

EL PASO COUNTY



OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

Diana K. May, County Attorney

Assistant County Attorneys

Lori L. Seago
Lisa A. Kirkman
Steven A. Klaffky
Mary Ritchie
Bryan E. Schmid
Nathan J. Whitney
Michael J. Desmond
Christopher M. Strider
Terry A. Sample

June 8, 2021

PUDSP-20-6 Eagle Forest Subdivision
PUD/Preliminary Plan

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

FINDINGS AND CONCLUSIONS:

1. This is a PUD/preliminary plan proposal by Eagle Forest Development, LLC ("Applicant") to subdivide 44.2 +/- acres of land located at 7360 Shoup Road into 9 single-family residential lots and open space (the "Property"). The Property is zoned PUD. This PUD project was initially proposed by a previous applicant and approved in 2007, but the project was put on hold due to financial issues related to a recession.

2. The Applicant has provided for the source of water to derive from individual on-lot wells from the not nontributary Dawson aquifer for the 9 lots pursuant to Colorado Water Court Consolidated Case Nos. 04CW336 (Division 1) and 04CW119 (Division 2), which was approved by the Court on November 2, 2005 ("Decree and Augmentation Plan") and issued to Edward A. Edwards. The Applicant estimates its annual water needs to serve household use for 9 single-family residences at 2.7 acre feet annually, outside irrigation at 4.7 acre-feet annually, and stock watering at 1.0 acre feet annually, for a total annual water demand of 8.4 acre-feet.¹ The Applicant must provide a supply of 8.4 acre-feet of water per year and 2,520 acre-feet total (8.4 acre-feet/yr. x 300 years) to meet the County's 300 year water supply requirement.

3. In a letter dated October 7, 2020, the State Engineer's Office reviewed the water demand and supply for this proposed subdivision of 44.2 +/- acres subdivided into 9 lots and a tract for open space. The State Engineer identified the water

¹ Note: Previous submittals of this project included a clubhouse with a water demand of 1.5 acre-feet/year. The present submittal omits the clubhouse from the project, which results in a water demand of 8.4 acre-feet/year instead of 9.9 acre-feet/year.



requirements as cited in the Water Supply Information Summary ("WSIS") as 2.7 acre-feet for household use (0.3 acre-feet per year per dwelling), irrigation in the amount of 4.7 acre-feet and stock watering of 1.0 acre-feet for a total of 8.4 acre-feet/year/subdivision. The State Engineer indicated the source of water is individual on-lot wells from the not nontributary Dawson aquifer operated pursuant to the Decree and Augmentation Plan. The Augmentation Plan permits Applicant to withdraw up to 9.9 acre-feet annually from the Dawson aquifer for a period of 300 years. The State Engineer identified the following Denver Basin groundwater rights underlying Applicant's property:

Aquifer	Tributary Status	Volume (A/F)	Annual Allocation 100 Year (AF/Year)	Annual Allocation 300 Year (AF/Year)
Dawson	NNT	2,970	29.7	9.9
Denver	NNT 4%	2,910	29.1	9.7
Arapahoe	NT	1,920	19.2	6.4
Laramie-Fox Hills	NT	1,270	12.7	4.2

The State Engineer noted there are 2 existing wells located on the property (Permit Nos. 168590-A and 168591) which are exempt wells pursuant to C.R.S. § 37-62-602. The Applicant intends to use one or both of the existing wells; therefore, the State Engineer directed the Applicant to apply for and obtain new well permits pursuant to C.R.S. § 30-90-137(4).

The State Engineer provided the 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 well permits issued pursuant to C.R.S. 37-90-137(4) and the plan for augmentation noted herein, for all wells in the subdivision and operates the wells in accordance with the terms and conditions of any future well permits." And further, it is the opinion of the State Engineer 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."

4. The Applicant provided a Water Resources Report dated January 21, 2005 from Curtis Wells & Co. which provided an overview of the water rights on the Property. The Applicant also provided report from Porzak Browning & Bushong, LLP, dated October 25, 2011, which included information related to the water rights chain of title, the history of the project, information regarding the well permits, and water uses on the Property. The report notes that the water rights were decreed to Edward A. Edwards in Colorado Water Court Consolidated Case Nos. 2004CW119 and 2004CW336. The Property, including the water rights, were subject to a foreclosure by Mr. Edwards pursuant to a release of Deed of Trust on December 7, 2007, recorded at Reception No. 207156125 in the records of the El Paso County Clerk and Recorder. The Deed of Trust included "all water, water rights and ditch rights (including stock in

utilities with ditch or irrigation rights)". A Confirmation Deed from the El Paso County Public Trustee to First National Bank of Colorado was issued on November 23, 2010, recorded at Reception No. 210119052. The Confirmation Deed included "all water, water rights and ditch rights" On November 1, 2011, Eagle Forest Development, LLC, purchased the property, including water rights, from First National Bank via Quitclaim Deed recorded at Reception No. 211107763.

5. Colorado Water Court Consolidated Case Nos. 04CW119 (Division 1) and 04CW336 (Division 2). The Colorado Water Court adjudicated water in the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers in the Decree and Augmentation Plan dated November 2, 2005. The water rights adjudicated are highlighted in paragraph 3 above as described by the State Engineer's Office. The allowed uses permitted from the Dawson aquifer water underlying the property were identified as domestic, commercial, irrigation, stock watering, recreational, fish and wildlife, fire protection, and any other beneficial purpose. The plan for augmentation requires an individual well on each property to serve each of the 9 single-family residences, as well as outdoor irrigation, stock watering, and a clubhouse.² The average annual amounts of groundwater that may be withdrawn from the Dawson aquifer are 9.9 acre-feet/year for a period of 300 years.

6. Replacement of Depletions During Pumping. The Decree and Augmentation Plan require non-evaporative septic system return flows for replacement of depletions during the pumping period. The Court found that the return flows at the Property will accrue to the Monument Creek stream system and will serve as an adequate augmentation source.

7. Replacement of Post-Pumping Depletions. Pursuant to the Decree and Augmentation Plan, replacement of post-pumping depletions shall be made by water supplied from the Arapahoe and Laramie-Fox Hills aquifers. The reserved amounts required are based on a water demand of 9.9 acre-feet/year³ for 300 years as follows:

Arapahoe aquifer	1725 acre-feet
Laramie-Fox Hills aquifer	1245 acre-feet (total amount minus 2% relinquishment)
Total	2970 acre-feet

(2970 is equal to the entire amount pumped over the projected 300-year period).

8. Analysis: The Decree and Augmentation Plan provides a water supply of 2,970 acre-feet of water in the Dawson aquifer or 9.9 acre-feet annually for 300 years. The annual demand for this PUD/preliminary plan is 8.4 acre-feet/year. Therefore, there appears to be a sufficient supply to meet the needs of this subdivision and the County's 300-year water supply rule.

² A clubhouse is no longer planned for this project.

³ Actual water demand is 8.4 acre-feet/year so amounts to be reserved should be prorated accordingly.

9. The water quality requirements of Section 8.4.7.B.10 of the Land Development Code must be satisfied.

10. Therefore, based upon the State Engineer's finding that the proposed water supply is adequate and will not cause material injury, the decreed water rights and plan for augmentation in Colorado Water Court Consolidated Case Nos. 04CW119 and 04CW336, on the analysis above, and on the conditions listed below, the County Attorney's Office recommends a finding of **sufficiency** as to quantity and dependability. The El Paso County Public Health Department will need to provide an opinion as to quality.

Conditions of Compliance:

A. Applicant and its successors and assigns shall comply with all requirements of Colorado Water Court Consolidated Case Nos. 04CW119 and 04CW336, specifically, that water use shall not exceed 9.9 acre-feet annually for the 9-lot subdivision; 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 requires that when there is an augmentation plan, Applicant must create a homeowners' association ("HOA"). 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 Colorado Water Court Consolidated Case Nos. 04CW119 and 04CW336, 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 separately sold, traded, or assigned in whole or in part for any other purpose. The Covenants more specifically shall require that each lot served by a Dawson aquifer well 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 from the wells. In addition, the Covenants shall advise future lot owners of this subdivision and 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 Arapahoe and/or Laramie-Fox Hills aquifer wells 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 2,520 acre-feet of Dawson aquifer water to satisfy El Paso County's 300-year water supply requirement for the 9 lots of the Eagle Forest 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 actual depletions 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 or used for any other purpose. The Covenants more specifically shall require that each lot served by a Dawson aquifer well 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 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 Colorado Water Court Consolidated Case Nos. 04CW119 and 04CW336 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."
- 4) 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 the existing Dawson aquifer well and future wells to be constructed in the Arapahoe and/or Laramie-Fox Hills aquifers.
- 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 Eagle Forest Subdivision pursuant to the plan for augmentation in Colorado Water Court Consolidated Case Nos. 04CW119 and 04CW336. 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 approved pursuant to the Colorado 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."

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 Colorado Water Court Consolidated Case Nos. 04CW119 and 04CW336 are also terminated by order of the 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 or its successors and assigns shall reserve in the Covenants and in any deeds of the Property the decreed amount of at least 0.933 acre-feet per lot annually and shall reserve a total decreed amount of at least 8.4 acre-feet annually of Dawson aquifer water for the 9-lot subdivision for 300 years for a total of 2,520 acre-feet. 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 shall provide copies of said Covenants or other 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.

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 9 lots of the Eagle Forest 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 or its successors and assigns shall reserve in the Covenants and/or in any deeds of the Property the proportional amount of 1,725 acre-feet of water in the Arapahoe aquifer and 1,2455 acre-feet of water from the Laramie-Fox Hills aquifer for use in the augmentation plan to replace post-pumping depletions, subject to proration as noted in footnote 3. Pursuant to the Decree and Augmentation Plan, 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 Arapahoe and 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 or its successors and assigns shall at the time of lot sales, convey by warranty deed to individual lot owners sufficient water rights in the Dawson aquifer pursuant to Colorado Water Court Consolidated Case Nos. 04CW119 and 04CW336 underlying the respective lots to satisfy El Paso County's 300-year water supply requirement. Dawson aquifer requirements for each lot are as follows: 280 acre-feet for each lot (0.933 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 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 the minor subdivision plat.

F. Applicant or 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 Colorado Water Court Consolidated Case Nos. 04CW119 and 04CW336 and shall identify the obligations of the individual lot owners thereunder.

G. Applicant or its successors and assigns shall record all applicable documents, including but not limited to, the decree in Colorado Water Court Consolidated Case Nos. 04CW119 and 04CW336, 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.

H. As noted by the State Engineer's Office, the Applicant must obtain new well permits for well permit nos. 168590-A and 168591 already existing on the property. All well permits must be obtained pursuant to C.R.S. § 37-90-137(4).

I. Prior to recording the final plat, Applicant shall upload to eDARP a current Water Resources Report that meets the requirements of Section 8.4.7 (B) of the Land Development Code. Applicant shall also upload to eDARP a corrected Letter of Intent which reflects the water demand of 8.4 acre-feet instead of 9.9 acre-feet as currently indicated.

J. 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: Ryan Howser, Planner II