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August 22, 2023

Peter Wysocki, AICP
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Delivery via electronic mail at Peter.Wysocki@coloradosprings.gov

**RE: Demand to Abate Violations or Stop Work on the Wilson Tank
Lawrence Starr, FJGG File No. 36438-1**

Dear Mr. Wysocki:

This law firm represents Lawrence Starr, owner of 6315 Wilson Road, Colorado Springs, CO 80919. We were engaged by Mr. Starr in relation to the construction of the new Wilson water tank project in the Mountain Shadows community (the "Project"). As you probably know from previous correspondence from Mr. Starr as well as the significant level of media coverage that the Project is garnering, Mr. Starr owns and resides in the residence which is directly adjacent to and most impacted by the Project.

With this letter, Mr. Starr hereby demands that the City require abatement of the Project's violations or issue a Stop Work Order requiring the cessation of construction on the Project, pending a hearing to determine if the Project can be permitted. The Colorado Springs Unified Development Code (the "Code" or the "UDC") provides multiple legal avenues which give the City the power to stop work on a project. We would urge the City to avail itself of one or more of these and force the stoppage of the Project now, before more public money is put in jeopardy.

It has been acknowledged by the City that the new Wilson water tank is being constructed to plans which show a maximum height of sixty (60) feet. This is despite that fact that the elevation drawings submitted with the approved Development Plan for the Project (City docket no. AR DP 21-00526) show the "Top of Tank Dome" at forty (40) feet.

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It is hard to comprehend how the project proponent, Colorado Springs Utilities (“CSU”), could have submitted construction drawings so far out of whack with its approval. The approval letter for the approved Development Plan made the Project subject to conditions which included the following:

1. *Development must conform completely to the approved development plan.*

3. *The building architecture must substantially comply with the elevation drawings.*

Replacing a 40-foot dome with a 60-foot dome is not even close to substantial compliance, let alone complete conformity.

What makes the nature of those construction drawings even more surprising is that they were submitted on behalf of CSU by Kimley-Horn, which according to its own website is “one of the nation’s premier engineering, planning, and design consultants.” Consultants of that profile ought to know that it is antithetical to American planning practice and common sensibility to submit construction drawings which would result in a structure of a completely different scale than what was approved. Moreover, anyone reviewing the Code would readily and easily conclude that increasing the height of an approved structure by fifty (50%) percent over what was approved requires a Major Modification to an approved Development Plan.

After the construction drawings were submitted to Pikes Peak Regional Building Department (“Building”), Building referred them to the City. It should be expected that the City reviewer in the Planning Department is aware of Section 7.5.524 of the UDC (Administrative Adjustment), which provides that “*the Manager has the authority to authorize adjustments up to fifteen (15) percent from any dimensional standard.*” It follows that the reviewer would also be aware that any increase above 15% (in this case, a 46-foot or taller structure), would require a Major Modification and a public hearing in front of the Planning Commission. That the City approved construction drawings proposing a 60-foot dome and a 50% increase in height – with no process at all – is hard to comprehend.

If the City were to have flagged the drawings as being wildly out of compliance with the approved Development Plan, as it should have done, CSU would have had to submit a Major Modification application to justify the Project. And the Planning Commission would have had to review that application against the following criteria found in UDC 7.5.516.D:

a. *Complies with the provisions of this UDC and all applicable City regulations;*
here, the Planning Commission should have found that the application FAILS – the maximum height in the zoning district is 45 feet

b. *Is consistent with any conditions in the approval or permit proposed to be modified, unless the decision-making body that imposed that condition modifies that condition;*

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c. *Does not create more adverse impacts on surrounding properties than the development approval or permit proposed to be modified; here, the Planning Commission should have found that the application likely FAILS – though this is a subjective criterion and*

d. *Is consistent with the Colorado Springs Comprehensive Plan, other plans adopted by City Council, and the intent of the zone district in which the property is located. here, the Planning Commission should have found that the application FAILS – the proposed structure violates the provisions and height limit in the Hillside Overlay*

In summary, the City's utility and its nationally-renowned planning firm inexplicably and unconscionably submitted a set of construction drawings which were substantially out of compliance with their approved Development Plan and its conditions of approval, and therefore should never have been submitted. Then, the City inexplicably, unconscionably, and unlawfully stamped the drawings, allowing initiation of construction of a new water tank that violates the Code and the Comprehensive Plan. If the City had performed appropriate review, the submittal would have been summarily denied. And now, while construction of the Project proceeds apace, the City plans to delay review of the ongoing violation and then hold a hearing to review a Major Modification which, if approved, would allow this unlawfully-constructed tank to remain.

Imagine if a private developer (and not a public utility) had been approved to construct a 6-story, 60-foot-tall apartment block (instead of a water tank). And imagine if, less than a year later, the developer submitted construction drawings to Building for a 9-story, 90-foot-tall building, and somehow, the City on referral review missed the 50% increase in building height and stamped off on the plans. Upon realizing its mistake, would the City let the construction continue and offer the developer a Major Modification hearing, or would the City demand that the developer build the building which was approved?

If Colorado Springs wants the trust of its citizens, it needs to put a stop to the work on the Project before any more time elapses and any more construction is completed which violates the approved Development Plan. At this point, CSU is working late hours and weekends to bring the Project closer to completion and, it could be surmised, make it harder for the City to justify requiring any demolition to bring the tank into compliance with its approval. The City extending the public comment period by two weeks only exacerbates this situation. No additional public comment is needed to conclude that the appropriate action at this point is to stop the work.

As mentioned above, the Code provides many tools to stop the work. First, the City can establish that the Project is in violation of the Code. The UDC requires continuing compliance with an approved Development Plan (UDC 7.5.515.F.4). Development which is out of compliance with the plan subjects the Project to enforcement under UDC 7.5.902 (Applicability).

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Moreover, UDC 7.5.903 (Violations) speaks directly to the situation at hand, specifically making it a Code violation to violate conditions of approval and providing that it is a Code violation to obtain “*an application based on the submission of false or misleading application materials.*” Here, as stated above, the Project violates conditions of its approved Development Plan, and the construction drawings were submitted falsely without any request for Major Modification despite impermissibly modifying the height of the tank by 50%.

So what is the remedy? Code Section 7.5.904 (Enforcement) provides that the City can administratively require work to be stopped via issuance by the Manager of an Emergency Abatement Order. This remedy applies to the extent that the Manager deems the ongoing construction of an illegal, unapproved water tank to be an emergency. We believe it is an emergency for the reasons stated above.

There is also a provision specifically authorizing the City to issue a stop work order in the Hillside Overlay. This remedy applies where the Manager finds that certain criteria are met. In this case, we believe that the criteria, which include avoiding irreparable harm to the hillside area, harm to the public, and a balancing factor between the public interest and the status quo, can be met, and a stop work order specific to Hillside Overlay areas can issue.

Finally, under UDC 7.5.905 (Remedies), there are Code provisions which also apply to the instant situation. Subsection C allows the Manager to “*enter into an agreement with a violator whereby the violator agrees to abate the violation within a certain time based upon certain conditions within the agreement.*” Subsection D allows the Manager to “*issue a notice and order ordering the cessation of an illegal condition within a specified period of time based upon the nature of the violation.*” Subsection E (Suspension or Revocation of Permit) allows the Manager to “*issue a notice to show cause*” and set a Planning Commission “*hearing on the allegations contained in the notice to show cause.*” Subsection F allows the Manager to “*pursue direct abatement for removal of any UDC violation.*” Subsection G provides for the City to “*initiate a civil action in the District Court for injunctive relief to abate violations of this UDC.*” And finally, the City has the power of Summary Abatement under Subsection J “*to authorize the removal of an item from private property that may create an imminent hazard to the public health, safety, and welfare.*”

The City has all of the above remedies at its disposal, as well as the previously cited enforcement powers. To allow the construction to continue in violation of the Project’s approved Development Plan – in spite of the known violation and all of the City’s powers to stop it – is to add acquiescence on top of the failure to notice and catch the violation in the first place.

Lawrence Starr is not one who can be, or ought to be, characterized as a “NIMBY neighbor” who wants to stand in the way of any change that he doesn’t like. In fact, he was well

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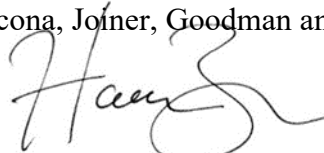
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aware of the need for the new tank. He had accepted the unfortunate (for him) reality that the new tank would necessarily be built next to the old one – basically in his backyard – to allow for the seamless decommissioning of the old tank when the new one was to be brought on-line. He understands that having a reliable source of water storage and pressure for his neighborhood is a non-negotiable need. With all of that in mind, he did not contest the approval of the Development Plan. What he cannot accept – and what the City, frankly, should also not accept – is a new tank which violates the conditions of its approved Development Plan, violates the Code and the Comprehensive Plan, was improperly submitted without any amendment being requested, and was illegally approved without any of the required process for amendment.

Therefore, given the City’s broad powers to require stoppage of illegal work and abatement of an ongoing violation, Mr. Starr hereby demands that the City exercise one or more of its powers to either require abatement of the violation or stop the work and promptly hold a public hearing to approve or deny the Project.

Please share this communication with City Attorney Wynetta Massey. Given the immediacy of the situation, Mr. Starr is expecting the City to provide a prompt response.

Sincerely yours,
Frascona, Joiner, Goodman and Greenstein, P.C.

A handwritten signature in black ink, appearing to read "Harmon", with a stylized flourish extending to the right.

By: Harmon Zuckerman, Esq.

cc: Lawrence Starr
FJGG File No. 36438-1