

# 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

July 22, 2020

SF-19-9      Retreat at TimberRidge Filing No. 1  
Final Plat

Reviewed by: Lori L. Seago, Senior Assistant County Attorney *LS*  
Edi Anderson, Paralegal, ACP

### **FINDINGS AND CONCLUSIONS:**

1. This is a proposal by TimberRidge Development Group, LLC ("Applicant"), for a final plat to subdivide approximately 68.135 acres into 70 single-family residential lots ("Property"). The subdivision is comprised of 11 lots that will utilize individual wells (of the 41 approved in the preliminary plan) and 59 lots served by a central water system (of the 164 lots approved in the preliminary plan). Applicant's property is zoned PUD (Planned Unit Development).

### **LOTS 1-11 INDIVIDUAL WELLS**

2. The Applicant has provided for the source of water for Lots 1-11 to derive from individual wells. As described in the Water Supply Information Summary ("WSIS"), the Applicant estimates its annual water requirements to serve 11 single-family lots at 3.88 acre-feet ("AF") annually (0.353 AF per lot). The water demand includes indoor household use of 0.18 AF and outdoor use of 0.173 AF. The Applicant would need to provide a supply of 1,164 AF of water (3.88 acre-feet/year x 300 years) to meet El Paso County's 300-year water supply requirement. Applicant is claiming more water than is allowed under the augmentation decree in District Court Water Division 2, 18CW3002, which only allows 0.32 acre-feet/year.

3. The Property is a portion of the property subject to the decree issued by District Court Water Division 2 in 17CW3002. The following allocations were decreed in that case:

Dawson Aquifer	12,202 AF
Denver Aquifer	11,909 AF
Arapahoe Aquifer	9,796 AF
Laramie-Fox Hills Aquifer	6,440 AF

200 S. CASCADE AVENUE  
OFFICE: (719) 520-6485



COLORADO SPRINGS, CO 80903  
FAX: (719) 520-6487

4. In 18CW3002, the Water Court authorized the use of Dawson Aquifer water decreed in 17CW3002 and approved an augmentation plan therefor. The decree approves 29 wells for the identified property, a portion of which includes the proposed 11 lots at issue here. The decree authorizes each well to pump up to 0.32 AF/year, for a total annual withdrawal from the Dawson Aquifer of 9.32 AF for all 29 wells. Depletions during pumping will be replaced by residential return flows from non-evaporative septic systems. The decree further requires that 2,796 AF of water in the Laramie-Fox Hills Aquifer be reserved to provide for replacement of injurious post-pumping depletions.

5. Based upon the decree in 18CW3002, Applicant must provide a supply of **1,056 AF of water from the Dawson Aquifer** (.32 AF/lot x 11 lots x 300 years) for the 11 lots to be served by individual wells. Applicant must also reserve **2,796 AF of water in the Laramie-Fox Hills Aquifer** to replace injurious post-pumping depletions.

6. The State Engineer's Office ("SEO") provided their comments regarding this proposal on May 13, 2019, which were confirmed in a letter dated November 1, 2019. The letter states that, "...pursuant to CRS 30-28-(1)(h)(I), it is our opinion that the proposed water supply can be provided without causing material injury to decreed water rights, and is **adequate**, so long as the plan for augmentation is operated according to its decreed terms and conditions."<sup>1</sup>

7. Though Applicant will have to correct its WSIS, based on the information and documents identified in paragraphs 2-6 above, it appears that the proposed water supply for Lots 1-11 will be sufficient to meet the needs of the proposal.

8. The water quality requirements of Section 8.4.7.B.10 of the El Paso County Land Development Code must be satisfied regarding Lots 1-11.

### **LOTS 12-70 CENTRAL WATER SYSTEM**

9. Subtracting the water needed to serve the 11 lots in individual wells, the following amounts decreed in 17CW3002 remain:

Dawson Aquifer	11,146 AF
Denver Aquifer	11,909 AF
Arapahoe Aquifer	9,796 AF
Laramie-Fox Hills Aquifer	3,644 AF

10. The Applicant has provided for the source of water for Lots 12-70 to derive from a central water system – Sterling Ranch Metropolitan District No. 1 ("District") – through an agreement between the District and The Retreat Metropolitan Districts. As

---

<sup>1</sup> The SEO used different numbers than those relied on herein to reach its conclusion. It stated that, in 18CW3002, the Division 2 Water Court limited on-lot wells to .321 AF/year, for a total annual withdrawal from the Dawson Aquifer of 3.53 AF/year for 11 lots.

described in the Water Supply Information Summary, the Applicant estimates its annual water requirements to serve 59 single-family lots at 20.83 acre-feet annually (0.353 acre-feet per lot). The water demand includes indoor household use of 0.18 acre-feet and outdoor use of 0.173 acre-feet. The Applicant will need to provide a supply of **6,249 acre-feet of water (20.83 acre-feet/year x 300 years)** to meet El Paso County's 300-year water supply requirement.

11. The *Water Resources and Wastewater Report for Sterling Ranch Service Area* by JDS-Hydro dated April 4, 2019 ("Report") details the source of the water supply for the District. The District's water supply originates from Arapahoe and Laramie-Fox Hills aquifer wells through 3 decrees granted in District Court Water Division 2:

Case No. 86CW18	575 AF/year (191.67 AF/year for 300 years);
Case No. 86CW19	539 AF/year (179.67 AF/year for 300 years); and
Case No. 08CW113	0.4 AF/year (0.13 AF/year for 300 years).

Therefore, the total water allocation available to the District from those three decrees is 371.47 AF/year based on El Paso County's 300-year rule. Per the Report, the District has already committed 255.96 AF/year to 6 subdivisions within the boundaries of the District, leaving 115.51 AF/year of uncommitted water supply, not including The Retreat Filing 1.

12. The Report also notes that The Retreat at TimberRidge will convey 14,619 AF of water from the Arapahoe and Laramie-Fox Hills aquifers to SRMD for use exclusively within the Retreat development, providing an additional water allocation of 48.73 AF/year based on El Paso County's 300-year rule.

13. In a letter dated April 16, 2020, James Morley, District President, states that the District "is willing to provide water and wastewater services to the proposed residential development known as the Retreat at TimberRidge, which includes 167<sup>2</sup> lots on approximately 200 acres ...." The commitment letter states that The Retreat at TimberRidge will convey 12,828 AF of water from the Arapahoe and Laramie-Fox Hills aquifers (42.76 AF/year for 300 years) to the District. (Note the discrepancy with the reported conveyance from the Report, in paragraph 9 above).

14. The commitment letter further states that the "District is in the process of developing a central water system and public wastewater facilities, including wells, treatment, storage and water rights sufficient to supply the needs of the 167 urban lots within the proposed development." The 59 lots of the Retreat at TimberRidge Filing No. 1 are included in the 167 urban lots noted. The District President further states that the water needs for the 167 lots are "58.95 acre-feet" which equates to 0.353 acre-feet/lot (20.83 acre-feet for the 59 lots of Filing 1). The District further notes that it is their understanding that the Applicant intends to organize a special district to provide services to the subdivision through an intergovernmental agreement with the District.

---

<sup>2</sup> Note that The Retreat at TimberRidge preliminary plan approved 164 lots to be served by central water.

15. The finding of the SEO set forth in paragraph 6 above also applies to the 59 lots to be served by a central water system.<sup>3</sup>

16. On March 3, 2020, the Colorado Department of Public Health and Environment issued its approval of the Sterling Ranch Metropolitan District No. 1's Assessment of Technical, Managerial and Financial Capacity. On April 1, 2020, the County received a professional engineer's certification that the District's drinking water system has been constructed consistent with CDPHE-approved design documents.

17. In an Agreement dated February 21, 2019, the Applicant agreed to construct the water system infrastructure necessary for the District to extend central water service to The Retreat at TimberRidge, including Filing No. 1.

18. Though Applicant will need to correct its Water Resources Report and obtain a corrected Commitment Letter, based on the information and documents identified in paragraphs 9-17 above, it appears that the proposed water supply for Lots 12-70 will be sufficient to meet the needs of the proposal.

19. Section 8.4.7(B)(10)(g), of the El Paso County Land Development Code allows for the presumption of acceptable water quality for projects such as this project (Lots 12-70) where water is supplied by an existing Community Water Supply operating in conformance with Colorado Primary Drinking Water Regulations unless there is evidence to the contrary.

### **Conclusion**

20. Based upon the finding of sufficiency and no injury by the State Engineer, the water supply available pursuant to Colorado District Court Water Division 2 Case Nos. 17CW3002 and 18CW3002 to serve Lots 1-11, the District's commitment to serve Lots 12-70, and pursuant to the requirements 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 must provide a recommendation as to water quality regarding Lots 1-11.

### **REQUIREMENTS:**

#### **ALL LOTS**

A. Prior to plat recording, Applicant shall provide an updated Water Supply Information Summary that corrects the Water Requirements for Lots 1-11 in Section 9

---

<sup>3</sup> The SEO used different numbers than those relied on herein to reach its conclusion. Rather than the 3,032 AF of Laramie-Fox Hills water that the Applicant agreed to convey to the District in the Agreement described in paragraph 18 herein, the SEO calculated that 3,644 of such water would be conveyed.

based upon the limitation decreed in 18CW3002, corrects the corresponding total Water Requirements, and removes the reference to Case No. 16CW3095 as inapplicable to this plat.

#### LOTS 12-70 CENTRAL WATER SYSTEM

B. Prior to plat recording, Applicant shall provide a copy of the Intergovernmental Agreement between Sterling Ranch Metropolitan District No. 1 and The Retreat Metropolitan District regarding the provision of central water service.

C. Prior to plat recording, Applicant shall provide an update to the Water Resources Report for Sterling Ranch Metropolitan District that corrects in Table 2 the amount of Laramie-Fox Hills water available onsite for The Retreat, based on the agreement to convey water in paragraph 2.1 of the Development and Infrastructure Agreement dated February 21, 2019, and that corrects the amount of Sterling rights committed to the Retreat Service Area identified in Section 3.2.

D. Prior to plat recording, Applicant shall provide an updated Commitment Letter from the Sterling Ranch Metropolitan District No. 1 that corrects the number of lots committed to be served to 164 corrects the corresponding water demand for 164 lots total, and provides the specific amount of water committed to be served for the 59 urban lots in this Filing 1.

E. Prior to plat recording, Applicant shall provide proof of conveyance of water rights to Sterling Ranch Metropolitan District No. 1.

F. Prior to plat recording, Applicant shall provide a professional engineer's certification that all offsite water infrastructure necessary to serve the subdivision has been constructed in accordance with CDPHE construction approval and final design plans and specifications.

G. Applicant and all future owners of lots within this filing shall be advised of, and comply with, any conditions, rules, regulations, limitations, and specifications set by the Sterling Ranch Metropolitan District No. 1.

#### LOTS 1-11 INDIVIDUAL WELLS

H. 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 and augmentation plan are conveyed to the successor purchaser. These Requirements shall apply to the Applicant and its successors and assigns. Applicant shall create a Homeowners' Association ("HOA") and advise the HOA and all future owners of these lots of all applicable requirements of the decree and augmentation plan entered in District Court Water Division 2 Case Nos. 2017CW3002

and 2018CW3002, as well as their obligations to comply with the decree and augmentation plan, including but not limited to, costs of operating the augmentation plan, including the costs for constructing and pumping the Laramie-Fox Hills aquifer wells for replacing post-pumping depletions, and the responsibility for metering and collecting data regarding water withdrawals from all wells.

J. Applicant shall reserve and convey by warranty deed to the HOA, Applicant's interests, rights, and obligations with respect the pro-rata share per lot of the 2,796 acre-feet of Laramie-Fox Hills aquifer groundwater to be used for replacing post-pumping depletions. 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 deeds 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 deeds 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.

The covenants shall address the following:

- 1) Identify the water rights associated with the property. The Covenants shall reserve 1,056 acre-feet of not nontributary Dawson aquifer water pursuant to the augmentation plan, District Court Water Division 2, Case No. 18CW3002, to satisfy El Paso County's 300-year water supply requirement for the 11 lots of the Retreat at TimberRidge Filing No. 1 Subdivision.
- 2) Require non-evaporative septic systems and reserve return flows from the same. The Covenants shall require each lot owner to use non-evaporative septic systems to ensure that return flows from such systems are made to the stream system to replace actual depletions during pumping, shall reserve said return flows to replace 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 served by the Dawson aquifer wells 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 from 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."

3) 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 the plan for augmentation in District Court Water Division 2, Case No. 18CW3002, 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."

4) 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 wells in the Dawson aquifer and future wells to be constructed in the Laramie-Fox Hills aquifer for post-pumping depletions.

5) 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 Retreat at TimberRidge Subdivision pursuant to the plan for augmentation in District Court Water Division 2, Case No. 18CW3002. 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 a Determination from the Division 2 Water Court 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 adjudication."

6) The Covenants shall address termination using the following or similar language:

"These Covenants shall not terminate unless the requirements of the plan for augmentation in District Court Water Division 2, Case No. 18CW3002, are also terminated by order of 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.”

K. Applicant and its successors and assigns shall reserve in the Covenants and in any deeds of the Property the decreed amount of 3.52 acre-feet annually for the 11 rural lots of the subdivision (0.32/acre-feet/lot/year) for a period of 300 years for a total of 1,056 acre-feet for the 11 lot subdivision for 300 years. 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. Applicant shall convey by recorded warranty deed these reserved Dawson aquifer water rights to the individual lot owners. Applicant shall provide copies of said Covenants or other such reservation and conveyance instruments that 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.

Any and all conveyance instruments shall 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 supply, and replacement during pumping, for each of the 11 lots of the Retreat at TimberRidge 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.”

L. Applicant and its successors and assigns shall reserve in the Covenants and in any deeds of the Property the pro-rata share for each lot of 2,796 acre-feet of water in the Laramie-Fox Hills aquifer for use in the augmentation plan to replace post-pumping depletions. Pursuant to the decree and plan for augmentation, Applicant shall recite that this water shall not be separated from transfer of title to the Property and shall be used exclusively for augmentation supply. Applicant shall convey by recorded warranty deed these reserved Laramie-Fox Hills aquifer water rights to the HOA or to the individual lot owners (with appropriate deed restrictions) for use in the augmentation plan. Applicant shall provide copies of such reservation and conveyance instruments that 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.

M. Applicant and its successors and assigns at the time of lot sales, shall convey by warranty deed to individual lot owners sufficient water rights in the Dawson aquifer, pursuant to District Court Water Division 2, Case No. 18CW3002, underlying the respective lots to satisfy El Paso County’s 300 year water supply requirement. Dawson

aquifer requirements are 96 acre-feet (0.32 acre-feet/year x 300 years). Said conveyance instruments shall recite that this water shall not be separated from transfer of title to the Property and shall be used exclusively for the primary supply and replacement during pumping for the respective lots. Applicant shall provide form deeds for such conveyances that 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.

N. Applicant, its successors and assigns, shall submit a 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 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 District Court Water Division 2, Case No. 17CW3002 (decree) and 18CW3002 (augmentation plan) and shall identify the obligations of the individual lot owners thereunder.

O. Applicant, its successors and assigns, shall record all applicable documents, including, but not limited to, the decree and augmentation plan in District Court Water Division 2, Case Nos. 17CW3002 and 18CW3002, and 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.

P. 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. Applicants 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: Kari Parsons, Project Manager/Planner III