

EL PASO COUNTY



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SF-20-3 Winsome Filing No. 1 Subdivision
Final Plat

Reviewed by: M. Cole Emmons, Senior Assistant County Attorney
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FINDINGS AND CONCLUSIONS:

1. This is a proposal by Winsome, LLC and McCune Ranch, LLC ("Applicant") for a subdivision of 47 single family lots, plus additional tracts, open space, and right-of-way on 164.4 acres (the "Property"). This filing is a portion of the McCune Ranch property. On July 9, 2019, the Board of County Commissioners approved applications to rezone the parcel and for a preliminary plan to include 143 single-family lots on 766 acres for McCune Ranch. The property is zoned RR-2.5 (Rural Residential).

2. The Applicant has provided for the source of water to derive from individual on-lot wells, as provided in the Findings and Order No. 1692-BD for the McCune Ranch subdivision, approved by the Colorado Ground Water Commission ("Commission") dated June 25, 2008 ("Determination"). On June 29, 2018, the Commission approved a Replacement Plan for the subdivision ("Replacement Plan No. 1") and on February 3, 2020, the Commission approved Replacement Plan No. 2 (hereinafter referred to as "Replacement Plan") which cancelled and replaced Replacement Plan No. 1. The Replacement Plan allows withdrawal of 49.8 acre-feet per year of groundwater to be withdrawn from the Dawson aquifer for a period of 300 years through 83 wells to be located on 83 single-family lots. Pursuant to the Water Supply Information Summary ("WSIS"), the subdivision demand is 0.30 acre-feet for each lot for household use, 0.25 acre-feet for irrigation, and 0.05 acre-feet for stock watering for a total of 0.60 acre-feet of water demand for each lot for a total of 28.20 acre-feet per year for the subdivision based on a total of 47 lots. Based on this total demand of 28.20 acre-feet per year for the subdivision, Applicant must be able to provide a supply of 8,460 acre-feet of water (28.20 acre-feet per year x 300 years) to meet the County's 300 year water supply requirement.

3. In a letter dated February 28, 2020, the State Engineer reviewed the submittal to plat the 164.4 acre parcel into a 47 lot subdivision. The Engineer stated that the "water supply is individual on-lot wells producing from the not-nontributary Dawson Aquifer that would be

permitted pursuant to the amended replacement plan for Determination of Water Right no. 1692-BD.” The State Engineer further states that the Replacement Plan “allows for the withdrawal of 49.8 acre-feet per year of ground water from the Dawson aquifer for 300 years, through 83 wells to be located on 83 residential lots on 278.1 acres, of which the subject 164.4 acres is a part. Each well may withdraw 0.6 acre-feet per year of ground water to be used for use in one single family dwelling, the irrigation of landscape, lawn and gardens and the watering of domestic animals and stock.”

The State Engineer noted that the amount of withdrawal of 49.8 acre-feet per year permitted by the Replacement Plan “is sufficient to supply the requirement of 28.2 acre-feet/year” as required for the Winsome Filing No. 1 subdivision. The State Engineer acknowledged the existence of several other water determinations referenced in Applicant’s *Water Resources and Wastewater Report for Winsome Filing No. 1*, dated January 2020, as prepared by JDS-Hydro. Those determinations include Nos. 1691-BD, 1690-BD, and 1689-BD; however, since those water rights are not identified as sources of water for this subdivision, they are not analyzed further in either the State Engineer’s letter or in this review.

The State Engineer stated that “[b]ased upon the above and pursuant to Sections 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 water rights.”

The State Engineer’s Office also provided the following advisory to the Applicant related to any construction and/or modification of storm water structures:

“... unless the [storm water] structure can meet the requirements of a ‘storm water detention and infiltration facility’ as defined in Designated Basin Rule 5.11, the structure may be subject to administration by this office. The applicant should review Rule 5.11 to determine whether the structure meets the requirements of the Rule and ensure any notification requirement is met.”

4. Determination of Water Right No. 1692-BD. The Colorado Ground Water Commission approved a Determination of a Right to Allocation of Ground Water No. 1692-BD from the Dawson aquifer on June 25, 2008, which included a quantified amount of water from beneath 900.52 acres of overlying land (McCune Ranch). The allowed average annual withdrawal permitted was 819 acre-feet based on a 100-year aquifer life (273 acre-feet based on El Paso County’s 300-year rule). The beneficial uses permitted by the Determination are: domestic, industrial, commercial, irrigation, augmentation, stock watering, recreational water feature ponds and piscatorial habitat less than 1000 square feet and wildlife, replacement and all other augmentation purposes. On March 13, 2018, the Commission approved an amendment to Determination No. 1692-BD which cancelled an allowed average annual withdrawal of 12 acre-feet, leaving an average annual amount of withdrawal of 807 acre-feet (269 acre-feet based on El Paso County’s 300-year rule).

5. Replacement Plan No. 2 – Determination of Water Right No. 1692-BD. On February 3, 2020, the Commission approved Replacement Plan No. 2, which allowed the annual withdrawal of 49.8 acre-feet per year from the Dawson aquifer for 300 years through 83 wells, which includes the 47 lots of the Winsome Filing No. 1 subdivision. The Replacement Plan permits 0.6 acre-feet of withdrawal per year of water for use in one single family dwelling, irrigation of landscaping, and watering of domestic animals. The source of the replacement water is septic and leach field return flows from the in-house use of the ground water to be pumped pursuant to the Replacement Plan.

The Replacement Plan provides for maximum withdrawal of 0.60 acre-feet of water per residence for a total of 28.20 acre-feet annually from the Dawson aquifer water for 300 years. Pursuant to the Replacement Plan, the households will use 0.30 acre-feet of water per year per lot for household use, with the remaining allocation for other uses to include irrigation and stock watering.

Replacement of Depletions During Pumping. The plan for replacement provides for a pumping period of 300 years. For any wells constructed into the not-nontributary Dawson aquifer, the Applicant is required to replace actual stream depletions on an annual basis during the 300 years of pumping by residential return flows from non-evaporative septic systems. As stated in the replacement plan: “[t]he return flows will flow to the alluvial aquifer of the Kiowa-Bijou Designated Water Basin. Return flows from in-house use of ground water shall occur through individual on-lot non-evaporative septic systems located within the 278.1 acres of land on which the 83 wells will be located.” Further, replacement of depletions must occur annually in the amounts shown in the attached Exhibit A (which was also attached to Replacement Plan 1692-BD). As noted in the Replacement Plan, the “annual amount of replacement water provided must be no less than the annual replacement requirement on a yearly basis. No credit shall be claimed by the Applicant for an oversupply of replacement water provided to the alluvium during previous years.”

Since the supply is from designated basin groundwater from the not-nontributary Dawson aquifer, pursuant to the Designated Basin Rules, Rule 5.3.6.2.C, the replacement water shall replace actual impact to depletion of alluvial water since the pumping will continue beyond 100 years. The Replacement Plan states that at withdrawal of 49.8 acre-feet annually for 300 years, depletions would increase to 1.87 acre-feet annually in the 300th year or 3.75% of pumping. The Plan states that the Applicant proposes to provide 22.41 acre-feet of replacement water per year to the alluvial aquifer system Kiowa-Bijou Designated Ground Water Basin; that Applicant estimates return flows from each lot will be 90% of water used for in-house purposes, and based on 0.30 acre-feet annual in-house use, return flow would be 0.27 acre-feet annually per lot for a total of 22.41 acre-feet annually for 83 lots. See Replacement Plan No. 2, ¶¶ 9-10. Based on these calculations, for these 47 lots, the replacement requirement would be approximately 12.69 acre-feet annually (0.27 ac.ft./yr. x 47 lots).

6. Analysis. Applicant’s water demand for the Winsome Filing No. 1 Subdivision is 0.6 acre-feet per lot or 28.20 acre-feet annually using Dawson aquifer water allowed under the

Replacement Plan for the 47 lot subdivision for a total demand of 8,460 acre-feet for 300 years. Replacement Plan No. 2 - 1692-BD authorizes withdrawal of 0.60 acre-feet/year of Dawson aquifer water per year for a period of 300 years. JDS-Hydro's Water Resources Report dated January 2020, states the annual supply for Winsome Subdivision Phases 1-4 is 232.66 acre-feet annually for 300 years. With an annual demand of 28.20 acre-feet and a total available supply of 232.66 acre-feet (or if this amount were to be divided evenly for each of 4 Phases, the supply would be 58.17 acre-feet/year/Phase), there appears to be a sufficient water supply to meet the water demands of the Winsome Filing No. 1 Subdivision.

7. The water quality requirements of Section 8.4.7.B.10 of the Land Development Code must be satisfied.

8. Therefore, based on the Water Supply Information Summary, based on the finding of sufficiency and no injury by the State Engineer, based on the Determination and Replacement Plan No. 2 - 1692-BD, 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. The El Paso County Health Department shall provide a recommendation as to water quality.

REQUIREMENTS:

A. Applicant, its successors and assigns, shall comply with all requirements of Replacement Plan No. 2 – Determination of Water Right No. 1692-BD, specifically, that water use shall not exceed 0.6 acre-feet annually per well for the 47 lot subdivision; and that all stream depletions will be replaced with non-evaporative septic system return flows for a period of 300 years.

B. The County requires that when there is a replacement plan, that Applicant, its successors and assigns, shall create a homeowners' association ("HOA"). Applicant, its successors and assigns, shall create restrictive covenants upon and running with the property which shall advise and obligate future lot owners of this subdivision, their successors and assigns, regarding all applicable requirements of Determination and Replacement Plan No. 2 - 1692-BD, as well as their obligations to comply with the Replacement Plan, including, but not limited to, ensuring that return flows by the use of non-evaporative septic systems are made to the stream systems, and that such return flows shall only be used to replace depletions and shall not be separately sold, traded, or assigned in whole or in part for any other purpose. The Covenants more specifically shall require the Dawson aquifer wells to serve on each lot 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 wells. In addition, the Covenants shall advise future lot owners of this subdivision, their successors and assigns, of their obligations regarding any costs of operating the Replacement Plan. Such Covenants shall also address responsibility for any metering and data collecting that may be required regarding water withdrawals from wells pursuant to the Replacement Plan, and shall protect the viability of the water supply by placing limitations in the Covenants as to amendments and termination as

applied to said water supply.

The covenants shall address the following:

1) *Identify the water rights associated with the property. The Covenants shall reserve 8,460 acre-feet of not nontributary Dawson aquifer water pursuant to Determination and Replacement Plan No. 2 - 1692-BD, to satisfy El Paso County's 300 year water supply requirement for the 47 lots of the Winsome Filing No. 1 Subdivision.*

2) *Require 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 or used for any other purpose. The Covenants more specifically shall require the Dawson aquifer well on each lot to be serving 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 Determination and Replacement Plan No. 2 - 16920-BD 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 Dawson aquifer wells.*

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 Winsome Filing No. 1 Subdivision pursuant to the Colorado Ground Water Commission Findings and Order – Replacement Plan No. 2 – Determination of Water Right No. 1692-BD. 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 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 Colorado Ground Water Commission Findings and Order – Replacement Plan No. 2 – Determination of Water Right No. 1692-BD are also terminated by order of the Commission, and a change of water supply is approved in advance of termination by the Board of County Commissioners of El Paso County."

C. Applicant, its successors and assigns, shall reserve in the Covenants and in any deeds of the Property the decreed amount of at least 0.60 acre-feet per lot annually and shall reserve a total decreed amount of at least 28.20 acre-feet of Dawson aquifer water for the 47 lots in the subdivision for 300 years for a total of 8,460 acre-feet for the 47 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 minor subdivision 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 lot of the Winsome Filing No. 1 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."

D. Applicant, its successors and assigns, at the time of lot sales, shall convey by warranty deed to individual lot owner(s) sufficient water rights in the Dawson aquifer, pursuant to Determination and Replacement Plan No. 2 - 1692-BD, underlying the respective lot to satisfy El Paso County's 300 year water supply requirement. Dawson aquifer requirements for each lot are as follows: 180 acre-feet for each lot (0.60 acre-feet/year x 300 yrs.). 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 supply 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 minor subdivision plat.

E. Applicant, its successors and assigns, shall submit 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 Colorado Ground Water Commission Determination and Replacement Plan No. 2 - 1692-BD and shall identify the obligations of the individual lot owners thereunder.

F. Applicant, its successors and assigns, shall record all applicable documents, including, but not limited to, the Colorado Ground Water Commission Findings and Order – Replacement Plan No. 2 – Determination of Water Right No. 1692-BD, and any 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.

G. Applicant and/or lot owners must obtain well permits pursuant to Colorado Ground Water Commission Findings and Order – Replacement Plan No. 2 – Determination of Water Right No. 1692-BD.

H. It is Applicant's responsibility, and not the County's, to comply with the advisory by the State Engineer's Office regarding any storm water collection and/or conveyance facilities that may be included in the development to ensure that any such structures meet the requirements of a 'storm water detention and infiltration facility,' and that notice, construction, and operation of the proposed structure meets statutory and administrative requirements.

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. 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: Nina Ruiz, Project Manager, Planner III