

CSU WILSON TANK APPEAL OF NOTICE AND ORDER

Planning Commission October 11, 2023

Staff Report by Case Planner: William Gray, Senior Planner



Quick Facts

Appellant
Colorado Springs Utilities

Property Owner
City of Colorado Springs

Address / Location
6560 Alabaster Way

TSN(s)
7315210006

Zoning and Overlays
Zone: PF (Public Facilities)
Overlay(s): HS-O (Hillside Overlay) and WUI-O (Wildland Urban Interface Overlay)

Land Area
3.63 acres

Land Use
Utility, Major (Water Tank)

Applicable Code
Unified Development Code

Project Summary

An appeal of the Notice of Violation and Order to Abate (Case #ENF23-05234) for the CSU Wilson Water Tank Development Plan.

File Number	Application Type	Decision Type
APPL-23-0005	Appeal of Administrative Decision	Quasi-Judicial

Staff Recommendations

Deny the appeal and uphold the Notice of Violation and Order to Abate for the CSU Wilson Water Tank Development Plan, based upon the findings that the Appeal of the Notice of Violation and Order to Abate does not meet the appeal criteria in UDC Code Section 7.5.415.A.2.



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Background

Prior Land-Use History and Applicable Actions

Action	Name	Date
Annexation	Flying W Addition #1	March 1, 1971
Subdivision	Wilson Tank Site	May 2, 2023
Master Plan	Mountain Shadows	March 9, 2021
Current Enforcement Action	Notice of Violation and Order to Abate	August 30, 2023

Site History

The City of Colorado Springs acquired the parcel in 1960 from DH Wilson and the existing 5-million-gallon (MG) water tank was constructed in 1966. This site location was originally selected by the City because it provided the necessary elevation for the gravity flow of water to the adjacent water distribution system existing at the time.

The site was zoned PF (Public Facilities) from A (Agricultural) in 1993 by Ordinance No. 93-25 (see "Ordinance No. 93-25" attachment). This change of zoning coincided with the planning and construction of the pump station that is located at the site. The development plan for the pump station was approved in February 1993 (see "Wilson Reservoir and Pump Station Development Plan" attachment). The development plan showed that the parcel was originally sized for two 5 MG water storage tanks. Colorado Springs Utilities Water Master Plan maintains the location for the water tank and pump station and the Mountain Shadows Master Plan, originally approved in 1996, labeled the site as Government Facility (see "Mountain Shadows Master Plan" attachment).

In July 2021, City Planning was contacted by Kimley-Horn regarding a new 5-MG water storage tank (see "Pre-Application Summary" attachment). The application for a new water storage tank and subdivision final plat was submitted in July 2021. The main goal of the project was replacement of the existing tank due to age and current condition. The existing tank is 60-plus years old, so it is at the end of its life cycle. Important design considerations included for the new water storage tank were to minimize site grading, erosion and sediment control, revegetation of old tank site, new tank impacts and wildfire risk reduction. The focus of the initial development plan review was to reduce visual contrast and soften the appearance of the tank to nearby and adjacent residence. This was to be accomplished through tank color and landscaping. The visual impact of the new water tank was also the major theme of public comment that was received during initial review. A maximum height of 45 feet was established with the development plan through the review process. It is also important to note that the development plan for the new water tank was reviewed under previously adopted Chapter 7. In the PF (Public Facilities) zone district there are no established dimensional standards. Further, it is stated that dimensional standards are to be established with the development plan. It is the reason the development plan set a maximum height. The other reason was that final engineering of the tank design was only preliminary when the development plan was reviewed. The original development plan and final plat were approved on June 21, 2022 (see "Approved Development Plan" and "Approved Final Plat" attachments).

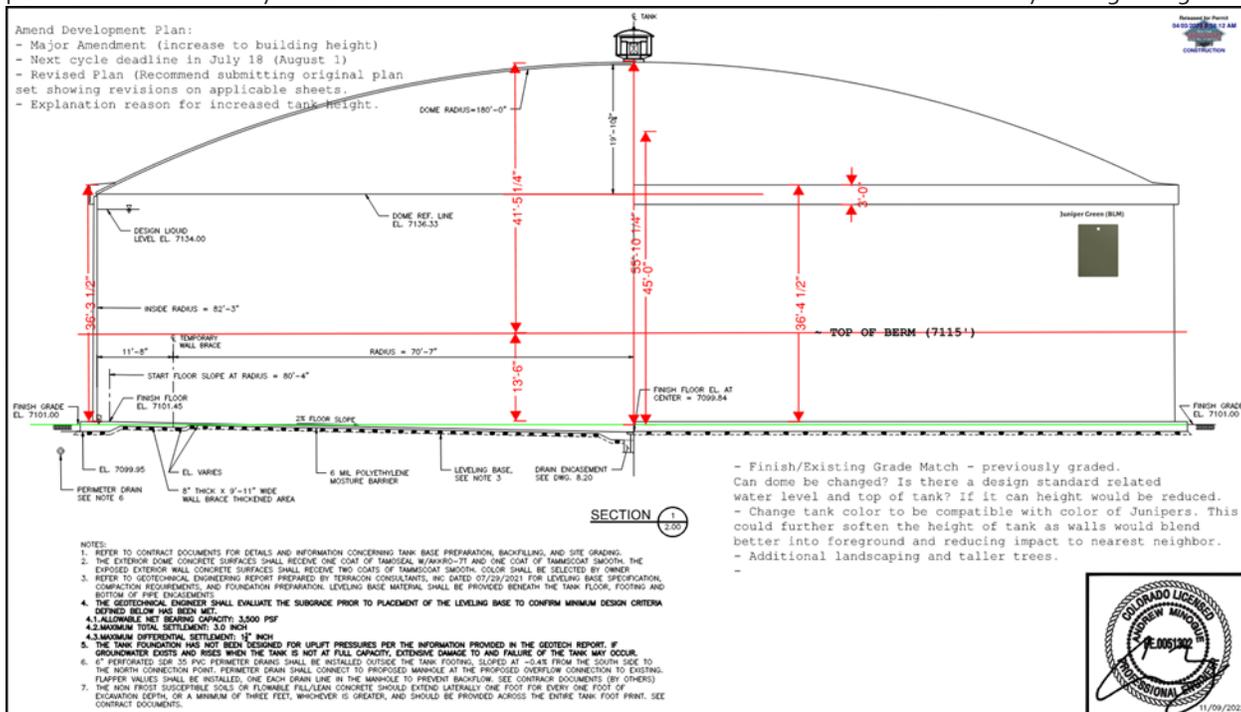
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The building permit for the new water storage tank was issued on May 5, 2023. As part of the issuance of the building permit it was reviewed and approved by City Planning. City Planning's approval of the permit was also on May 5, 2023. A comment included along with City Planning's approval was that the "project was required to be completed in compliance with the approved Development Plan (AR DP 21-00526). Approved tank color is adobe per email dated 2/15/23" (see figure below).

Departme	Sta	Log Date	Reviewer	Comments
AR Springs	A	5/05/2023 09:20	WGRAY	Approved by WGRAY. Project is to be completed in compliance with the approved Development Plan (AR DP 21-00526). Approved tank color is adobe per email dated 2/15/23. (see full review)
Arizona	E	5/03/2023 08:52	WGRAY	In Current Review by WGRAY
Submital	/	5/03/2023 08:48	SIERRA	Submital #3

With the issuance of the building permit tank construction commenced. Around June 13, 2023, the tank height was questioned by a neighboring property owner. It was at this time that City Planning learned of the discrepancy between the tank height of the approved development plan and the tank as built. As stated previously the approved development plan established a maximum height of 45' and the elevations drawing indicated an approximate tank height of 40'. The reason for this was that the structural design of the tank was not yet complete at the time of development plan review. The as-built height of the tank is 55 feet with five (5) feet vent (total height is 60 feet). Upon discovery of the discrepancy City Staff reviewed the approved plans in the building permit. In this secondary review the sheet titled "Tank Section and Elevation" was further analyzed regarding the height



discrepancy (see figure above). This analysis did reveal that the tank section/elevation drawing included in the building permit was in fact 60 feet tall. A clear oversight in the review of the structural plans for the water tank was made by City Planning. A condition of the building permit approval was that the project had to be completed in compliance with the approved development plan and this was not intended for only landscaping and tank color but also height of the tank. Included in any approval letter for a development plan is the statement that "if any changes to the approved site or building design become necessary prior to, or during construction, an amended development plan will be need to be submitted for City Planning review..." Certainly, City Planning was a part of this error, but the presumption that a 60 feet tall tank complied with the development plan simply because sheet 12 of 12 of the development plan stated "elevations were estimations and would be finalized during structural design phase"



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meant that the tank could be as tall as necessary based on final structural design. A maximum tank height was established for this development plan and that height was 45 feet. In retrospect, while conducting this analysis of the water tank height associated with the building permit tank height was not a primary focus. The reason, a five (5) MG water storage tank is going to be a huge structure in width, height, and depth. It was City Planning’s position that tank color and landscaping would best achieve blending the tank into the landscape and softening its size to the nearest neighbors.

In late June City Staff met with CSU to discuss the height difference between the development plan and the building permit. At this meeting, steps to address the problem were outlined to CSU. This included modifying the existing tank to bring it into compliance with the maximum allowed height to amending the development plan to increase the height to 60 feet. We also discussed the importance on acting quickly to address the situation because tank construction was for all practical purposes complete. For example, if structurally modifying the tank was an option it needed to be acted upon earlier rather than later because the contractor was still on-site doing work, or having an amended reviewed with a decision before any final inspection could be completed. At this meeting, as it related to the amendment option that a better tank color and additional landscaping (i.e., taller trees) needed to be included with any application. The Applicant elected to pursue the major modification to the height of the water tank and submitted the request on July 17, 2023.

Shortly after public notice was made on the proposed major modification City Planning received a significant amount of public comment regarding the proposed amendment. Further, the amendment application garnered a high level of media coverage. It was these factors that directly led to the water tank amendment being referred to the Planning Commission. More plainly, it was a project that needed its evaluation and decision to be made at public forum. At the same time, City Planning had demands that a violation of the development plan had occurred and that a notice of that violation was needed and necessary under the UDC (see “Stop Work Demand” attachment). A Notice of Violation and Order to Abated was issued to the Applicant on the August 30, 2023 (see “Notice and Order” attachment). Subsequently, CSU submitted an appeal to the notice of violation primarily on the grounds of estoppel. That is to say that the building permit approval was the determination of compliance with all applicable requirements. So, once that occurred City Planning has no right to claim the building permit is invalid.

Applicable Code

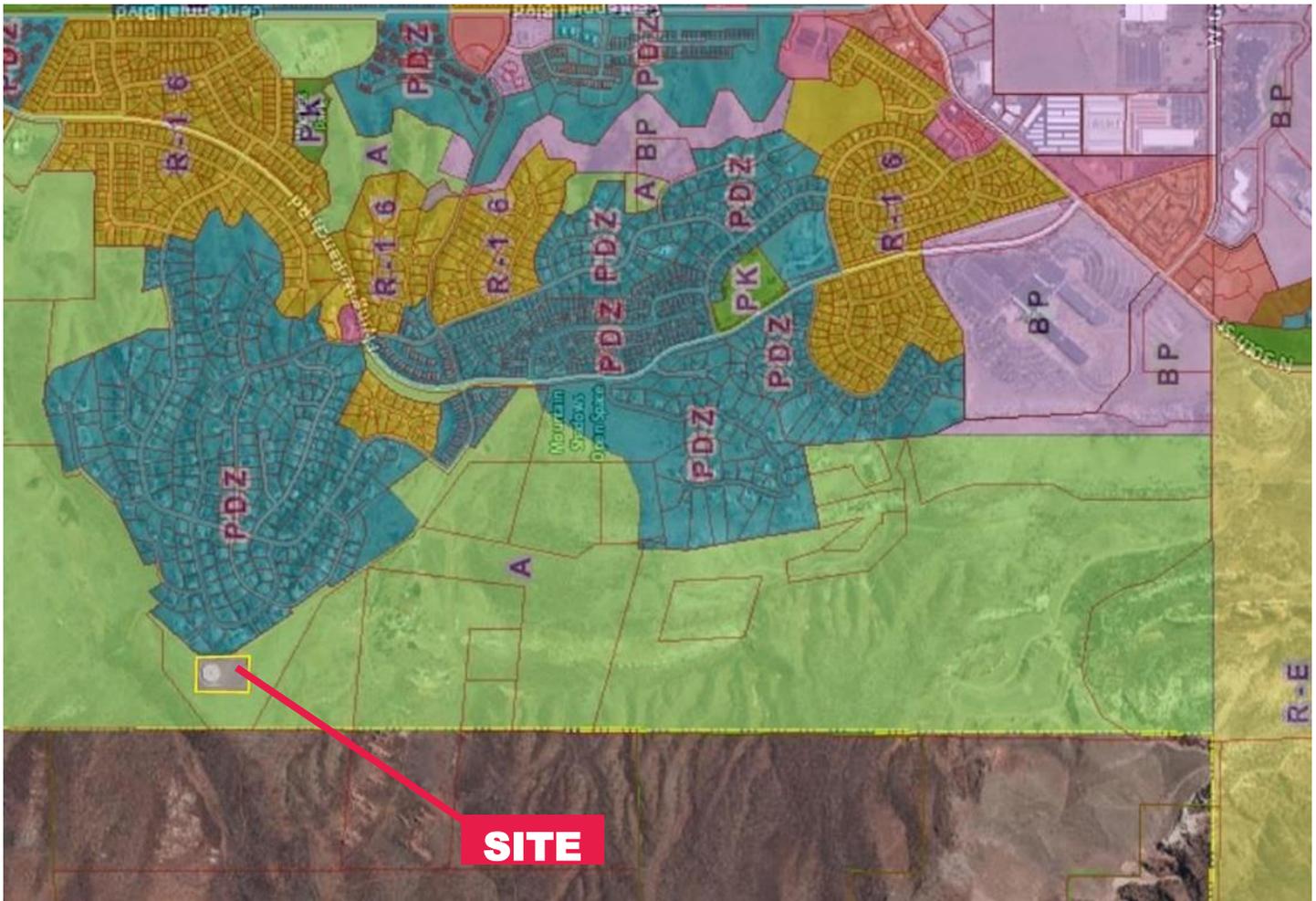
All references within this report that are made to “the Code” and related sections are references to the Unified Development Code.

Surrounding Zoning and Land Use

Adjacent Property Existing Conditions

	<i>Zoning</i>	<i>Existing Use</i>	<i>Special Conditions</i>
North	A (Agricultural)	Agricultural – open land, grazing	Privately managed land, part of Flying W Addition #1 Annexation (1971)
West	A (Agricultural)	Agricultural – open land, grazing	Privately managed land, part of Flying W Addition #1 Annexation (1971)
South	A (Agricultural)	Agricultural – open land, grazing	Privately managed land, part of Flying W Addition #1 Annexation (1971)

East PDZ (Planned Development Zone) Single-family residential Mountain Shadows Filing No. 22, part of Flying W Addition #1 Annexation (1971) and Mountain Shadows Master Plan (1996)



Zoning Map

Stakeholder Involvement

Public Notice

Public Notice Occurrences (Poster / Postcards)	1, Planning Commission
Postcard Mailing Radius	1,000 feet
Number of Postcards Mailed	53



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Number of Comments Received

No comments received

Public Engagement

Public engagement for the appeal was done through public notice as required by the UDC. No public comment has been received on the proposed appeal.

Agency Review

N/A

Appeal

Summary of Application

Colorado Springs Utilities ("Appellant") filed an application appealing the Notice of Violation and Order ("Notice and Order" for the Wilson Water Tank located at 6560 Alabaster Way (see "Statement of Appeal" attachment). The Notice and Order contends that the increase in tank height, or any change for that matter, first required review and approval from the City Planning Department (see "Notice and Order" attachment) which constitute a violation of UDC Section 7.1.106.

<u>Date(s) Inspected</u>	<u>Code Section</u>	<u>Conditions Observed</u>	<u>Reinspection Date(s)</u>
8/30/2023	Unified Development Code	As of today's date, Wednesday, August 30, 2023, immediately stop any and all work associated with the construction of the water tank located at 6560 Alabaster Way. Any changes or amendments made for this development plan (AR DP 21-00526) must first be reviewed and approved through the City Planning Department.	9/14/2023

The Wilson Water Tank was granted approval of a Development Plan on June 21, 2023. The approval letter for the project stated, "If any changes to the approved site or building design become necessary prior to, or during construction, an amended development plan will need to be submitted for City Planning review and approval. Further, a condition or comment associated with the approval of the building permit required that the development must conform completely to the approved Development Plan.



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Zoning	P	5/03/2023 08:52	WGRAY	In Current Review by WGRAY
Submittal	F	5/03/2023 08:48	SIERRA	Submittal #3

In June 2023, City Planning was informed that the water tank exceeded the maximum building height of 45 feet (see "Approved Development Plan" attachment). This was confirmed by the Appellant on June 26, 2023, when they asked what they needed to match tank height from the building permit with the approved Development Plan. City Planning Staff worked with the Appellant on applying to amend the development plan pursuant to UDC Section 7.5.516, Modification to Approved Plans. A part of this assistance included issuing the Notice and Order. The reason was the project was not in compliance with the approved Development Plan. It was the duty of the City to notice the Appellant of the violation even if both parties were voluntarily working to address the height problem.

UDC Section 7.1.106, Conformity with regulations states the following:

"It shall be unlawful to use any building, structure, or land or to erect, move, structurally alter, convert, extend, or enlarge any building or other structure except in conformity with the requirements established in the zone district in which said structure, building, or land is located and in compliance with all applicable provisions of this UDC."

The Appellant is erecting a structure that is not in compliance with the provisions of the UDC. UDC Section 7.5.515.F.4 requires that all properties subject to an approved Development Plan shall be developed and maintained in accord with the approved Plan. All new construction, alteration, enlargement, or modification of existing structures and changes of land use must substantially conform to the approved development plan or as amended or modified. The approved development plan established a maximum building height of 45 feet. At the time City Planning approved the building permit for the new structure they were advised with an approval comment, as indicated previously, that the project was required to be completed in compliance with the approved development plan. In addition, the approved development plan and approval letter were a part of the building permit set. The approval letter also emphasized that any changes to the approved site or building design would require an amended development plan. Therefore, the project is not in compliance with applicable provisions of this UDC. With this finding, the Notice and Order should not be appealed because a violation of the UDC exists and that violation needs to be corrected to bring the project into compliance with the code.

Compliance with Relevant Code Sections and Review Criteria

City Planning used the Notice and Order provision of UCD Section 7.5.9, General Enforcement, ordering that work stop due to the discrepancy of the as-built water storage tank with the approved development plan, and specified a period for compliance. This section of code also provides the option for the violator to appeal. The Appellant filed the appeal within 10 days as required and the appeal is considered under UDC Section 7.5.415, Appeals.

UDC Section 7.5.415, Appeals

The Appellant meets the requirements to file or submit an appeal as they are the Applicant for the decision being appealed. The appeal statement (see "Appeal Statement" attachment) submitted by the Appellant is required to specifically address the following:



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a. The notice of appeal shall state:

(1) The specific provision(s) of this UDC that is the basis of the appeal.

The basis of the appeal is that approved building permit remains effective until expired, revoked or forfeited. Both the development plan and building permit remain effective. The UDC requires compliance with an approved development plan and the change in height was not approved through development plan modification process as required by the record of approval (Approval Letter) and UDC Section 7.5.515.F.4 requiring compliance with an approved development plan until changed or modified by the appropriate decision-making body.

(2) Which of the following criteria for reversal or modification of the decision is applicable to the appeal:

(a) The decision is contrary to the express language of this UDC.

The decision to issue a Notice and Order for the non-compliant status on the approved development plan is not contrary to the UDC. The Notice and Order is an applicable action under the UDC to enforce all provisions of this code. The provision being enforced is the requirement for continued compliance with an approved development plan. The Appellant has not completed the review process for "Modifications to Approved Plans".

(b) The decision is erroneous; or

The decision to issue a Notice and Order is not erroneous. The issuance of the Notice and Order is based upon the fact that the project is not in compliance with an approved plan. An approved plan is required to be modified or changed through the adopted review process for "Modifications to Approved Plans".

(c) The decision is clearly contrary to law; and

The Notice and Order was not issued to make a claim the building permit or approved development plan is invalid. The Notice and Order was issued to formally notify the Appellant of their violation and the period to cure the problem. This is not contrary to law, and it is an applicable action for the circumstances of this application. The appeal statement includes a statement that they relied upon the permit or authorization for construction of the new water storage tank. City Planning authorized approval of the building permit with the comment that the "Project is to be completed in compliance with the approved Development Plan (AR DP 21-00526)". The building permit set also included the approved development plan and the approval letter that reinforced the comment for compliance and when an amendment needs to be submitted for review. City Planning has acknowledged its role in the review and issuance of the building permit in the Site History section of this Staff Report. In terms of a vested right, it occurs with the approval of a development plan and is subject to any of its terms and condition. A term of the approval was the establishment of a 45-foot maximum building height standard as required by the PF (Public Facilities) zone district. The act of issuing the Notice and Order is not contrary to applicable law.

(3) Describe how the criteria for the relevant application have or have not been met.

The criteria for approving the appeal have not been met by the Appellant. The Notice and Order was issued in compliance with the adopted UDC. The Notice and Order identified the compliance issue with the approved development plans and provided a time for the Appellant to cure the problem.

Recommendation

APPL-23-0005



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Recommend denial of the appeal and uphold the Notice of Violation and Order to Abate for the CSU Wilson Water Tank Development Plan, based upon the findings that the Appeal of the Notice of Violation and Order to abate does not meet the appeal criteria in UDC Code Section 7.5.415.A.2.