

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

September 6, 2023

MS-23-1 Murr 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 the Murr Subdivision, an application by Sharon and Erik Murr (“Applicant”) for a 4-lot subdivision on a parcel of 37.13 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 of 37.13 acres into 4 residential lots. Lots 1, 2 and 4 are estimated to use 0.50 acre-feet/year (0.26 acre-feet/year for a single-family dwelling, 0.196 acre-feet per year for irrigation of 2,100 square-feet of home lawn/garden and 0.044 acre-feet per year for watering of 4 head of livestock). Lot 3 is estimated to use 0.38 acre-feet per year (0.26 acre-feet/year for a single-family dwelling, 0.109 acre-feet per year for irrigation of 1,100 square-feet of home lawn/garden, and 0.011 acre-feet per year for watering of 1 head of livestock). The total estimated demand is 1.88 acre-feet per year for the 4 lots. Based on this total demand, Applicant must be able to provide a supply of 564 acre-feet of water (1.88 acre-feet per year x 300 years) to meet the County’s 300-year water supply requirement.

Proposed Water Supply

The Applicant has provided for the source of water to derive from one or more individual on-lot wells withdrawing from the not-nontributary Denver aquifer as provided in Determination of Water

ASSISTANT COUNTY ATTORNEYS

NATHAN J. WHITNEY
CHRISTOPHER M. STRIDER

STEVEN A. KLAFKY
TERRY A. SAMPLE

LORI L. SEAGO
DOREY L. SPOTTS

BRYAN E. SCHMID
STEVEN W. MARTYN

Right No. 4366-BD (“Determination”) and Replacement Plan No. 4366-BD (“Replacement Plan”). The replacement water requirements effectively divide the property into two areas (Lots 1, 2, and 4 as 4% replacement and Lot 3 subject to actual impact replacement). The maximum annual amount of water available for allocation will be determined specifically for the portion of the aquifer underlying each of the two areas. The Replacement Plan applies only to the actual impact replacement portion of the Denver aquifer (Lot 3).

The Determination allocates 548 acre-feet of water from the not-nontributary (4% replacement) portion of the Denver aquifer and 125 acre-feet of water from the not-nontributary (actual impact replacement) portion of the Denver aquifer underlying the property, for a total decreed amount of 673 acre-feet. Further, as El Paso County requires a 300-year supply, 548 acre-feet and 125 acre-feet are divided by 300, leaving 1.82 acre-feet per year available to 3 lots from the Denver aquifer (4% replacement) and .41 acre-feet per year available to 1 lot from the Denver aquifer (actual impact replacement) portion of the aquifer. Available Denver aquifer withdrawals available for this subdivision are to be used for the following: domestic, irrigation of lawn, garden, and greenhouse; domestic animal and stock watering; commercial; firefighting; piscatorial; and replacement, either directly or after storage.

State Engineer’s Office Opinion

4. In a letter dated May 25, 2023, the State Engineer stated that “[t]he proposed source of water is individual on-lot wells producing from the not-nontributary Denver aquifer that will operate pursuant to the Determination of Water Right no. 4366-BD.” “Each of lots 1, 2, and 4 are estimated to use .50 acre-feet/year (0.26 acre-feet/year for single-family dwelling; 0.196 acre-feet/year for irrigation of 2,100 square-feet of home lawn/garden; and 0.044 acre-feet/year for watering of 4 head of livestock). Lot 3 is estimated to use 0.38 acre-feet/year (0.26 acre-feet/year for a single-family dwelling; 0.109 acre-feet/year for irrigation of 1,100 square-feet of home lawn/garden; and 0.011 acre-feet/year for watering of 1 head of livestock).”

Lot 3 is located above the not-nontributary actual replacement portion of the property, and wells constructed on this property must comply with the Determination and Replacement Plan. Well Permit No. 87436-F was issued and corresponds with Lot 3. It is permitted for the withdrawal of 0.38 acre-feet per year, up to a maximum of 114 acre-feet.

Proposed Lot 4 has been issued Well Permit No. 87143-F and has been constructed. The well is permitted to withdraw 0.38 acre-feet/year from the Denver aquifer. If the applicant intends to withdraw the 0.50 acre-feet/year allowed from the Determination, a new permit must be applied for and granted.

Lot 1 and 2 are to be serviced by individual on-lot wells, not yet permitted or constructed, operating pursuant to the Determination. These wells may draw a maximum of 0.50 acre-feet per year for 300 years.

Finally, the State Engineer provided their opinion, “. . . pursuant to CRS 30-28-136(1)(h)(l), that the anticipated water supply can be provided without causing material injury to decreed waters.”

Recommended Findings

5. Quantity and Dependability. Applicant’s water demand for Murr Subdivision is 1.50 acre-feet per year for Lots 1, 2, and 4 (0.50 acre-feet per lot per year) and .38 acre-feet per year for Lot 3, for a total demand of 1.88 acre-feet per year. This results in a demand of 564 acre-feet for the subdivision for 300 years. Under the Determination, Applicant owns the right to withdraw up to 673 acre-feet of water from the Denver aquifer, comprised of 548 acre-feet or 1.82 acre-feet per year (4% replacement) and up to 125 acre-feet or 0.41 acre-feet per year (actual impact replacement) from the Denver aquifer based on a 300-year allocation for use within the subdivision.

Based on the water demand of 564 acre-feet total or 1.88 acre-feet/year (1.50 acre-feet for Lots 1, 2, and 4; 0.38 acre-feet per year for Lot 3) for Murr Subdivision and the right to withdraw up to 673 acre-feet total or 2.23 combined acre-feet per year (1.82 acre-feet per year (4% replacement) and up to 0.41 acre-feet per year (actual impact replacement), the County Attorney’s Office recommends a finding of sufficient water quantity and dependability for the Murr 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 March 20, 2023, the Water Supply Information Summary, the State Engineer’s Office Opinion dated May 25, 2023, Determination of Water Right No. 4366-BD entered on June 15, 2022, and Replacement Plan No. 4366-RP entered on June 21, 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 Colorado Ground Water Commission Determination of Water Right No. 4366-BD (“Determination”) and Replacement Plan No. 4366-RP (“Replacement Plan”), including that water withdrawn from the Denver aquifer shall not exceed 2.23 combined acre-feet per year (1.82 acre-feet per year (4% replacement) and up to 0.41 acre-feet per year (actual impact replacement)). Pursuant to the Replacement Plan, the allowed annual amount of groundwater

to be withdrawn from wells on Lots 1, 2 and 4 is 0.50 acre-feet per year, and 0.38 acre-feet from the well on Lot 3 (1.88 acre-feet total).

B. Applicant may create a homeowners' association ("HOA") for the purpose of enforcing covenants and assessing any necessary fees related to compliance with the water determinations and replacement plans for the property. For minor subdivisions such as this, however, Applicant may elect to solely rely on 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 Determination of Water Right No. 4366-BD and Replacement Plan No. 4366-RP.

Covenants shall specifically address the following:

- 1) Identify the water rights associated with the property. The Covenants shall reserve 564 acre-feet of not-nontributary Denver aquifer water pursuant to Determination of Water Right No. 4366-BD to satisfy El Paso County's 300-year water supply requirement for the 4 lots of the Murr Subdivision. The Covenants shall further identify that 150 acre-feet (0.50 acre-feet/year) of Denver aquifer water is allocated to each of Lots 1, 2 and 4, and 114 acre-feet (0.38 acre-feet/year) is allocated to Lot 3.
- 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 plan for replacement, which include the installation and/or maintenance of totalizing flow meters.
- 3) Require non-evaporative septic systems and reserve return flows from the same. The Covenants shall require lot owners for Lot 3 to use a non-evaporative septic system to ensure that return flows from such system 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 require that Lot 3 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. Lot owners must follow all applicable laws, rules, regulations, court orders, and permit conditions related to return flows."

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 Determination of Water Right No. 4366-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.”

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, data collecting, and reporting that may be required regarding water withdrawals from existing and future wells in the Denver aquifer.

6) 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 Murr Subdivision pursuant to Determination of Water Right No. 4366-BD and Replacement Plan No. 4366-BD. 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.”

7) 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 Determination of Water Right No. 4366-BD and Replacement Plan No. 4366-BD are also terminated by 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 and its successors and assigns shall reserve in any deeds of the property Denver aquifer water in the decreed amount of 150 acre-feet (0.50 acre-feet/year) for each of Lots 1, 2, and 4 and 114 acre-feet (0.38 acre-feet/year) for Lot 3. 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 aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Denver aquifer underlying the respective lots to satisfy El Paso County's 300-year water supply requirement. Sufficient water rights are 150 acre-feet (0.50 acre-feet/year x 300 years) of Denver aquifer water for Lots 1, 2, and 4 and 114 acre-feet (0.38 acre-feet/year x 300 years) of Denver aquifer water for Lot 3.

Any and all conveyance instruments shall also recite as follows:

For the water rights and return flows conveyed for the primary supply (Denver 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 Murr 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 Determination of Water Right No. 4366-BD and Replacement Plan No. 4366-RP 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 Determination of Water Rights No. 4366-BD and Replacement Plan No. 4366-RP, 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. Applications for well permits submitted by persons other than the Applicant must include evidence that the permittee has acquired the right to the portion of the water being requested.

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. 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.”

J. Prior to recording the final plat:

1) Upload into eDARP a Water Supply Information Summary correcting the name of the subdivision and removing Water Court Decree Case Numbers 4365-BD and 4364-BD as they do not pertain to this subdivision.

cc: Ryan Howser, Project Manager, Planner