

EL PASO COUNTY



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SF-18-41 Settlers View
 (Final Plat)

Reviewed by: M. Cole Emmons, Senior Assistant County Attorney
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FINDINGS AND CONCLUSIONS:

1. This is a proposal by Gary and Brenda Brinkman ("Applicant") for approval of a final plat to subdivide approximately 40.61 acres of land into 14 single-family residential lots. Applicant is in process of selling the property that is being subdivided, but will continue to reside in the existing residence that is located on what will be identified as Lot 2. The property is currently zoned RR-2.5 (Rural Residential).

2. The Applicant has provided for the source of water to derive from individual on-lot wells withdrawing from the not nontributary Dawson aquifer, pursuant to the groundwater decree in District Court Water Division Consolidated Case Nos. 11CW045 (Div. 1) and 11CW023 (Div. 2) (the "Decree"). The Decree provided for alternative water demands based on the number of lots in the subdivision. Because this subdivision is identified as a 14-lot subdivision, the Decree allows for 0.97 acre-feet of Dawson Aquifer water to be pumped for 13 wells and 1.0 acre-feet to be pumped by existing Well Permit No. 75798-F, which is located on proposed Lot 2, for a total demand of 13.6 acre-feet/year for the 14 lots. Pursuant to the Water Supply Information Summary and correspondence from the Hank Worley Law Firm, LLC, the Applicant estimates its annual water requirements for the 14-lot subdivision as follows: household use at 3.64 acre-feet/year, irrigation at 3.15 acre-feet/year, stock watering for 28 animals at 0.345 acre-feet/year, and 6.475 acre-feet/year for other uses for a total of 13.6 acre-feet/year. Applicant will need to provide a supply of 4,080 acre-feet of water (13.6 acre-feet/year x 300 years) to meet the County's 300-year water supply requirement.

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3. In letters dated July 31, 2017 and March 15, 2018, the State Engineer's Office reviewed the proposed water supply for this final plat. The State Engineer's Office indicates that the proposed source of water for the subdivision is the Denver Basin with the water supply withdrawing from the Dawson Aquifer operating pursuant to the plan for augmentation noted in the Decree. The State Engineer notes that there is a pre-existing well on the property (well permit no. 75798-F) which will continue to be used by Applicant on Lot 2 of the subdivision. The following chart delineates the available water supply pursuant to the Decree:

Aquifer	Annual amount available for the 40 acre parcel	
	100 year allocation	300 year allocation
Dawson	49.6 af	16.5 af
Denver	37.1 af	12.3 af
Arapahoe	16.3 af	5.4 af
Laramie-Fox Hills	12.0 af	4.0 af

In its letter dated July 31, 2017, the State Engineer noted that the “plan for augmentation ... allows for an average diversion of 13.6 acre-feet annually and 4,081 acre feet total over a 300-year period. The decree allows the withdrawal from up to 15 wells in the Dawson aquifer, including the existing well with permit no. 75798-F ... and one well in each other aquifer underlying the property.... According to the decree, the allowed withdrawal from each well depends on the eventual number of lots in the subdivision. Annual diversions from the existing Dawson aquifer well ... are limited to 1.0 acre-feet annually by decree. For the proposed fourteen lot subdivision, the decree would allow pumping of up to 0.97 acre-feet per year for the remaining thirteen Dawson aquifer wells.” The State Engineer further notes that “the annual demand for the subdivision is less than the allowed average annual amount of withdrawal of 13.6 acre-feet per year, allowed by the augmentation plan.”

The State Engineer's letter dated July 31st asked the Applicant to provide clarification on the proposed uses that are labeled “other uses” in the Water Supply Information Summary. In correspondence to the County from the Worley Law Firm, LLC, dated March 13, 2018, Mr. Worley detailed the allowed uses that were not on the Water Supply Information Summary but which were allowed by the Decree, to include:

- 1) Drinking and sanitation water for commercial uses;
- 2) A stand-alone office or guest cottage; and
- 3) A hot tub/spa and/or swimming pool.

Mr. Worley stated that the above noted uses are permitted “so long as such owner's well pumping does not exceed the allowed amount of 0.97 acre foot annually per well (1.0 acre foot annually for the existing well, permit no. 75798-f).” In the State Engineer's letter dated March 15, 2018, the Engineer acknowledged the clarification by Mr. Worley and that the “above described uses are allowed by the decree....Lot owners

may chose [sic] to use the Dawson aquifer well for none, one, or any combination of the above described uses allowed by the water decree . . . so long as the well pumping does not exceed the allowed amount of 0.97 acre-feet/year or 1.0 acre foot/year for the existing well, permit no. 75798-F. If the existing well is expanded to be used for the above described uses the applicant must obtain a new well permit for this structure in accordance with Section 37-90-137(4) C.R.S.”

The State Engineer also noted that Applicant’s materials indicate that the proposed development will have a detention pond. Therefore, the State Engineer provided an advisory to the Applicant that “unless the structure can meet the requirements of a ‘storm water detention and infiltration facility’ as defined in section 37-92-602(8), Colorado Revised Statutes, the structure may be subject to administration by this office.”

Finally, pursuant to C.R.S. § 30-28-136(1)(h)(l), the State Engineer’s Office stated that “it is our opinion that the proposed water supply is adequate and can be provided without causing injury to decreed water rights.”

4. The water quality requirements of Section 8.4.7.B.10 of the El Paso County Land Development Code must be satisfied.

5. Plan for Augmentation. The Decree permits the Applicant to subdivide the parcel into up to a total of 15 lots, using the existing Dawson Aquifer well on one lot and Dawson aquifer wells on each additional lot. The Decree provides that if “14 or 15 lots are created, the [existing well] will continue to be allowed to pump 1.0 acre feet per year, but annual Dawson aquifer pumping on the remaining lots shall be reduced to 0.97 acre-feet for the remaining wells in a 14 lot subdivision. . . Dawson aquifer pumping under this plan for augmentation will be limited to a maximum of 13.6 acre-feet annually, and 4,081 acre feet total...” In short, the Decree permits the Applicant to withdraw and use 4,081 acre-feet of the Dawson Aquifer water for this 14 lot subdivision.

Replacement of depletions during pumping. The plan for augmentation requires that stream system depletions during the 300 years of pumping the Dawson Aquifer are to be replaced by septic system return flows. Therefore, Applicants, their successors and assigns, must use nonevaporative septic tanks and leach fields for each single-family dwelling.

Replacement of post-pumping depletions. The Decree requires the Applicant, its successors and assigns, “. . . to replace the actual depletions caused by pumping the Dawson aquifer well that impact the stream system after pumping ceases.” The Decree requires the Applicant, its successors and assigns, to “. . . reserve and dedicate to this plan for augmentation all 3,706 acre feet of their Denver aquifer water decreed herein for the purpose of replacing to the South Platte River system all post-pumping depletions. This is less than a 1:1 replacement of the 4,080 acre-feet of Dawson Aquifer water that will be pumped during 300 years; however, the Water Court says this 3,706 acre-feet of

Denver Aquifer water will be adequate. The Court stated: “[t]aking into account the two percent relinquishment amount for nontributary water, and the fact that depletions of approximately 449 acre feet will occur during the projected 300 year pumping period, this amount is adequate to replace post-pumping depletions of approximately 3,632 acre feet under the maximum pumping scenario of 13.6 acre feet annually. . . .” In other words, it appears the Court took 4,080 acre-feet of the Dawson Aquifer demand, subtracted 449 acre-feet of depletions during pumping, which equals 3,631 acre-feet (likely the Court rounded to 3,632 acre-feet) to arrive at the amount of post-pumping depletions that will have to be replaced. The Decree also requires that the Applicant, its successors and assigns, return at least two percent of Arapahoe Aquifer water to the South Platte River system,; and return at least two percent of the Laramie-Fox Hills Aquifer water to the Monument Creek drainage .

6. Analysis. The Court decreed a permitted withdrawal of 13.6 acre-feet of water annually for 300 years for a total of 4,080 acre-feet from the Dawson Aquifer, which can be withdrawn to serve the 14 residential lots in this subdivision through individual wells, including one existing Dawson aquifer well. In this 14-lot subdivision, the lot with the existing well will use 1.0 acre-foot/year (300 acre-feet) and the remaining 13 lots in this subdivision will use 12.61 acre-feet/year total (3,783 acre-feet total for 300 years). With a total available supply based on the Decree of 4,960 acre-feet of Dawson Aquifer water, 1,632 acre-feet of Arapahoe Aquifer water, and 1,200 acre-feet of Laramie-Fox Hills Aquifer water, and an annual demand allowed by the Decree of 13.6 acre-feet/year (4,080 acre-feet total for 300 years) of Dawson Aquifer water, there should be a sufficient supply to meet the County’s 300 year water supply rule.

7. Therefore, at this time, based on the finding of no injury and sufficiency by the State Engineer, the decreed water rights and plan for augmentation in District Court Water Division Consolidated Case Nos. 11CW045 (Div. 1) and 11CW023 (Div. 2), and based on the requirements listed below, the County Attorney’s Office recommends a finding that the proposed water supply is **sufficient** in terms of quantity and dependability. The El Paso County Health Department shall make a finding as to water quality.

REQUIREMENTS:

Plat Notes and Documentation are required to address the following:

A. Applicant shall take all necessary steps to ensure that if and when Applicant conveys the property for this subdivision, that the appropriate water rights and obligations of the Decree are also conveyed to the successor purchaser. These Requirements shall apply to the Applicant and its successors and assigns. Applicant, its successors and assigns, shall create a Homeowners’ Association (“HOA”) and advise the HOA and all future owners of these lots of all applicable requirements of the Decree entered in District Court Water Division Consolidated Case Nos. 11CW045 (Div. 1) and 11CW023 (Div. 2), as well as their obligations to comply with the Decree and plan for

augmentation, including but not limited to, costs of operating the plan for augmentation, including the costs for constructing and pumping the Denver Aquifer well(s) for replacing post-pumping depletions, and the responsibility for metering and collecting data regarding water withdrawals from all wells.

B. Applicant shall reserve and convey by warranty deed to the HOA, Applicant's interests, rights, and obligations in all of the 3,706 acre-feet of Denver Aquifer groundwater to be used for replacing post-pumping depletions. Applicant shall reserve, dedicate, and convey, as appropriate, to the HOA, at least two percent of the Arapahoe Aquifer water vested to the Applicant to return to the South Platte River system and at least two percent of the Laramie-Fox Hills Aquifer water to return to the Monument Creek drainage system. Applicant shall create restrictive covenants upon and running with the property which shall obligate individual lot owners and the HOA to carry out the requirements of the plan for augmentation. The conveyance instruments and/or deed(s) shall provide that these water rights shall be appurtenant to the land, to be used for replacing depletions to the applicable stream systems, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, bartered, or encumbered. Such conveyance instruments and/or deed(s) shall be reviewed and approved by both the Planning and Community Development Department and the County Attorney's Office prior to recording the final plat.

C. Applicant shall require non-evaporative septic systems and leach fields to replace depletions during 300 years of pumping from the Dawson Aquifer. Deeds for the subdivision property as a whole and lots shall specifically state that all return flows shall be dedicated by Grantee to replacing depletions during pumping of the Dawson Aquifer pursuant to the plan for augmentation, and said return flows shall not be sold, leased or otherwise used for any other purpose, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, bartered, or encumbered. In addition, the Covenants shall recite that return flows from non-evaporative septic systems shall comply with the requirements of the plan for augmentation, that such return flows shall only be used to replace depletions, shall not be sold, leased or otherwise used for any other purpose, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, bartered, or encumbered.

D. Applicant, its successors and assigns, at the time of lot sales, shall convey by warranty deed to individual lot owners sufficient water rights in the underlying Dawson Aquifer to satisfy El Paso County's 300 year water supply requirement: 291 acre-feet total for each of the 13 lots and 300 acre-feet for the lot with the existing Dawson aquifer well, as well as sufficient water rights in the Arapahoe and Laramie-Fox Hills aquifers to accommodate post-pumping depletions. Said Deed shall provide that the water rights shall be appurtenant to the land, to be used for the benefit of the lot owner, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, bartered, or encumbered. It is anticipated that these conveyances will satisfy the State Engineer's evidentiary requirement that an applicant for an individual on-lot well has

acquired the right to the portion of water being requested on the application. Applicant shall provide a form deed for such conveyance that shall be reviewed and approved by both the Planning and Community Development Department and the County Attorney's Office prior to recording of the final plat.

E. Applicant shall submit a Declaration of Covenants, Conditions, and Restrictions as well as Bylaws and Articles of Incorporation of the HOA 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 of the final plat. Said Declaration shall cross-reference the decreed plan for augmentation and the related water rights decrees, and shall recite the obligations of the individual lot owners and the HOA under each of these documents. Applicant shall provide a copy of the Certificate of Incorporation of the HOA by the Secretary of State to the Planning and Community Development Department and the County Attorney's Office prior to recording of the final plat.

F. Applicant, its successors and assigns, shall record all applicable documents including, but not limited to, the Decree and plan for augmentation, agreements, assignments, and warranty deeds regarding the water rights, Declaration of Covenants, Bylaws, and Articles of Incorporation in the land records of the Office of the Clerk and Recorder of El Paso County, Colorado.

G. 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, which is based on an allocation approach. Applicants, the Home Owners Association, 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 indicated due to anticipated water level declines. Furthermore, the water supply plan should not rely solely upon non-renewable aquifers, and Applicants and their successors and assigns, including individual lot owners in the subdivision and the HOA, may be required to acquire, develop, and incorporate alternative renewable water resources in a permanent water supply plan that provides future generations with a water supply."

cc: Kari Parson, Project Manager, Planner II