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May 17, 2023

MS-22-5 Owl Ridge Minor Subdivision

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

**WATER SUPPLY REVIEW AND RECOMMENDATIONS**

Project Description

1. This is a proposal for approval of the Owl Ridge Subdivision, a minor subdivision application by the Colt & Kathryn Haugen Living Trust (“Applicant”) for a 2-lot subdivision on 27 acres of a 61.55-acre parcel of land (the “property”). The property is zoned RR-5 (Rural Residential). Lot 1 is 22 acres and is planned for 2 single-family dwellings. Lot 2 is 5 acres and has one existing single-family dwelling.<sup>1</sup>

Estimated Water Demand

2. Pursuant to the Water Supply Information Summary (“WSIS”), the water demand for the subdivision is 2.35 acre-feet/year, comprised of 0.90 acre-feet/year for household use for 3 single-family dwellings, 1.25 acre-feet/year for irrigation, and 0.2 acre-feet/year for animal watering. Based on this total demand, Applicant must be able to provide a supply of 705 acre-feet of water (2.35 acre-feet per year x 300 years) to meet the County’s 300-year water supply requirement.

Proposed Water Supply

3. The Applicant has provided for the source of water to derive from the not-nontributary Dawson aquifer as originally decreed in 05CW260 and approved for withdrawal pursuant to the Findings of Fact, Conclusions of Law, Ruling of the Referee, and Judgment and Decree in 21CW3126 (“Augmentation Plan”). In the Augmentation Plan, the Court recognized that Applicant

<sup>1</sup> This information is derived from the Water Resources Report. The Water Supply Information Summary states that Lot 1 will have 1 dwelling and Lot 2 will have 2 dwellings. Applicant is required to reconcile these statements as part of this Review.

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had been deeded 49.0 annual acre-feet of water in the Dawson aquifer, 45.0 annual acre-feet (4,500 acre-feet total) of which were available for use. The Augmentation Plan approved the annual withdrawal of 2.35 acre-feet of Dawson aquifer water for 300 years through up to two (2) wells on two (2) lots. One well may withdraw up to 0.6 acre-feet annually to serve one-single family residence, irrigation, and up to 4 large domestic animals, and the other may withdraw up to 1.75 acre-feet annually to serve two (2) single-family residences, irrigation, and up to 12 large animals. The Court recognized existing Well Permit No. 280006 and required re-permitting of the well under the Augmentation Plan.

The Court also recognized that Applicant had been deeded 4,980 acre-feet of water in the Denver aquifer, 2,750 acre-feet of water in the Arapahoe aquifer, and 1,870 acre-feet of water in the Laramie-Fox Hills aquifer, all decreed in Case No. 05CW260.

The approved augmentation plan has a term of 300 years and requires that septic system return flows be used for augmentation during the pumping period for the 2 approved wells. Applicant must reserve 705 acre-feet of its water rights in the Laramie-Fox Hills aquifer for replacement of post-pumping depletions.

#### State Engineer's Office Opinion

4. In a letter dated February 6, 2023, the State Engineer stated that “the estimated annual demand for each lot is as follows: Lot 1 is 1.75 acre-feet per year to serve two residences, Lot 2 is 0.6 acre-feet per year to serve one residence. The total irrigation demand for Lots 1 and 2 is 22,084 square feet and the total number of horses to be watered for Lots 1 and 2 are 16 horses.” The State Engineer noted that the decreed augmentation Plan in Division 1 Water Court Case no. 21CW3126 allows for the annual withdrawal of 2.35 acre-feet per year from the Dawson aquifer through up to two wells on two lots.

Finally, the State Engineer stated that, “... pursuant to 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 Owl Ridge Minor Subdivision is 2.35 acre-feet per year for a total demand of 705 acre-feet for the subdivision for 300 years. The Augmentation Plan allows for 2 wells limited to an annual withdrawal of 2.35 acre-feet for domestic, irrigation, and animal watering uses.

**Based on the water demand of 2.35 acre-feet/year for the Owl Ridge Minor Subdivision and the Augmentation Plan withdrawals in that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for the Owl Ridge Minor 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 April 13, 2023, the Water Supply Information Summary submitted October 27, 2022, the State Engineer's Office Opinion dated February 26, 2023, and Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Case No. 21CW3126 entered on February 8, 2022. 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 the Referee and Judgment and Decree in Division 1 Case No. 21CW3126, specifically, that water withdrawn from the Dawson aquifer shall not exceed 0.6 annual acre-feet for the existing permitted well and 1.75 annual acre-feet for the future second well, based on a total combined annual withdrawal of 2.35 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 Case No. 21CW3126.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 705 acre-feet of Dawson aquifer water and 705 acre-feet of Laramie-Fox Hills aquifer water pursuant to Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 21CW3126 to satisfy El Paso County's 300-year water supply requirement for the 2 lots of the Owl Ridge Minor Subdivision. The Covenants shall further identify that 525 acre-feet (1.75 AF/year) of Dawson aquifer water and 525 acre-feet of Laramie-Fox Hills aquifer water is allocated to Lot 1 and 180 acre-feet (0.60 AF/year) of Dawson aquifer water and 180 acre-feet of Laramie-Fox Hills

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 Dawson wells in a manner to replace depletions during pumping and the cost of drilling Laramie-Fox Hills 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 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 Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 21CW3126 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 Dawson and/or Laramie-Fox Hills 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 the Referee and Judgment and Decree in Division 1 Case No. 21CW3126 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 Owl Ridge Minor Subdivision pursuant to Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 21CW3126. 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.”

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 the Referee and Judgment and Decree in Division 1 Case No. 21CW3126 are also terminated by the Division 1 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 Dawson aquifer water in the decreed amount of 535 acre-feet (1.75 acre-feet per year) and 535 acre-feet of Laramie-Fox Hills aquifer water for Lot 1, and Dawson aquifer water in the decreed amount of 180 acre-feet (0.60 acre-feet per year) and 180 acre-feet of Laramie-Fox Hills aquifer water for Lot 2. 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 and Laramie-Fox Hills aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Dawson and Laramie-Fox Hills 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 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 Owl Ridge Minor Subdivision. 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 the Referee and Judgment and Decree in Division 1 Case No. 21CW3126 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 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."

I. Prior to recording the final plat, Applicant shall submit a corrected Water Supply Information Summary that identifies the number of residences on each lot.

cc: Ryan Howser, Project Manager, Planner III