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August 16, 2023

MS-23-3 Gunners Ridge

Reviewed by: Lori L. Seago, Senior Assistant County Attorney
April Willie, Paralegal

WATER SUPPLY REVIEW AND RECOMMENDATIONS

Project Description

1. This is a proposal for approval of the Gunners Ridge, a minor subdivision application by Andrew and Emilee Makings (“Applicant”) for a 4-lot subdivision on a parcel of 38.83 acres of land (the “property”). 3 lots will be approximately 5 acres each in size, and the fourth lot will be approximately 23.8 acres in size with two residences. 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 1.5 acre-feet per year for 4 units,¹ 0.3 acre-feet per year for commercial use, irrigation of up to 1.4 acres requiring 2.9 acre-feet of water per year along with stock watering of up to 104 head at 1.3 acre-feet per year for a total demand of 6 acre-feet per year.

Based on this total demand, Applicant must be able to provide a supply of 1,800 acre-feet of water (6 acre-feet per year x 300 years) to meet the County’s 300-year water supply requirement.

¹ The number of household units is actually five (5), due to the larger lot having two residences.

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Proposed Water Supply

The Applicant has provided for the source of water to derive from up to four (4) individual on-lot wells² withdrawing from the not-nontributary Dawson aquifer as provided in Determination of Water Right no. 463-BD (“Determination”) and Replacement Plan no. 463-RP (“Replacement Plan”). In the Determination, the Court quantified an amount of water from beneath 310 acres of overlying land, of which this proposed subdivision is part. The Applicant has acquired via quitclaim deed the rights to withdraw up to 27.125 acre-feet annually from the Dawson aquifer (on a 100-year basis). The Replacement Plan allows the withdrawal of Dawson aquifer water from up to four wells for the following:

- One well will withdraw 3.9 acre-feet annually for the following uses: in-house use in up to two (2) single-family residences; in-building commercial sanitary use; up to one (1) acre of irrigation of home lawn, garden, pasture, hay and trees; and watering of up to eighty (80) large domestic animals.
- The other three (3) wells will each withdraw 0.7 acre-foot annually for in-house use in one (1) single family residence; up to 6,000 square-feet of irrigation of home lawn, garden, pasture, hay and trees; and watering of up to eight (8) large domestic animals; for a total withdrawal from the three (3) wells of 2.1 acre-feet annually.

The allowed annual amount of groundwater to be withdrawn from the aquifer by all wells operating under the Replacement Plan shall not exceed 6 acre-feet. A totalizing flow meter shall be installed on each well.

The approved Replacement Plan has a term of 300 years and requires that return flows from in-house use of groundwater shall occur through individual on-lot non-evaporative septic systems.

State Engineer’s Office Opinion

4. In a letter dated March 23, 2023, the State Engineer stated that “[t]he proposed water supply is individual on-lot wells withdrawing from the not-nontributary Dawson aquifer that will operate pursuant to Determination of Water Right no. 463-BD and Replacement Plan no. 463-RP.... Replacement Plan no. 463-RP allows the withdrawal the [sic] Dawson aquifer water from up to four wells for the following uses: One well with withdraw 3.9 acre-feet annually....The other three (3) wells will each withdraw 0.7 acre-foot [sic] annually....”

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

² Well permits will need to be applied for and approved prior to drilling any wells.

Recommended Findings

5. Quantity and Dependability. Applicant's water demand for Gunners Ridge is 6 acre-feet per year for a total demand of 1,800 acre-feet for the subdivision for 300 years. The Replacement Plan allows for 4 wells limited to an annual withdrawal of 3.9 acre-feet for one well, and up to 2.1 acre-feet total for the additional 3 wells.

Based on the water demand of 6 acre-feet/year for the Gunners Ridge subdivision and the Replacement Plan permitting withdrawals in that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for the Gunners Ridge 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: a *Water Resources Report* dated February 27, 2023, the Water Supply Information Summary, the State Engineer's Office Opinion dated March 23, 2023, and Replacement Plan No. 463-RP for Determination of Water Right No. 463-BD entered on March 15, 2023. 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 and its successors and assigns shall comply with all requirements of the Colorado Ground Water Commission Determination of Water Right No. 463-BD and Replacement Plan No. 463-RP, specifically, that water withdrawn from the Dawson aquifer by each of the proposed four wells permitted shall not exceed 6 acre-feet total. The allowed annual amount of groundwater to be withdrawn from one of the wells is 3.9 acre-feet and for the remaining wells is 0.7 acre-foot per well (2.1 acre-feet total). Depletions during pumping shall be replaced by individual on-lot non-evaporative septic systems.

B. The County prefers that when there is a replacement plan, Applicant create a homeowners' association ("HOA") for the purpose of enforcing covenants and assessing any necessary fees related to compliance with the water decree and replacement plan for the property. For a four-lot subdivision such as this, however, in which the replacement of post-pumping depletions is not required, Applicant may elect to solely rely on the covenant provisions required below and forego creation of an HOA.

C. 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 Determination of Water Right No. 463-BD and Replacement Plan No. 463-RP, including the limitations on diversions and use of water for each well and lot, the requirement to meter and record all well pumping, and information on how records are to be reported.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 1,800 acre-feet of not-nontributary Dawson aquifer water pursuant to Determination of Water Right No. 463-BD and Replacement Plan No. 463-RP to satisfy El Paso County's 300-year water supply requirement for the 4 lots of the Gunners Ridge Subdivision. The Covenants shall further identify that 1,170 acre-feet (3.9 acre-feet/year) of Dawson aquifer water is allocated to Lot 1 and 210 acre-feet (0.7 acre-feet/year) of Dawson aquifer water is allocated to each of Lots 2 through 4.

2) Advise of responsibility for costs. The Covenants shall advise the lot owners and their successors and assigns of their obligations regarding the costs of operating the plan for replacement, which include the installation and/or maintenance of totalizing flow meters.

3) Require non-evaporative septic systems and reserve return flows from the same. The Covenants shall require each lot owner to use a non-evaporative septic system to ensure that return flows from such systems are made to the stream system to replace actual depletions during pumping and shall state that said return flows shall not be separately sold, traded, assigned, or used for any other purpose. The Covenants more specifically shall require that each lot in the subdivision 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. 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."

4) Address future lot conveyances. 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 of Water Right No. 463-BD and Replacement Plan No. 463-RP 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.”

5) Advise of monitoring requirements. 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 existing and future wells in the Dawson aquifer.

6) Address amendments to the covenants. 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 Gunners Ridge Subdivision pursuant to Determination of Water Right No. 463-BD and Replacement Plan No. 463-RP. 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 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 determination.”

7) Address termination of the covenants. The Covenants shall address termination using the following or similar language:

“These Covenants shall not terminate unless the requirements of Determination of Water Right No. 463-BD and Replacement Plan No. 463-RP 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.”

D. Applicant and its successors and assigns shall reserve in any deeds of the Property Dawson aquifer water in the decreed amount of 1,170 acre-feet (3.9 acre-feet annually) for Lot 1 and 210 acre-feet (0.7 acre-feet annually) for each of Lots 2 through 4. 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.

E. Applicant and its successors and assigns shall convey by recorded warranty deed these reserved Dawson aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Dawson aquifer underlying the respective lots to satisfy El Paso County’s 300-year water supply requirement.

Any and all conveyance instruments shall also 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 water supply, and replacement during pumping, for each of the lots of the Gunners Ridge. 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.”

F. Applicant and its successors and assigns shall submit a Declaration of Covenants, Conditions, and Restrictions, form deeds, 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 of Water Right No. 463-BD and Replacement Plan No. 463-RP and shall identify the obligations of the individual lot owners thereunder.

G. Applicant and its successors and assigns shall record all applicable documents, including but not limited to Determination of Water Rights No. 463-BD, Replacement Plan No. 463-RP, 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. Applications for well permits submitted by persons other than the Applicant must include evidence that the permittee has acquired the right to the portion of the water being requested.

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.”

J. Prior to recording the final plat, Applicant shall:

- Upload a corrected Water Supply Information Summary that:
 - Corrects the number of household units to 5 in Section 9;
 - Enters the Determination and Replacement Plan numbers in Section 10;
- Upload a corrected Water Resources Report that states in Section 3.2 that the proposed 4 new wells will utilize only the Dawson aquifer.

Cc: Kylie Bagley, Project Manager, Planner