



COLORADO SPRINGS PLANNING

Land Use Review

Appeal of an Administrative Decision to City Planning Commission

Appeal of an Administrative Decision to City Planning Commission

Complete this form if you are appealing an **Administrative Decision** to City Planning Commission.

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: 7315200003 | |
| Site Address (TSN if not yet addressed) | | |
| Notice of Violation and Order to Abate | | |
| Type of Application Being Appealed | | |
| TSN: 7315200003 Case#: ENF23-05324 AR DP 21-00526 | | |
| All File Numbers Associated with the Application | | |
| William Gray | | |
| 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 | Date |



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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 (see requirements on page 3 of this document).
- \$176 check payable to the City of Colorado Springs.

Submit all 4 items above to into the Accela review system - <https://aca-prod.accela.com/COSPRINGS/Default.aspx>. 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 at 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 is the applicant of the decision being appealed and owner of the property at issue.**
- (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.



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Notice of Appeal

The Notice of Appeal Shall State:

- (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 section 7.5.415(A)(2). This is an appeal of the Notice of Violation and Order to Abate issued on August 30, 2023 (Case # ENF23-05234) to Colorado Springs Utilities ("Utilities"). Utilities is the property owner and the appellant.

This appeal is based on Uniform Development Code ("UDC") sections 7.1.109 and 7.5.503, as well as well-established Colorado case law. As described below, the Notice of Violation and Order to Abate is erroneous and clearly contrary to law.

Facts:

On June 21, 2022, City Planning administratively approved a Development Plan ("DP") application (AR DP 21-000526) for the property located at 6560 Alabaster Way, Colorado Springs CO 80919 (TSN 7315200003) (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. Note 1 on page 12 of the DP plan was provided. "All measurements above are estimates. final elevations will be designed by tank manufacturer during structural design phase".

The Prime 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 final height at approximately 60 feet.

Utilities, through its consultant Kimley Horn, submitted an application for a building permit to 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 has 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 and was informed that the City had erroneously issued the building permit and 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 \$2,998,201 was expended 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. City Planning initially indicated that the change in height was a minor modification to the DP that could be administratively approved. On July 7, 2023 a preapplication review meeting was held with the city planner where he indicated the amendment would need to be submitted as a major modification. City Planning recently has stated that it intends to refer the decision of whether to approve the amendment to Planning Commission. 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.

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 *City and County of Denver v. Stackhouse*, 310 P.2d 296 (Colo. 1957),

[T]here was substantial reliance on a building permit which had been erroneously issued for the construction of a building which was prohibited by the existing zoning ordinance. The court noted that the landowner had expended substantial funds in the amount of \$18,000, and held that Denver was estopped to contest the validity of the permit.

Crawford, 473 P.2d at 731 (citing *Stackhouse*, 310 P.2d 296); 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 pending with City Planning and is likely to be referred to the City Planning Commission. 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.

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| City of Colorado Springs, State of Colorado Code Enforcement Administrator Address: 30 S Nevada Ave, Mail Code 730 Colorado Springs, CO 80903 | |
| TO: Colorado Springs Utilities 6560 Alabaster WAY COLORADO SPRINGS, CO 80919 AND/OR OCCUPANTS OR OTHER PERSON WITH AN INTEREST IN THE PROPERTY KNOWN AS: 6560 ALABASTER COLORADO SPRINGS, CO 80919 RESPONDENT | |
| <hr/> TSN: 7315200003 CASE#: ENF23-05324 | |
| NOTICE OF VIOLATION AND ORDER TO ABATE | |

WHEREAS, it has been made to appear to the Code Enforcement Administrator, City of Colorado Springs, State of Colorado that CITY OF COLORADO SPRINGS, owner of 6560 ALABASTER, COLORADO SPRINGS, CO 80919 (“Respondent”), has violated the Code of the City of Colorado Springs 2001, as amended (“City Code”) in the following particulars:

- I. On August 30, 2023, Code Enforcement conducted an inspection at 6560 ALABASTER, COLORADO SPRINGS, CO 80919. An inspection was conducted in response to a concern received on June 29, 2023.

Upon arrival, I (Michael Flynn) observed the below noted violation(s):

| <u>Date(s) Inspected</u> | <u>Code Section</u> | <u>Conditions Observed</u> | <u>Reinspection Date(s)</u> |
|------------------------------|--------------------------|---|---------------------------------|
| 8/30/2023 | Unified Development Code | As of today's date, Wednesday, August 30, 2023, immediately stop any and all work associated with the construction of the water tank located at 6560 Alabaster Way. Any changes or amendments made for this development plan (AR DP 21-00526) must first be reviewed and approved through the City Planning Department. | 9/14/2023 |

Unified Development Code - 7.1.106 Conformity with Regulations Required

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 compliance with all applicable provisions of this UDC.

IF YOU WISH TO CONTEST this Notice of Violation and Order to Abate, you must file an appeal with the City of Colorado Springs Zoning Commission in accordance with §7.5.908 of the City Code, within 10 days of receipt of this Notice of Violation and Order to Abate.

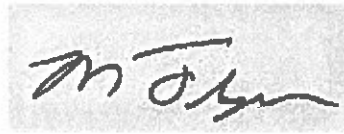
NOW THEREFORE, you are hereby ORDERED to remove all violations listed within this notice and order from the above-mentioned property located in Colorado Springs, CO within 10 days from the date of the issuance of this NOTICE OF VIOLATION AND ORDER TO ABATE.

Failure to comply with this Notice of Violation and Order to Abate may result in legal action including, but not limited to, re-inspection fees up to \$1,000, court summons, and/or abatement at the property owner's expense. All unpaid fees or expenses will result in a lien against the property pursuant to city code.

If you have any questions regarding this NOTICE, please contact Sr. Code Enforcement Officer, Michael Flynn at 719-686-4925 or via e-mail at Michael.Flynn@coloradosprings.gov

DONE THIS 30th day of August 2023.

FOR THE CODE ENFORCEMENT ADMINISTRATOR



Michael Flynn
Sr. Code Enforcement Officer
Michael.Flynn@coloradosprings.gov
719-686-4925