

January 27, 2014

**Appeal from the Findings of the City Planning Commission to the
City Council of Colorado Springs
Re: CPC CU 13-00077
Whistling Pines Gun Club West, 4750 Peace Palace Point**

The Findings by the Planning Commission did not conform to City Ord. Section 7.5.704 and were erroneous, unreasonable, contrary to law and not supported by the available evidence in that:

- 1) The qualities of the surrounding neighborhood will be substantially injured, and
- 2) The conditional use is not consistent with the intent and purpose of the zoning ordinance and
- 3) The conditional use is not in keeping with the Comprehensive Plan of the City.

Our appeal of the Planning Commission's decision to recommend approval of Conditional Use Permit (CUP) as described by CPC CU 13-00077 focuses on five major areas:

- I. Insufficient Official Public Notice contrary to the letter and spirit of City Ord. 7.5.102
- II. The approved permit is not "in keeping with the Comprehensive Plan of the City" in that it completely lacks any documentation or analyses of "Erosion control measures (that) should be established and followed prior to any site development." (Per State of Colorado Geological Survey)
- III. The conditional use is not in keeping with the Comprehensive Plan of the City and is contrary to Section 7.3.101 (Residential Districts).
- IV. Surrounding Neighborhood. Matters bearing on "substantial injury" to the surrounding neighborhood and the health, safety and general welfare
- V. Adverse Impact by the Planning Commission Decision

A detailed description which supports our grave apprehensions concerning this ill-conceived development is given in the narrative which follows.

CITY CLERK'S OFFICE
2014 JAN 27 10:00 AM

Grounds in support of appeal:

I

Insufficient Official Public Notice contrary to the letter and spirit of City Ord. 7.5.102.

- 1) The Planning Department failed to seek and encourage citizen input regarding the CUP proposal. In early August 2013 the Planning Department sent formal notice (by postcard) to only 13 owners within 500 ft of the subject property. Only two postcard mailings were sent to residential owners. No notification was sent to the Pinecliff Home Owner Association President, Bruce Hutchinson, who only learned of this matter from one other Pinecliff resident. By letter received from the non-mandatory Pinecliff HOA dated August 19, 2013, the Planning Department was formally advised that:

"... as many as 30 Pinecliff homes along Cliff Point Circle may be adversely affected by this facility once it opens for business" and "My biggest concern is that these houses may be subject to continuous popping noise from the gun fire throughout most of the day and especially during the summer months when residents are enjoying outdoor activities."

No follow-up formal notifications were sent to potentially affected residents.

- 2) Such minimal notification went unexplained at the December 3, 2013 meeting other than it was "standard procedure" although 1000 ft notifications have been used by the Planning Department for other projects. The additional formal notification would have cost the city less than \$14 and as a result many Pinecliff residents may remain unaware of the CUP application and its impact on their properties. IAW Section 7.5.902 3b, the additional 28 residential properties should have been considered within the "scope of the potential external impacts of the proposed project," The unexplained failure to use a 1000 feet notification for a project involving noise from gunfire could affect dozens (not two) of homeowners' property and their quality of life. The formal notice is, under the circumstances, an abuse of discretion and should be re-initiated.
- 3) The appellants and other un-notified residents have been prejudiced by lack of sufficient notice. Dozens of other property owners could potentially participate in the planning and zoning process and may be unaware. Their participation would be helpful to demonstrate the strength of community opposition, to provide greater in depth points of appeal, and for deferring financial costs associated with and opposing the approved permit.

II

The approved permit is not “in keeping with the Comprehensive Plan of the City” in that it completely lacks any documentation or analyses of “Erosion control measures (that) should be established and followed prior to any site development.” (Per State of Colorado Geological Survey)

The State of Colorado Geological Survey, by letter dated June 11, 2007, recognized the hazards of “Large boulders in the lot area, and also on the natural slopes north of the site.” It also noted, **with caution**, the following:

- “As observed, the steeper slopes are prone to accelerated erosion. Erosion control measures should be established prior to any site development.” (and)
- Six “(S)uggestions to the City to incorporate into the development plan prior to approval” (emphasis NOT added).
 - #1 Rockfall mitigation **beyond the lot boundary** may be prudent.
 - #5 Establish an erosion control plan prior to any site development to control erosion and prevent sediment transport.
 - #4 Site grading should be used to repair the eroded channels in the steep cut slopes north of the site, direct water away from the structures, and minimize water infiltration to the soils (which may affect collapsible soils and shallow groundwater). Runoff water should not be allowed to pond. Landscapng should use minimal water in the vicinity of foundations.
- Although specifically addressed as a concern by the appellants (email December 23, 2013), no response has been provided or is contained in the Planning Department’s file. The “Geologic Hazard Study” mentioned in the Planning Department’s file does not specifically address “erosion” planning or erosion control measures. The word “erosion” is not so much as mentioned as an issue.
- By letter dated December 10, 2013, Terracon Consultants, Inc. (the historical geo-technical consultants for this parcel which has provided detailed reports including Rockfall Mitigation), stated:

We recommend a qualified Civil Engineer address Suggestions 4 and 5.
- The applicant’s file is completely devoid of any civil engineer reports that address:
 - Any erosion “rockfall mitigation beyond the lot boundary,”

- An erosion control plan or any expert technical analyses thereof, and
 - Site grading or analyses to report “to repair eroded channels in the steep cut slopes north of the site.”
- Grading and Erosion Control Plans are required for all but minor land disturbing activities IAW 7.7.1504 (Grading Ordinance) and 7.3.504 (Hillside Ordinance). In this context the almost sole geologic hazard commentary on “Rockfall” is too narrow in scope and fails to address broader scope of an erosion control plan. Stated simply, a plan that provides only for a 10 foot wide rock catchment ditch is insufficient.
 - Also of significant note, the “Preliminary Grading Plan, July 2013” map provided by Hammers Construction fails to disclose noteworthy geologic features including the existence of a “7-FOOT DIAMETER BOULDER” in the lot area and a significant erosive and deep drainage gully in the upper right section adjacent to the proposed site. Both of these features were clearly noted and disclosed in the 2007 Terracon diagram dated January 28, 2008. These features should be considered and professionally addressed for erosion control measures and planning.
 - The State of Colorado Geologic Survey provided significant written information and guidance to the Colorado Springs Planning and Community Development by rendering its professional opinion authored by Engineering Geologist (T.C. Wait, dated June 11, 2007). It would be prudent to submit the current development plans to that office, again, for review and comment.

III

The conditional use is not in keeping with the Comprehensive Plan of the City and is contrary to Section 7.3.101 (Residential Districts).

- 1) Section 7.3.101 A. states “The purposes of this part are to:
 3. Achieve a compatible land use relationship with the surrounding area which **will protect residential neighborhoods from excessive noise, illumination, smoke and odor.**”
- 2) A large parcel of land owned by Geo-Tech and Mr. G.W. Flanders, President, is merely 80 feet north of the proposed gun club and runs the length of the boundary of the Whistling Pines Gun Club parcel. This parcel is zoned **Residential, R1-6** (Exhibit 1 map dated 12/11/2013). R 1-6 zoning permits future development of single family, two family, and multi-family residential development in those areas. According to Section 7.3.104 A. Minimum lot areas could vary in size from 4000-9000 square

feet (Single-family detached R-1 through R-5) or 6000-7000 square feet or Duplex development (R-2 through R-5).

3) Non-Conformance with City Comprehensive Plan. Approval is contrary to the following:

--Policy LU 4: Encourage Infill and Redevelopment ... "If properly designed, these projects can serve an important role in achieving quality mixed-use neighborhoods."

--Strategy LU 801f: Plan and Locate Mixed Uses to Serve Industrial Areas: An indoor shooting range is contrary to "serve the **needs of employees in industrial areas**, including commercial, service, and restaurant uses." On the contrary, a shooting range is incompatible and offers nothing to serve the "needs of employees in industrial areas." A shooting range adjacent to Diversified Machine Systems (DMS) will actually cause intensified traffic congestion problems, additional stress over a small access bridge, and discomfort, alarm, and apprehension among DMS employees caused by repetitive impulse annoyance from firearm discharges. The CEO of DMS, Patrick Bollar, provided evidence of these concerns that was not sufficiently considered.

--Strategy: LU 302c: Promote Compatibility between Land Uses of Differing Intensities. The CUP does not comply with and inhibits the comprehensive plan as it does not promote: "Design and develop mixed land uses to ensure compatibility and **appropriate transitions between land uses** that vary in intensity and scale."

--Strategy: NE 202a: **Natural Ecosystems Protection**. Protect natural ecosystems and habitats for native plant and animal species on public and private lands through land use plans, development plans, best management practices and ordinances. It is believed that an animal migration pattern/route crosses this area, or is nearby, which **has not been examined or discussed in the Planning Department's Analysis of Review** (page 60, CPC file).

--Strategy: NE 202d: Natural Ecosystem and Drainage Way Restoration: "require protection and mitigation plans for private lands during the development review process." Again, not considered or discussed in the Planning Department's and, ergo, not in conformance with the City's Comprehensive Plan (7.5.704 (3)).

--Policy: NE 303: Avoid or Mitigate Effects of Geologic Hazards. Undertake efforts through the development review process to

substantially reduce adverse consequences of development by recognizing and appropriately addressing geologic processes. Discourage development in potentially hazardous areas associated with hillside and geologic development constraints, **including steep slopes, erosion**, unstable soil, subsidence, coal hazards or similar development constraints

- 4) Impact on Noise Abatement Standards with R1-R5 Zoning.
Because the "Residential Zoning" issue was an unrealized (discovered) matter during the course of the Planning Commission's hearing, it was very apparent that the seriousness of Residential R1-6 zoning was not fully considered. A shooting range located this close to Residential zoning would clearly endanger the quality of life for future residents and negatively impact residential building and infill development.

- 5) Improper consideration noise level requirements of residential area in proximity of proposed gun club.

The Planning Commission was advised of the existence of residential property located approximately 80 feet north of the proposed gun club that is zoned R1-6. For reasons that are unclear or erroneous, the Planning Commission determined that the noise level requirements for this property would be governed by those applying to a Light Industrial Zone. There should be no confusion here --- residential noise levels (45 dBA) as specified in Section 9.8.104 of the Colorado Springs Noise Ordinance apply to this residential property.

- 6) Noise projection levels by the Applicant's sound expert did not consider compliance with 45 dBA limits within close proximity to the residential zoned areas and, accordingly, should not be considered as definitive guidance or a sufficient study on complying with the City Noise Ordinance.
- 7) The Planning Department's own report under "*Noise*" in Analysis of Review Criteria (CPC file page 58), clearly notes, "The sound of gunfire has the potential to greatly affect quality of life for surrounding property owners and residents."

IV

Surrounding Neighborhood. Matters bearing on "substantial injury" to the surrounding neighborhood and the health, safety and general welfare:

1) The Commission erred by failing to determine that the 45 dBA limit would equally apply to the R1-6 (Geo-Tech) property within 80 feet of the proposed shooting range.

2) The Commission gave insufficient consideration to completely, public, un-denied, and un-rebutted admissions by the applicant that clearly reveal the applicant's expectation that the shooting range's operation will diminish and injure the reasonable use, value and enjoyment of adjacent residential properties by depriving the residential homeowners of the use of their outdoor decks. Residents without air conditioning will be required to close their windows.

- Of particular note was PowerPoint slide #16 provided by Mr. John Wei that noted 9 out of 17 (i.e. $9/17 = 0.529 \times 100 = 52.9\%$) Pinecliff homes in the area do not have central air conditioning, and
- Out of the seventeen (17) homes in our neighborhood watch program ten (10) homes have one or more household members who are retired. As such, the percentage of **retirees per household constitutes approximately 59%** (i.e., $10/17 = 0.588 \times 100 = 58.8\%$). (Page 108 of the CPC file).

3) The Commission gave insufficient consideration to written and oral misrepresentations by the applicant that they tested, for sound projection purposes, "the loudest weapons likely to be used in the range."

4) The Commission gave insufficient consideration to prior inconsistent and misleading statements that the applicant clearly intended to permit use of a .50 Caliber Browning Machine Gun ("50 Cal BMG") and at the PC hearing altered his position that a .50 Caliber Machine Gun would not be used, or if used, they would be used with a muzzle or as a .50 Caliber BMG rifle. As pointed out to the Planning Commission, in a string of emails Hammers Construction specifically requested Wave Engineering: **"If your (sic) going to eliminate the .50 cal. That would help our case so let me know."** (page 248 CPC file). One inference from this statement is that the .50 cal. test results would adversely impact the sound test projections. Consequently, no .50 caliber weapons were tested for sound projections. This presents an appearance of manipulating sound test results to meet the 45 decibel level limit.

5) The Commission gave insufficient consideration to the applicant's statement to permit use of fully automatic machine guns at the proposed range (December 3, 1013 public meeting).

6) The Commission gave insufficient consideration to many obvious large rifles and pistols that were popular and likely to be used on the range that

were never included in sound projection tests but should have been. The test weapons sound database for sound projections were “**cherry picked**” and not representative of the “**loudest weapons likely to be used.**”

7) Insufficient consideration was given by the Planning Commission to evidence that many potentially affected homes lack air conditioning and would be foreseeably and adversely affected and consequently devalued by repetitive impulse noise sounds.

8) The Planning Commission’s conditional permit for the applicant to construct the building, at nearly a \$3 million expenditure, and then permit the applicant’s self-imposed, self-hired, self-designed, self-selected expert paid for by the contractor (*without any specific number or types of weapons to be used*)---to determine if 45 dBA audio limits are exceeded is totally unreasonable and improper delegation of the Planning Department’s independent responsibility and would, *ab initio*, be rendered completely untrustworthy and unreliable. Under these circumstances the applicant could fire a couple .22 caliber rifles individually and would technically completely pass the post-building “conditional audio test” required by the Commission. The lack of imposing controlled, realistic and specific measurement of large weapons firing on several lanes and simultaneous use of large caliber weapons on multiple rifle and pistol ranges for audio testing renders the Planning Commission’s un-exact and unclear “condition” meaningless and unreasonable. Further, the undefined, uncontrolled, and nonspecific *a posteriori* building audio test casts great doubt on the integrity and public trust of the Planning Commission and Planning Department’s development approval process.

9) The Planning Commission’s acceptance that the applicant’s verbal promise to not permit a .50 Caliber Browning Machine Gun (BMG) was rebutted during the hearing by the applicant’s construction manager’s statement to permit a “muzzled” .50 Caliber rifle.

10) The applicant did not make any statement to disallow use of other loud untested rifles including .375 H&H, 416 Rigby, 460 Weatherby, and machine guns used by its present members (as admitted by the applicant at the public meeting on December 3, 2013).

11) The sound tests performed by the applicant’s acoustical engineer were rendered unreliable due to a lack of any calculation of a mathematical scientific “margin of error” in the sound test projections and are, hence, unreliable. No independent verification and validation of Wave Engineering software was provided for the use of gunshot noise prediction software.

12) A second sound test at two other gun ranges was completely unscientific, uncontrolled, and unreliable testing in that it lacks any specifics as to weapons used ("a variety") and what specific dba readings were made in response to unspecified guns and distances.

13) Distance for dba measurement locations shifted during the course of the Planning Commission meeting. Accordingly the previous sound study locations by Wave Engineering are unreliable, irrelevant and erroneous. Although hampered by the lack of official meeting minutes being published by this filing date, the following is believed to have occurred:

- Commissioner Shonkwiler asked where the 45 decibel test should be measured. There were major disconnects with the City Planner as well as the applicant, their sound engineer and Hammers Construction.
 - The first and main Wave sound study measured the 45 decibel at the upper ridge of homes on Cliff Point Circle East. Apparently, Wave (and others) did not realize that the residential property owners' lots (e.g., Morrison's and others) extend 100 feet over the ridge and towards the proposed shooting range. Accordingly, the 45 decibel measurements should have been properly located elsewhere (for sound study purposes) at the start of the studied lots (which can extend 100 feet or more depending on the residential lot in question---not at the top of the ridge. This shift casts significant doubt on the relevance of the Wave sound **measurements and projections that were taken in the wrong locations on the ridge** (see page 92 in the CPC packet). The correct measuring location is approximately 100 feet closer to the shooting range. The Commission's consideration of the sound study is prejudicial error.
 - The Planning Department did not catch this major error nor did the applicant's sound engineer (i.e. Wave Engineering). Therefore, the sound study results which were at the 45 decibel levels (i.e. which is already at the maximum allowable level) are not accurate and therefore invalid.
- Clarification for the Planning Commission was necessary since the City Planner, the applicant, and his representatives did not know where the measurements of decibel levels were required to be measured.

14) The conclusions of the first sound study render it nearly irrelevant for the Planning Commission's consideration. Specifically, the sound engineer admitted, **"Gunshots may be audible because distinct sounds can be discerned by the ear even below ambient sound levels. However, they will likely be difficult to measure because they will be below**

ambient levels.” (CPC pages 95-96) This means, even at the 45 decibel level allowed by the Colorado Springs Noise Ordinance at the edge of the property, the residents above will have to retreat to the interior of their homes and close the doors and windows. Reliance on this admission is recognition of potential harm to the neighborhood that brings a commensurate depreciation of property values.

- 15) Oversight of HILLSIDE OVERLAY: (Does not comply with the review criteria in City Code Section 7.4.504: HS Area Overlay, para. A.3.g objective **"To preserve wildlife habitat and wetland areas which provide wildlife migration corridors,"** and "The characteristics of hillside areas mean that special care and consideration are necessary in the design of these sites." This was not fully and completely examined and is an error. It does not conform to or is not in keeping with the Comprehensive Plan of the City (Ord. Section 7.5.704 of the Zoning Code).
- Because of the Hillside Overlay designation, the wildlife corridors in this area should have been studied but were not.
 - Pinecliff is bordered on the north by the 560-acre Ute Valley regional park, and because of the nearby Douglas Creek and it has many wildlife corridors in the neighborhood that may potentially be affected. Having been exposed as prey to gunfire in the past would also certainly change the wildlife migration patterns.
- 16) Wavering and evolving plans by the applicant have made objections difficult.
- a. The applicant has caused repeated incidents of confusion for the public in that the original building design purportedly demonstrated the shooting lanes were "buried," and underground. That plan was inexplicably discarded and announced at the December 3, 2013, meeting that the lanes were now "above ground." During the Planning Commission meeting it was disclosed that the new "above ground" plan met a 100 year flood plan review.
 - b. The use of a .50 Caliber "BMG" was repeatedly addressed in the December 3d meeting and not conditioned in any respect (e.g., a rifle). Recently, the applicant has disavowed permitting this caliber weapon although (per Planning Commission hearing) the construction manager believes a "muzzled .50 caliber" is permissible.
 - c. The non-specific audio test to be administered **after** the building is constructed without any detailed realistic specifics as to types of large weapons (including machine guns) and frequency of firing, how many lanes, etc. render it useless. The applicant clearly stated "machine guns" were owned by its members and can be expected to be used (December 3, 2013 meeting). It is not clear, at

this juncture, if machine guns are permitted or not, although they provide classes on how to purchase them.

V

Adverse Impact by the Planning Commission Decision

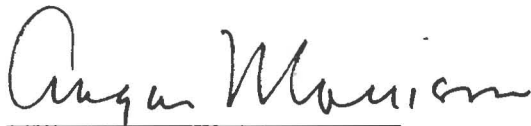
Approval of the permit has an unreasonable consequential effect, *by law*, of potentially disallowing "individual" property *and business owners* to file noise complaints with and seek the assistance of the Colorado Springs Police and Code Enforcement. Without affirmative support from the City of Colorado Springs to seek declaratory relief of the pre-emptive State "shooting range exemption" of C.R.S. 25-12-109 through its "home rule" authority, individual property owners are unconstitutionally deprived of public services, disadvantaged, and left to initiate difficult, convoluted, and expensive civil suits to resolve shooting range noise complaints. Counsel for the applicant, in his closing statement at the Planning Commission, affirmed that the exemption would apply to the City but that complainants could act as their own "Attorneys General" for civil suit purposes.

On January 20, 2014, the Colorado Springs Police Department was contacted for guidance as to whether any noise complaints (individual or business owner) would be investigated and pursued under circumstances meriting a citation for a violation of City Ord. 9.8.101 (noise) and the preemptive C.R.S. 25-12-109. To date, no response has been received.

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In view of all the above errors, uncertainties, oversights, re-calculations (even during the course of the Planning Commission's meeting), misstatements and misrepresentations, decibel testing that is completely unrealistic and questions the integrity of the Planning Development process, the Planning Department's approval is not supported by the greater weight of evidence and should be disapproved or returned for further clarity and examination.

We reserve the right to submit additional allegations of matters in error once the minutes of the Planning Commission are made available. We also request, accordingly that the appeal be heard by the City Council on March 25, 2014.


Angus Morrison


Gail Morrison

Signed this 26th day of January, 2014, at 4935 Cliff Point Circle East, Colorado Springs, CO 80919



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