

EL PASO COUNTY

OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

Diana K. May, County Attorney

Assistant County Attorneys

M. Cole Emmons
Lori L. Seago
Lisa A. Kirkman
Steven A. Klaffky
Peter A. Lichtman
Mary Ritchie
Bryan E. Schmid

October 9, 2019

VR-17-017 Hadden Heights No. 2, Lot 18B (Contreras)
Vacation and Replat

Reviewed by: M. Cole Emmons, Senior Assistant County Attorney *M.C.E.*
Edi Anderson, Paralegal

FINDINGS AND CONCLUSIONS:

1. This is a proposal by Jose and Mary Contreras ("Applicant") for a vacation and replat of their property located at 11480 Eggar Drive ("subject property") into a legal lot. The subject property is part of a 10.210 acre lot identified as Lot 18 of the Hadden Heights subdivision. Lot 18 originally included a "park area" for public use. In 1981, pursuant to Resolution No. 81-65, El Paso County authorized conveyance of the park area via quitclaim deed to a private property owner. This portion of Lot 18 then became a single-family residence, but was never platted as part of a legal subdivision. The current vacation and replat will plat the 5.105 acre lot owned by Jose and Mary Contreras into a legal lot to permit construction of a new residence on the subject property. The new legal lot will now be identified as Lot 18B of Hadden Heights No. 2 Subdivision. The adjacent lot that is referred to above as a previous "park area" is not part of this subdivision action and this proposal does not address the water supply for that property. The subject property (Lot 18B) is located in a RR-5 (Residential Rural) zoning district.

2. The Applicant has provided for the source of water for the 1-lot subdivision to derive from an individual existing well on the subject property, previously identified as exempt Well Permit No. 191102, but which is now a well permitted with Well Permit No. 82920-F pursuant to the Replacement Plan—Determination of Water Right No. 3640-BD by the Colorado Ground Water Commission ("Replacement Plan"). There are three sources of water for this subdivision. The primary source of water for years 1-215 is water from the not nontributary Denver aquifer, adjudicated under Determination of Water Right No. 3640-BD.¹ For years 216-300 (85 years), Applicant will use water from either or both

¹ Determination 3640-BD adjudicated an allowed average annual withdrawal from the Denver aquifer of 2.16 acre-feet, with total volume that can be withdrawn not to exceed 216 acre-feet (based on 100 year aquifer life). The Replacement Plan states that pumping under the Plan is limited to 215 years. This water review is based on the 215



of the not nontributary Arapahoe aquifer, adjudicated under Determination of Water Right No. 3639-BD (which requires a 4% replacement returned to the uppermost aquifer in the vicinity of the permitted point or points of withdrawal of the annual amount withdrawn) (“Determination 3639-BD”) or nontributary Laramie-Fox Hills aquifer, adjudicated under Determination of Water Right No. 3639-BD (“Determination 3638-BD”). Applicant estimates its annual water needs for the 1 residential lot at 1.0 acre-feet per year. Based on these figures, Applicant must be able to provide a supply of 300 acre-feet of water (1.0 x 300 years) to meet the County’s 300 year water supply requirement.

The subject property will be served by the Denver, Arapahoe, and Laramie-Fox Hills aquifers in amounts and pursuant to the Determinations as noted in the table below.

Aquifer	Determination of Water Right	Total amount of acre-feet	Annual amount of acre-feet
Denver	3640-BD	216 a/f (NNT)	1.0 a/f (first 216 years)
Arapahoe	3639-BD	195 a/f (NNT)	1.95 a/f
Laramie-Fox Hills	3638-BD	153 a/f (NT)	1.53 a/f

3. In a letter dated July 11, 2019, the State Engineer reviewed the submittal to replat the 10.210 acre parcel into one 5.105 acre residential lot to be identified as Lot 18B. The Engineer reviewed the Water Supply Information Summary and the water supply letter dated May 10, 2019, from MVE, Inc. The State Engineer stated that the estimated water requirement for the 1-lot subdivision is 1.0 acre-feet per year for “in-house use, irrigation of 0.14 acres of lawn, garden and greenhouse, and the watering of 5 large domestic animals.” The State Engineer describes the water supply as follows: “the proposed water source for the first 216 years is an existing Denver aquifer well currently permitted under well permit no. 82920-F, with the source after that time proposed to be wells into the Laramie-Fox Hills aquifer and/or Arapahoe aquifer.”

The State Engineer’s Office issued Well Permit No. 82920-F pursuant to C.R.S. § 37-90-107(7), as permitted by Colorado Ground Water Commission Determination of Water Right No. 3640-BD and the Replacement Plan. The State Engineer states that “[p]ermit no. 82920-F was issued for the use of an existing well constructed under permit no. 191102 and well permit no. 191102 was cancelled upon issuance of well permit no. 82920-F.” And further, pursuant to Determination 3640-BD and well permit no. 82920-F, the well is permitted to “divert 1 acre-foot annually for 215 years for domestic use (in home use, lawn and garden irrigation and domestic animal watering), irrigation and replacement.”

acre-feet/ year figure. Therefore, based on Applicant’s demand of 1.0 acre-feet per year, the Denver aquifer can only supply water for 215 years under the Preplacement Plan. An additional 85 acre-feet of water is required to meet the County’s 300-year aquifer life requirement.

The State Engineer described the Determinations of Water Rights, noting that the “replacement plan under Determination of Water Right 3640-BD allows withdrawal of Denver aquifer ground water for 215 years, and Determinations of Water Rights nos. 3639-BD and/or 3638-BD allow withdrawals for at least another 100 years from the Arapahoe and/or Laramie-Fox Hills aquifers. This plan would meet the county’s requirement of providing the average annual demand of the subdivision for a period of 300 years.”

Finally, the State Engineer stated that “pursuant to Section 30-28-136(1)(h)(I), 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.”

4. Determination 3640-BD. This Determination adjudicates water in the not nontributary Denver aquifer underlying 5.105 acres (Lot 18B) located within the Upper Black Squirrel Creek Designated Ground Water Basin. The Determination noted the existing small-capacity well, Permit No. 191102, located on the property, that is permitted to withdraw 1.0 acre-feet per year, but which must be cancelled when a new well permit is issued under the Replacement Plan (Well Permit No. 82920-F replaces this permit). Determination 3640-BD adjudicated an allowed average annual withdrawal from the Denver aquifer of 2.16 acre-feet, with total volume that can be withdrawn not to exceed 216 acre-feet (based on 100 year aquifer life). Allowed uses are: domestic, irrigation of lawn and garden, greenhouse irrigation, vehicle and structure washing, stock watering, and replacement.

Replacement Plan. The Replacement Plan states the allowed annual amount that will be withdrawn from the Denver aquifer is 1.0 acre-foot, “for domestic (in home use, lawn and garden irrigation and domestic animal watering), irrigation and replacement.” Pumping is limited to 215 years. Return flows from in-house use shall come through individual on-lot non-evaporative septic systems located on the property. The Plan states “[t]o assure adequate return flows, the well must be serving an occupied single-family dwelling that is generating return flows via a non-evaporative septic system before any irrigation or animal watering is allowed to be served by the well.” The Plan further states “Applicant proposes to provide 0.18 acre-feet per year of replacement water to the alluvial aquifer system of the Upper Black Squirrel Creek Designated Ground Water Basin. The proposed source of replacement water is septic and leaching field return flows from the in-house use of ground water to be pumped under the plan. The Applicant estimates that return flows will consist of 90% of the water used for in-house purposes. Assuming a total annual amount for in-house use of 0.20 acre-feet, the return flow would be 0.18 acre-feet annually.” The Plan indicates that the return flows will be adequate if Applicant complies with the Plan: “[s]o long as the well continues to pump and supply an occupied dwelling, the plan’s required replacement obligations, shown in Exhibit A, will be met.” Finally, the Plan includes typical metering, monitoring, and reporting requirements.

5. Section 8.4.7.B.10.g. of the El Paso County Land Development Code allows for the presumption of acceptable water quality for minor subdivision projects such as this proposal.

6. Analysis. As described above, pursuant to Determination Nos. 3640-BD, 3639-BD, and 3638-BD, the Applicant has 3 sources of water to serve the subject property. The Replacement Plan allows withdrawal of 1.0 acre-foot/year of Denver aquifer water for 215 years. Based on an annual withdrawal of 1.0 acre-foot/year, the water demand for the subdivision requires a total of 300 acre-feet for 300 years. Pursuant to the Replacement Plan, Applicant may withdraw 215 acre-feet from the Denver aquifer adjudicated by Determination 3640-BD. The balance of the water supply for years 216-300 (85 years) will require 85 acre-feet total, which will need to be supplied from either the Arapahoe aquifer pursuant to Determination 3639-BD (195 acre-feet of total water supply available) or the Laramie-Fox Hills aquifer pursuant to Determination 3638-BD (153 acre-feet of total water supply available), or both. As indicated above, if Arapahoe aquifer is used, 4% annual replacement is required. As noted in the letter from MVE, Inc., the Applicant intends to withdraw a total of "1.00 Ac-Ft per year from either individual or combined sources." Therefore, based upon the finding of sufficiency and no injury by the State Engineer and the Colorado Ground Water Commission in the Replacement Plan (if the Plan is operated appropriately), based on the State Engineer's issuance of Well Permit No. 82920-F pursuant to C.R.S. § 37-90-107(7), and based on the Requirements below, the County Attorney's Office recommends a finding that the proposed water supply is **sufficient** in terms of quantity and dependability. There is a presumption of sufficient water quality.

REQUIREMENTS:

A. Applicant, its successors and assigns, shall comply with all requirements of the Replacement Plan, Determination 3640-BD, Determination 3639-BD, Determination 3638-BD, and the Denver aquifer Well Permit No. 82920-F.

B. When Applicants, their successors and assigns, convey the Property, then at the time of lot sale, they shall convey by warranty deed to individual lot owner(s) sufficient water rights in the Denver Basin aquifers as follows:

- 1) 215 acre-feet of not nontributary Denver aquifer water pursuant to the Replacement Plan and Determination 3640-BD underlying the subject property to satisfy the first 215 years of El Paso County's 300 year water supply requirement. Denver aquifer requirements for the single-family lot are a total of 215 acre-feet based on annual withdrawal of 1.0 acre-

foot/year x 215 years).² Said conveyance instrument shall recite that the annual withdrawal is limited to 1.0 acre-feet per year, from which the lot owner is responsible for meeting the annual replacement required by the Replacement Plan from return flows through a non-evaporative septic system.

- 2) 85 acre-feet of either not nontributary Arapahoe aquifer water pursuant to Determination 3639-BD underlying the subject property or 85 acre-feet of nontributary Laramie-Fox Hills aquifer water pursuant to Determination 3638-BD underlying the property to satisfy the remaining 85 years of El Paso County's 300 year water supply requirement, or some combination of the two to arrive at a total of 85 acre-feet to meet the annual withdrawal of 1.0 acre-foot/year. Said conveyance instrument shall recite that the annual withdrawal is limited to 1.0 acre-feet per year, and if the Arapahoe aquifer water is conveyed, it shall also recite that the lot owner is responsible for meeting the 4% annual replacement required from this amount conveyed.

Any and all conveyance instruments shall recite as follows:

For the water rights conveyed for the primary supply (Denver and Arapahoe and/or Laramie-Fox Hills aquifer waters): "These water rights conveyed are intended to provide a 300-year supply for Lot 18B, Hadden Heights No. 2 Subdivision. 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."

For the return flows for replacement: "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."

Applicant shall provide a form warranty deed(s) for review and approval to the Planning and Community Development Department and the County Attorney's Office prior to recording the final plat.

C. Because the water supply derives from three sources and must meet the County's 300 year water supply requirement by using different sources over the 300 year

² Determination of Water Right Nos. 3640-BD, 3639-BD, and 3638-BD base the water commitments on a 100-year aquifer life. Due to El Paso County's 300-year rule, the acre-feet of water per year to be supplied to the single-family lot is computed to reflect El Paso County's 300-year requirement.

period, Applicant, their successors and assigns, shall create restrictive covenants (Declaration of Covenants, Conditions, and Restrictions), upon and running with the property which shall advise and obligate future lot owner(s) of this subdivision, their successors and assigns, regarding all applicable requirements of Colorado Ground Water Commission Replacement Plan—Determination of Water Right No. 3640-BD, Determination of Water Right Nos. 3640-BD, 3639-BD, and 3638-BD, and Well Permit No. 82920-F. The covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 215 acre-feet of not nontributary Denver aquifer water pursuant to the Replacement Plan and Determination 3640-BD to satisfy the first 215 years of El Paso County's 300 year water supply requirement; 85 acre-feet of either not nontributary Arapahoe aquifer water pursuant to Determination 3639-BD (from 195 acre-feet total available) or 85 acre-feet of nontributary Laramie-Fox Hills aquifer water pursuant to Determination 3638-BD (from 153 acre-feet total available) or some combination of the two to arrive at a total of 85 acre-feet to satisfy the remaining 85 years of El Paso County's 300 year water supply requirement and meet the annual withdrawal of 1.0 acre-foot/year for 300 years. The following or similar language shall be included: "These water rights are intended to provide a 300-year supply for Lot 18B, Hadden Heights No. 2 Subdivision, shall be appurtenant to Lot 18B, 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."

2) The following or similar language shall be included to address conveyances of Lot 18B 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 Determination or Decree and the water rights 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) Address return flows required from use of Denver aquifer water. Covenants shall ensure that return flows by the use of non-evaporative septic systems are made to address the replacement requirements. This shall include the following language from the Replacement Plan: "To assure adequate return flows, the well must be serving an occupied single-family dwelling that is generating return flows via a non-evaporative septic system before any irrigation or animal watering is allowed to be served by 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."

4) Address 4% replacement for use of not nontributary Arapahoe aquifer. Covenants shall ensure that the 4% annual replacements are made and shall include the following language derived from the Determination: "Pursuant to Determination No. 3639-BD, at least four percent (4%) of the allowed amount of Arapahoe aquifer withdrawn annually must be returned to the uppermost aquifer in the vicinity of the permitted point or points of withdrawal, unless other locations are approved by the Colorado Ground Water Commission." The Covenants shall also include the following or similar language to ensure that such replacement water is used only for replacement purposes: "These 4% replacement waters 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."

5) The Covenants shall advise future lot owners of this subdivision, their successors and assigns, of their responsibility for any metering and data collecting that may be required regarding water withdrawals from the existing Denver aquifer well and future wells to be constructed in the Arapahoe and/or Laramie-Fox Hills aquifers.

6) The Covenants shall advise future lot owners of this subdivision, their successors and assigns, of their obligations regarding construction of a well or wells that will be required to be constructed in the future to withdraw water from either the Arapahoe aquifer or the Laramie-Fox Hills aquifer, or both, to provide a supply of water for years 216-300 in order to satisfy the remaining 85 years of El Paso County's 300 year water supply requirement, and to withdraw water only from the specific aquifer intended, as required by the applicable Determination(s).

7) 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 Lot 18B, Hadden Heights No. 2 Subdivision, provided by the Colorado Ground Water Commission Replacement Plan—Determination of Water Right No. 3640-BD, Determination of Water Right Nos. 3640-BD, 3639-BD, and 3638-BD, and Well Permit No. 82920-F. 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 pursuant

to a Determination from the Colorado Ground Water Commission approving such amendment, with notice to El Paso County Planning and Community Development for an opportunity for the County to participate in any such adjudication.”

8) The Covenants shall address termination using the following or similar language: “These Covenants shall not terminate unless the requirements of the Colorado Ground Water Commission Replacement Plan—Determination of Water Right No. 3640-BD, Determination of Water Right Nos. 3640-BD, 3639-BD, and 3638-BD, and Well Permit No. 82920-F are also terminated by order of 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 shall submit the 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 must be approved by the Planning and Community Development Department and the County Attorney’s Office prior to recording the final plat. Said Covenants shall cross-reference the Determinations and shall recite the obligations of the individual lot owners under the same.

E. Applicant, its successors and assigns, shall record all applicable documents, including, but not limited to, Replacement Plan—Determination of Water Right No. 3640-BD, Determination of Water Right Nos. 3640-BD, 3639-BD, and 3638-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.

F. The following plat note shall be added 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, 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 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: Nina Ruiz, Planner III