

Regular Meeting Aspen Planning and Zoning Commission December 15, 2009

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Stan Gibbs opened the regular Planning and Zoning Commission meeting in Sister Cities Meeting Room at 4:30 pm. Commissioners Bert Myrin, Cliff Weiss, Jim DeFrancia and Stan Gibbs were present. Michael Wampler, Brian Speck, Jasmine Tygre and LJ Erspamer were excused. Staff in attendance were Jim True, Special Counsel; Sara Adams, Drew Alexander and Chris Bendon, Community Development; and Jackie Lothian, Deputy City Clerk.

COMMENTS

Jackie Lothian stated that Jasmine Tygre was appointed as the alternate member of P&Z.

MINUTES

Stan requested that on page 9 “lower” be added to the windows.

MOTION: Cliff Weiss moved to approve the minutes with Stan’s changes of November 03, 2009; seconded by Jim DeFrancia. All in favor, APPROVED.

DECLARATIONS OF CONFLICT OF INTEREST

None stated.

CONTINUED PUBLIC HEARING:

DESIGN CALL UP CODE AMEDMENT

Stan Gibbs opened the continued public hearing on the Design Call up. Notice was previously provided.

Sara Adams stated the application before P&Z was asking for a recommendation to City Council about a de novo code amendment. Currently City Council has the authority to call up HPC and P&Z decisions that are really commercial design approvals and also historic properties certificate of appropriateness. Adams said that right now these were called procedural, which means it is based on the record; they are looking for an abuse in discretion or was there a denial of due process or did the board exceed their jurisdiction. This is the way that the code is written right now; so sometimes projects get called up to City Council for design related reasons but Council is restricted in their review to adjust these procedural issues that were just talked about. Adams said an example is that Council looks at a project and decides that HPC made the wrong decision but the board didn’t exceed their jurisdiction; so Council would really have to say that HPC did their job incorrectly in order to change the decision and that’s a really difficult position for Council to be in so staff was directed to look at changing the call up language so staff drafted 2 resolutions in the packet; one was a draft resolution that Council directed staff to compose and one was the HPC (Exhibit E) approval.

Adams said the Council directed the resolution that starts on page 4 of the packet and the key language was on page 6, which were the numbers 1 through 5. Adams used the

example of an application approved by HPC and the call up information goes to City Council and they have 30 days to call up this decision and it's not just one Council Member but at least 3 the Council members vote on it. Page 6 had the actions that Council has after they review the application using the same criteria that HPC reviewed on the project that they were looking at to grant approval. Adams said so the options that Council has are they can (1) accept the decision that HPC made, (2) reverse or amend the decision, (3) can alter the conditions of approval, (4) remand it back to HPC for a rehearing or (5) Continue to get more information. Jim DeFrancia asked if right now the Council ability to call up is restricted to 2 or 3 circumstances. Adams replied it was based on the record. DeFrancia asked if the intent of this was to allow Council to call up for any reason they want. Adams answered to call up was based on the contents of the application. DeFrancia said that even if they acted within the scope of their authority, even if it complied, if P&Z approved it and Council just doesn't like it, Council can call it up for review at Council or the applicant doesn't like it and appeal it to Council. Chris Bendon stated that an applicant can always appeal a board's decision and appeals are on the record; if an applicant doesn't like the decision or if the decision was something that stops at P&Z they can appeal it on procedural grounds; if it's something that goes onto City Council anyway like a PUD review that P&Z is only a recommending body there is already a path. DeFrancia said so the first part of consideration is that this amendment gives Council broader authority to call up any of these applications that they see reason they see fit. Adams said that they were just proposing to amend the sections of the code that already have the call up provision in them, which are commercial design standard review, which is Planning & Zoning and the HPC certificate of appropriateness; so the design related decisions stop at HPC and stop at P&Z.

Cliff Weiss said that he was stuck on the concept of all of this; we are recommending bodies. Weiss asked if it was only when P&Z or HPC was the final review that Council could have a call up to send it back to P&Z. Bendon explained that both P&Z and HPC have the circumstance where ½ of the reviews stop at P&Z; so applications that you are a recommending body there is no reason for a call up or appeal because it was already a recommendation that goes onto Council.

Adams said essentially what Council can do is reverse or amend the decision that the Planning & Zoning Commission makes for a commercial design standard review and staff has concerns authorizing Council to conduct the de novo review with the ability to amend the approval. Adams said staff was concerned about the predictability of the land use process, it may be jeopardized by changing approvals after the applicant works with the Planning & Zoning Commission for example to get a commercial design review approval and concerned that there is a level of uncertainty for the applicant regarding the validity of an approval that they would get for commercial design review from the Planning & Zoning Commission for the next 30 days they could be uncertain as to what

kind of approval they could end up with if City Council does call it up based on the proposed language here. There was also concern that Council takes on a HPC or P&Z role in addition to the normal City Council responsibilities. Adams said another perspective is that the amendment adds another level of checks and balances to the system; it could ultimately result in a more balanced application at the end of the process; Boulder and Telluride both used the de novo call up system.

Stan Gibbs asked if HPC has a role in a code amendment. Adams said that they don't but since it involved them staff felt it was appropriate to ask for a recommendation from HPC but typically is was a recommendation from P&Z to City Council.

Adams said the HPC approved (6-0) the resolution on page 13 of the packet that eliminates the ability of Council to remand or reverse the decision that HPC or P&Z makes and proposes 3 options. (1) Accepting the decision. (2) Remand the application back to HPC or P&Z for a rehearing. (3) Continue the meeting to request additional information to conclude the call up review.

Adams said that HPC decided that eliminating Council's ability to amend or reverse the decision in remanding it back to the applicable board with some clear direction as to what they didn't agree with was probably the fairest way to go and the most consistent way to go and probably meets the Aspen Area Community Plan a lot closer than allowing Council to change the decision. Adams said that staff was recommending that P&Z approve the language in the HPC resolution with the same language. Bendon said staff was concerned about a de novo review at Council not to turn the Council into an HPC or P&Z because the nature of these kinds of call ups can be a fairly political environment and staff does not think that the best design decisions are made in highly intense political environment; we do think that it is appropriate for Council to hear that feedback so when they are in a procedural review they don't get to take new information, they don't get to take new testimony, they don't get to take hear new information from an applicant about how something is addressed; it's purely procedural review so it really leaves them short on hearing from the public from more of a management philosophy. Bendon said instead of Council taking over P&Z's job; instead staff though it would be better for them to say that they didn't like the decision that you made; maybe you didn't hear from the same public; it reinforced P&Z and HPC's role as opposed to taking away from your role and maintains the integrity of the process; it should be part of the P&Z process as someone who wants to speak to the project. Bendon said it does raise a potential for a disconnect between P&Z and Council.

Bert Myrin asked if the applicant was not certain for 30 days; isn't that decision on hold for 30 days because someone could do a referendum to overturn. Adams replied sure; it was a little more probable to have City Council call up a decision based on content like

Chris was saying. Adams said that the public doesn't always come to HPC, they wait to go to Council when the decisions regarding design are already set in stone; there is always that concern. Bendon said that you might see applicant's in a close decision almost sound like they are speaking to Council when they are in this room. Myrin asked from Telluride and Boulder were the decisions or approvals that were overturned or reviewed or were they denials that were reviewed or overturned. Adams stated that she was looking at the language but her understanding for Boulder was that it was typically approvals that are called up by Council. Myrin asked if there was something in Aspen that changed. Bendon replied there was a call up on Bidwell; so what happened under the current language now, if Council wants to reverse the decision or alter the conditions that have been approved themselves; if Council wants to take over the first half to declare that P&Z or HPC that the procedure was not followed; there was a conflict of interest, you didn't hear from the public, something was done procedurally wrong, which was a tough thing for Council to declare unless there was something very clear on the record along those lines. Bendon said Council said that they were not happy with the decision; they want to have an opportunity to correct it. Bendon said that it could lead to a ping pong and that would probably prompt a meeting between the 2 boards and this has nothing to do with an appeal.

Stan Gibbs asked the language that was also in the current code "but not limited to:" was that Council could do anything they wanted to do. Gibbs asked if that language should be in the resolution. Bendon responded that if all 5 points were being included then the language should be in there but if we were limiting to the 3 points then it should be stricken.

Gibbs said that on page 2 "recognize the qualifications of the review boards" pertained to HPC but not P&Z. Adams answered that the point was the decisions rendered by HPC and P&Z and there is a certain level of expertise on the boards and it is important to recognize that and to trust in the process and maintain the integrity of the process. Gibbs asked Sara to expand on "B." on page 11. Adams replied that in the original draft there was definitely concern around having Council take on P&Z and HPC's role; adding another level of review; the same review that P&Z or HPC already went through gets a little redundant; where the changes in Exhibit B were a better communication between City Council and the boards that they call up a decision with more integrity giving in this process where Council will give feed back to the Planning & Zoning Commission. Bendon noted that last 2 statements speak to this "The excessive body of regulations must not keep expanding and many should be reconsidered". Bendon said that you could read a lot into that but one of the pathways and "rather than creating new rules was to creatively solve problems".

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Cliff Weiss said that this was like the tip of an iceberg; how many things end here that Council may want to call up. Weiss said that his big concern is when P&Z works through a big application and it then goes through a whole new set gauntlets with Council and he wanted P&Z to do more negotiation, more solutions and more compromises with developer here on PUDs and other applications before it goes to Council. Weiss said this was the exact reverse of where he sees P&Z should be moving and in subsequent years beyond today. Weiss asked how they could make improvements and the big projects (Bidwell, Aspen Club, Wheeler) get major subsequent changes beyond P&Z and he felt like there's where there was a lack of communication in working together with Council and in some situations Council improves on the work P&Z does and in some situations he feels that P&Z does not do enough; he feels frustrated with various applicants that P&Z just doesn't make difficult decisions that he felt should be made. Weiss asked staff how they could make some improvements to that. Weiss said that he wanted to do more of the land use for Council. Bendon responded that he did not have an answer and he did not think that the answer was in the room tonight; often times it is a particular case but it might be something that you could bring up with Council. Bendon said that in the past staff has been better about making sure that there is an annual meeting with P&Z and Council and HPC and Council.

Jim DeFrancia said that the land use that goes to Council is starting over from the beginning; P&Z that has already done it and when Council gets a recommendation from P&Z (whether it's for or against) Council should be predisposed to follow that recommendation unless somebody can show up with a prevailing argument to counter it and it should be relatively routine.

Bert Myrin spoke of page 6 in the memo that City Council's action "shall be limited to"; #1 he would leave accepting the decision; #2 he would change if reversing and adding approved by P&Z, it would be a check and balance; he would delete #3 because it was open ended; #4 he liked the remanding and #5 he thought was reasonable.

Jim DeFrancia said there was the resolution that begins on page 4 and there's a resolution on page 13 and staff recommended approval of the resolution on page 13. DeFrancia suggested dealing with the resolution that begins on page 13 as opposed to going through both of them. Stan Gibbs said that was going to be his question to the commissioners, whether it's de novo or not. Gibbs said whether Council can call up this decision for any reason or it has to be specifically as written. Myrin said that he would allow a de novo review or encourage it if there was a limit of what Council could do with it. Gibbs said Council has the right to review those things at some point because if they feel that something is wrong, they should have that right in his mind because they are the only ones that accountable to the voters. Gibbs said that HPC did a good job as did staff. Weiss said he tends more towards the HPC approval with only being able to be remanded

back to them once in order to prevent a ping pong situation. DeFrancia agreed with the HPC resolution approval.

Bendon said that an approval would create this drumbeat in the community that Council feels the need to respond to because the approval was inappropriate but it could be that a denial get a drumbeat around and that Council feels the need to respond to it. DeFrancia said that whether it was an approval or denial and he follows Stan's logic, Council is the elected body and are entitled to a different perspective with different considerations then they should be able to do it either way. Gibbs said that he agreed with Jim DeFrancia but asked Jim True the difference between reversing the decision and remanding it back. True replied that he had a problem with just remanding without discussing what that means; in a litigation context the court of appeals can remand things back for further hearing and it can always go back up for further review if the further hearing doesn't work; most of the time you remand it back with direction. True said Cliff brought up that you can only remand it one time and what happens if it goes back to P&Z and P&Z does the same thing and doesn't change anything then what happens. Weiss stated that at that point they lose #2 in red; they can only accept it or continue it. Gibbs said that the whole principal of remanding in his mind it has to essentially be a reversal; it's the opposite of accepting it so #1 is accepting it and #2 is not accepting it; because basically Council is remanding it back saying this is not an acceptable decision. Bendon says it would be helpful to be codified that it is remanded back with direction.

DeFrancia asked why staff favored version B. Adams responded that the understanding was that it would be remanded with clear direction; they were in favor of it for a couple of reasons: the checks and balances; a better product would come out with better communication between City Council and the boards because City Council does attract more public to their meetings than perhaps more than P&Z or HPC. Adams said that one of the reasons that staff didn't think that it was appropriate for Council to reverse or alter the decision has to do with the integrity of the process and keeping the design related issues for the appropriately assigned boards to make those decisions and to try and keep it out of the political realm as much as possible. Bendon said that if there was a disconnect between the P&Z decision and the community expressed by Council, it is a learning opportunity where you can converge your thought process and it might result in a better understanding of what Council expects of P&Z; it may result in realizing that the code needs to be changed with the design guidelines changed with a learning and convergence of thought. Bendon said that when Council has to step in and do the process for P&Z; he thought there was a divergence of P&Z and Council's relationship.

DeFrancia said that if he was following the logic that staff considered looking at was a version; P&Z takes action and goes to the Council; first of all they can accept it; rather than denying it and overriding our acceptance Council can remand it back to P&Z with

some direction. Gibbs said for Council's remanding to have any real authority it has to be able to go back to them again and P&Z changes whatever point and comes back with some change that they just wanted to see. Gibbs said that if we are really going to give de novo that was really the crux in his mind and Council has the ability to call anything up they want. Weiss said the key was he didn't mind that Council has the opportunity to call it up, to review it and make recommendations back to P&Z; what worries him was if it was unlimited Council can keep sending it back to P&Z until they get what they want. Weiss said that he was looking for a morph between the two and Council may have something important to put into the process. Bendon said that after any commercial design review that P&Z approves Council gets a memo with drawings saying this was approved last night and you have 30 days to call it up and Council needs 3 people to call it up.

Adams distributed copies of P&Z Resolution #17, 2009.

MOTION: Jim DeFrancia moved to approve P&Z Resolution #17-09 concerning the form as represented by staff (Exhibit B) and adding remanding with direction and that the call up can only be once; seconded by Bert Myrin. Roll call vote: Weiss, yes; Myrin, no; DeFrancia, yes; Gibbs, yes. APPROVED 3-1.

Discussion of the previous motion prior to the vote: Weiss said that *remanding with direction* was preferred by the commissioners. Gibbs asked if they want to put some kind of limitation on the number of remands. DeFrancia said if you do that he thought that P&Z effectively takes away the authority of the Council to override. Weiss stated that right now Council doesn't have that and Stan suggested that because they were elected officials Council should have the final say; they don't have that presently. Weiss said he was saying he is willing to have a little bit more of a gauntlet that Council participates in and if they are not comfortable with something Council can send it back to P&Z and P&Z can look at it what it is Council is not comfortable with; what worries him is no he doesn't want to give up this board's authority over land use applications especially ones that weren't going through conceptual and final and Council would see anyway. Weiss said he does respect what Stan said about Council being elected officials and perhaps having more comment from the public and he is willing to open that up so there is more of a process for the Council and public to participate in. Gibbs said that this certainly reduces the uncertainty because it really can't just go on forever. DeFrancia stated that he was persuaded. Myrin said that Cliff is attempting to eliminate the ping pong and he said that he can see both sides of it. Bendon said that they will combine all the recommendations for Council. Bendon stated that the resolution will include the amendments adding remanded with direction. Bendon said that on page 3 of the new resolution "the City Council shall conduct its review of the application on the same process and requirements applicable to the reviewing body" with the conditions listed

below and may hear additional information from the applicant and public should be replaced with "City Council shall conduct its review of the application under the same criteria of the applicable reviewing body". The commissioners agreed with this change with the exception of Myrin.

PUBLIC HEARING:

PROPOSED MISCELLANEOUS CODE AMENDMENTS

Stan Gibbs opened the Land Use Code Amendments. Chris Bendon said that they wanted to talk about development orders first and then Drew has a presentation on public amenity space. Bendon said that outdoor vending signage code and Main Street banners but the overall sign code was not ready and they would like some thoughts on it.

Bendon said the development order code amendment had the same code language as in Exhibit A.1 and Exhibit A.2 has the cut/paste language; in the resolution there was basically a clean version of the proposed language. Bendon said there were 2 sections that were being affected: the a development order does not expire but is subject to changes in the code, the allotments expire, a development order is good for 3 years, that's the vested rights. Bendon said unless a building permit is approved because from time to time it could take a long time to approve a building permit and with a lot of larger building permits the building department will issue phased permits; an access infrastructure permit while staff is still reviewing the main body of the process. Bendon said on page 8 Exhibit A.2; unless a complete building permit application submittal is accepted by the chief building official; the acceptance was accepting it and registering it as a building permit, it is logged into the computer system and you can look up the date that it occurred. Jim DeFrancia asked in that case the applicant would be protected against the imposition of code modifications. Bendon said that theoretically this could extend the vested rights period but the relative unpredictability of how long it's going to take through the process of review your building permit and the confusion around what happens if staff issues a phase of the permit. DeFrancia asked how long the building permit was good for. Bendon replied 6 months and you have to have taken some action; you have to have an inspection so that it has to be continuously moving along. DeFrancia asked about the Stage III stopping of building and what happens to the process. Bendon answered it goes to the attorneys and they start taking about common law vesting. Bendon said that his intent was to make sure the responsibility for pursuing the application is completely on the applicant and that it is submitted in a timely fashion; there was a definition of what the applicant is expected to do and it is to submit a completed application. Gibbs said that the applicant knows that there is a 3 year limit if they don't get the application into the City.

Bendon said this building permit section was added to so that building recordation and fees were paid. Bendon said that the building permit must meet the standards of the City

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Engineer; he added a section on completion of review, a section on compliance review and a clean- up of the process.

MOTION: Jim DeFrancia moved to approve Resolution #18, series 2009; seconded by Cliff Weiss. Roll call vote: Myrin, no; Weiss, yes; DeFrancia, yes; Gibbs, yes; APPROVED 3-1.


PUBLIC HEARING:

TEMPORARY OUTDOOR FOOD VENDING AND BANNERS and FLAGS on MAIN STREET LIGHT POSTS

Stan Gibbs opened the public hearing. Jim True said that the language in the resolution was not compatible. Jim DeFrancia said that maybe we should come back to this with language Jim True has scrutinized.

MOTION: Jim DeFrancia moved to continue the public hearing for the Temporary Outdoor Food Vending and Banners and Flags on Main Street to January 5, 2010; seconded by Bert Myrin. All in Favor, APPROVED.

The commission adjourned the regular meeting at 7:15 pm and went into a work session. Drew Alexander and Chris Bendon provided a slide presentation.



Jackie Lothian, Deputy City Clerk