

## County Attorney

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June 21, 2024

SF-21-41            Ohana Acres

Reviewed by:    Lori L. Seago, Senior Assistant County Attorney  
April Willie, Paralegal

### **WATER SUPPLY REVIEW AND RECOMMENDATIONS**

#### Project Description

1. This is a proposal for approval of Ohana Acres, a minor subdivision application by G & D Hammann Ohana Trust, Hamman Gary L. Trustee and Noel-Hammann Darlene C. Trustee (“Applicant”) for a 4-lot subdivision on 19.31 acres (the “property”). The property is zoned RR-5 (Rural Residential).

#### Estimated Water Demand

2. Pursuant to the Water Supply Information Summary (“WSIS”), the water demand for the subdivision is 2.0 acre-feet/year which includes irrigation of a fourth of an acre and stock watering of 2 heads per lot. Based on this total demand, Applicant must be able to provide a supply of 600 acre-feet of water (2.0 acre-feet per year x 300 years) to meet the County’s 300-year water supply requirement.

#### Proposed Water Supply

3. The Applicant has provided for the source of water to derive from up to four (4) wells withdrawing from the not-nontributary Arapahoe aquifer as provided in Determination of Water Right No. 3714-BD (“Determination”). The Determination allocates 755 acre-feet (7.55 acre-feet per year based on a 100-year aquifer life or 2.51 acre-feet per year based on El Paso County’s 300-year aquifer rule) of Arapahoe aquifer water to be used for in-home, lawn and gardens, domestic animals, commercial, agricultural, stock and replacement. At least four percent (4%) of the amount of the underlying water withdrawn annually must be returned to the uppermost aquifer in the vicinity. The

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allowed annual amount of water to be withdrawn shall not exceed 2.51 acre-feet pursuant to the determination.

#### State Engineer's Office Opinion

4. In a letter dated April 3, 2024, the State Engineer stated that “[e]ach lot will be served by a proposed individual on lot well withdrawing the allocation for the Arapahoe aquifer approved in Determination of Water Right No. 3714-BD.” The allowed average annual amount of withdrawal provided for in Determination of Water Right no. 3714-BD is 2.51 acre-feet with at least four percent (4%) of the amount of the underlying water withdrawn annually returned to the uppermost aquifer in the vicinity.

Finally, the State Engineer stated that, “... pursuant to section 30-28-136(1)(h)(I) C.R.S., it is our opinion that the proposed water supply is adequate and can be provided without causing injury to decreed water rights.”

#### Recommended Findings

5. Quantity and Dependability. Applicant's water demand for Ohana Acres is 2.0 acre-feet per year for a total demand of 600 acre-feet for the subdivision for 300 years. The Determination allows for one or more wells necessary to meet the needs of this subdivision, limited to an annual withdrawal of 0.62 acre-feet per well for up to 4 wells, for a total of up to 2.51 acre-feet. **Based on the water demand of 2.0 acre-feet/year for Ohana Acres and the Determination permitting withdrawals in excess of that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for Ohana Acres.**

6. The water quality requirements of Section 8.4.7.B.10.g. of the El Paso County Land Development Code must be satisfied. **El Paso County Public Health shall provide a recommendation as to the sufficiency of water quality.**

7. Basis. The County Attorney's Office reviewed the following documents in preparing this review: a Water Resources Report dated June 13, 2018, the Water Supply Information Summary, the State Engineer's Office Opinion dated April 3, 2024, Determination of Water Right No. 3714-BD entered on June 26, 2019. The recommendations herein are based on the information contained in such documents and on compliance with the requirements set forth below. ***Should the information relied upon be found to be incorrect, or should the below requirements not be met, the County Attorney's Office reserves the right to amend or withdraw its recommendations.***

#### **REQUIREMENTS:**

A. Applicant and its successors and assigns shall comply with all requirements of the Colorado Ground Water Commission Determination of Water Right No. 3714-BD, specifically,

that water withdrawn from the Arapahoe aquifer shall not exceed 2.51 annual acre-feet for 300 years. At least four percent (4%) of the allowed amount of water withdrawn annually must be returned to the uppermost aquifer in the vicinity of the permitted point of withdrawal.

B. The County prefers that Applicant create a homeowners' association ("HOA") for the purpose of enforcing covenants and assessing any necessary fees related to compliance with the water decree for the property. For a four-lot subdivision such as this, however, in which the replacement of post-pumping depletions is not required, Applicant may elect to solely rely on the covenant provisions required below and forego creation of an HOA.

C. Applicant shall create restrictive covenants upon and running with the property which shall advise and obligate future lot owners of this subdivision and their successors and assigns regarding all applicable requirements of Determination of Water Right No. 3714-BD, including the limitations on diversions and use of water for each well and lot, the requirement to meter and record all well pumping, and information on how records are to be recorded.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve at least 600 acre-feet of not-nontributary Arapahoe aquifer water pursuant to Determination of Water Right No. 3714-BD to satisfy El Paso County's 300-year water supply requirement for the four (4) lots of Ohana Acres. The Covenants shall further identify that 150 acre-feet (0.5 acre-feet/year) of Arapahoe aquifer water is allocated to each lot. Said reservations shall not be separated from transfer of title to the property and shall be used exclusively for primary water supply.

2) Advise of responsibility for costs. The Covenants shall advise the lot owners and their successors and assigns of their obligations regarding the costs of complying with the Determination, which include installation and/or maintenance of totalizing flow meters.

3) Require reserve return flows. The Covenants shall require each lot owner return at least four percent (4%) of the amount of water withdrawn annually to the uppermost aquifer in the vicinity of the permitted points of withdrawal. Determination of Water Right No. 3714-BD does not specify the manner in which the return flows are generated or applied. The Covenants shall 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. Lot owners must follow all applicable laws, rules, regulations, court orders, and permit conditions related to return flows."

4) Address future lot conveyances. 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 Determination of Water Right No. 3714-BD and the water rights therein 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.”

5) Advise of monitoring requirements. The Covenants shall advise the future lot owners of this subdivision and their successors and assigns of their responsibility for any metering and data collecting that may be required regarding water withdrawals from existing and future wells in the Arapahoe aquifer.

6) Require well permits. The Covenants shall require that well permits be obtained pursuant to the requirements of Determination of Water Right No. 3714-BD and C.R.S. § 37-90-137(4) and (10).

7) Address amendments to the covenants. 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 Ohana Acres pursuant to Determination of Water Right No. 3714-BD. Further, written approval of any such 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 the Colorado Ground Water Commission approving such amendment, with prior notice to the El Paso County Planning and Community Development Department for an opportunity for the County to participate in any such determination.”

8) Address termination of the covenants. The Covenants shall address termination using the following or similar language:

“These Covenants shall not terminate unless the requirements of Determination of Water Right No. 3714-BD are also terminated by the Colorado Ground Water Commission and a change of water supply is approved in advance of termination by the Board of County Commissioners of El Paso County.”

D. Applicant and its successors and assigns shall reserve in any deeds of the entire property Arapahoe aquifer water in the decreed amount of at least 600 acre-feet (150 acre-feet per lot). 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.

E. Applicant and its successors and assigns shall convey by recorded warranty deed these reserved Arapahoe aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Arapahoe aquifer underlying the respective lots to satisfy El Paso County's 300-year water supply requirement.

Any and all conveyance instruments shall also recite as follows:

For the water rights and return flows conveyed for the primary supply (Arapahoe aquifer): "These water rights conveyed, and the return flows therefrom, are intended to provide a 300-year water supply, and replacement during pumping, for each of the lots of Ohana Acres. 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."

F. Applicant and its successors and assigns shall submit a Declaration of Covenants, Conditions, and Restrictions, form deeds, 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 Determination of Water Right No. 3714-BD and shall identify the obligations of the individual lot owners thereunder.

G. Applicant and its successors and assigns shall record all applicable documents, including but not limited to Determination of Water Right No. 3714-BD, 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.

H. Applications for well permits submitted by persons other than the Applicant must include evidence that the permittee has acquired the right to the portion of the water being requested.

I. 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. Applicant 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.”

J. Prior to recording the final plat, Applicant shall submit proof that existing well 53485-A has been plugged and abandoned.

cc: Kylie Bagley, Project Manager, Planner