



CITY OF COLORADO SPRINGS

OFFICE OF THE CITY CLERK
30 S. NEVADA AVE., SUITE 101
COLORADO SPRINGS, CO 80903
719-385-5901

RECEIPT

DATE: 10/23/2023

Receipt #: 107627

License Type: _PER_SUB_TYPE

Payment Type: Credit Card in-house

Reference #: 991732

LICENSE NO: 10FDD-00000-#0001

Post Date: 10/23/2023

Receipt Total: \$176.00

PAYEE:

COLORADO SPRINGS UTILITIES

For the Licensed Premises at:



Comments: PLANNING APPEAL OF WILSON TANK REPLACEMENT WATER TANK

TSN:7315210006

CASE#: ENF23-05324

AR DP 21-00526

APPL-23-0005

PAYMENT DETAILS:

Description

Quantity

Amount

Planning Appeal Fee

1

\$176.00



COLORADO SPRINGS PLANNING

Land Use Review

Appeal of a City Planning Commission Decision to City Council

Appeal of a City Planning Commission Decision to City Council

Complete this form if you are appealing a **City Planning Commission, Historic Preservation Board or Downtown Review Board Decision** to City Council.

Appellant Contact Information

Colorado Springs Utilities

719-668-8679

Name of Appellant

Phone Number

121 South Tejon Street STE 500, Colorado Springs, CO 80903

Address (Include City, State, ZIP)

dpadgett@csu.org

Email

Project Information

Wilson Tank Replacement Water Tank

Project Name

6560 Alabaster Way, Colorado Springs, CO 80919

TSN:7315210006

Site Address (TSN if not yet addressed)

Notice of Violation and Order to Abate

Type of Application Being Appealed

TSN: 7315210006 Case#:ENF23-05324 AR DP 21-00526 APPL-23-0005

All File Numbers Associated with the Application

William Gray

10/11/2023

7.D.

Project Planner's Name

Hearing Date

Item Number on Agenda

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

10/23/2023

Date



COLORADO SPRINGS PLANNING

Land Use Review

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Appeal Submittal Should Include:

All Items Are Required

- Completed Appeal Form (this document).
- Evidence of "Affected Party" Status – check the box below and provide justification for the chosen box.
- Notice of Appeal Statement (see requirements on page 3 of this document).
- \$176 fee payable to the City of Colorado Springs.

Submit all 4 items above to into the City Clerk’s Office at **30 South Nevada, Colorado Springs, Colorado**. Appeals are accepted for 10 days after a decision has been made. Submittals must be received no later than 5pm MST on the due date of the appeal. Incomplete submittals and / or 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 no later than 5 pm MST.

If you need additional assistance with this application, please call the Land Use Review front desk at (719) 385-5905.

Affected Party Status

Please indicate, per UDC Subsection 7.5.415.A(1)(a) (Right to Appeal), which of the definitions of "Affected Party" that applies to the Appellant.

- (1) The applicant for the decision being appealed; **Colorado Springs Utilities was the applicant for the decision being appealed in APPL-23-0005.**
- (2) The owner or tenant of a lot or parcel of land located within one thousand (1,000) feet of the subject lot; or
- (3) Any owner or tenant of a lot or parcel of land located within three (3) miles of the subject property who has preserved standing by:
 - (a) Testifying at the public hearing on the application;
 - (b) Submitting written comments prior to the public hearing on the application; or
 - (c) In the case of applications approved by the Manager or an administrative official, submitting written comments to the Manager or administrative official during the comment period before the Manager or administrative official's action.



COLORADO SPRINGS PLANNING

Land Use Review

Appeal of a City Planning Commission Decision to City Council

Notice of Appeal

UDC 7.5.415.A.2 (Notice of Appeal):

- (1) The specific provision(s) of this UDC that is the basis of the appeal;
- (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;
 - (b) The decision is erroneous; or
 - (c) The decision is clearly contrary to law; and
- (3) Describe how the criteria for the relevant application have or have not been met.

This shall serve as the Notice of Appeal required under City Code sections 7.5.415(A)(2) and 7.5.705. This is an appeal of an October 11, 2023, City Planning Commission decision to deny an appeal of a Notice of Violation and Order to Abate, which was issued on August 30, 2023 (Case # ENF23-05234) to Colorado Springs Utilities ("Utilities") for the property located at 6560 Alabaster Way, Colorado Springs CO 80919 (TSN 7315210006) (the "Site"). Utilities is the property owner for the Site and the appellant.

This appeal is based on Uniform Development Code ("UDC") sections 7.1.109.E.2 and 7.5.503, as well as well-established Colorado case law. As described below, the Planning Commission's decision to deny the appeal was erroneous and clearly contrary to law, because the Notice of Violation and Order to Abate was erroneous and clearly contrary to law.

Summary:

Utilities has a vested right in its building permit under Colorado law. The Notice of Violation and Order to Abate at issue in this appeal prevents Utilities from exercising its vested right. Thus, the Notice of Violation and Order to Abate violates the law. Planning Commission's decision to uphold the Notice of Violation and Order to Abate is erroneous and clearly contrary to law, because the Notice of Violation and Order to Abate violates the law.

Facts:

On June 21, 2022, City Planning administratively approved a Development Plan ("DP") application (AR DP 21-00526) for the Site. The DP provided for the construction of a 5-million-gallon ground water storage tank ("Wilson Tank" or the "Tank") on the Site with a maximum height of 45 feet. At the time of the DP submission the overall true tank dome height was uncertain as a Tank vendor providing the structural design had not been contracted yet.

Utilities' construction contractor was under contract on August 15, 2022, along with the Tank vendor as a subcontractor. The Tank vendor developed the tank structural design based on the project AWWA D110, Type III performance specifications. The result of the structural design put the Tank dome at approximately 55 feet with the required vent at a final height of approximately 60 feet. The walls of the tank were the same in the approved DP and the construction drawings. The increase in the height of the Tank was the result of the design of the Tank's roof. The drawings on the approved DP and the proposed maximum height were conceptual and subject to final design. Note 1 on page 12 of the approved DP provided: "All measurements above are estimates. Final elevations will be designed by tank manufacturer during structural design phase".

Utilities, through its consultant Kimley Horn, submitted an application for a building permit to Pikes Peak Regional Building on February 20, 2023. The building permit application included the DP and construction drawings, which showed a tank height 55 feet and vent at approximately 60 feet. The building permit application was reviewed by City Planning, Development Review Enterprise, and approved on May 5, 2023, by the planner who had approved the DP. This approval came after City Planning disapproved the building permit two times (March 27, 2023 and April 3, 2023), because the submittal was incomplete.

After receiving the approved building permit, Utilities, through its construction contractor, began work on the Site. Work on the Tank's structural foundation began the first week of May 2023, and work on the Tank continued through August 30, 2023.

It was not until June 13, 2023, that Utilities was alerted that it may be out of compliance with its land use approvals. This was brought to Utilities' attention when Lawrence Starr, a neighbor of the Site, contacted a Utilities representative to state that the neighbor believed the Tank was too tall. Utilities conducted an internal investigation to determine whether this was, in fact, true.

During this investigation, Utilities determined that its building permit was not in compliance with its DP. On June 29, 2023, City Code Enforcement came to the Site. On June 30, 2023, Utilities met with Code Enforcement onsite and discussed the issue of the building permit and the DP. Code Enforcement left the Site satisfied as Utilities had an approved building permit for what was being constructed. No work stoppage was issued at that time. At approximately the same time, Utilities contacted its land use consultant on this matter. The land use consultant contacted the City and was informed that the City had erroneously issued the building permit. The land use consultant informed Utilities that Utilities was not required to take any remedial actions but that the recommended action was to amend the DP. Utilities, intending to correct the mistake, worked with City Planning and its land use consultant to prepare and file an amendment to the DP, which was filed with City Planning on July 18, 2023.

Utilities continued work on Wilson Tank at the Site in reliance on the building permit, because such work was necessary to secure the Site and to mitigate the risk of cost overruns and destruction of materials that would occur from delaying construction and not completing the work before the change in seasons.

To date, Utilities has completed over 80% of the construction of Wilson Tank in reliance on the building permit. Utilities estimates that it has expended \$3,420,000.00 on construction of Wilson Tank in reliance on the building permit. Of that amount, Utilities estimates that it spent \$2,998,201 on the construction of Wilson Tank prior to having actual knowledge that the building permit was erroneously approved.

On August 30, 2023, City Code Enforcement, as a division of City Planning, issued Utilities a Notice of Violation and Order to Abate, which ordered Utilities to stop work on Wilson Tank based on non-compliance with the DP. According to the Notice of Violation, City Code Enforcement had received notice of a concern with the project on June 29, 2023, but it failed to conduct an inspection until August 30, 2023. During this time, Utilities had been in regular communication with City Planning regarding its amendment to the DP and had not been told that it was required to stop work on the project. On July 7, 2023 a preapplication review meeting was held with City Planning where Utilities was informed that it would need to submit an application for a major modification to the DP to change the maximum height restriction on the DP. Utilities has tried to work with City Planning throughout this project, including self-reporting the mistake to City Planning and filing an amendment to the DP with Planning despite having a vested right arising from its reliance on the building permit.

On October 11, 2023, the Planning Commission heard the appeal of the Notice of Violation and Order to Abate. The Planning Commission denied the appeal despite the fact that the Notice of Violation and

Order to Abate violates Utilities' vested rights in the building permit.

The existing building permit has not expired or been revoked or forfeited.

Law:

Section 7.1.109(E)(1) of the UDC states that "[a]pproved applications and permits, including building permits and certificates of occupancy, shall remain effective until expired, revoked, or forfeited in accordance with the provisions of this UDC or other relevant codes or laws." Section 7.5.503 of the UDC states that "[t]he Building Official shall approve an application for a Building Permit only upon determining that the application complies with all applicable requirements."

Colorado Courts consistently have found that when a building permit or other authorization has been granted by a local government and the recipient has relied on such permit or authorization to the recipient's detriment, the government cannot later claim the permit or authorization is invalid. "The doctrine of equitable estoppel bars a municipal corporation from enforcing an obligation by taking a position contrary to a previous representation relied upon by defendants to their detriment." *Crawford v. McLaughlin*, 473 P.2d 725, 730 (Colo. 1970) (citing *Franks v. Aurora*, 362 P.2d 561 (Colo. 1961)).

In a Colorado Supreme Court case, the court found that the City and County of Denver could not contest the validity of a building permit it had erroneously issued, because the property owner had relied on the permit to the property owner's detriment. *City and County of Denver v. Stackhouse*, 310 P.2d 296 (Colo. 1957). In that case a building permit was issued by Denver that allowed construction of a building that was prohibited by the existing zoning ordinance. Because the property owner had expended substantial funds, in the amount of \$18,000, in reliance on the building permit, the Court held that Denver could not contest the validity of the permit.

See also Cline v. City of Boulder, 450 P.2d 335, 338 (Colo. 1969) (citing 8 *McQuillin, Municipal Corporations* s. 25.156 (3d ed. 1965)); *Piz v. Housing Authority*, 289 P.2d 905 (Colo. 1955) (estoppel may be asserted against a City).

Analysis:

Although Utilities willingly accepts that the building permit may have been erroneously approved, Utilities was unaware of the alleged error until after it had expended a substantial amount of funds in reliance on the building permit. Utilities has attempted to update its DP to be in conformance with the building permit by filing an amendment to the DP, which is currently also being appealed to City Council. Regardless of the outcome of the DP amendment, under well-established law, Utilities has a vested right in the building permit based on its reliance thereon. Because Utilities has a vested right in the building permit under Colorado law, City Planning is estopped from contesting the validity of the building permit and Utilities' right to build the Tank in conformance with the building permit. As such, the Notice of Violation and Order to Abate is erroneous and clearly contrary to law. Planning Commission's decision to uphold the Notice of Violation and Order to Abate is also erroneous and clearly contrary to law, because its decision results in Utilities being prohibited from exercising its vested rights. The Notice of Violation and Order to Abate violates the law and should be overturned.