

RECORD OF PROCEEDINGS

Minutes of the
City Council of the City of Cherry Hills Village, Colorado
Held on Tuesday, February 6, 2007 at 6:30 p.m.
At the Village Center

Mayor Mike Wozniak called the meeting to order at 6:31 p.m.

ROLL CALL

Councilmembers Bonnie Blum, Scott Roswell, Russell Stewart, Doug Tisdale, and Klasina VanderWerf were present on silent roll call. Also present were Interim City Manager Eric Ensey, City Attorney Thad Renaud, Finance Director Karen Proctor, Police Chief John Patterson, Public Works Director Jay Goldie, Parks, Trails, and Recreation Administrator Paul Burkholder, and City Clerk Karen Losier.

AUDIENCE PARTICIPATION PERIOD

Cathy Pomeroy, 4520 S. Downing Circle, commended the Public Works department on their recent snowplowing efforts. She also stressed to Council that water-related issues affect the whole community and asked them to keep this in mind in light of the Floodplain Development Permit application currently before Council.

CONSENT AGENDA

Councilmember Blum moved, seconded by Councilmember Tisdale, to approve the following items on the Consent Agenda:

- Approval of January 16, 2007 Minutes
- Approval of a Subdivision Improvement Agreement for the Layton Lane Subdivision (northeast corner of the intersection of S. Clarkson Street and E. Layton Avenue)
- Expenditure of Funds – City Entry Signs
- Expenditure of Funds – Dump Truck Replacement Bed
- Expenditure of Funds – University Feasibility Study Additional Core Samples

The motion passed unanimously.

ITEMS REMOVED FROM CONSENT AGENDA**Expenditure of Funds – Volunteer Park Project**

Councilmember Roswell questioned how neighbors wanted to modify the proposed park. Mr. Burkholder responded that neighbors are not satisfied with how the park has been presented. He stated that Councilmember LaMair has been working with affected residents on the issue and staff will be making minor modifications regarding how the funds will be used. Councilmember Roswell inquired why staff was requesting the expenditure if it was not known how the money would be spent. Mr. Ensey and Mayor Wozniak clarified that the expenditure must be approved or the funds will be lost due to the approaching grant deadline.

Councilmember Tisdale moved, seconded by Councilmember Roswell, to approve the expenditure of funds.

The motion passed unanimously.

ORDINANCES, RESOLUTIONS, AND PERMITS**Floodplain Development Permit – To allow for the installation of a pond and road for the property located at 4501 S. Monroe Lane (Mary Scott)**

Councilmember VanderWerf recused herself, stating that a conflict of interest existed due to a potential perception of bias on her part from her previous recommendation of the application's denial during her tenure on the Parks, Trails, and Recreation Commission. She stated that if the subject came before Council again with substantial changes, she would not recuse herself.

Mayor Wozniak highlighted all the exhibits, correspondence, and testimony that Councilmembers have received and reviewed regarding the permit application. He requested that audience members limit their speaking time to five minutes due to the number of people wishing to speak. Mayor Wozniak mentioned that when this item was initially before Council on May 16, 2006, the question of water rights arose and the applicant wished to have the item continued at that time.

Mr. Ensey presented the application. He stated that the applicant has presented additional information since the May, 16, 2006 Council meeting. He stated that the Planning & Zoning Commission had reviewed the information and voted 5 to 1 to recommend denial of the application. Mr. Ensey highlighted the staff report and brought to Council's attention the matter of whether Council must be presented with applicable federal, state, and local permits per 16-17-50(c)(2) prior to approval or whether approval could be conditional upon future receipt of these permits.

Mr. Ensey stated that the applicant provided letters indicating that water rights were conveyed with the purchase of the land. He stated that staff does not have the jurisdiction or expertise to determine if the applicant has water rights, or if they are appropriate and of enough magnitude to fill the proposed pond. Mr. Ensey stated that if Council determines that 16-17-50(c)(2) requires the applicant to obtain all permits prior to approval, then Council must deny the application because not all permits have been obtained. He also pointed out that the staff report outlines the conditions that Council will need to require if they approve the application conditionally. Mr. Ensey pointed out that the pond size has been reduced by 10% since the matter was first brought before Council.

Councilmember Roswell questioned whether the City Manager is the "Administrator" with decision making authority as described in the code. Mr. Ensey confirmed that was correct. Councilmember Roswell asked for Mr. Ensey's opinion on whether or not other permits are required prior to approval. Mr. Ensey stated that there are required permits that have not yet been obtained, but the code is not clear on whether to require them prior to approval of the permit application, or whether it can be a conditional requirement to be obtained subsequent to City Council granting approval.

Mayor Wozniak questioned whether one of the required permits would relate to the establishment of water rights. Mr. Renaud responded that in his view it would be.

Councilmember LaMair inquired why permits are sometimes required before approval and other times they are a conditional requirement. Mr. Ensey responded that the difference is in the code provision of 16-17-50(c)(2), which seems to require upfront submittal of permits. He stated that in some instances, permits may not be required upfront, but issues may arise during the public hearing process which make conditions necessary. Mr. Renaud added that staff is not aware of any floodplain development permits issued by the City on condition that prerequisite federal, state, or local permits be obtained.

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Councilmember Tisdale also pointed out that it is unclear if the code requires that permits be obtained as a condition prior to construction or prior to Council approval.

Mayor Wozniak invited the applicant to address Council regarding the recently submitted information.

Ms. Mary Scott, 4501 S. Monroe Lane, stated that she has met the code requirements and has stated four hardships, including the possible loss of water rights, the mosquito habitat, the Glenmoor Country Club ("Glenmoor") surcharge, and poor water quality. She stated that they have established certain water rights through her water attorney.

Ms. Scott introduced Exhibit 1, an illustration outlining the flows of the proposed pond, and Exhibit 2, an aerial photograph with the proposed pond superimposed upon it. She also introduced Exhibit 3, two photographs of her children playing near stagnant water on her property. Ms. Scott explained that she is concerned about the health issues caused by poor water quality, mosquito breeding, and fertilizer runoff in the standing water of Greenwood Gulch.

Ms. Scott introduced their pond consultant, Paul Cassidy, of Aquatics Consulting in Albuquerque, New Mexico. Mr. Cassidy confirmed that the Scotts are proposing the smaller 2.7 acre pond rather than the original 3.0 acre pond. Mayor Wozniak questioned the distance from the pond to the property line, but Mr. Cassidy stated that he did not know the exact distance.

Mr. Cassidy stated that the pond will be aerated and will have larvae-eating *Gambusia* fish that will eliminate mosquito breeding. He mentioned that the excavated dirt will be distributed on the land surrounding the pond. Mr. Cassidy addressed concerns regarding the sound from pumps associated with the proposed pond, saying that they would be vaulted underground. Mr. Cassidy pointed out that surrounding ponds are smaller than the Scotts' proposed pond. He verified that the incoming and outgoing points of water through the gulch on the property will remain the same. Mr. Cassidy asserted that the pond will create a more functional wetland than the existing gulch.

Ned Giles, attorney for Kim and Mary Scott, emphasized that the property in question is private and the Scotts are in jeopardy in losing their water rights. Mr. Giles pointed out that the staff report that went before the Planning & Zoning Commission recommended approval of the application. He reiterated the four hardships that currently exist. Mr. Giles stated that Ms. Scott did not file an appeal to the court on the loss of her quiet title action, and as a practical matter she cannot subdivide her property. Mr. Giles stated that the pond/land ratio would be 13.5 percent which is considerably lower than that of the surrounding neighbors.

Councilmember Tisdale mentioned that there is a perception of anticipated development and questioned the compatibility of future development with the proposed use. Mr. Giles responded that if there is future development, there will be compatibility with the downstream properties.

Councilmember Stewart asked Mr. Giles if there was any connection between abandonment and construction. Mr. Giles responded that two issues exist, whether Ms. Scott's water rights are in jeopardy if she cannot use them for this pond, and whether sufficient water rights exist. Mr. Giles specified that water court decides whether or not the water rights have been abandoned and they have not yet made that decision. Councilmember Stewart stated that the issue of water rights should not be affected whether or not a pond exists.

Mr. Giles specified that the pond would be used for irrigation purposes. He asserted that Council is not charged with deciding water rights. He also stated that in his

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interpretation, establishment of water rights would not classify as a permit. Extensive discussion was held regarding the specifications of the pond and whether or not Urban Drainage's review would be considered a required permit.

Councilmember Stewart pointed out that if Ms. Scott's water rights are proven not to have been abandoned, she will have a very valuable commodity. He also stated that Council should know whether or not the water rights have been abandoned before approving the application. Mr. Giles stated that the Scotts would purchase other water if necessary. Mr. Scott provided cost estimates on water purchase.

Mayor Wozniak opened the public hearing at 8:05 p.m.

Barbara Dangleis, 30 Meade Lane, stated that she lives downstream from the proposed pond. She stated she is uncomfortable with the permit being issued since the impact of the proposed pond on her property in the event of a 100-year flood is unknown.

Nancy Petry, 3200 East Quincy Avenue, stated that she wants to be assured that the pond would not have adverse impacts on her property. She stated that she has never had a mosquito problem, but is concerned that she may if the pond is constructed. She requested Council protect the neighboring residents' rights.

Ms. Petry also spoke briefly on behalf of Bob and Judi Newman, 2 Random Road, who had submitted a letter in opposition to the pond but could not be present at the meeting.

David Hayes, attorney for Glenmoor, requested that water rights be established before Council considers granting the permit. Discussion was held regarding the impact of the proposed pond on Glenmoor.

Jason Matherly, 10 Random Road, explained that his property backs to the property in question. He requested that Council deny the application because he feels the pond is still too big, there is no reason to fill in Greenwood Gulch, the pond would create hardships on surrounding neighbors, and the applicant has failed to demonstrate extraordinary hardship. He stated that the Planning & Zoning Commission had offered to consider a significantly smaller pond, but the applicant rejected the compromise. Mr. Matherly expressed concern that the pond would cause a reduction in his property value.

Fred Abrams, 105 Meade Lane, reiterated that he would like an unbiased environmental impact study conducted to determine the downstream effects of the proposed pond prior to Council considering approval of the application.

Brownell Bailey, 10 Parkway Drive, expressed concern that Council is considering approval before knowing whether or not the pond can be filled. He asked Council to deny the application and require the applicant to establish water rights first.

Laura Christman, 18 Cherry Lane Drive, requested that water rights be established precedent to the approval of the permit. She also questioned whether the Glenmoor surcharge was really an extraordinary hardship since it was not mentioned at the May 16, 2006 City Council meeting and just came up in the Planning & Zoning Commission meeting.

Stephanie Blucher, 82 Glenmoor Circle, presented a letter from the Cherry Hills Land Preserve and asked Council to consider potential environmental impacts of the pond.

Harmon Graves, 17 Glenmoor Circle, stated that he represents Glenmoor's homeowners' association. He asked Council to establish water rights before making any decisions.

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Suzie Halle, 17 Random Road, supported the statements made by Ms. Blucher and Mr. Graves. Ms. Halle expressed concern regarding Gambusia fish being introduced into the pond and impacts on other wildlife in the existing gulch.

Martha Berkland, 4600 S. Monroe Lane, stated that she had recently bought land on S. Monroe Lane. She asserted that the Scotts' property is private and they should have the right to improve it as they see fit. She pointed out that many of the neighbors opposed to the pond have ponds on their property.

Mr. Matherly rebutted by saying that he is not trying to impose on the applicant's rights, but is trying to protect his own rights.

Janney Carpenter, 9 Random Road, expressed concerns regarding the impacts of the proposed pond on the floodplain, as well as potentially reduced water quantities for surrounding properties.

Clair Mindock, 8 Random Road, stated that she lives downstream of the proposed pond. She said that she feels there are too many unknowns and unanswered questions that need to be dealt with before the permit can be considered.

Randy Oaks, 5050 S. Franklin Street, stated that he had heard nothing that convinces him that the pond would be anything other than beautification of the Scott property and improvement of the surrounding area. He expressed support for the approval of the permit.

Peter Mindock, 8 Random Road, said that he is not trying to downplay the Scotts' rights, but feels that water rights must first be established before approval of the permit is considered.

Mayor Wozniak closed the public hearing at 9:10 p.m. He asked the Scotts if they would like to respond.

Mr. Scott questioned what the setbacks are and Mr. Ensey responded that side setbacks for primary structures are 50 feet. Mr. Scott offered to concede to a 100-foot side setback.

Mike Dungan of Muller Engineering, consultant engineer to the City, stated that he had not conducted an extensive review of the Conditional Letter of Map Revision ("CLOMR") because Urban Drainage and FEMA would conduct the review. He stated that in his opinion he did not see a difference in the floodplain upstream or downstream and he felt that the final outcome of the CLOMR is that it would be accepted.

Mr. Scott stated that he had reviewed the City's other floodplain development permit applications and none of them were denied or required establishment of water rights. He questioned whether the City was increasing its standards. He reiterated that the Scotts have water rights, they have dirty water, and they have a mosquito problem that they will be correcting. He stated that he has no concerns regarding water, since holes that are dug on their property fill with groundwater.

Discussion was held regarding what could be interpreted as "exceptional" hardship as specified in the code.

Mr. Scott stated that they lost the quiet title action and the Scott's title company has filed an appeal on Ms. Scott's behalf. Mayor Wozniak pointed out that in the packet was a document that stated that the title company has made a declaratory judgment against the Scotts because the Scotts had made a claim against the title company for 7.6 million

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dollars because the Scotts were unable to subdivide the property. Mr. Scott responded that their title company sued them because they did not file an appeal.

Mayor Wozniak asked that the Scotts' Notice of Appeal and the Separate Answer Counterclaim Jury Demand and Request for Extradited Hearing be entered in as exhibits.

Councilmember LaMair inquired whether the pond was really the minimum necessary or if it could be smaller. Mr. Scott responded that they have already reduced the pond by 10% and if it is further reduced, the water quality and mosquito problems would not be corrected. A map of Glenmoor was entered in as an exhibit.

Councilmember Tisdale asked the Scotts to address the addition of the Glenmoor surcharge to the list of hardships. Mr. Scott responded that they originally did not think they had to include it since the surcharge is where the standing water comes from. Ms. Scott responded that the mosquito problem due to standing water will be eliminated with the addition of the pond. Mr. Cassidy explained that the pond will be stocked with Gambusia fish which eat mosquito larvae, and the fish are present in every waterway in Colorado.

Councilmember Blum asked Mr. Cassidy exactly how small the pond could be and still accomplish the same goals and he stated that 2.7 acres is the minimum necessary. Mr. Cassidy also stated that the pond in question would be of higher quality construction than most of the surrounding ponds.

The applicant's presentation ended at 9:48 p.m.

Mayor Wozniak asked Council to consider whether or not approval can be granted prior to the applicant receiving all required permits, and whether or not establishment of water rights can be considered a permit.

Councilmember Stewart pointed out that Council should not make rulings that may conflict with what the federal or state government is requiring. He stated that he felt Council should require permits and final approvals before making a decision. Councilmember Tisdale questioned whether Council should move forward unless the applicant has proven that they have water rights. He reiterated that the code requires the City Manager as the Administrator to make the recommendation on whether or not the applicant has obtained all required permits.

Councilmember Blum expressed concern over conditional approval allowing the pond exactly as proposed, even if the applicant does not establish water rights sufficient to fill the pond.

Councilmember Roswell again questioned why the issue was before Council if the City Manager was required by the code to make the decision on whether required permits had been obtained. Mr. Renaud clarified that the code states that the Administrator's obligation is to review permit applications to determine that necessary permits have been obtained, and Mr. Ensey has made a determination that all permits have not yet been obtained and stated so in his staff report. Councilmember Tisdale added that the question before Council was whether or not to require the necessary permits prior to approval, or allow the applicant to obtain the permits subsequent as a condition of approval.

Councilmember LaMair asserted that there were too many unknowns and Council would be negligent if they proceeded without water rights being established.

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Councilmember Stewart pointed out that prior Councils may have mistakenly approved applications in which water rights were not established, but Council should not continue to do so if it is in conflict with federal and state provisions and the City's code.

Councilmember Stewart moved, seconded by Councilmember LaMair, to deny the application for a Floodplain Development Permit for the installation of a pond and road at 4501 S. Monroe Lane because said applicant has not obtained all required federal, state, and local government permits at this time.

Further discussion was held regarding whether or not Council was ready to make a decision on the application. Councilmember Tisdale asserted that a clear case had not been made that the proposed pond would create hardships.

The following votes were recorded:

Scott Roswell	no
Harriet LaMair	yes
Doug Tisdale	no
Bonnie Blum	yes
Russell Stewart	yes
Klasina VanderWerf	recused

The motion passed by a vote of 3 yes and 2 no.

Mr. Scott inquired what his appeal options were and Mayor Wozniak instructed him to ask his counsel.

Council Bill 01, Series 2007 – A bill for an ordinance amending Chapter 7 of the Cherry Hills Village Municipal Code, concerning Health, Sanitation & Animals, by amending Section 7-1-30(4), concerning Noise, and Section 7-1-40(7), concerning Exceptions to Nuisance (Second and Final Reading)

Mr. Ensey presented the Council Bill.

Councilmember LaMair suggested that Council consider adding a section on items causing persistent low noise, such as air conditioners.

Councilmember Blum questioned why the O-1 Zone District allowed noise reaching 60 decibels. Mr. Ensey responded that this already existed in the City's code and is probably due to increased noise associated with open space and country clubs. Mr. Ensey clarified that country clubs are zoned as O-1 and the City therefore allows 60 decibels at clubhouses.

Councilmember LaMair moved, seconded by Councilmember VanderWerf, to table Council Bill 01, Series 2007 – A bill for an ordinance amending Chapter 7 of the Cherry Hills Village Municipal Code, concerning Health, Sanitation & Animals, by amending Section 7-1-30(4), concerning Noise, and Section 7-1-40(7), concerning Exceptions to Nuisance (Second and Final Reading).

The motion passed by a vote of 5 yes and 1 no.

NEW BUSINESS**Presentation by the South Suburban Park Foundation – Big Dry Creek Trail Project at Broadway**

Bob Stearns of the South Suburban Park Foundation (“the foundation”) presented Council with a slideshow depicting beautification projects that the foundation has completed. He asked Council to donate the use of a City grant for the foundation to use to request funding from Arapahoe County. He stated that the \$250,000 grant application would be written by the foundation and submitted to the county.

Councilmember Tisdale questioned how much staff time would be spent on the grant process. Mr. Goldie explained that the majority of time would be spent by Ms. Proctor in financial reporting of the monies. Councilmember Tisdale asked if the grant could include a contingency amount to cover the cost of staff time. Mr. Stearns responded that it would be possible as long as the amount was reasonable.

Councilmember VanderWerf moved, seconded by Councilmember Roswell, to approve the donation of a 2007 grant to the South Suburban Park Foundation contingent on a reasonable amount of money to be written into the grant to reimburse the City for administrative staff time spent.

The motion passed unanimously.

Mayor’s Report

There was no report.

Members of City Council

There were no reports.

Members of City Boards and Commissions

There were no reports.

City Manager & Staff**Financial Reports**

Financial Reports were included in Council packets. There were no questions from members of the City Council.

Special Needs Registry

Chief Patterson presented the draft registry and stated that volunteer resident Rose Lynch is assisting in establishing a program.

Membership to the National League of Cities

Mayor Wozniak stated that the second vice president of the league, Northglenn Mayor Kathie Novak, had offered a discount to the City to join. He stated that he felt the City should be supportive of the League and that it would be helpful to see what other cities are doing. Council agreed to join and directed staff to proceed with membership.

Emergency Funds for Snow Removal

Mr. Goldie presented a report outlining the City's costs relating to snow removal efforts as a result of several major snowstorms in December 2006 and January 2007. He stated that staff has submitted the initial paperwork and that the federal government will reimburse for up to 75% of eligible expenses for the most expensive consecutive 48 hour period of the storm.

City Attorney

There was no report.

EXECUTIVE SESSION

Councilmember Tisdale moved, seconded by Councilmember Roswell, to hold executive sessions for the purpose of:

1. Discussion of specific legal questions with the City Attorney for the purposes of receiving legal advice on specific legal questions, pursuant to CRS §24-6-402(4)(b), concerning pending South Suburban litigation
2. Discussion for the purpose of determining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators, pursuant to CRS §24-6-402(4)(e), concerning a prior agreement of the City
3. Discussion for the purpose of the purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest of specific legal questions with the City Attorney for the purposes of receiving legal advice on specific legal questions, pursuant to CRS §24-6-402(4)(a), concerning City owned land
4. Discussion for the purpose of determining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators, pursuant to CRS §24-6-402(4)(e), concerning the City's City Manager search

The following votes were recorded:

Harriet LaMair	yes
Doug Tisdale	yes
Bonnie Blum	yes
Russell Stewart	yes
Klasina VanderWerf	yes
Scott Roswell	yes

The motion passed unanimously.

Council adjourned to Executive Session at 10:52 p.m.

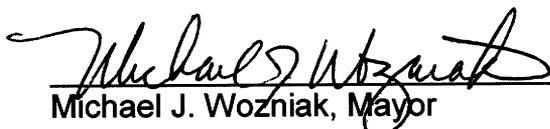
ADJOURNMENT

A motion was made by Councilmember Tisdale, seconded by Councilmember Blum, to adjourn the executive session and the regular City Council meeting.

The motion passed unanimously.

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The meeting adjourned at 11:31 p.m.



Michael J. Wozniak, Mayor



Karen C. Losier, CMC, City Clerk