Via E-mail Only

Chris Daly
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March 14, 2018

Dear Mr. Daly,

I have been retained by Arvada for All the People to assess their legal options relative to the scheduled March 19 City Council hearing on the Olde Town Residences project. In offering this assessment, I have sought to determine the legal basis under which City Council will be reviewing for a second time the Olde Town Residences project.

3.1.17 of the Land Development Code states that:

> If the City Council denies an application, that same request or one substantially the same may not be heard by the City Council for a period of (1) year from the date of denial, unless the City Council explicitly states that an earlier reapplication will be considered. The Applicant may submit a revised application that adequately addresses all of the Council's stated reasons for denial, however, at any time. Such revised application shall be treated as a new application for purposes of review and scheduling.

The information I have reviewed makes it unclear whether City Council is proceeding under the one-year waiver provisions of 3.1.17 or under the "revised application" provisions. The "Notice of Public Hearing," does not indicate the legal basis for the hearing; the press release issued by the Arvada Urban Renewal Authority dated February 9, 2018 cites the Land Use Code, Section 3.1.17 and deems the application a "resubmittal." An email to Maureen Phair from David Smith, dated January 24, 2018, indicates that Councilmember Marriott would propose "reconsideration" on February 5, 2018. There are no minutes currently available online for that meeting. A February 8, 2018 email from City Manager Mark Deven to City Council members asks whether council members "agree to hear TCC's application." Council action via an email poll is not authorized by the City Charter. The provisions of 3.1.17 appear to require official action for reconsideration.

For these reasons, it is unclear the legal basis for City Council's March 19 hearing of the Olde Town Residences project. The legal basis for how/when the City Council decided to hear the Olde Town Residences project is also unclear.

One-Year Waiver

Based on information obtained under the Colorado Open Records Act, it appears that City Council may be considering the Olde Town Residences Project by waiving the one-year limitation on reconsideration. This reading is based on:

(1) Agendas in January and February 2018 for meetings between Mayor Marc Williams and City Manager Mark Deven that contain the agenda item "Olde Town Residences – Update on Reconsideration."

(2) Email from Maureen Phair to other Arvada officials including Mayor Williams that the developer would prefer to go the "reconsideration" route, due to "fear" of resubmittal.

(3) Email from Mark Deven to City Council dated February 8, 2018, indicated that the Land Development Code "allows for an application to be reheard with City Council consent." Consent for rehearing is cited only in the first clause of 3.1.17, in connection with the one-year restriction.

(4) Email from Mark Deven to City Council dated February 8, 2018, stated that the entirety of the application would be **reheard** and identifies March 19, 2018 as a **rehearing** of the Olde Town Residences application.

The statute imposes a restriction on City Council – a one-year time limit – that City Council can waive only with an explicit determination that it will hear a reapplication earlier than the one-year time limit.

Although the statute does not specifically state that City Council must make this determination at the time of the denial, no other reading of the statute gives effect to the entirety of the statute. The word "explicit" means to be "fully revealed or expressed without vagueness, implication, or ambiguity." [1] The word "states" means to "set forth formally in speech or writing," "to set forth in proper or definite form," or "to fix or settle, as by authority."[2] The word "will" is "used to express futurity," as in "tomorrow morning I will wake up in this first-class hotel suite."[3] Combined, these words spell out how City Council may waive the one-year restriction. Procedurally, under the City Charter, it would appear the only way that City Council acts, and therefore "explicitly states" its views, is via adoption of a resolution, ordinance or motion.

By contrast, Deven's February 8, 2018 email suggests no restrictions exist on City Council's ability to rehear a project it previously denied. That reading, however, would render meaningless the one-year restriction and waiver language because it poses no actual restraint on City Council action. Nor is that permissive reading consistent with the principles of statutory construction. Statutes should be read to "give effect to every word." *Hygiene Fire Prot. Dist. v. Bd. of County Comm'rs of Boulder*, 205 P.3d 487, (Colo. App. 2008), citing *People v. Cross*, 127 P.3d 71, 74 (Colo. 2006). Courts should "give effect to the ordinary meaning of the language and read the provisions as a whole, construing each consistently and in harmony with the overall statutory design, if possible," *Id.* at 490, citing *Cross* at 73. Moreover, "Interpretations that will render words or phrases superfluous should be rejected." *Id.*

A permissive reading of the rehearing authority is also illogical. A statute imposing NO limitations on rehearing could have stated: "If the City Council denies an application, that same request or one substantially the same, may be heard at any time."

Additionally, 3.1.17 requires a determination by City Council of whether the rehearing involves the "same" or "substantially the same," the project. Arguably, if the project is the same or substantially the same, the Land Use Code does not authorize a hearing unless City Council indicated, **when it declined the application**, a willingness to rehear the application at an earlier future date.

This reading is supported by City Council Rules of Procedures which state: *An action may be reconsidered only if a motion for reconsideration is made **at the same meeting as the action sought to be reconsidered was originally voted upon**. The councilmember making*

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[1] https://www.merriam-webster.com/dictionary/explicit

[2] http://www.dictionary.com/browse/state

[3] https://www.merriam-webster.com/dictionary/will

*such motion shall state that they were on the **prevailing** side of the motion.* Rule L 8. likewise states: *In the event a quasi-judicial matter is to be reconsidered, the required notice mandates established by ordinance shall be followed and the **reconsideration of the original question shall be postponed to a future regularly scheduled or special meeting**.*

Thus, it appears the City Council's rules of procedures do not authorize a motion to reconsider at any future date, but instead must be made *at the time of the initial vote* and, in the case of quasi-judicial matters, the hearing is postponed to comply with notice requirements. A document labeled "City Council Minutes of January 22, 2018" indicates that the project was voted down and that no motion for reconsideration was made. For this reason, it appears that City Council lacks the authority to rehear this project on March 19, 2018 based on a waiver of the one-year restriction in 3.1.17.

Revised Application

Alternatively, if City Council is proceeding under the second half of 3.1.17, the revised application must be treated as a new application for purposes of review and scheduling. Under the Land Use Code, 3.7.3, a new application must follow this trajectory: A pre-application conference, a potential neighborhood meeting, review by the community development director and staff, a Planning Commission public hearing and recommendation, and then City Council review. Under 3.7.3, City Council "shall" consider the application after receiving the recommendation of the Planning Commission. Thus, there appears to be no discretion by City Council to not hear the application once it is forwarded from the Planning Commission.

An email from Mark Deven to City Council dated February 8, 2018, indicates that the Candelas Townhomes project rehearing provides a precedent for not seeking a Planning Commission recommendation. Deven stated that because "the Planning Commission already recommended approval of the PDP 6-0 and the Height Exception 4-2, and the proposed changes are intended to lessen the impact of development, **staff does not believe the resubmittal needs to be taken back to Planning Commission for its recommendation**."

Because Planning Commission review would be required under 3.7.3 for new applications, and because 3.1.17 requires revised applications to be treated as new, Deven appears to be suggesting that City Council will be hearing the Olde Town Residences Project as a revised project, rather than as reconsideration of a same or substantially the same project that was rejected January 22, 2018.

Nothing in 3.1.17 allows city officials to sidestep the full review required under 3.7.3 for Preliminary Development Plans. Staff's opinion on whether the review is necessary does not obviate the statutory mandate that just such a review occur. Moreover, the statutory mandate gives effect to the statutory language of 3.1.17. The statute allows submission of a revised application that adequately address **all** of the Council's stated reasons for denial. Review by planning staff and the Planning Commission can ensure that the completed application addressed all of the council's concerns before triggering council's responsibility under 3.7.3. to review the application.

Deven cites the Candelas Townhomes project as "precedent" for proceeding without Planning Commission review, yet Candelas was apparently reheard as a waiver to the one-year requirement at the developer's request and after Councilmember Marriott moved to waive the one-year period, which therefore does not resolve whether Planning Commission review is necessary for revised applications which must be treated as new per 3.1.17. Moreover, a prior action that is not consistent with the statute would not provide legal precedent for a later action likewise not consistent with the statute.

Based on the analysis I have provided here, I have advised my clients that I cannot find legal authority for the City Council's March 19 hearing on the Olde Town Residences Project. I

would welcome your thoughts about the issues I have raised in this letter so that I may properly advise my clients on the legal remedies that may be at their disposal. If you would like to discuss this matter with me, I can be reached at (303) 532-6860.

Sincerely

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