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SF-24-33 Berkheimer Subdivision Filing No. 1

Reviewed by: Lori L. Seago, Senior Assistant County Attorney
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WATER SUPPLY REVIEW AND RECOMMENDATIONS

Project Description

1. This is a proposal for approval of Berkheimer Subdivision Filing No. 1, an application by John Berkheimer (“Applicant”) to subdivide a parcel of 13.686 acres of land (the “property”) into two single-family residential lots. The property is zoned RR-5 (Rural Residential).

Estimated Water Demand

2. Pursuant to the Water Resource Report, the water demand for the subdivision is 1.566 acre-feet/year consisting of 0.52 acre-feet per year for household uses (0.26 acre-feet per home) and 0.566 acre-feet per year of irrigation of 0.28 acres (0.253 acre-feet per lot) and stock watering in the amount of 0.48 acre-feet for 8 horses (0.24 acre-feet per lot for 4 horses).¹ Based on this total demand, Applicant must be able to provide a supply of 469.8 acre-feet of water (1.566 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 the not-nontributary Dawson aquifer as provided in the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 1 Case No. 2024CW3038 (“Decree”). The groundwater decreed underlying the property includes 1,070 acre-feet of water in the Dawson aquifer, 1,090 acre-feet of water in the Denver aquifer, 547 acre-feet of water in the Arapahoe aquifer and 372 acre-feet of water in the

¹ The estimated demand in the Water Resource Report is consistent with the presumptive demand figures in the El Paso County Land Development Code. Applicant will be required to revise its Water Supply Information Summary (“WSIS”) to be consistent with the Water Resource Report.

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Laramie-Fox Hills aquifer. The Augmentation Plan approved the pumping of up to 1.566 acre-feet per year for 300 years and 469.8 acre-feet total of Dawson aquifer water.

There is a well currently located on the Applicant's property under Well Permit No. 215326. This well will re-permitted under the plan for augmentation.

The approved augmentation plan has a term of 300 years and requires that non-evaporative septic system return flows be used for augmentation during the pumping period for the approved wells. Applicant must reserve 479.4 acre-feet of its water rights in the Arapahoe aquifer for the replacement of post-pumping depletion. Each of the 2 wells may pump up to 0.783 acre-feet per year.

State Engineer's Office Opinion

4. In a letter dated December 9, 2024, the State Engineer broke down the estimated annual water requirement totals . . . "0.4 acre-feet for in-house use (0.2 acre-feet/lot), 0.686 acre-feet for irrigation of up to 12,120 square-feet (6,060 square-feet/lot), and 0.48 acre-feet for the watering of 8 horses or equivalent livestock (0.24 acre-feet/lot). The total subdivision would be 1.566 acre-feet/year (0.783 acre-feet/year/lot)."² The State Engineer noted that the wells will produce from the not-nontributary Dawson aquifer pursuant to the augmentation plan decreed in Case No. 2024CW3038.

Finally, the State Engineer provided their opinion, ". . . pursuant to Section 30-28-136(1)(h)(l) 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, provided well no. 215326 is re-permitted pursuant to the augmentation plan decreed in case no. 2024CW3038."

Recommended Findings

5. Quantity and Dependability. Applicant's water demand for the Berkheimer Subdivision Filing No. 1 is 1.566 acre-feet per year for a total demand of 469.8 acre-feet for the subdivision for 300 years. The Decree and Augmentation Plan allows for 2 wells to withdraw water, pumping a maximum combined total of 1.566 acre-feet from the Dawson aquifer annually, with each lot pumping a maximum of 0.783 acre-feet per year (469.8 acre-feet total), which is equivalent to the requested demand.

Based on the water demand of 1.566 acre-feet/year for Berkheimer Subdivision Filing No. 1 and the Decree's allowable amount of 1.566 acre-feet per year, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for Berkheimer Subdivision Filing No. 1.

² Though the State Engineer uses estimated demand figures for each use type from the Water Supply Information Summary rather than the updated Water Resource Report, no update to their letter is necessary since the total estimated demand remains the same.

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 November 6, 2024, the *Water Supply Information Summary*, the *State Engineer's Office Opinion* dated December 9, 2024, and Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 2024CW3038 entered on October 21, 2024. 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 1 Case No. 2024CW3038, specifically, that water withdrawn from the Dawson aquifer shall not exceed 1.566 annual acre-feet. Depletions during pumping shall be replaced by individual on-lot non-evaporative septic systems.

B. The County prefers that when there is an augmentation plan, 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. For minor subdivisions such as this, however, 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, their successors and assigns, and the HOA regarding all applicable requirements of the Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 2024CW3038.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve at least 469.8 acre-feet of Dawson aquifer water and 479.4 acre-feet of Arapahoe aquifer water pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 1 Case No. 2024CW3038 to satisfy El Paso County's 300-year water supply requirement for the 2 lots of the Berkheimer Subdivision Filing No. 1. The Covenants shall further identify that 234.9 acre-feet (0.783 acre-feet/year) of Dawson aquifer water and 239.7 acre-feet 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 and augmentation.

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 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 Arapahoe 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 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 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 1 Case No. 24CW3038 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 Dawson and Arapahoe aquifers.

6) Require well permits. The Covenants shall require that well permits be obtained pursuant to the requirements of Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 1 Case No. 24CW3038 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 Berkheimer Subdivision Filing No. 1 pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 1 Case No. 24CW3038. 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 1 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 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 1 Case No. 24CW3038 are also terminated by 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.”

D. Applicant and its successors and assigns shall reserve in any deeds of the property Dawson aquifer water in the decreed amount of 469.8 acre-feet, as well as 479.4 acre-feet of Arapahoe aquifer water. 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 Dawson aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Dawson and Arapahoe aquifers underlying the respective lots to satisfy El Paso County’s 300-year water supply requirement, which amounts are 234.9 acre-feet of Dawson aquifer water and 239.7 acre-feet of Arapahoe aquifer water per lot.

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 Berkheimer Subdivision Filing No. 1. 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 1 Case No. 2024CW3038 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 agreements, assignments, 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 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.”

I. Prior to recording the final plat:

- Applicant shall provide proof that the well operating under permit no. 215326 has been re-permitted.
- Applicant must upload a Water Supply Information Summary that matches the information in the updated Water Resources Report.

cc: Joe Letke, Project Manager, Planner