

INTRODUCTION

1. This is a Complaint under Colo.R.Civ.Pro. 57 and the Colorado Uniform Declaratory Judgments Law seeking a declaratory ruling that the City of Fort Collins' Site Plan Advisory Review ("SPAR") land use procedure, as promulgated in the City of Fort Collins' Land Use Code ("LUC" or "Code"), is *not* legally applicable to the Northern Integrated Supply Project ("NISP").

2. NISP is being proposed by Defendant Northern Integrated Supply Project Water Activity Enterprise ("Northern").

3. Northern submitted its SPAR application on May 5, 2021.

4. Under the Code, the City Planning and Zoning Commission has 60 days to render a decision on Northern's SPAR application. LUC § 2.1.3(E)(2).

5. The City Planning and Zoning Commission has set a hearing date on the NISP SPAR application for June 30, 2021. Exhibit 1.

JURISDICTION AND VENUE

6. NISP is a proposed raw water conveyance pipeline and river diversion project to be located, in part, in the City of Fort Collins.

7. On April 19, 2021 Save the Poudre submitted a written request for interpretation asking the Defendants City of Fort Collins and Interim Director of Community Development & Neighborhood Services Department, Paul Sizemore, to find that the Code's SPAR land use process is not legally applicable to NISP, as proposed by Northern. Exhibit 2.

8. On May 5, 2021 the City and Sizemore issued a written interpretation finding that the SPAR land use process was applicable to NISP. Exhibit 3.

9. Northern submitted a SPAR land use application to the City of Fort Collins on May 5, 2021. Exhibit 4.

10. This Court has subject matter jurisdiction in this action as provided in Colo.R.Civ.Pro. 57 and the Uniform Declaratory Judgment Law, C.R.S. §13-51-101 *et seq.*

11. Venue is proper before this Court pursuant to Colo.R.Civ.Pro. § 98(a) because this is an action affecting real property in Larimer County, Colorado.

12. Plaintiffs have standing to bring these claims because Plaintiffs and/or their members live in close proximity to the proposed project and will be adversely impacted by noise, air pollution, traffic, water pollution, City property damage, adverse possession of City property, diminution of City property value, loss of recreational interests and enjoyment thereof, and waste of City of Fort Collins tax dollars paid by its members. Plaintiffs and their members also assert procedural standing by seeking a ruling that will protect and fulfill their right to have the NISP construction project proceed under a legally appropriate City of Fort Collins land use process that ensures full public notice, public comment, and public rights of appeal, as well as a land use process that does not allow the permit applicant to unilaterally override the final land use decision by the City. These injuries are causally connected to Save the Poudre's April 19, 2021 Request for Interpretation, the City and Sizemore's May 5, 2021 Interpretation, and the NISP SPAR application. The injuries complained of by Plaintiffs can be remedied by an order from this Court declaring that the City's SPAR process is not applicable to NISP and imposing preliminary and permanent injunctive relief.

THE PARTIES

13. Defendant City of Fort Collins is a home rule city and municipal corporation that rendered a May 5, 2021 Interpretation of its Land Use Code adverse to Save the Poudre's April 19, 2021 Request for Interpretation and interests. The City is now processing Northern's SPAR land use application and will hold a determinative hearing on the application on June 30, 2021.

14. Defendant Paul Sizemore, in his official capacity, is the Interim Director of the City's Community Development & Neighborhood Services Department and issued the City's May 5, 2021 written Interpretation.

15. Defendant Northern Integrated Supply Project Water Activity Enterprise is the NISP project proponent and SPAR land use applicant.

16. Plaintiff Save the Poudre ("STP") is a Colorado Non Profit membership corporation based in Larimer County, Colorado. STP's mission is to protect and restore the Cache la Poudre River of Northern Colorado.

17. Plaintiff No Pipe Dream Corporation ("NPD") is a Colorado Non Profit membership corporation based in Larimer County, Colorado. NPD's purpose is to protect citizens from the intense adverse impacts of multiple proposed water pipelines and reservoir projects in Larimer County, including but not limited to NISP.

18. Plaintiffs' members live and own properties in close proximity to the City of Fort Collins owned Natural Areas that will be adversely affected by NISP. Plaintiffs' members pay taxes and fees to the City of Fort Collins that help to fund the purchase, construction, and maintenance of City of Fort Collins owned Natural Areas.

19. Plaintiffs' members recreate in and along the Cache la Poudre River and in

the City of Fort Collins Natural Areas that would be adversely impacted by NISP.

20. NISP would adversely impact the Plaintiffs' members by imposing unwanted noise, traffic, dust, reduced recreational use and enjoyment of the Natural Areas, loss of ecological value of the Natural Areas, increased flooding on Natural Areas, and aesthetic injury.

21. Plaintiffs' members are taxpayers and/or ratepayers to the City of Fort Collins. Fort Collins taxpayers have invested tens of millions of dollars to conserve unmatched ecological resources running through the heart of the City, including the Natural Areas that would be damaged by NISP. Exhibit 5, p. 1. Fort Collins taxpayers, including Plaintiffs' members, believed that the Natural Areas would be protected in perpetuity. Exhibit 5, p. 1. The City of Fort Collins' own Land Conservation and Stewardship Board, within the City of Fort Collins Natural Areas Department, found on June 10, 2020 that NISP's removal of water from the river, through the Poudre River Intake, would further drain and degrade the immediate and downstream Natural Areas. Exhibit 5, p. 1. Hundred-year old trees will dry up, understory plants will shift to more drought tolerant species, biodiversity will decrease, and forests and wetland dependent animals will disappear. Exhibit 5, p. 1.

22. On April 16, 2020 the Fort Collins City Manager informed then City Council of "Northern Water's need to acquire real property rights on City-owned land and in the City right-of-way near the intersection of Lemay Avenue and Mulberry Street, where Northern Water would divert NISP water from the Cache la Poudre River." Exhibit 6, p. 4. As of that date "[t]he City and Northern Water have not yet begun those discussions." *Id.* "Any acquisition of real property rights for NISP on City-owned land

would require City Council approval.” *Id.*

23. Under LUC Section 2.1.3(E)(1), the SPAR land use process only applies to “parcels owned or operated” by the appropriate permit applicant. Exhibit 7.

24. As of May 5, 2021, Northern did not own or operate the parcels of property within the City of Fort Collins that are the subject of its SPAR application. Therefore, Plaintiffs’ procedural rights are being violated by Northern pursuing the inapplicable SPAR land use approval process, the City’s determination that the SPAR process applies to NISP, and the City’s ongoing processing of Northern’s SPAR application.

25. Plaintiffs and their members’ procedural and/or due process rights are also adversely impacted by the City’s May 5, 2021 Interpretation and the City’s processing of Northern’s land use application under SPAR. The SPAR process does not provide a full quasi-judicial process--public notice, public comment, and rights of appeal. The SPAR process may also allow the applicant’s governing body to override a final decision by the City on the land use application. Plaintiffs and their members assert in this action that the SPAR procedure is not legally applicable to NISP as proposed by Northern.

STATEMENT OF FACTS

26. NISP is a municipal water project involving, *inter alia*, the construction of a new river diversion structure, known as the Poudre River Intake, on the Cache la Poudre River which would be located on parcels in a City of Fort Collins owned Natural Area. NISP also involves, *inter alia*, the construction and perpetual operation of a related raw water pipeline to be located on parcels in a different City of Fort Collins owned

Natural Area. The Poudre River Intake and the above-referenced water pipeline would both be constructed on land within the City of Fort Collins. Exhibit 12, p. 1.

27. The proposed Poudre River Intake would be located near the intersection of South Lemay Avenue and East Mulberry Street, Fort Collins, in the active river channel and the associated riparian zone in the City of Fort Collins Homestead Natural Area property. Exhibit 8, p. 5. The City of Fort Collins owns and operates the Homestead Natural Area, which is located within the City of Fort Collins. Exhibit 13.

28. The Homestead Natural Area was created and funded, at least in part, by City of Fort Collins taxpayers. Exhibit 5.

29. The Homestead Natural Area is sensitive to disturbance and is an important public use area with established access paths. Exhibit 8, p. 5.

30. The purpose of the Poudre River Intake is to divert water from the Cache la Poudre River and eventually funnel the water to the water pipeline for transport to Northern's treatment and distribution facilities east of I-25. Exhibit 8, p. 3.

31. When operational, the Poudre River Intake would divert a significant percentage of the flows in the Cache la Poudre River, thus reducing downstream flows. Exhibit 8, p. 3.

32. Northern does not own or operate the parcels or property upon which the Poudre River Intake would be located. Exhibit 13. The parcels upon which the Poudre River Intake would be located are owned by the City of Fort Collins. *Id.*

33. On April 16, 2020 the Fort Collins City Manager informed then City Council of "Northern Water's need to acquire real property rights on City-owned land and in the City right-of-way near the intersection of Lemay Avenue and Mulberry Street,

where Northern Water would divert NISP water from the Cache la Poudre River.”

Exhibit 6, p. 4. As of that date “[t]he City and Northern Water have not yet begun those discussions.” *Id.* “Any acquisition of real property rights for NISP on City-owned land would require City Council approval.” *Id.*

34. Under LUC Section 2.1.3(E)(1), the SPAR land use process only applies to “parcels owned or operated” by the appropriate permit applicant. Exhibit 7. As of May 5, 2021, Northern did not own or operate the parcels of property that are the subject of its SPAR application.

35. Northern also proposes to construct a portion of the NISP water pipeline in the City of Fort Collins owned Riverbend Ponds Natural Area. The City of Fort Collins owns and operates the Riverbend Ponds Natural Area, which is located within the City of Fort Collins. Exhibit 14.

36. Riverbend Ponds Natural Area is located downstream of the proposed Poudre River Intake. Exhibit 14.

37. Riverbend Ponds Natural Area was created and funded, at least in part, by City of Fort Collins taxpayers. Exhibit 5.

38. The City’s June 10, 2011 Cache la Poudre River Natural Areas Management Plan Update (“Management Plan”) includes the Riverbend Ponds Natural Area. The Management Plan includes policies that “provide adequate instream flows to maintain the ecological functionality, recreational, and scenic values of the Cache la Poudre River through Fort Collins” (Policy ENV 24.5). The Management Plan also includes a policy to maintain natural area protection buffers “of three hundred (300) feet wide” along both banks of the Poudre River to protect natural features and scenic

qualities...” (Policy ENV 24.3). Exhibit 9, p. 3 (Cache la Poudre River Natural Areas Management Plan Update). Construction and operation of NISP would interfere with both of these management policies.

39. Northern does not own or operate the parcels or property upon which the Riverbend Ponds Natural Area water pipeline would be located. Exhibit 14.

40. On April 16, 2020 the Fort Collins City Manager informed then City Council of “Northern Water’s need to acquire real property rights on City-owned land and in the City right-of-way near the intersection of Lemay Avenue and Mulberry Street, where Northern Water would redivert NISP water from the Cache la Poudre River.” Exhibit 6, p. 4. As of that date “[t]he City and Northern Water have not yet begun those discussions.” *Id.* “Any acquisition of real property rights for NISP on City-owned land would require City Council approval.” *Id.*

41. Under LUC Section 2.1.3(E)(1), the SPAR land use process only applies to “parcels owned or operated” by the appropriate permit applicant. Exhibit 7. As of May 5, 2021, Northern did not own or operate the parcels of property that are the subject of its SPAR application.

42. The Fort Collins City Council must approve any transfer of City of Fort Collins parcels, land, or property rights to Northern for construction of the Poudre River Intake and/or water pipeline. Exhibit 6, p. 4.

43. To date, the Fort Collins City Council has not approved any transfer of any of its property or property rights to Northern that would be required for construction and operation of the Poudre River Intake or water pipeline.

44. The Fort Collins City Council could deny any voluntary transfer of property or property rights to Northern needed for the construction and operation of the Poudre River Intake or the water pipeline.

45. The proposed Poudre River Intake and water pipeline would be entirely new structures and are not improvements to any existing public building or structure.

46. Section 1.4.2 of the LUC allows “any person” to request an interpretation of the Code. Exhibit 10, hereto (LUC § 1.4 of the Code).

47. The Director of the City of Fort Collins’ Community Development& Neighborhood Services Department has the legal authority to issue interpretations of the Code. Exhibit 10 hereto (LUC § 1.4.1 of the Code).

48. At all times relevant to this Complaint, Defendant Paul Sizemore was the Interim Director of the Community Development& Neighborhood Services Department.

49. On April 19, 2021, Plaintiff Save the Poudre submitted a written Request for Interpretation to Defendants City of Fort Collins and Interim Director Sizemore.

Exhibit 2. Save the Poudre’s April 19, 2021 Request for Interpretation asked the City and Mr. Sizemore to render a written interpretation that the Site Plan Advisory Review land use process is not legally applicable to NISP as proposed by Northern. *Id.*

50. On May 5, 2021 Defendants City of Fort Collins and Sizemore, in his official capacity, rendered a written legal interpretation that “the SPAR process applies to NISP...” Exhibit 3 hereto, p. 4.

51. Northern had not submitted a Site Plan Advisory Review application with the City at the time Save the Poudre submitted its April 19, 2021 Request for Interpretation. Exhibit 3 hereto, p. 1.

52. Defendants City of Fort Collins and Sizemore were not in possession of Northern's SPAR application at the time it prepared and/or issued its May 5, 2021 interpretation. Exhibit 3 hereto, p. 1.

53. Plaintiffs hereby contest each of the City Defendants' May 5, 2021 interpretations and also generally contests that the SPAR land use process is applicable to NISP, as proposed by Northern.

54. Specifically, Plaintiffs contests the Sizemore's "interpretation of LUC Section 2.1.3(E)(1) is that the SPAR process is intended to apply not only to improvements made by a public entity on parcels such entity currently owns or operates but also to improvements to parcels an entity may not own or operate at the time a SPAR application is reviewed but **intends** to own or operate." Exhibit 3, p. 3 (emphasis added).

55. Section 2.1.3(E)(1) of the LUC states:

"Site Plan Advisory Review.

(1) *Purpose and Effect.* The Site Plan Advisory Review process requires the submittal and approval of a site development plan that describes the location, character and extent of improvements to parcels ***owned or operated by public entities.***" (emphasis added).

Exhibit 7.

56. Northern does not own or operate the parcels in the Homestead Natural Area upon which the Poudre River Intake would be located. Exhibit 13.

57. Northern does not own or operate the parcels in the Riverbend Ponds Natural Area upon which the water pipeline would be located. Exhibit 14.

58. Northern's May 5, 2021 SPAR application acknowledges that the City of Fort Collins owns and operates the parcels in the Homestead Natural Area upon which the Poudre River Intake would be located.

59. Northern's SPAR application acknowledges that the City of Fort Collins owns and operates the parcels in the Riverbend Ponds Natural Area upon which a portion of the pipeline would be located.

60. Construction of the Poudre River Intake and water pipeline will physically harm City of Fort Collins Natural Areas and deny or interfere with Fort Collins citizens' use and enjoyment of the Natural Area.

61. Plaintiffs request a declaratory ruling that the City's SPAR land use process is not applicable to NISP as proposed by Northern and that Northern's SPAR application is premature and unripe for processing by the City because Northern does not own or operate the property upon which it seeks to conduct development of the Poudre River Intake and water pipeline.

62. Plaintiffs also challenges Defendants City and Sizemore's interpretation that "the governing board of the NISP Enterprise would have the ability to overrule a Planning and Zoning Board disapproval" of Northern's SPAR application. Exhibit 3, p. 4.

63. Defendant Sizemore's May 5, 2021 interpretation states, "The City's SPAR process is intended to be consistent with Colorado Revised Statutes ("C.R.S.") C.R.S. § 31-23-209 and §22-32-124 and these statutes are specifically referenced in LUC Section 2.13(E) and Division 2.16." Exhibit 3 p. 2.

64. Plaintiffs assert that the City's interpretation that "the governing board of the NISP Enterprise would have the ability to overrule a Planning and Zoning Board disapproval" is *not* consistent with C.R.S. § 31-23-209.

65. C.R.S. § 31-23-209 states “the planning commission’s disapproval may be overruled by said governmental body by a vote of not less than two-thirds of its membership.”

66. C.R.S. § 31-1-101 contains the definitions used in C.R.S. § 31-23-209. C.R.S. § 31-1-101 defines the term “governing body” to mean “the city council of a city...the board of trustees of a town, or any other body, by whatever name know, given authority to adopt ordinances for a specific municipality.”

67. C.R.S. § 31-1-101 defines the term “municipality” to mean “a city or town....”

68. Northern is not a “city,” “town,” a “municipality” or “other body” (as defined by C.R.S. § 31-1-101) and has not been “given authority to adopt ordinances for” the City of Fort Collins.

69. Based on Plaintiffs’ plain reading of C.R.S. § 31-1-101 and C.R.S. § 31-23-209, the Colorado legislature has not granted Northern the authority to overrule a decision by the City of Fort Collins Planning & Zoning Commission with regard to its SPAR application.

70. Plaintiffs also assert that LUC § 2.16.2 (L) is not consistent with C.R.S. § 31-23-209 because the Colorado legislature did not grant public entities that are not cities or towns with authority to adopt ordinances for the municipality the authority to overturn decisions by a planning commission. Exhibit 11 (LUC § 2.16.2 (L)).

71. Plaintiffs also request an interpretation by the Court that the City does not have the legal authority to allow an entity outside the City of Fort Collins government to veto land use decisions made by the Planning & Zoning Commission. Plaintiffs asks the

Court to find that to the extent LUC § 2.16.2(L) grants Northern veto power over decisions by the Planning & Zoning Commission, the Code provision is inconsistent with C.R.S. § 31-23-209; beyond the authority of the City Council to enact, *ultra vires*, unconstitutional, and/or otherwise unenforceable by any of the Defendants.

72. Plaintiffs also contests Defendants City and Sizemore’s interpretation of that “there is not another development review process applicable to NISP currently contained in the LUC.” Exhibit 3, pp. 3-4.

73. Section 1.2.4 of the Code states that “[t]he provisions of this Code shall apply to any and all development of land within the municipal boundaries of the City” and that “no development shall be undertaken without prior and proper approval or authorization pursuant to the terms of this Code.” Exhibit 10 (LUC § 1.2.4).

74. Section 5.1.2 of the Code defines the term “development” to mean “the carrying out of any building activity..., the making of any material change in the use or appearance of any structure or land...” Exhibit 11 (LUC § 5.1.2).

75. The construction of the Poudre River Intake and the water pipeline will involve building activity and the making or any material change in the use or appearance of any structure or land.

76. Defendant Sizemore’s May 5, 2021 interpretation admits that “the proposed buried water pipeline and Poudre River Intake diversion structure fall within the definition of both ‘improvement’ and ‘structure found in the Code.’” Exhibit 3, p. 2.

77. Article 2 of the Code “establishes the development review procedures for different types of development applications and building permits within the city.” Exhibit 7 LUC § 2.1.2.

78. If a particular “development proposal doesn’t fit into one of the types of development applications” it “will be reviewed according to applicable steps in the common development review procedures.” Exhibit 7 (LUC § 2.1.2 (F)).

79. Plaintiffs request a declaration that Defendant Sizemore erred in finding that “there is not another development review process applicable to NISP currently contained in the LUC.” Plaintiffs request a declaration that, at a minimum, Northern must submit a development application to the City that will be reviewed according to applicable steps in the common development review procedures, including public notice, public comment, and right to appeal any final decision in Larimer County district court.

80. On May 5, 2021 Northern has submitted a Site Plan Advisory Review (“SPAR”) land use application with the City of Fort Collins to construct various NISP structures, components, and appurtenances within the City limits. Exhibit 4.

81. Under the City’s Code, SPAR “applications shall be reviewed and approved or disapproved by the Planning and Zoning Board within sixty (60) days following receipt of a complete application.” Exhibit 7 (Code § 2.1.3(E)(2)).

82. The City has determined that Northern’s SPAR application is complete and has scheduled a hearing before the Planning & Zoning Commission on June 30, 2021. Exhibit 1.

CLAIM FOR RELIEF

(Request for Declaratory and Injunctive Relief)

83. The Plaintiffs incorporate all of the foregoing allegations as if set forth herein.

84. A controversy exists between the parties as to whether the City Code’s SPAR land use process is legally applicable to NISP as well as the other controversies

identified in the paragraphs above.

85. For the reasons stated herein, Plaintiffs request a declaration from this Court that the SPAR land use procedure, as defined in the City Code, is not legally applicable to the NISP as proposed, as well as the other declarations sought in the paragraphs above.

86. A judgment or decree by the Court, if rendered or entered on these Rule 57 issues, would end the uncertainty, insecurity, and controversy with respect to the rights, status, or other legal relations between the parties regarding Save the Poudre's April 19, 2021 Request for Interpretation, the Defendants' May 5, 2021 response, Northern's May 5, 2021 SPAR application, and the issues identified in the paragraphs above.

87. Plaintiffs have suffered and will continue to suffer harm as a result of the Defendants' May 5, 2021 interpretation, the May 5, 2021 NISP SPAR application, the imminent June 30, 2021 hearing by the City's Planning and Zoning Commission, and the City's processing of the NISP SPAR application.

88. Plaintiffs have no other plain, speedy, or adequate remedy provided by law.

WHEREFORE, Plaintiffs respectfully request that this Court:

- a) Declare that the SPAR land use procedure in the City's Code is not legally applicable to NISP and Northern's SPAR application;
- b) Issue all other declarations requested by Plaintiffs in the paragraphs above;
- c) Preliminarily enjoin the City Defendants from processing the NISP SPAR application, including but not limited to enjoining the City's Planning & Zoning

Commission hearing on the NISP SPAR application currently scheduled for June 30, 2021;

d) Permanently enjoining the City Defendants from processing the May 5, 2021 NISP SPAR application;

e) Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 9th day of June 2021.

/s/ John M. Barth

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LIST OF EXHIBITS

Exhibit 1- City of Fort Collins Notice of June 30, 2021 NISP SPAR Hearing

Exhibit 2- Save the Poudre's April 19, 2021 Request for Interpretation

Exhibit 3- City of Fort Collins May 5, 2021 Interpretation

Exhibit 4- Northern's May 5, 2021 SPAR permit application cover letter

Exhibit 5- City of Fort Collins June 1, 2020 NISP Memo

Exhibit 6- City of Fort Collins April 16, 2020 NISP Memo

Exhibit 7- LUC Article 2

Exhibit 8- Appendix C to Northern SPAR permit application

Exhibit 9- City of Fort Collins Management Plan, excerpt

Exhibit 10- LUC Article 1

Exhibit 11- LUC Article 5

Exhibit 12- Technical Memo #2 to Northern's SPAR application

Exhibit 13- Maps of property ownership from Northern's SPAR application

Exhibit 14- Map from Appendix B of Northern's SPAR application

CERTIFICATE OF DELIVERY

I hereby certify that on this 9th day of June 2021, a true and correct copy of the foregoing **Complaint for Declaratory Relief Under Colo.R.Civ.Pro. 57 and the Uniform Declaratory Judgment Law** was filed via Colorado Courts E-filing System.

/s/ John M. Barth
John M. Barth