

# EL PASO COUNTY



## OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

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MS-19-4 Walker Reserve  
(Minor Subdivision)

Reviewed by: M. Cole Emmons, Senior Assistant County Attorney  
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### **FINDINGS AND CONCLUSIONS:**

1. This is a proposal by G3 Investments, Inc. ("Applicant") for a 3 lot minor subdivision on 40.77 +/- acres ("Property"). The Applicant desires to replat the parcel into 3 lots. The 3 lots will have the following acreages: Lot 1 = 5.10 acres, Lot 2 = 5.12 acres, and Lot 3 = 28.52 acres. There is currently an existing single family residence and an existing well on what will be the newly created Lot 3. The Property is zoned RR-5 (Residential Rural).
2. The Applicant has provided for the source of water to derive from individual on-lot wells into the not nontributary Dawson aquifer pursuant to the Findings of Fact, Conclusions of Law, Ruling of Referee, and Decree of the Water Court regarding Scott and Susan Mikulecky (District Court Water Division 1, Case No. 18CW3004 ("Decree"). The Decree provides that the plan for augmentation permits pumping a total of 2.25 acre-feet annually for 300 years from 3 on-lot Dawson aquifer wells located on the Property, including an existing well.
3. Pursuant to a "Water Supply Letter" provided by the Applicant's attorney, the Applicant estimates its annual water needs to serve the 3 lot minor subdivision as follows: 0.35 acre-feet per lot for household use, 0.35 acre-feet per lot for irrigation of 6000 square feet of home lawn, garden and trees, and 0.05 acre-feet per lot for stock watering of 4 large domestic animals. The total water demand for the subdivision is 2.25 acre-feet per year (0.75 acre-feet per each lot). Based on Applicant's demand of 2.25 acre-feet per year for the subdivision, Applicant must be able to provide a supply of 675 acre-feet of water (2.25 acre-feet per year x 300 years) to meet the County's 300-year water supply requirement.
4. In letters dated May 2, 2019, July 8, 2019, and October 21, 2019, the State Engineer's Office reviewed the submittal to plat the 40.77 +/- acre parcel into a 3 lot minor subdivision. The State Engineer reviewed the Decree and Water Supply Letter and confirmed that the proposed water source for the subdivision is a bedrock aquifer in the Denver Basin. The State Engineer further stated that the water demand encompasses "in-house use (0.35 acre-

feet/year), irrigation of 6,000 square-feet of home lawn, garden and trees (0.35 acre-feet/year) and the watering of four large domestic animals (0.05 acre-feet/year).” The Engineer noted the following amounts of water have been adjudicated and are available under the Property:

Aquifer	Annual amount available for 40-acre parcel based on 100 year allocation approach (acre-feet)	Annual Allocation based on the County’s 300 year rule (acre-feet)
Dawson	29.6*	9.87
Denver	36.4	12.13
Arapahoe	17.7	5.9
Laramie-Fox Hills	12.6	4.2

\* Annual amount reduces by 4 acre-feet annually for well permit no. 174104

The State Engineer stated that the “plan for augmentation decreed in case no. 2018CW3004 allows for an average diversion of 2.25 acre-feet/year for 300 years. The decree allows the withdrawal from up to 3 wells (including the well currently operated under well permit no. 174104) in the Dawson aquifer pursuant to the decreed augmentation plan.”

In the State Engineer’s letter dated July 8, 2019, the Engineer noted that Well Permit No. 174104 “was re-permitted to be operated under permit no. 83194-F pursuant to the terms and conditions of the augmentation plan. Permit no. 174104 was canceled upon issuance of well permit no. 83194-F. The use of ground water from well no. 83194-F is limited to in house use, irrigation of 6,000 square-feet of lawn, garden and trees and stockwatering of up to 4 large domestic animals.” Finally, the State Engineer provided the opinion that “pursuant to Section 30-28-136(1)(h)(I), C.R.S., we reiterate that it is our opinion that the proposed water supply is adequate and can be provided without causing injury to decreed water rights.” And further, it is our opinion “that the water supply is adequate is based on our determination that the amount of water required annually to serve the subdivision is currently physically available, based on current estimated aquifer conditions. Our opinion that the water supply can be provided without causing injury is based on our determination that the amount of water that is legally available on an annual basis, according to the statutory allocation approach, for the proposed uses is greater than the annual amount of water required to supply existing water commitments and the demands of the proposed subdivision.”

5. Decree, Case No. 18CW3004. The Water Court Decree adjudicates water in all four Denver Basin aquifers underlying the Property in the respective amounts identified in the Table in Paragraph 4 above (as to the 100 year allocation). The Decree approves the plan for augmentation to allow withdrawal of the not nontributary Dawson aquifer water for this subdivision using non-evaporative septic system return flows to replace depletions to the stream system during 300 years of pumping the Dawson aquifer and using Laramie-Fox Hills water to replace post-pumping depletions.

The Decree provides for maximum withdrawal of the Dawson aquifer water through 3 wells for 300 years. The plan for augmentation, as applied to this 3 lot subdivision, allows for a maximum total withdrawal of 2.25 acre-feet annually from the Dawson aquifer or 0.75 acre-feet annually for each of the 3 lots. Indoor use will be 0.35 acre-feet annually per lot, 0.35 acre-feet for irrigation, and 0.05 acre-feet for stock watering of up to 4 large domestic animals. Beneficial uses include domestic, commercial, irrigation, livestock watering, fire protection, and augmentation purposes, including storage, both on and off the Property. The Decree indicates that a conservative estimate is 0.2 acre-feet per lot for residential or household use.

Replacement of Depletions During Pumping. The plan for augmentation provides for a pumping period of a minimum of 300 years. For any wells constructed into the not nontributary Dawson aquifer, the Applicant is required to replace actual stream depletions on an annual basis during the 300 years of pumping by residential return flows from non-evaporative septic systems. Depletions will accrue to the South Platte River system via Cherry Creek. The Decree indicates the consumptive use for non-evaporative septic systems is 10% per year per residence; therefore, at a household use rate of 0.2 acre-feet per lot per year, 0.18 acre-feet per lot is returned to the stream system per year. This would be a total of 0.54 acre-feet replaced from the 3 lots annually. The Decree states that the maximum annual stream depletions over the 300-year pumping period will be approximately 20.8% of pumping or 0.156 acre-feet for each well (0.468 acre-feet for all 3 lots); thus, the Decree concludes “[r]eturn flow associated with in house use on each lot (0.18 acre-feet per year) is sufficient to replace actual depletions associated with pumping of 0.75 acre-feet per year for 300 years.” Therefore, Applicants, their successors and assigns, must use nonevaporative septic systems and leach fields for each single-family dwelling to generate these return flows.

Replacement of Post-Pumping Depletions. The Decree requires the Applicant to replace any injurious post-pumping depletions by reserving up to 675 acre-feet of water (2.25 acre-feet per year for 300 years) from the nontributary Laramie-Fox Hills aquifer, but reserves the right to substitute the use of other nontributary groundwater, including return flows for replacement of post-pumping depletions. Any such substitution would constitute a substantial change in the water supply and would require prior approval by the County. Assuming pumping of 2.25 acre-feet per year for 300 years for a total of 675 acre-feet, the Decree notes that the “maximum total depletion to the affected stream systems is also 20.8% of the annual amount withdrawn in the 305<sup>th</sup> year.” The reserved Laramie-Fox Hills aquifer groundwater will be used to replace any injurious post-pumping depletions, and the Decree requires that these waters may not be severed from ownership of the overlying Property.

6. Analysis. Applicant’s water demand for the Walker Reserve Minor Subdivision is 0.75 acre-feet per lot or 2.25 acre-feet annually using the full allotment of Dawson aquifer water allowed under the plan for augmentation for the 3 lot subdivision for a total demand of 675 acre-feet for the subdivision for 300 years. The Decree and augmentation plan in District Court Water Division 1, Case No. 18CW3004, authorizes withdrawal of 0.75 acre-feet/year/lot of Dawson aquifer water for a period of 300 years or a total of 675 acre-feet; therefore, the supply and the

demand are equal. Based on the foregoing, there appears to be a sufficient water supply to meet the water demands of the Walker Reserve Minor Subdivision.

7. Section 8.4.7.B.10.g., of the El Paso County Land Development Code allows for the presumption of acceptable water quality for minor subdivision projects such as this.

8. Therefore, based upon the documentation provided with the proposal, based on the finding of sufficiency and no injury by the State Engineer, based on the Decree and augmentation plan in District Court Water Division 1, Case No. 18CV3004, and based on the requirements below, the County Attorney's Office recommends a finding that the proposed water supply is **sufficient** in terms of quantity and dependability. There is a presumption of sufficient water quality.

#### REQUIREMENTS:

A. Applicant, its successors and assigns, shall comply with all requirements of District Court Water Division 1, Case No. 18CW3004, specifically, that water use shall not exceed 2.25 acre-feet annually for the 3 lot subdivision (the Decree limits withdrawal to 0.75 acre-feet annually for the subdivision based on 3 lots), and that all stream depletions will be replaced with non-evaporative septic system return flows for a period of 300 years, pursuant to the Court's augmentation plan.

B. The County prefers that when there is a plan for augmentation, that Applicant, its successors and assigns, create a homeowners' association ("HOA"); however, alternatively to establishing an HOA, especially for minor subdivisions such as this, Applicant, its successors and assigns, shall create restrictive covenants upon and running with the property which shall advise and obligate future lot owners of this subdivision, their successors and assigns, regarding all applicable requirements of District Court Water Division 1, Case No. 18CW3004, as well as their obligations to comply with the plan for augmentation, including, but not limited to, ensuring that return flows by the use of non-evaporative septic systems are made to the stream systems, and that such return flows shall only be used to replace depletions and shall not be sold, traded, or assigned in whole or in part for any other purpose. The Covenants more specifically shall require the Dawson aquifer wells to serve on each lot an occupied single-family dwelling that is generating return flows from a non-evaporative septic system before any irrigation or animal watering is allowed from the wells. In addition, the Covenants shall advise future lot owners of this subdivision, their successors and assigns, of their obligations regarding costs of operating the plan for augmentation, which will include pumping of the Dawson wells in a manner to replace depletions during pumping and the cost of drilling a Laramie-Fox Hills aquifer well in the future to replace post-pumping depletions. Such Covenants shall also address responsibility for any metering and data collecting that may be required regarding water withdrawals from wells pursuant to the plan for augmentation, and shall protect the viability of the water supply by placing limitations in the Covenants as to amendments and termination as applied to said water supply.

The covenants shall address the following:

- 1) Identify the water rights associated with the property. The Covenants shall reserve 675 acre-feet of not-nontributary Dawson aquifer water pursuant to the plan for augmentation in District Court Water Division 1, Case No. 18CW3004, to satisfy El Paso County's 300 year water supply requirement for the 3 lots of the Walker Reserve Minor Subdivision.
- 2) Require evaporative septic systems and reserve return flows from the same. The Covenants shall require each lot owner to use non-evaporative septic systems to ensure that return flows from such systems are made to the stream system to replace depletions during pumping, shall reserve said return flows to replace depletions during pumping, and shall state that said return flows shall not be sold, traded or used for any other purpose. The Covenants more specifically shall require the Dawson aquifer well on each lot to be serving an occupied single-family dwelling that is generating return flows from a non-evaporative septic system before any irrigation or animal watering is allowed from the well. The Covenants shall also include the following or similar language to ensure that such return flows shall only be used for replacement purposes: "Return flows shall only be used for replacement purposes, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, sold, traded, bartered, assigned or encumbered in whole or in part for any other purpose."
- 3) The following or similar language shall be included in the Covenants to address future conveyances of the lots subsequent to the initial conveyance made by Applicant/Declarant: "The water rights referenced herein shall be explicitly conveyed; however, if a successor lot owner fails to so explicitly convey the water rights, such water rights shall be intended to be conveyed pursuant to the appurtenance clause in any deed conveying said lot, whether or not the plan for augmentation in District Court Water Division 1, Case No. 18CW3004, and the water rights are specifically referenced in such deed. The water rights so conveyed shall be appurtenant to the lot with which they are conveyed, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, sold, traded, bartered, assigned or encumbered in whole or in part for any other purpose. Such conveyance shall be by special warranty deed, but there shall be no warranty as to the quantity or quality of water conveyed, only as to the title."
- 4) The Covenants shall advise future lot owners of this subdivision, their successors and assigns, of their responsibility for any metering and data collecting that may be required regarding water withdrawals from the existing Dawson aquifer well and future wells which may be constructed in the Dawson and/or Laramie-Fox Hills aquifer.
- 5) The Covenants shall address amendments using the following or similar language:

"Notwithstanding any provisions herein to the contrary, no changes, amendments, alterations, or deletions to these Covenants may be made which

would alter, impair, or in any manner compromise the water supply for the Walker Reserve Minor Subdivision pursuant to the plan for augmentation in District Court Water Division 1, Case No. 18CW3004. Further, written approval of the proposed amendments must first be obtained from the El Paso County Planning and Community Development Department, and as may be appropriate, by the Board of County Commissioners, after review by the County Attorney's Office. Any amendments must be pursuant to a Determination from the Division 1 Water Court approving such amendment, with prior notice to El Paso County Planning and Community Development for an opportunity for the County to participate in any such adjudication."

6) The Covenants shall address termination using the following or similar language:

"These Covenants shall not terminate unless the requirements of the plan for augmentation in District Court Water Division 1, Case No. 18CW3004, are also terminated by order of the Division 1 Water Court, and a change of water supply is approved in advance of termination by the Board of County Commissioners of El Paso County."

C. Applicant, its successors and assigns, shall reserve in the Covenants and in any deeds of the Property the decreed amount of at least 0.75 acre-feet per lot annually and shall reserve a total decreed amount of at least 2.25 acre-feet of Dawson aquifer water for the 3 lots in the subdivision for 300 years for a total of 675 acre-feet for the 3 lot subdivision for 300 years. Said reservation shall recite that this water shall not be separated from transfer of title to the Property and shall be used exclusively for primary and replacement supply. Applicant shall convey by recorded warranty deed these reserved Dawson aquifer water rights to the individual lot owners. Applicant, its successors and assigns, at the time of lot sales, shall convey by warranty deed to individual lot owner(s) sufficient water rights in the Dawson aquifer, pursuant to District Court Water Division 1, Case No. 18CW3004, underlying the respective lots to satisfy El Paso County's 300 year water supply requirement. Dawson aquifer requirements for each lot are as follows: 225 acre-feet for each lot (0.75 acre-feet/year x 300 yrs.). Said conveyance instruments shall recite that this water shall not be separated from transfer of title to the Property and shall be used exclusively for the primary supply and replacement during pumping for the respective lots. Applicant shall provide said Covenants or other such reservation instrument and form deeds for such conveyances that shall be reviewed and approved by both the Planning and Community Development Department and the County Attorney's Office prior to recording of the minor subdivision plat.

Any and all conveyance instruments shall recite as follows:

For the water rights and return flows conveyed for the primary supply (Dawson aquifer):  
"These water rights conveyed, and the return flows therefrom, are intended to provide a 300 year supply, and replacement during pumping, for each of the 3 lots of the Walker Reserve Minor Subdivision. The water rights so conveyed, and the return flows

therefrom, shall be appurtenant to each of the respective lots with which they are conveyed, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, sold, traded, bartered, assigned or encumbered in whole or in part for any other purpose. Such conveyance shall be by special warranty deed, but there shall be no warranty as to the quantity or quality of water conveyed, only as to the title.”

D. Applicant shall reserve in the Covenants and/or in any deeds of the Property at least 675 acre-feet of water in the Laramie-Fox Hills aquifer for use in the augmentation plan to replace post-pumping depletions. Pursuant to the Decree and plan for augmentation, Applicant shall recite that this water shall not be separated from transfer of title to the Property and shall be used exclusively for augmentation supply. Applicant shall convey by recorded warranty deed these reserved Laramie-Fox Hills aquifer water rights to the HOA or to the individual lot owners (with appropriate deed restrictions) for use in the augmentation plan. Applicant shall provide copies of such reservation and conveyance instruments that shall be reviewed and approved by both the Planning and Community Development Department and the County Attorney’s Office prior to recording the minor subdivision plat.

E. Applicant, its successors and assigns, shall submit Declaration of Covenants, Conditions, and Restrictions and any plat notes required herein to the Planning and Community Development Department and the County Attorney’s Office for review, and the same shall be approved by the Planning and Community Development Department and the County Attorney’s Office prior to recording the final plat. Said Declaration shall cross-reference District Court Water Division 1, Case No. 18CW3004 (including plan for augmentation) and shall identify the obligations of the individual lot owners thereunder.

F. Applicant, its successors and assigns, shall record all applicable documents, including, but not limited to, the decree in District Court Water Division 1, Case No. 18CW3004 (including plan for augmentation) and agreements, assignments, and warranty deeds regarding the water rights, and Declaration of Covenants in the land records of the Office of the Clerk and Recorder of El Paso County, Colorado.

G. As noted by the State Engineer’s Office, the Applicant must obtain well permits pursuant to C.R.S. § 37-90-137(10) and pursuant to the Decree and plan for augmentation in District Court Water Division 1, Case No. 18CW3004. Permit applications submitted by entities other than the holder of the water rights in Case No. 18CW3004, must include evidence that the permit applicant has acquired the right to the portion of the water being requested in the application.

H. Prior to recording the final plat, Applicant must provide evidence of ownership of the water rights decreed in District Court Water Division 1, Case No. 18CW3004, to the Planning and Community Development Department and the County Attorney’s Office. In other words, the Applicant must provide proof acceptable to the County of a chain of title of the water rights from Scott and Susan Mikulecky to G3 Investments, Inc.

I. As further noted by the State Engineer's Office, the following plat note shall be added that addresses the State Engineer's admonition to advise landowners of potential limited water supplies in the Denver Basin:

"Water in the Denver Basin aquifers is allocated based on a 100 year aquifer life; however, for El Paso County planning purposes, water in the Denver Basin aquifers is evaluated based on a 300 year aquifer life. Applicants and all future owners in the subdivision should be aware that the economic life of a water supply based on wells in a given Denver Basin aquifer may be less than either the 100 years or 300 years used for allocation indicated due to anticipated water level declines. Furthermore, the water supply plan should not rely solely upon non-renewable aquifers. Alternative renewable water resources should be acquired and incorporated in a permanent water supply plan that provides future generations with a water supply."

cc: Nina Ruiz, Planner III