

EL PASO COUNTY



OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

Kenneth R. Hodges, County Attorney

Assistant County Attorneys

Lori L. Seago
Steven A. Klaffky
Mary Ritchie
Bryan E. Schmid
Nathan J. Whitney
Christopher M. Strider
Terry A. Sample
Dorey L. Spotts
Steven Martyn

August 23, 2022

Koinonia Ranch Filing No. 1
SP-21-4 Preliminary Plan
SF-21-35 Final Plat

Reviewed by: Lori L. Seago, Senior Assistant County Attorney
Edi Anderson, Paralegal, ACP

FINDINGS AND CONCLUSIONS:

1. This is a preliminary plan and final plat proposal by Koinonia Ranch, LLC ("Applicant") for a 6-lot subdivision on a parcel of approximately 39 +/- acres of land, plus tracts for open space and right-of-way (the "property"). There is an existing residence and existing well on 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 3.21 acre-feet/year, reflecting 1.56 acre-feet for household use (0.26 AF/lot), 1.35 acre-feet for irrigation, and 0.30 acre-feet for stock watering (4 animals per lot) which equates to 0.535 acre-feet/year for each of the 6 lots. Based on this total demand, Applicant must be able to provide a supply of 963 acre-feet of water (3.21 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 individual on-lot wells in the not nontributary Dawson aquifer as provided in Findings of Fact, Conclusions of Law, Ruling of Referee and Decree Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation, Division 2 Case No. 19CW3051 ("Case No. 19CW3051", "Decree" or "Augmentation Plan"). The Decree was granted to Sarah Barker Bartels Trust and recorded on September 22, 2020. The property was conveyed from the Trust to Koinonia Ranch, LLC via a Bargain and Sale Deed which was recorded on November 13, 2020.

The Decree adjudicated 963 acre-feet of Dawson-aquifer water underlying the 39.10-acre property.¹ Pursuant to the Augmentation Plan, "Bartels Wells Nos. 1 through 7 may each pump up to 0.46 acre feet of water per year, assuming seven lots, for a maximum total of 3.21 acre-feet Should fewer than seven lots be developed on Applicant's property, but a minimum of five lots are developed, each well thereon shall be entitled to withdraw its proportional share of the total 3.21 acre feet available." The Decree notes the beneficial uses on the property are: "domestic, irrigation, stock water, recreation, wildlife, fire protection, and also for storage and augmentation purposes associated with such uses."

State Engineer's Office Opinion

4. In a letter dated November 12, 2021, the State Engineer stated that the estimated water requirements are 3.21 acre-feet, with annual uses comprised of single-family use, irrigation of lawn and garden, and watering of up to four horses or equivalent livestock, per residence. The State Engineer identified that the wells in the subdivision "will operate pursuant to the augmentation plan decreed in case no. 2019CW3051 (Division 2). The water underlying this property was adjudicated and the applicant is the owner of the Dawson, Denver, Arapahoe, and Laramie Fox-Hills aquifers." The plan for augmentation "allows for annual diversion of 3.21 acre-feet from the Dawson aquifer for the uses proposed in the subdivision referral." The State Engineer identified an existing residence and well on the property (Well Permit No. 87527) and stated the Applicant will need to re-permit this well.

Finally, the State Engineer provided their opinion that "pursuant to CRS 30-28-136(1)(h)(l), that the anticipated water supply can be provided without causing material injury to decreed water rights so long as the applicant obtains a well permit for all existing, and proposed, wells pursuant to the plan for augmentation noted herein." And finally, "[o]ur 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."

Recommended Findings

5. Quantity and Dependability. Applicant's water demand for the Koinonia Ranch Subdivision is 3.21 acre-feet per year for a total demand of 963 acre-feet for the subdivision for 300 years. The Decree and Augmentation Plan in Case No. 19CW3051 permits withdrawal of 3.21 acre-feet/year (963 acre-feet total) of Dawson aquifer water for a period of 300 years.

Based on the water demand of 3.21 acre-feet/year for the Koinonia Ranch Subdivision and Case No. 19CW3051 permitting withdrawals in that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for the Koinonia Ranch Subdivision.

¹ Note: The Decree also adjudicated water in the following aquifers: Denver (2,050 acre-feet), Arapahoe (1,810 acre-feet), and Laramie-Fox Hills (1,110 acre-feet).

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: The Water Supply Information Summary provided on October 21, 2021, a *Water Resources Report* from MVE, Inc. dated December 31, 2021, the State Engineer's Office Opinion dated November 12, 2021, and Decree and Augmentation Plan in Case No. 19CW3051 recorded on September 22, 2020. 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 Decree and Augmentation Plan in Case No. 19CW3051. Water use shall not exceed 3.21 acre-feet annually for the 6-lot subdivision for a period of 300 years. Stream depletions shall be replaced with non-evaporative septic system return flows for a period of 300 years pursuant to the Court's approved augmentation plan.

B. The County requires that when there is a plan for augmentation, Applicant create a homeowners' association ("HOA") for the purpose of enforcing covenants and assessing any necessary fees related to compliance with the water decrees and augmentation plans for the property.

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 the Decree and Augmentation Plan in Case No. 19CW3051.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 963 acre-feet of not nontributary Dawson aquifer water and 920 acre-feet of nontributary Laramie-Fox Hills water pursuant to Case No. 19CW3051. The Covenants shall further identify that 160.5 acre-feet (3.21 AF/year) of Dawson aquifer water and 153.3 acre-feet of Laramie-Fox Hills aquifer water is allocated to each residential lot. In the alternative, the Covenants may identify that 160.5 acre-feet (3.21 AF/year) of Dawson Aquifer water is allocated to each residential lot and 920 acre-feet of Laramie-Fox Hills aquifer water shall be conveyed to the HOA. 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 water supply and post-pumping depletions.

2) Advise of responsibility for costs. The Covenants shall advise lot owners and their successors and assigns of their obligations regarding the costs of operating the plan for augmentation, which include pumping of the Dawson wells in a manner to replace depletions during pumping and the cost of drilling Laramie-Fox Hills aquifer wells in the future to replace post-pumping depletions.

3) Require non-evaporative septic systems and reserve return flows from the same. The Covenants shall require each lot owner to use a non-evaporative septic system to ensure that return flows from such systems are made to the stream system to replace actual deletions during pumping, shall reserve said return flows to replace depletions during pumping, and shall state that said return flows shall not be separately sold, traded, assigned, or used for any other purpose. The Covenants more specifically shall require that each lot served have an occupied single-family dwelling that is generating return flows from a non-evaporative septic system before any irrigation or animal watering is allowed. 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."

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 Case No. 19CW3051 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 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 wells in the Dawson and/or Laramie-Fox Hills aquifers.

6) Require well permits. The Covenants shall require that well permits be obtained pursuant to the requirements of Division 2 Case No. 19CW3051.

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 the Koinonia Ranch Subdivision pursuant to Case No. 19CW3051. 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 Division 2 Water Court 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 adjudication.”

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 Case No. 19CW3051 are also terminated by the Division 2 Water Court 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 Property Dawson aquifer water in the decreed amount of 160.5 acre-feet (0.535 AF/year for 300 years) and, if not conveyed to the HOA, Laramie-Fox Hills aquifer water in the decreed amount of 153.3 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 those reserved Dawson and, if not conveyed to the HOA, Laramie-Fox Hills aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Dawson and Laramie-Fox Hills aquifers 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 (Dawson 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 the Koinonia Ranch 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.”

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 Case No. 19CW3051 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, Case No. 19CW3051, 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. The State Engineer’s Office identified an existing well on the property (Well Permit No. 87527 – Bartels Well No. 1). If this well continues to be utilized, it must be re-permitted pursuant to the non-exempt well statute and in accordance with Case No. 19CW3051.

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.”

cc: Ryan Howser, Project Manager, Planner III