

NOTICE OF APPEAL

FOR CITY CLERK'S
USE ONLY:

DATE FILED: 6/3/21
at Ops Services
INITIALS: RK

Action Being Appealed: MJA200002, Planning & Zoning Commission denial of APU/PDP
for fuel station within HC

Date of Action: 05/20/2021 Decision Maker: Planning & Zoning Commission

Appellant/Appellant Representative (if more than one appellant):

Name: Carolynne C White

Phone #: (303) 223-1197

Address: Brownstein Hyatt Farber Schreck, 410 17th St.,
Suite 2200, Denver, 80202

Email: cwhite@bhfs.com

INSTRUCTIONS

For each allegation marked below, attach a separate summary of the facts contained in the record which support the allegation of no more than two pages, Times New Roman 12-point font. Please restate allegation at top of first page of each summary.

GROUND(S) FOR APPEAL

The Decision Maker committed one (1) or more of the following errors (check all that apply):

- Failure to properly interpret and apply relevant provisions of the City Code, the Land Use Code, and Charter. List relevant Code and/or Charter provision(s) here, by specific Section and subsection/subparagraph:

Please see attached

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. [New evidence not allowed]
- (b) The Board, Commission or other Decision Maker substantially ignored its previously established rules of procedure. [New evidence not allowed]
- (c) The Board, Commission or other Decision Maker considered evidence relevant to its findings which was substantially false or grossly misleading. [New evidence allowed]
- (d) The Board, Commission or other Decision Maker improperly failed to receive all relevant evidence offered by the appellant. [New evidence allowed]
- (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. [New evidence allowed]

NEW EVIDENCE

All new evidence the appellant wishes Council to consider at the hearing on the appeal must be submitted to the City Clerk within seven (7) calendar days after the deadline for filing a Notice of Appeal and must be clearly marked as new evidence. No new evidence will be received at the hearing in support of these allegations unless it is submitted to the City Clerk by the deadline (7 days after the deadline to file appeal) or offered in response to questions posed by Councilmembers at the hearing.

APPELLANTS

Parties-in-interest have the right to file an appeal.

A party-in-interest is 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 is limited to the following:

- The applicant.
- Anyone who owns or occupies the property which was the subject of the decision made by the board, commission or other decision maker.
- Anyone who received the mailed notice of, or spoke at, the hearing of the board, commission or other decision maker.
- Anyone who provided written comments to the appropriate City staff for delivery to the board, commission or other decision maker prior to or at the hearing on the matter that is being appealed.
- A City Councilmember.

Signature: 	Date: 06/03/2021
Name: Carolynne C White	Email: cwhite@bhfs.com
Address: 410 17th St., Suite 2200, Denver, CO 80202	Phone #: (303) 223-1197
Describe how you qualify as a party-in-interest: I am counsel to the Applicant, Sam's Real Estate/Sam's East, LLC.	

Signature:	Date:
Name:	Email:
Address:	Phone #:
Describe how you qualify as a party-in-interest:	

Signature:	Date:
Name:	Email:
Address:	Phone #:
Describe how you qualify as a party-in-interest:	

ATTACH ADDITIONAL SIGNATURE SHEETS AS NECESSARY

June 3, 2021

City of Fort Collins
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P.O. Box 580
Fort Collins, CO 80522
Email: wwinkelman@fcgov.com

Carolynne C. White
Attorney at Law
303.223.1197 tel
cwhite@bhfs.com

Dear Ms. Winkelman:

Please accept this letter and attached application form as an appeal pursuant to Section 2-48 of Article II, Chapter 2 of the Fort Collins Land Use Code ("LUC"), from the May 20, 2021 decision of the Fort Collins Planning & Zoning Commission to deny application MJA#200002, a proposed Major Amendment and Addition of a Permitted Use ("APU") to the Harmony Market 1st Filing PUD, on behalf of the applicant, Sam's Real Estate/Sam's East, Inc. ("Sam's").

On behalf of Sam's, we respectfully request that the City Council either overturn the Planning & Zoning Commission's denial of the Major Amendment, or remand it back to the Planning Commission for further review.

The Planning & Zoning Commission (1) failed to properly interpret and apply all of the relevant Code and Charter provisions, and (2) failed to hold a fair hearing in that it exceeded its authority and jurisdiction, and considered evidence that was false or grossly misleading.

Embedded within the application for a Major Amendment is the application for the APU. No other grounds for denial of the Major Amendment other than the denial of the APU were provided, thus this appeal focuses on the Planning & Zoning Commission's denial of the APU, reversal of which should therefore equal reversal of the denial of the Major Amendment as well.

The central question for the Planning & Zoning Commission was whether the addition of a fuel station (without convenience store) to an existing Sam's Club, which was constructed prior to the adoption of the Harmony Corridor Plan, Harmony Corridor Standards & Guidelines, and Council approval of Harmony Corridor zoning, meets the criteria for an APU under the LUC. The LUC sets forth eight criteria for an APU, as follows (LUC 1.3.4(C)(1)). Below is the complete list of the criteria. Those criteria we believe were misinterpreted by the Planning & Zoning Commission include an explanation following regarding the interpretation.

(a) Such use is appropriate in the zone district to which it is added.

The Planning & Zoning commission improperly applied this criterion insofar as it did not thoroughly consider the fact that this use already exists not only within the zone district, but within the same sub-designation (regional shopping center) and in fact on the very same property.

(b) Such use conforms to the basic characteristics of the zone district and the other permitted uses in the zone district to which it is added.

The purpose of this criterion is to ensure that additional permitted uses are in conformance with the basic characteristics of the zone district and other permitted uses of the zone district to which it is added.

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main 303.223.1100

June 3, 2021

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Page 2

First, as noted below, in this case, the permitted use of fuel station is not technically being proposed to be added to the HC zone district, rather it is proposed to be added to the regional shopping center category within the HC zone district. Fuel stations are clearly already allowed in the HC zone district, within Neighborhood Centers.

(c) The location, size and design of such use is compatible with and has minimal negative impact on the use of nearby properties.

The Planning & Zoning Commission did not properly interpret and apply this criterion. Note that this language provides that the "location, size and design" of the use is compatible with and has minimal negative impact on the use of nearby properties. This criterion is not asking about the use itself, but rather the "location, size and design" of such use. Very little discussion was had regarding these factors and the "location, size and design" of such use clearly did not impact the Planning & Zoning Commission's decision.

Rather, a significant portion of the discussion focused on the testimony of two representatives of adjacent property owners, who testified that Sam's Club has declined to participate financially in the maintenance and repair of certain roadways within the existing shopping center. This testimony was principally regarding existing maintenance responsibility, as opposed to potential future potential negative impact on nearby properties.

Several Commissioners indicated that this formed at least part of the basis for their decision to deny the APU and the Major Amendment, although it was acknowledged that private agreements between third parties is not within the purview of the Planning Commission.

In any event, while dialogue between the private parties remains ongoing, the issue of responsibility for the maintenance of existing, internal, private roadways is one that is resolvable between and among those private parties. It is anticipated that the Applicant will be submitting new evidence demonstrating such agreement prior to the appeal hearing before City Council, such that this issue is not a proper basis for denial.

(d) Such use does not create any more offensive noise, vibration, dust, heat, smoke, odor, glare or other objectionable influences or any more traffic hazards, traffic generation or attraction, adverse environmental impacts, adverse impacts on public or quasi-public facilities, utilities or services, adverse effect on public health, safety, morals or aesthetics, or other adverse impacts of development, than the amount normally resulting from the other permitted uses listed in the zone district to which it is added.

First it should be noted that this criterion does not address whether or not the proposed use will create ANY adverse effects; rather, it addresses whether it will create MORE adverse effects than the amount

June 3, 2021

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Page 3

normally resulting from the other permitted uses in listed in the zone district to which it is added. A close review of the deliberation by the Planning & Zoning Commission reveals that they focused only on whether addition of a fuel station to the existing shopping center would create any adverse effects, not a comparison of potential adverse effects to the permitted uses in the zone district.

Second, several planning commissioners stated that they assumed that a proposed fuel station would create odor, noise, and "spills," although no evidence was presented in the record to this effect, either by staff, the applicant, or public testimony. The Commissioners also concluded that other adverse effects would result, alluding to potential environmental impacts, despite there being no evidence in support of such a conclusion – other than the neighboring property owner's concerns about road maintenance costs described above. In fact, the staff report concludes that no adverse impacts will result; the traffic study concludes that no adverse traffic impacts will result; and at least one Commissioner noted that the existence of a fuel station within the very same regional shopping center constitutes evidence that adverse impacts will not result.

Third, fuel stations ARE a permitted use in the HC zone district. The distinction here is that this property, for reasons which staff notes, are in hindsight not entirely valid, was designated as a "regional shopping center." The HC Standards and Guidelines, which, unlike any other zone district in the LUC, sets for the allowed uses for the zone district, describes the permitted uses for each of several different types of shopping centers. The principal purpose of these definitions and permitted uses, as stated in the Harmony Corridor Plan, is to avoid piecemeal strip development along the corridor, and cluster retail uses into shopping centers of varying sizes and types. Adding a fuel station to an existing shopping center with a warehouse club is entirely consistent with this purpose and intent. In this case, the proposed APU is really asking to add the fuel station use to the regional shopping center category, not to the HC zone district, within which such use is already allowed.

Therefore, the Planning & Zoning Commission did not correctly analyze, interpret and apply the applicable regulatory documents in denying the APU, which in turn led to the denial of the Major Amendment

(e) Such use will not change the predominant character of the surrounding area.

Although much of the discussion focused on other criteria, it appears that this criterion, and criterion (f), below, are the ones with which Planning & Zoning Commission was primarily concerned. This alone is sufficient grounds for a remand, given the extreme lack of clarity of the Planning & Zoning Commission's deliberations regarding subjective terms like "compatibility" and "character."

(f) Such use is compatible with the other listed permitted uses in the zone district to which it is added.

June 3, 2021

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Page 4

This is the criterion addressing compatibility, not criterion C as was stated by several Commissioners. Regardless of which criterion they were referring to, it is unclear whether the Planning & Zoning Commission were attempting to analyze the compatibility of the proposed fuel station with other uses allowed in the HC zone district (which includes fuel stations) or the "regional shopping center" category within the HC zoned district (which omits, but does not expressly prohibit, the use of fuel stations). And, the Commissioners discussed compatibility in the context of the adjacent properties, or the overall Harmony Corridor Plan, but not "other listed permitted uses in the zone district to which it is added," which is what this criterion requires. In any case, the Commissioners did not articulate any basis for concluding that a fuel station is not compatible with other listed permitted uses, only that "this was not what was envisioned." This is evidence that the Commission did not correctly interpret or apply the criteria, and that the decision should be overturned, or at least remanded.

(g) Such use, if located within or adjacent to an existing residential neighborhood, shall be subject to two (2) neighborhood meetings, unless the Director determines, from information derived from the conceptual review process, that the development proposal would not have any significant neighborhood impacts. The first neighborhood meeting must take place prior to the submittal of an application. The second neighborhood meeting must take place after the submittal of an application and after the application has completed the first round of staff review.

Not applicable (although a neighborhood meeting was held on December 19, 2020).

(h) Such of is not a medical marijuana business as defined in Section 15-452 of the City Code or a retail marijuana establishment as defined in Section 15-603 of the City Code.

Not applicable/not addressed.

Further, the Planning & Zoning Commission did not properly apply any of the criteria as required by the LUC, to analyze the "unique circumstances and attributes of the site and development plan."

Finally, in addition to the eight criteria for the APU, consideration of an APU requires consideration of the following three additional criteria which were not addressed by the Planning & Zoning Commission, despite staff's exhaustive analysis of these criteria in the staff report, and conclusion that these criteria were met:

(2) would not be detrimental to the public good;

**(3) would be in compliance with the requirements and criteria contained in Section 3.5.1;
and**

(4) is not specifically listed as a "prohibited use" in the zone district in which the proposed site is located.

VIA EMAIL TO CITY CLERK, WWINKELMANN@FCGOV.COM

June 3, 2021

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Page 5

Furthermore, the Planning & Zoning Commission failed to conduct a fair hearing, in that it exceeded its authority and abused its discretion, and considered false or grossly misleading evidence. Some examples of the ways in which the Planning & Zoning Commission failed to conduct a fair hearing include:

- Made a determination of negative impact based on evidence/information that is not within the purview of the Planning & Zoning Commission
- Considered evidence not germane to the criteria such as macroeconomic forces and individual business owners' decisions
- Addressed site plan and other criteria and considerations not relevant to an APU to deny the APU, and then used the denial of the APU to deny the Major Amendment

As noted, the applicant will offer new evidence prior to the appeal hearing as set forth in the LUC.

On behalf of Sam's, we look forward to the opportunity to present this matter to the City Council for review on appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "Carolynne C. White". The signature is written in a cursive, flowing style.

Carolynne C. White

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