

## **Arvada City Council Meeting, October 5, 2015**

Notes taken by Susan Shirley

### *Unanimous Approval of Construction Defects Modification*

An Executive Session was called prior to the public portion of the meeting. The reason given was Instructions to Negotiators, pertaining to West Arvada Retail Initiative. This session ran late and the public meeting began at 6:15.

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In attendance for the public meeting were Mayor Marc Williams, Mayor Pro Tem Mark McGoff, and Councilmembers Don Allard, Bob Dyer, Bob Fifer, Jerry Marks, and John Marriott.

At 6 p.m., attendance by citizens was 15.

Minutes from the September 21, 2015 meeting were approved with no changes.

Proclamation:

Councilmember Bob Dyer recognized the Daughters of the American Revolution for their 125th anniversary. The DAR was founded October 11, 1890, and is a non-profit, non-political women's service organization, with currently 177,000 members around the world. It is open to any woman over age 18 who can prove she is descended from a patriot of the American Revolution. The DAR owns a comprehensive genealogical library, which is free and open to the public. DAR members volunteer millions of hours every year in support of veterans and active duty military personnel, as well as schools and scholarships.

Regent Cheryl Heyen accepted the proclamation and gave some additional information. The Susan Anderson (Arvada) chapter of the DAR was organized in 2008, has 159 members, and on October 11 will be participating in a number of service activities to commemorate this anniversary of the DAR. They will be engaged in the Adopt-A-Street in Olde Town, will be presenting a quilt to a servicemember of the armed forces as part of the Quilts of Valor program, sending cards to care facilities for Alzheimers patients, and placing a commemorative bench and xeriscape garden with the memorial plaque at the site of the Leyden Mine disaster.

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Public Comment:

Jessica Johnson, on behalf of the Festivals Commission, Arvada Gardeners, and Historic Olde Town Arvada, invited Council and the public to the upcoming Festival of Scarecrows from 10 a.m. to 3 p.m. on Saturday, October 10. There will be all kinds of activities for all ages, including a giant pumpkin, pie eating, costumes, a hayride, bean bag toss, and more. Pumpkins will be on sale, with proceeds to benefit the Carin' Clinic. Donations of canned goods will be forwarded to the Arvada Community Food Bank.

For more information, visit the Festivals Commission information at: <http://arvada.org/explore/arts-and-culture/festival-of-scarecrows>

Susan Shirley read a portion of an email sent from Cindi Kreutzer to City Council. Because her email referred to both the construction defects ordinance and the public hearing on the Hilton two weeks ago, the comments were divided into two comment periods. Ms. Kreutzer was unable to attend this evening's meeting but wanted her concerns noted. She wrote, "At the last regular council meeting, Mayor Williams very sternly admonished citizens about what they would and would not be allowed to speak about during public comment on the Hilton project. He then went on to allow Clark Walker [of AURA] and both representatives of the Hilton developers to speak about exactly the same issues the citizens were told they could not speak about. Most disappointing about that situation was that every one of the remaining six council members sat back and allowed this to occur. Unfortunately, at this point, neither of these issues is at all surprising to me."

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Consent Agenda: None at this meeting.

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Ordinances, First Reading:

Public Hearings for these items will be October 19, 2015, at 6:30 p.m

Budget appropriation for 2016, in the amount of \$195,320,648. (CB15-036) How that breaks down is available here: <http://www.arvadarecords.org/.../07.A.01.%20CB15-036,%20An%20...>

Mill Levy for 2016. There is no change from the previous year's mill levy. (CB15-037)

Increases in wastewater and water rates and water tap fees. The Utilities Department is seeking a rate increase of 2.45% for wastewater, which would add about \$6.60 a year to an average single family water bill; also a rate increase for water of 4%, increasing the average single family bill by about \$17 a year. The desired tap fee increase is 3%. Tap fees go toward capital improvements. (CB15-038, -039, and -040)

Quail Valley rezoning: Empire Homes plans to build 22 units on 1.38 acres, a density lower than what is zoned at the location between Quail and Oak Streets along W. 64th Avenue. Empire is requesting a rezoning to align with what the density will be in their plan. (CB15-041)

All items were approved on a 7 to 0 vote.

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Public Hearings:

**Construction Defects Law, workaround:**

Colorado's construction defects law was passed in 2005 and provides for class-action lawsuits among condominium owners against the builders of those units. It was passed to give protections to condo owners against shoddy construction. Unfortunately, one of the possibly unforeseen side effects has been a drastic decrease in the number of condominium or townhome units built here, which lowers the stock of affordable housing. The proposed action at this hearing is to allow a change in Arvada's ordinance to permit a builder to require mandatory arbitration rather than a lawsuit. This will take effect on new construction of multi-family housing when the builder includes a note in the plat to that effect as well as wording in the covenants spelling out the change. (CB15-034)

Senior Assistant City Attorney Randall Sampson advised Council that there has been a dearth of construction activity with regard to owner occupied multi-family housing, and that the state legislature has so far been unsuccessful in passing bills to reform the current legislation. Now, momentum is building at the local level to address what the legislature has not. Lone Tree, Littleton, Lakewood, Parker, and Wheat Ridge have each addressed the problem. Arvada's approach, said Sampson, modifies Parker's approach to some degree. The developer has to write a plat note as well as declarations in the covenants, and HOAs cannot delete the provisions without consent of the developer. Sampson said this approach is consistent with recent case law from May of this year.

Mayor Williams opened up the hearing for public discussion.

Nancy Young spoke first, saying, "This ordinance...is heavily weighted in favor of developers and provides virtually no reasonable consumer protections ... [it] gives all power to the developer who writes the governing documents. Invariably, those provisions will be written to his/her benefit. The ordinance also states that homeowners cannot revise any of those governing documents without the developer's approval ... finally, the proposal requires binding arbitration, without any form of appeal by a homeowners association. What's worse--the developer can specify the arbitration service in the Association's governing documents. Homeowners therefore have no protection ... From a citizen's perspective, the proposal looks like special interests in the construction industry have had an excessive influence on it, while homeowners and citizens appear to have been left out of the process entirely. Like many citizens, I would like the State law on construction defects to establish a better balance between the developers' responsibility for repair and homeowners' rights to have defects corrected. This ordinance does not provide that balance. I urge you to reject it."

Next, Susan Shirley read Cindi Kreutzer's observations: "Based on [this] ordinance, it appears that once again, the City of Arvada intends to give preference to construction developers to the potential detriment of its citizens. I am very clear about the reasoning for this bill and the fact that other municipalities have adopted similar ordinances. What I will never be clear about is the nearly desperate efforts being taken by City Council to give an advantage to the parties who need it the least."

Susan Shirley added her own comments, "I understand that we really need multi-family, owner occupied housing. To me, this ordinance might be borderline acceptable if not for the provision that the developer can choose the mediator, and the lack of a right of appeal on the part of the homeowner. I find that to be unfair in the extreme – it's a fox guarding the henhouse kind of scenario – and I hope you will as well."

Christine Jensen, Arvada resident and manager of the Arvada branch of Cherry Creek Mortgage, thanked Council for their support of the down payment assistance program, and said, "Let's get these folks a place to buy." She said that developers can't build in Arvada because of the way the current construction defects law is written, so there is very limited availability of homes to be purchased here. She added that today's homebuyers want transit-oriented development, and also that properties affected by lawsuits under the law are ineligible for Federal financing, taking away yet another help for homebuyers.

Jason Peck, Government representative for the Denver Metro Association of Realtors, said his group is very much in favor of this ordinance. He said that, although rentals are an important part of a community's housing portfolio, they need to be complemented by other types of housing. He added that the data indicate clearly that homeowners spend more in their community than renters. He said, "it's about protecting the homeowner," and stated that condos are a stepping stone into home ownership.

John Bodnar, chairman of the Arvada Chamber of Commerce, said that if current laws are not fixed right away, developers will continue to build rental units, which will have a detrimental effect on Arvada. He said, "we support a yes on this."

Bruce Likoff, real estate attorney who says he generally represents developers and contractors, said that the timing is critical to pass some new ordinances. The window of opportunity is starting to close, he said, because if interest rates go up it will affect mortgage rates, and construction costs are now rising as well. He said this is consumer friendly, because consumers have at least three opportunities to be warned in writing of the requirements, and consumers "have some responsibility to read" what they are signing.

Attorney David McLain, who also normally represents builders and developers, said he urges Council's support on this ordinance. He provided the information that Colorado law doesn't guarantee jury trials in civil cases. With respect to concerns that the developers might choose arbitrators unfairly, he said that it is required by law to be impartial and neutral. McLain stated that "Colorado public policy strongly favors resolution through arbitration."

Lakeside Insurance Agency owner Michael McCarron said that the current state construction defects law increases builders' insurance premiums five- to ten-fold. He said that hurts small businesses and their ability to employ more contractors. He said many general contractors have gone to other states to work, or have changed from building for-sale housing to rental housing. He urged support of the new ordinance.

Councilmember Mark McGoff asked Christine Jensen for clarification of her earlier statement that Fannie Mae and Freddy Mac would not lend on properties affected by litigation. She said that once a unit enters into litigation, all units in that development become ineligible for all types of Federally governed lending. That renders units ineligible for sale to subsequent buyers, even in the case of units whose owners did not participate--or who maybe were not even aware--of such litigation.

Councilmember Bob Dyer noted the testimony that consumers will be given notice, similar to the way buyers next to golf courses are notified of potential problems there with stray golf balls. He said, in trying to weigh harm to the purchaser, he had a hard time understanding the assumption in the law that builders of multi-family housing would do a worse job than builders of single family homes. He added that it is harmful to owners and buyers both if lending isn't available. He added that he has heard many stories of subcontractors who have been pulled into lawsuits for no other reason than that they had worked on the building – so that a tile-setter could be drawn into a suit over a faulty roof, for example. Another concern, said Dyer, is that of delayed harm to purchasers, stemming from the fact that many builders are putting together apartment buildings now with the intent of converting those later to condos. Dyer said that units purchased new, under this ordinance, will at least come with the mechanism for arbitration – but buyers of those converted apartments, 7 or 8 years down the road, had better hope they have good inspections done, because if something is wrong with those, they'll be out of luck. The protections to the purchasers will have dissolved away after the statute of limitations has passed.

Councilmember John Marriott asked staff if this ordinance will be at all retroactive to anything currently underway and was told it will not be.

Councilmember Mark McGoff observed that he thinks there are sufficient safeguards for consumers in this ordinance. However, although he said he would be voting in favor of the ordinance, "I have to say I don't think it will have the impact people think it might; I don't know if city-by-city is the best approach" to solving the problem.

Mayor Marc Williams asked attorneys Sampson and McLain about the language in Colorado law requiring arbitrators to be qualified and impartial. Sampson agreed and added there can be no conflict of interest. McLain said the Uniform Arbitration Act provides for parties to ask district courts to make a determination in the case of a suspicion of bias or unfairness on the part of the arbitrator. Williams then asked if the time frame would be shorter using arbitration vs. judicial relief. The answer was that cases will not have to wait for district court dockets to clear their criminal cases, which take precedence over any civil cases.

Councilmember Bob Fifer said this ordinance should help to solve the problem of too little attainable housing.

Councilmember Jerry Marks said that he agreed with the other Councilmembers' comments. He said he went to a conference and heard a description of how sometimes HOAs get involved with defects and, for example, will determine windows are leaky by aiming a high pressure fire hose at them.

Councilmember Dyer noted that covenants are always written by developers, so this doesn't change that. He is mainly very concerned with the apartments that will be converted, especially in the cases of where a lot of deferred maintenance gets passed along to the buyers. He added that this is not a matter of "sending a message" to the legislature, as they are not open to hearing anything right now about this issue.

Councilmember Marriott said he would be supporting the ordinance. He pointed out that each community is unique, with its own set of building codes, so it's appropriate and maybe best to have their own rules about construction defects. He added that we need a mix of housing types, not only apartments.

Mayor Williams said this has been a big issue at the Metro Mayors' Caucus. He said this ordinance is a methodology to try to hold down the costs of construction for attainable housing; that, in this economy, time, and place, owner-occupied multi-family housing is the best opportunity for first time home ownership. Those owners can keep the units indefinitely, or sell them and take the appreciation and buy other properties. Lowered insurance costs, he added, will lower the cost of the finished units as well. He noted that arbitration, or any other form of alternative dispute resolution, is "always better than going to court." He also mentioned that most builders do provide warranties, as part of our free market system.

A vote was taken, and the ordinance was passed on a 7 to 0 vote.

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**Hyland Hills water agreement:**

Colorado has some unique or unusual aspects to its water laws ever since they were formed in the early days of settlement. Arvada is partnering with Hyland Hills Park and Recreation District in the creation of a park at 58th and Tennyson, Clear Creek Valley Park. A portion of the site was a gravel quarry, which is now filled with water. In a year's time, a certain amount of water evaporates from the surface of that pond, and under state law, Hyland Hills would be responsible for the cost of that water. Hyland Hills has water rights to offset that, but they are earmarked for irrigation, not replacement. The matter has to go through Water Court to change that allocation, which is a long, drawn-out process taking as long as five years to complete. By request of Hyland Hills, Arvada can use our water rights to replace the water until then. It is expected that evaporation will amount to about 24 acre-feet per year, which this year is valued at \$7,500. (CB15-035)

There was no public input, Councilmember Fifer clarified that the time limit is five years, and the item passed on a 7 to 0 vote.

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Public Comment: none

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**Reports from City Council:**

Councilmember Marks thanked, recognized, and commended the Arvada Police for their adept handling of a situation Friday night. Mayor Williams agreed, explaining that a person, present after-hours in the police facility, had become threatening. Police personnel defused the situation with no loss of life. "Job well, well done," he said.

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Reports from City Manager:

City Manager Mark Deven requested a vote to cancel the October 26 workshop as well as the November 2 meeting, which by tradition is cancelled the night before City Council elections. Both were cancelled on a 7 to 0 vote.

Next Monday's workshop will be about 10-year Capital Improvement Project options and an update on the Olde Town Business Improvement District.

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Report from City Attorney: none

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The meeting was adjourned at 7:30.