

# AGENDA ITEM SUMMARY

## FORT COLLINS CITY COUNCIL

ITEM NUMBER: 32 A-C

DATE: June 6, 2006

STAFF: Steve Roy  
Greg Byrne

### SUBJECT

Items Relating to the Amendment of the Appeals Process Contained in Chapter 2, Article II, Division 3 of the City Code.

### RECOMMENDATION

Staff recommends adoption of the Ordinances on Second Reading.

### EXECUTIVE SUMMARY

- A. Second Reading of Ordinance No. 088, 2006, Making Various Amendments to Chapter 2, Article II Division 3 of the City Code Pertaining to the Appeals Process.
- B. Second Reading of Ordinance No. 089, 2006, Amending Chapter 2, Article II, Division 3 of the City Code with Regard to the Grounds upon which Appeals to the City Council are Decided.
- C. Second Reading of Ordinance No. 090, 2006, Amending Chapter 2, Article II, Division 3 of the City Code Pertaining to the Filing of Appeals by Members of the City Council.

Ordinance No. 088, 2006, unanimously adopted on First Reading on May 16, 2006, makes various amendments to the appeals process that are perceived to be non-controversial.

Ordinance No. 089, 2006, pertains to the basis for Council's decision on appeal and retains the existing provision that limits the grounds to those stated in the notice of appeal and eliminates the opportunity for Councilmembers to add additional issues prior to the appeal. This Ordinance was adopted on First Reading on May 16, 2006 with a vote of 5-2 (Nays: Manvel, Roy).

Ordinance No. 090, 2006, pertains to appeals filed by Councilmembers. It retains Councilmembers' ability to file an appeal but states that Councilmembers who do so should not participate in deciding the appeal, although they may participate in the appeal hearing in the same manner as other appellants. This Ordinance was adopted on First Reading, with amendments, on May 16, 2006 with a vote of 5-2 (Nays: Ohlson, Roy).

**AGENDA ITEM SUMMARY**  
**FORT COLLINS CITY COUNCIL**

**ITEM NUMBER: 31 A-C**

**DATE: May 16, 2006**

**STAFF: Steve Roy**  
**Greg Byrne**

**SUBJECT**

**COPY**

Items Relating to the Amendment of the Appeals Process Contained in Chapter 2, Article II, Division 3 of the City Code.

**RECOMMENDATION**

Staff recommends adoption on First Reading of Ordinance No. 088, 2006, adoption of Option #2 of Ordinance No. 089, 2006, and adoption of any of the three optional versions of Ordinance No. 090, 2006.

**EXECUTIVE SUMMARY**

- COPY**
- A. First Reading of Ordinance No. 088, 2006 Making Various Amendments to Chapter 2, Article II Division 3 of the City Code Pertaining to the Appeals Process.
  - B. First Reading of Ordinance No. 089, 2006, Amending Chapter 2, Article II, Division 3 of the City Code with Regard to the Grounds upon which Appeals to the City Council are Decided.
  - C. First Reading of Ordinance No. 090, 2006, Amending Chapter 2, Article II, Division 3 of the City Code Pertaining to the Filing of Appeals by Members of the City Council.

Ordinance No. 088, 2006, makes various amendments to the appeals process that are perceived to be non-controversial.

Ordinance No. 089, 2006, (Options 1 and 2) pertains to the basis for Council's decision on appeal. Option #1 would retain the existing provision that limits the grounds to those stated in the notice of appeal and eliminates the opportunity for Councilmembers to add additional issues prior to the appeal. Option #2 would allow the Council to address issues relevant to the appeal even if they were not raised by the appellant in the notice of appeal.

**COPY**

Ordinance No. 090, 2006, (Options 1, 2 and 3) pertains to appeals filed by Councilmembers. Option #1 would eliminate the ability of Councilmembers to file an appeal. Option #2 would retain Councilmembers' ability to file an appeal and states that the fact that a Councilmember has filed an appeal does not, in itself, prevent the Councilmember from participating in hearing the appeal. Option #3 again retains Councilmembers' ability to file an appeal but states that a Councilmember who does so should not participate in hearing the appeal.

One other possible change discussed at the work session on April 11, 2006, that is not included in these ordinances is a proposed amendment that would eliminate the ability of members of the general public to file an appeal or participate in the hearing of an appeal. The City Attorney is recommending consideration of that proposed amendment be postponed pending the outcome of a civil action in the local District Court in which the Court is expected to address the question of whether members of the general public have standing to contest City Council's site-specific land use decisions in court.

## BACKGROUND

At the work session on April 11, 2006, Council considered several proposed amendments to the process contained in Chapter 2, Article II, Division 3 of the City Code pertaining to appeals to the Council. At the conclusion of the discussion, Council directed staff to prepare several ordinances that would allow Council to first adopt those changes that were perceived as noncontroversial and fairly routine in nature, and then consider options relating to certain other changes. Toward that end, staff has prepared three ordinances for Council's consideration.

### **Ordinance No. 088, 2006, Making Various Amendments to Chapter 2, Article II Division 3 of the Code of the City of Fort Collins Pertaining to the Appeals Process.**

This ordinance would:

- add a definition of evidence;
- limit the submission of written materials prior to the appeal hearing to those materials that are relevant to allegations that the decision maker considered evidence relevant to its findings which was substantially false or grossly misleading;
- discourage ex-parte contacts on the part of Councilmembers prior to hearing an appeal;
- state that, if Council remands the matter for rehearing, such remand shall include direction as to the scope of the rehearing.

### **Ordinance No. 089, 2006, Amending Chapter 2, Article II, Division 3 of the Code of the City of Fort Collins with Regard to the Grounds upon which Appeals to the City Council are Decided.**

This ordinance presents two options relating to the scope of the appeal hearing. At present, the Code states Council's decision on appeal will be 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 City Council at least seven calendar days prior to the date of the hearing. Staff believes this provision unduly limits the scope of the appeal and prevents Council from addressing issues relevant to the appeal that might not have been raised by the appellant. Two options are presented for Council's consideration. Both would eliminate the need for Council members to identify additional issues prior to the appeal hearing.

**Option #1** would continue to limit the scope of Council's review to the grounds stated in the notice of appeal.

**Option #2** would allow the Council to raise additional issues at the appeal hearing even if those issues have not been raised by the appellant in the notice of appeal. Staff recommends adoption of **Option #2**.

**Ordinance No. 090, 2006, Amending Chapter 2, Article II, Division 3 of the Code of the City of Fort Collins Pertaining to the Filing of Appeals by Members of the City Council.**

This ordinance deals with appeals filed by Councilmembers.

**Option #1** would eliminate the ability of Councilmembers to file appeals. **Option #2** would continue to allow for the filing of appeals by Councilmembers and would allow Councilmembers who file a notice of appeal to still participate in the appeal hearing unless other circumstances exist which call into question the impartiality of the Councilmembers. **Option #3** would continue to allow Councilmembers to file appeals and would require Councilmembers who do so to refrain from participating in the appeal hearing.

One other change that had been recommended by staff prior to the work session was to eliminate the ability of members of the general public to file an appeal or to participate in an appeal hearing. Staff based this recommendation on their opinion that the appeal process should be reserved to those parties-in-interest who are more directly affected by the decision in question than members of the general public. Staff is recommending Council postpone consideration of this proposed amendment pending the outcome of a lawsuit in the Larimer County District Court where the Court is considering the City's motion to dismiss based upon the plaintiff's lack of standing. Staff believes the Court's ruling may alleviate the need to consider this Code change if it appears from the ruling that granting a member of the public the right to file an appeal to Council and participate in the appeal hearing does not necessarily give that person standing to challenge the Council's decision in Court.

At the work session, Council also directed the City Attorney to consult with other Front Range municipalities regarding their appeals process in order to see how those municipalities deal with some of the issues addressed at the Work Session. Four municipalities responded to staff's inquiry. The appeal procedures in those municipalities vary widely as to whether appeal hearings are based on the record or are "de novo" (entirely new hearings); whether the record on appeal can be supplemented by additional evidence at the appeal hearing; whether participation is open to any member of the public or limited to the applicant and abutting property owners; and whether Council members can appeal (or is "call up for review") decisions of boards and commissions.

COPY

ORDINANCE NO. 088, 2006  
OF THE COUNCIL OF THE CITY OF FORT COLLINS  
MAKING VARIOUS AMENDMENTS TO CHAPTER 2, ARTICLE II  
DIVISION 3 OF THE CODE OF THE CITY OF FORT COLLINS  
PERTAINING TO THE APPEALS PROCESS

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; and

WHEREAS, the Council recently considered at a work session certain proposed changes to that appeals process that have been recommended by City staff; and

WHEREAS, after considering those recommendations, the Council has determined that the changes provided for below would help clarify the appeals process and make it more understandable to the general public and would also increase the efficiency of the appeals process.

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

Section 1. That Section 2-46 of the Code of the City of Fort Collins is hereby amended to add a definition of "evidence," to read as follows:

*Evidence* shall mean any ~~legally probative~~ information, whether **in** verbal, written, graphic or otherwise **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.

Section 2. That Section 2-54(b) of the Code of the City of Fort Collins is hereby amended so as to read in its entirety as follows:

**Sec. 2-54. Scheduling of the hearing.**

(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 § ~~2-56-57~~(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 3. That Chapter 2, Article II, Division 3 of the Code of the City of Fort Collins is hereby amended by the addition of a new Section 2-55 which shall read in its entirety as follows, with all subsequent sections in said Division to be renumbered accordingly:

**Sec. 2-55. No *ex parte* contacts.**

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 4. That **new** Section 2-57(d)(2) of the Code of the City of Fort Collins is hereby amended so as to read in its entirety as follows:

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

(d) At the conclusion of such hearing, the City Council shall uphold, overturn or modify the decision of the board, commission or other decision maker; 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(2).
- (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 re-hearing.

Introduced, considered favorably on first reading, and ordered published this 16th day of May, A.D. 2006, and to be presented for final passage on the 6th day of June, A.D. 2006.

---

Mayor

ATTEST:

---

City Clerk

Passed and adopted on final reading on the 6th day of June, A.D. 2006.

---

Mayor

ATTEST:

---

City Clerk

ORDINANCE NO. 089, 2006  
OF THE COUNCIL OF THE CITY OF FORT COLLINS  
AMENDING CHAPTER 2, ARTICLE II, DIVISION 3 OF THE CODE  
OF THE CITY OF FORT COLLINS WITH REGARD TO THE GROUNDS  
UPON WHICH APPEALS TO THE CITY COUNCIL ARE DECIDED

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; and

WHEREAS, the Council recently considered at a work session certain proposed changes to that appeals process that have been recommended by City staff; and

WHEREAS, on May 16, 2006, the Council approved on first reading Ordinance No. 088, 2006, which would add a new Section 2-55 to the Code and renumber all subsequent sections in Chapter 2, Article II, Division 3 accordingly; and

WHEREAS, one of the recommended changes had to do with the grounds upon which Council decides appeals under Section ~~2-56~~2-57(a) of the Code; and

WHEREAS, after considering alternative ways in which the above-referenced Code section might be amended, Council has determined that the language in the Code should be amended to **eliminate the ability of Councilmembers to identify, prior to the appeal hearing, additional issues not raised in the notice of appeal and to** clarify that issues not raised in the notice of appeal should not be considered by the Council in deciding the appeal.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF FORT COLLINS that Section 2-57(a) of the Code of the City of Fort Collins is hereby amended to read as follows:

(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. 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 16th day of May, A.D. 2006, and to be presented for final passage on the 6th day of June, A.D. 2006.

\_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

Passed and adopted on final reading on the 6th day of June, A.D. 2006.

---

Mayor

ATTEST:

---

City Clerk

ORDINANCE NO. 090, 2006  
OF THE COUNCIL OF THE CITY OF FORT COLLINS  
AMENDING CHAPTER 2, ARTICLE II, DIVISION 3  
OF THE CODE OF THE CITY OF FORT COLLINS PERTAINING TO  
THE FILING OF APPEALS BY MEMBERS OF 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; and

WHEREAS, the Council recently considered at a work session certain proposed changes to that appeals process that have been recommended by City staff; and

WHEREAS, among the changes recommended by staff is clarification of the Code provision pertaining to appeals filed by members of the City Council; and

WHEREAS, after considering various alternative ways in which the provisions of the Code may be changed in this regard, the Council has determined that the Code should be clarified to expressly state that Councilmembers filing an appeal should not participate in deciding the appeal, **although they may participate in the appeal hearing in the same manner as other appellants.**

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF FORT COLLINS that Section 2-48 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.**

(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 taken during said period of time.

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

(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 Section 2-568(c)(2).**

Introduced, considered favorably on first reading, and ordered published this 16th day of May, A.D. 2006, and to be presented for final passage on the 6th day of June, A.D. 2006.

---

Mayor

ATTEST:

---

City Clerk

Passed and adopted on final reading on the 6th day of June, A.D. 2006.

---

Mayor

ATTEST:

---

City Clerk