CITY COUNCIL

CITY OF FORT COLLINS, STATE OF COLORADO

Appellants:	Marcus Mims and Libby Abramovich
Applicant:	J.R. Engineers and Planners on behalf of Zocalo Community Development
Re:	Appeal of the Administrative Hearing Officer Decision regarding Approval of PDP #220009 – College and Trilby Multifamily Community (6301 S. College Ave.)
Date:	September 24, 2024

HEARING BRIEF OF APPLICANT

Zocalo Community Development ("**Applicant**") submits this Hearing Brief in opposition of the Notice of Appeal filed on August 20, 2024, by the above-named Appellants (this "**Appeal**"). Applicant is under contract to purchase certain real property on the west side of South College Avenue between Skyway Drive and Trilby Road (the "**Property**") and submitted a project development plan application (the "**Application**") to create two hundred sixty-five multi-family, single-family attached, and two-family homes on the Property (the "**Project**"). The City's staff and a hearing officer (the "**Hearing Officer**") concluded the Application satisfied the approval criteria set forth in Articles 2, 3, and 4 of the Fort Collins 2024 Transitional Land Use Regulations (the "**LUC**"). Staff recommended approval of, and the Hearing Officer approved, the Application with conditions following a public hearing on July 24, 2024 (the "**Approval**").

Appellants are a group of nearby residents who oppose the Project. They do not take issue with any on-site aspect of the Project, or its compliance with the relevant approval criteria. Rather, they contend that the City should have required Applicant to upgrade Appellants' neighborhood street

system—based on nothing more than Appellants' conjecture that traffic will not take the routes identified in Applicant's 221-page Traffic Impact Study ("**TIS**"). Appellants have not and cannot point to any evidence suggesting that Applicant should upgrade their streets at Applicant's expense. Similarly, they have not identified any reason why Applicant should be required to expand Skyway Drive when neither the level of service impacts nor the City's own Transportation Master Plan ("**TMP**") map requires or envisions Skyway as being widened beyond its current configuration. In sum, while Appellants may well want improvements to their streets, they cannot ask Applicant to deliver them, and the Hearing Officer correctly approved the Application.

For these reasons and those set forth below, the Application complied with all the approval criteria, the Hearing Officer correctly approved it, and Appellants have not offered the Council any compelling reason to overturn that Approval now.

ARGUMENT

A. Legal Standard

This is an appeal under Section 2-48(b)(1) of the LUC, alleging that the Hearing Officer (a licensed attorney specializing in municipal law), failed to "properly interpret and apply relevant provisions of the Code and Charter." Section 2-56(a) of the Code therefore governs this Appeal, which provides that Council, in its judgment, shall determine how the relevant provisions and standards should be applied to the evidence contained in the record. In doing so, Council must adhere to the same principles of construction a court would use in interpreting the LUC, the Fort Collins Municipal Code (the "**Code**") and the Larimer County Urban Area Street Standards ("**LCUASS**") provisions at issue in this Appeal. Most basically, in interpreting such provisions, Council must "accept the [applicable legislature's] choice of language and not add or imply words that simply are not there." *People v. Benavidez*, 222 P.3d 391, 393-94 (Colo. App. 2009).

B. The Hearing Officer Properly Interpreted and Applied the Relevant Provisions of the Code and Charter

Appellants raise two primary challenges, both of which must fail. First, they assert that the Hearing Officer erred in failing to require Applicant to upgrade streets in *Appellants'* neighborhood (not the Project itself). (Notice of Appeal, Allegation #1.) This argument cannot succeed because LCUASS does not allow the City to request such off-site improvements, and even if it did, Applicant's TIS—which is the only such study in the record and was approved by the City's Traffic Engineering department—does not identify any material traffic impacts in Appellants' neighborhood. Second, Appellants appear to argue that the City should have demanded that Applicant upgrade, widen, and otherwise improve Skyway Drive north of the Project. (Notice of Appeal, Allegation #2.) Appellants' precise complaint is unclear, but in any event, Applicant's TIS, LCUASS, and the City's TMP all confirm that Applicant delivered the required improvements.

1. Appellants are not entitled to off-site improvements in their neighborhood.

Appellants first argue that existing infrastructure is insufficient on portions of Skyway Drive, Constellation Drive, Venus Avenue, and Mars Drive located in the neighborhoods around the Property. Appellants apparently contend that the City should have required Applicant to upgrade the streets in their neighborhood, well beyond the Project itself. Appellants are wrong about both the law and the facts. As a matter of law, LCUASS does not require applicants to upgrade streets in nearby neighborhoods. As a matter of fact, Applicant's TIS, which is the only official study in the record and which was approved by the City's Traffic Engineering department, confirms that Appellants won't suffer any material traffic impacts. Appellants have not pointed Council to any provision of the LUC empowering the City to require that Applicant pay for off-site impacts that do not exist.

Appellants may of course ask that the City upgrade their street system, or apply for traffic calming measures to be put in place, but not at Applicant's expense.

LCUASS requires applicants to make "all improvements required of *their development*" and those required improvements "adjacent to the site boundaries." LCUASS § 1.9.2. (emphasis added). Constellation Drive, Venus Avenue, and Mars Drive are not "adjacent" to the "site boundaries"[1] and are instead streets in nearby neighborhoods. LCUASS's adjacency requirements therefore do not apply to or support Appellants' demand. That leaves only the "off-site" LCUASS requirements, but those apply to a narrow scenario: the City may require an applicant to acquire and develop off-site right-of-way only when a project lacks an existing route to an arterial street. LCUASS § 1.9.2.B.5. That scenario doesn't exist here. Both Skyway Drive and Trilby Road deliver access to the closest arterial, College Avenue, so the City correctly declined to require new off-site connections. There is no legal basis for Appellants' argument that the Project entitled them to an upgraded street system in their neighborhood.

Furthermore, even if LCUASS could be interpreted as allowing the City to impose such a requirement, the facts in the record still did not support it. The scope of the TIS was determined by both the Applicant and City staff based on "good engineering judgment, and an understanding of future land use and traffic conditions at and around the site" at a scoping meeting held in compliance with the procedures set forth in Chapter 4 of LCUASS.[2] LCUASS § 4.3.3. Following that scoping meeting, the traffic engineer exercised his "good engineering judgment" and issued a "Transportation Impact Study Base Assumptions" identifying the area to be studied in the TIS. Appellants have not identified any legal flaw in the traffic engineer's conclusion as to the TIS's scope, or any failure to

[1] Applicant addresses Skyway Drive below.
[2] The City's Engineer at the time signed off on the base assumptions of Applicant's TIS. TIS, p. 31

comply with the standards for traffic impact studies set forth in Chapter 4 of LCUASS. There was no error. And because there was no legal error, the TIS correctly forecasted that there would not be any impacts to Appellants' neighborhood streets—and Appellants have not introduced any information to the contrary. Rather, the TIS only recommended improvements be made to the intersection of College Avenue and Trilby Road to accommodate forecasted traffic volumes. TIS, p. 29.[3]

To be sure, Appellants contend the TIS does not adequately address their concerns and ask Council to require Applicant to complete a new traffic impact study to show additional improvements necessary to these off-site roadways. But this assertion suffers from two flaws. First, as noted above, the Appeal does not identify any legal deficiencies with the TIS or its City-approved scope, and this is an appeal in which they must demonstrate that the Hearing Officer's decision did not "properly interpret and apply relevant provisions of the Code and Charter." This Appeal does not permit Appellants to relitigate the facts. That is, Appellants may disagree with the facts in the TIS, but they haven't argued that any aspect of the TIS was legally deficient. Second, even assuming Appellants do have some concern about the facts, they could have commissioned their own traffic impact study and included that in the record. They did not. Appellants have not presented any study that complies with LCUASS requirements, and Council should not give them a second bite at the apple.

Apart from what LCUASS requires and what the TIS reflects, Appellants' request for off-site improvements must also fail because it violates state and federal law. The Fifth Amendment to the U.S. Constitution requires local governments to limit requested project improvements to those that share an "essential nexus" with the project impacts and that are "roughly proportional" to those impacts. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*,

[3] Applicant is exempt under LCUASS from making these improvements because such improvements have been funded and are currently under construction by the City as a capital improvement project. *See* LCUASS § 1.9.2.

512 U.S. 374 (1994). The Regulatory Impairment of Property Rights Act, C.R.S. 29-20-201 *et seq*. codifies essentially the same requirement. Here, Appellants have not provided evidence that the TIS, or a new TIS, would indicate what improvements, if any, would be related to the Project's impacts on these off-site and non-adjacent roadways. There is simply no lawful basis upon which the City could have required the improvements to Appellants' neighborhood street system.

The Hearing Officer correctly concluded Applicant has complied with the requirements of the TIS and Appellant has pointed to no insufficiencies related to these findings.

C. LCUASS Did Not Require Improvements to Skyway

After requesting improvements to the streets in front of their homes, Appellants next argue that "LCUASS is not fungible." It is not clear what Appellants mean by "fungible" in this context. Nevertheless, Appellants appear to believe that the City should have required Applicant to upgrade Skyway Drive to a "collector" standard because of certain remarks at the hearing on the Application suggesting that Skyway "functions like a collector." Nothing in the LUC or LCUASS required any such upgrade, however, and Applicant is delivering or paying its share for all required improvements.

The Hearing Officer properly concluded that Skyway Drive's current configuration is sufficient. For the City, LCUASS does not dictate street classifications by trip count and employs a more flexible approach centered on Level of Service ("**LOS**") at intersections, project-specific needs, and the City's TMP. Per Section 4.5.2, LCUASS requires additional improvements when intersection LOS falls below a "D."[4] That stands in contrast to the LCUASS requirements for Loveland, which require improvements when (1) a roadway exceeds a specific trip-count capacity or (2) intersection LOS requirements. (Compare LCUASS Tables 7-1 [City] and 7-2 [Loveland].) Why the different standard? Likely because the City has adopted a TMP map identifying roads that are or will be

[4] LUC § 3.6.4 also include LOS requirements.

classified "collector" and "arterial." Section 7.3 of LCUASS requires street classifications to "conform with the Local Entity TMP, when applicable . . . ." Otherwise, it requires that street "meet the needs of the specific development and satisfy all other specific requirements of this chapter. " LCUASS § 7.2.3.

To summarize, then, LCUASS permits the City to require street upgrades when (1) the LOS falls below the threshold level; (2) the City's TMP designates a street for a particular classification; or (3) when necessary to meet specific Project needs.

None of these applied to Skyway Drive. First, the TIS reflects that the intersection of Skyway Drive and College Avenue will perform at or above the threshold LOS. Second, the City's master street plan (the "**MSP**") does not identify the Skyway Drive, west of College Avenue, as a collector. Third, as discussed above, no aspect of the Project required Skyway Drive to be improved beyond its current configuration, which Appellants acknowledge already includes a wider-than-necessary cross section with a bike lane and sidewalk. The City did not, as Appellants suggest, skip this required analysis either. The Staff Report (p. 15) notes that improvements were necessary at the intersection of Trilby Road and College Avenue, which will be delivered in connection with the City's own capital improvement project. Against this, Appellants have not identified any LCUASS or LUC section requiring Skyway Drive to be upgraded beyond its current configuration.

Appellants contend that a "local" street is capped at 1,000 daily trips and that Skyway Drive therefore ought to be widened and improved. That limitation does not appear anywhere in the LUC or LCUASS, though, and the LUC defines a local street in the City as one anticipated to carry under 2,500 daily trips. LUC § 5.1.2. While Applicant acknowledges the TIS shows approximately 2,800 projected daily trips on Skyway Drive, that alone does not trigger any improvement obligation. The LUC simply requires the streets of the Project to comply with the MSP, City-adopted access control

plans, and LCUASS. LUC § 3.6.1(B). As discussed above, none of these standards trigger any additional improvements to be made to Skyway Drive, and it bears repeating that the City's TMP reflects the considered decision to end Skyway Drive's collector status on the west side of College Avenue. Thus, the City correctly decided not to apply a limitation that does not exist and instead appropriately exercised its engineering judgment that Skyway Drive's current design will "meet the needs of the specific development." There was no error.

D. Appellants May Not Present New Issues or New Evidence at the Hearing

Section 2-55(a) of the Code states that the Council may not consider "issues raised during the presentation of argument but not raised in the notice of appeal." Additionally, Section 2-55(b) of the Code requires that "no new evidence" be presented to the Council before or during an appeal hearing. New evidence includes any evidence related to the Application that was not presented before the Hearing Officer. *See* Code § 2-46. Thus, Appellants must be limited to the two issues raised in their Notice of Appeal and evidence presented at, and relied upon, by the Hearing Officer at the July 24, 2024 hearing, and should not be permitted to introduce new issues or new evidence at the appeal hearing.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Council affirm the Approval.

SUBMITTED this 24th day of September, 2024.

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