



Land Use

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BOULDER COUNTY BOARD OF COUNTY COMMISSIONERS

April 14, 2011 – 9:00 AM
Hearing Room, Third Floor
Boulder County Courthouse

PUBLIC HEARING with PUBLIC TESTIMONY

STAFF: Abby Shannon Janusz, AICP

Docket DC-11-0002: A VARIETY OF POLICY CLARIFICATIONS TO ARTICLES 3, 4, 8, 9, AND 18 OF THE BOULDER COUNTY LAND USE CODE

Proposed Land Use Code amendments related to: Conservation Easement-holder signatures on applications, the classification of garage sales, cumulative square footage increases as a trigger for SPR, factor to overcome the SPR size presumption if a project already exceeds the allowable size, eligibility for severing TDCs, determiner of adequate water supply in 1041 applications, missing word in Subdivision Exemption section, and definition of Building Lot.

Action Requested: Recommendation of approval following staff presentation and public hearing.

SUMMARY

Staff has identified eight areas where the Land Use Code should be amended in order to make specific corrections and provide policy clarification in order to improve the Code. Each of the topic areas proposed for amendment and the rationale for proposing the amendment are included below along with staff's suggested amendment language.

PROPOSED AMENDMENTS

1. Conservation Easement-holder Signatures on Applications

As made evident in a recent appeal to the Board of Adjustment involving this provision, we should make clear that the Land Use Department does not decide whether or not a project conflicts with a Conservation Easement (CE) as part of the Code's general application processing requirement in Article 3 (see attachment A for the BOA staff report). Also, the Code currently requires all CE holders to sign the application if the project conflicts with the CE, but SPR is triggered only if the CE is County-owned. This inconsistency should be rectified. The suggested amendment is:

Art. 3-203(A)(1) Application Submittal Standards

(a) An application form with all agents designated, exhibiting all landowner signatures, and all necessary information completed. ~~Where the proposal, if approved and commenced or constructed, would conflict with the terms of an existing conservation easement on the subject property, the form shall also contain a signature from the conservation easement holder consenting to the proposal.~~ The signature on an application form will be deemed to indicate the landowners' concurrence with

all submissions and commitments made by their designated agent. If the proposal is located on property over which a conservation easement has been granted, the application shall include either:

- (i) a signature from the conservation easement holder consenting to the proposal being processed under the Code, or*
- (ii) a written statement from the easement holder(s) indicating that, in the opinion of the easement holder(s), the proposal, if approved and commenced or constructed, would not conflict with the terms of the easement.*

Art. 4-802(A)

(6) New structures or additions to existing structures of any size on property over which a conservation easements held by Boulder County has been granted.

2. Classification of Garage Sales

Garage Sale is listed in error as an Accessory Use in all zone districts. It should be listed as a Temporary Use in all zones. The full description of Garage Sales or Occasional Sales can be found in Article 4-517, Temporary Uses. The suggested amendment is:

Art. 4-101 ~~(C)(8) Garage Sales or Occasional Sales~~
 (D)(2) Garage Sales or Occasional Sales

Art. 4-102 ~~(C)(10) Garage Sales or Occasional Sales~~
 (D)(2) Garage Sales or Occasional Sales

Art. 4-103 ~~(C)(9) Garage Sales or Occasional Sales~~
 (D)(2) Garage Sales or Occasional Sales

(Etc.)

3. Cumulative Non-Residential Square Footage

Art. 4-802(A)(2) – When the Presumptive Size Maximum (PSM) trigger was added to the list of Site Plan review triggers in September 2009 (DC-05-002H), the list made a distinction between residential and nonresidential floor area to reflect the PSM threshold. The trigger list separated the thresholds for each type of floor area – one for up to 1,000 square feet of residential square footage and one for up to 1,000 square feet of nonresidential square footage – but the intent was to retain the single 1,000 square foot threshold that combined increases in residential and nonresidential floor area. Staff proposes the following amendments to this section to reflect its actual intent:

4-802 Applicability and Scope of the Site Plan Review Process for Development

A. Site plan review shall be required for (unless not required or waived pursuant to sections B and C below):

2. ~~For residential development, Site Plan Review shall be required for the more restrictive of either any cumulative increase in residential floor area of more than 1,000 square feet on a parcel over that legally existing as of September 8, 1998 or a~~Any cumulative increase in residential floor area which results in a total residential floor area greater than 125% of the median residential floor area for the defined neighborhood in which the subject parcel is located. In determining if the proposed

development is greater than 125% of the residential median floor area, any demolition and rebuilding of any existing residential structure or any portions thereof, shall be counted toward the threshold.

~~a. In calculating the 1,000 square foot threshold or determining if the proposed development is greater than 125% of the residential median floor area, any demolition and rebuilding of any existing residential structure or any portions thereof, shall be counted toward the threshold~~

~~b. Any construction of residential floor area not legally existing as of September 8, 1998 shall be counted toward the threshold~~

~~c. Applies to all parcels in unincorporated Boulder County~~

~~d. Applies to all residential floor area, as defined in Article 18-189D.~~

3. Any cumulative increase in nonresidential floor area of more than 1,000 square feet on a parcel over that existing as of September 8, 1998

a. In calculating this 1,000 square foot threshold, any demolition and rebuilding of any existing nonresidential structure or any portions thereof, shall be counted toward the threshold

b. Any construction of nonresidential floor area not legally existing as of September 8, 1998 shall be counted toward the threshold

~~c. Applies to all parcels in unincorporated Boulder County~~

d. Applies to all principal ~~or~~ and accessory nonresidential structure(s)

4. Factor to overcome the SPR size presumption if a project already exceeds the allowable size

There are a number of factors to overcome the neighborhood size presumption in SPR. One of the factors is:

Art. 4-806(A)(2)(b) *Either the applicant or the Director may demonstrate that this presumption does not adequately address the size compatibility of the proposed development with the defined neighborhood.*

(i) *Factors to be considered when determining the adequacy of this presumption and whether it can be overcome include:*

(G) *Existing residential floor area that already exceeds the size presumption and has not been approved through a prior County land use approval.*

(1) Up to a one-time maximum of 200 square feet of residential floor area may be granted under this factor.

The word "approved" in statement (G) is too broad. It seems to imply that any development proposal would not be eligible to overcome the size presumption if they had already been through a land use review process and received approval. The intent was to provide an opportunity for a modest size increase (200 square feet) to those parcels whose size is already larger than 125% of the median for the neighborhood, so long as they did not have an existing square footage restriction. In order to clarify that parcels over the size presumption that went through a previous review – but were not restricted in size – are eligible for up to 200 square feet more, staff suggests changing the word "approved" to "limited:"

(G) *Existing residential floor area that already exceeds the size presumption and has not been approved limited through a prior County land use approval.*

5. Transferrable Development Credits

Staff suggests adding a section to Conveyance and Severance of Development Credits (4-1303) that would allow landowners of large parcels to be eligible for TDCs in order to extinguish building rights or to limit the size of new residences without having to create new 35 acre parcels. The purpose of

this amendment is to create incentives through the TDC program for owners of large parcels to maintain such parcels of land intact. The Board of County Commissioners authorized staff to pursue this amendment, however staff did not present recommended language to the Planning Commission on March 16, 2011. While simple in concept, the application of this suggested change needs to be studied in detail before a recommendation can be brought to the Planning Commission or the Board.

6. 1041 Standards for Approval of a Permit Application

The 1041 regulations say that adequate water supply is determined by the Colorado Department of Health; this should be the State Engineer instead. The suggested change is:

Art. 8-511(B)(3) Adequate water supplies, as determined from the Colorado Department of Health by the Colorado State Engineer, are available for the proposal, if applicable.

7. Intro Paragraph for Subdivision Exemptions

The first paragraph is missing the word "land," which the proposed change would insert as follows:

*Art. 9-100(A) The Board of County Commissioners may grant exemptions from the application of the Subdivision Regulations for any subdivision of unsubdivided **land** which the Board determines, pursuant to this Article 9, is not within the purposes of the Subdivision Regulations, as evidenced in Section 1-300 and Article 5 of this Code, and Part 1 of Article 28, Title 30 of the Colorado Revised Statutes.*

8. Definition of Building Lot

Art. 18-121(A)(4) – According to the definition of *Building Lot*, transferring property from government ownership to private ownership must meet minimum lot size at the time of transfer to be considered a legal building lot. This provision was added to the definition of Building Lot in 1983 (AR-82-1), to prevent the federal government from selling small inholdings or other substandard parcels to private owners thereby (arguably) creating additional developable parcels which did not previously exist. The provision as then adopted applied broadly to parcels coming into government ownership at any time or for any length of time. This provision renders prior legal building lots illegal.

We suggest changing this language so that building lots that have been purchased by a government agency since this provision was added in 1983 that are then divested by the agency to continue to be considered legal building lots. The effect of this amendment would allow County Parks and Open Space to exchange parcels (often mining claims) with other parties, typically state or federal land management agencies, and value the parcel as a legal building lot. The change would also reflect current administrative practice of allowing HUD-foreclosed lots to be conveyed out of the mortgage's ownership back into private hands as legal building lots. The suggested amendment is:

18-121 Building Lot

A parcel occupied by, or designated by the Director pursuant to this Code to be occupied by, a use which is required by the Zoning District provisions of this Code to comply with the minimum lot area requirements of the zoning district in which it is located. Except as provided in subsection (A) below, the parcel shall be of sufficient size and shape to conform to all requirements of the zoning district within which it is located.

A. A substandard parcel shall be considered a building lot only if it meets one of the following criteria:

1. A parcel upon which a use, which is required to comply with the minimum lot area requirements of the zoning district in which it is located, lawfully exists or, if none exists, has lawfully existed prior to the effective date of this Code.
2. A parcel which the Board of County Commissioners has exempted from the definition of 'subdivision' with the specific intent, as stated in the exemption Resolution, of allowing the parcel to be designated as a building lot; provided however that said parcel shall remain subject to any use and building requirements imposed pursuant to Article 9 as well as all other provisions and requirements of this Code.
3. A lot, tract, undivided block, or other plot of land, other than an outlot or right-of-way, within an area of subdivided land, which met the lot area and lot frontage requirements of this Code in effect at the time of the approval of the subdivided land, such land shall be designated as a building lot in accordance with those area and/or frontage requirements in effect at the time of its approval, subject, however, to all other provisions and requirements of this Code, as amended.
4. A parcel which conformed to the lot area and lot frontage requirements of the zoning district in which it was located at the time it was created, and which has continued to be held as a separate parcel, shall be designated a building lot in accordance with those area and frontage requirements in effect at the time of its creation, and with all other provisions and requirements of this Code, as amended; provided, however, if such parcel was at any time owned by a governmental entity, it may be occupied only in accordance with the area and frontage requirements in effect at the time legal title was transferred from the governmental entity to a person, unless it was acquired by the governmental entity after December 13, 1983, and was a building lot at the time of acquisition ~~and with all other provisions and requirements of this Code, as amended.~~

PLANNING COMMISSION

The Planning Commission considered these amendments at a Public Hearing on March 16, 2011. Following testimony from one member of the public and a brief discussion, the Planning Commission approved staff's recommendation by a vote of 7-0 with a few editorial changes. Those changes have been incorporated into the staff recommendation presented in this report.

TEXT AMENDMENT CRITERIA ANALYSIS

Article 16-100.B. contains the criteria for amending the text of the Land use Code. Staff finds that these criteria are met in the context of this Docket, as follows:

The existing text is in need of amendment:

Staff has identified the reasons why each of the eight topics areas is in need of amendment. In some cases, drafting errors occurred; in other cases, policy clarifications are needed. All of these amendments will improve the content and clarity of the Land Use Code.

The amendment is not contrary to the intent and purpose of this Code:

None of the proposed amendments are contrary to the intents and purposes of the Code.

The amendment is in accordance with the Boulder County Comprehensive Plan:

The proposed changes to the TDC program (#5) and the definition of Building Lot (#8) help further the stated goal of sending development to appropriate locations and maintaining the rural character of Boulder County. Conservation easements are a tool used to protect open space.

The changes proposed in #1 do not threaten this tool in any way – they simply make clear that it is the CE holder who decides whether a development proposal is in conflict with the CE.

Some of the proposed amendments are so minor they do not seem to relate to the Comprehensive Plan in any way.

REFERRALS AND PUBLIC INVOLVEMENT

These proposed changes were referred to the following Boulder County departments: Parks and Open Space, Transportation, Building Division, and the County Attorneys. While no formal referral responses have been submitted by these departments, Land Use staff worked closely with the Open Space Department, County Attorneys, and the TDC Clearinghouse Administrator (Ruth Becker) to develop and revise the staff-recommended language.

The staff report was emailed to the Land Use Code listserv on March 9, 2011 and April 7, 2011. No written comments on the proposed changes have been received to date.

STAFF RECOMMENDATION

STAFF RECOMMENDS THAT THE BOARD OF COUNTY COMMISSIONERS APPROVE DOCKET DC-11-0002, A VARIETY OF POLICY CLARIFICATIONS TO ARTICLES 3, 4, 8, 9, AND 18 OF THE BOULDER COUNTY LAND USE CODE.

ATTACHMENTS

Exhibit A Richards Appeal (AP-11-0001)



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BOULDER COUNTY BOARD OF ADJUSTMENT

AGENDA ITEM

Wednesday, February 2, 2011 — 4:00 PM

Hearing Room, Third Floor, Boulder County Courthouse

PUBLIC HEARING

STAFF PLANNER: Dale Case, AICP, Director & Zoning Administrator

STAFF RECOMMENDATION RE:

Docket AP-11-0001: Richards Appeal

Request: Appeal of Director's interpretation of Article 3-203(A)(1)(a) that a conservation easement holder must sign a Land Use application form in order for it to be considered a complete application for processing, where the development in the application conflicts with the easement.

Appellants: Judith Richards, 7001 Nimbus Road

RECOMMENDATION:

Uphold the Director's determination that Article 3-203(A)(1)(a) of the Land Use Code requires the City of Boulder (as conservation easement holder) to sign the property owner's zoning (site plan review) application to construct an outdoor pool in order for the application to be complete for processing, on the basis that the easement holder has determined that the proposed development conflicts with the easement

It is worth nothing that the City of Boulder, not Boulder County, holds this conservation easement and any corresponding property interest in that easement. For this reason, I have informed the applicant that I believe the BOA's decision on this matter would not have an effect on the City of Boulder's property interests or its ability to independently enforce its easement, should it so choose.

The standards of review the Board must consider during an appeal hearing from Article 4-1202

A. Interpretations of this Code

1. In hearing an appeal of an administrative decision or interpretation, the Board of Adjustment shall consider the following:
 - a. the technical meaning of the provision being appealed;
 - b. evidence as to the past interpretation of the provision;
 - c. the principles of interpretation and rules of construction in Article 1 of this code; and
 - d. the effect of the interpretation on the intent of this Code and the implementation of the Comprehensive Plan and any applicable intergovernmental agreement affecting land use or development

BACKGROUND/ANALYSIS:

The Richards filed a zoning (Article 4 site plan review) application to build an outdoor pool at their residence located at 7001 Nimbus Road. The application for Site Plan Review (SPR-10-0083) was

required because this project is located in the floodplain and requires a Floodplain Development Permit. Article 3-203 of the Land Use Code identifies what is necessary for the Land Use Department to consider an application complete for processing. One of the requirements for a complete application is the signature of the conservation easement holder consenting to the proposal, in cases where the proposed development would conflict with the terms of the easement. The exact language is below.

Boulder County Land Use Code Article 3-203(A)(1) Before any request for County approval under this Code may be processed, a complete application must be filed with the Land Use Department.

(a) An application form with all agents designated, exhibiting all landowner signatures, and all necessary information completed. Where the proposal, if approved and commenced or constructed, would conflict with the terms of an existing conservation easement on the subject property, the form shall also contain a signature from the conservation easement holder consenting to the proposal. The signature on an application form will be deemed to indicate the landowners' concurrence with all submissions and commitments made by their designated agent." *(Emphasis added)*

We received copies of letters from the City of Boulder stating they could not approve the construction of the pool under the terms of their conservation easement (letters attached – October 8, 2009 & August 4, 2010), due to a conflict with building a pool under the easement. These letters demonstrate the conservation easement holder would not sign the application form and on two occasions expressed how the development proposal conflicted with the conservation easement. Based on this information our office issued a letter on January 7, 2011 Richards stating their application for Site Plan Review could not be processed because it was considered incomplete without the signature of the conservation easement holder.

The Richards are appealing the determination the application is incomplete because it lacks that signature. They argue that the Land Use Director should not have found their proposal in conflict with the conservation easement, despite the opposite determination made by the easement holder itself, and therefore should process the application for the proposed development without the City's consent.

It has been our Department's consistent practice to rely on the conservation easement holder for a determination regarding when proposed development conflicts with the terms of a conservation easement encumbering the subject property. Many cases are development proposals on County-owned conservation easements, where Land Use defaults to the County Parks and Open Space Department, -as management agency for County conservation easements,- for the determination if a conflict exists. Even where the easement holder is not the County, it is appropriate to look to the easement grantee for an interpretation of conflict as the easement purchaser/grantee is the most knowledgeable regarding the terms and conditions under which the conservation easement was acquired, and also would be the plaintiff in any enforcement action if development were to proceed, under a County approval, that was deemed to violate the easement. The City of Boulder is a major owner of open space and grantee of many conservation easements both inside and outside of the City, and specifically determined here, after reviewing the proposed development and the terms of the affected easement, that a conflict existed. The City is a property interest holder in the subject property, and, under the circumstances of a determined easement conflict, should be given the opportunity to sign off, or refuse to sign off, on a development application affecting its interest. Indeed, this is the very purpose of Article 3-203(A)(1)(a). In this case we did not receive a positive response from the City and thus could not process the application. If the City and property owner can come to some agreement or amend their conservation easement, the County could move on to process the proposal.

RECOMMENDATION:

Therefore, the Land Use Director recommends the Board of Adjustment UPHOLD the Director's determination that the application for SPR-10-0083 is incomplete due to a conflict with the governing conservation easement and refusal of the easement holder to sign the application, and cannot be processed under the Land Use Code for this reason.

Attachments:

Attachment A - -Appeal application materials

Attachment B – Letters from City of Boulder to Judy Richards