

MEMO

TO: Boulder Planning Commission

FROM: Lee Nellis, FAICP

DATE: August 23, 2022

RE: Effective Development Review

Communities adopt substantive standards - like how far a structure must be set back from a property line or a stream – to ensure that land development is consistent with their vision for the future. Those standards can have their intended impact, however, only if they are effectively applied, case-by-case, in the review of development proposals.

The Minimum: Observing the Legal Formalities

As you all know, development review is supposed to operate within the bounds set by law. Adequate notice must be provided before meetings. Those who may be affected by a proposed project must have an opportunity to be heard. Commission members must avoid conflicts of interest and give defensible reasons for their decisions. There must be a way for those who feel aggrieved by a decision to appeal.

It is common, however, to comply with these legal minima, but still generate more heat than light when reviewing development proposals. The process can go astray in many ways, but the root of dysfunctional development review is the confusion that results from working in a legal system in which proceedings are assumed to be adversarial while trying to make community planning a cooperative endeavor. Good planning is undercut when people feel they must take and defend positions instead of sharing interests.

Doing Better: Having a Constructive Community Conversation

Boulder can find a happy balance between landowners' ambitions and the public interest only by having constructive conversations about proposed projects while still observing the legal formalities. A comprehensive and reasonably detailed general plan is a necessary foundation for those conversations. So too, are well drafted development standards. But the ordinances must also establish an effective process, a sequence of events. Here, in language less formal and detailed than an ordinance would be, is what I have learned about how that process is best managed.

The underlying principle is that the community conversation about a proposed development must begin early. Key questions must be raised and at least tentatively answered before most of the formalities apply.

Pre-Application/Sketch Plan

The conversation should begin with submission of a rough sketch of the developer's idea. This sketch should not be drawn on the back of a placemat, but neither should it reflect substantial investment in surveying, engineering, or design. That is because the sketch plan is the basis for a conversation that may result in substantial changes in what the applicant proposes.

Sketch plans should be filed with the ZA at least 10 days before the regularly scheduled PC meeting at which review is requested. No determination of completeness will be required, though the ordinances should say something about the scope of the sketch plan and the ZA can make suggestions.

Site Visit/Discussion of the Sketch

The best way for the PC to review a sketch plan is on the site. You can properly notice a meeting anywhere. It is then the applicant's responsibility to arrange safe access and parking for the PC and the interested public. An alternative (though I do not recommend it) is to have a subcommittee that is smaller than a quorum of the PC visit the site with the applicant and report its observations to the PC.

Wherever it happens, sketch plan review is the critical opportunity for the PC to educate the applicant about the community's expectations as they are embodied in the general plan and ordinances. You can ask and answer questions and make suggestions about what you hope to see in the application. Community members who attend may join in the conversation if they do so respectfully. Discussion of the sketch plan will be facilitated by following a checklist of standards that is similar to the checklist we developed to guide the review of applications for CUPs.

Following Up on the Sketch Plan

The ZA and the Clerk of the PC (and possibly a subcommittee of PC members) should work together to ensure that the minutes of the sketch plan review provide the guidance the PC wants the applicant to have. The applicant should be asked to acknowledge receipt of these minutes on the application form.

The Application

The worst mistake a PC can make is to give any consideration at all to incomplete applications. Doing so is an invitation to a frustrating series of meetings in which you try to cajole the applicant into providing the information you needed at the beginning while they complain (if not to you, to everyone else) about the time and cost involved.

The ZA must be authorized to determine the completeness of applications and reject the incomplete. The best way to support the ZA in this task is to create a checklist of application requirements that has spaces for the initials of both the applicant and the ZA. Every item must be initialed by both before a hearing may be scheduled. Most applicants appreciate this assurance that their application is complete. There must, nonetheless, be a way to appeal a determination of incompleteness.

What if an Applicant is Inflexible?

My experience is that most applicants respond well to up-front guidance during sketch plan review. Answering the PC's questions and following its suggestions is the shortest path to obtaining approval and moving on. There are exceptions who will test you with an application that is complete but not responsive. Their choice. You are required to reject proposals that do not comply.

Scheduling The Hearing

Upon accepting a complete application, the ZA will schedule a hearing at the next regularly scheduled PC meeting at which there will be time for its proper consideration. It probably won't happen in Boulder, but if you get busy, you want the ordinances to allow you to manage your agenda. I can say from personal experience that development reviews conducted late in the evening are not as effective.

ZA Recommendations

This is a sticking point in small places. Ideally, the ZA would prepare recommendations for review by the PC, the applicant, and the interested public before the hearing. The approach I have been teaching makes this easier with a well-organized checklist of standards, but making a recommendation about compliance (or not) with a few of the standards may still be difficult for someone who does not have extensive professional training.

That difficulty will be mitigated by relying on the determinations of other agencies, like the district health department, but may remain some standards in some situations. The best solution in Boulder is probably to ask the ZA to make recommendations, but leave the checklist blank where there is a judgement about compliance that she or he feels more comfortable leaving to the PC.

Hearing Procedure

A hearing procedure must be adopted either into the ordinances or the PC's bylaws or both. Here is how it works best in my experience.

- Whoever is presiding introduces the hearing topic, notes that proper notice was given (this needs to be in the hearing record) and asks if any member wishes to declare or discuss a potential conflict of interest.
- Members who have potential conflicts of interest should leave the room. There is a famous case from Washington state in which a member who had declared a conflict and stepped away was found to still have improperly influenced fellow PC members with body language from the back of the room. A Utah court might not be so strict, but there is no reason to take the risk of having a decision voided.
- Whoever is presiding asks the ZA to briefly describe the project. This description should always include a very brief history of the project so far. That way the date of the sketch plan review, the date when the follow-up was sent to the applicant, and similar facts will be in the hearing record.
- Following ZA's presentation, the presiding member will ask if there are factual questions about the project. This is a time for clarification, not comment. You have been doing this with CUPs.
- After any factual questions have been answered (having the ZA answer is best, but you don't have to be strict about this if PC members take care to be neutral in how

they answer), the public hearing can begin. This is the time for people to make statements. Here are the ground rules for that.

- As you have been doing with CUPs, the PC should answer no questions during the hearing. You allowed time for that.
 - Make sure that everyone clearly states their name and place of residence before they launch into what they want to say. Having an accurate list of who spoke is important in determining who has a right to appeal.
 - It's a matter of courtesy to ask the applicant or a representative to speak first.
 - You may set time limits and you must – if you want this to work well – insist that people confine their statements to the subject of compliance (or not) with the plan and standards. Encourage those speaking to refer to specific provisions of the general plan or standards if they can.
 - Use the gavel to maintain focus if necessary. Long-winded irrelevant testimony discourages public interest and participation.
 - PC members may ask questions to clarify statements, but they are not to comment on the answers. They will have their chance.
 - Remember to read any written statements you have received into the record by reference before you close the hearing.
- When all statements have been taken, close the hearing and begin discussion.

The Decision

There may be pressing issues for the PC to talk about, but I have found that this all goes better if you start with what is not controversial. Areas of agreement are usually extensive.

A member can move to accept the ZA's recommendations on compliance except where the ZA, the PC, or the testimony you have heard raise a question. You can modify that motion by assent until it is an accurate list of what need not be discussed, then vote to approve it.

With the areas of agreement clearly defined, you can work through the remaining issues, resolving them and establishing conditions of compliance as you go. Multiple motions may be required, but this will create a clear record of how and why your decision was made.

Following Up on the Decision

It is important to get a written notice of decision out to the applicant (and anyone else who requests it) as soon as reasonably possible. This notice should include a brief statement that there is a right to appeal and where one could learn more about the possibility of an appeal.

Common Questions About this Process

May people testify more than once at a public hearing? Yes. You should allow people to speak more than once if their comments will be relevant. A hearing can't, by definition, be a conversation, but people (many of whom find testifying stressful) should be allowed to correct themselves or add a thought.

May we table a decision on an application? If the process is working as intended you shouldn't have to, but you may table a decision to a date certain. It is advisable to clearly state a reason for doing this.

What about special meetings? Applicants are often in a hurry and may ask for a special meeting. But scheduling such a meeting can only create a public impression of preferential treatment. Don't.

Boulder Can Do This!

This is a lot when you read it all in one setting, but please don't be overwhelmed. You are already doing much of this reasonably well and are capable of adding the rest. These best practices described here just need to be adopted into the ordinances and followed.