

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
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August 1, 2023

SF-22-31 Joyful View Subdivision
Final Plat

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 Joyful View Subdivision, a subdivision application by OGC RE2, LLC (“Applicant”) for a 9-lot subdivision on a parcel of 70.2 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 70.2 acres into 9 residential lots is comprised of 0.26 acre-feet of indoor household use per home for a total of 2.34 acre feet for the nine lots; 0.17 acre-feet per lot for irrigation for a total of 1.53 acre-feet for the 9 lots (with a maximum of 3,000 square feet per lot); stock watering of two per lot at .013 acre-feet per lot per year for a total of .24, for a total demand of .456 acre-feet per year per lot or 4.11 acre-feet per year total for the 9 lots. Based on this total demand, Applicant must be able to provide a supply of 1,233 acre-feet of water (4.11 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 Arapahoe aquifer as provided in Determination of Water Right No. 1940-BD (“Determination”). The Determination allocated 27.8 annual acre-feet of water in the Arapahoe aquifer to Grand View Partners, LLC. On April 2, 2018, Grand View Partners

ASSISTANT COUNTY ATTORNEYS

NATHAN J. WHITNEY
CHRISTOPHER M. STRIDER

STEVEN A. KLAFFKY
TERRY A. SAMPLE

LORI L. SEAGO
DOREY L. SPOTTS

BRYAN E. SCHMID
STEVEN W. MARTYN

executed a Bargain and Sale Deed to Applicant conveying water rights described as one half of the determination from 1940-BD minus one acre-foot. The Determination allowed an average annual amount of withdrawal from the Arapahoe aquifer at 27.8 acre-feet for a 100-year allocation. Dividing in half and then subtracting one acre-foot leaves approximately 12.9 acre-feet annually, allocated over 100 years for this 70.2 acre subdivision. Further, as El Paso County requires a 300-year supply, 12.9 acre-feet is divided by 3, leaving 4.3 acre-feet per year of available Arapahoe aquifer withdrawals available for this subdivision. This results in approximately 0.477 acre-feet of water available per year per lot for the following uses: domestic, commercial, industrial, irrigation, stock watering, and replacement supply.

The Determination requires that at least 4% of the amount of water withdrawn annually be returned to the uppermost aquifer in the vicinity of the points of withdrawal.

State Engineer's Office Opinion

4. In a letter dated November 1, 2022, the State Engineer stated that “[t]he nine (9) lots will be serviced by individual on-lot wells producing from the not-nontributary (4% replacement) Arapahoe aquifer that will operate pursuant to the Determination of Water Right No. 1940-BD.” The allowed average annual amount of withdrawal for the subdivision shall not exceed 4.63 acre-feet¹ for a maximum of 300 years.

Finally, the State Engineer provided their opinion, “. . . 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 Joyful View Subdivision is 4.11 (0.456 acre-feet per lot per year) acre-feet per year for a total demand of 1,233 acre-feet for the subdivision for 300 years. Under Determination of Water Right No. 1940-BD and the Bargain and Sale Deed from Grand View Partners, Applicant owns the right to withdraw up to 4.3 acre-feet per year from the Arapahoe aquifer based on a 300-year allocation for use within the subdivision.

Based on the water demand of 4.11 acre-feet/year for the Joyful View Subdivision and the right to withdraw up to 4.3 acre-feet per year, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for the Joyful View 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.**

¹ The State Engineer's Office neglected to subtract the one acre-foot per year that was reserved by Grand View Partners in the deed to Applicant; therefore, their annual allocation is a bit higher than otherwise allowed.

7. Basis. The County Attorney's Office reviewed the following documents in preparing this review: a *Water Resources Report* dated February 10, 2022, the Water Supply Information Summary, the State Engineer's Office Opinion dated November 1, 2022 and Determination of Water Right No. 1940-BD entered on December 22, 2008. 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. 1940-BD, including that water withdrawn from the Arapahoe aquifer shall not exceed 4.11 acre-feet total per year. The allowed annual amount of groundwater to be withdrawn from each well is .456 acre-feet (4.11 acre-feet total).

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 for the property.

C. Applicant 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. 1940-BD.

Covenants shall specifically address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 1,233 acre-feet of not-nontributary Arapahoe aquifer water pursuant to Determination of Water Right No. 1940-BD to satisfy El Paso County's 300-year water supply requirement for the 9 lots of the Joyful View Subdivision. The Covenants shall further identify that 137 acre-feet (0.456 acre-feet/year) of Arapahoe aquifer water is allocated to each residential lot.

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 plan for replacement, which include the installation and/or maintenance of totalizing flow meters.

3) Require and reserve return flows. The Covenants shall require each lot owner to return at least four percent (4%) of the amount of water withdrawn annually to the uppermost aquifer in the vicinity of the permitted points of withdrawal. Determination of Water Right No. 1940-BD does not specify the manner in which the return flows are generated or

applied. 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. 1940-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 HOA, 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 Arapahoe 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 Joyful View Subdivision pursuant to Determination of Water Right No. 1940-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. 1940-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 Arapahoe aquifer water in the decreed amount of 137 acre-feet (0.456 acre-feet annually) per residential lot, equating to 4.11 acre-feet annually for the subdivision for a period of 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.

E. Applicant and its successors and assigns shall convey by recorded warranty deed these reserved Arapahoe aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Arapahoe aquifer underlying the respective lots to satisfy El Paso County’s 300-year water supply requirement. Sufficient water rights are 137 acre-feet (0.456 acre-feet/year x 300 years) from the Arapahoe aquifer for each residential lot.

Any and all conveyance instruments shall also recite as follows:

For the water rights and return flows conveyed for the primary supply (Arapahoe 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 Joyful View 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. 1940-BD 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. 1940-BD, 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."

cc: Ryan Howser, Project Manager, Planner