

**BEFORE THE CITY COUNCIL
OF THE CITY OF LITTLETON COLORADO**

PC Resolution 02-2022

APPEAL OF PC RESOLUTION 02-2022: APPROVING THE MASTER DEVELOPMENT
PLAN - CONCEPTUAL (MDP) FOR ASPEN GROVE

**OPENING BRIEF OF THE LITTLETON PLANNING COMMISSION IN SUPPORT OF
PC RESOLUTION 02-2022**

The Littleton Planning Commission, by and through its undersigned counsel, Kissinger & Fellman, P.C., submits its Opening Brief in Support of PC Resolution 02-22 pursuant to Section 10-9-3.7 of the Littleton Unified Land Use Code (“ULUC”).

Factual Background

In October of 2021, the City of Littleton City Council (“City Council”) adopted the ULUC. The ULUC created a new type of land use approval called a Master Development Plan (“MDP”). As the code existed on July 25, 2022, an MDP is required when the following conditions are met:

- a. Development with two or more single-family attached or multi-family residential, commercial retail and service, office, entertainment, recreation, and public or institutional uses;
- b. A development site of greater than 10 acres in size;
- c. Construction in two or more phases; or
- d. Large-scale development with:
 - 1. More than 100,000 square feet of gross floor area in a single building, including big box stores, supermarkets, wholesale stores, and multi-tenant shopping centers; or
 - 2. Two or more separate buildings and a combined square footage of 150,000 square feet.

ULUC 10-9-5.7 (July 25, 2022).

The MDP application process is the beginning stage for “large-scale” development and is intended to describe the “nature and character” of a proposed development rather than the detailed specifics of the final design of a development. ULUC 10-9-5.7 (B)(2) (“A Master Development Plan is required to illustrate the *nature and character* of development”)(emphasis added). MDP applications are required to submit information on the *nature and character* of 1) context; 2) location, scale, and design; 3) density; 4) intensity; 5) parking and circulation; 6) streets; 7) common open space; 8) environmental protection; and 9) phases. *Id.* at (B)(2). The MDP process requires more detailed information to be submitted as part of subsequent approvals, particularly in Site Plans (“SIPs”). *Id.* at (E). (“Upon approval [of the Master Development Plan], all subsequent plats, plans, and permits shall clearly demonstrate consistency and conformance with the adopted Master Development Plan.”) Following approval of an MDP, a development is required to submit SIPs prior to the “development of one or more single-family attached, multi-family, or non-residential buildings” which are evaluated against the detailed standards and design guidelines contained in Chapters 1 and 3 of the ULUC. ULUC 10-9-5.4(b).

In March of 2022, Gerrity Group (the “Applicant”) submitted an application for an MDP for the Aspen Grove Shopping Center (the “Application”). The Application seeks to redevelop a portion of the existing property to add a new mixed-use building with multifamily apartments above ground level retail, structured and on-street parking, new retail/commercial buildings, common open space, private streets, and pedestrian/bicycle amenities. The proposed plan shows 481 dwelling units in the southeastern portion of the site adjoining the RTD Mineral Station Park & Ride and allows an overall cap of 1,966 dwelling units on the property, provided sustainability incentives are met.

The Application is the first to request approval of an MDP in the City of Littleton. As a result, City Staff and the Planning Commission were required to interpret for the first time the ULUC requirements for the submission and approval of an MDP. Staff and the Planning Commission reasonably interpreted that the intent of the MDP process is to determine the “nature and character” of a development and that means that an MDP application could be conceptual in nature. Detailed requirements relating to development are separately contained in the general standards and standards for commercial mixed use (“CMU”) contained in Chapter 1 and 3 of the ULUC respectively. Whether a development meets the requirements of Chapters 1 and 3 of the ULUC is verified upon submission and approval of an SIP and is not as part of the MDP process. An MDP and a SIP application are separate processes and are not required to be submitted concurrently under the version of the ULUC Section 10-9-5.7 which existed on July 25, 2022.

The Planning Commission held a duly noticed public hearing on the MDP Application on July 25, 2025.¹ The public packet for the MDP application consisted of 82 pages of material as well as hundreds of pages of additional documentation publicly available on the Development Activity List (“DAL”). The hearing lasted over four hours, with approximately an hour of deliberation by the Planning Commission. Both Staff and the Applicant gave presentations and answered the questions of the Planning Commission. Over 70 individuals signed up to speak at the hearing either for or against the proposal. A majority of those individuals, and three who did not sign up, did provide oral comments to the Planning Commission. The Planning Commission unanimously approved the Application pursuant to PC Resolution 02-2022. The Resolution contained four conditions:

¹ The public hearing was originally scheduled for June 27, 2022, but was continued at the Applicant’s request.

- 1.1 At Site Plan application, applicant shall provide clear, safe and complete vehicular, pedestrian, and bicycle circulation from Area A to the existing transportation system in and around the existing Aspen Grove development as required in the Master Development Plan and said connection shall be provided with the first phase of development; and
- 1.2 Note 3 shall be removed from Sheet 1: Cover Sheet and Notes;
- 1.3 Visual renderings as shown in the presentation shall be added to the packet; and
- 1.4 Material and design shall be consistent with those details as further detailed in the Unified Land Use Code.

A group of concerned citizens (“Appellants”) filed an appeal of Planning Commission’s decision on or about August 16, 2022. Accordingly, this appeal process under Section 10-9-3.7 of the ULUC follows.

Standard of Review

Appellants have filed this appeal pursuant to Section 10-9-3.7 of the ULUC. Section 10-9-3.7 provides, “[a]ny party aggrieved by or alleging an error in a final decision of the Commission may appeal to the Council within 30 calendar days of the Commission's decision.” Pursuant to the standard contained in the ULUC, the City Council may only review the decision of the Planning Commission to approve PC Resolution 02-2022 for “error” based on the record that was before the Planning Commission at the time of their decision.

In conducting its review of Planning Commission’s final decision on PC Resolution 02-2022, the City Council may only consider the factual record that was before the Planning Commission at the time of its decision. *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 529 (Colo. 2004). This means that in conducting this appeal the City Council is limited to reviewing the following items: the MDP Application, the Staff Communication, the presentations of both Staff and the Applicant, the written comments submitted prior to hearing, the oral comments made during the public hearing, the questions and deliberations of the Planning Commission, the text of PC Resolution 02-2022, and other materials submitted with the public agenda for PC

Resolution 02-2022 including those on contained on the Development Activity List. The City Council is strictly prohibited from considered any new factual evidence, whether presented orally during the appeal hearing or through written materials submitted by the Appellants or any other party to the appeal, or any other information outside of the MDP Planning Commission hearing. This means the City Council is specifically excluded from considering issues concerning the November 8, 2022, ballot measure or previous approvals sought by the Applicant. The City Council may only consider new *legal argument* as to why the Planning Commission decision was made in error or why it was not made in error.

Furthermore, the City Council may only overturn the decision of the Planning Commission if the decision was made in “error.” Importantly, this means that the decision of the Planning Commission cannot be overturned on a difference of opinion. To overturn the decision of the Planning Commission, City Council must find a clear error in the decision-making process of the Planning Commission in arriving to their conclusion of approving the MDP.

The ULUC does not define the term “error.” However, the appeal process of the ULUC is loosely based on the appeal process for governmental quasi-judicial decisions contained in Colorado Rule of Civil Procedure (C.R.C.P) 106(a)(4). In reviewing C.R.C.P. 106(a), the Colorado Supreme Court has held that the legal standard of review for finding error in a governmental body’s decision is as follows:

Review shall be limited to a determination of whether the body [...] has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body [...]. When reviewing a decision under C.R.C.P. 106(a)(4), a court considers whether an erroneous legal standard was applied by the governmental body. C.R.C.P. 106(a)(4) also permits a district court to reverse a decision of an inferior tribunal only if there is “no competent evidence” to support the decision. “No competent evidence” means the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.

City of Colorado Springs v. Givan, 897 P.2d 753, 756 (Colo. 1995)(internal citations omitted).

In this appeal proceeding, the City Council must act as if it is a court reviewing a governmental decision for error under C.R.C.P 106(a)(4). This means that the City Council has two responsibilities:

- 1) Reviewing whether the Planning Commission exceeded its jurisdiction or abused its discretion by misapplying the law; and
- 2) Reviewing whether the Planning Commission's decision is supported by competent evidence in the record.

Stevenson Imports, Inc. v. City and Cnty, of Denver, 143 P. 3d 1099, 1101 (Colo. App. 2006);
Bd. of County Comm'rs v. Condor, 927 P.2d 1339, 1343 (Colo. 1996).

In the present matter, the Planning Commission did not commit an error in approving PC Resolution 02-2022. The Planning Commission reasonably interpreted the requirements to approve an MDP, as reflected in Section 10-9-5.7 of the ULUC as it existed at the time of Planning Commission's decision, and thus did it did not misapply the law. Furthermore, substantial and competent evidence exists in the record which supports the decision to approve the MDP.

Argument

A. The Planning Commission Appropriately Applied the Legal Standard for Approving an MDP

The Planning Commission appropriately applied the legal standard for approving an MDP is contained in ULUC Section 10-9-5.7. Appellants argue that the Planning Commission applied the wrong legal standard by evaluating the Application under the standards for a Master

Development Conceptual Plan (“MDCP”) under the current ULUC rather the standards for an MDP which existed on July 25, 2022. This argument is factually inaccurate and misconstrues the Planning Commission’s ability to interpret the submission and approval requirements for an MDP as an incorrect application of law. The record reflects that Planning Commission based their decision entirely on the decision criteria contained in Section 10-9-5.7(C) of the ULUC as it existed on July 25, 2022. Furthermore, Planning Commission reasonably interpreted the submission requirements of a MDP as permitting the submission of conceptual-level designs, plans, and renderings which would be further refined as part of the SIP process.

At the time of the hearing, the requirements in ULUC Section 10-9-5.7 required the applicant to submit to information which showed the *nature and character* of a proposed development as it related to nine categories of required submission information: 1) context; 2) location, scale, and design; 3) density; 4) intensity; 5) parking and circulation; 6) streets; 7) common open space; 8) environmental protection; and 9) phases. ULUC Section 10-9-5.7(B)(2). The decision criteria roughly track the same submission requirements: 1) Layout; 2) Building Form and Massing; 3) Quality Design; 4) Walkability; 5) Undeveloped Space; 6) Complete Streets and Parking; 7) Effect on the Natural Environment; 8) Nuisance Mitigation; 9) Phasing; and 10) Crime Prevention. ULUC Section 10-9-5.7(C). Both the submission content requirements of Section 10-9-5.7(B)(2) and the decision criteria of Section 10-9-5.7(C) contain limited information as to their requirements. However, each provide minimum requirements which are general in nature, and which do not refer to specific standards found elsewhere in the ULUC.

It cannot be reasonably argued that the Planning Commission applied the incorrect decision criteria to approve the Application. The record in this matter is extensive. The Staff

Communication which the Planning Commission relied upon to arrive at their decision extensively analyzes the Application against the decision criteria contained in Section 10-9-5.7(C) of the ULUC as it existed at the time of the public hearing. The deliberations of the Planning Commission were firmly rooted in Section 10-9-5.7(C) of the ULUC. Prior to voting, Chair Craig Coronato specifically went through each of the decision criteria of Section 10-9-5.7(C) and explained how the Application met each of the requirements. Finally, PC Resolution 02-2022 itself shows that each of the decision criteria contained in Section 10-9-5.7(C), in effect on July 25, 2022, had been met.

City Staff and the Planning Commission are permitted to reasonably interpret the submission requirements and decision criteria of Section 10-9-5.7 of the ULUC. Appellants argue that the interpretation of the of the MDP process to permit the submission of conceptual-level designs, plans, and renderings was in error. However, this argument ignores the plain language of Section 10-9-5.7(B)(2) which existed at the time, the context of the MDP process within the ULUC, and the ability of local governments to interpret their own codes and regulations for the purpose of implementing them.

Colorado courts have long held that local governments, local government administrative boards (such as a planning commission), and local government officials charged with enforcing local government codes and regulations are able to make interpretations of their own codes and regulations. *Yakutat Land Corp. v. Langer*, 2020 CO 30, ¶ 24, 462 P.3d 65, 71 (Holding that implementation of a land use code “will necessarily involve code interpretation.”) Furthermore, Colorado courts have long held that local government interpretations of their own codes and regulations are *entitled to deference*. *SD Rangeview, LLC v. City of Aurora*, 2014 Colo. Dist. LEXIS 2221, *2 (Colo. Dist. Ct. November 18, 2014) (“Generally, a reviewing court should

defer to the construction of a statute by the administrative officials charged with its enforcement. If there is a reasonable basis for an administrative board's interpretation of the law, we may not set aside the board's decision.") Interpretations of local codes by administrative boards administrative officials which are reasonable should not be considered to be in error. *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007). City Staff and the Planning Commission's interpretation of Section 10-9-5.7(B)(2) of the ULUC to permit the submission of conceptual-level designs, plans, and renderings was reasonable and is not a basis for error for two primary reasons.

First, the plain language of Section 10-9-5.7 of the ULUC envisions submission of conceptual-level designs, plans, and renderings. MDP applications are required to submit information on the "nature and character" of a development. ULUC 10-9-5.7 (B)(2). The Meriam-Webster Dictionary defines "nature" as: "the inherent character or basic constitution of a person or thing." The Meriam-Webster Dictionary defines "character" as: "main or essential nature especially as strongly marked and serving to distinguish." Both terms refer to the general, basic, overall, main, and overview of characteristics and conditions of the development. By only requiring that a submission show the nature and character of development, the ULUC expressly refutes the Appellants' arguments that the MDC process required SIP-level design specifications in order to approve the Application and expressly supports Staff's and the Planning Commission's interpretation that the MDP process permits the submission of conceptual-level designs, plans, and renderings.

Second, the context of the MDP application within the overall development process outlined in the ULUC supports the submission of conceptual-level designs, renderings, and plans. The MDP application process is the beginning stage for "large-scale" development. The

MDP process envisions subsequent, more detailed, submissions following the MDP process such as SIPs. ULUC 10-9-5.7 (E). Separately, the ULUC requires the submission of SIPs upon “development of one or more single-family attached, multi-family, or non-residential buildings.” ULUC 10-9-5.4(b). At the time of SIP submission, a project is extensively analyzed with compliance with the general standards and standards for CMU contained in Chapter 1 and 3 of the ULUC respectively. A project proposed in an application for an MDP cannot be built without submitting one or more SIPs.

The Appellants ask that the Application be evaluated against the detailed requirements of and SIP submission. This argument fails because the MDP process contains distinctly separate review criteria. *Compare* ULUC 10-9-5.7 vs 10-9-5.4. Also, reviewing an MDP as if the submission were an SIP would render the MDP (or SIP) application process duplicative and meaningless. Instead, the clear legislative intent of the MDP submission process is to provide an overview of the *nature and character* of a proposed development and that detailed information on the strict compliance with development and design criteria be shown and evaluated during the SIP submission process. Theoretically, an applicant could submit an MDP and SIPs concurrently or in close coordination with each other. However, the ULUC, as written on July 25, 2022, did not require coordinated MDP and SIP submissions nor did it require MDP details at the level of an SIP. Therefore, it is entirely reasonable that Staff and the Planning Commission interpreted Section 10-9-5.7 of the ULUC as requiring the submission of conceptual-level designs, plans, and renderings which contain the minimum information contained in ULUC Section 10-9-5(B)(2).

In making its decision on PC Resolution 02-2022, the Planning Commission correctly applied the appropriate legal standard by strictly applying decision criteria contained in ULUC

Section 10-9-5.7(C), as they existed on July 25, 2022. Planning Commission was also reasonable in interpreting ULUC Section 10-9-5(B)(2) as permitting “conceptual” level designs, plans, and renderings with the assurance that final designs, plans, and renderings would be required to be submitted as part of the SIP process. The SIP process and not the MDP, process requires specific compliance with the general standards and standards for CMU contained in Chapter 1 and 3 of the ULUC respectively. Consequently, the City Council should affirm that Planning Commission’s application of the legal standard for an MDP approval was not in error.

B. There is Substantial and Competent Evidence in the Record to Support the Planning Commission’s Decision to Approve the MDP

The Planning Commission based its decision on an extensive record of competent evidence which supports its decision to approve the MDP. The public packet for the MDP application consisted of 82 pages of material as well as hundreds of pages of additional documentation publicly available on the Development Activity List. The hearing lasted over four hours, with approximately an hour of deliberation by the Planning Commission. Both Staff and the Applicant gave presentations and answered the questions of the Planning Commission concerning the application. Over 70 individuals signed up to speak at the hearing either for or against the proposal. A majority of those individuals, and three who did not sign up, did provide oral comments to the Planning Commission.

In addition, the Applicant provided additional testimonial and visual evidence supporting the decision criteria during the hearing which were later incorporated in the public record, and which were required conditions of approval. These additional pieces of evidence specifically included visuals representing the materials and quality of design of the project, a massing study

showing the conceptual massing of the project relative to surrounding structures, and testimonial evidence as to the materials, quality of design, and massing of the project.² By the conclusion of the Planning Commission's deliberations, no member of the Planning Commission believed that any aspect of the decision criteria contained in ULUC Section 10-9-5.7(C) had not been adequately addressed by the substantial amount of evidence in the public record.

Appellants argue that the evidence does not "adequately illustrate the nature and character of the development as required by ULUC Section 10-9-5.7 Master Development Plan." However, their argument is really rooted in the belief that the evidence presented to Planning Commission was not of type of evidence they would have wanted, and not whether the evidence that was presented was competent. Appellants' argument misconstrues the legal standard. In Colorado, the legal standard for finding error in a governmental body's decision is whether *there is any competent evidence to support the decision*, not whether evidence is of the kind that satisfies the opponents of the proposal. *Bd. of Cty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996) ("We have long held that in a Rule 106(a)(4) action, a reviewing court must uphold the decision of the governmental body "unless there is no competent evidence in the record to support it.") "No competent evidence" means that the governmental body's decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. *Id.*

Here, the public record of evidence supporting approval is extensive. The Planning Commission carefully examined each of the decision criteria of ULUC Section 10-9-5.7(C)

² For example, the Applicant provided testimonial evidence relating to the materials and quality of design which included that the project would feature four-sided architecture, wrap-around design garages, human-scale amenities, public spaces, and stepped-back frontage design. The applicant also provided testimonial evidence regarding the height and massing of the project in relation to existing business such as Ted's Montana Grill and the Alamo Draft House.

against the evidence submitted for the public record. Deliberations on whether the criteria had been met were substantial. In particular, the Planning Commission initially questioned whether the decision criteria for Building Form and Massing and Quality Design had been met by the Application. However, by supplementing the record through additional testimonial and visual evidence developed through the thoughtful questioning of the Applicant and Staff by the Planning Commission, the Planning Commission was able to develop a record of competent evidence which supports that all decision criteria had been satisfied and that the Application should be approved. Additionally, the Planning Commission buttressed its decision that all decision criteria had been met by conditioning its approval on future compliance with the ULUC with respect to vehicular, pedestrian, and bicycle circulation and materials and design. The extent and quality of the evidence in the record is supported by the fact that the decision of the Planning Commission was unanimous, despite the initial reservations of several members of the Commission. The Commission's careful examination of the evidentiary record is exactly the kind of competent evidence required by Colorado law as necessary in in local governmental decision-making and should not be disturbed by City Council.

The evidentiary record for PC Resolution 02-2022 shows that substantial and competent evidence exists to approve the Application. The Planning Commission carefully applied the evidence contained in the public record to the decision criteria contained in ULUC Section 10-9-5.7(C). Planning Commission's application of the evidentiary record to the decision criteria was reasonable and supported by competent evidence. Because Appellants cannot show that "there is no competent evidence in the record to support" Planning Commission's decision, the City Council must affirm that Planning Commission's decision to approve PC Resolution 02-2022 was not in error for failure to be supported by competent evidence.

Conclusion

For the forgoing reasons, the Planning Commission requests that the City Council find that its decision to approve PC Resolution 02-2022 was not an error and should be upheld on appeal.

Respectfully submitted this 22nd Day of September 2022

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