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May 11, 2017

Douglas County Planning Commission  
100 Third Street  
Castle Rock, CO 80104

Re: Franktown Village Planned Development – Water Supply and Developer’s  
Appeal of 1809A.03.1, Project No. ZR2014-003-WS-Revised

Dear Members of the Planning Commission:

We are writing on behalf of the Franktown Citizens Coalition II (Coalition). The Coalition is comprised of hundreds of Franktown residents. As you know, the Coalition is deeply concerned about the proposed Franktown Village Planned Development (“FVPD”). The Coalition’s concerns are many, but start with the desire to preserve the historic and rural character of Franktown. The Coalition members are also extremely concerned about the proposed water supply for the FVPD. Many of the Coalition members own wells that draw water from the Denver Basin aquifers, which are the sole proposed supply for the planned FVPD.

We have been asked to look at the planned water supply for the FVPD, in particular the legal sufficiency and potential impact of the new development on existing wells relying on the same source. We have also been asked to comment on the merits of the appeal sought by the FVPD with respect to the application of Water Supply Standard 1809A.03.1 and the proposal to use Denver Basin water from outside of the development property. Our comments are below.

**Water Supply Background**

The only water supply proposed to serve the FVPD is non-renewable groundwater from the Denver Basin aquifers. According to the most recent water supply and demand analysis for the FVPD prepared by Kennedy/Jenks Consultants, dated April 6, 2017 (“2017 Kennedy/Jenks Report”), the water demand for the latest iteration of the FVPD will be 267.32 AF/year. This is the amount that the Developer has calculated as necessary to meet the demand from 357 SFEs, which includes irrigation of a 9-acre park. To meet the calculated demand, plus a 5% safety

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factor, the Developer is proposing to dedicate 280.69 AF of Denver Basin groundwater from the Denver, Arapahoe and Laramie-Fox Hills aquifers. The developer of the FVPD has not identified any renewable water resources that could provide a long-term supply to the proposed development.

In order to provide the 280.69 AF of Denver Basin water necessary to serve the FVPD, the developer must bring in Denver Basin water associated with 156 acres of the non-adjacent, off-site Carroll property (“Off-Site Property”) that it has identified. *See*, April 7, 2017, letter from J. Reutzel to J. Fowler (“FVPD Appeal Letter”). Under DCZR 1809A.03.1, the only way that the off-site water can be used for the FVPD water supply plan is if the Off-Site Property is zoned as Open Space Conservation District or is subject to a perpetual conservation easement. With the appeal in ZR2014-003-WS, however, the developer of the FVPD is asking that the County postpone the time when the FVPD must show that the Off-Site Property will be permanent open space.

Water and sewer service will be provided to the FVPD by the Franktown Business Area Metropolitan District (“FBAMD”). According to the 2017 Kennedy/Jenks Report, the service plan for the FBAMD was approved by the Douglas County Board of County Commissioners on October 3, 2000.

### **I. The Rules: Colorado Statutes and Douglas County Zoning Regulations Require the Water Supply for a Proposed Development to be Adequate and Sufficient.**

Pursuant to Colorado statute, “[a] local government shall not approve an application for a development permit unless it determines in its sole discretion, after considering the application and all of the information provided, that the applicant has satisfactorily demonstrated that the proposed water supply will be adequate.” C.R.S. § 29-20-303 (emphasis added). “Adequate” under the statute “means a water supply that will be sufficient for build-out of the proposed development in terms of quality, quantity, dependability, and availability to provide a supply of water for the type of development proposed, and may include reasonable conservation measures and water demand management measures to account for hydrologic variability.” C.R.S. § 29-20-302.

Similarly, the Douglas County Zoning Resolution (“DCZR”) on water requires proof that the water supply proposed for a new development is sufficient in terms of quantity, quality and dependability. *See* DCZR 1801A, 1809A.01, .03. The DCZR addressing water supply specifies a number of additional requirements where the water for a new development will be provided by a “New Special District” under Section 1809A.03. A “New Special District” is a special district offering water service with a service plan approved by Douglas County after August 12, 1998. DCZR 1812.10. Because the service plan for the FBAMD was approved by Douglas County on October 3, 2000, the FBAMD is a “New Special District” under the DCZR. As such, and among other things, the FVPD must demonstrate:

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- The proposed water supply can rely on Denver Basin aquifers underlying the subject land; and/or from beneath other land in the Central Basin, but only when that other land has been zoned as perpetual open space or is subject to a perpetual open space conservation easement. 1809A.03.1 (emphasis added).
- The water in all Denver Basin aquifers will be reserved in perpetuity, for the benefit of future landowners within the proposed development, pursuant to a declaration of restrictive covenants in a form prescribed by the County.
- The service plan for the New Special District providing water service must include a well-field analysis demonstrating that any planned Denver Basin wells will “not adversely impact existing water rights on adjoining lands, consistent with the provisions in § 37-90-137(4)(c).” 1809A.03.8(1) (emphasis added).
- The service plan for the New Special District must require an acceptable water level measuring device in all new district wells to measure and record water levels on a monthly basis and provide for an annual report of such data to Douglas County. 1809A.03.8(2).

The Douglas County determination regarding the sufficiency of the proposed water supply must be made on the basis of all of the information submitted by the developer of the FVPD, and on the referral comments provided by the State Engineer. C.R.S. § 29-20-305(1)(b). The State Engineer concluded last fall that the water supply proposed for the FVPD was an “insecure” source. *See*, October 20, 2016, letter from Karlyn Armstrong, Colo. Div. of Water Resources, to J. Fowler (“SEO 2016 Letter”). The State Engineer’s Office very recently updated its analysis in a May 1, 2017 letter. (“SEO 2017 Letter”). Although some of the issues identified in the SEO 2016 Letter have been addressed in the more recent letter, many of the most important have not. The State Engineer’s letters are discussed in more detail in Section III below.

**II. The Appeal of DCZR 1809A.03.1 regarding open space dedication of the off-site parcel should be denied.**

The argument in support of postponing the open space dedication for the Off-Site Property is that such a dedication should not be required until the time when the County determines the sufficiency of the water supply for the FVPD. FVPD Appeal Letter at 2-3. The developer has asserted in many of its filings and correspondence that the County should make the water supply sufficiency determination at the time of Preliminary Plan. *See*, FVPD Appeal Letter. We do not agree with that reading. Under the County regulations, all aspects of the

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water supply sufficiency showing, including the open space dedication required for Off-Site Property under 1809A.03.1, must be made at rezoning.

The DCZR is clear that the water supply regulations in Section 18A of the DCZR (“Water Supply – Overlay District”) apply at rezoning. *See* DCZR 2502.6, 2503.01.5. Indeed, citing those regulations, the Douglas County Planning Department has interpreted the DCZR to require an applicant to demonstrate “a sufficient water supply in terms of quantity, quality and dependability for the type of subdivision proposed, as determined in accordance with the standards in the Water Supply – Overlay District of the DCZR (Section 18A)” at the time of rezoning. *See Guide to Rezoning* attached hereto as Exhibit A, at p. 4, step 8; *see also*, DCZR 1502.1, 1503.10, 2502.6, 2503.01.5.

Similarly, the County’s *Guide to Rezoning* brochure asks: “How does rezoning relate to water supply overlay district requirements?” In answer to that question, the brochure states:

Regardless of where a parcel is located in Douglas County, it must comply with the requirements of the Water Supply Overlay District as part of the rezoning process. Compliance with the Water Supply Overlay District demonstrates that the site under consideration has enough water in terms of quantity, quality, and dependability to serve the proposed development.

*See, Guide to Rezoning*, Exhibit A at 1. Clearly, FVPD’s interpretation of when sufficiency must be shown is at odds with the plain language of the County’s water supply regulation and with the County’s stated and published policy on the importance of meeting the water supply requirements at rezoning.

The FVPD Appeal Letter argues, “[w]e read the regulation to require the 1809A.03.1 findings when the Board finds the water supply plan sufficient in terms of quantity, quality and dependability.” FVPD Appeal Letter at 2. We agree. Under the clear terms of the DCZR and the County’s own interpretation of the DCZR, however, that time is at rezoning – not later. The sufficiency of the water supply may need to be reviewed again at the time of the Preliminary Plan if it is materially different from what was reviewed at the time of rezoning, but that additional review is not a substitute for and does not eliminate the determination that the County regulations clearly indicate is required at rezoning.

To the extent there is any ambiguity or uncertainty with respect to how the direction in the County’s rezoning regulations regarding when the water supply sufficiency showing must be made fits with related direction in section 18 of the DCZR, the *County’s Guide to Water Supply Standards* is instructive. Attached as Exhibit B. This guide asks: “Who needs to comply with the County’s water supply standards?” In response, the guide states:

Anyone undertaking any of the following processes is required to adhere to the water supply standard regulations: planned development, rezoning, use by special

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review, sketch plan, preliminary plan, final plat, minor development, building permits, special district service plan applications, and certain site improvement plans. If there are any overlapping or conflicting requirements among processes, the most restrictive provisions will apply.

Exh. B at 1 (emphasis added).

Moreover, the risks identified by the developer concerning the inequities that could result if the Off-Site Property is dedicated as open space without any certainty that the FVPD will in fact be developed or that the off-site water will be necessary can be addressed by other means. It should be possible to put a conservation easement on the Off-Site Property with a reversion or other mechanism in the conservation easement documents dissolving that conservation easement if the off-site water turns out not to be necessary for the FVPD development. At a minimum, that question should be referred to the Douglas County Land Trust or other appropriate entity to confirm whether such a structure is possible before a variance from the County's clear regulations on this issue is granted.

In short, the showing on the sufficiency of the water supply for the FVPD should be made at rezoning. There is not adequate or sufficient water to serve the FVPD now because the off-site water cannot be included in the calculation. Because there is not sufficient water, the rezoning request should be denied. The developer of the FVPD has not even mentioned the rezoning regulations in its FVPD Appeal Letter nor attempted to explain why they do not apply. *See*, DCZR 1502.1, 1503.10, 2502.6, 2503.01.5. The County, however, cannot ignore its own regulations and its own published commentary about how those regulations should be read.

**III. The Proposed Water Supply is not Adequate or Sufficient.**

In addition to the fact that there is simply not enough water to support the required demand because of the rezoning issue discussed above, the County must consider a number of other factors that compel the conclusion that the proposed water supply for the development is not sufficient.

**A. The FVPD should not rely exclusively on Denver Basin groundwater.**

As a general matter, it is a mistake to allow any more development based solely on the limited and non-renewable resources in the Denver Basin aquifers. This point has been made again and again with respect to development in Douglas County. As succinctly stated in the Douglas Master Plan: "The Denver Basin alone (a non-renewable resource) cannot sustain the population's water needs long-term." Douglas County 2035 Comprehensive Master Plan, Section 8, "Water Supply" at 8-1.

The point that new development should not rely only on Denver Basin groundwater is evident in the statewide Colorado Water Plan released in 2015, which identified the over-reliance

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on non-renewable groundwater supplies, and the need to develop renewable supplies, as one of the major challenges for the South Platte Basin. *See* Colorado Water Plan at 3-13, 14 (“Strong economic and population growth in [Douglas and other South Platte drainage counties], coupled with the lack of surface water supplies, has led to the need to develop renewable surface-water supplies and additional water storage for the south metro area.”).

Just a few years ago, then Douglas County Commissioner Steve Board stated: “We don’t want to allow non-renewable water to be used as a permanent water supply again in Douglas County.” *DENVER POST*, Sept. 13, 2012. Similarly, the South Metro Water Supply Authority, whose member entities serve about half of Douglas County, states very clearly:

Historically, our region has relied on non-renewable underground aquifers for much of our water supply. These aquifers do not provide a sustainable supply that can adequately support our growing families and businesses. We must conserve, diversify and increase our water supply, to protect home values, jobs and provide a community our children and grandchildren can call home.

Statement from “About Us” – South Metro Water Supply Authority, [southmetrowater.org](http://southmetrowater.org). There are numerous similar policy statements from local entities all through the South Metro region.

The major driver of all of the foregoing policy statements is the recognition that the Denver Basin aquifers are dropping rapidly. “While the aquifers are believed to contain large quantities of water, their levels are depleting at much faster rates than once believed. It is no secret that additional renewable water supplies are necessary to help augment existing ground water resources, while ambitious water conservation efforts are needed by all County water users.” Douglas County Planning Department, <https://www.douglas.co.us/water/water-resources>; *See also, USGS Groundwater levels in the Denver Basin Bedrock Aquifers of Douglas County, Colorado 2011-2013, Scientific Investigations Report 2014-5172* (“Increased groundwater withdrawal is causing large water-level declines, especially . . . in parts of Douglas County. This raises concerns that the groundwater supply may be depleted much faster than previously thought”).

**B. The State Engineer has stated clearly that the development should not be allowed to rely exclusively on Denver Basin groundwater.**

The State Engineer concluded last fall that the water supply proposed for the development was an “insecure source.” SEO 2016 Letter at 4. One criticism of the water supply as it was proposed at that time was that there had been no adjudication of the Denver Basin groundwater under part of the FVPD development property. SEO 2016 Letter at 2-4. While that issue appears to have been addressed, other important points and criticisms about the water supply made in the 2016 SEO Letter persist as fundamental flaws and are reiterated in the SEO 2017 Letter.

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Most problematic, the 2017 Kennedy/Jenks Report still shows a development that depends exclusively on Denver Basin groundwater. The SEO 2017 Letter clearly states that the State Engineer's Office "does not have evidence regarding the length of time for which this source will be a physically and economically viable source of water." The SEO 2017 Letter goes on to bluntly state that "the water supply plan should not rely solely upon non-renewable aquifers." With respect to the need for a long-term, sustainable supply, the SEO 2017 Letter explains "[a]lternative renewable water resources should be acquired and incorporated in a permanent water supply plan that provides future generations with a water supply." Despite that clear direction, no such renewable resources are included in the 2017 Water Report.

In addition, the SEO 2017 Letter states that FVPD must demonstrate that the water supply will be sufficient after accounting for system losses. The 2017 Kennedy/Jenks Report does not address system losses. Similarly, the SEO 2017 Letter states that the FVPD must demonstrate how the wells proposed to divert the Denver Basin water can be dispersed within the FBAMD to withdraw the necessary supply. There is no such showing and analysis in the 2017 Kennedy/Jenks Report because the wells have not been located.

We also question whether the water from the Laramie Fox-Hills ("L-FH") aquifer should be included in the quantification of the available supply. The L-FH water is about 20% of the proposed total Denver Basin supply for the FVPD. As you know, the quality of the L-FH water is not always sufficient for it to be readily used in a municipal project. *See*, <http://www.douglas.co.us/water/water-supply/ground-water/laramie-fox-hills-aquifer> ("In the deeper portions of the basin, high water temperatures and sulfur content in the coal beds makes this water less desirable for municipal supply.")

### **C. The FVPD has not supplied an analysis of the impact of the new wells on existing wells.**

As the County is well aware, Denver Basin wells in the Franktown area have already run dry or dropped in yield due to the increased pressure on this finite water resource from the demands of new development. Thus, even if the Denver Basin water supply planned for the FVPD lasts for 100 years, the wells to serve the new development are likely to impact existing wells. The DCZR places the burden to prove there will be no such impact on the FVPD and the FBAMD.

Pursuant to DCZR 1809A.03.8, the service plan for the FBAMD must contain a "well-field analysis" that demonstrates that the planned new wells will not adversely impact existing water rights on adjoining lands. That analysis is not possible until the locations of the required wells are identified. When it is prepared, it should be shared with the Coalition and other concerned citizens.

The DCZR defines "well-field analysis" as follows:

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Evaluation required with proposed land-uses that plan to use Denver Basin water in Margin B or the Central Basin, to assess whether a new proposed well field associated with the proposed land use will create water level change impacts such that neighboring wells, either on or off the subject property, will have their ability to produce their water rights impaired. A change in water level at an adjacent well is not, in and of itself, considered to be an impact. This analysis is typically completed using an analytical ground water model. DCZR 1812A.21.

Clearly, the State Engineer's letters are not any sort of "well-field analysis." They did not and could not consider the specific impact of the wells to serve the FVPD because the locations for those wells have not been identified. Indeed, the SEO 2017 Letter specifically notes "the county should be aware that the economic life of a water supply based on wells in a given Denver Basin aquifer may be less than the 100 years used for allocation due to anticipated water level declines."

In short, the County cannot make the water supply sufficiency determination until the well field analysis is prepared and presented to the County. DCZR 1809A.03.8. The water supply for FVPD simply cannot be called "sufficient" under the DCZR where the DCZR requirements have not been met and there has been no showing with respect to the impact of the proposal on existing wells.

### Conclusion

Pursuant to Colorado statute, a local government "shall not" approve an application for a development permit unless it determines that the applicant has satisfactorily demonstrated that the proposed water supply will be adequate. The approval criteria in the Douglas County Zoning Resolution require proof of a water supply that is sufficient in terms of quantity, quality and dependability. Pursuant to the DCZR, the sufficiency determination must be made at rezoning, and not postponed as suggested by the FVPD.

As set forth above, the proposed water supply is neither adequate nor sufficient. To reiterate, the major problems and issues with the FVPD appeal and the proposed water supply that we have been able to identify from the available information are as follows:

- The water supply is based on only non-renewable sources.
- The Denver Basin aquifers from which the supply is proposed to be drawn are dropping rapidly.
- The FVPD/FBAMD has not explained the impact of the new wells on the pre-existing wells that already depend on the Denver Basin water.



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- The FVPD/FBAMD has not identified the location of the wells it is proposing and has therefore not supplied the information the County needs to make an informed decision about the proposed water supply.
- The State Engineer's Office called the water supply "insecure" in its October 2016 referral letter. Some of the problems cited in that letter have been addressed, but important issues identified by the State Engineer as problems with the proposed water supply persist.
- The County's water supply determination should be made at rezoning, as required by the DCZR on rezoning.
- The water associated with the Off-Site Property cannot be considered available to the development because it is not dedicated open space. Approval of the rezoning request despite this defect would be contrary to the County's clear regulations and policy. There is no basis for the County to approve the requested appeal.

Thank you for considering these comments. We look forward to working with the Planning Board and the Board of County Commissioners on these issues and will supplement the foregoing as more information becomes available.

Sincerely,

BUCHANAN SPERLING & HOLLEMAN PC



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P. Fritz Holleman for Franktown Village Citizens  
Coalition II.

PFH: rlo  
Enclosures