

## 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

February 29, 2024

SP-23-8 Overlook at Homestead  
Preliminary Plan

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

### WATER SUPPLY REVIEW AND RECOMMENDATIONS

#### Project Description

1. This is a proposal by PT Overlook LLC (“Applicant”) for subdivision of 62 residential lots on an existing 346.55-acre parcel of land (the “property”). The property is zoned PUD (Planned Unit Development).

#### Estimated Water Demand

2. Pursuant to the Water Supply Information Summary (“WSIS”), the water demand for the subdivision is 31 acre-feet/year, comprised of 0.26 acre-feet/year for household use for each of the residential lots totaling 16.12 acre-feet/year, 0.196 acre-feet per year per lot for 3,463 square feet of irrigation for a total of 12.152 acre-feet/year, and 0.011 acre-feet/year per head for stock watering of up to 248 head for a total of 2.728 acre feet per year. Based on this total demand, Applicant must be able to provide a supply of 9,300 acre-feet of water (31 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 provided in Determination of Water Right no. 4638-BD (“Determination”) and Replacement Plan no. 4638-RP (“Replacement Plan”). The Determination allocates 24,518 of water

#### ASSISTANT COUNTY ATTORNEYS

NATHAN J. WHITNEY  
CHRISTOPHER M. STRIDER

STEVEN A. KLAFFKY  
TERRY A. SAMPLE

LORI L. SEAGO

BRYAN E. SCHMID  
STEVEN W. MARTYN

MERI GERINGER  
DOREY L. SPOTTS

in the Dawson aquifer to the property, and the allowed average annual amount of groundwater to be withdrawn from the aquifer is limited to 245.18 acre-feet per year (based on a 100-year aquifer life). The Replacement Plan allows the withdrawal of Dawson aquifer water in the amount of 31 acre-feet annually (0.5 acre-feet per lot) for up to 300 years.

The allowed annual amount of groundwater to be withdrawn from the aquifer by all wells operating under the Replacement Plan shall not exceed 31 acre-feet. The allowed annual amount to be withdrawn per well is 0.5 acre-feet for the following beneficial uses: domestic, livestock, domestic animals, irrigation (indoor and outdoor), recreation, fire suppression, wildlife, and replacement, either directly or after storage. A totalizing flow meter shall be installed on each well.

The approved Replacement Plan has a term of 300 years and requires that return flows from in-house use of groundwater shall occur through individual on-lot non-evaporative septic systems. The Applicant is responsible for ensuring that replacement water is provided to the alluvial aquifer as required by the Replacement Plan. The annual amount of replacement water provided must be no less than the annual replacement requirement on a yearly basis.

#### State Engineer's Office Opinion

5. In a letter dated February 8, 2024, the State Engineer reviewed the proposal to subdivide the 350 +/- acre parcel into 62, 5-acre residential lots. The State Engineer stated that "[t]he proposed water source is individual on lot Dawson wells which will operate pursuant to Determination of Water Right no. 4638-BD and Replacement Plan no. 4638-RP. The State Engineer identified the total estimated water requirement at 31 acre-feet/year (0.5 acre-feet/year/lot).

The State Engineer stated that "[b]ased upon the above and 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

6. Quantity and Dependability. Applicant's water demand for Overlook at Homestead is 31 acre-feet per year from the Dawson aquifer for a total demand of 9,300 acre-feet for the subdivision for 300 years. The Replacement Plan allows for up to 62 wells limited to an annual withdrawal of 0.5 acre-feet per well.

**Based on the water demand of 31 acre-feet/year for Overlook at Homestead and the Replacement Plan permitting withdrawals approved in that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for Overlook at Homestead.**

7. Quality. The water quality requirements of Section 8.4.7.B.10 of the Land Development Code must be satisfied. **El Paso County Public Health shall provide a recommendation as to the sufficiency of water quality.**

8. Basis. The County Attorney's Office reviewed the following documents in preparing this review: a Water Resources Report dated January 2024, the Water Supply Information Summary, the State Engineer Office's Opinion dated February 8, 2024, and Determination of Water Right no. 4638-BD entered on January 29, 2024, and Replacement Plan no. 4638-RP For Determination of Water Right No. 4638-BD entered on January 29, 2024. 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. 4638-BD and Replacement Plan no. 4638-RP, specifically, that water withdrawn from the Dawson aquifer by each of the proposed 62 wells permitted shall not exceed 0.5 annual acre-feet, based on a total combined annual withdrawal of 31 acre-feet. Depletions during pumping shall be replaced by individual on-lot non-evaporative septic systems.

B. Applicant must 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.

C. Applicants 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, and the HOA regarding all applicable requirements of Determination of Water Right No. 4638-BD and Replacement Plan No. 4638-RP, including the limitations on diversions and use of water for each well and lot, the requirement to meter and record all well pumping, and information on how records are to be recorded.

Covenants shall specifically address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 9,300 acre-feet of Dawson aquifer water pursuant to Determination of Water Right No. 4638-BD and Replacement Plan No. 4638-RP to satisfy El Paso County's 300-year water supply requirement for the 62 lots of Overlook at Homestead. The Covenants shall further identify that 150 acre-feet (0.5 acre-feet/year) of Dawson aquifer water is allocated to each of the 62 lots. 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 HOA, 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.

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 the Determination of Water Right No. 4638-BD and Replacement Plan No. 4638-RP 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 HOA, 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 Dawson 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 Overlook at Homestead pursuant to Determination of Water Right No. 4638-BD and Replacement Plan No. 4638-RP. 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 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."

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. 4638-BD and Replacement Plan No. 4638-RP 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. Applicants and their successor and assigns shall reserve in any deeds of the property Dawson aquifer water in the decreed amount of 150 acre-feet (0.5 acre-feet per year) per 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. Applicants and their successors and assigns shall convey by recorded warranty deed these reserved Dawson aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Dawson aquifer underlying the respective lots to satisfy El Paso County's 300-year water supply requirement.

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, replacement during pumping, and replacement of post-pumping depletions for each lot of Overlook at Homestead. 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 the Determination of Water Right No. 4638-BD and Replacement Plan No. 4638-RP and shall identify the obligations of the individual lot owners thereunder.

G. Applicants and their successors and assigns shall record all applicable documents, including but not limited to Determination of Water Right No. 4638-BD and Replacement Plan No. 4638-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 hearing on the preliminary plan before the Board of County Commissioners, Applicant must upload a corrected Water Supply Information Summary into eDARP that identifies Determination of Water Right No. 4638-BD and Replacement Plan No. 4638-RP in Section 10 under Water Court Decree Case Numbers, rather than the information currently included.

cc: Kylie Bagley, Project Manager, Planner