

AGENDA ITEM SUMMARY

FORT COLLINS CITY COUNCIL

ITEM NUMBER: 9

DATE: February 5, 2008

**STAFF: Steve Roy
Cameron Gloss**

SUBJECT

Second Reading of Ordinance No. 003, 2008, Amending Chapter 2, Division 3 of the City Code Pertaining to Appeals to the City Council.

RECOMMENDATION

Staff recommends adoption of this Ordinance on Second Reading.

EXECUTIVE SUMMARY

This Ordinance authorizes Councilmembers to inspect the site of development project plans or other proposals that are the subject of a Council appeal and prescribes the terms and conditions under which such site inspections may occur.

On First Reading, this Ordinance presented two proposed amendments to the Council. The first of those amendments would have limited the parties-in-interest who are considered to have a legally protected interest under the Code for the purposes of seeking judicial review of the Council's determination of an appeal. The motion to approve that proposed amendment failed to gain majority support. Accordingly, the Ordinance presents on second reading only the second part of the original Ordinance, which was unanimously adopted on First Reading on January 15, 2008.

ATTACHMENTS

1. Copy of First Reading Agenda Item Summary - January 15, 2008.

AGENDA ITEM SUMMARY

FORT COLLINS CITY COUNCIL

ITEM NUMBER: 13

DATE: January 15, 2008

STAFF: Steve Roy
Cameron Gloss

COPY

SUBJECT

First Reading of Ordinance No. 003, 2008, Amending Chapter 2, Division 3 of the City Code Pertaining to Appeals to the City Council.

RECOMMENDATION

Staff recommends adoption of this Ordinance on First Reading.

EXECUTIVE SUMMARY

This Ordinance would amend Chapter 2, Division 3 of the City Code pertaining to appeals to the City Council in two respects. First, the Ordinance would clarify which parties-in-interest, as defined in the Code, are entitled to seek judicial review of the Council's determination of an appeal. Second, the Ordinance would explicitly authorize Council members to inspect the site of development project plans or other proposals that are the subject of a Council appeal and would prescribe the terms and conditions under which such site inspections may occur.

BACKGROUND

The City Code, in Chapter 2, Division 3, establishes a procedure under which the decisions of certain boards and commissions and other decision makers of the City can be appealed to the City Council. The Ordinance proposes two amendments to the provisions of those Code sections.

STANDING TO SEEK JUDICIAL REVIEW

The first of the amendments would clarify which of the "parties-in-interest," as that term is defined in Section 2-46 of the Code, have standing not only to file appeals with the Council and to address the Council at the hearings held on those appeals but also to seek judicial review of the Council's determination of an appeal. The Code defines the following as parties-in-interest; however, it is silent as to which of the parties-in-interest may appeal Council's decision to the district court.

- (1) The applicant;
- (2) Any party holding a proprietary or possessory interest in the real or personal property which 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 which sent written comments to the board, commission or other decision maker prior to the action which is to be appealed;
- (5) Any person who 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.

In 2005, the City Council heard an appeal of a hearing officer's denial of a proposed project development plan to be located at the intersection of College Avenue and Cherry Street. At the conclusion of the appeal hearing, the Council overturned the decision of the hearing officer and approved the plan. The Council's decision was appealed to court by Patrick Reeves, a resident of the City. Mr. Reeves qualified as a party-in-interest under the provisions of the City Code because he had submitted comments to the hearing officer regarding the development proposal and had appeared at the appeal hearing. However, Mr. Reeves' property is not located in close proximity to the site of the development project and he did not assert any damages that he would sustain as a property owner as a result of the Council's approval of the project. Instead, the injury he asserted was aesthetic in nature and had to do with his use of the Poudre River, the Poudre River Trail, College Avenue and other public facilities and amenities located near the project. Essentially, he asserted that his enjoyment of these facilities would be diminished by construction of the project.

The City moved to dismiss Mr. Reeves' appeal on the grounds that he lacked legal standing to appeal the Council decision. The test for legal standing is twofold. First, a party must have a legally protected interest in the decision. Second, he or she must allege some "injury in fact" that would result from the decision. The trial court granted the City's motion to dismiss because of a lack of standing. However, the Colorado Court of Appeals reversed the trial court's decision and reinstated the complaint. In doing so, the Court of Appeals held that, in adopting the City's Land Use Code and the appeals provision of the City Code, the City Council had given all parties-in-interest under Section 2-46 the same rights of participation and appeal as applicants for development approval and had conferred on those parties-in-interest a legal interest in the Council's determination of the appeal that they might not otherwise have under the law. Thus, the Court found that all such parties-in-interest have standing to such judicial review of the Court's decision.

City staff is recommending that Council amend the Code to limit the right of judicial review to those parties-in-interest who have a direct stake in the outcome of the appeal, that is, those who fall within the first three categories of the definition of parties-in-interest: the applicant; persons or entities that hold a proprietary or possessory interest in the real property that is the subject of the appeal; and any person to whom or organization to which the City mailed notice of the hearing before the original decision maker (those within the "notice zone" of the affected property).

Staff makes this recommendation because it believes that, while the input of all parties-in-interest is helpful to the Council in deciding an appeal and the opportunity for such input should be extended to all interested parties who have participated in the original hearing, the right of judicial appeal should be limited to those who are most directly affected by the outcome of the appeal, both because of the expense incurred by the City in defending such court actions and because of the considerable

delay that generally results from judicial review of these kinds of decisions. This expense and delay could very likely thwart the approval and construction of development proposals that meet all the City requirements and that may be important to the economic well-being of the City.

Accordingly, the amendment would still allow all persons to participate in the administrative proceedings related to development proposals but would limit those who can pursue judicial review.

SITE INSPECTIONS

The second proposed amendment is being presented at the request of several Councilmembers, and it would amend the Code so as to expressly permit Councilmembers to inspect the real property that is the subject of an appeal. At present, the Code limits Council's consideration of an appeal to the record of the proceedings before the decision maker, the relevant provisions of the Code and Charter, and the grounds for appeal cited in the notice of appeal. New evidence is not to be considered on appeal except when offered in support of or in opposition to an allegation that the decision maker considered evidence that was substantially false or grossly misleading or when offered by City staff or parties-in-interest in response to questions presented by Councilmembers.

The proposed amendment would allow Councilmembers to obtain additional information related to the appeal by inspecting the site of the development project plan or other proposal that is the subject of the appeal, and to take that information into consideration when determining the appeal. Staff is offering several guidelines as to how these site inspections can occur, while still protecting the due process rights of the parties-in-interest involved in the appeal.

Those proposed guidelines are as follows:

1. If a Councilmember wishes to inspect the site of a project development plan or other proposal that is the subject of an appeal, he or she could, no later than ten days prior to the date of the hearing on the appeal, request that the City Manager schedule such inspection. Upon receipt of such a request, the City Manager would forthwith schedule the inspection for a date and time when he or she believes that the majority of Council will be able to attend.
2. No less than five (5) days prior to the date of the hearing on the appeal, the City Clerk would mail notice of the proposed site inspection to the appellant and to all parties-in-interest to whom notice of the appeal hearing was sent by the City Clerk under Section 2-54(a).
3. The appellant and such parties-in-interest would be entitled to attend the inspection, along with any members of City staff whose presence is requested by the City Manager.
4. Any Councilmembers conducting a site inspection under this provision would be required to state for the record, at the time of the hearing on the appeal, any observations they made or conversations they had at the site which they believe may be relevant to their determination of the appeal.
5. The requirements of this provision would not apply to observations made of the site by Councilmembers during the course of their travels within public rights-of-way adjacent to

the site, but only to site inspections conducted for the express purpose of gathering additional information that may assist them in determining the appeal.

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ORDINANCE NO. 003, 2008
OF THE COUNCIL OF THE CITY OF FORT COLLINS
AMENDING CHAPTER 2, DIVISION 3 OF THE CODE OF THE
CITY OF FORT COLLINS PERTAINING TO APPEALS TO THE CITY COUNCIL

WHEREAS, several members of the Council have requested that staff prepare a proposed amendment to the provisions of Chapter 2, Division 3 of the Code that would expressly permit Councilmembers to inspect the site of a project development plan or other proposal that is the subject of an appeal; and

WHEREAS, staff has recommended certain proposed amendments to the Code that would achieve that purpose while protecting the due process rights of all parties-in-interest involved in an appeal; and

WHEREAS, the Council believes that the foregoing proposed amendments are in the best interest of the City and wishes to adopt the same.

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

Section 1. That Section 2-55 of the Code of the City of Fort Collins is hereby amended to read as follows:

Sec. 2-55. Site visits/~~No~~ ex parte contacts.

(a) If a Councilmember wishes to inspect the site of a project development plan or other proposal that is the subject of an appeal, he or she may, no later than ten (10) days prior to the date of the hearing on the appeal, request that the City Manager schedule such inspection. 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 the majority of Council will be able to attend. The City Clerk shall, no less than five (5) days prior to the date of the hearing on the appeal, mail notice of the proposed site inspection to the appellant and to all parties-in-interest to whom notice of the appeal hearing was sent by the City Clerk under § 2-54(a). The appellant and all other parties-in-interest shall be entitled to attend such inspection, along with any members of City staff whose presence is requested by the City Manager. Any Councilmembers conducting a site inspection under this provision 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. The requirements of this provision shall not apply to observations made of the site by Councilmembers during the course of their travels within public rights-of-way adjacent to the site, but only to site inspections conducted for the express purpose of gathering additional information that may assist them in determining the appeal.

(b) 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.

Section 2. That Subsection 2-56(a) of the Code of the City of Fort Collins is hereby amended to read as follows:

Sec. 2-56. 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) Explanation of the nature of the appeal and presentation by City staff;
- (2) **Comments by Councilmembers who have visited the site pursuant to Subsection 2-55(a);**
- (~~2~~3) Presentation of argument by the appellant and any party-in-interest in support of the appeal;
- (~~3~~4) Presentation of argument by any party-in-interest who is an opponent of the appeal;
- (~~4~~5) Rebuttal presentation by the appellant and any party-in-interest in support of the appeal;
- (~~5~~6) Rebuttal presentation by any party-in-interest who is an opponent of the appeal;
- (7) **Councilmember questions of City staff and parties-in-interest; and**
- (~~6~~8) Motion, discussion and vote by the City Council.

...

Section 3. That Section 2-57 of the Code of the City of Fort Collins is hereby amended to read as follows:

Sec. 2-57 New evidence; scope of review; alternative actions available to the City Council; date of final action.

...

(b) New evidence shall not be considered on appeal except under the following circumstances:

- (1) When offered in support of or in opposition to an allegation under Subparagraph 2-48(2)c that a board, commission or other decision maker considered evidence relevant to its findings which was substantially false or grossly misleading;
- (2) When offered by City staff or parties-in-interest in response to questions presented by Council-members under Subsection ~~2-55(b)~~ **2-56(a) or (b)**;
- (3) **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 Subsection 2-55(a).**

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Introduced and considered favorably on first reading and ordered published this 15th day of January, A.D. 2007, and to be presented for final passage on the 5th day of February, A.D. 2007.

Mayor

ATTEST:

City Clerk

Passed and adopted on final reading this 5th day of February, A.D. 2007.

Mayor

ATTEST:

City Clerk