

Sunset Amphitheater Planning Commission Appeal

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10 JANUARY 2023

Agenda

- Introduction
- Nonuse Variances
- Parking
- Noise
- ADA/FHA
- Closing Statements

Introduction

- We are a group of concerned citizens that are against the Sunset Amphitheater as it is approved.
- We are a group of diverse individuals, including veterans, DoD Civilians, Fireman, Retirees, Teachers, Active Military Officers, Health Care Provider, and an Attorney
- We have dedicated several hundred hours of our own time to express to City Planning Commission and now, City Council why we believe this is not the correct location for Sunset Amphitheater
- We believe City Council should approve our appeal and hold the developer accountable for a sub-standard proposal that currently fails to meet Nonuse variance requirements as well as several current city ordinances, and if approved will have an adverse impact on surrounding properties, including established business, residences, and common use community areas.

Overview of Unmet Nonuse Variance Criteria

- 7.5.802 (B): Nonuse Variances

B. Criteria For Granting: The following criteria must be met in order for any Nonuse variance to be granted:

1. The property has **extraordinary** or **exceptional physical conditions** that do not generally exist in nearby properties in the same zoning district; and
2. That the **extraordinary** or **exceptional physical conditions** of the property will not allow a reasonable use of the property in its current zone in the absence of relief; and
3. That the granting of the variance will not have an adverse impact upon surrounding properties.

Bottom Line: The Polaris Pointe amphitheater proposal **fails to meet** Nonuse Variance Criteria **1, 2, and 3**

- Further evidence of this is provided by the statements made by several Planning Commissioners during the November 9, 2022 hearing (see transcript).

Developer seeks Nonuse Variance for parking as they say the land is not sufficient for parking.....But is sufficient for other developments

How Nonuse Variance Legal Criterion 1 is Not Met

Criterion 1: The property has extraordinary or exceptional physical conditions that do not generally exist in nearby properties in the same zoning district (Parking)

Developer Position

The extraordinary or exceptional physical conditions of the property do not allow for on-site parking.

Logical Fallacies

- Variance Request **does not address** the actual **physical conditions** of the property!
- Approval strategy **conflates intended use & physical condition**
- **Voluntary Limiting Condition** – On-site parking solutions exist. The developer’s unwillingness to use the vacant property immediately adjacent (but has planned for apartments) is driving the need for the on-site parking exception
- Original Plan had Retail Mall with Underground Parking

City Procedural or Analytical Discrepancies

- Planning Commission **failed in their responsibility to address this variance Criterion and failed to realize the developer is fabricating a hardship that does not exist.**
- Planning Commission was required to review the variance requirements in accordance with **law and actual physical condition** of the property.
- The Planning Commission **erroneously approved** the parking variance in the context of the **limited duration of use** and an **unlawful and unreasonable alternative presented by the developer.**

Violations

- ✗ There are **no extraordinary or exceptional physical conditions** of the property that prevent the developer from providing sufficient on-site parking.
- ✗ The **same physical conditions generally exist in nearby properties** including:
 - Other Polaris Pointe PUDs, all of which are mildly sloped with gentle variations

How Nonuse Variance Legal Criterion 2 is Not Met

Criterion 2. That the extraordinary or exceptional physical condition of the property will not allow a reasonable use of the property in its current zone in the absence of relief (Parking)

Developer Position

The extraordinary or exceptional physical condition (Voluntary limited use by time for both) of the property does not allow it to be used for **any purpose, other than an outdoor amphitheater**, without an on-site parking exception.

Logical Fallacies

- Variance Request **does not address** the actual **physical conditions** of the property!
- Approval strategy **conflates intended use & physical condition**
- **Voluntary Limiting Condition** – On-site parking solutions exist. The developer’s unwillingness to use the vacant property immediately adjacent (but has planned for other development) is driving the need for the on-site parking exception

City Procedural or Analytical Discrepancies

- Planning Commission **failed in their responsibility to address this variance Criterion and failed to realize the developer is fabricating a hardship that does not exist.**
- Planning Commission was required to review the variance requirements in accordance with **law and actual physical condition** of the property.
- The Planning Commission **erroneously approved** the parking variance in the context of the **limited duration of use** and an **unlawful and unreasonable alternative presented by the developer.**

Violations

- ✗ There are **no extraordinary or exceptional physical conditions** of the property **that will prevent a reasonable use** of the property in its current zone in the absence of relief.
- ✗ **Undisputable that numerous** other reasonable uses exist:
 - **Myriad diverse businesses** in Polaris Pointe and surrounding areas make "reasonable use" of similar properties (Magnum, Top Golf, iFly, Overdrive, Offices, Medical, Retail, Restaurants, etc.) and provided their own parking
 - The **previously planned Polaris Pointe marketplace and theater complex** could “make use” without variance, in line w/typology
 - The physical size of the filing, which is sufficient if the capacity/size of the amphitheater was reduced or the immediately adjacent parcel was developed for parking

How Nonuse Variance Legal Criterion 3 is Not Met

Criterion 3. That the granting of the variance will not have an adverse impact upon surrounding properties. (Parking)

7.4.204(B)(c) – On street parking should not generate significant impacts to neighboring properties

Variance Invalidating Statements

At Planning Commission, developer admitted

- This would, more than likely, impact local neighborhoods
- There is no way to stop people from parking in neighborhoods
- Businesses/Neighborhoods had to police their own areas
- No enforcement Plan
- Parking is not allowed on Spectrum East
- Local law does not allow action until >72 hours
- Traffic study did not include impact to traffic on Spectrum east of Voyager if patrons utilize Spouts parking

Multiple parking plan concerns from Planning Commissioners

7.4.204(C)(1) – Conditions for Reduction of off-street parking

Direct Violations

- x Para (a): Must be within 400' of property
 - o Does Not Meet – Planning Commission approved more than half mile away from venue
- x Para (b): Must be within 400' of direct pedestrian access
 - o Does Not Meet – No sidewalks adjacent to off-site parking
- x Para(c): Must be within 400' of public/private lot or parking ramp
 - o Does Not Meet – Parking is further than 400' from private or public lot serving venue
- x Para(d): The parking arrangements are satisfied by shared parking arrangements
 - o Notes Live has “intent to rent” agreements w/ TCA and
 - o Compassion that can be severed at any time for any reason
 - o Dr Sojourner (TCA President) stated on 17 October there is no formal agreement and there would be none until Spring 2023 (See transcript)
 - o Does Not Meet – requires permanent agreement recorded w/ County Clerk and Records Office (7.4.204 (C)(1)(d)(1))

How Nonuse Variance Criterion 3 is Not Met

Criterion 3. That the granting of the variance will not have an adverse impact upon surrounding properties. (Noise, Parking, and Light)

Developer Position

- Parking at external sites greater than 400 ft away will not increase traffic concerns
- Pedestrians will have no adverse impact on the environment
- TCA parking will be accessible when needed
- Parking lots and common walkways and parks will be left clean and not generate safety concerns
- No increased risk to public safety by not requiring on-site parking, and making use of a decentralized parking plan

Amplification of Concerns (Major Topics)

- Developer consistently states that events **should not** have an adverse impact on surrounding properties/communities but has never committed to **“will not”**, as this Criterion clearly states is required
- Rental Parking agreements are not permanent contracts and not yet filed w/ County Clerk and Recorder
 - 1600 rental spots = 6400 people from Compassion + TCA
 - They’re temporary and readily **voidable** in the immediate future.
- Developer stated it is up to the City, businesses, and residential property owners to police parking concerns
 - HOAs have no authority over parking on city streets
- No Plan”B”

Multiple Violations

- x The amphitheater, if approved, will have numerous adverse effects on surrounding properties.
 - x Noise in excess of allowable dB limits
 - x Noise in violation of allowable time-frames
 - x Unauthorized parking in business lots and in neighborhoods
 - x Light pollution (unknown as no light study exists)

How Nonuse Variance Criterion 3 is Not Met

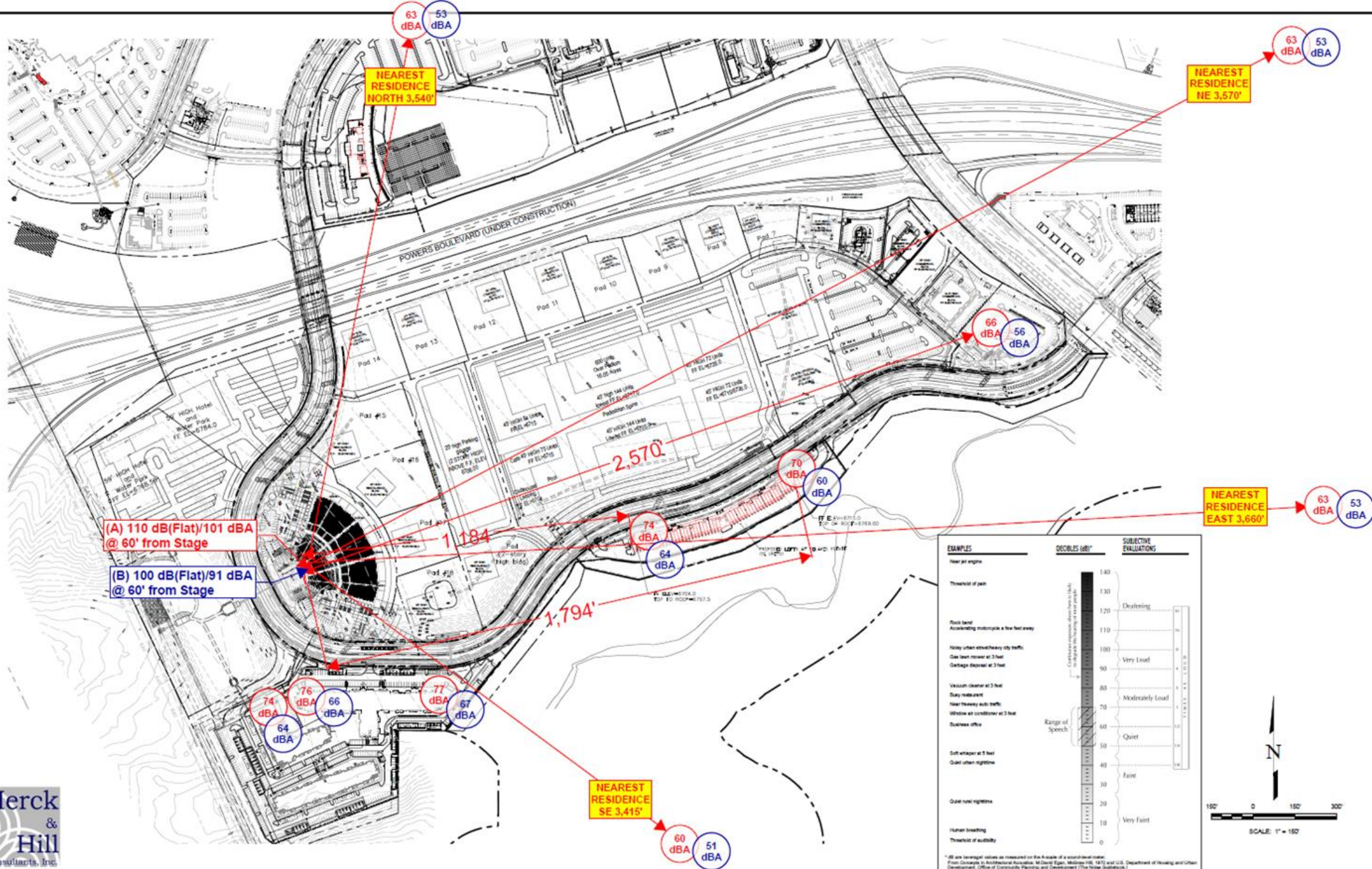
Criterion 3. That the granting of the variance will not have an adverse impact upon surrounding properties. (Noise)

Noise Impact Inconsistencies

- “Some of the productions will operate their own sound systems
 - In excess of assumed spectrum
 - In excess of evaluated power
 - May not have same sound mitigation capabilities
- Developer has no committed schedule for events
 - Developer plans end time of 10:30 PM on weekdays and 11:30 PM on Weekends
 - Planning commission requested a 10pm end time commitment
 - Mr. Mudd deferred scheduling to event scheduler (Ticketmaster)
 - No definitive annual schedule limitations
- Mitigations are poorly defined
 - Employment of 28’ or 40’ sound barriers (non contiguous)
 - Mitigations for sound outside barrier angles
- Sound study is consistent with City Code; however...
 - Sound study doesn’t address Colorado physical conditions
 - Sound study doesn’t highlight full spectrum of sound (**31.5 Hz**)
- Sound study does not show impact to future apartments
 - Apartments at Spectrum and voyager south of Sprouts
 - Apartments directly adjacent to amphitheater

Violations Noise

- x Page 10 of the LSTN Noise Report shows that noise in the **63Hz and 125Hz bands** will generate **66dB and 61dB** (respectively) of noise at nearby residences, with Physical Mitigation, and violate the City ordinance that limits noise in residential areas to **50 dB** between 7pm and 7am.
- x **Soundchecks** in the afternoons **will also violate the City ordinance** that limits noise in residential areas to **55 db** between between 7am and 7pm.
- x This report **fails to address** the fact that noise in the **31.5Hz band** will also violate the ordinance, to an even **greater degree** and with a **more severe impact** on nearby residents.
- x **Most of the Commissioners expressed concerns about noise and wanted to see a more robust sound study done**, including some who wanted to make that a **condition of approval**.
- x Will be 5x the Sound and 5x the Harmful Effect



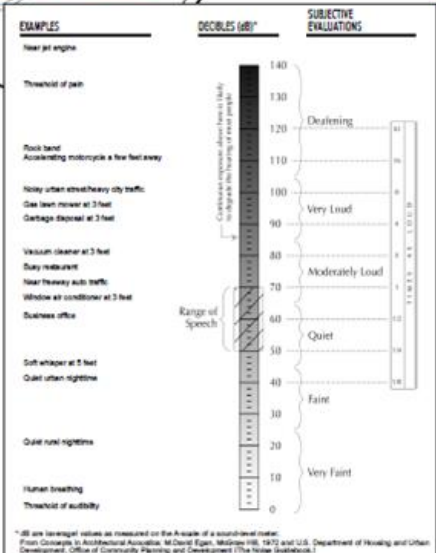
(A) 110 dB(Flat)/101 dBA
@ 60' from Stage

(B) 100 dB(Flat)/91 dBA
@ 60' from Stage

NEAREST RESIDENCE
SE 3,415'

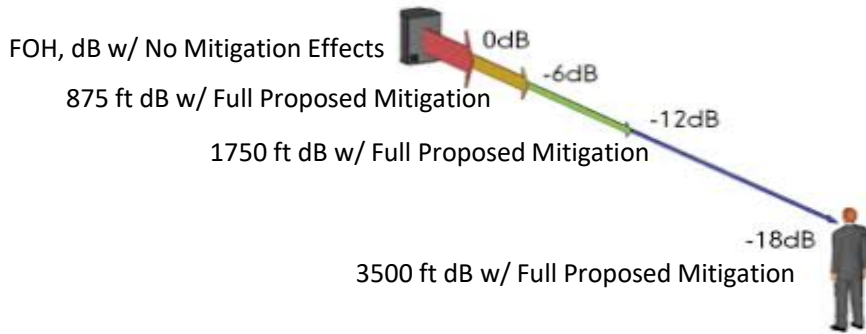
NEAREST RESIDENCE
NE 3,570'

NEAREST RESIDENCE
EAST 3,660'

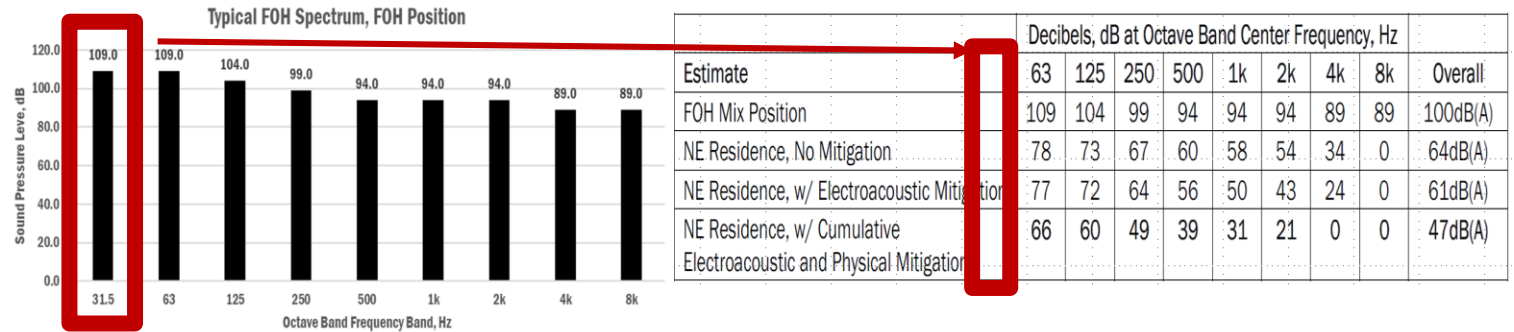
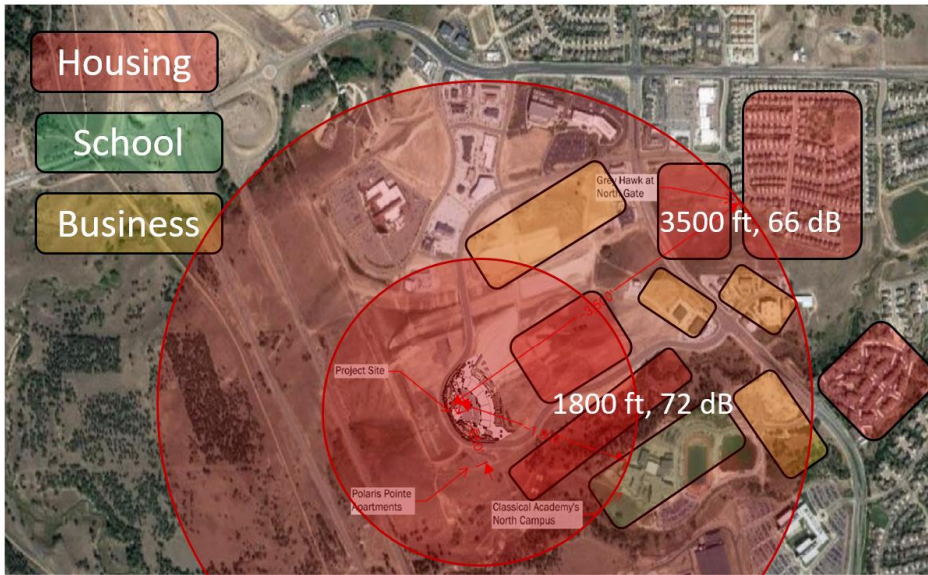


The "Sound" Science

Residences at 3500 feet will have bass frequency sound impacts of more than 66 dB
With all mitigations in place!



63 Hz "Bass" (1)		Study	"Limit"(2)	Rock(3)	Loudest(4)
In Venue, No Mitigation					
0 ft	Front of House	109 dB	115 dB	120 dB	143 dB
w/ Full Mitigation in Place					
875 ft	Apartments	78 dB	84 dB	89 dB	112 dB
1750 ft	Business	72 dB	78 dB	83 dB	106 dB
3500 ft	Residences	66 dB	72 dB	77 dB	100 dB



In addition, 31.5 Hz is missing from the "mean" table on the right. This low sub-bass 31.5 Hz sound is characterized by being **felt** rather than **heard**.

- Analysis uses published City Code, Sound Study, Development Plan
- 1 Does not include lowest frequencies expected (highest dB, farther reaching)
 - 2 Limits FOH to "an average of 115 dB during any five minute period" – Sound Study
 - 3 "Rock concert dB levels often exceed 120 dB" – Earpros, Hearnert, Multiple Sources
 - 4 Loudest concert recorded – Sleazy Joe at 143.2 dB

These Noise Levels Consistently Violate the Law – You Can't Average Them

NOISE VIOLATIONS - 9.8.104: Colorado Springs Permissible Noise Levels: “A noise measured or registered as provided in section [9.8.103](#) of this part from any source other than as provided in section 9.8.109 of this part at a level which is equal to or in excess of the db(A) established for the time period and zones listed in this section, is declared to be excessive and unusually loud and is **unlawful.**”

SOUND TRANSMISSION

Colorado Springs Noise Limits 9.8.104	7am- 7pm	7pm - 7am
Residential	55 dB	50 dB
Commercial	60 dB	55 dB

SOUND IMPACT ON NEIGHBORHOODS

Impacted Communities	Distance	M&H 100+ dB Report	LSTN report 109+ dB Report	Typical outdoor concert 110 - 120 dB
Polaris Junction Apartment	600ft	67 dB	76 dB	up to 87 dB
Apartments by Bass Pro	2500ft	53 dB	64 dB	up to 83 dB
Spectrum Loop Apt	2800ft	56 dB	65 dB	up to 76 dB
Greyhawk, Serenity, Stonewater, Ngate	3500ft	53 dB	62 dB	up to 73 dB

Frequency Hz - pitch	Decibel Levels								
	Sub/Bass Sounds long range travel				Mid range Guitars		High Pitch Sounds		
	31	63	125	250	500	1k	2k	4k	8k
Sound Engineers Box	109	109	104	99	94	94	94	89	89
NE Residences, w/ no Mitigation	~80	78	73	67	60	58	54	34	0
NE Residences, w/ Electroacoustic Mitigation	~80	77	72	64	56	50	43	24	0
NE Residences, w/ Physical Mitigation	~69	66	60	49	39	31	21	0	0

LSTN Consultants stated that sound levels of **125 dB** (22116, pg 12) will be achieved and that concerts will operate in **violation of Colorado Springs noise laws** (Pg #4).

Bottom-line: Multiple noise analysis reports confirm that Sunset Amphitheater will severely impact surrounding residences, and will operate in an unlawful manner.

Hardship Waiver Approval Violations of Process, Intent, & Logic

Legal Definition: "must be particular to the property, not general to the neighborhood or community"

City Definition: "9.8.109 Hardship Permits: "...for relief from the noise level designated...on the basis of undue hardship" and "Shall specify a reasonable time for which the permit will be effective"

"The mayor may grant relief if it is found:"

- A. Additional time is necessary for the applicant to alter or modify the activity or operation to comply
- B. The activity, operation or noise source will be of temporary duration, and cannot be done in a manner that would comply with "noise ordinance" **and**
- C. There is no reasonable alternative to the applicant
- D. The Mayor may prescribe any conditions or requirements deemed necessary to minimize adverse effects upon the community or the surrounding neighborhood

Implications

- 1) Waiver approval is bound by the conditions of city law/code
- 2) Reasonable alternatives exist for the developer and the city
- 3) Granting a noise hardship **violates Federal Public Health Law (ADA/FHA)**

Violations General

- x This waiver for noise **enables a nuisance** that is "general to the neighborhood and community"
- x **Waivers are necessary and temporary in scope**
- x The **hardship is not undue**, is a self-created consequence of Dev Plan
 - Self-fabricated hardships are not justifiable
 - Re-Design/Re-Plan could eliminate waiver "need"
- x Indefinite waiver is not intent under city code
 - Recurring in perpetuity is not "Reasonable time"
- x The "noise level designated" in the sound study misrepresents impact
 - Actual power at residences is 66 db at 63 Hz, **not "overall" 47 dB**
 - Actual bass frequency is 31.8 Hz, generates higher sound power
 - **Segregates area** (Neurological conditions PTSD, disabilities)
- x There are reasonable alternatives
 - Other Sites Exist...Southwest of Baptist and I-25 is for sale
 - PlanCOS has an outdoor venue typology designated in strategy
 - Architecture Changes like full/half-dome, full parking structure
- x Paragraph D implies the **mayoral responsibility** is to the surrounding neighborhood and community, not the developer
- x 90%+ of email correspondence against it (Commission Transcript)

To date there is no hardship waiver on file.

What should come first....approval of hardship waiver or City Council approval of project?

Unintended Violations Americans with Disabilities Act and Fair Housing Act

What the ADA and FHA Do

- Establishes **protected groups** of people (Veterans w/PTSD, Elderly persons, Disabled persons--Autism, MS, etc.)
- Establishes discriminatory practices in context of effect, whether **intentional or unintentional**
- Identifies segregated housing **practices/policies** as illegal
- Stipulates discriminatory effect may be **actual or predictable**
- Establishes legal obligation for limiting impact to protected groups – **municipalities are not immune**
- Provides concessions ...**only if no less discriminatory option exists**

Findings from ADA and FHA in Context

- Protected individuals near development will actually or predictably be disparately impacted by noise and other limiting effects
- Intentionally, or unintentionally, creating conditions that would prevent protected individuals from participating in services is illegal
- Current and future residents and patrons will likely be unable to live in and take part in services in the area

Americans with Disabilities Act in Law

Americans with Disabilities Act, Title 42, Ch 126

- It shall be **discriminatory** to subject...a class of individuals on the basis of disability, directly, or through contractual, licensing, other arrangement, to deny the opportunity to participate in the goods, services, facilities, privileges, advantages, or accommodations of an entity
- Includes the imposition of eligibility criteria...to screen out an individual with a disability...and **a failure to take such steps**...to ensure no individual with a disability is excluded or denied services, segregated, or otherwise treated differently

Fair Housing Act in Law

Fair Housing Act §100.5 Scope

- The illustration of unlawful housing discrimination may be established by a practice's discriminatory effect, even if not motivated by discriminatory intent
- **Ensure that zoning and other regulations concerning land use are not employed to hinder the residential choices of these individuals...**

Fair Housing Act §100.500 Discriminatory Effect

- Liability is established by the practices effect (**Noise Hardship & Light Impacts**)
- State is not immune from violation of Public Health (ADA, Ch 126)
- Practice has discriminatory effect where it actually or predictably results in **disparate impact** on a group of person or creates, increases, reinforces, or perpetuates **segregated housing patterns** because of race, color, religion, sex, handicap, familial status, or national origin (**Neurological Condition or Other Limiting Condition**)
- Could be legal if it is necessary to meet...other nondiscriminatory interests and...Those interests could not be served by **another purpose that has less discriminatory effect**
- Built elsewhere, with different design, or enforcement published ordinances

Closing Remarks

- We have shown in this presentation why the Planning Commission decision to approve was an incorrect decision
 - Violates multiple city ordinances to include noise, parking, and Nonuse variances
 - Would create adverse impact to already existing/established business and residential areas
 - No permanent parking agreement is in place or recorded with the El Paso County Clerk and Recorder's Office
- If this were your neighborhood or your business, would you vote yes on this proposal as it is currently written
- What will you tell those living in the closest homes/multi family units with disabilities that would be affected by this project or the parents that can't get their children to sleep on a school night because of the noise
- We are not opposed to an amphitheater in Colorado Spring, what we are opposed to is the location
- Of the three locations they have proposed, this is the only one in a densely populated area (Georgia and Tennessee are located near a river in more commercial setting)
- We are asking the City Council to do the right thing and uphold this appeal and not create an adverse impact on surrounding residences and business and to follow the law as it is written today

“if it doesn't fit, you ~~[must acquit]~~” ...can't permit.

Supporting Detail

Please have City Council review these additional supporting slides as they are legally pertinent to the Appeal

Appeal of COS Planning Commission's Decision to Approve the Polaris Point Amphitheater

Agenda

- Who we are
- Why we are here
- How the Development Plan Review Criteria Are Not Met
- How the Nonuse Variance Criteria Are Not Met
- Hardship Waiver Approval – Violations of Process, Intent, & Logic
- Unintended Violations of Americans with Disabilities Act and Fair Housing Act
- Misrepresented Data & Logical Fallacies
- City Planning Commission and City Planner Deviations

Who We Are

- A large group of concerned citizens and homeowners, living in and conducting business in, the neighborhoods that will be the most severely impacted by the numerous negative impacts of the Polaris Pointe Amphitheater if it is approved by the COS City Council
- The appeal group consists of: 17 community members (3 veterans, 3 DoD Staff Members, 1 Fireman, 6 Retirees, 2 Teachers, 2 Active Military Officers, an Attorney who have received feedback from hundreds of neighborhood residents
- Many of us are in protected categories such as those of us who:
 - Have a physical and/or mental disability that impacts daily life
 - Require additional daily care and easy access to medical/emergency services
- Hundreds of us, and hundreds of pages of our emails, have voiced our well-researched concerns regarding the negative impacts of the amphitheater proposal
- We reject the over-optimistic, unrealistic, and unenforceable claims made by Notes Live, as well as the minimization of our concerns by the COS Planning Commission and Planning Department.

Why We Are Here

- To show that the Planning Commission's initial approval of the Polaris Pointe amphitheater proposal was misguided and wrong because:
 - The proposal **fails** to meet **many** of the Development Plan Review criteria
 - The proposal **fails** to meet **all three** Nonuse Variance criteria
 - The proposal **fails** to comply with PlanCOS
- To show how the COS Planning Commission and City Planning Staff
 - **Failed** to properly execute their duty during the amphitheater approval process
 - **Failed** to accurately and independently assess the analysis purchased by the developer
- To make it clear that any miniscule potential benefit to us of this amphitheater is **vastly** outweighed by the many damaging impacts it will have.
- To make it clear that, according to law, logic, and common sense, this amphitheater proposal **must be rejected** by the COS City Council

Development Plan Criteria

Please have City Council review these backup slides as pertinent to the Appeal

Overview of Unmet Development Plan Review Criteria

- 7.5.502 (E): Development Plan Review Criteria:
 - A development plan shall be reviewed using the criteria listed below.
 - No development plan shall be approved unless the plan complies with all the requirements of the zone district in which it is located, is consistent with the intent and purpose of this Zoning Code and is compatible with the land uses surrounding the site.
 - Alternate and/or additional development plan criteria may be included as a part of an FBZ regulating plan.

Bottom Line: The Polaris Pointe amphitheater proposal **fails to meet** Development Plan Review Criteria **1, 2, 5, 8, 9, 12, and 13**

- Further evidence of this is provided by the statements made by several Planning Commissioners during the November 9, 2022 hearing (see transcript).

List of Unmet Development Plan Review Criteria

- Criterion 1: The details of the use, site design, building location, orientation and exterior building materials are compatible and harmonious with the surrounding neighborhood, buildings and uses, including not-yet-developed uses identified in approved development plans. (**Compatibility**)
- Criterion 2: The development plan substantially complies with any City- adopted plans that are applicable to the site, such as master plans, neighborhood plans, corridor plans, facilities plans, urban renewal plans, or design manuals. (**City Plans**)
- Criterion 5. The project provides off-street parking as required by this chapter, or a combination of off-street or on-street parking as permitted by this chapter. (**Parking**)
- Criterion 8. The project preserves, protects, integrates or mitigates impacts to any identified sensitive or hazardous natural features associated with the site. (**Ecological**)
- Criterion 9. The building location and site design provide for safe, convenient and ADA-accessible pedestrian, vehicular, bicycle, and applicable transit facilities and circulation. (**Accessibility**)
- Criterion 12. If necessary to address increased impacts on existing roadways and intersections, the project includes roadway and intersection improvements to provide for safe and efficient movement of multi-modal traffic, pedestrians and emergency vehicles in accordance with the City's Traffic Criteria Manual, public safety needs for ingress and egress and a City accepted traffic impact study, if required, prepared for the project. (**Traffic**)
- Criterion 13. Significant off-site impacts reasonably anticipated as a result of the project are mitigated or offset to the extent proportional and practicable. Impacts may include, but are not limited to light, odor and noise. (Ord. 94-107; Ord. 95-125; Ord. 01-42; Ord. 02-64; Ord. 03-74; Ord. 03-157; Ord. 09-50; Ord. 09-78; Ord. 12-72; Ord. 18-2) (**Impact**)

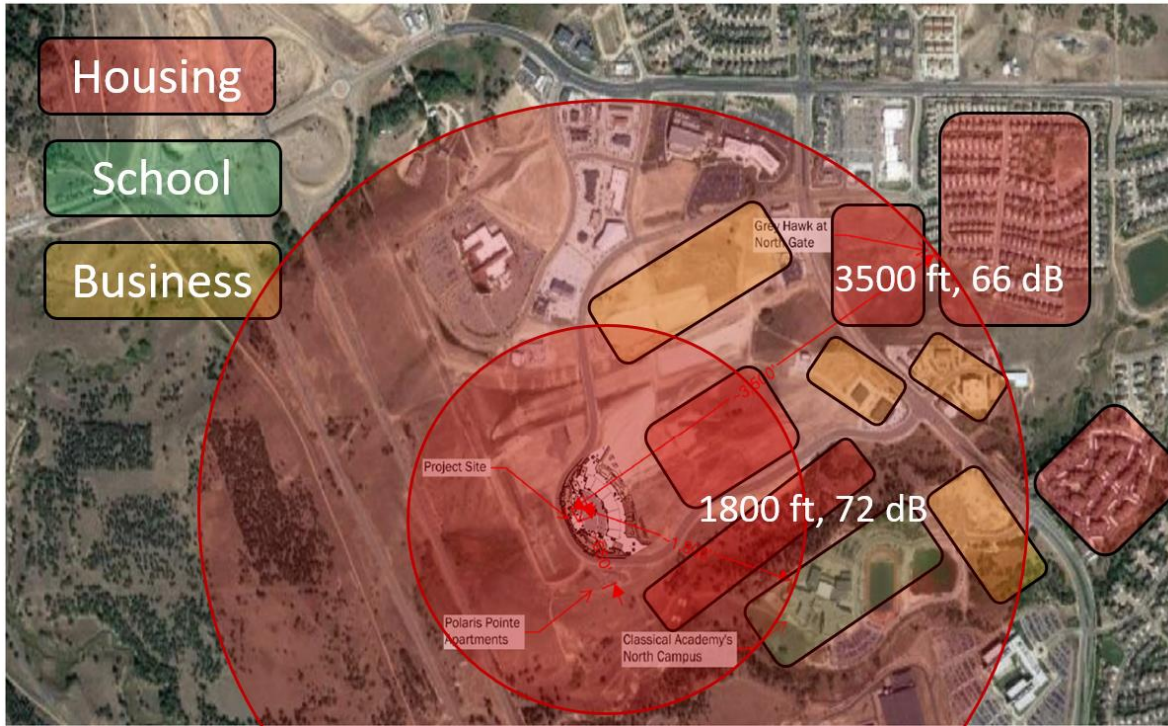
Summary of Planning Commissioner's Concerns

- The Planning Commissioners expressed concerns that the following Development Plan Review criteria were not met (see transcript for specifics):
 - Criteria 5, 12 and 13 (Commissioner Briggs)
 - Criteria 1, 5 and 13 (Commissioner Hensler)
 - Criteria 9, 12 and 13 (Commissioner McMurray) Agreed with Rickett's concerns
 - Criteria 1, 5, 12 and 13 (Commissioner Almy) Agreed with Briggs' and Hensler's concerns
 - Chairman Hente expressed no concerns
 - Criteria 1, 5, 9, 12 and 13 (Commissioner Rickett)
 - Commissioner Raughton expressed no concerns
 - Criterion 5 (Commissioner Slattery)
 - Criteria 1, 5, 9, 12, 13 (Commissioner Foos) Agreed with Rickett's concerns

How Development Plan Review Criterion 1 is Not Met

Criterion 1 - Compatibility

- Not harmonious (Noise, parking/traffic, light, crowds, access)
- Self-fabricated problems, many operational mitigations
- Residences experience much higher than 47 dB noise
- Fireworks, video screens, Security lights, lasers, pyrotechnics



Criterion 2 – City Plans (Safe and Diverse)

- Does not create safe, diverse neighborhoods
- Restricts housing access from disabled, elderly
- Increased safety risk (accidents, fire, crime, egress, medical care)

Criterion 2 – City Plans (PlanCOS, Master Plans)

- Unused and inaccessible much of year
- Prevents development of continual use property
- Designated Typology 4, Typology 3 is Major Tourist Attraction

Criterion 2 – City Plans (Connections)

- D-Rated intersections, Congests Interquest thru Northgate
- Business patron access – traffic/parking and noise (disability)

Criterion 2 – City Plans (Culture)

- Not a year-round attraction
- Other venues could meet same “need” but do not
- Is not similar to a cultural arts complex

Criterion 2 – City Plans (Landscapes)

- Generates light pollution, ruins northern front range
- Inaccessible as an outdoor space much of year
- Noise pollution ruins outdoor tranquility

How Development Plan Review Criterion 1 is Not Met

Criterion 5 – Parking

- Admitted impact – significant impact to neighborhoods/businesses
- Study is limited in scope, fails to account for larger impact
- No enforcement mechanisms in place

Criterion 8 – Ecological

- Monument Branch Creek Wildlife habit disruption
- Preble’s Meadow Jumping Mouse habitat
- 30% use argument should apply to Parking structure and ecology

Criterion 9 – Accessibility

- Dispersed parking & traffic limits neighborhood/services access
- Spectrum bike lane removal
- Segregates housing from disabled/elderly

Criterion 12 – Traffic

- D-Rated intersections, Congests Interquest thru Northgate
- Traffic management solutions – temporary and unenforceable
- Shuttle services insufficient – wait times, slow traffic
- Restricted emergency egress (population density, access points)
- Traffic accidents increase congestion delays

Criterion 13 – Reasonably anticipated off-site impacts

- Evidenced by:
 - Numerous violations of city code requiring exception
 - Numerous violations of Public Health law and policy
 - Developers sound study (regularly acts in excess of 115 dB)
 - Developers own statements
 - City Traffic Manager statements
 - City Planning Commission statements
 - Constituent correspondence and public comment
- Predictable negative impacts to surrounding community
 - Traffic – Vehicle and Foot
 - Light Pollution – Event and Security Lighting
 - Noise – Time-of-Day and Hazardous dB Power Levels
- Limited access to services (Urgent and Emergency Care)
- Limited access from services (Fire, Police, Ambulatory)
- Limited access to business for ADA/FHA protected groups

Slide 21

Development Plan Review Criteria set the foundation for approval of a project and are necessarily subjective. The review criteria meant to ensure the intent and purpose of zoning code are met, they highlight the need for variances and waivers when not met, and they provide a measuring stick to assess compatibility with surrounding land uses. The City Planning Staff maintains that the developer's proposal meets them; however, their final report to you fails to address the myriad ways the proposal does not meet the criteria. The recommendation you received from City Planning Staff should have included the counter-argument, but it focuses almost exclusively on how the developer's interpretation and work-arounds of city code meet the intent of law; and falls far short of addressing the full negative impact to surrounding developments and residential areas.

Today you have the opportunity to assess the impact to surrounding areas yourself.

Using the context of unmet City Development Plan Criteria, we will show that the request for variances and waivers to avoid compliance with city codes should not be approved.

Slide 22

Here are the definitions of the Unmet Development Plan Criteria. This development fails to fully, or meet Compatibility, City Plans, Parking, Ecological, Accessibility, Traffic, and Significant Impact Criteria.

Slide 23

In fact, Planning Commission members voiced their concerns with most of these criteria. The following slides will detail how there is a just as strong, or stronger, argument against this project's Development Plan than for it and that the variances and waivers are unjustified.

Slide 24

In brief, the conditions fabricated by the development are not compatible with the surrounding community. The traffic, noise, and light are detrimental conditions that limit current and future residents and business patrons in the area, which violates development plan review criterion 1 and Nonuse variance criterion 3. Criterion 2 validates compliance with city strategic plans. The city planning staff summarized the positive aspects for their development plan recommendation, but failed to illustrate where it fell woefully short of safety, diversity, strategic planning, cultural and environmental objectives in the impacted area.

Slide 25

The developer admitted parking will occur in neighborhoods and businesses and said they would have to police their own. Nothing can be done about habitat disruption and sound impacts to wildlife or local ecology. Where mitigation measures were discussed, that being Accessibility and Traffic, there were no defined actions required of the developer. With accessibility specifically, one mitigation to add "on-site" spaces is to remove bike lanes. Essentially requiring a solution to a problem that, itself, creates another problem. Finally, there is significant developer and constituent documentation and testimony, that shows reasonable off-site impacts that are only partially, or are completely, unmitigated. Even when mitigation is available, it is very reasonable to presume these very predictable impacts will remain in our community. The truth that variances and indefinite hardships are requested, and operational mitigations still fail to stave-off negative effects, give you cause to vote NO today.

In fact, the developers own statements and sound study prove the violation of these criteria, and city planning efforts fail to fully address the violations. It cannot be over-stated, in context of the variances and hardships required to execute on this Development Plan, that there is more reason for you to vote NO today than there is to vote yes.

How Development Plan Review Criterion 2 (Compatibility) is Not Met

Criterion 2: The development plan substantially complies with any City-adopted plans that are applicable to the site, such as master plans, neighborhood plans, corridor plans, facilities plans, urban renewal plans, or design manuals.

Violation

Does not comply with **PlanCOS Chapter 2 Vibrant Neighborhoods** Vision Statement which reads:

“Forms diverse and safe neighborhoods with quality gathering areas, a mix of housing types, transportation choices, and a shared sense of pride.”

Details

- **Not diverse** and actually limits diversity, biased against those with PTSD, Sound, and/or Light related disabilities and those folks will be unable to buy/rent in adjacent neighborhoods
- **Direct violation** of the American’s with Disabilities Act and Fair Housing Act
- **Not safe** for neighborhoods
- **Increased fire danger** from cigarette/marijuana smokers transiting between venue and parking lots across/through native areas
- Concerts and sporting events are at high risk for **child trafficking**
- **Limits use of property** to 30% of the year and is not a consistent gathering location or location for enduring quality business
- **Does not invoke a sense of pride** for many current residents

How Development Plan Review Criterion 2 (City Plans) is Not Met

Criterion 2: The development plan substantially complies with any City- adopted plans that are applicable to the site, such as master plans, neighborhood plans, corridor plans, facilities plans, urban renewal plans, or design manuals.

Violation

Does not comply with **PlanCOS Chapter 3 Unique Places** Vision Statement which reads:

“Centers on a vibrant Downtown and is strengthened by our reinvestment in walkable, healthy, and magnetic activity centers that are located in new and reinvented areas throughout the city.”

Critical: Development location is the **wrong Typology!** PlanCOS requires “**Typology 3 Regional Entertainment and Commercial Centers.**” **Not in Polaris Pointe** which is designated as “**Typology 4 Regional Employment and Activity Centers**”. (following slides)

Details

- **Unused and inaccessible space** (18 acres) with no residual use value for ~70% of the year
 - **Prevents development** of continuous use business and/or recreational opportunity
 - **Minimally/Periodically magnetic** because large event opportunities will be limited by season and time of event (much less than 30% of the year)
 - **Not healthy** for residents in nearby apartments and single family residential areas due to noise/light pollution and limited access to and from homes
- ☒ It may be a unique place, just like Red Rocks or Fiddler's Green, but it would be built in a primarily **residential location**

How Development Plan Review Criterion 2 (City Plans) is Not Met

PlanCOS & Typology

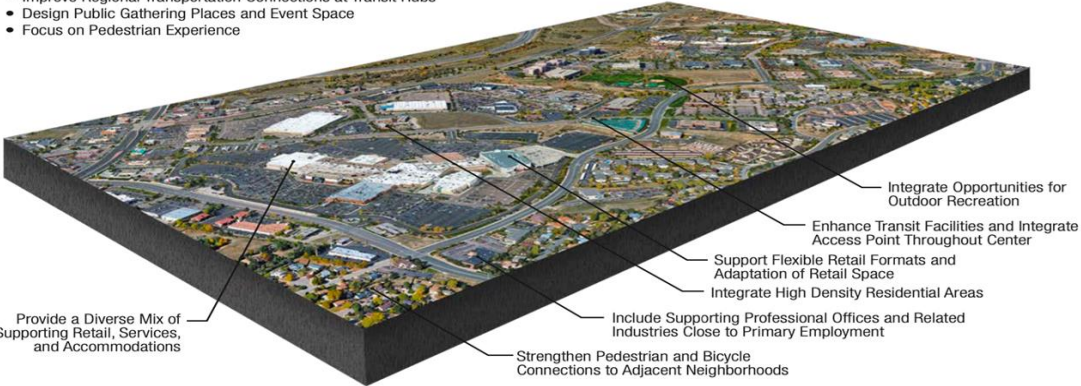
Polaris Pointe is “Typology 4: Regional Employment and Activity Center”.

The Typology 4 description indeed matches existing and proposed developments and promotes healthy, productive residential zones near Polaris Pointe.

Typology 4: Regional Employment and Activity Centers

- Regional Center Recommendations:**
- Increase Mix of Supporting Land Uses
 - Integrate High Density Residential Development
 - Improve Regional Transportation Connections at Transit Hubs
 - Design Public Gathering Places and Event Space
 - Focus on Pedestrian Experience

Example Location:
Chapel Hills Mall
Academy Blvd. and Voyager Pkwy.

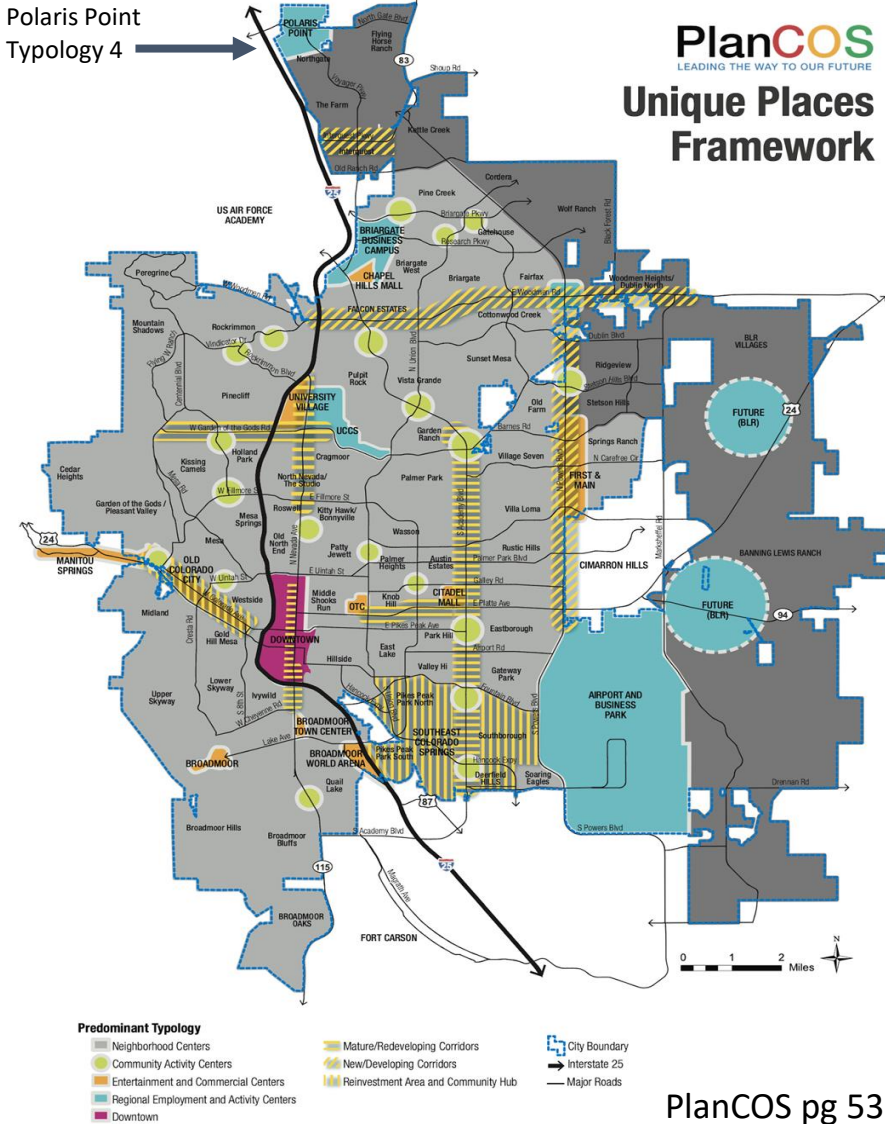


The goal of this place typology is to encourage the continuing adaptation and development of regional centers as more complete and well-functioning places, each with an increase of desired elements and unique places within them.

Regional centers draw from the largest regional service areas and are major concentrations of employment and commercial activity. They are large intensive centers that serve the city and region as a whole. These places are supported by a mix of uses that meet the needs of employees and visitors, such as restaurants, lodging, child care, higher density residential development, and educational facilities. A regional center may be focused on one or more predominant uses, such as a large shopping mall, office park, major medical complex, or educational institution, but are supported by a variety of other uses, including housing. Because of the scale, extent, and complexity of these regional centers, their boundaries may contain one or more focusing unique places within them.

EXAMPLES

Chapel Hills Mall and Briargate Business Campus, University of Colorado-Colorado Springs/University Village, Airport/Airport Business Park, Copper Ridge/ Polaris Point, and potential new regional center in Banning Lewis Ranch. Refer to the [Framework Map](#) for additional places.



How Development Plan Review Criterion 2 (City Plans) is Not Met

PlanCOS & Typology

“Typology 3: Entertainment and Commercial Center” (page 48)
“Feature Major Community Tourist Attraction”

Similar to the World Arena, this development serves to
“Reinforce Unique Entertainment and Commercial Experience”.

Typology 3: Entertainment and Commercial Centers

Entertainment Center Recommendations:

- Reinforce Unique Entertainment and Commercial Experience
- Increased Connectivity to Region and Surrounding Neighborhoods
- Create Defining Features
- Expand Diversity of Land Uses
- Design Buildings and Site to Appropriate Scale
- Connect with Interior Sidewalks and Trails
- Expand Transit and Multimodal Facilities

Example Location:
Broadmoor World Arena
Lake Ave. and I-25



The goal of this place typology is to create, redevelop, or reinforce entertainment and large commercial places in a manner that increases their multimodal connectivity, number, quality, and extent of their defining attributes.

EXAMPLES

First and Main Town Center, Old Colorado City, Olympic Training Center, University Village, and Colorado Springs World Arena. Refer to the [Framework Map](#) for additional places.

Entertainment and Commercial Centers may accommodate larger retail establishments and serve a number of residential and employment areas over a significant portion of the city. The special characteristics and tourist attraction of some entertainment centers may draw users from a state-wide market area or even beyond. These centers typically include a mix of supporting uses, such as higher density residential, office, service, medical, and civic uses.

PlanCOS pg 48

Violation

Typology 3 is the appropriate typology in which to build an outdoor amphitheater of the scale Notes Live proposes and **not Polaris Pointe, which is Typology 4** according to PlanCOS.

There are many alternative reasonable uses for Gary Erickson’s property that are appropriate for Polaris Pointe, but an amphitheater is not one of them and we have just proved it.

Typology 3 facilitates emergency egress and response during crisis actions (e.g. natural disaster, terrorist activity, riot, etc.)

Planning Commission Misrepresentation

The Planning Commission failed to notice this violation of PlanCOS.

Notes Live has been misleading on the numerous occasions they’ve mentioned that their amphitheater plan not only complies with PlanCOS, but actually enhances it.

In fact, it neither complies with PlanCOS nor does it enhance it.

1 Type 4 (Blue) - for Regional Employment and Activity Center

Example Area:
Chapel Hills Mall
Academy Blvd & Voyager

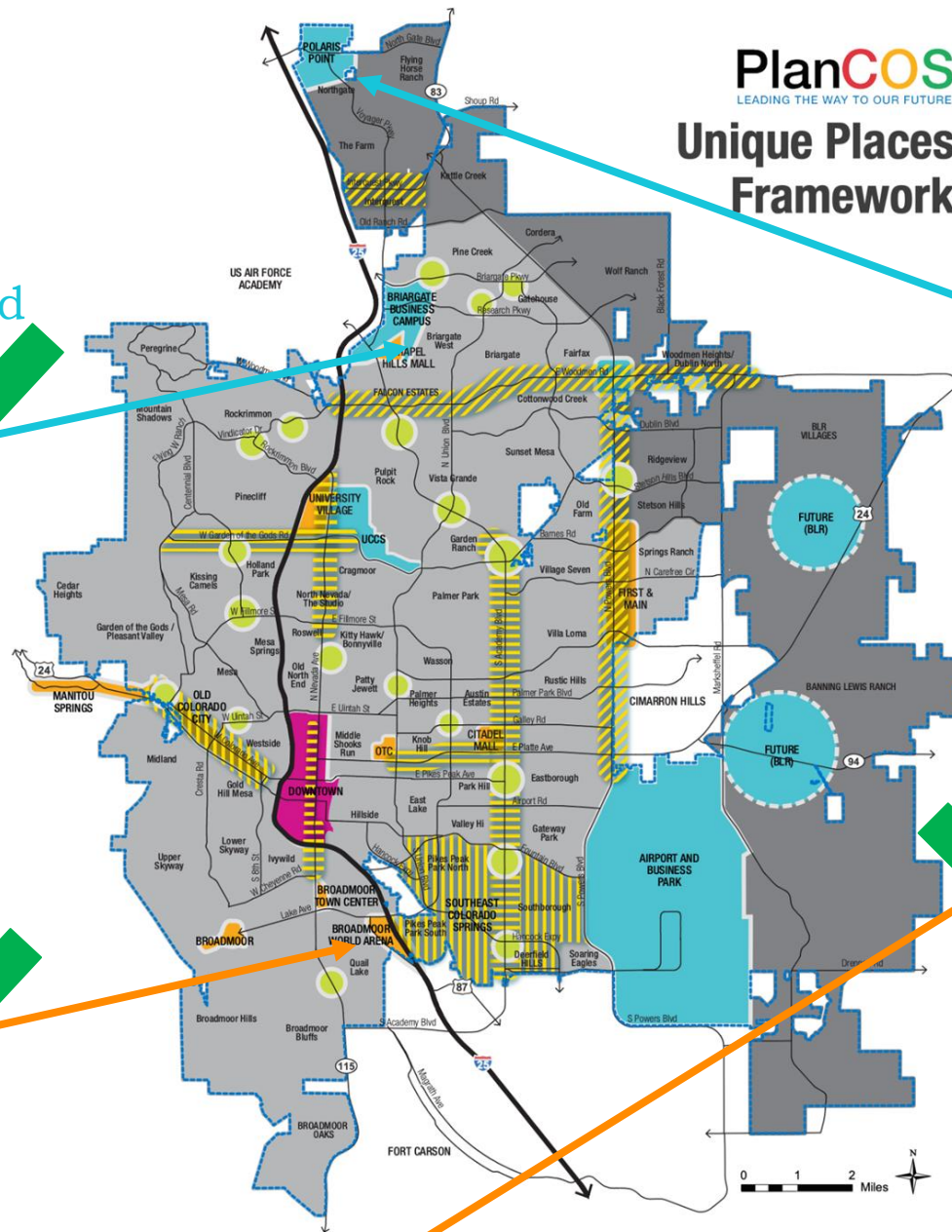
4 Polaris Point, if an amphitheater were built here, violates the design and intent of PlanCOS

3 Per PlanCOS design, What "Typology" would an amphitheater correctly fit into?

Type 3 (Orange) - for Entertainment...

2 Type 3 (Orange) - for Entertainment...

Example Area:
Broadmoor World Arena
Lake Ave & I-25



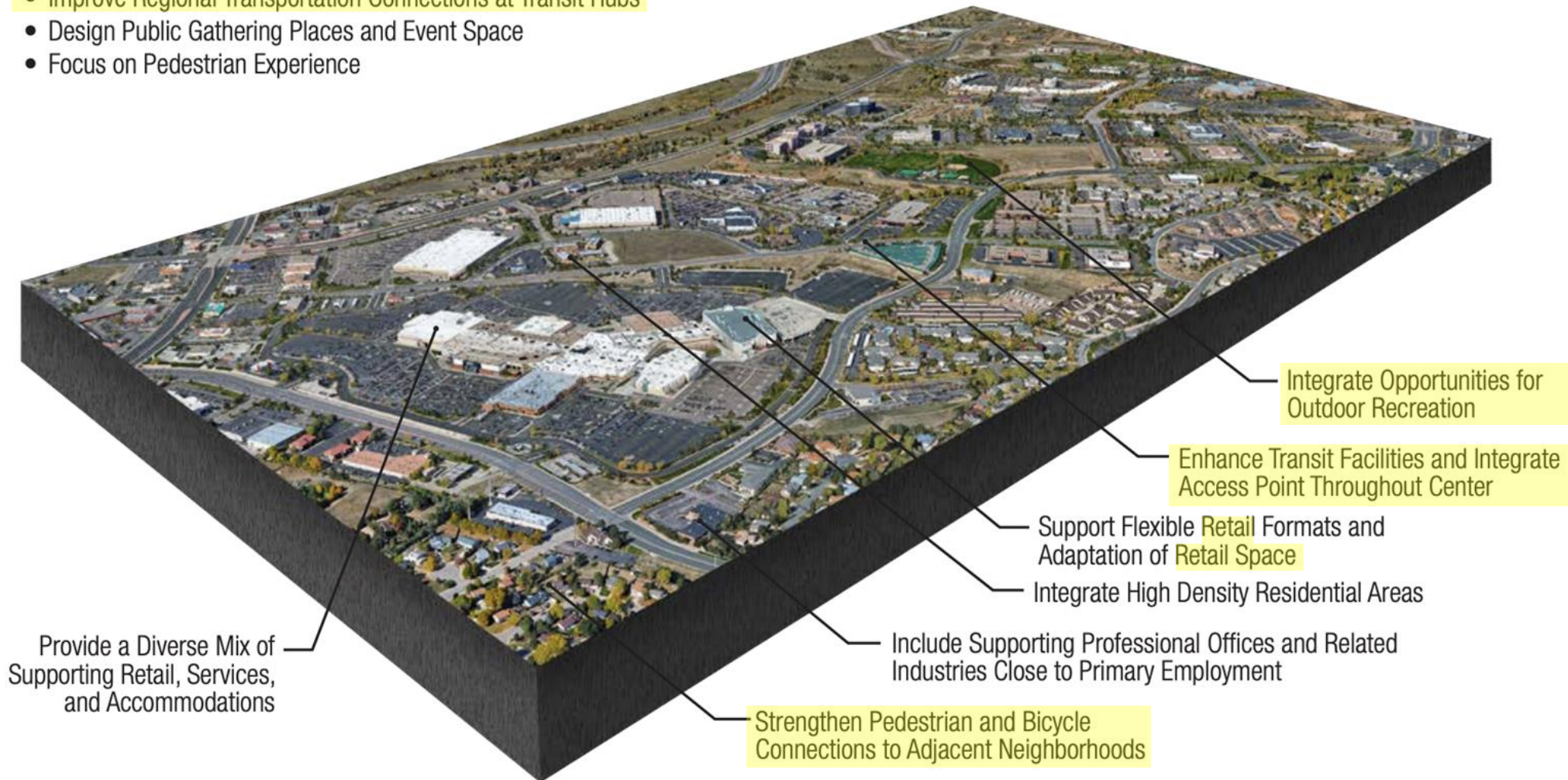
Typology 4: Regional Employment and Activity Centers

Regional Center Recommendations:

- Increase Mix of Supporting Land Uses
- Integrate High Density Residential Development
- Improve Regional Transportation Connections at Transit Hubs
- Design Public Gathering Places and Event Space
- Focus on Pedestrian Experience

Example Location:

Chapel Hills Mall
Academy Blvd. and Voyager Pkwy.



Typology 3: Entertainment and Commercial Centers

Entertainment Center Recommendations:

- Reinforce Unique Entertainment and Commercial Experience
- Increased Connectivity to Region and Surrounding Neighborhoods
- Create Defining Features
- Expand Diversity of Land Uses
- Design Buildings and Site to Appropriate Scale
- Connect with Interior Sidewalks and Trails
- Expand Transit and Multimodal Facilities

Example Location:

Broadmoor World Arena
Lake Ave. and I-25



How Development Plan Review Criterion 2 (City Plans) is Not Met

Criterion 2: The development plan substantially complies with any City- adopted plans that are applicable to the site, such as master plans, neighborhood plans, corridor plans, facilities plans, urban renewal plans, or design manuals.

Violation

Does not comply with **PlanCOS Chapter 4 Thriving Economy** Vision Statement which reads:

“Fosters an environment of inclusivity and economic diversity by attracting an innovative and adaptive workforce, advancing existing and targeted employment sectors, investing in quality of life, supporting our military, and expanding our sports ecosystem as Olympic City USA.”

Details

- Primarily **Seasonal Employment** (~30% of year)
 - Event driven hours of employment leading to **limited full-time** opportunities for majority of staff employed
 - **Low skill employees** do not attract an innovative and adaptive workforce to attract businesses and medium/high wage job creation
- ☐ Developer claims it will bring an estimated \$100M into the economy (unverified figure)

How Development Plan Review Criterion 2 (City Plans) is Not Met

Criterion 2: The development plan substantially complies with any City-adopted plans that are applicable to the site, such as master plans, neighborhood plans, corridor plans, facilities plans, urban renewal plans, or design manuals.

Violation

Does not comply with **PlanCOS Chapter 5 Strong Connections** Vision Statement which reads:

“Adapts to how we move by transforming our corridors to support our future generations’ health and mobility needs, enhancing economic vibrancy, upgrading infrastructure, and improving regional connectivity.”

Details

- **D-rated intersections** in community which are simply unacceptable and easily could end up even worse
- **Blocks Voyager** corridor traffic between Interquest and Northgate for hours before and after amphitheater events
- **Does not significantly contribute to upgraded infrastructure** as most, if not all, of the planned traffic management solutions are temporary workarounds at best
- **Will hinder or prevent patronizing businesses** along the Voyager, Northgate, and Interquest corridors before, during, and after events due to excessive concert traffic and unavailable parking

How Development Plan Review Criterion 2 (City Plans) is Not Met

Criterion 2: The development plan substantially complies with any City-adopted plans that are applicable to the site, such as master plans, neighborhood plans, corridor plans, facilities plans, urban renewal plans, or design manuals.

Violation

Does not comply with **PlanCOS Chapter 6 Renowned Culture Vision** Statement which reads:

“Promotes and embraces arts, culture, and education as essential parts of our lives and our identity. This builds on the efforts of General Palmer and many others that envisioned culture as the cornerstone of the community and where creative energy generates new possibilities, interpersonal connections, and unprecedented philanthropy.”

Details

- **Far different than an Arts complex** like Denver Center for the Performing Arts and performs the same purpose as Boot Barn Hall across the street only on a much more intrusive scale
- The venue will **not be a year-round attraction for culture**, as would be an enclosed/enclosable venue
- **Several venues** for larger acts **already exist** in Colorado Springs, including the World Arena, Falcon Stadium, Robson Arena, Security Service Field, and Weidner Field that can fill the same function

How Development Plan Review Criterion 2 (City Plans) is Not Met

Criterion 2: The development plan substantially complies with any City-adopted plans that are applicable to the site, such as master plans, neighborhood plans, corridor plans, facilities plans, urban renewal plans, or design manuals.

Violation

Does not comply with **PlanCOS Chapter 7 Majestic Landscapes** Vision Statement which reads:

“Values our natural and man-made outdoor spaces and celebrates our location at the base of America’s Mountain by designing a city oriented around our iconic landmarks. We ensure our community can engage with and enjoy these places through an integrated system of parks, streetscapes, and natural areas.”

Details

- **Inaccessible** as an "outdoor" space for 70% of year
- Provides an incredible view of Front Range for 30% of the year to event ticket holders, but which will be mostly **moot** to them **due to the video screens and concert/event lighting**
- **Light pollution** from concerts (lasers, flood lights, pyrotechnics) and constant security lights **will actually ruin the Pikes Peak and Front Range vistas** from dusk to dawn for everyone not attending an event
- **Light pollution** from this venue **will render invisible** one of the most majestic of all natural spaces – **the nighttime sky**
- **Noise pollution** from this venue will make enjoying **any** nearby **outdoor spaces difficult at best, impossible at worst**

How Development Plan Review Criterion 5 (Parking) is Not Met

Criterion 5. The project provides off-street parking as required by this chapter, or a combination of off-street or on-street parking as permitted by this chapter.

Violation

- Developer is providing a **grossly insufficient** number of on-site parking spaces, including both off-street and on-street, and therefore requires Nonuse Variances.
- Variance request is supported by data including Compassion parking lot numbers (NES, 4 Oct 22)
- On-street parking plan violates ordinance 7.5.204 (B)
 - **Will generate significant impacts** to neighboring properties

Details

- Admitted there will be an impact, and Neighborhoods and business must police their own areas
 - Notes Live COO, Planning Commission 9 Nov 22
- On-street parking / Traffic Study plan fails to account for:
 - Impact of nearby apartment residents and guests
 - Impact of parking in business lots and along Spectrum Loop east of Voyager, only pattern those west
 - Impact of parallel parking delays during heavy traffic
- Parking is not allowed on Spectrum Loop east of Voyager, but no plan to enforce “no parking zones” exists
 - City Traffic Engineering

Figure 8: Unbundled Parking Pricing Scheme

Lot	On-site (VIP)	On-street ¹	Interim	Bass Pro Shops	The Classical Academy	Compassion International ³	Neighborhood Streets	Neighborhood Business
Inventory	216	499	500 (0) ²	195	475 (1,375) ²	4,164	Shorter Walks	Top Golf, Verizon, Sprouts, Chick-Fil-A, Taco Bell, etc.
Fee	\$20	\$10	\$15	\$15	\$15	\$10	FREE	FREE
Missing Data		Unethical Use	Tentative 2 yrs MAX	Tentative 2 yrs MAX	Tentative 2 yrs MAX	Tentative 1 yr	FREE FOREVER	No documented coordination

¹ Public parking; potentially limited availability

² Interim parking within Polaris Pointe will be available upon venue opening

Neighborhoods are easier/cheaper!

How Development Plan Review Criterion 8 (Ecological) is Not Met

Criterion 8. The project preserves, protects, integrates or mitigates impacts to any identified sensitive or hazardous natural features associated with the site.

Violation/Impact

- A Preble's Meadow Jumping Mouse environmental impact study has not been provided.
 - This goes against the spirit of PlanCOS that celebrates the natural beauty of our city.
 - In addition, will impact phase 2 parking with TCA if this ever occurs happens.
- Adverse effects on Monument Branch Creek wildlife
 - Habit destruction
 - Noise & light disruptions
 - Concert pedestrian effects such as increased fire danger (cigarettes/joints) and littering

Details

- Since the property is within a protected species' habitat zone, an Army Corps of Engineers impact study must be done prior to development.
- Since it appears that such a study was not conducted prior to construction, which has already begun and mouse habitat destroyed, what are the consequences to the developer and/or the City of COS?

Logical Fallacy

- Ecological argument should applied to Parking **and** Venue – 30% annual use by both

How Development Plan Review Criterion 9 (Accessibility) is Not Met

Criterion 9. The building location and site design provide for safe, convenient and ADA-accessible pedestrian, vehicular, bicycle, and applicable transit facilities and circulation.

Violation

- The development plan, particularly the location and site design, does not provide safe or convenient circulation for anyone travelling in the vicinity of the amphitheater during an event via any mode of transportation other.
- The development plan does not provide safe and convenient transit facilities.
- The ADA-accessible transit features such as sidewalks and off-site parking in the development plan are inadequate.

Details

- According to Commissioner McMurray, 6' sidewalks are insufficient for the projected volume of pedestrians, especially with disabled persons using them, and he recommended 10' sidewalks and various environmental cues to protect pedestrians.
- Inaccessible neighborhoods and increased safety risk due to traffic.
- Bike lane removal is being considered to meet parking needs on Spectrum Loop.
- Noise, Light, Traffic increase risk to ADA qualifying individuals who will be restricted from transiting through or using any facilities in the area during event windows.
- Parallel parking on Spectrum Loop in heavy event traffic will be dangerous to pedestrians and drivers alike – especially disabled persons.
- The shuttle round-trip times specified in the Traffic Report are unrealistic anyway, but especially so considering the physical challenges of some disabled persons that could slow downloading and unloading times.

How Development Plan Review Criterion 12 (Traffic) is Not Met

Criterion 12. If necessary to address increased impacts on existing roadways and intersections, the project includes roadway and intersection improvements to provide for safe and efficient movement of multi-modal traffic, pedestrians and emergency vehicles in accordance with the City's Traffic Criteria Manual, **public safety needs for ingress and egress** and a City accepted traffic impact study, if required, prepared for the project.

Violation

The development plan does not provide for sufficient roadway and intersection improvements but rather relies on a series of dubious, temporary workarounds – several of which are unenforceable – but all of which together will result in chaos and confusion during events.

Details

- Traffic report (optimistically) projects D-Rated intersections, unacceptable for residential areas
- Traffic management solutions are temporary and/or unenforceable, and predictably insufficient
 - Dynamic signage, signal timing changes, lane reconfigurations, traffic directors, cones, “assigned” parking
 - No traffic officer support projected
- The 50-person shuttle round-trip times are unrealistic
- Higher likelihood of traffic accidents and impacts are not addressed, will cause gridlock when they occur
- Parallel parking on Spectrum Loop in heavy event traffic will be dangerous to pedestrians and drivers alike
- No consideration of flash-flooding impact or other severe weather - regularly occur during concert season
- Restricted emergency egress capability due to population density and limited access points

How Development Plan Review Criterion 13 (Impact) is Not Met

Criterion 13. Significant off-site impacts reasonably anticipated as a result of the project are mitigated or offset to the extent proportional and practicable. Impacts may include, but are not limited to light, odor and noise. (Ord. 94-107; Ord. 95-125; Ord. 01-42; Ord. 02-64; Ord. 03-74; Ord. 03-157; Ord. 09-50; Ord. 09-78; Ord. 12-72; Ord. 18-2)

Violation

- Numerous violations of current city codes
- Numerous violations of Public Health law and policy
- Predictable negative impacts to community
 - Traffic - Vehicle and Foot
 - Light Pollution - Event and Security
 - Noise – Time-of-Day and Power
 - Etc.

Details

This will be addressed in detail under section Nonuse Variance Criterion 3

Nonuse Variance Criteria

Please have City Council review these backup slides as pertinent to the Appeal

Overview of Unmet Nonuse Variance Criteria

- 7.5.802 (B): Nonuse Variances

B. Criteria For Granting: The following criteria must be met in order for any nonuse variance to be granted:

1. The property has extraordinary or exceptional physical conditions that do not generally exist in nearby properties in the same zoning district; and
2. That the extraordinary or exceptional physical condition of the property will not allow a reasonable use of the property in its current zone in the absence of relief; and
3. That the granting of the variance will not have an adverse impact upon surrounding properties.

Bottom Line: The Polaris Pointe amphitheater proposal **fails to meet** Nonuse Variance Criteria **1, 2, and 3**

- Further evidence of this is provided by the statements made by several Planning Commissioners during the November 9, 2022 hearing (see transcript).

How Nonuse Variance Criterion 1 is Not Met

Criterion 1: The property has extraordinary or exceptional physical conditions that do not generally exist in nearby properties in the same zoning district

Developer Position

The extraordinary or exceptional physical conditions of the property do not allow for on-site parking.

Logical Fallacies

- Variance Request **does not address** the actual **physical conditions** of the property!
- Approval strategy **conflates intended use & physical condition**
- **Self-Fabricated Condition** – On-site parking solutions exist. The developer’s unwillingness to use the vacant property immediately adjacent is driving the need for the on-site parking exception

Violations

- There are **no extraordinary or exceptional physical conditions** of the property that prevent the developer from providing sufficient on-site parking.
- The **same physical conditions generally exist in nearby properties** including:
 - Other Polaris Pointe PUDs, all of which are mildly sloped with gentle variations
 - Vacant adjacent land between proposed site and Voyager Pkwy
 - Numerous vacant plots around Colorado Springs / Monument

City Procedural or Analytical Discrepancies

- Planning Commission **failed in their responsibility to address this variance Criterion** and **failed to realize the developer is fabricating a hardship that does not exist.**
- Planning Commission was required to review the variance requirements in accordance with **law and actual physical condition** of the property.
- Instead, the Planning Commission **erroneously approved** the parking variance in the context of the **limited duration of use** and an **unlawful and unreasonable alternative presented by the developer.**

How Nonuse Variance Criterion 2 is Not Met

Criterion 2. That the extraordinary or exceptional physical condition of the property will not allow a reasonable use of the property in its current zone in the absence of relief;

Developer Position

The extraordinary or exceptional physical condition of the property does not allow it to be used for **any purpose, other than an outdoor amphitheater**, without an on-site parking exception.

Logical Fallacies

- Variance Request **does not address** the actual **physical conditions** of the property!
- Approval strategy **conflates intended use & physical condition**
- **Self-Fabricated Condition** – On-site parking solutions exist. The developer's unwillingness to use the vacant property immediately adjacent is driving the need for the on-site parking exception

Violations

- There are **no extraordinary or exceptional physical conditions** of the property **that will prevent a reasonable use** of the property in its current zone in the absence of relief. **Not. A. Single. One.**
- **Undisputable that numerous** other reasonable uses exist:
 - **Myriad businesses** in Polaris Pointe and surrounding areas make "reasonable use" of similar properties (Magnum, Top Golf, iFly, Overdrive, Offices, Medical, Retail, Restaurants, etc.)
 - The **previously planned Polaris Pointe marketplace and theater complex** could "make use" without variance, in line w/typology
 - The physical size of the filing, which is sufficient if the capacity/size of the amphitheater was reduced or the immediately adjacent parcel was developed for parking

City Procedural or Analytical Discrepancies

- Planning Commission **failed in their responsibility to address this variance Criterion and failed to realize the developer is fabricating a hardship that does not exist.**
- Planning Commission was required to review the variance requirements in accordance with **law and actual physical condition** of the property.
- Instead, the Planning Commission **erroneously approved** the parking variance in the context of the **limited duration of use** and an **unlawful and unreasonable alternative presented by the developer.**

How Nonuse Variance Criterion 3 is Not Met

Criterion 3. That the granting of the variance will not have an adverse impact upon surrounding properties.

Developer Position

- Parking at external sites greater than 400 ft away will not increase traffic concerns
- Pedestrians will have no adverse impact on the environment
- TCA parking will be accessible when needed
- Parking lots and common walkways and parks will be left clean and not generate safety concerns
- No increased risk to public safety by not requiring on-site parking, and making use of a de-centralized parking plan

Amplification of Concerns (Major Topics)

- Developer consistently states that events **should not** have an adverse impact on surrounding properties/communities but has never committed to **“will not”**, as this Criterion clearly states is required
- Parking agreements are not contracts and not yet filed w/ City Clerk
 - They’re temporary and readily cancellable in the immediate future
- Developer stated it is up to the City, businesses, and residential property owners to police parking concerns
 - City Law does not allow action until +72 hours
 - HOAs have no authority over parking on city streets

Multiple Violations

- The amphitheater, if approved, will have numerous adverse effects on surrounding properties.
 - Noise in excess of allowable dB limits
 - Noise in violation of allowable time-frames
 - Unauthorized parking in business lots and in neighborhoods
 - Excessive traffic
 - Light pollution
 - Increased crime risk
 - Transient Nuisance in Crime (Pan-Handling - Planned Theft)
 - Increased wildfire risk
 - Degraded emergency response times
 - Limited Emergency Egress due to erratic population density
 - Reduced access to Urgent and Emergency Care facilities

How Nonuse Variance Criterion 3 is Not Met

Criterion 3. That the granting of the variance will not have an adverse impact upon surrounding properties. (Parking)

7.4.204(B)(c) – On street parking should not generate significant impacts to neighboring properties

Variance Invalidating Statements

At Planning Commission, developer admitted

- This would, more than likely, impact local neighborhoods
- There is no way to stop people from parking in neighborhoods
- Businesses/Neighborhoods had to police their own areas

City Traffic Engineering offered no solutions

- Parking is not allowed on Spectrum East, but no plan to enforce
- Local law does not allow action until >72 hours
- Traffic study did not include parking impact at shopping centers

Multiple parking plan concerns from Planning Commissioners

7.4.204(C)(1) – Conditions for Reduction of off-street parking

Direct Violations

- Para (a): Must be within 400' of property
 - Does Not Meet – Planning Commission approved more than half mile away from venue
- Para (b): Must be within 400' of direct pedestrian access
 - Does Not Meet – No sidewalks adjacent to off-site parking
- Para(c): Must be within 400' of public/private lot or parking ramp
 - Does Not Meet – Parking is further than 400' from private or public lot serving venue
- Para(d): The parking arrangements are satisfied by shared parking arrangements
 - Notes Live has “intent to rent” agreements w/ TCA and Compassion that can be severed at any time for any reason
 - Does Not Meet – requires permanent agreement recorded w/ County Clerk and Records Office (7.4.204 (C)(1)(d)(1))

How Nonuse Variance Criterion 3 is Not Met

Criterion 3. That the granting of the variance will not have an adverse impact upon surrounding properties.

Violations Noise

- Page 10 of the LSTN Noise Report shows that noise in the **63Hz and 125Hz bands** will generate **66dB and 61dB** (respectively) of noise at nearby residences, with Physical Mitigation, and violate the City ordinance that limits noise in residential areas to **50 dB** between 7pm and 7am.
- This report **fails to address** the fact that noise in the **31.5Hz band** will also violate the ordinance, to an even **greater degree** and with a **more severe impact** on nearby residents.
- **Most of the Commissioners expressed concerns about noise and wanted to see a more robust sound study done**, including some who wanted to make that a **condition of approval**. But ultimately, they lost the plot and **approved the motions without first attaching these any of the conditions they said they needed**.

Noise Impact Inconsistencies

- “Some of the productions will operate their own sound systems
 - In excess of assumed spectrum
 - In excess of evaluated power
 - May not have same sound mitigation capabilities
- Developer has no committed schedule for events
 - No definitive end time of night
 - Planning commission requested a 10pm end time commitment
 - Mr. Mudd deferred scheduling to event scheduler (Ticketmaster)
 - No definitive annual schedule limitations
- Mitigations are poorly defined
 - Employment of 28’ or 40’ sound barriers
 - Mitigations for sound outside barrier angles
- Sound study is consistent with City Code; however...
 - Sound study doesn’t address Colorado physical conditions
 - Sound study doesn’t highlight full spectrum of sound (31.8 Hz)

Noise Hardship Waiver Criteria

Please have City Council review these backup slides as pertinent to the Appeal

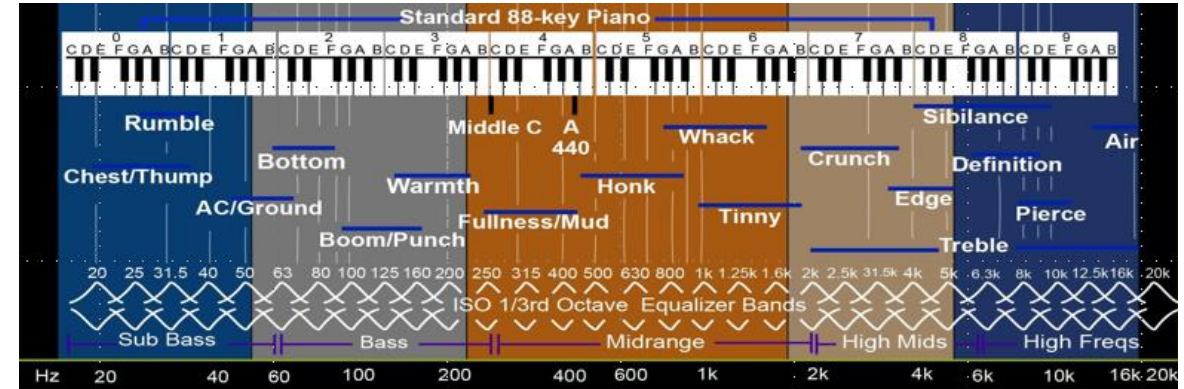
Noise Hardship Waiver Conditions

- Development Plan Proves Negative Impact from Noise Nuisance Violations
- The self-generated condition for a hardship waiver for noise:
 - Extends the time of public nuisance to 11:30 pm
 - Allows egregious and dangerous noise levels in excess of city code
 - Noise levels above 55 dB during daytime hours (7:00 am to 7:00 pm)
 - Noise levels above 50 dB during “quiet hours” (7:00pm to 11:30, or later)
 - May be requested for any day of the calendar year
- Requires Mayoral signature
 - Of acceptance of responsibility/liability
 - On a recurring, perpetual, and/or indefinite basis
- Should be a Variance, using the same criteria as Parking Variance
 - Will be required in perpetuity
 - The developer cannot, and does not intend, to fix the nuisance
- Forces patrons to choose between access to businesses and services or their health
- Generates a residual residential noise hazard, worse for businesses and residences w/in 3500 ft
- Segregates ADA and FHA protected groups from using North Colorado Springs residential areas and businesses
 - Forces current residents to capitulate Public Health protections
 - Restricts future residents from use of impacted areas

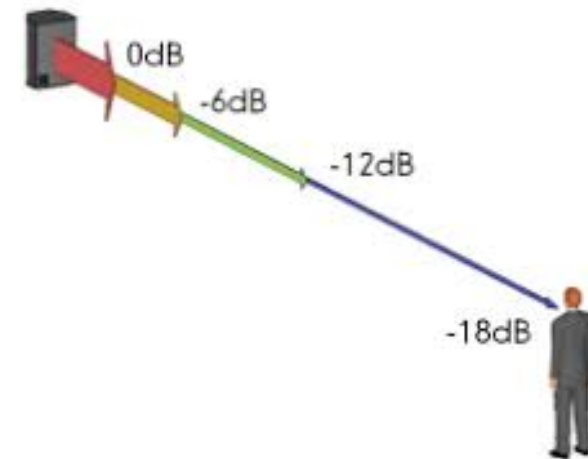
Sound Physics

Music and Sound Facts

- Sound is a power & frequency wave, it behaves predictably
- Sound power includes the complete sound profile
 - Includes frequencies (Hz, Hertz) and their power (dB, Decibels)
 - Includes 31.8 (actual bass guitar low string) **and lower!**
 - Lower sound propagates farther – Higher power received!
 - Is **NOT** an “overall” or an average
- The decibel (dB) scale is logarithmic (not linear)
 - An increase of 3 dB equals 2 times power, 6 dB = 4 X power
 - People may perceive “double the sound” with 6-10 dB increase
...real world received power is predictable
- Sound power weakens w/ distance by inverse square ($1/r^2$)
 - At 2 times distance from source, power is 4 times weaker
 - Conversely, if power is measured at residences 3500 feet away, it is 4 times more powerful at 1750 feet away

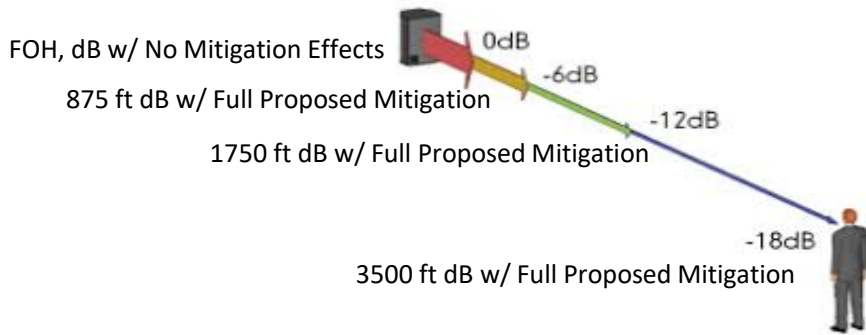


Concerts generate significant sound power across the frequency spectrum



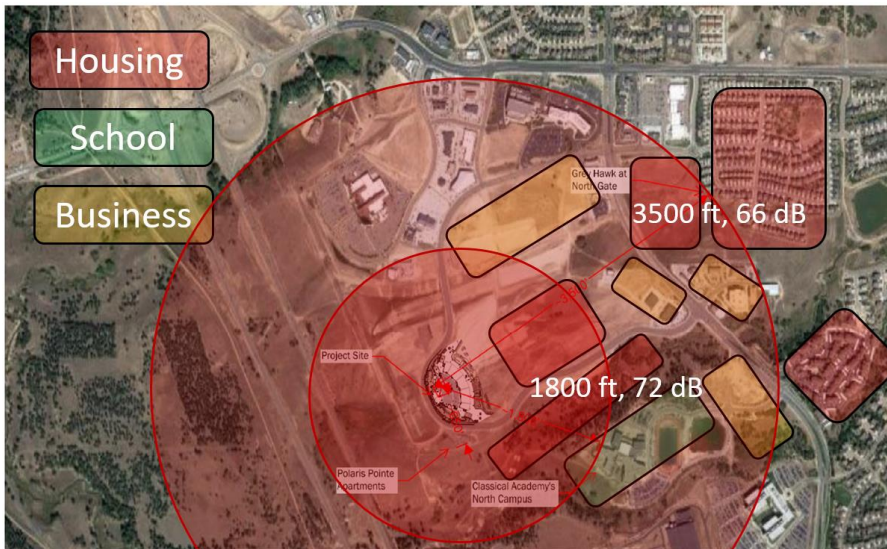
Sound Facts that Scope Criterion 13 Concerns

Residences at 3500 feet will have bass frequency sound impacts of more than 66 dB
With all mitigations in place!

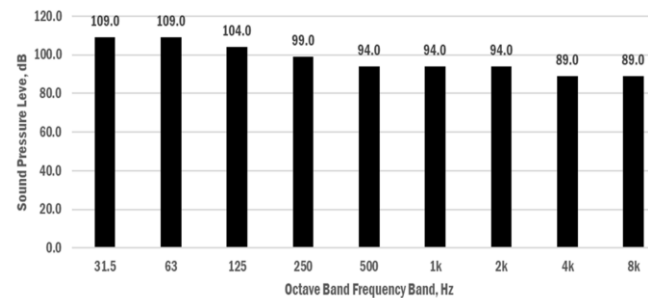


63 Hz "Bass" (1)		Study	"Limit"(2)	Rock(3)	Loudest(4)
In Venue, No Mitigation					
0 ft	Front of House	109 dB	115 dB	120 dB	143 dB
w/ Full Mitigation in Place					
875 ft	Apartments	78 dB	84 dB	89 dB	112 dB
1750 ft	Business	72 dB	78 dB	83 dB	106 dB
3500 ft	Residences	66 dB	72 dB	77 dB	100 dB

Real World noise effect is far different from the "overall" noise!



Typical FOH Spectrum, FOH Position



Estimate	Decibels, dB at Octave Band Center Frequency, Hz								Overall
	63	125	250	500	1k	2k	4k	8k	
FOH Mix Position	109	104	99	94	94	94	89	89	100dB(A)
NE Residence, No Mitigation	78	73	67	60	58	54	34	0	64dB(A)
NE Residence, w/ Electroacoustic Mitigation	77	72	64	56	50	43	24	0	61dB(A)
NE Residence, w/ Cumulative Electroacoustic and Physical Mitigation	66	60	49	39	31	21	0	0	47dB(A)

Why does this matter to the Mayor and COS Staff?

Analysis uses published City Code, Sound Study, Development Plan
 1 Does not include lowest frequencies expected (highest dB, farther reaching)
 2 Limits FOH to "an average of 115 dB during any five minute period" – Sound Study
 3 "Rock concert dB levels often exceed 120 dB" – Earpros, Hearnet, Multiple Sources
 4 Loudest concert recorded – Sleazy Joe at 143.2 dB

Hardship Waiver Approval

Violations of Process, Intent, & Logic

Legal Definition: "must be particular to the property, not general to the neighborhood or community"

City Definition: "9.8.109 Hardship Permits: "...for relief from the noise level designated...on the basis of undue hardship" and "Shall specify a reasonable time for which the permit will be effective"

"The mayor may grant relief if it is found:"

A. Additional time is necessary for the applicant to alter or modify the activity or operation to comply

B. The activity, operation or noise source will be of temporary duration, and cannot be done in a manner that would comply with "noise ordinance" **and**

C. There is no reasonable alternative to the applicant

D. The Mayor may prescribe any conditions or requirements deemed necessary to minimize adverse effects upon the community or the surrounding neighborhood

Implications

- 1) Waiver approval is bound by the conditions of city law/code
- 2) Reasonable alternatives exist for the developer and the city
- 3) Granting a noise hardship **violates Federal Public Health Law (ADA/FHA)**

Violations General

- This waiver for noise **enables a nuisance** that is "general to the neighborhood and community"
- Colorado Springs Code Requires a Variance, not Waiver...
 - For exemptions to conditions that will not be fixed
 - To allow formal public redress of Public Health concerns
- **Waivers are necessary and temporary in scope**
- The **hardship is not undue**, is a self-created consequence of Dev Plan
 - Self-fabricated hardships are not justifiable
 - Re-Design/Re-Plan could eliminate waiver "need"
- Indefinite waiver is not authorized under city code
 - Recurring in perpetuity is not "Reasonable time"
- The "noise level designated" in the sound study misrepresents impact
 - Actual power at residences is 66 db at 63 Hz, **not "overall" 47 dB**
 - Actual bass frequency is 31.8 Hz, generates higher sound power
 - **Segregates area** (Neurological conditions PTSD, disabilities)
- There are reasonable alternatives
 - Other Sites Exist...Southwest of Baptist and I-25 is for sale
 - PlanCOS has an outdoor venue typology designated in strategy
 - Architecture Changes like full/half-dome, full parking structure
- Paragraph D implies the mayoral responsibility is to the surrounding neighborhood and community, not the developer
- 90%+ of email correspondence against it (Commission Transcript)

Unintended Violations

Americans with Disabilities Act and Fair Housing Act

What the ADA and FHA Do

- Establishes **protected groups** of people (Veterans w/PTSD, Elderly persons, Disabled persons--Autism, MS, etc.)
- Establishes discriminatory practices in context of effect, whether **intentional or unintentional**
- Identifies segregated housing **practices/policies** as illegal
- Stipulates discriminatory effect may be **actual or predictable**
- Establishes legal obligation for limiting impact to protected groups – **municipalities are not immune**
- Provides concessions ...**only if no less discriminatory option exists**

Findings from ADA and FHA in Context

- Protected individuals near development will actually or predictably be disparately impacted by noise and other limiting effects
- Intentionally, or unintentionally, creating conditions that would prevent protected individuals from participating in services is illegal
- Current and future residents and patrons will likely be unable to live in and take part in services in the area

Americans with Disabilities Act in Law

Americans with Disabilities Act, Title 42, Ch 126

- It shall be **discriminatory** to subject...a class of individuals on the basis of disability, directly, or through contractual, licensing, other arrangement, to deny the opportunity to participate in the goods, services, facilities, privileges, advantages, or accommodations of an entity
- Includes the imposition of eligibility criteria...to screen out an individual with a disability...and **a failure to take such steps**...to ensure no individual with a disability is excluded or denied services, segregated, or otherwise treated differently

Fair Housing Act in Law

Fair Housing Act §100.5 Scope

- The illustration of unlawful housing discrimination may be established by a practice's discriminatory effect, even if not motivated by discriminatory intent
- Ensure that zoning and other regulations concerning land use are not employed to hinder the residential choices of these individuals...

Fair Housing Act §100.500 Discriminatory Effect

- Liability is established by the practices effect (**Noise Hardship & Light Impacts**)
- State is not immune from violation of Public Health (ADA, Ch 126)
- Practice has discriminatory effect where it actually or predictably results in **disparate impact** on a group of person or creates, increases, reinforces, or perpetuates **segregated housing patterns** because of race, color, religion, sex, handicap, familial status, or national origin (**Neurological Condition or Other Limiting Condition**)
- Could be legal if it is necessary to meet...other nondiscriminatory interests and...Those interests could not be served by **another purpose that has less discriminatory effect**
- Built elsewhere, with different design, or enforcement published ordinances

Predictable Liability for Violations Americans with Disabilities Act and Fair Housing Act

Potential Liability - City & Executive Offices

- Affording indefinite hardship waivers for noise is discriminatory against current and future residents with sensory disabilities and in advanced age (forced to move, look elsewhere)
- Insufficient assessment of sound study
- Restricts protected persons from use of nearby restaurants and facilities during venue operating hours
- Restricts access to residential areas and services

Potential Liability – Apartment Developers/Owners

- Marketing to "Concert Aficionados" is unintentionally discriminatory against protected groups, limits housing options
- Federal funding for high density housing development could be deemed potentially fraudulent if discriminatory effects are reasonably assumed to exist in the development plan, sales strategy, and/or daily operation of the facility (Title 42)

Potential Liability - Notes Live & Sound Study

- Potentially liable for the intentional or unintentional delivery of sound and light data to City Officials with incomplete and/or misleading presentation of information (used as basis for variance and hardship decisions)
- Presentation of development plan to City Officials as an only investigated option, and requesting egregious exemptions

Whether intentional or unintentional,
It is illegal to execute policy that allows or creates conditions
that violate Federal Public Health Law

It is illegal for the city or apartment/business owners
to ask for, or force, capitulation of Public Health Law protections
as a condition of use of residential areas or business services

Federal Law Protects Our Rights As Existing and Future
Residents!

Talking Points To “Noise Hardship Waiver Criteria”

Slide 51 –

The cities planning activities stipulate a variance for parking, but are taking the developers recommendation and tacitly authorizing them to pursue a noise hardship waiver. According to the development plan and operational strategy, these waivers will extend nuisance time to 1130 pm **or later** and allow for noise powers outside of healthy and legal limits. The developer says these conditions will be during “concert season,” but their documentation states events can be conducted any day of the year. The mayor will be required to sign either an indefinite waiver, a waiver for an entire season, or one for each event. Because a waiver will be required in perpetuity, and there can be no resolution, this should be a variance. In either case, the effective window and power levels created by this development will have an adverse effect on the community, particularly against those with neurological conditions, and should disqualify this proposal today.

Slide 52 –

It is important for you to understand sound characteristics, especially in light of Planning Commission comments. Sound behaves predictably. 66 decibels of power is 66 decibels of power, whether the source is half-a-mile away or 10 feet away. It includes every frequency broadcast from the source and each of those frequencies will reach whoever is hearing it at a different power level. **It is not an average or “overall” number** you see in the sound study. The power from lower frequency bass soundwaves propagates farther, and mitigation measures have less effect on them. Sound waves do naturally lose power over distance, so if you double the distance, power decreases by 6 decibels. Anyone hearing it will perceive it as “half the sound,” but the fact remains that 66 decibels at any distance is 66 decibels of sound power.

So what does this mean in context...

Slide 53 –

Simply, the sound study and development plan state that, with electro-acoustic mitigation **and** physical mitigation in place, residences at 3500 feet will receive 66 decibels of sound power, not the 47 decibel overall noise touted by city planning staff. But this is not the extent of the noise hazard. The developer will ask each act to limit noise to “an average of 115 dB during any 5 minute period”. With all mitigations in place, this means an average sound power, lower and higher, of 72 dB...if the act complies. Rock concerts “often exceed 120 decibels,” so this is a hazardous exposure of 77 dB, just shy of the OSHA mandated 80 dB safety limit. Take into account the fact that bass and sub-bass frequencies from concerts extend to 20 Hertz or lower, there is a significant and predictable noise hazard to residents.

What justifies this hardship...

Talking Points To “Noise Hardship Waiver Criteria” Cont’d

Slide 54

Nothing. City law defines hardship waivers as a permit for relief, on the basis of undue hardship, for a reasonable time, to allow the applicant time to comply with law...and only when there is no reasonable alternative for the applicant. The waiver generates a perpetual nuisance, of which, the business has no intention of ever complying with. The noise hazard is intentional and self-fabricated condition, and due to operations strategy operating hours, **will never and can never be modified or altered**. When you take into account the reasonable, factual, and very predictable real world sound power levels we presented, this noise waiver will create a hazard, not just nuisance, the community.

Slide 55 –

The noise hazard particularly impacts those in ADA and FHA protected groups. Noise is particularly triggering to individual with neurological conditions like autism, multiple sclerosis, and PTSD. This also includes the elderly with chronic and life limiting conditions. These people are already part of our community and may be forced out for the sake of their health. Anyone looking to rent an apartment or buy a home will be restricted from the neighborhood by the residual noise violations.

What the developer requests, is that city forces current and future residents to capitulate their Federally protected Public Health Law rights. The noise level is not just predictable, but is calculated for you in the sound study. And whether intentional, or unintentional, any city practice or policy that allows this level of hazard is not only failing to take steps to prevent the developments discriminatory effects, but authorizes predictably discriminatory and segregated housing patterns.

Do other options exist? Yes. Is there potential for liability? Yes.

Slide 56 –

Whether intentional, or unintentional, this development creates predictable negative impact to the area. These are not only predictable and common sense, but have been documented in the traffic and sound studies. Traffic flow will be impacted, and predictably limit access to neighborhoods and services, noise will violate Public Health law and predictably limit residential options. Neither the city, nor anyone managing the exceedingly close apartments, can legally force the capitulation of Public Health Law rights.

Supporting Slides - Fiddlers Green

Please have City Council review these backup slides as pertinent to the Appeal

- Non use Variance - Noise Cont'd
 - Developer compares this venue to Fiddlers Green
 - Fiddlers Green is surrounded by office buildings
 - Nearest resident is more than two thirds of a mile away with layers of actual sound mitigation to include 30ft contiguous sound barrier, 5 story parking garage, then 6-18+ story buildings between it and the nearest residents
 - Fiddlers Green requires concerts to end by 10PM
 - Developer proposes concerts going to 11:30PM on weekends and 10:30PM on weekdays
 - Many Planning Commission members took issue with these times requested a 10PM cut off time like Fiddlers
 - Fiddlers Green has dedicated 5 story onsite parking structure at foot of their amphitheater

Fiddlers Green Today



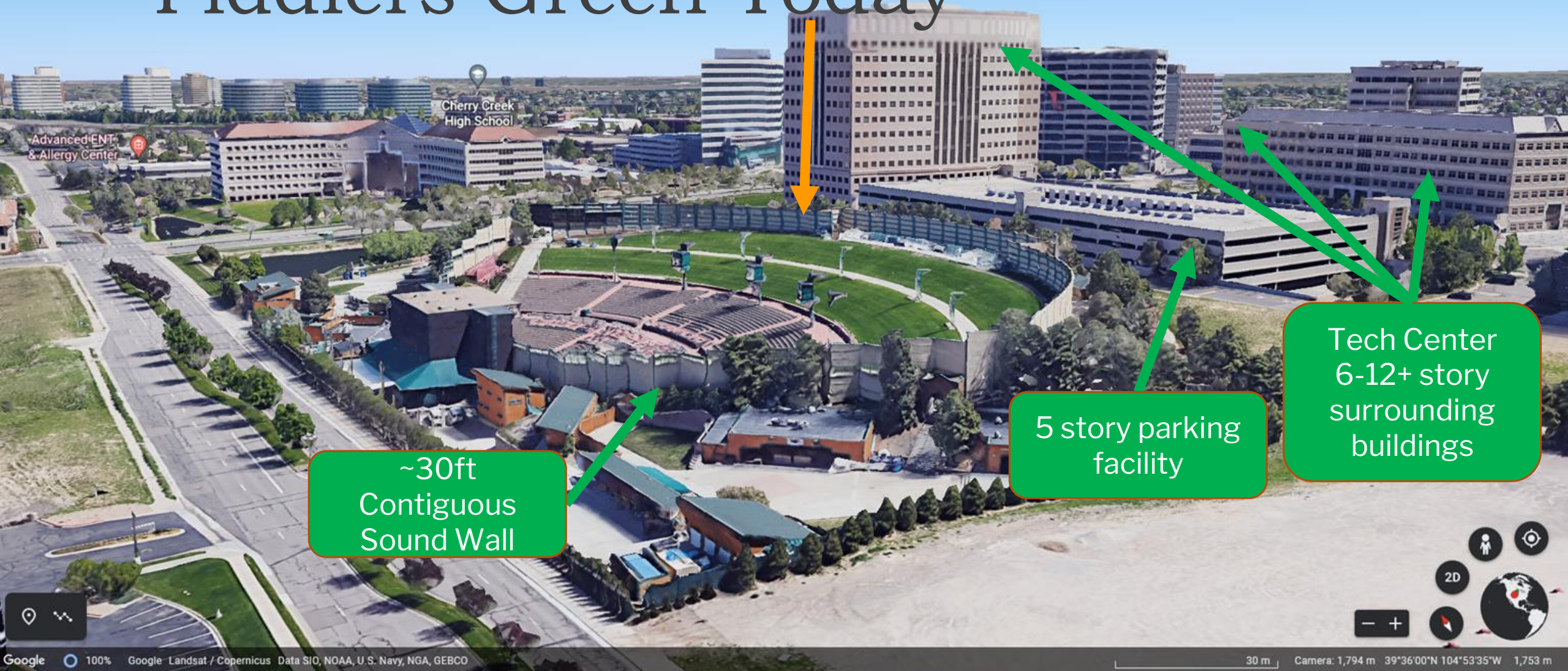
~30ft
Contiguous
Sound Wall

5 story parking
facility

Surrounding
Tech Center
6 - 18+ story
buildings



Fiddlers Green Today

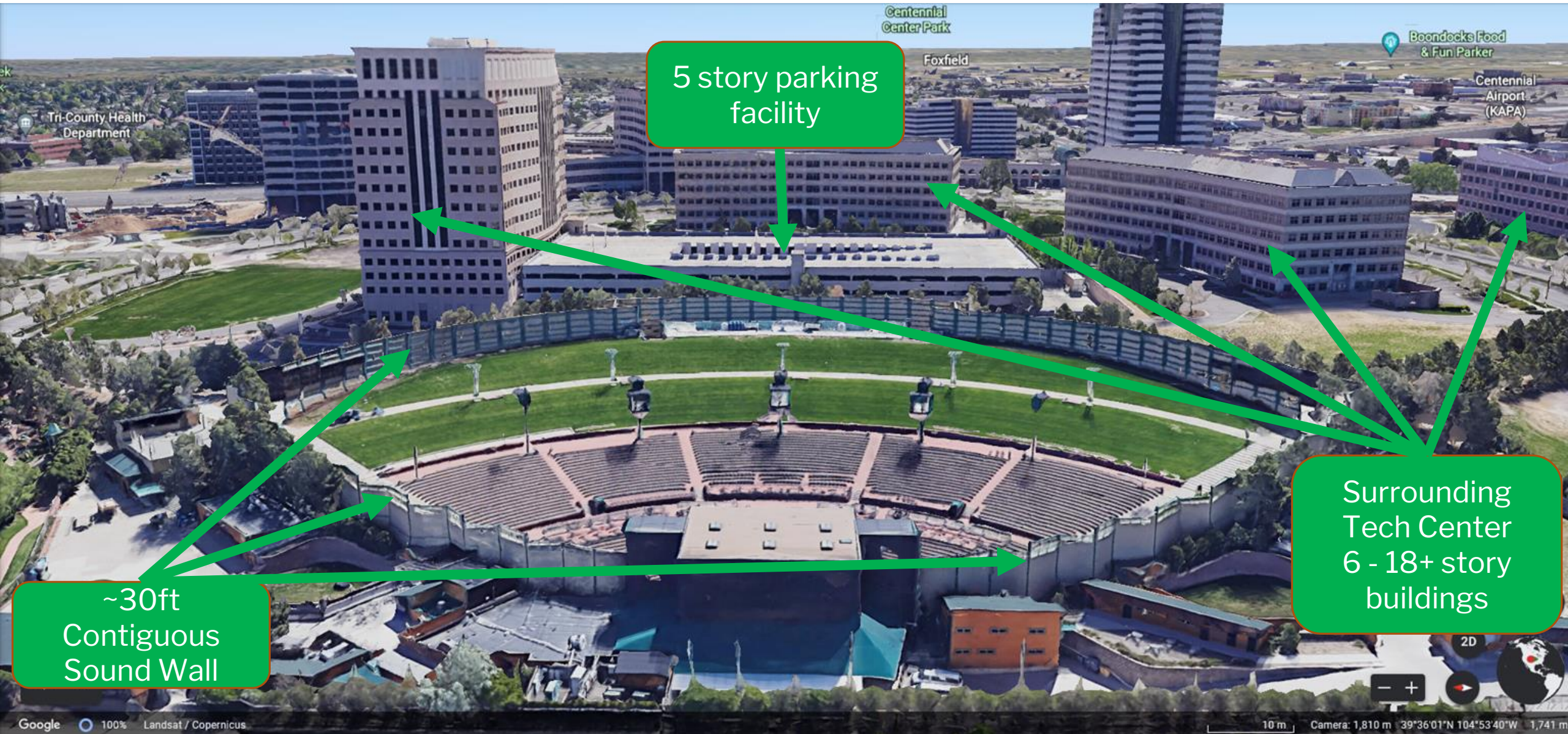


~30ft
Contiguous
Sound Wall

5 story parking
facility

Tech Center
6-12+ story
surrounding
buildings

Fiddlers Green Today



5 story parking facility

Surrounding Tech Center 6 - 18+ story buildings

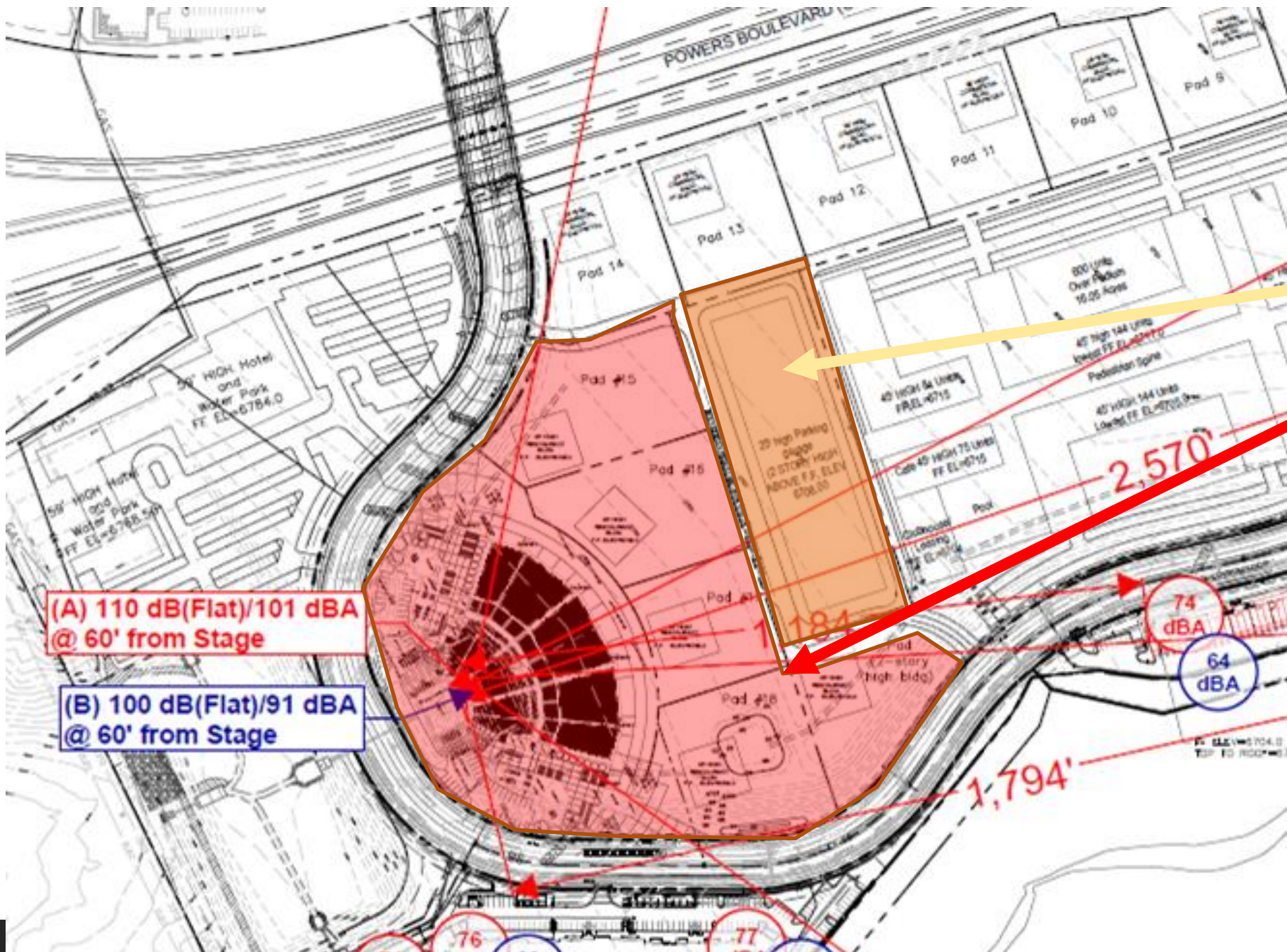
~30ft Contiguous Sound Wall

Neighborhood View

Surrounding
Tech Center
6 - 18+ story
buildings

Fiddlers Green





BLUF: This parcel is not a good fit for Sunset Amphitheater as developer is unwilling to:

- Build adequate parking facility on premise
- Build contiguous sound protects around entire amphitheater?
- Residences nearest Fiddlers Green, with these precautions, still complain of noise pollution.

This is not a good fit.