

# EL PASO COUNTY



## OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

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SF-20-1 Mountain's Edge subdivision  
Final Plat

Reviewed by: Lori L. Seago, Senior Assistant County Attorney  
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### **FINDINGS AND CONCLUSIONS:**

1. This is a proposal by OGC RE2, LLC ("Applicant") for a 5-lot subdivision on a parcel of approximately 30.613 +/- acres of land (the "Property"). This is a reapproval of a previous application approved by the Board of County Commissioners on January 13, 2011. The Board's approval expired before the previous owners were able to record the final plat. 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 0.26 acre-feet for each lot for household use, plus an additional 0.85 acre-feet total for irrigation, and 0.13 acre-feet total for stock watering for a total demand of 2.28 acre-feet/year for the subdivision (0.456 acre-feet/year for each of the 5 lots). Based on this total demand, Applicant must be able to provide a supply of 684 acre-feet of water (2.28 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 nontributary Arapahoe aquifer as provided in Colorado Ground Water Commission Findings and Order Determination No. 1484-BD ("Determination"). The Determination was issued on March 12, 2008, to TKB Properties, LLC. The water rights were later deeded to Steven Cook on April 21, 2011, and then were deeded to OGC RE2, LLC on April 2, 2018.

The Determination adjudicated 1,326 acre-feet of Arapahoe aquifer water underlying the 40-acre property.<sup>1</sup> Based on that amount, “the maximum allowed average annual amount of ground water in the aquifer that may be allocated for withdrawal ... is 13.3 acre-feet” for a period of 100 years, which equates to 4.43 acre-feet/year for 300 years. The Determination provides that “use of ground water from this allocation shall be limited to the following beneficial uses: domestic, commercial, industrial, irrigation, stock watering and replacement supply. The place of use shall be limited to the above described 40 acre land area.”

#### State Engineer's Office Opinion

4. In a letter dated January 31, 2022, the State Engineer stated that the “estimated water requirements are “(0.456 acre-feet/year per lot), for in-house use; a maximum of 3,000 square feet of landscape/irrigation of lawn and gardens; and watering of 2 domestic animals per lot” for total subdivision water demand of 2.28 acre-feet per year. The State Engineer identified the water supply as “producing from the nontributary Arapahoe aquifer pursuant to Determination of Water Right No. 1484-BD.” And further, the Determination provides for an “allowed average annual amount of withdrawal of groundwater of 13.3 acre-feet from the Arapahoe Aquifer” for a period of 100 years. The State Engineer notes that, to meet El Paso County's requirements, “the annual amount of withdrawal of 13.3 acre-feet per year from the Arapahoe aquifer would be reduced to one third of the allocation, or 4.43 acre-feet/year. As a result, the water may be withdrawn in that annual amount for a maximum of 300 years, and is sufficient to meet the proposed on lot demands.”

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

The State Engineer identified an existing well on the property (Permit No. 225983) which will not be utilized by the Applicant; therefore, it needs to be plugged and abandoned prior to subdivision approval.

#### Recommended Findings

5. Quantity and Dependability. Applicant's water demand for the Mountain's Edge Subdivision is 2.28 acre-feet per year for a total demand of 684 acre-feet for the subdivision for 300 years. Determination No. 1484-BD permits withdrawal of 4.43 acre-feet/year (1,326 acre-feet total) of Arapahoe aquifer water for a period of 300 years.

**Based on the water demand of 2.28 acre-feet/year for the Mountain's Edge Subdivision and Determination of Water Right No. 1484-BD permitting withdrawals in excess of that**

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<sup>1</sup> Note: 9.387 acres has been removed from the tract and is no longer part of this subdivision; however, no water allocated for the 9.387-acre portion was transferred to the new owner of that tract.

amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for the Mountain's Edge Subdivision.

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 July 22, 2021, the Water Resources Report dated December 8, 2021, the State Engineer's Office Opinion dated January 31, 2022, and Commission Determination of Water Right No. 1484-BD dated March 12, 2008. 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, its successors and assigns, shall comply with all requirements of Determination No. 1484-BD, specifically, that water use shall not exceed 4.43 acre-feet annually for the 5-lot subdivision for a period of 300 years.

B. Because there are no water augmentation or replacement plan obligations associated with the water supply for this subdivision, the County Attorney's Office recommends that Applicant not be required to create a homeowners' association but simply required to create and record restrictive covenants upon and running with the property. The Covenants shall advise and obligate future lot owners of this subdivision and their successors and assigns regarding all applicable requirements of Determination No. 1484-BD, including the requirements regarding the location and construction of wells. The Covenants shall address responsibility for any metering and data collecting that may be required regarding water withdrawals from wells pursuant to the Determination 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 684 total acre-feet of nontributary Arapahoe aquifer water, reserving 136.8 acre-feet per lot, pursuant to Determination No. 1484-BD to satisfy El Paso County's 300-year water supply requirement for the 5 lots of the Mountain's Edge Subdivision.
- 2) 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 No. 1484-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."

3) 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 Arapahoe aquifer.

4) 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 Mountain's Edge Subdivision pursuant to Determination No. 1484-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 a Determination from 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 adjudication."

5) The Covenants shall address termination using the following or similar language:

"These Covenants shall not terminate unless the requirements of Determination No. 1484-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."

C. Applicant and its successors and assigns shall reserve in the Covenants and in any deeds of the Property the determined amount of at least 2.28 acre-feet annually for the subdivision (0.456 acre-feet annually per lot) from the Arapahoe aquifer for a period of 300 years for a total of 684 acre-feet (136.8 acre-feet per lot) for the 5-lot subdivision. 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. Applicant shall convey by recorded warranty deed the reserved Arapahoe 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 conveyed for the Arapahoe aquifer: "These water rights conveyed are intended to provide a 300-year supply for each of the 5 lots of the Mountain's Edge Subdivision. The water rights so conveyed 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 and its successors and assigns, at the time of lot sales, shall convey by warranty deed to individual lot owners sufficient water rights in the Arapahoe aquifer, pursuant to Determination No. 1484-BD underlying the respective lots to satisfy El Paso County's 300-year water supply requirement. Arapahoe aquifer requirements are 136.8 acre-feet (0.456 acre-feet/year x 300 years). 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 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.

E. Applicant and its successors and assigns shall submit a 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 Determination No. 1484-BD and shall identify the obligations of the individual lot owners thereunder.

F. Applicant and its successors and assigns shall record all applicable documents, including, but not limited to, Determination No. 1484-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.

G. Pursuant to Determination No. 1484-BD, a condition of a well permit requires that two percent of the water pumped from the Arapahoe wells be relinquished to shallow soils beneath the property.

H. The State Engineer's Office cited the existence of a Denver aquifer well (No. 225983) on the property. The well must be plugged and abandoned prior to recording the final plat.

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 II