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# UNFINISHED BUSINESS CALENDAR

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## CITY PLANNING COMMISSION AGENDA

ITEM NO.: 4

STAFF:  
PETER WYSOCKI &  
TOM WASINGER (CODE ENFORCEMENT SUPERVISOR)

FILE NO:  
CPC AP 14-00002 – QUASI-JUDICIAL

**PROJECT:** 332 EAST COLORADO  
**APPELLANT:** STUDIO A64, LLC. AND K.C. STARK  
**OWNER:** BRADY KENNETH



**PROJECT SUMMARY:**

1. Project Description: The appellant is appealing a Notice and Order to abate an illegal use of a property at 332 East Colorado as a marijuana smoking facility. City staff made a determination that the marijuana smoking facility was not a permitted use because it is not specifically listed as a permitted use within the FBZ (Form Based Zone) Central zoning district. The appellant believes that the determination was erroneous and that the Notice and Order is clearly contrary to law.

According to the owner of Studio A64 and Studio A64 website, the facility offers other services and activities such as live music, dance, recording studio, private events, among others.

Staff would like to note that this discussion should focus on zoning and whether or not a recreational marijuana smoking facility is a permitted use within the FBZ. Staff suggests that discussion regarding recreational use or sales of marijuana be avoided.

2. Applicant's Project Statement: **FIGURE 1**
3. Planning & Development Department's Recommendation: Deny the appeal and uphold the Notice and Order.

**BACKGROUND:**

1. Site Address: 332 East Colorado
2. Existing Zoning/Land Use: Form-Based Zoning (FBZ) Central
3. Surrounding Zoning/Land Use:  
North: FBZ Central – mixed commercial uses  
South: FBZ Central – parking lot  
East: FBZ Central – mixed commercial uses  
West: FBZ Central – mixed commercial
4. Comprehensive Plan/Designated 2020 Land Use: Regional Center

**STAKEHOLDER PROCESS AND INVOLVEMENT:**

Not applicable.

**ANALYSIS:**

Zoning enforcement procedures are set forth in City Code Chapter 7, Article 5, Part 10. Notices of Order can be appealed pursuant to City Code Section 7.5.906. Pursuant to Section 7.5.906, the appeal criteria are as follows:

*In the written notice, the appellant must substantiate the following:*

- a. *Identify the explicit ordinance provisions which are in dispute.*
- b. *Show that the administrative decision is incorrect because of one or more of the following:*
  - (1) *It was against the express language of this zoning ordinance, or*
  - (2) *It was against the express intent of this zoning ordinance, or*
  - (3) *It is unreasonable, or*
  - (4) *It is erroneous, or*
  - (5) *It is clearly contrary to law.*

- c. *Identify the benefits and adverse impacts created by the decision, describe the distribution of the benefits and impacts between the community and the appellant, and show that the burdens placed on the appellant outweigh the benefits accrued by the community.*

Staff's determination that the Studio A 64 is not a permitted use was based on City Code Section 7.2.107 which states:

*Except as herein specified, 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 accord with the provisions of this Zoning Code*

And, on City Code Section 7.2.108, which states:

*When a use is not specifically identified as allowed in a zone district, it shall not be allowed in the zone district unless it meets the following description and criteria of a similar use. The function, performance characteristics, and location requirements of the unlisted, proposed use must be consistent with the purpose and description of the zone district where it is proposed, compatible with the uses specifically allowed in the district, and similar in characteristics such as traffic and parking generation, noise, glare, vibration, and dust. Uses may be allowed as principal permitted, conditional, and accessory uses in any zone district where similar uses are allowed. Similar use determinations shall be made by the Manager or the designee in writing.*

A marijuana smoking facility is not defined, permitted or conditionally permitted by City Code, Chapter 7 or the Downtown Colorado Springs Form-Based Code. The owner alleges that Studio A 64 should be considered a "private club" as patrons must pay to enter and bring their own marijuana to smoke it at the facility. Drinks and snacks are also sold.

The appellant did not request a similar use determination prior to opening the facility.

City Code does not specifically define "private club". The closest definition is a "social club" under the "club" use definition, which is under the "Civic Use Types" category in City Code Section 7.2.302.D.3:

*CLUB (Membership): A use providing meeting, recreational, or social facilities for a private, nonprofit or noncommercial association [emphasis added], primarily for use by members and guests, excluding uses with the chief activity being a service customarily carried on as a business.*

- a. *Recreational Clubs: A club providing indoor and/or outdoor athletic facilities, with or without social facilities. Typical uses include health clubs, country clubs, nonprofit recreation or community centers.*
- b. *Social Clubs: A club providing social or meeting facilities. Typical uses include private social clubs and fraternal organizations.*

The Form-Based Code utilizes use types and specific use definitions in City Code, Chapter 7. The FBZ-Central zone allows all Residential Uses, all Office Uses, Civic Uses, retail, service, restaurant and entertainment Commercial Uses, Lodging Uses and Communication Uses. Club uses fall under the Civic Use category in City Code, Chapter 7.

Staff believes that Studio A 64 does not meet the definition of a social club because it is a commercial facility, and under the umbrella definition of club a social club must be nonprofit or noncommercial.

**STAFF RECOMMENDATION:**

**Item No. : 4                   CPC AP 14-00002 – APPEAL OF NOTICE AND ORDER**

Deny the appeal and uphold the Notice and Order to cease the use of the property located at 332 East Colorado as a marijuana smoking facility.

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LAND USE REVIEW DIVISION  
PLANNING & DEVELOPMENT TEAM

APPLICATION FORM FOR APPEAL OF ADMINISTRATIVE DECISION

Appellant: Studio A64, LLC and KC Stark Telephone 719 930-9846 Fax N/A  
Address: 332 E Colorado Ave, Colo. Sprngs, CO Zip Code 80903 e-mail KC@studioa64.com

Premises Involved:

City Planning File Number (if applicable): \_\_\_\_\_  
Address: 332 East Colorado Ave, Colorado Springs, CO 80903  
Direction from nearest street intersection NW Corner of Colorado Ave & Wahsatch  
Tax Schedule No. 64181-19-015 Acreage N/A  
(The tax schedule number can be obtained from the El Paso County Tax Assessor located at 27 E. Vermijo Avenue on the 2<sup>nd</sup> Floor; phone: 520-6600 or at their web site <http://www.land.elpasoco.com>)  
Date of Receipt of Notice and Order or Date of Final Administrative Decision November 21 2013

Appeal of Decision Regarding:

Development/Landscape Plan \_\_\_\_\_ Subdivision Plat \_\_\_\_\_ Notice and Order X  
Hillside Site Plan \_\_\_\_\_ Administrative Relief \_\_\_\_\_ Non-Conforming Use \_\_\_\_\_  
Sexually Oriented Business \_\_\_\_\_ Temporary Use Permit \_\_\_\_\_ Relocation payments \_\_\_\_\_  
Similar Use Determination \_\_\_\_\_ Property Boundary Adjustment \_\_\_\_\_  
Preservation Area Boundary Adjustment \_\_\_\_\_ Building Permit to Unplatted Land \_\_\_\_\_  
Building Permit prior to Platting \_\_\_\_\_ Historic Preservation Board Determination \_\_\_\_\_  
Home Occupation Permit \_\_\_\_\_ Human Service Establishment \_\_\_\_\_  
Other: \_\_\_\_\_

OFFICIAL CITY PLANNING USE:

Fee Receipt # 20 25013 Date Application Accepted 12/2/13  
Completed Form \_\_\_\_\_ Intake Staff KO  
Appeal Statement (2) - Vicinity Map \_\_\_\_\_  
Authorization - Copy of Notice and Order (if applicable) \_\_\_\_\_  
Applicant informed of Poster Pickup Date? Yes - No \_\_\_\_\_ If Yes, Date of Poster Pickup \_\_\_\_\_  
Notification Options: Waive Notification \_\_\_\_\_ Adjacent \_\_\_\_\_ 500' \_\_\_\_\_ 1,000' \_\_\_\_\_  
Assigned to: \_\_\_\_\_ (Notice to be sent at time of CPC/CC Hearing only)

OWNER/APPLICANT AUTHORIZATION:

The signature(s) below certifies that I (we) is(are) the authorized appellant and that the information provided on this form is in all respects true and accurate to the best of my (our) knowledge and belief. I(we) familiarized myself(ourselves) with the rules, regulations and procedures with respect to preparing and filing this petition. I agree that if this request is approved, it is issued on the representations made in this submittal, and any approval or subsequently issued building permit(s) or other type of permit(s) may be revoked without notice if there is a breach of representations or conditions of approval.

KC Stark 2. Dec. 2013  
Signature of Appellant Date



**PRE-APPLICATION CONFERENCE:**

A pre-application conference with the planning staff is not mandatory for these applications. However, if you would like a pre-application meeting, please call 385-5905 and one will be scheduled for you.

**PROJECT TRACKING**

City Planning maintains an internet-based project tracking system (**LUIStrack**) that reflects all significant processing benchmarks associated with each development application. Go to <http://www.springsgov.com/luispublic/luispublic.asp> to search for your application in **LUIStrack** project tracking.

**PUBLIC NOTICE:**

The following public notice requirements will be imposed in conjunction with the review of these applications:

- Written notification to the adjoining property owners within 500 or 1,000 feet (at planner's discretion) of the property site will be required. City Planning will coordinate with the applicant on the required postage amount with the postage amount required to be paid when the applicant picks up the public notice poster.
- A public notice poster will be provided to the applicant a minimum of ten (10) days prior to the public hearing date. The proposed project site must be posted, by the applicant for a minimum of ten (10) consecutive days. The poster should be posted in a very visible location on the site, which can be viewed by passing motorists and/or pedestrians without trespassing. The applicant is required to complete the affidavit (a copy will be attached to the poster) attesting to the specific dates that the site was posted. The applicant must check the site occasionally to confirm that the property continues to be posted throughout the posting period. If the poster is no longer in good shape or has disappeared from the site, please contact the City Planning Office at 385-5905 for a replacement poster.

**FEES:**

An application review fee will be required to accompany these applications (checks payable to City of Colorado Springs). The fee schedule is as follows:

<b>Appeal of Administrative Decision to Planning Commission</b>	<b>\$176</b>
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If you are indigent, your fee may be waived; please ask the planning staff for an Indigent Fee Waiver form if you wish to apply for this fee waiver.

**APPLICATION REQUIREMENTS:**

This application should be submitted to the City of Colorado Springs-Planning Office at 30 South Nevada Avenue, Suite 301. All applications must be completed in full and accompanied by the following information:

**APPLICANT**

**PLANNER**

- |       |  |       |
|-------|--|-------|
| _____ | 1. Two (2) copies of an <b>APPEAL STATEMENT</b> identifying the following:   | _____ |
|       | • A clear <b>DESCRIPTION</b> of the appeal. The file number, ordinance and/or provision must be identified and a brief summary of facts.           | _____ |
|       | • A <b>JUSTIFICATION</b> based on the review criteria as set forth in Section 7.5.906 Justifying why the appeal should be approved.                | _____ |
| _____ | 2. A <b>VICINITY MAP</b> showing the parcel outlined with the adjacent streets within the neighborhood noted on a separate 8½" x 11" page.         | _____ |
| _____ | 3. A copy of the <b>NOTICE and ORDER</b> from the issuing agency (if applicable).  | _____ |
|       | 4. City Planning, City Planning Commission and/or the City Council may require other <b>ADDITIONAL INFORMATION</b> for this application as needed. |       |

**INFORMATION REGARDING APPEAL OF A NOTICE and ORDER:**

If you are appealing a Notice and Order issued by an official of the City of Colorado Springs, you are stating that one or both of the following are true:

1. You are not in violation of City Code and you believe the official is in error; and,
2. The abatement period is unreasonable and should be lengthened.

**INFORMATION REGARDING APPEAL OF A NOTICE AND ORDER, continued:**

A perfected appeal shall operate as a stay of the enforcement process unless the City Agency which issued the Notice and Order certifies in writing that the condition giving rise to the decision constitutes an imminent hazard to the public health, safety and welfare or the violation is of such a short term nature that by the time an appeal hearing is held, the violation will have been terminated or moved to another site. You should take no further action regarding the alleged violation during this stay of proceedings. Do not continue construction, add on or otherwise modify your property or buildings. If you do, it is at your own risk and a completed project will not guarantee automatic approval. In no event will a variance be granted upon appeal from any order, requirement, decision or determination. Any variance will require the filing of a separate application and payment of applicable fees.

**INFORMATION REGARDING AN APPEAL OF AN ADMINISTRATIVE DECISION:**

An individual aggrieved by a decision made by an administrative officer of the City may appeal such a decision by filing a written notice specifying briefly the grounds of the appeal within ten (10) days from the date of mailing, posting, or personal service of notice of the decision. City Planning shall place the appeal on the Planning Commission agenda at the next regularly scheduled meeting occurring at least twenty-one (21) days but not more than forty-eight (48) days thereafter. After the public hearing, the Planning Commission shall have the power to affirm, reverse, or modify such decisions.

In accordance with the Zoning Code, individuals filing appeals of an administrative decision made by City Planning staff must substantiate the following in written form:

1. Identify the explicit ordinance provisions which are in dispute.
2. Show that the administrative decision is incorrect because of one or more of the following:
  - a) It was against the express language of the Zoning Ordinance, or
  - b) It was against the express intent of the Zoning Ordinance, or
  - c) It is unreasonable, or
  - d) It is erroneous, or
  - e) It is clearly contrary to law.
3. Identify the benefits and adverse impacts created by the decision, describe the distribution of the benefits and impacts between the community and the appellant, and show that the burdens placed on the appellant outweigh the benefits accrued by the community.

**Investigation:** City Planning shall investigate the application and the facts bearing on the case to provide the information necessary for action consistent with the intent, purpose and requirements of the Zoning Code. City Planning shall report the findings to the Planning Commission.

**Appearance:** If making an appearance of record, the following persons, are hereby defined as parties and shall be entitled by themselves or through a representative to participate in a public hearing before the Planning Commission:

1. The applicant or the appellant;
2. Either the owner or lessee of property of agent for the owner or lessee which is directly affected by the matter which is before the reviewing authority;
3. Any person, organization, group or governmental entity who demonstrate to the Planning Commission that they have a significant interest in the subject matter of the hearing;
4. Any member of the City administration.

The "appearance of record" shall mean either:

1. An oral statement sufficiently identifying the person making the same or by his representative made at the hearing, or
2. A written statement giving the name and address of the person making the appearance signed by their representative and filed with the Planning Commission either prior to the beginning of the hearing or when permitted by the Planning Commission.

**FINAL DISPOSITION:**

In consideration of an appeal, the Planning Commission may affirm, reverse or modify an administrative decision under their jurisdiction in accordance with of the Zoning Code. After receiving testimony, the Planning Commission shall announce its decision at the conclusion of the public hearing. The decisions shall set forth the findings of fact together with conditions of approval considered necessary to mitigate impacts and protect the public health, safety and welfare. The Planning Commission may recommend conditions, which are necessary and reasonable in order to further, the purpose of the Zoning Code. Such conditions may include, but are not limited to, setbacks, from adjacent uses or property lines, landscaping, screening, placement and size of signs, placement and amount of parking and access restrictions.

**Appealing a Decision of the Planning Commission:**

The decision of the City Planning Commission to approve or deny an application may be appealed to the City Council within ten days from the date of the public hearing decision. The appeal must be in writing and should be submitted to the City Clerk at 30 South Nevada Avenue, Suite 101 along with a \$175.00 non-refundable fee. The appeal must include the file number of the item and specify briefly the grounds for the appeal. If a perfected appeal is filed within this ten-day period, the decision to approve or deny will be suspended until the appeal process is finalized.

Upon receipt of the subsequent appeal, the City Clerk shall schedule a public hearing before the City Council at the next meeting occurring at least thirteen (13) days thereafter. City Council has the power to refer any matter appealed back to Planning Commission for further consideration or affirm, reverse or modify the action of the Planning Commission. In all matters before the City Council relating to the actions of the Planning Commission, the entire file from City Planning pertaining to such matters shall be made a part of the record of the City Council. The file shall include but not be limited to Planning Commission minutes, maps, drawings, departmental reports and application. If the appellant wants to submit additional exhibits to Council to include in the record, the original of such exhibit and twelve (12) copies must be submitted to the City Clerk. If the exhibits are electronic, a disk must be given to the City Clerk. All exhibits are kept for a maximum of ten (10) working days after the time of appeal has expired.

At the public hearing, City Planning staff will summarize their recommendation and the Planning Commission's recommendation for the record. The appellant may present an argument in support of their position. An individual who has not appealed may present an argument in support of the appellant's position. A short rebuttal by the applicant shall be limited to issues raised during the preceding argument. Final comments from the applicant and all other parties are allowed only by permission of the Mayor. Final comments from City staff and staff's recommendation shall conclude the hearing. All questions will be directed through the Mayor who will then direct the question to the appropriate person. Council may then make a decision on the matter or delay the decision. If final action is not taken at the public hearing, the Mayor will advise the audience when the matter will be considered.

**Appealing a Decision of the City Council:**

Once City Council has made a final decision to grant or deny an appeal, the administrative process shall be deemed to be exhausted. Any subsequent appeal must be made to the court.

**DO NOT REMOVE THIS PAGE – IT MUST BE KEPT WITH THE ORIGINAL APPLICATION FORM!**

*The City of Colorado Springs-Planning Group is committed to ensuring that all of our services are accessible to those with disabilities. We encourage participation by all individuals. If you have a disability, advance notification of any special needs will help us better serve you. Please call City Planning at 385-5905 to request any special service that you may require. A one (1) week advance notice to allow us to accommodate your request is appreciated.*



POLICE DEPARTMENT  
Code Enforcement  
PO Box 2169 MC 1525  
Colorado Springs, CO 80901  
(719) 444-7891



November 21, 2013

BRADY KENNETH  
30 BERTHE CIR  
COLORADO SPRINGS, CO 80906

### NOTICE AND ORDER

To the owner or other person with an Interest in the property at 332 E COLORADO AVE , Tax Schedule Number 6418119015, pursuant to the code of the City of Colorado Springs, 2001, as amended.

YOU ARE HEREBY NOTIFIED that the following violation(s) of the City Code existed at the above-cited premises.

Date(s) Inspected	Violations	Comments	Reinspection Date(s)
11/19/2013	IU-C - Illegal Use in a Commercial Zone Chapter 7 Article 3 Part 203	You are hereby notified that the Colorado Springs Police Department – Code Enforcement Unit and Zoning Administration have probable cause to believe that the following violation(s) of the City Zoning Code exists at the above-cited premises. Specifically: Illegal use within the Form-Based Zoning District (FBZ); a marijuana smoking establishment is not an identified use within the City of Colorado Springs Zoning Regulation nor is the use recognized as a permitted or a conditional use within the Zoning District. To bring the property into compliance the illegal use must cease and desist by the next re-inspection deadline. Failure to take proper action according to this notice may result in a summons being Issued requiring a mandatory court appearance or other zoning enforcement action being taken.	12/2/2013

Failure to abate, remove or otherwise correct the above violation(s) may result in legal action to abate the conditions and/or assessment of costs to abate or otherwise correct said condition(s) in the form of a lien against your property pursuant to Chapter 3, Article 4; Chapter 4, Article 204B; Chapter 6, Article 5; Chapter 7, Article 5, Part 1009; Chapter 9, Articles 3,6, and/or 7 of the City Code.

YOU ARE HEREBY ORDERED to do one of the following:

1. Remove, correct or otherwise abate the above violations prior to reinspection date(s) noted in the Violation Table.
2. Appeal this Notice and Order. (See General Information Sheet attached).

Our office is located at the Police Operations Center 705 S. Nevada Avenue, Colorado Springs, CO 80903

Please refer to the attached General Information Sheet for additional information. Failure to Comply Fees in the amount of One Hundred Dollars (\$100.00) and Repeat/Chronic Repeat Offender Fees may be assessed.

CC Post       CC Occupant       CC Owner

Tom Wasinger  
CODE ENFORCEMENT OFFICER

Case Number 1311223

*wasingthe@cicodospgs.co.us*

**APPEAL STATEMENT  
FOR  
332 WEST COLORADO AVE**

**Description of Appeal:**

This is an appeal from a Notice and Order dated November 21, 2013 regarding the premises located at 332 East Colorado Avenue, Colorado Springs, CO 80903. The Notice and Order alleges an “illegal use within the Form-Based Zoning District (FBZ); a marijuana smoking establishment is not an identified use within the City of Colorado Springs Zone Regulation nor is the use recognized as a permitted or a conditional use with the Zoning District.” The violation alleged is stated as IU-C – Illegal Use in a Commercial Zone, Chapter 7, Article 3, Part 203.

**Statement of Facts:**

The Appellant is the Tenant in the building located on the top floor of 332 East Colorado Avenue, Colorado Springs, Colorado. The Appellant is a Colorado limited liability company that operates a private club that, among other things, allows its private members, all of which are over the age of 21 to ingest marijuana in accordance with the provisions of Amendment 64 to the Colorado Constitution. The private club has been operational since February 2013. The use that is being made of the premises is legal under both Colorado law and the Zoning Ordinance.

**Justification for Appeal:**

The Criteria for Review set forth in City Code Section 7.5.906 provide guidance concerning why this appeal should be granted in favor of the Appellant. Those criteria state in pertinent part:

“b. Show that the administrative decision is incorrect because of one or more of the following:

- (1) It was against the express language of this zoning ordinance, or
- (2) It was against the express intent of this zoning ordinance, or
- (3) It is unreasonable, or
- (4) It is erroneous, or
- (5) It is clearly contrary to law.”

The base assumption behind the Notice and Order is the erroneous presumption that just because a particular use is not expressly mentioned in a Zoning Code, that is it “illegal.” That notion has been rejected by Colorado case law. It is simply not possible for any Zoning Code to outline any and all possible uses. Due to changes in law, social norms, and technological progress, new uses that had previously never existed are created every day. Just because a use is not expressly mentioned in a zoning code does not make it “illegal.” It may be a non-conforming use, but is it not *illegal*. Accordingly, the Notice and Order is clearly contrary to law.

If the City Council desires to make the use illegal, it would have to pass an ordinance, amending the Zoning Code, specifically making it illegal. There is no such ordinance in place.

If such an ordinance were passed, this particular use would be an existing non-conforming use and would be allowed to continue to operate under Colorado law. In short, it would be grandfathered and could not be closed.

Further, as a private club, Studio A64, LLC is entitled to operate in the FBZ in which it is located. The Notice and Order ignores the true use, a private club. Accordingly, the Notice and Order it is expressly against both the intent, and the express language of the Zoning Ordinance.

**Representation by Counsel:**

The Appellant has retained the services of Charles T. Houghton, Esq., attorney at law, to assist it in these proceedings. Mr. Houghton can be reached via email, cthlaw@msn.com, or by phone, 719-351-4261.

**Conclusion:**

The use being made of the subject premises cannot be terminated by the City. The use is not illegal, the private club is allowed on the existing City of Colorado Springs Zoning Ordinance. Further, the failure to have a provision concerning a certain use does not render that use illegal and subject to termination. Rather, it makes the use an existing non-conforming use that cannot be terminated.

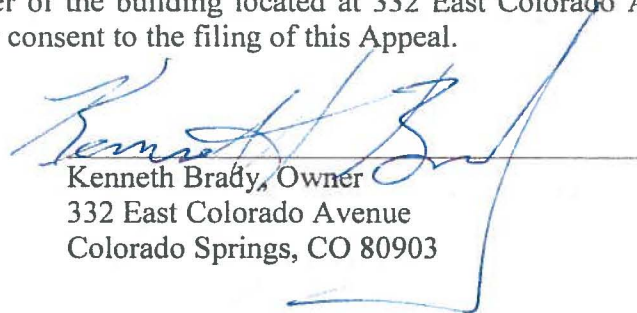
Dated: December 2, 1013

STUDIO A64, LLC

  
K.C. Stark, Owner and Manager

**Consent of Owner:**

I, Kenneth Brady, am the owner of the building located at 332 East Colorado Avenue, Colorado Springs, Colorado and hereby consent to the filing of this Appeal.

  
Kenneth Brady, Owner  
332 East Colorado Avenue  
Colorado Springs, CO 80903

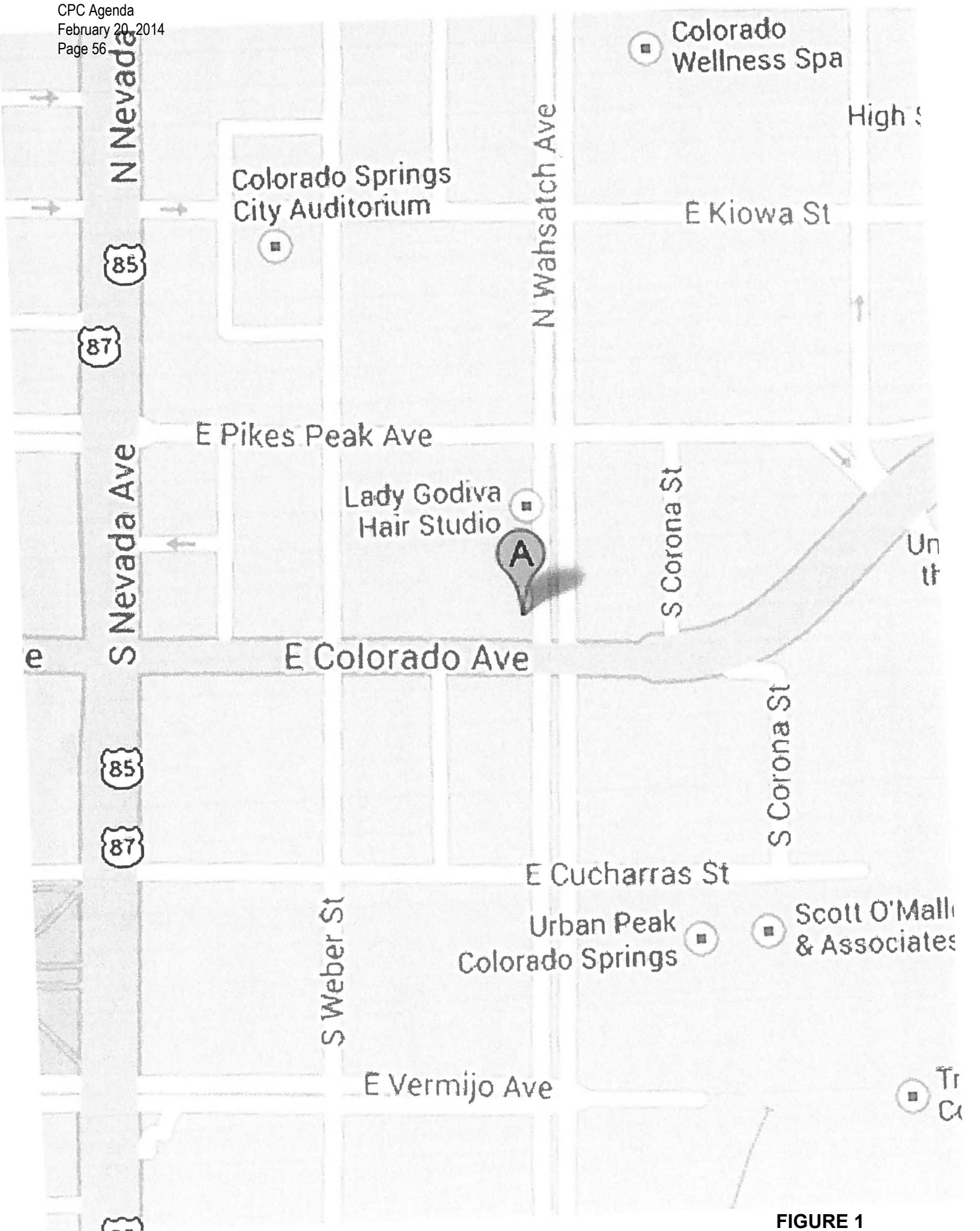


FIGURE 1