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March 28, 2022

City Clerk
Attention: Ellen Wagner
City of Colorado Springs
30 S. Nevada Ave., Suite 105
Colorado Springs, CO 80903

**RE: Appeal of Approval Letter for Creekwalk North Development Plan and Plat File
Numbers: AR DP 21-00551 and AR FP 21-00552**

Dear City Council:

Weiner & Cording represent Protect Colorado Springs, a group of neighbors, residents, and workers, who have concerns about the proposed Creekwalk North development (the "Project").

We are herewith appealing the Project's Approved Development Plan, Plat, and Drainage Report, File Numbers: AR DP 21-00551 and AR FP 21-00552 which were approved on January 20, 2022 (collectively referred to as the "Development Plan"). The Planning Commission heard our appeal of the Development Plan on March 17, 2022. Attached herewith is the executed "Planning & Development Department Appeal" to City Planning Commission form, provided by Urban Planning Manager Ryan Tefertiller.

Our appeal fee in the amount of \$176.00 was received by the City Clerk's offices today, March 28, 2022.

APPEAL STATEMENT

I. Ordinance Provisions in Dispute

Colorado Springs City Code, § 7.5.502(B) (development plans); § 7.5.503 (minor amendment to development plan); Article 7, parts 2 and 3 (final subdivision plat), and ordinances approving various aspects of this project including Ordinance No. 21-89 vacating portions of a public right-of-way known as Metzler Avenue and Creekwalk Court (file no. CPC V 21-0011321-516); Ordinance No. 21-90 amending the zoning map of the City of Colorado Springs (file no. CPC ZC 21-00112); Minor Amendment to the Ivywild Master Plan to add multiple properties between E. Ramona Ave. and E. St. Elmo Ave. to the area recognized as part of the Creekwalk Commercial project (CPC MP 93-176-A5MN21); Creekwalk North Concept Plan Amendment to expand the scope of the previously approved Creekwalk Commercial Concept Plan (file no. CPC CP 18-00097-A2MJ21).

In the next section, we reference various ordinances, statutes and the Drainage Criteria Manual (“DCM”) which are in dispute.

II. The Administrative Decision is Incorrect, Unreasonable and Contrary to Law

A. The Underground Water Detention Facility Does Not Meet Variance Requirements or the April 12, 2017 “Policy Clarification.”

1. Underground BMPs are Prohibited Without Compliance with a Variance Process.

This appeal challenges the January 20, 2022 approval of the Development Plan which incorporates a “private underground detention basin” under the proposed parking lot identified as “Tract A.” (Creekwalk Filing 1 – Development Plan, Sheet 8 of 13).

As detailed by Kimley Horn and Associates, the Applicant’s consultant:

The proposed Project will route stormwater for the entire 2.833-acre development to a proposed private underground StormTech chamber for full spectrum detention. This underground detention is located beneath the proposed parking lot.

Flows from the site will be captured by roof drains and inlets located throughout the site and directed to the underground detention structures ... Flows are then conveyed west with a proposed 30” RCP storm sewer and then outfalls into Cheyenne Creek via the proposed outlet structure.

Eric Gunderson, P.E., Kimley Horn, Variance Request ltr. for Creekwalk North, 8/16/21 at 2.

The Drainage Criteria Manual (DCM) notes that “the use of underground, vault type BMPs¹ is generally prohibited; however they may be allowed on a case by case basis ...”. DCM, Vol. 2, Ch. 4, § 4 (emphasis added).

As underground BMPs are disfavored, the applicant required a variance. The DCM provides a Four Step Process to determine if a variance may be granted. “Variances cannot be granted in a manner that effectively negates the minimum requirement of the Four Step Process...” DCM Vol. I Chap. 1 §10.0. A Policy Clarification entitled “Criteria for Underground BMPs” dated April 12, 2017, modifies the Four Step Process for the purposes of considering underground drainage detention. The Policy Clarification states that “[i]t is the opinion of the City of Colorado Springs that a variance allowing for the use of an underground BMP may only be granted if...” the conditions are met.

¹ BMP stands for best management practices. All redevelopment that disturbs more than 1 acre “must assess the existing and planned water quality treatment for the drainage basis in which the development lies.” DCM, Vol. 2, Ch. 4, § 1.0. The record does not reflect that this was done.

Despite testimony by the applicant to the Planning Commission during the appeal hearing on March 17, 2022, the Development Plan fails to meet the requirements of both the Four Step Process and the criteria described in the applicable Policy Clarification.

2. The Variance Process Should Not Have Been Divided.

First, the applicant expressly admits that the development of the site will be split into two phases. Kimley Horn Drainage Report at 11. “The Project is to be divided into two phases. Phase 1 is described within this report as the Project and is depicted on the proposed drainage map in the Appendix.” *Id.* (emphasis added). “This report and the preliminary design will be used during Phase 2 to design appropriate creek improvements.” *Id.* Significantly, the information provided by the applicant applies to Phase 1 only. Yet, the whole site is within five hundred feet of Cheyenne Creek, and indeed it is “the Phase 2 development that is directly adjacent to Cheyenne Creek.” *Id.* Cheyenne Creek is a major tributary to Fountain Creek and has historically been subject to significant urban stormwater runoff and pollution.² Indeed, the 2020 EPA and Colorado Springs stormwater management settlement noted the City’s “problems that have plagued its storm sewer system for two decades...”.

The Development Plan allows the applicant to construct and utilize the underground detention basin in Phase 1 without addressing the variance requirements in Phase 2. Protect Colorado Springs understands the utility of dividing development planning into phases, but in this case, allowing the applicant to parse out the construction adjacent to Cheyenne Creek as another phase is inappropriate.

For instance, the applicant does not adequately address Steps 3 of the Four Step Process, which requires the stabilization of stream channels. The applicant admits that improvements to and stabilization of Cheyenne Creek will not occur until Phase 2. Kimley Horn Drainage Report at 11. Therefore, Phase 1 will be constructed without concern for stream stabilization. This is unacceptable for Cheyenne Creek. Development next to a valuable (and vulnerable) creek in an urban environment should give priority consideration to the health of the Creek. The applicant negates the requirement for stabilization by pushing any stabilization work to the end of a two-phase project, with no promise that the next phase will even occur.

The applicant also does not adequately address Step 1 of the Four Step Process. Step 1 requires that the BMP “[r]educe runoff by disconnecting impervious area, eliminating ‘unnecessary’ impervious area and encouraging infiltration into soils that are suitable.” The applicant states only that landscaping will be “implemented throughout the site.” The landscaping, in combination with the stormwater infrastructure and the underground detention basin, will slow runoff and encourage infiltration. Kimley Horn Report at 11. The applicant cannot rely on the drainage infrastructure to disconnect and/or eliminate impervious areas. This

² The City of Colorado Springs agreed in a settlement with The Department of Justice, the EPA and the State of Colorado to further develop standard operating procedures and increase staff training for its stormwater management program and to mitigate the damage to Fountain Creek and its tributaries through stream restoration projects. See <https://www.justice.gov/opa/pr/colorado-springs-agrees-improve-stormwater-management-settlement-united-states>.

utterly defeats the purpose of Step 1 and its clear goal to encourage *less* reliance on drainage infrastructure and *more* reliance on appropriate land use and pervious areas.

Of course, the Development Plan does not include landscaping plans for the areas next to Cheyenne Creek, as that is part of Phase 2.

Finally, the applicant fails to address any of the criteria described in the applicable Policy Clarification with regard to Phase 2. The applicant provides no “adequate and sound engineering analysis” regarding Phase 2. *See* Policy Clarification. This is extremely concerning as, unlike the Four Step Process which applies to all variances, the Policy Clarification has been fine-tuned by the City to apply specifically to the exact type of BMP the applicant intends to utilize in Phase 2, *adjacent to Cheyenne Creek*. In sum, the applicant is segmenting its Development Plan to get approval for Phase 1. There is no indication the phases together would meet all applicable criteria.

B. Parking is Excessive and Violates the Developer’s Promise.

The Applicant is seeking a shortcut to avoid having to place a detention pond on its property, the traditional means of detaining stormwater in Colorado, or to purchase additional land for such a pond (“Parking lot storage was also considered; however, this solution would cover almost the entire parking lot area to meet the 100-year volume demand and the required maintenance would create a great burden on the client”). Variance Request ltr. at 2. However, the Applicant has admitted that “[t]he proposed parking ratios exceed the designated commercial center ratio of 1 stall per 300 square feet and over-sized parking stalls are proposed.” Creekwalk Filing No. 1 – Development Plan Project Statement, Aug. 17, 2021 (the “Project Statement”) at 3. Such reliance on an overly large parking lot not only excludes the use of the standard above ground water detention, but conflicts with the Applicants’ promise that “parking stalls and drive aisles have been designed as efficiently as possible to minimize asphalt area....”. *Id.*

C. The Underground Water Detention Facility Cannot Keep Captured Organic Material Dry and Will Be a Maintenance Nightmare.

The DCM requires an underground BMP to “keep captured organic material dry to mitigate leaching of nutrients from leaves and grass clippings, and have an approved monitoring, inspection, and maintenance program.” DCM, Vol. 2, Ch. 4, § 4. There is no indication that the underground StormTech chamber will keep organic material dry, or that there is a monitoring, inspection and maintenance program in place to assure this will happen. Rather, the Applicant notes that “Maintenance of the full spectrum underground detention system can be done by accessing each storage chamber via private manholes. These manholes allow for vacuum trucks to remove accumulated dirt and debris which is collected over time.” The use of a vacuum truck placing a hose down a series of manholes is a far cry from a BMP that keeps “captured organic material dry” or substitutes for a reasonable “monitoring, inspection and maintenance” program. The proposed “private underground StormTech chamber” does not appear to allow access for reasonable monitoring and maintenance of the captured organic material, and the documents

submitted by the Applicant do not address this. This arrangement would be unreasonably susceptible to breakdown.

D. The StormTech Chamber Violates Colorado Statutes and Unreasonably Burdens Other Members of the BID or the Public.

The Applicant proposes to avoid personal responsibility for maintenance of the proposed “private underground StormTech chamber” and to make it the responsibility of the Creekwalk Business Improvement District (BID). While this may provide a benefit to the developer or the Sprouts Market, by having the BID maintain the private improvement, the BID (and ultimately the taxpayer) bears the financial cost. This unreasonable arrangement allows the financial burden of the StormTech chamber to shift to the BID members or the public, with commensurate financial benefits that may accrue to the developer and/or the Sprouts Market.

C.R.S. Title 31, Chapter 25, Part 12 only allows BIDs for *public improvements*. The Applicant acknowledges that this is a “private underground StormTech chamber ... located beneath the proposed parking lot.”

A BID’s authority is addressed in C.R.S. § 31-25-1212(1)(f)(II)), and allow "maintenance of improvements, by contract, if it is determined to be the most cost-efficient." In other words, if a BID is going to maintain any kind of improvement, the BID (or the City) bears the burden of showing that the BID's maintenance of the improvement is "the most cost-efficient" way to do so. Since the alternative here is to have the developer (or Sprouts Market) maintain the StormTech underground detention facility, it would clearly not be more cost effective for the BID to assume the cost.

E. The Development Plan and Plat Will Result in Unreasonable Amounts of Water Pollution.

The addition of parking and internal circulation roads as impervious surfaces so close to the Creek means that significant toxic particulate matter will be discharged. This includes the typical benzene emissions, but also coolant, which is highly toxic, and transmission and brake fluid. Even if these are not discharged in significant quantities, on top of these particulates are those associated with road salt, which is distributed somewhat liberally between November and March. Road salt is a major form of particulate pollution that, given the proximity to the Creek, will be discharged into the water regularly.

There is no specific analysis about the impact to Cheyenne Creek (the “Creek”) of the discharge of particulate matter as a result of the addition of significant amounts of the *auto-centered* impervious surfaces. Because the underground detention facility is a “non-filtration” system, it will not significantly improve the water quality of the runoff from the parking areas.

Since the development nearly sits on top of the Creek, the lack of detailed analysis of the water pollutant discharges is unreasonable. Indeed, the Final Drainage Report from the Applicant, dated 12/16/2021, does not address pollutants whatsoever.

Finally, in “determining rainfall and runoff for the proposed drainage system,” the Drainage Report uses the hydrologic criteria of a “100-year design storm event[,]” even though the Applicant acknowledges that “the Site [is] partially within the ... 500-year floodplain.” Final Drainage Report at 7.

III. Benefits and Adverse Impacts Created by the Decision

Protect Colorado Springs believes that the Development Plan approval will result in adverse impacts to water quality of Cheyenne Creek and an increased risk of flooding due to the unlawful use of the underground StorageTech facility. It will unduly burden other members of the Creekwalk BID and the public, which will be forced to maintain and subsidize a “private” StorageTech facility. The project will also result increases traffic to the area which will decrease levels of service in the area beyond acceptable limits. It will have a negative impact on emergency response times, public safety, air/water quality and existing businesses and jobs. This project has a disproportionate negative impact on the public as compared to the applicant.

Thank you for the opportunity to submit this appeal of the Planning Commission’s decision.

Very truly yours,

WEINER & CORDING

*Original Signature on file at
Law Offices of Weiner & Cording*

By: /s/ Randall M. Weiner
Randall M. Weiner

On behalf of Protect Colorado Springs



THE PLANNING & DEVELOPMENT DEPARTMENT APPEAL TO CITY COUNCIL

Complete this form if you are appealing **City Planning Commission's, Downtown Review Board's or the Historic Preservation Board's** decision to City Council.

APPELLANT CONTACT INFORMATION:

Appellants Name: Protect Colorado Springs Telephone: (303) 440-3321
Address: c/o Weiner & Cording, 3100 Arapahoe, Suite 202 City Boulder
State: CO Zip Code: 80303 E-mail: randall@randallweiner.com

PROJECT INFORMATION:

Project Name: Creekwalk North Project (aka Sprouts on S. Nevada)
Site Address: 1720 S. Nevada Ave., Colorado Springs, CO
Type of Application being appealed: Approved Development Plan, Plat, and Drainage Report
Include all file numbers associated with application: AR DP 21-00551; AR FP 21-00552
Project Planner's Name: Ryan Tefertiller
Hearing Date: 1/20/2022 (final decision) Item Number on Agenda: _____
3/17/2022 (planning comm. appeal)

YOUR APPEAL SUBMITTAL SHOULD INCLUDE:

1. Completed Application
2. \$176 check payable to the City of Colorado Springs
3. Appeal Statement
 - See page 2 for appeal statement requirements. Your appeal statement should include the criteria listed under "Option 1" or "Option 2".

Submit **all** 3 items above to the **City Clerk's office (30 S Nevada, Suite 101, Colorado Springs, CO 80903)**. Appeals are accepted for 10 days after a decision has been made. Submittals must be received no later than 5pm on the due date of the appeal. Incomplete submittals, submittals received after 5pm or outside of the 10 day window will not be accepted. If the due date for the submittal falls on a weekend or federal holiday, the deadline is extended to the following business day.

If you would like additional assistance with this application, please contact the Land Use Review offices at 385-5905.

APPELLANT 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.

Signature of Appellant

Date

THE APPEAL STATEMENT SHOULD INCLUDE THE FOLLOWING

☒ **OPTION 1:** If you are appealing a decision made by City Planning Commission, Downtown Review Board, or the Historic Preservation Board that was **originally** an administrative decision the following should be included in your appeal statement:

1. Verbiage that includes justification of City Code 7.5.906.A.4
 - i. Identify the explicit ordinance provisions which are in dispute.
 - ii. 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.
 - iii. 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.

☐ **OPTION 2:** If the appeal is an appeal of a City Planning Commission, Form Based Zoning Downtown Review Board, or Historic Preservation Board decision that was **not made administratively initially**, the appeal statement must identify the explicit ordinance provision(s) which are in dispute and provide justification to indicate how these sections were not met, see City Code 7.5.906.B. For example if this is an appeal of a development plan, the development plan review criteria must be reviewed.

CITY AUTHORIZATION:

Payment: \$ _____

Date Application Accepted: _____

Receipt No: _____

Appeal Statement: _____

Intake Staff: _____

Completed Form: _____

Assigned to: _____

CITY OF COLORADO SPRINGS
INTEROFFICE MEMORANDUM

DATE: March 29, 2022
TO: Peter Wysocki, Director of Planning
FROM: Sarah Johnson, City Clerk
SUBJECT: Notice of Appeal

ITEM NO. 7.A AR DP 21-00551; ITEM NO. 7.B AR FP 21-00552

An appeal has been filed by Protect Colorado Springs c/o Weiner & Cording in regard to the Planning Commission meeting that took place on March 17, 2022.

I am scheduling the public hearing on this appeal for the City Council meeting of April 26, 2022.

We are in receipt of the vicinity map.

cc: Ryan Tefertiller
Elana Lobato

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