the fact that the very same public that is disadvantaged by unfairness and is unable to address such unfairness with revisions and amendments to process and law is also being asked to finance, by virtue of public assistance, parties that are unfairly advantaged, the motivation to make such allegations is increased.

The decision maker did ignore previously established procedures. Evidence submitted at the appeal hearing will bear this out.

4) Failure to conduct a fair hearing in that:

The board, commission or other decision maker considered evidence relevant to its findings which was substantially false or grossly misleading;

Have I mentioned that it really doesn't help my case to provide much information here? When city staff are so disinterested in any appearance of propriety that they immediately tell the newspaper that they are analyzing a newly received appeal, one can be quite certain that saying nothing is the best course of action.

It also has to be noted that this is the appellant's weakest allegation. Why? That answer might be evident at the appeal hearing. However, the citizens of Fort Collins have seen examples of how evidence relevant to findings of decision makers – which came from city staff – was grossly misleading. Not that appealing the finding of that allegation did them any good.

5) Failure to conduct a fair hearing in that:

The board, commission or other decision maker improperly failed to receive all relevant evidence offered by the appellant.

I'll get a little specific here, even though it will likely hurt the appeal. The hearing officer was so unfamiliar with the process as to confuse the Land Use Code with City Plan. The former, of course, is the governing document, carrying the weight of law, for the granting of development rights. The latter is policy, which is presumably composed at great public expense, to guide the actions of the city government in ways that affect land use with in the GMA. I get it. Apparently Mr. Lopez doesn't and that is born out by the record.

The failure to understand City Plan and its significance represents a failure to receive all relevant evidence offered by the appellant. The LUC, is a bunch of laws. The judicial system upon which it is based, English common law, allows for the interpretation of such laws on the basis of other findings of other decision makers and legislative actions taken by authorities. One need not go to law school to understand this concept or its importance to the organization of our society and the origins of our prosperity. As such, City Plan, which has been duly adopted by vote of Fort Collins City Council, is primary evidence that is essential to the interpretation of the legal provisions of the Land Use Code.

.. and it doesn't matter. Recent experience would indicate to the interested observer that the protections that the citizens of Fort Collins might expect under the LUC and the assumption of rule of law it is based upon are compromised by poor process and, sometimes, outright disregard for the letter of the law.

This affront might be overlooked in the matter of the AH PDP # 110018, save for the unfortunate reality that the public is also going to be asked to shoulder a large percentage of the financial burden this development will place on our collective enterprises. Conversations with the applicant, (not part of the record), have convinced the appellant that there is no sensitivity toward the interests of the taxpayers of Larimer County, even as a wildfire with far reaching financial impacts, smothers our city in smoke.

Appellants response to City Attorney's review of notice of appeal.
Aspen Heights PDP #110018

RECEIVED

JUL 10 2012

CITY CLERK'S OFFICE

Deputy City Attorney Paul Eckman has provided a response to my notice of appeal. His concerns can be summarized into two points.

- 1) PAGINATION
- 2) NEW EVIDENCE

1) PAGINATION

My sincerest apologies for the format of my appeal. Following, please find the original notice of appeal repaginated to suit everyone's expectations. See Appendix A

2) NEW EVIDENCE

Upon receipt of the Deputy City Attorney's review, I fired off an email noting the duplicity and hypocrisy that is inherent in speculating that I might be introducing new evidence in the appeal hearing. i.e. The worst offenders of this rule to date have been the City Manager and City Attorney. This email, to which I received no response, is included in this document as Appendix B.

However, Mr. Eckman's review and comments take on an even more ridiculously absurd nature when one considers one basic fact; **THERE IS NO RECORD OF THE EVIDENCE PRESENTED IN THE TYPE 1 REVIEW HEARING.**

On Monday, July 9th, I inquired about obtaining a record of the original hearing from the planning office. I was referred to the City Clerk's office. Upon inquiring at the City Clerk's office, I was informed, for the first time, that a 'snafu' had resulted in no audio recording of the hearing.

How could any determination be made in an appeal hearing or at any other stage of the game regarding the acceptability of evidence if there is no record of the evidence that was originally submitted?

How could the decision maker have provided his decision without the ability to review the evidence that citizens and the applicant provided?

The absence of any record of the evidence presented in the Type 1 hearing further substantiates and adds to the complaints made in the notice of appeal. Specifically allegations #'s 3 and 5 are made much stronger and definitive in the following way:

*3) Failure to conduct a fair hearing in that:
The board, commission or other decision maker substantially ignored its previously established rules of procedure;*

Obviously, the previously established rules of procedure provide for the recording of evidence presented at the hearing. Proceeding to analyze the evidence presented without the benefit of a record is a departure from prior convention and the intent and function of the provisions of the Land Use Code governing this process. The hearing can not be considered to have been fair, because no one knows, with any certainty, what evidence was presented. Both the appellant and applicant are similarly disadvantaged by this departure from previously established rules and procedures.

5) Failure to conduct a fair hearing in that:

The board, commission or other decision maker improperly failed to receive all relevant evidence offered by the appellant.

Receiving evidence is akin to recording it. Without a record, there is absolutely no evidence that evidence was received.

The hearing officer, Richard Lopez, must be credited with great skills for his ability to feign a decision made with the complete and total absence of evidence. A rereading of the decision that Mr. Lopez produced - aided by the understanding that he was working entirely from memory (unless he was assisted by City Staff, a violation of the intent of the LUC) – is now made somewhat more understandable. The various nonsensicalities and problematic statements can be attributed to the significant handicap that delivering an opinion without the benefit of having received evidence of the hearing.

ADDITIONAL CONSIDERATIONS

A) Allegations regarding lack or authority of hearing officer appear to be correct. It must be noted ... *attention requested by all involved* ... that the most substantive allegation, especially from a viewpoint that might be scanning the legal horizon, of the notice of appeal was not addressed in any way by Deputy City Attorney Paul Eckman.

This complaint is repeated in 1) and 2) below. Mr. Richard Lopez was not duly authorized nor competent to stand or perform in the capacity of a hearing officer and decision maker in this Type 1 review hearing.

My inquiries regarding the existence of a record of the hearing were concurrent with another line of inquiry: *Where, when and why was Mr. Lopez appointed to serve in this capacity in the original hearing?*

As both the City Attorney's office and Current Planning are now obliged to explain, there is no record of this appointment being made as required by the Land Use Code.

The word "Director" is used 136 times in Chapter 2, Administration of the LUC alone. (The director being the person who holds the top position in the current planning department. The names sometimes change.) The responsibilities and authorities of the

director include being the hearing officer and decision maker in Type 1 hearings, like the one I am appealing.

Obviously, the Director was not the decision maker. Richard Lopez was. I don't even know who the Director was at the time of the hearing. It is now equally obvious that the appointment of Mr. Lopez by the Director to serve as the decision maker was not duly performed as required by the LUC.

I know this because I asked Ted Shepard, the senior staff member responsible for the development application, if he could provide any evidence of the appointment. A memo might have been acceptable. He could not. He did, however, inform me that the City Attorney's office handled the appointment of Mr. Lopez. This would not be consistent with the LUC.

It gets worse. My inquiries of the City Attorney's office so far have produced nothing except a statement that Current Planning is being consulted by that office to see what is going on.

There can be no other reasonable conclusion: As alleged in my notice of appeal, Richard Lopez was not duly authorized to conduct the hearing or render a decision granting development rights to the applicant. If he was duly authorized, evidence would most certainly have been entered into the non-existent record of the appointment by the director. If he was duly authorized, I certainly should have received some response regarding this allegation from Deputy City Attorney Paul Eckman. I do wish to acknowledge that I am grateful that some backdated document was not presented in response to my notice of appeal. Previous experience has informed me that such things are not entirely out of the question.

B. All other allegations remain unchallenged.

The hearing was not fair as I have alleged. The good citizens of Fort Collins who attended the hearing were disadvantaged as I have alleged in the notice of appeal and made note of on many different occasions.

Eric Sutherland
(970) 224 4509

APPENDIX A - ORIGINAL NOTICE OF APPEAL

Appeal of AH PDP #110018 by Eric Sutherland *(repaginated to comport with administrative expectations.)*

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APPENDIX B – CONTENTS OF EMAIL SENT TO Deputy City Attorney Paul Eckman UPON RECEIPT OF HIS REVIEW OF NOTICE OF APPEAL

To: "Rita Harris" <RHARRIS@fcgov.com>, "Paul Eckman" <WECKMAN@fcgov.com>
Cc: "Ted Shepard" <TSHEPARD@fcgov.com>, datteberry@fcgov.com, sroy@fcgov.com, kcumbo@fcgov.com, cvatterott@myaspenheights.com, bhendee@fcgov.com

Paul,

Thanks for your review of my appeal.

I have to admit, I'm perplexed. In your review, you make note of the fact I have telegraphed the possibility of introducing evidence at the appeal hearing. You don't know if this is new evidence or not, but have advised and stated that new evidence is not allowed under City Code.

Really? Then why did City Manager Darin Atteberry introduce new evidence (and cross examine witnesses) in an appeal hearing last year? With the City Attorney sitting at his side? You ought to review that Campus Crest appeal. Time code 6:00 on the Channel 14 video.

The prevailing theory is that Atteberry was spoofing the process from the beginning. He has 7 City Council members on a string. By using the whole thing with Josie Plaut of the Institute for the Built Environment as a messenger, Atteberry clearly conveyed his preference that the Council reject the appeal that citizens interested in defending our community brought forward.

The Institute for the Built Environment didn't do anything to look after our community. The citizens who filed two appeals did. IBE originally refused to have anything to do with Campus Crest, on either side, until an out-of-town developer took out a checkbook and started writing.

Consequently, I have a hard time taking you seriously.

The one piece of the whole appeal that is definitely immaterial to the appeal is the piece about the anticipated TIF award. You didn't mention anything about that in your review. Why?

I guess a better question to ask is "why in the world is Aspen Heights being led to believe that a TIF award might be in their future?" Think about it.

The way the policies are set up right now. TIF is only supposed to be awarded on an "if not but for" basis. In other words, if AH doesn't get TIF, they can't build. However, they can't apply for TIF unless they have started the development review process.

Essentially, the type 1 hearing and the appeal are speculative risks that the developer is taking with the hopes of getting TIF'ed. Is that screwed up or what? Aspen Heights doesn't offer anything that deserves public assistance. Any tax increment that they generate for the URA will go into public improvements, (if the city's new CFO doesn't repeat the plundering of his

predecessor). Aspen heights will benefit from these public improvements along with the rest of North College and Fort Collins.

Why is Aspen Heights being led to believe that they might get TIF'ed? The city is doing them a huge disservice by leading them on like this, except that the completely incompetent way that the URA has been managed might actually allow for the tax payers to suffer another insult.

Charlie Vatterott told me flat out. He thinks he deserves TIF because the development fees are too high. Twice as high, he said, as any other market he is working in. OK, Fort Collins easily offers twice as much to his company and his future customers than any other place in the country. Why the TIF?

Charlie had absolutely no sensitivity to the financial or other outcomes we are going to feel from the High Park fire. Larimer County is going to see higher expenses and lower revenues. Meanwhile, we can expect that commerce associated with rebuilding is going to enrich the City's coffers. Demand for his product will go up, meaning his need for TIF (if it were ever real to begin with) will be diminished. He had no idea of the implications of a TIF award and even the dramatic example of the worst fire in Colorado's history couldn't seed a thought.

The lack of leadership down there at City Hall is as palpable as the smoke hanging in the air this and every morning for the past two weeks.