ORDINANCE NO. 066, 2014
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
APPEALS PROCEDURE

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 that Chapter 2, Article II, Division 3 of the Code of the City of Fort Collins is hereby amended 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 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.

Evidence shall mean any information, whether in verbal, 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 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. *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 the original graphic.

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~~ provided written comments to the appropriate City staff for delivery to the board, commission or other decision maker prior to or at the ~~action~~ hearing on the matter which is to be appealed;

(5) Any person who, or organization which, 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, except for decisions made under C.R.S. §22-32-124 and C.R.S. §31-23-209;

(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.

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.

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 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~~52. Said information shall then be mailed to the parties-in-interest together with the notice of hearing. 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; no other written materials.

(a) 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) calendar days after the action which is the subject of the appeal. Such notice of appeal shall be on a form provided by the City Clerk, 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) 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 under Paragraph 2-48(b)(2)c. that a board, commission or other decision maker considered evidence relevant to its findings that was substantially false or grossly misleading, any new evidence the appellant wishes to submit at the hearing on the appeal in support of this allegation; and

(6) In the case of an appeal filed 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 § 2-5~~0~~2; and

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

(b) No information other than that specified in Subsection (a) above shall be included in or attached to the notice of appeal~~, nor shall any additional written materials be submitted to or received by the City prior to or during the hearing on an appeal~~.

~~**Sec. 2-50. Review of notice of appeal by City Attorney.**~~

~~Within five (5) working days of the date of the filing of the notice of appeal, the notice shall be reviewed by the City Attorney for any obvious defects in form or substance. The City Clerk shall notify the appellant in writing by certified mail of any such defect in the notice of appeal, which notice shall be mailed no more than seven (7) working days from the date of filing of the notice of appeal.~~

~~**Sec. 2-51. Amended notice of appeal permitted.**~~

~~An amended notice of appeal may be filed by the appellant within fourteen (14) working days after the date of filing of the notice of appeal. Such amended notice of appeal shall contain all of the information required under § 2-49 for the original notice of appeal and, upon filing with the City Clerk, shall supersede the original notice of appeal. Amendments to the notice of appeal need not be limited to those defects, if any, which have been identified by the City Attorney.~~

Sec. 2-~~52~~50. Cost 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.) for the cost of the appeal, to be paid to the City Clerk at the time of the filing of the notice of appeal.

Sec. 2-~~53~~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. 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 videotape recording of such proceedings before the board, commission or other decision maker. The cost of reproducing any such videotape 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.

Sec. 2-~~54~~52. Scheduling of the hearing.

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 more than seventy-five (75) 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 ten (10) 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~~any new evidence permitted under Subsection 2-55(b)(1) or (2) must be submitted.

Sec. 2-5~~5~~3. Site inspection/no ex parte contacts.

(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, 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 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 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 Subsection 2-54~~2(a)~~ of this Article. 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.

(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. 2-5~~6~~4. 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 inspected the site pursuant to Subsection 2-5~~5~~3(a);

(3) Consideration of any procedural issues identified under Subsection (c) of this Section;

(~~3~~4) Presentation of argument by the appellant and any party-in-interest in support of the appeal;

(~~4~~5) Presentation of argument by any party-in-interest who is an opponent of the appeal;

(~~5~~6) Rebuttal presentation by the appellant and any party-in-interest in support of the appeal;

(~~6~~7) Rebuttal presentation by any party-in-interest who is an opponent of the appeal;

(~~7~~8) Councilmember questions of City staff and parties-in-interest; and

(~~8~~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 determine, 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, the period of time to be allowed by the Mayor for presentation of argument 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, 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. 2-5~~7~~5. Written materials; ~~N~~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, the grounds for appeal cited in the notice of appeal and the arguments made by parties-in-interest at the hearing on 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) ~~New evidence shall not be considered on appeal except~~ No written materials related to an appeal, other than the notice of appeal and the record on appeal, shall be presented to the City Council before or during an appeal hearing and no new evidence shall be considered on appeal, except that new evidence in oral or written form may be submitted and considered under the following circumstances:

(1) When offered in support of or in opposition to an allegation under Subparagraph 2-48(b)(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 in support of or in opposition to an allegation of bias under Subparagraph 2-48(b)(2)e;

(~~2~~3) When offered by City staff or parties-in-interest in response to questions presented by Councilmembers under Subsection 2-5~~6~~4(a) or (d);

(~~3~~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 § 2-5~~5~~3.

(c) Any ~~N~~new evidence permitted under Subsections (b)(1) or (2) above and submitted prior to the hearing or offered at the appeal hearing by City staff or parties-in-interest shall be limited to that which~~offered under Subsection (b)(1) above shall be limited to any new evidence that is either described in the notice of appeal of or offered in response to questions presented by Councilmembers~~ is either:

(1) described in the notice of appeal;

(2) submitted to the City Clerk in writing at least seven (7) days prior to the appeal hearing by any party-in-interest opposed to the appeal; or

(3) provided to the City Council by City staff prior to or during the appeal hearing.

(d) 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, ~~T~~the Mayor shall rule on ~~such~~ 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.

(e) 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), the City Council shall determine how such provisions should, in the City Council's judgment, be applied to the evidence contained in the record on appeal.

(f) 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(b)(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 rehearing.

(g) 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.

Introduced, considered favorably on first reading, and ordered published this 6th day of May, A.D. 2014, and to be presented for final passage on the 20th day of May, A.D. 2014.

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Mayor

ATTEST:

_____
City Clerk

Passed and adopted on final reading on the 20th day of May, A.D. 2014.

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Mayor

ATTEST:

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City Clerk