

ORDINANCE NO. 020, 2020
OF THE COUNCIL OF THE CITY OF FORT COLLINS
REPEALING AND REENACTING CHAPTER 2, ARTICLE II, DIVISION 3
OF THE CODE OF THE CITY OF FORT COLLINS RELATING TO
PROCEDURES FOR APPEALS TO THE CITY COUNCIL

WHEREAS, Chapter 2, Article II, Division 3 of the City Code establishes a process whereby parties directly affected by the quasi-judicial decisions of City boards and commissions and certain other City decision makers may be appealed to the City Council; and

WHEREAS, the City Council has periodically amended these provisions of the Code; and

WHEREAS, several procedural issues have arisen during recent appeals that have prompted City staff to further review the appeal process, and to confer with affected members of the public about additional amendments that will eliminate ambiguities in certain provisions, add an additional ground for appeal, clarify the circumstances under which new evidence may be considered by the City Council during appeal hearings, and make certain other procedural changes that staff believes will enhance the fairness and efficiency of appeal hearings; and

WHEREAS, the City Council believes that such amendments are in the best interests of the City.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF FORT COLLINS as follows:

Section 1. That the City Council hereby makes and adopts the determinations and findings contained in the recitals set forth above.

Section 2. That Chapter 2, Article II, Division 3 of the Code of the City of Fort Collins is hereby repealed and reenacted to read as follows:

Sec. 2-46. - Definitions.

The following words, terms and phrases, when used in this Division, shall have the meanings ascribed to them in this Section:

Appellant shall mean one or more parties-in-interest appealing from a board, commission or other decision maker to the City Council by the filing of a notice of appeal.

Applicant shall mean the person who or organization that submitted the application to the board, commission or other decision maker whose decision has been appealed.

Evidence shall mean any information, whether in verbal, audio, written, graphic, or other form, presented at the hearing to support or refute a particular proposition or conclusion. *Evidence* shall not include argument as to how information offered as evidence should be viewed by the City Council.

Final decision shall mean the action of a board, commission or other decision maker by a vote of a majority of its members when no further rehearing is available before such board, commission or other decision maker; provided, however, that a recommendation to the City Council from a board, commission or other decision maker shall not be considered as a final decision of that board, commission or other decision maker.

New evidence shall mean any evidence, relating to the proposal or application that was the subject of final decision by a board, commission or other decision maker, that was not presented at the hearing before such board, commission or other decision maker. *New evidence* does not include modifying, highlighting, underlining, italicizing or otherwise emphasizing certain portions of writings or graphics presented to the original decision maker as long as any modified graphic presented to the City Council at the appeal hearing is accompanied by a reference to the location of the original material in the record of the decision being appealed.

Party-in-interest shall mean a person who or organization that has standing to appeal the final decision of a board, commission or other decision maker. Such standing to appeal shall be limited to the following:

- (1) The applicant;
- (2) Any party holding an ownership or possessory interest in the real or personal property that was the subject of the decision of the board, commission or other decision maker whose action is to be appealed;
- (3) Any person to whom or organization to which the City mailed notice of the hearing of the board, commission or other decision maker;
- (4) Any person who or organization that provided written comments to the appropriate City staff for delivery to the board, commission or other decision maker prior to or at the hearing on the matter which is to be appealed;
- (5) Any person who or organization that appeared before the board, commission or other decision maker at the hearing on the action which is to be appealed;
- (6) The City Council as represented by the request of a single member of the City Council.

Sec. 2-47. - Certain appeals to be taken to city council.

An appeal of any final decision expressly appealable to City Council under other provisions of this Code, including the Land Use Code, shall be decided by the City Council in the manner set forth in this Division.

Sec. 2-48. - Appeal of final decision permitted; effect of appeal; grounds for appeal.

(a) A party-in-interest may appeal to the City Council the final decision of any board, commission or other decision maker to which this appeal procedure applies in the manner provided in this Division. Any action taken in reliance upon any decision of a board, commission or other decision maker that is subject to appeal under the provisions of this Division shall be totally at the risk of the person(s) taking such action until all appeal rights related to such decision have been exhausted, and the City shall not be liable for any damages arising from any such action.

(b) Except for appeals by members of the City Council, the permissible grounds for appeal shall be limited to allegations that the board, commission or other decision maker committed one (1) or more of the following errors:

(1) Failure to properly interpret and apply relevant provisions of the Code and Charter.

(2) Failure to conduct a fair hearing in that:

a. The board, commission or other decision maker exceeded its authority or jurisdiction as contained in the Code or Charter;

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

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

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

e. The board, commission or other decision maker was biased against the appellant by reason of a conflict of interest or other close business, personal or social relationship that interfered with the decision maker's independence of judgment.

(c) Appeals filed by members of the City Council need not include specific grounds for appeal, but shall include a statement of each specific question to be considered on appeal.

(1) Upon the filing of any such appeal, the director of the affected City service area shall identify the specific Code provisions that may pertain to the specific questions raised by such appeal and shall provide such information to the City Clerk prior to the date that the notice of hearing on the appeal is to be mailed by the City Clerk to parties-in-interest under § 2-52 of this Division.

(2) Said information shall then be mailed to the parties-in-interest together with the notice of hearing.

(3) Councilmembers who file an appeal may participate in hearing such an appeal in the same manner as they participate in hearing appeals filed by other parties-in-interest.

Sec. 2-49. - Filing of notice of appeal; new evidence.

(a) An appeal shall be commenced by filing a notice of appeal of the final decision of a board, commission or other decision maker to which this Division applies with the City Clerk within fourteen (14) calendar days after the action that is the subject of the appeal.

(b) Such notice of appeal shall be on a form provided by the City Clerk, shall be signed by all persons joining the appeal and shall include the following:

(1) The action of the board, commission or other decision maker that is the subject of the appeal;

(2) The date of such action;

(3) The name, address, telephone number and relationship of each appellant to the subject of the action of the board, commission or other decision maker;

(4) In all appeals except those filed by members of City Council, the grounds for the appeal, including specific allegations of error and a summary of the facts contained in the record on appeal which support those allegations;

(5) In the case of an appeal alleging a fair hearing issue under § 2-48(b)(2)c, d or e, above all new evidence related to such allegations that the appellant wishes for Council to consider at the hearing on the appeal must be submitted to the City Clerk within seven (7) days calendar days after the deadline for filing a notice of appeal and must be clearly marked as new evidence;

(6) In the case of an appeal filed by more than one (1) person, the name, address and telephone number of one (1) such person who shall be authorized to receive, on behalf of all persons joining the appeal, any notice required to be mailed by the City to the appellants under the provisions of § 2-52 of this Division; and

(7) Any other information required by the City Clerk.

(c) No materials other than that specified in Subsection (b) above shall be included in or attached to the notice of appeal or submitted by the appellant, except for presentation materials as allowed in §2-55(d).

(d) The City Clerk will promptly post the notice of appeal and any attached information, and any new evidence subsequently received pursuant to Subsections (b)(5) above or 2-55(b)(2), on the City's website, and such information shall be available for public inspection in the Office of the City Clerk.

Sec. 2-50. - Fee for filing of appeal.

In all appeals, except those filed by members of the City Council, the appellant shall be charged a fee of one hundred dollars (\$100.), to be paid to the City Clerk at the time of the filing of the notice of appeal.

Sec. 2-51. - Record on appeal.

Any appeal to the City Council shall be an appeal on the record of the hearing before the board, commission or other decision maker together with such additional evidence as may be admitted by the Council for consideration as provided in this Article. The record provided to the City Council shall include the following:

- (1) All exhibits, including, without limitation, all writings, drawings, maps, charts, graphs, photographs and other tangible items received or viewed by the board, commission or other decision maker at the proceedings;
- (2) A verbatim transcript of such proceedings before the board, commission or other decision maker. The cost of the transcript shall be borne by the City. If a verbatim transcript of the proceedings does not exist and cannot be produced, whether due to an equipment malfunction or clerical error, or for any other reason, the decision that is the subject of the appeal will be re-heard before the decision maker after notice as required by the relevant provisions of this Code or the Land Use Code, whichever is applicable, and the appeal shall be terminated.
- (3) If available, a video recording of such proceedings before the board, commission or other decision maker. The cost of reproducing any such video recording for review by the City Council shall be borne by the City. Additional copies shall be provided to any party-in-interest requesting the same within a reasonable period of time prior to the date for hearing the appeal, at a cost not to exceed the actual reproduction costs incurred by the City.
- (4) A copy of notice of the hearing on the decision appealed, along with a list of those to whom such notice was mailed.

Sec. 2-52. - Scheduling of the hearing/no ex parte contacts.

(a) In the event of an appeal, the City Clerk shall schedule the hearing on the appeal for a date as early as reasonably practicable but no fewer than twenty-eight (28) days and no more than seventy seven (77) calendar days after the deadline for filing of the notice of appeal. Prior to scheduling the hearing, the Clerk shall provide the appellant and applicant with a possible hearing date, or dates, to determine if unavoidable conflicts that make attendance impossible at such date, or dates, exist. The City Clerk shall mail written notice of the date, time and place of the hearing to the appellant and all other parties-in-interest no less than twenty-one (21) calendar days prior to the date of said hearing. Said notice shall also include a copy of the notice of appeal (excluding attachments, which shall be available as provided in § 2-49(c)).

(b) All appeals regarding the same decision may be consolidated and scheduled together to be heard in a single hearing. Council may in its discretion by majority vote at the time of the scheduled hearing separate the hearing process for individual appeals.

(c) At any time prior to the expiration of the time for Council to hear an appeal under Subsection (a), the City Manager may in the event of scheduling difficulties or notice defects request that Council approve by motion or resolution the extension of the time for hearing an appeal for a specified period.

(d) In order to afford all parties-in-interest a fair opportunity to respond to the information upon which the City Council is to base its decision on appeal, and in order to preserve the impartiality of Councilmembers hearing the appeal, all Councilmembers who intend to participate in hearing the appeal shall, to the extent reasonably possible, avoid communications with parties-in-interest and members of the general public regarding the merits of the appeal prior to the hearing on the appeal.

Sec. 2-53. - Site inspection.

(a) Councilmembers may inspect the site of an overall development plan, project development plan or other proposal that is the subject of an appeal, either alone or with City staff present, for the purpose of gaining a better understanding of the physical characteristics of the site and the surrounding area.

(1) If a Councilmember wishes to schedule a site inspection with City staff present, he or she shall, no later than fourteen (14) days after the filing of the notice of appeal, request that the City Manager schedule such inspection.

(2) Upon receipt of such a request, the City Manager shall forthwith schedule the inspection for a date and time when he or she believes that a majority of the Councilmembers wishing to inspect the site will be able to attend.

(3) The City Clerk shall, no less than seven (7) days prior to the date of the site inspection, mail notice of such inspection to the appellant and to all parties-in-interest to whom notice of the appeal hearing was sent by the City Clerk under § 2-52 above.

(4) The appellant and all other parties-in-interest shall be entitled to attend such scheduled inspection, along with any members of City staff whose presence is requested by the City Manager. Failure to mail notice to any party-in-interest shall not affect the scheduling or validity of any proceeding held or determination made under this Division. Upon receipt of any notice returned by the U.S. Postal Service marked as undeliverable for any reason, the City Clerk may exclude the party-in-interest to which such notice had been mailed from any future mailings related to the appeal that was the subject of the returned notice.

(b) Any Councilmembers conducting a site inspection under the provisions of Subsection (a) above, either alone or with City staff present, shall, at the hearing on the appeal, state on the record

any observations they made or conversations they had at the site which they believe may be relevant to their determination of the appeal.

(c) Nothing in this Section shall be construed to authorize any Councilmember or other officer or employee of the City to enter upon any parcel of real property that is not open to the public without the permission of the owner of such property or the permission of such other person or entity as may be lawfully in possession of the property.

Sec. 2-54. - Procedure at the hearing.

(a) At the hearing on the appeal by the City Council, the presentation of argument on the merits of the appeal shall be made in the following order, subject to such limitations in time and scope as may be imposed at the discretion of the Mayor:

- (1) Presentation by City staff explaining the nature of the appeal or appeals and the decision being appealed;
- (2) Comments by Councilmembers who have inspected the site pursuant to Subsection 2-53(a) above;
- (3) Consideration of any procedural issues identified under Subsection (c) below;
- (4) Presentation of argument by the appellant and any party-in-interest in support of the appeal;
- (5) Presentation of argument by any party-in-interest who is an opponent of the appeal;
- (6) Rebuttal presentation by the appellant and any party-in-interest in support of the appeal;
- (7) Rebuttal presentation by any party-in-interest who is an opponent of the appeal;
- (8) Councilmember questions of City staff and parties-in-interest; and
- (9) Motion, discussion and vote by the City Council.

(b) Factors to be considered in determining the period of time for the presentation of argument on the merits of an appeal shall include, but not be limited to, the complexity of the issues raised in the notice of appeal, the length of the record on appeal, the potential impact that the determination of the appeal may have on the community at large and the number of parties-in-interest who wish to address the Council with regard to the merits of the appeal.

(c) Prior to hearing the presentation of argument on the merits of the appeal, the Mayor may, in his or her discretion, establish a separate period of time during which the Council may first consider and the Mayor may determine, subject to override by the Council by majority vote, any procedural issues related to the hearing of the appeal, including, but not limited to, the possible

introduction or exclusion of certain evidence, whether to separate any consolidated appeals of the same decision by different appellants, the period of time to be allowed for presentation of argument and rebuttal on the merits of the appeal and any concerns or objections related to the record on appeal.

(d) No person making a presentation to the City Council shall be subject to cross-examination except that members of the City Council and the City Attorney may inquire of such person for the purpose of eliciting information and for the purpose of clarifying information presented.

(e) In the event of multiple appeals involving the same decision of a board, commission or other decision maker that have been consolidated in accordance with § 2-52(b), the Mayor, in his or her discretion, may modify the procedure contained in Subsection (a) above so as to expedite the hearing of such appeals.

Sec. 2-55. - Written materials; new evidence.

(a) The City Council shall consider an appeal based upon the record on appeal, including any new evidence admitted for or at the appeal hearing, the relevant provisions of the Code and Charter and any other applicable legal authorities, the grounds for appeal cited in the notice of appeal, the arguments made by parties-in-interest at the hearing on the appeal, and the City staff report and presentation prepared for the appeal; provided, however, that issues raised during the presentation of argument but not raised in the notice of appeal shall not be considered by the City Council in deciding the appeal.

(b) No new evidence shall be presented to the City Council before or during an appeal hearing, and no new evidence shall be considered on appeal, except as follows:

(1) When offered by an appellant and submitted pursuant to § 2-49(b)(5);

(2) When offered by a party-in-interest opposed to the appeal in response to and regarding appeal allegations under § 2-48(b)(2)c, d, or e, provided that any such new evidence must be submitted to the City Clerk within twenty-one (21) calendar days after the deadline for filing the related notice of appeal and the City Clerk shall not provide any new evidence to Council submitted by any person after the time for submittal has expired;

(3) When offered by City staff or parties-in-interest in response to questions presented by Councilmembers under Subsection 2-54(a) or (d) above; or

(4) When offered by Councilmembers after inspecting the site of the project development plan or other proposal that is the subject of an appeal pursuant to the provisions of § 2-53 of this Article.

(c) City staff shall prepare for Council consideration the record as described in § 2-51, together with a staff agenda item summary and presentation materials, which shall become part of the record of the appeal hearing. Staff shall also provide to the Council the notice of appeal and all attachments to it, and new evidence provided to the City Clerk in accordance with subsection

(b)(2), above. The Council will determine whether to admit for consideration each item of new evidence offered by any party, and those materials admitted for consideration shall become part of the record of the appeal hearing.

(d) Any party-in-interest shall submit to the City Clerk a copy of all materials, including digital presentations, to be presented to the Council at the appeal hearing no later than noon on the day of the appeal hearing, or 4:00 p.m. the business day prior to the appeal hearing if the Council meeting at which the hearing will be conducted is scheduled to begin earlier than 6:00 p.m., and such materials shall thereafter be made reasonably available by the City Clerk to any persons upon request. In light of the limitations on admission of new evidence, admission of any such materials for consideration shall be subject to Council determination at the appeal hearing. Any party-in-interest may provide a true and accurate hard copy of any such presentation for Council reference, so long as no fewer than twenty (20) such copies are provided to the City Clerk along with the digital presentation.

(e) Any party-in-interest who believes that new evidence has been improperly introduced into the appeal hearing may, at any time during the hearing, interrupt the proceedings and object to the Council's consideration of such evidence. If such an objection is made, the Mayor shall rule on the objection, after consultation with the City Attorney if necessary, and the evidence shall either be received and considered by the Council or disregarded by the Council in accordance with the ruling of the Mayor; provided, however, that the Mayor's ruling on this or any other procedural issue raised during the course of the hearing may be overridden by a majority of the Council. The failure of a party-in-interest to make such an objection shall constitute a waiver of the same by that party-in-interest for the purpose of any court appeal of the Council's decision.

Sec. 2-56. - Council decision on appeal.

(a) In considering an allegation that a board, commission or other decision maker failed to properly interpret and apply the relevant provisions of the Code or Charter asserted under Paragraph 2-48(b)(1) of this Article, the City Council shall determine how such provisions should, in the City Council's judgment, be applied to the evidence contained in the record of the appeal hearing.

(b) At the conclusion of such hearing, the City Council shall uphold, overturn or modify the decision of the board, commission or other decision maker, and may impose such conditions as the Council determines appropriate to further the purposes of or compliance with the standards governing the decision; provided, however, that:

(1) The City Council shall instead remand the matter for rehearing if it finds that the appellant was denied a fair hearing before the board, commission or other decision maker for any of the reasons stated in Paragraph 2-48(b)(2) of this Article. Notwithstanding any language to the contrary in City Code, if City Council determines that on remand the board, commission, or decision maker will be unable to provide a fair rehearing or will be unable to provide a rehearing because a quorum will not be available, City Council shall remand the matter for rehearing to a qualified, alternative decision maker determined by City Council. Additionally, City Council may remand the matter for rehearing to a qualified,

alternative decision maker if the public confidence in the decision on remand would be better served than remand to the original board, commission, decision maker.

(2) The City Council may also remand the matter for rehearing in order for the board, commission or other decision maker to receive and consider additional information with regard to any issue raised on appeal. Any such remand shall include direction from the City Council to the board, commission or other decision maker as to the issues to be considered at the rehearing.

(c) No later than the date of its next regular meeting, the City Council shall adopt, by resolution, findings of fact in support of its decision. The date of passage of such resolution shall be the date of final action of the City Council for the purpose of any subsequent judicial review of the decision of the City Council.

(d) Subsequent to the adoption of the resolution required under Subsection (c), above, the Council may amend said resolution at any time in order to clarify or correct it, or to modify the decision in order to resolve a related legal dispute or to bring the decision into compliance with federal, state or local law, including the Charter and Code of the City of Fort Collins.

(1) At least fourteen (14) days prior to consideration of any such amendments, written notice that the Council will consider such amendments must be mailed to the last known address of the appellant, the applicant, and any other party-in-interest who appeared at the related appeal hearing.

(2) Persons entitled to notice of the consideration of amendments shall have an opportunity to comment at the time of such consideration.

Introduced, considered favorably on first reading, and ordered published this 21st day of January, A.D. 2020, and to be presented for final passage on the 4th day of February, A.D. 2020.

ATTEST:


City Clerk



Passed and adopted on final reading on this 4th day of February, A.D. 2020.


Mayor

ATTEST:


City Clerk

