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DHN Development, LLC
2335 Coral Bell Grove, #101
Colorado Springs, CO 80910

Re: Southmoor Ridge Development – Stormwater Infiltration Basin

I have been requested to provide a legal opinion as to DHN Development, LLC's Southmoor Ridge Development concerning the proposed Stormwater Infiltration Basin to be located thereon, and specifically whether any appropriation of water rights under Colorado law are implicated thereby. In preparing this opinion I have reviewed the proposed development plan and site layout provided by DHN, as well as a "Master Development Drainage Plan/Preliminary Drainage Report" prepared by MVE, Inc. on DHN's behalf (the "MVE Report").

Appropriation of a water right in Colorado requires diversion of water and placing such water to beneficial use, neither of which will occur in the proposed stormwater infiltration basin, which is rather intended to provide a means for stormwater to rapidly accrue to Fountain Creek without flooding or other damage occurring. There has been a good deal of development in the law in recent years concerning situations in which stormwater management can result in a water right appropriation, or potentially result in injury to other water users, such arguments often based upon the disruption in the timing of stormwater accruing to Colorado river systems as a result of such stormwater management infrastructure. *See e.g. Meridian Service Metro Dist. v. Colo. Ground Water Comm.*, 361 P.3d 392 (2015). The Colorado legislature has responded to such litigation with statutory revisions providing a framework for stormwater detention ponds and infiltration basins to avoid appropriation of water and resulting augmentation requirements, and to avoid injuring the owners of vested water rights, specifically C.R.S. §37-92-602(8). As described in the MVE Report, from a technical standpoint the proposed Stormwater Infiltration Basin meets all of the technical requirements of C.R.S. §37-92-602(8), specifically:

- The stormwater infiltration basin will continuously infiltrate at least 97% of all of the runoff from a rainfall event that is less than or equal to a 5-year storm within 72 hours after the end of the event;

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- The stormwater infiltration basin will continuously infiltrate at least 99% of the runoff within 120 hours after the end of events greater than a 5-year storm; and,
- The stormwater infiltration basin will operate passively and will not subject the stormwater runoff to any active treatment process (e.g., coagulation, flocculation, disinfection, etc.).

In addition to these technical requirements, C.R.S. §37-92-602(8) further requires that:

- The stormwater infiltration basin must be owned or operated by a governmental entity, or subject to oversight by a governmental entity (e.g., required under an MS4 permit); and,
- Because the Southmoor Ridge Infiltration Basin is located within the Fountain Creek drainage, the infiltration basin must actually be operated in compliance with an MS4 permit.

These latter legal requirements of C.R.S. §37-92-602(8) will, to my understanding, likewise be complied with in that the City of Fountain, in which the Stormwater Infiltration Basin will be located, will exercise oversight of the use, operation, maintenance and repair of the Stormwater Infiltration Basin, and will further include this Stormwater Infiltration Basin in the inventory maintained for the City of Fountain's MS4 Permit. The statute provides that, provided an infiltration basin meets the above described requirements, there is "a rebuttable presumption that the facility does not cause material injury to vested water rights", though the owner of a vested water right may challenge such presumption in court if such water user is able to prove material injury does in fact occur. See C.R.S. §37-92-602(8)(c)(I)(A).

It is my opinion that the Southmoor Ridge Development Stormwater Infiltration Basin, as described in detail in the MVE Report, is designed to be fully compliant with the relevant statutory guidance, including DHN's intent that the infiltration basin be subject to the oversight of the City of Fountain and be included within the City of Fountain's MS4 Permit. Because no water is being appropriated and placed to beneficial use, it is my opinion that no water right is required for the development of this stormwater infiltration basin, and based upon the rebuttable presumptions provided by C.R.S. §37-92-602(8), no material injury will occur to other water users through its development and operation.

Sincerely,

MONSON, CUMMINS, SHOHET
& FARR, LLC

/s/ Chris D. Cummins

Chris D. Cummins

