

## County Attorney

**Kenneth R. Hodges, County Attorney**  
719-520-6485  
Centennial Hall  
200 S. Cascade, Suite 150  
Colorado Springs, CO 80903  
www.ElPasoCo.com

**Board of County Commissioners**  
Holly Williams, District 1  
Carrie Geitner, District 2  
Stan VanderWerf, District 3  
Longinos Gonzalez, Jr., District 4  
Cami Bremer, District 5

May 24, 2024

MS-23-9            Driftwood Estates Filing No. 1  
Minor Subdivision

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 Driftwood Estates Filing No. 1, a minor subdivision application by Andrew Alm (“Applicant”) for a 2-lot subdivision on a parcel of 12.72 acres of land (the “property”). 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 1.27 acre-feet/year, comprised of 0.52 acre-feet/year of indoor household use for two single-residential lots, 0.57 acre-feet per year for irrigation of 0.23 acres, stock watering of up to 8 animals at 0.09 acre-feet per year and 0.09 acre-feet for other uses. In the Water Resources Report (“Report”), the estimated demand is divided between the two lots such that Lot 1 has an estimated demand of 0.85 acre-feet/year (0.26 acre-feet for indoor household use and 0.59 acre-feet for all other uses combined) and Lot 2 has an estimated demand of 0.42 acre-feet per year (0.26 acre-feet for indoor household use and 0.16 acre-feet for all other uses combined). Based on this total demand, Applicant must be able to provide a supply of 381 acre-feet of water (1.27 acre-feet per year x 300 years) to meet the County’s 300-year water supply requirement. 255 acre-feet must be supplied to Lot 1, and 126 must be supplied to Lot 2.

#### **ASSISTANT COUNTY ATTORNEYS**

NATHAN J. WHITNEY  
CHRISTOPHER M. STRIDER

STEVEN A. KLAFFKY  
TERRY A. SAMPLE

LORI L. SEAGO  
DOREY L. SPOTTS

BRYAN E. SCHMID  
STEVEN W. MARTYN

MERI GERINGER  
ERIKA KEECH

### Proposed Water Supply

3. The Applicant has provided for the source of water for Lot 1 to derive from the not-nontributary Denver aquifer and the source of water for Lot 2 to derive from either the not-nontributary Denver aquifer or the not-nontributary Dawson aquifer as provided in the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 23CW3022 (“Decree and Augmentation Plan”). In the Decree and Augmentation Plan, the Court granted a vested right to 561 acre-feet of water in the Denver aquifer underlying Applicant’s property and 127 acre-feet of water in the Dawson aquifer. Pumping from the Denver aquifer will be a maximum of 1.7 acre-feet of water per year, with each pumping a maximum of 0.85 acre-feet per year if both wells are constructed to the Denver aquifer. If one lot is utilizing Denver aquifer water and the other lot is using Dawson aquifer water, then maximum pumping from the Denver aquifer will be 0.85 acre-feet per year and maximum pumping from the Dawson will be 0.42 acre-feet per year. Uses for the wells include domestic, structure and equipment washing, hot tub, lawn, garden and greenhouse, irrigation, stock water, commercial, recreation, wildlife, fire protection, and also for storage and augmentation purposes.

The approved augmentation plan has a term of 300 years and requires that non-evaporative septic system return flows be used for augmentation during the pumping period for the 2 approved wells. Applicant must reserve 521 acre-feet total of its water rights in the Arapahoe aquifer to be used for replacement of post-pumping depletions.

### State Engineer’s Office Opinion

4. In a letter dated March 4, 2024, the State Engineer stated that the proposed source of water is individual on lot wells. Lot 1 would contain a well drilled into either the Dawson aquifer or the Denver aquifer. Lot 2 would contain a well drilled into the Denver aquifer. The two wells would operate pursuant to the decree and augmentation in Case. No. 2023CW3022.

The State Engineer provided their opinion, “. . . 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.”

### Recommended Findings

5. Quantity and Dependability. Applicant’s water demand for the Driftwood Estates Filing No. 1 is 1.27 acre-feet per year for a total demand of 381 acre-feet for the subdivision for 300 years. The Decree and Augmentation Plan allows for 2 wells limited to an annual withdrawal of 0.85 acre-feet per well from the Denver aquifer, for a total permitted withdrawal of 255 acre-feet per well, and 0.42 acre-feet per year from the Dawson aquifer well, for a total permitted withdrawal of 126 acre-feet, if utilized.

**Based on the water demand of 1.27 acre-feet/year for the Driftwood Estates Filing No. 1 and the Decree and Augmentation Plan approving withdrawals in that amount, the County**

**Attorney's Office recommends a finding of sufficient water quantity and dependability for the Driftwood Estates Filing No. 1.**

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 April 30, 2024, the Water Supply Information Summary, the State Engineer's Office Opinion dated March 4, 2024, and Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 23CW3022 entered on December 13, 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 23CW3022, specifically, that water withdrawn by Lot 1 from the Denver aquifer shall not exceed 0.85 annual acre-feet and water withdrawn by Lot 2 shall not exceed 0.85 annual acre-feet if from the Denver aquifer or 0.42 acre-feet from the Dawson aquifer, for a total combined maximum annual withdrawal for Driftwood Estates Filing No. 1 of 1.7 acre-feet. Depletions during pumping shall be replaced by individual on-lot non-evaporative septic systems.

B. The County prefers that when there is an augmentation plan, Applicant create a homeowners' association ("HOA") for the purpose of enforcing covenants and assessing any necessary fees related to compliance with the water decrees and augmentation plans for the property. For minor subdivisions such as this, however, 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 the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 23CW3022.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve a minimum of 510 acre-feet of Denver aquifer water, 126 acre-feet of Dawson aquifer water, and 521 acre-feet of Arapahoe aquifer water pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 23CW3022 to satisfy El Paso County's 300-year water supply requirement for the 2 lots of Driftwood Estates Filing No. 1. The Covenants shall further identify that 255 acre-feet (0.85 acre-feet/year) of Denver aquifer water and 260.6 acre-feet of Arapahoe aquifer water is allocated to each lot and 126 acre-feet (0.42 acre-feet/year) of Dawson aquifer water is allocated to Lot 2. Said reservations shall not be separated from transfer of title to the property and shall be used exclusively for primary water supply.

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 plans for augmentation, which include pumping of the Denver/Dawson wells in a manner to replace depletions during pumping and the cost of drilling Arapahoe aquifer wells in the future to replace post-pumping depletions.

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 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 23CW3022 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 the 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 Denver, Dawson and/or Arapahoe aquifers.

6) Require well permits. The Covenants shall Require that well permits be obtained pursuant to the requirements of Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 23CW3022 and C.R.S. § 37-90-137(4) and (10).

7) 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 Driftwood Estates Filing No. 1 pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 23CW3022. 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 District Court, Water Division 2, 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.”

8) 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 23CW3022 are also terminated by the Division 2 Water Court 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 Denver aquifer water in the decreed amount of 510 acre-feet (0.85 acre-feet/lot/year), 126 acre-feet of Dawson aquifer water (0.42 acre-feet/year for Lot 2), and 521 acre-feet of Arapahoe aquifer water (260.5 acre-feet/lot). 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 Denver and Dawson aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Denver, Dawson, and Arapahoe aquifers 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 and replacement supply (Denver, Dawson, and Arapahoe aquifers): "These water rights conveyed, and the return flows therefrom, are intended to provide a 300-year water supply, and replacement during and after pumping, for both lots of the Driftwood Estates Filing No. 1. 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 23CW3022 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 the Decree and Augmentation Plan, 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. 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: Christian Haas, Project Manager, Planner