

# Porzak Browning & Bushong LLP


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### MEMORANDUM

TO: Ty Klikus

CC: Melissa Sternfield, Esq.

FROM: Kevin Kinnear 

DATE: October 25, 2011

RE: Water Rights for 7360 Shoup Road, Colorado Springs, Colorado

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You had requested that I review certain documents relating to your acquisition of the property known as 7360 Shoup Road (the "Property") to advise you with respect to water rights matters associated with the Property.

I have reviewed the documents forwarded to me by Melissa Sternfield, including the following: the ALTA Title Commitment No. 951715 issued September 29, 2011 from Stewart Title; the Personal Representative's Deed dated April 9, 2004 from Diane E. Doyle as Personal Representative of the Estate of E. Elinor Hannasch a/k/a Evelyn Elinor Hannasch to Edward A. Edwards,; the Deed of Trust dated November 30, 2007 from Edward A. Edwards to First National Bank of Colorado; the Public Trustee's Certificate of Purchase dated October 27, 2010; the Confirmation Deed dated November 23, 2010 from the Public Trustee to First National Bank; the Eagle Forest Subdivision Development Guidelines, Improvement Location Certificate, PUD Development Plan (2 pages), and El Paso County Assessor's Map; Resolution No. 07-427 (Approve Rezone), Board of County Commissioners, County of El Paso, Colorado; Resolution No. 07-428 (Approve Preliminary Plan), Board of County Commissioners, County of El Paso, Colorado. In addition, I have researched and reviewed the following documents from the records of the Colorado State Engineer: Well Permit No. 168590 and related documents; Well Permit No. 168591 and related documents; and the Findings of Fact, Conclusions of Law, Ruling of the Referee, and Decree of the Court, Consolidated Case Nos. 04CW119 and 04CW336. I did not review any records of title, and I do not by this memorandum offer any opinion regarding title to any property or water rights.

Based on my review of the foregoing, it appears that there are certain water rights associated with the Property. First, there are two domestic "exempt" wells on the Property that were permitted by Ms. Hannasch. The first, Well Permit No. 168590, was permitted for the withdrawal of up to 0.75 acre-foot of water per year for use inside one single family dwelling, fire protection, watering of domestic animals and poultry, and the

irrigation of up to 2,000 s.f. of lawns and gardens. The second, Well Permit No. 168591, was permitted for the withdrawal of up to 0.75 acre-foot of water per year for use inside two single family dwellings, fire protection, and the watering of domestic animals and poultry. These wells are “exempt” wells, meaning that the Office of the State Engineer does not administer them in Colorado’s priority system<sup>1</sup>, but instead they may divert and use water as set forth in the permits without the threat of curtailment by water administration officials. These wells can be re-drilled and relocated within 200 feet of their original locations without requiring a new permit.

The Property’s prior owner, Edward A. Edwards, also adjudicated in water court the Denver Basin groundwater<sup>2</sup> underlying the Property, together with a plan for augmentation by which such groundwater may be diverted and used to provide water for up to 9 single family homes and a clubhouse, including outdoor irrigation. A complete description of the legal qualities and status of the Denver Basin aquifers is beyond the scope of this memorandum. However, the effect of the decree is that the plan provides a 300 year water supply from the shallow Dawson aquifer for up to 9 single family homes and a clubhouse, including indoor uses, some outdoor irrigation, and stock watering for up to 50 animals. Water would be diverted by individual wells (one for each lot), and wastewater would be treated by on-site septic systems. There are on-going obligations to replace stream depletions after pumping has ceased (the effects on streams of pumping groundwater can be delayed for years).

I would point out that the legal description of the property that is the subject of the decree in Case No. 04CW119 is slightly different than the legal description of the Property as described in the ALTA title commitment. As a result, a very small portion of the decreed water rights might not be appurtenant to the Property. Ms. Sternfield has indicated that Mr. Edwards retained a very small portion of property; it is possible that his retained parcel is associated with a portion of the decreed water rights. If so, then the total volumes of water decreed will have to be reduced proportionately. A water resources engineer will have to assist in making this determination.

In determining whether these water rights are appurtenant to the Property, prior conveyances must be reviewed. A water right is a distinct interest in real property. Therefore, the transfer of a water right must be affected with the same formality and documentation as any other interest in real property to comply with Colorado law to avoid the statute of frauds, and to afford the transferee the protection of the recording statutes. As a water right may be conveyed with or without the land to which it is

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<sup>1</sup> Colorado’s priority system is based on the premise of “first in time, first in right” – that is, the first appropriators of water are entitled to receive the full useful amount of their appropriations, even if that means that more junior appropriators must stop diverting water to make water available to the senior water rights. Ground water is presumed to be tributary to a stream, and thus is administered as if it was a stream diversion, unless it is demonstrated to be among a few special categories of ground water.

<sup>2</sup> As a result of the adjudication of the Denver Basin groundwater and plan for augmentation, the State Engineer’s office is likely going to take the position that the exempt wells described in the preceding paragraph can no longer be used as exempt wells. Instead, they must be used under the plan for augmentation, or else they must be plugged and abandoned.

appurtenant and is a distinct subject of grant, a conveyance of a water right should expressly describe such water right.

Oftentimes, however, when water rights are conveyed with the land on which they have been historically used, they are not specifically described. Instead, water rights are sometimes conveyed by general language such as “together with all appurtenances” or “together with all water rights.” When such language is used without a specific description of the water rights involved, an ambiguity arises as to whether a specific water right was conveyed. This issue is primarily a factual question hinging upon the intent of the grantor. Among the factors that evidence the intent of the grantor is whether the water right was incident to and necessary to the beneficial enjoyment of the land. Conveyancing documents which reference only land, with no references to appurtenances or water rights, are presumed to convey only the land. However, non-tributary ground water rights and associated Denver Basin ground water rights, such as the ground water decreed in Case No. 04CW119, are apparently presumed to be conveyed with the land.<sup>3</sup>

The Deed of Trust and the Confirmation Deed both include an appurtenance clause that includes the following: “together with . . . all water, water rights and ditch rights (including stock in utilities with ditch or irrigation rights), and all other rights, royalties, and profits relating to the real property . . .” This language, coupled with the apparent presumption that non-tributary and related water rights (and the water underlying the land itself) are conveyed with the land, creates a presumption that the ground water rights and plan for augmentation decreed in Case No. 04CW119 will be conveyed with the Property to the extent that the Property constitutes the land described in the decree, unless there has been a prior conveyance of these water rights apart from the Property.

With respect to the deed from the bank, I recommend the following language be used either in the property description (Exhibit A to the deed), in the general appurtenance clause, or in a separate appurtenance clause: “together with all water and water rights and ditch rights (including stock in utilities with ditch or irrigation rights), including without limitation all water and water rights, and the plan for augmentation decreed in Case No. 04CW119 to the extent that the decree therein is associated with the Property, . . .” The underlined language is not included in any prior deed, but it would be helpful to include it in this deed. Because the bank is conveying by quit claim deed, this should not be objectionable. However, if the bank refuses to include this language, then the language that is in the Deed of Trust and Confirmation Deed appurtenance clause would be acceptable. It would not be acceptable for the bank to refuse to include the same language in the appurtenance clause that was included in its Deed of Trust and Confirmation Deed.

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<sup>3</sup> There is no express statutory support for this presumption, but there is at least one Colorado Supreme Court decision expressing that this presumption applies in Colorado.