

SUBJECT

First Reading of Ordinance No. 131, 2011, Amending the Appeals Procedure Contained in Chapter 2, Article II, Division 3 of the City Code Relating to the Procedures for Hearing Appeals to the City Council.

EXECUTIVE SUMMARY

This Ordinance makes several changes to the way in which appeals to the City Council are handled. The changes are in response to concerns and suggestions of persons who have participated in recent land use appeals, and to direction provided by the City Council at a Council work session. The changes deal with the following topics: the scheduling of the appeal hearing; the ability of Councilmembers who file an appeal to participate in hearing the appeal; the ability of opponents of an appeal to present their views in writing in addition to presenting argument at the hearing; the manner in which site visits are conducted; the submission of written materials to the Council; and expanding the group of persons who can participate in appeal hearings.

BACKGROUND / DISCUSSION

Chapter 2, Article II, Division 3 of the City Code establishes a procedure whereby the final decisions of certain boards and commissions and other decision makers can be appealed to the City Council. Most frequently, this appeal process is used for considering appeals from the decisions of the Planning and Zoning Board or the City's administrative hearing officer on applications for approval of land use proposals. Over the recent past, parties on both sides of the appeal process have expressed concerns about the process and have suggested ways in which it could be improved.

On June 14, 2011, at a City Council work session, the Council considered a number of these issues, including the possibility of establishing a "*de novo*" appeal process in place of the existing "on the record" appeal process. Under a *de novo* process, the Council would conduct an entirely new hearing on the matter that had been decided by the initial decision maker rather than limiting the evidence at the appeal hearing to the record that was established at the hearing before the initial decision maker. At the conclusion of the work session discussion, the Council indicated a preference for retaining the current appeal process but making several revisions. The proposed revisions to be included in this Ordinance were the following:

- eliminating the current provision that prevents Councilmembers who file an appeal from participating in hearing the appeal;
- expanding the period of time within which the hearing on an appeal must be scheduled; and
- expanding the group of persons who are entitled to speak at an appeal hearing to include members of the general public.

Those changes are included in the proposed Ordinance. In addition, City staff has recommended the following additional changes:

- creating an opportunity for parties opposed to an appeal to file a statement in opposition to the appeal;
- clarifying the extent to which new evidence may be contained in written materials presented to the Council prior to the hearing and in presentations made at the hearing;
- clarifying the purpose and procedure for conducting inspections of the site that is the subject of an appeal.

The primary purpose behind allowing opponents of an appeal to file a written statement in opposition to the appeal is to give the parties on both sides of the appeal early notice of the other party's position. In that way, the parties can

better prepare and focus their remarks at the appeal hearing. This change should also shorten the time needed at the appeal hearing for the parties to make their oral presentations, especially in the case of appeals that are complex in nature.

STAFF RECOMMENDATION

Staff is supportive of all of the proposed changes with the exception of expanding participation in the appeal process to allow comment at the appeal hearing by members of the general public in addition to parties-in-interest. Staff is concerned about that proposal for several reasons.

First, the City's decision whether to approve a land use proposal is made through a "quasi judicial" process in which the decision maker (both the initial decision maker and the City Council), determine the rights of particular parties who are directly and immediately affected by the proposal. The decision must be based upon established criteria. Those who have been involved in the process prior to the Council appeal hearing and who are directly affected by a development proposal are more likely to focus their remarks on the facts in the record and the relevant criteria rather than on general policy consideration.

Second, the City Code already defines "parties-in-interest" to include not only the applicant, the interest holder in the property that is the subject of the application, and those who live close to the site, but also those members of the general public who sent comments to the initial decision maker or appeared at the hearing before the initial decision maker. Thus, the general public is already able to participate in the process for reviewing land use applications.

Third, allowing the general public to speak at the appeal hearing would likely make it more difficult for the Council to hear all persons who wish to speak at the hearing within the limited period of time that is available for presentations at the hearing.

Finally, this change could be construed as expanding the group of persons who would have legal "standing" to challenge the Council's decision in court, in which case, then even nonresidents of the City who have no direct stake in the approval or denial of the particular application could bring such a challenge. Therefore, if the Council decides to make this change, staff recommends that additional language be added on Second Reading expressly stating that the ability of members of the public to speak at the appeal hearing should not be construed as giving those members of the public the right to challenge the City Council's decision in court.

ATTACHMENTS

1. Chart of Appeal Timeline
2. Powerpoint presentation

Appeal Timeline

Notice of Appeal

Must be filed within 14 *calendar* days of date of decision subject to appeal.

Internal Review

Within 5 *working* days of filing of Notice of Appeal -
City Attorney reviews.

Within 7 *working* days of filing of Notice of Appeal -
City Attorney's comments are mailed to Appellant.

Within 14 *working* days of filing of Notice of Appeal -
Appellant may file an amended appeal.

Site Inspection?

Within 10 *calendar* days of filing of Notice of Appeal,
Council may request a site inspection.

(Clerk provides Appellant inspection notice no less than 5 calendar days prior.)

Appeal Timeline

Notice of Hearing

No less than 30 *calendar* days prior to the hearing date - Notice of Hearing is mailed to parties-in-interest.

Statement in Opposition

Within 10 *calendar* days after mailing of hearing notice - any party-in-interest opposed to the appeal may respond in writing.

Hearing

Must be held within 120 *calendar* days of filing of Notice of Appeal.

Ordinance No. 131, 2011 Amending the Procedures for Hearing Appeals to the City Council

Steve Roy, City Attorney

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Council Appeal Process

- **Council hears appeals from the following boards, commissions and hearing officers that make “quasi-judicial” decisions:**
 - Building Review Board
 - Fire Board of Appeals
 - Landmark Preservation Board
 - Planning and Zoning Board
 - A “decision maker” under the provisions of Sec. 2.2.12 of the Land Use Code
 - Water Board
 - Zoning Board of Appeals

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Quasi-Judicial Decisions

- **Made at a hearing held after notice to affected parties;**
- **Where the decision is based on:**
 - **evidence in the record, and**
 - **previously established criteria.**
- **The decision must be made by an impartial tribunal.**

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- **City’s appeal process is based on the record of the hearing before the initial decision maker—not an entirely new hearing.**
- **Different than a “*de novo*” hearing.**

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Proposed changes

- Councilmembers who file an appeal may participate in hearing the appeal;
- More time for holding appeal hearing – increased from 60 days to 120 days after filing of notice of appeal;
- Parties opposed to appeal may file statement in opposition;
- Opportunity for written materials to be submitted immediately prior to hearing eliminated.

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Proposed changes (cont'd)

- Clarifies provisions related to new evidence:
 - May be included in opposition statement but only if related to allegation of false or misleading evidence;
 - “Reconfigured” evidence not admissible at hearing.
- Procedures for site inspections clarified.
- Members of general public allowed to comment at hearing.

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Staff Recommendation

- Approval of all changes except allowing general public to comment at appeal hearing:
 - Not directly affected by proposal;
 - Can already participate if appeared at initial hearing or sent comments to initial decision maker.
 - May increase time needed at appeal hearing or take time away from parties-in-interest.
 - Would allow non-community members to challenge Council decision in court as matter of principle even if no direct involvement or impact.

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Appeal Timeline

Notice of Appeal

Must be filed within 14 *calendar* days of date of decision subject to appeal.

Internal Review

Within 5 *working* days of filing of Notice of Appeal - City Attorney reviews.
Within 7 *working* days of filing of Notice of Appeal - City Attorney's comments are mailed to Appellant.
Within 14 *working* days of filing of Notice of Appeal - Appellant may file an amended appeal.

Site Inspection?

Within 10 *calendar* days of filing of Notice of Appeal, Council may request a site inspection.
(Clerk provides Appellant inspection notice no less than 5 calendar days prior.)

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Appeal Timeline

Notice of Hearing

No less than 30 *calendar* days prior to the hearing date - Notice of Hearing is mailed to parties-in-interest.

Statement in Opposition

Within 10 *calendar* days after mailing of hearing notice - any party-in-interest opposed to the appeal may respond in writing.

Hearing

Must be held within 120 *calendar* days of filing of Notice of Appeal.

ORDINANCE NO. 131, 2011
OF THE COUNCIL OF THE CITY OF FORT COLLINS
AMENDING THE APPEALS PROCEDURE CONTAINED IN CHAPTER 2,
ARTICLE II, DIVISION 3 OF THE CODE OF THE CITY OF FORT COLLINS
RELATING TO PROCEDURES FOR HEARING APPEALS TO THE CITY COUNCIL

WHEREAS, Chapter 2, Article II, Division 3 of the City Code establishes a procedure whereby the final decisions of boards, commissions and other decision makers can be appealed to the City Council (the “Appeals Procedure”); and

WHEREAS, City staff has identified a number of issues related to the appeal process that warrant Council consideration, some of which were considered and discussed by the City Council in a work session held on June 14, 2011; and

WHEREAS, the issues discussed by the City Council at the work session and the additional issues that have been identified by City staff include the following:

- the period of time within which the hearing on an appeal must be scheduled;
- the fact that parties-in-interest to an appeal do not have an opportunity to respond in writing to the allegations contained in the notice of appeal that is filed by appellants;
- the process for scheduling site inspections;
- the role of the public in appeal hearings; and
- whether Councilmembers who file an appeal should be able to participate in hearing the appeal; and

WHEREAS, the City Council has determined that these issues should be addressed by amendments to the Appeals Procedure.

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

Section 1. That Section 2-48(c) of the Code of the City of Fort Collins is hereby amended to read as follows:

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

...

(c) Appeals filed by members of the City Council need not include specific grounds for appeal, but shall include a general description of the issues to be considered on appeal. 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 issues 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 § 2-54. Said information shall then be mailed to the parties-in-interest together with the notice of hearing. ~~Councilmembers who file an appeal shall not participate in deciding the appeal. Such Councilmembers may, however, participate in the appeal hearing in the same manner as other appellants, notwithstanding the provisions of Paragraph 2-568(c)(2)~~ **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.**

Section 2. That Section 2-49 of the Code of Fort Collins is hereby amended to read as follows:

Sec. 2-49. Filing of notice of appeal.

An appeal shall be taken 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) days after the action which is the subject of the appeal. Such notice of appeal shall be signed by all appellants and shall include the following:

- (1) The action of the board, commission or other decision maker which 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) For 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; ~~and~~
- (5) **For any appeal alleging under Subsection 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, any new evidence the appellant wishes to submit that tends to prove or disprove such allegation; and**
- (65) In the case of an appeal by more than one (1) appellant, the name, address and telephone number of one (1) such appellant who shall be authorized to receive, on behalf of all appellants, any notice required

to be mailed by the City to the appellants under the provisions of § 2-50.

Section 3. That the Code of the City of Fort Collins is hereby amended by the addition of a new Section 2-53 which reads in its entirety as follows and all subsequent section are hereby renumbered accordingly:

Sec. 2-53. Submissions related to appeal.

(a) Any party-in-interest opposed to the appeal who wishes to respond in writing to the allegations contained in the notice of appeal or amended notice of appeal, as applicable, may do so by filing a written statement with the City Clerk no later than ten (10) days after the date of mailing of notice of the appeal hearing pursuant to Subsection 2-54(a). No new evidence shall be contained within such response unless such new evidence falls within the exception contained in Subsection 2-57(b)(1). Any new evidence contained in the response that does not fall within such exception shall be disregarded by the Council in deciding the appeal, unless that same information is independently provided to the City Council at the hearing under the exceptions contained in Subsection 2-57(2) or (3).

(b) Other than the notice of appeal, or amended notice of appeal, as applicable, and a responsive statement filed by one or more parties-in-interest in opposition to an appeal pursuant to Subsection (a) of this Section, no written materials may be submitted by parties-in-interest in advance of the appeal hearing in connection with an appeal.

(c) Parties-in-interest may provide copies of, or direct the City Council to, specific evidence in the record of an appeal, but may not reconfigure, revise or otherwise modify materials from the record for the purpose of presentation at the hearing on the appeal.

Section 4. That Section 2-54 of the Code of the City of Fort Collins is hereby amended to read as follows:

Sec. 2-54. Scheduling of the hearing.

(a) — In the event of an appeal, the City Clerk shall schedule a date for hearing the appeal no less than ~~thirty (30)~~ nor more than ~~sixty (60)~~ **one hundred twenty (120)** calendar days after the date of filing of the notice of appeal. Written notice of the date, time and place of the hearing shall be mailed by the City Clerk to the appellant and all other parties-in-interest no less than ~~thirty (30)~~ **thirty ten (130)** calendar days prior to the date of said hearing. Said notice shall also include a copy of the notice of appeal or amended notice of appeal, as applicable, and shall inform the parties-in-interest of the period of time within which additional issues may be identified under § 2-56.

~~(b) Any written materials that any party-in-interest may wish the City Council to consider in deciding the appeal and that fall within the exception to new evidence contained in Paragraph 2-57(b)(1) shall be submitted to the City Clerk no later than 12:00 p.m. on the Wednesday immediately preceding the date upon which the hearing on the appeal is scheduled to be held. Such materials shall then be included by the City Clerk in the agenda materials pertaining to the appeal.~~

Section 5. That Section 2-55 of the Code of the City of Fort Collins is amended to read as follows:

Sec. 2-55. Site ~~visits~~inspection/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.~~ 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, as well as the issues on appeal. If a Councilmember wishes to schedule a site inspection with City staff present, he or she shall, no later than ten (10) days after the filing of the notice of 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~~a majority of the Councilmembers wishing to inspect the site 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~~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 Subsection 2-54(a) of this Article. The appellant and all other parties-in-interest shall be entitled to attend such ~~such~~scheduled inspection, along with any members of City staff whose presence is requested by the City Manager.

~~(b) Any Councilmembers conducting a site inspection under this~~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. ~~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.~~

~~(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.

(bd) 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 6. That Section 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~~**inspected** the site pursuant to Subsection 2-55(a);
- (3) Presentation of argument by the appellant and any party-in-interest **and/or other member of the public** in support of the appeal;
- (4) Presentation of argument by any party-in-interest **and/or other member of the public** who is an opponent of the appeal;
- (5) Rebuttal presentation by the appellant and any party-in-interest **and/or other member of the public** in support of the appeal;
- (6) Rebuttal presentation by any party-in-interest **and/or other member of the public** who is an opponent of the appeal;

...

Section 7. That Section 2-57(a) 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.

(a) The City Council shall consider an appeal based upon the record on appeal, the relevant provisions of the Code and Charter and the grounds for appeal cited in the notice of appeal, **together with arguments in favor of and opposing the appeal submitted or presented in accordance with the terms of this Article.** Issues not raised in the notice of appeal shall not be considered by the City Council in deciding the appeal.

...

Introduced, considered favorably on first reading, and ordered published this 4th day of October, A.D. 2011, and to be presented for final passage on the 18th day of October, A.D. 2011.

Mayor

ATTEST:

Chief Deputy City Clerk

Passed and adopted on final reading on the 18th day of October, A.D. 2011.

Mayor

ATTEST:

City Clerk