

DATE: April 11, 2006

**STAFF: Steve Roy
Greg Byrne**

**WORK SESSION ITEM
FORT COLLINS CITY COUNCIL**

SUBJECT FOR DISCUSSION

Proposed Amendments to the Appeals Process Contained in Chapter 2 of the City Code.

GENERAL DIRECTION SOUGHT AND SPECIFIC QUESTIONS TO BE ANSWERED

Should the following proposed amendments to the appeals process contained in Chapter 2 of the City Code be presented for Council's consideration?

BACKGROUND

The City Council is frequently called upon to hear appeals from certain City board and commissions and other "decision makers" under Chapter 2, Article II, Division 3 of the City Code. Most of these appeals are from site-specific land use decisions made by the Planning and Zoning Board or a hearing officer under the City's Land Use Code. However, there are several other boards and commissions of the City that are called upon to make "quasi-judicial" decisions, and those decisions are appealable to the Council as well under the provisions of Chapter 2 of the Code. (A "quasi-judicial" decision is one that is made after notice to parties directly affected by the decision at a hearing at which those parties are given an opportunity to be heard, and the decision entails the application of criteria established in the Code to particular fact situations.) In addition, certain decisions of City service area directors are appealable to the Council, though they are not specifically referenced in Chapter 2.

The procedure for hearing these appeals has been in the Code since February 1982. Periodically, this appeal process has been refined through various City Code amendments. City staff believes that it would be beneficial for the Council to again consider possible changes to the appeal process for the following reasons.

- Each appeal consumes a significant amount of staff time and Council time in preparing for and conducting the hearing. Thus, there is some "lost opportunity cost" to be considered since the time devoted to appeals could be devoted to other City business. Therefore, staff suggests reviewing the appeal process to ensure that it operates as efficiently as possible.
- There is also a direct monetary cost to be considered. The fee for filing an appeal is fixed by the Code at \$100. As discussed below, staff estimates that the actual costs incurred in processing appeals far exceeds that amount.
- There are a number of procedural issues that have surfaced during recent appeals that may warrant amendments to the process prescribed in the Code.

These issues are discussed in more detail below.

Defining "evidence."

Because the Code states that Council's decision on an appeal is to be based on the record of the proceedings before the original decision maker, the Code generally prohibits the introduction of new evidence at appeal hearings. The term "new evidence" is defined in the Code but "evidence" is not.

Staff recommendation: Add a definition of "evidence" to the Code so that parties addressing the Council will have a better understanding of the difference between evidence and argument.

Clarifying the definition of "new evidence."

Recently, questions have arisen at appeal hearings as to whether information that was presented to the original decision maker in one form constitutes "new evidence" when it is offered for Council's consideration at the appeal hearing in a different form. For example, parties in interest may put together a power point presentation that contains verbatim excerpts of the transcript for the purpose of emphasis. Or, something that was described orally in the transcript may be offered in the form of a map or drawing at the hearing. Considerable time can be consumed at the hearing debating whether these kinds of exhibits are admissible.

Staff recommendation: Amend the Code to make it clear that the same information in a different form is not "new evidence."

Eliminating the filing of written statements prior to appeal hearings.

The Code presently states that parties in interest who wish to provide written materials to the Council regarding the appeal may do so by filing the materials with the City Clerk's Office no later than the Wednesday prior to the hearing on the appeal. The reason this provision was added to the Code was to give Councilmembers an opportunity to review any written materials that parties in interest wanted to submit prior to the hearing. However, this provision has proved to be problematic for a couple of reasons. First, some parties in interest file written statements and others do not, and this can result in parties "soliciting" invitations from Councilmembers at the hearing to offer additional information that missed the Wednesday deadline. Second, the written materials often contain new evidence. When that occurs, staff needs to decide whether to: (a) send the materials on to Council with advice to disregard the new evidence, (b) delete the new evidence from the materials before sending them to Council, or (c) ask the parties submitting the materials to modify them before they are sent to the Council.

Staff recommendation: Repeal the provision in question.

Clarifying the scope of review on appeal.

The Code presently states that the Council is to consider an appeal based upon the record on appeal, the relevant provisions of the Code and Charter, the grounds for appeal cited in the notice of appeal and any additional issues identified by a member of the Council prior to the hearing. Any such additional issues must be identified in writing and filed with the City Clerk no later than seven

calendar days prior to the date of the hearing. This second provision was added to the Code to give parties in interest an opportunity to prepare for all issues that might come up at the appeal hearing, including those that Councilmembers might raise. As a practical matter, however, Councilmembers have little opportunity to review the materials related to an appeal more than a week prior to the appeal hearing. Thus, it isn't until the hearing itself that Councilmembers really have a chance to identify issues that may not have been included in the notice of appeal. Consequently, questions have arisen at recent hearings as to whether the Council can go beyond the grounds stated in the notice of appeal and address other issues that may have come to light at the hearing, even though they have not filed notice of their intent to do so prior to the hearing.

Because the underlying purpose of the decision-making process is to thoroughly review, in its entirety, the land use proposal or other matter under consideration, staff believes the current wording of the Code is too limiting and that, on appeal, the Council should be permitted to explore issues that may not have been raised by the appellant but that are, nonetheless, important to address. Staff also believes that, by the time the matter comes to Council on appeal, the parties in interest are familiar enough with the decision at hand to be able to address whatever issues Council believes are relevant.

Staff recommendation: Amend the Code to clarify that Council has the latitude to address any and all issues related to the decision that are relevant under the applicable criteria.

Clarifying Council direction on remands.

The Code allows Council to remand a matter to the original decision maker under either of two circumstances: (a) if the appellant was denied a fair hearing, and (b) in order for the board, commission or other decision maker to receive and consider additional information with regard to any issue raised on appeal. When the Council remands a matter in order that a particular issue be further considered, it generally tries to clarify the scope of the remand, in other words, the extent to which the initial decision is open for re-consideration. However, clarifying the scope of the remand is not presently required by the Code.

Staff recommendation: Language should be added to the Code to ensure that a remand for additional consideration by the original decision maker is accompanied by direction regarding the scope of the remand.

Addressing ex parte contacts.

Much attention is paid to preserving Council's impartiality in hearing appeals. Frequently, parties in interest and other members of the public attempt to contact Councilmembers in advance of an appeal in order to present their positions regarding the appeal. The rules of law pertaining to quasi-judicial decision making discourage such contacts for two reasons. First, the Council's decision must be based on the evidence at the appeal hearing, including the record of the proceedings before the original decision maker and the presentations at the hearing. This limitation is necessary in order to ensure that all affected parties know the information that Council will use to make its decision and have an opportunity to speak to that information. Second, the parties in interest are entitled to an impartial decision maker, and if Councilmembers engage in "ex parte" contacts before the hearing, they risk losing that impartiality.

Parties interested in an appeal are often surprised to learn that Council must abide by these kinds of rules when it make a quasi-judicial decision. They expect to be able to contact their Council representatives and present their views ahead of time, just as they are permitted to do when Council acts in a legislative, policy-making capacity. Staff believes that it might be helpful to add language to the Code explaining the problems presented by ex parte contacts prior to an appeal hearing and discouraging such contacts, so that this rule of procedure will be less of a surprise to the public and easier for Councilmembers to explain to their constituents.

Staff recommendation: Add some general language to the Code discouraging ex parte contacts and explaining why they should be avoided.

Modifying the role of members of the general public in the filing and hearing of appeals.

The Code defines the parties who are eligible to file an appeal and participate in the appeal hearing as "parties in interest." Those who qualify as parties in interest are the following:

- (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.

Staff questions whether members of the general public who appeared at the initial hearing or who sent written comments to the decision maker should be eligible to file an appeal and participate in the appeal hearing. As noted above, quasi-judicial hearings are designed to afford due process of to those persons who are directly affected by the decision. In the case of land use decisions, those parties are the applicant, the owner of the real property that is the subject of the decision, and those persons or entities that own real property in close proximity to the site of the proposed development.

Clearly, the public has a role in site-specific land use decisions. However, there are two opportunities for members of the public to provide input on such decisions: (a) when the Council establishes the Land Use Code standards to be used in making those decisions, it does so by ordinance, so there are two opportunities during that legislative process for public input (first and second readings of the ordinance); (b) when the Planning and Zoning Board or other decision maker applies the criteria to particular facts such as a project development plan application, the public has

the opportunity to comment on the decision. The question, then, is whether the public should be able to not only participate in the initial decision but also to appeal that decision.

A recent lawsuit challenging Council's approval of the Cherry Street Station PDP points out the potential legal implications of allowing members of the general public to file such appeals and to be included among the parties in interest who may speak at appeal hearings. In that case, a resident of the City who owns property eight blocks away from a proposed residential building has challenged the Council's approval of the building in court. The City has filed a motion to dismiss on the grounds that the plaintiff lacks standing to file such an action. The plaintiff has responded by claiming that his standing to file the court action is based, in part, on his status as a party in interest in the appeal hearing. The court has not yet ruled on the issue.

In 2005, the City received 138 applications for project development plans. Staff believes the ability to challenge the City's decisions on those applications should be limited to those who are most directly affected by them, not only because of the expense and time involved in hearing such appeals but also because the filing of an appeal essentially puts development applications "on hold" pending the outcome of the appeal which, in turn, can result in considerable expense to the applicant.

Staff recommendation: Limit the filing of an appeal and participation in an appeal hearing to the applicant, those who have a legal interest in the property that is the subject of the application and those directly affected members of the general public who received mailed notice of the hearing from the City.

Considering whether Councilmembers who file an appeal should participate in hearing the appeal.

This issue arises when one or more Councilmembers file an appeal. The question is whether a Councilmember who files an appeal can, as a general rule, be unbiased in hearing the appeal. To date, this question has been addressed on a case-by-case basis. Staff recommends that the Code be amended to address the question so that Council's position on a subject will be clearly established prior to the filing of an appeal by a Councilmember.

Staff recommendation: The issues should be addressed in the Code.

Considering whether the appeal fee should be increased.

The Leadership Planning Team has suggested that Council consider increasing the fee charged by the City for filing an appeal to cover more of the costs incurred by staff in processing appeals. At present, the fee is set by Code at \$100. Staff estimates that the average cost of preparing for an appeal is approximately \$1,650. This includes preparing the record of the proceedings before the original decision maker, including a verbatim hearing transcript, reviewing the record in light of the notice of appeal, preparing the management and legal memoranda related to the appeal, preparing the agenda materials, organizing information, maps and attachments for Council packet, preparing

Power Point presentation, preparing for questions, copying, folding and mailing of notice to affected property owners, conducting the appeal hearing, and preparing the resolution finalizing the appeal.

Staff recommendation: The amount of the fee should be increased so as to more closely approximate actual costs.

ATTACHMENTS

1. Powerpoint presentation slides
2. Current Appeals Procedure from Division 3, City Code

**PROPOSED AMENDMENTS TO
THE CITY'S APPEAL PROCESS**

Presented by:
Steve Roy, City Attorney
Greg Byrne, CPES Director

APPEAL PROCESS

- The Code specifies the decisions that are appealable to the Council.
- Grounds for appealing a decision are:
 - Failure to properly interpret and apply relevant provisions of the Code or Charter; and
 - Failure to conduct a fair hearing.

APPEALS PROCESS (cont'd)

- Appeals must be filed within 14 days of the decision being appealed.
- The appeal hearing must be held no less than 30 days and no more than 60 days after the notice of appeal is filed.
- Only "parties in interest" can appeal a decision to Council or participate in the appeal hearing.

APPEALS PROCESS (cont'd)

- Council's decision on the appeal is based on:
 - the grounds stated in the notice of appeal;
 - the relevant provisions of the Code or Charter;
 - the record of the proceedings before the original decision maker (exhibits, transcript and videotape); and
 - any additional issues that Councilmembers have identified a week prior to the appeal hearing.

APPEALS PROCESS (cont'd)

- Staff presents the appeal, then parties in interest on both sides of the appeal make presentations.
- The Mayor sets the time limit for the presentations.

APPEALS PROCESS (cont'd)

- In deciding an appeal, Council can either uphold the decision that was appealed, overturn it, modify it, or send the matter back ("remand" it) for a new hearing if:
 - Council finds that the appellant did not have a fair hearing; or
 - Council wants the original decision maker to consider additional information about any issue raised at the appeal hearing.

"NEW EVIDENCE" RULE

- New evidence is generally not admissible at the appeal hearing.
- The Code prohibits new evidence at the appeal hearing except when:
 - A party has alleged that evidence was substantially false or grossly misleading; or
 - The new evidence is offered in response to a Councilmember's question.

PROPOSED CHANGES TO DEFINITIONS OF EVIDENCE

- Add a definition of "evidence" so parties can better understand the difference between evidence and argument.
- Amend the definition of "new evidence" to clarify that the same information presented in a different form is not "new evidence."

ELIMINATE THE FILING OF WRITTEN STATEMENTS BY PARTIES IN INTEREST PRIOR TO THE APPEAL HEARING

- Any written statements parties want Council to consider must be filed by parties in interest no later than noon on the preceding Wednesday.
- **Concerns:**
 - Some parties miss the deadline then "solicit" questions from Councilmembers at the hearing in order to be able to submit written materials.
 - Written materials often contain new evidence.

ELIMINATE THE FILING OF WRITTEN STATEMENTS BY PARTIES IN INTEREST PRIOR TO THE APPEAL HEARING (cont'd)

■ Staff recommendation:

Eliminate the filing of written statements prior to, or at, the appeal hearing. Limit input to oral statements.

CLARIFY THE SCOPE OF REVIEW ON APPEAL

- The Code presently limits Council to the issues raised in the notice of appeal plus any issues identified a week in advance by Councilmembers.
- Councilmembers do not have sufficient information a week in advance to know whether other issues should be considered.

CLARIFY THE SCOPE OF REVIEW ON APPEAL

■ Staff recommendation:

Amend the Code to permit Council to consider all relevant issues.

CLARIFY COUNCIL DIRECTION ON REMANDS

- When an appeal is remanded for further consideration of information presented at the appeal hearing, Council generally advises the decision maker of the scope of the review at the re-hearing.

- Staff recommendation:

Institutionalize this practice by stating in the Code that remands will always be accompanied by such direction.

ADDRESS "EX PARTE" CONTACTS

- To preserve their impartiality, Councilmembers should avoid off-the-record, *ex parte* contacts with parties affected by Council's decision on the appeal.
- When Council acts as a legislative body, Councilmembers are free to talk to their constituents in advance, so the *ex parte* rule is often confusing to the parties.

ADDRESS "EX PARTE" CONTACTS (cont'd)

- Staff recommendation:

Amend the Code to explain the problems presented by *ex parte* contacts and to discourage such contacts.

CONSIDER MODIFYING THE ROLE OF MEMBERS OF THE PUBLIC IN FILING AN APPEAL AND PARTICIPATING IN THE APPEAL HEARING

- Appeals are limited to "parties in interest:"
 - The applicant;
 - The owner or tenant of the property that is the subject of the decision;
 - Any person or organization on the City's list of affected parties;

CONSIDER MODIFYING THE ROLE OF MEMBERS OF THE PUBLIC IN FILING AN APPEAL AND PARTICIPATING IN THE APPEAL HEARING (cont'd)

- Any member of the general public who sent written comments to the original decision maker or who appeared at the hearing on the action that is being appealed;
- The City Council as represented by the request of a single member of the Council.

CONSIDER MODIFYING THE ROLE OF MEMBERS OF THE PUBLIC IN FILING AN APPEAL AND PARTICIPATING IN THE APPEAL HEARING (cont'd)

■ Question presented:

Should members of the general public be able to file an appeal and participate in the appeal hearing, or should their participation be limited to the hearing before the board, commission or other decision maker?

CONSIDER MODIFYING THE ROLE OF MEMBERS OF THE PUBLIC IN FILING AN APPEAL AND PARTICIPATING IN THE APPEAL HEARING (cont'd)

■ **Staff recommendation:**

Limit participation to those who have "due process rights" under the law because:

- they are affected differently than the general public;
- allowing appeals to be filed by the general public can result in unnecessary Council appeals and court appeals.

CONSIDER WHETHER COUNCILMEMBERS WHO FILE AN APPEAL SHOULD PARTICIPATE IN THE APPEAL HEARING

- One or more Councilmembers may file an appeal.
- No grounds need to be stated in appeals filed by Councilmembers, but issues must be identified.
- The Council must be impartial in deciding an appeal.

CONSIDER WHETHER COUNCILMEMBERS WHO FILE AN APPEAL SHOULD PARTICIPATE IN THE APPEAL HEARING

■ **Staff recommendation:**

Council should decide whether, as a general rule, a Councilmember who files an appeal should participate in hearing the appeal.

**CONSIDER WHETHER TO
INCREASE THE APPEAL FEE**

- The fee for filing an appeal is presently set at \$100.
- Counting only "primary staff," the City's cost for handling an appeal averages approximately \$1,650.

■ Staff recommendation:

Increase the fee to cover more of the cost.

DIVISION 3. APPEALS PROCEDURE¹

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 a party-in-interest who has taken an appeal 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 which submitted the application to the board, commission or other decision maker whose decision has been appealed.

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 which was the subject of final decision by a board, commission or other decision maker and which was not presented at the hearing before such board, commission or other decision maker.

Party-in-interest shall mean a person who or organization which 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 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,

¹ **Cross-references**—Appeals from the Liquor Licensing Authority, § 3-36; appeals from the Building Review Board may be heard by the City Council, § 5-312; appeals from the decision of the City regarding alarm permits to the City Council, § 15-36; appeals from the determinations of the Building Review Board regarding alarm permits to the City Council, § 15-41(b); disapproval of pawnbroker's license may be appealed to the City Council, § 15-265(c); applicant for license regarding places of entertainment may appeal the decision to the City Council, § 15-298; appeals from the denial of the secondhand dealer's license to the City Council, § 15-318(d); appeals for denial of a license for a mobile home park may be appealed to the City Council, § 18-5(d).

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.

Sec. 2-47. Certain appeals to be taken to City Council.

Appeals taken from decisions made by any of the following boards, commissions or other decision makers shall be taken to the City Council in the manner set forth in this Division:

- (1) Building Review Board;
- (2) Fire Board of Appeals;
- (3) Landmark Preservation Commission;
- (4) Planning and Zoning Board;
- (5) A "decision maker" under the provisions of Section 2.2.12 of the Land Use Code;
- (6) Water Board;
- (7) Zoning Board of Appeals.