

EL PASO COUNTY



OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

Amy R. Folsom, County Attorney

First Assistant County Attorney

Diana K. May

Assistant County Attorneys

M. Cole Emmons

Lori L. Seago

Kenneth R. Hodges

Lisa A. Kirkman

Steven A. Klaffky

Peter A. Lichtman

February 16, 2018

MS-17-006 Arvidson Minor Subdivision

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

FINDINGS AND CONCLUSIONS:

1. This is a proposal by Matthew and Jenna Arvidson ("Applicant") for a 2-lot minor subdivision on a parcel of approximately 5.45 acres (the "Property"). The Applicant desires to subdivide the property into 2 lots: Lot 1 with a size of 2.3 acres and Lot 2 with a size of approximately 2.1 acres. The property is currently zoned RR-5 (Rural Residential) with a concurrent proposal pending to rezone the parcel to RR-2.5 (Rural Residential).

2. The Applicant has provided for the source of water to derive from individual on-lot wells, as provided through District Court Water Division 2, Case No. 2016CW3098 ("Decree"). An existing well (Well Permit No. 25919 issued on November 23, 1965) is located on the Property. Pursuant to the Water Supply Information Summary, the source of the water supply will derive from the Dawson aquifer, operating pursuant to the augmentation plan noted in the Decree. Applicant estimates the annual water needs to serve the property at .70 acre-feet per year for each of the lots, to include 0.25 acre-feet for in-house demand, 0.2 acre-feet for irrigation, and 0.25 acre-feet for stock watering of 4 large domestic animals. Based on Applicant's total demand of 1.40 acre-feet per year for the minor subdivision, Applicant must be able to provide a supply of 420 acre-feet of water (1.40 acre-feet per year x 300 years) to meet the County's 300 year water supply requirement.

3. In a letter dated January 2, 2018, the State Engineer reviewed the submittal to plat the approximately 5.45 acre parcel into a 2-lot minor subdivision. The State Engineer reviewed the Water Supply Information Summary, the Decree, and existing Well Permit No. 25919. The Engineer stated that the "water is to be provided by on-lot wells producing from the Dawson aquifer that will operate pursuant to the augmentation plan decreed by the Division 2 Water Court in case no. 2016CW3098. This case adjudicated



water in the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers underlying the 5.4 acres of land which make up the entire proposed Arvidson Subdivision.” The amounts identified by the State Engineer (for 300 years) are summarized as follows:

Aquifer	Volume (AF)	Annual Allocation 300 Year (AF/Year)
Dawson (NNT)	421	1.4
Denver (NT)	128	0.43
Arapahoe (NT)	256	0.86
Laramie-Fox Hills (NT)	143	0.48

The State Engineer notes that the Decree allows for diversion of 1.4 acre-feet annually from the not non-tributary Dawson aquifer for a maximum of 300 years. The State Engineer further states that “pursuant to CRS 30-28-136(1)(h)(l), that the anticipated water supply can be provided without causing material injury to decreed water rights so long as the applicant obtains well permits issued pursuant to C.R.S. 37-90-137(2) and the plan for augmentation noted herein, for all wells in the subdivision and operates the wells in accordance with the terms and conditions of any future well permits.”

The State Engineer notes that the existing well located on the Property was constructed on December 2, 1965, pursuant to Well Permit No. 25919. The Applicant plans to continue to utilize the existing well as provided by the Decree, but the State Engineer notes that the Applicant must “apply for, and obtain a new well permits [sic] issued pursuant to Section 37-90-137(2) C.R.S.”

4. Analysis. Applicant’s total water demand for the Arvidson Subdivision is 1.40 acre-feet/year. Pursuant to District Court Water Division 2, Case No. 2016CW3098, the total estimated demand for the subdivision is 1.40 acre-feet/year. The Decree determined that there is an available water supply from the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers. The Decree permits withdrawal of 1.40 acre-feet/year from the Dawson aquifer for 300 years which is adequate to meet the demand of the subdivision. Based on the permitted withdrawal of 1.40 acre-feet annually for 300 years and an annual water demand of 1.40 acre-feet/year, there appears to be a sufficient water supply to meet the demands of the Arvidson Subdivision utilizing the Dawson aquifer water supply.

Applicant will also need to provide appropriate amounts of water to meet the replacement requirement in the Decree. Pursuant to the Decree, during pumping of the Dawson aquifer water, Applicant will replace actual depletions to the affected stream system utilizing non-evaporative septic system return flows. The Decree also requires post-pumping depletion augmentation and requires that the Applicant reserve 123 acre-feet of water from the nontributary Laramie-Fox Hills aquifer and 256 acre-feet of water from the nontributary Arapahoe aquifer (379 acre-feet total) for replacement of post-pumping depletions.

5. Section 8.4.7(B)10(g) of the Land Development Code allows for the presumption of acceptable water quality for minor subdivision projects such as the Arvidson Minor Subdivision.

6. Therefore, based on the finding of sufficiency and no injury by the State Engineer pursuant to their review of District Court Water Division 2, Case No. 2016CW3098 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. There is a presumption of sufficient water quality.

REQUIREMENTS:

- A. Applicant, its successors and assigns, shall comply with all requirements of Well Permit No. 25919, and further, must apply for and obtain a new nonexempt well permit pursuant to Section 37-90-137(2), C.R.S.
- B. The County prefers that when there is a plan for replacement, that Applicant, its successors and assigns, create a homeowners' association ("HOA"); however, alternatively to establishing an HOA, Applicant, its successors and assigns, shall create restrictive covenants or deed restrictions 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 District Court Water Division 2, Case No. 2016CW3098 ("Decree") and their obligations to comply with the same. The Decree specifically requires that the water allocation be limited to the following beneficial uses: "domestic, commercial, irrigation, stock water, recreation, wildlife, wetlands, fire protection, piscatorial, and for storage and augmentation associated with such uses." Said Covenants or deed restrictions shall also ensure 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 sold, traded, or assigned in whole or in part for any other purpose. The Covenants or deed restrictions 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. Such Covenants or deed restrictions shall also address responsibility for any metering and data collecting that may be required regarding water withdrawals from wells pursuant to the Decree.
- C. Applicant, its successors and assigns, shall reserve in the Covenants or deed restrictions and in any deeds of the Property the decreed amount of at least .70 acre-feet per lot annually or shall reserve a total decreed amount of at least 210 acre-feet of Dawson aquifer water for each lot for 300 years for a total of 420 acre-feet for the 2 lots 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 deed restrictions 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.

- D. Applicants shall assign or convey to the individual lot owners Applicant's interests, rights, and obligations in the Decree, including the replacement requirement, and shall create restrictive covenants upon and running with the Property which shall advise and obligate future lot owner(s) of this filing, their successors and assigns, regarding all applicable requirements of the Decree as well as their obligations to comply with the replacement requirement ensuring that replacement water shall be withdrawn annually and be returned to the uppermost aquifer in the vicinity of the permitted points of withdrawal. Such assignment or conveyance shall be accomplished by an appropriate agreement and assignment or conveyance instrument 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. Given the replacement requirement of the augmentation plan in the Decree, Applicant, its successors and assigns, shall reserve in the Covenants or the deed restrictions a supply of 123 acre-feet of water from the Laramie-Fox Hills aquifer and 256 acre-feet of water from the Arapahoe aquifer (total amount of 379 acre-feet) for post-pumping depletion augmentation. Applicants, its successors and assigns, shall be required to construct a Laramie-Fox Hills aquifer well and an Arapahoe aquifer well at the time replacement of post-pumping depletions commences, pursuant to the Decree. Applicant, its successors and assigns, shall convey in any deeds of the Property at the time of lot sales to successor owners, sufficient water rights in the Laramie-Fox Hills and Arapahoe aquifers underlying the Property to comply with the Decree. Said Covenants or deed restrictions or conveyance instrument shall recite that this water shall not be separated from transfer of title to the Property and shall be used exclusively for the replacement supply for the lots. Applicant shall provide said Covenants or deed restrictions or other such reservation and/or 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 of the final minor subdivision plat.
- F. Applicant shall submit the Declaration of Covenants, Conditions, and Restrictions or deed 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 must be approved by the Planning and Community Development Department and the County Attorney's Office prior to recording the final plat. Said

Declaration/deed restrictions shall cross-reference the Decree and shall recite the obligations of the individual lot owners under each of these documents.

- G. Applicant, its successors and assigns, shall record all applicable documents, including, but not limited to, the Decree (District Court Water Division 2, Case No. 2016CW3098), agreements, assignments, and warranty deeds regarding the water rights, and Declaration of Covenants (if applicable) in the land records of the Office of the Clerk and Recorder of El Paso County, Colorado.
- H. 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, the Home Owners Association, 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 II