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July 18, 2017

Douglas County Board of County Commissioners
100 Third Street
Castle Rock, CO 80104

Re: Franktown Village Planned Development Water Commitment

Dear County Commissioners:

The Franktown Citizens Coalition II ("FCCII") asked us to consider the water related commitment in section 1.B. of the Statement of Commitments in the development plan for the proposed Franktown Village Planned Development ("FVPD"). In particular, FCCII asked us to consider the strength of the commitment by the developer in that statement and how easily it could be changed. Our brief discussion on this issue is set forth below.

Question Presented: How binding is FVPD's statement in Commitment 1.B of its development plan regarding the water supply for the project. The statement reads as follows:

"The owner commits that only the Denver, Arapahoe and Laramie-Fox Hill aquifer water shall be part of the water supply plan for the Project and for any subsequent land use applications as submitted to Douglas County as required by Section 18A of the Douglas County Zoning Resolution, as amended."

Short Answer: If FVPD's water supply plan for Franktown Village is approved as proposed in Commitment 1.B, FVPD cannot use Dawson aquifer water to serve the Franktown Village project unless and until an amended development plan is approved by Douglas County. If the FVPD is going to be approved, the development plan should be revised to affirmatively state that the Dawson aquifer will not be used, and should also clearly state that any future amendment allowing use of the Dawson aquifer must be considered a "major" amendment under the Douglas County Zoning Resolution ("DCZR") that can only become effective after full public notice and comment and Board of County Commissioner's ("Board") approval.

Discussion: Under C.R.S. § 29-20-301 to 306, Douglas County has the right and responsibility to review and approve the quantity, quality, availability, and dependability of a proposed water

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supply that is part of a development permit application process. Douglas County has implemented this statute through DCZR Section 1802A.01-02 (1999), under which the Board shall determine the adequacy of the water supply for various types of applications, including a rezoning request and subdivision approval.

For applications involving non-renewable Denver Basin water and a new special district, as in FVPD's application, the Board must make determinations regarding the specific water rights that will be used, including that the water rights are sufficient based on the minimum water demand standards and that the water rights can be used for the proposed use(s). DCZR 1806A.03.4-5, 1809A.03.4-5. The DCZR thus clearly requires that specific water rights must be identified and then approved as part of the required water supply adequacy determination.

Pursuant to C.R.S. § 29-20-303(1), the County is to determine the sufficiency of a water supply plan for a particular development only one time, "unless the water demands or supply of the specific project for which the development permit is sought are materially changed." It seems clear that adding or changing the water rights on which an earlier adequacy determination was made would constitute a "material change" from what was initially reviewed and approved. Accordingly, if FVPD later attempts to add water from the Dawson aquifers after the initial sufficiency determination is made, it is our conclusion that FVPD should have to amend the development plan. We note that FVPD representatives agreed with this general position at the June Planning Commission hearing. *See* Transcript at 13(Reutzel statement).

For being held-out as a commitment that the FVPD will not in the future rely on the Dawson aquifers, it is striking that the actual language in Commitment 1.B does not explicitly mention the Dawson aquifers. Instead, the commitment states: "The owner commits that only the Denver, Arapahoe and Laramie-Fox Hill aquifer water shall be part of the water supply plan for the Project and for any subsequent land use applications as submitted to Douglas County as required by Section 18A of the Douglas County Zoning Resolution, as amended." The actual language is silent as to the Dawson. The indirection in this statement indicates a hesitation to foreclose the developer's right to use the Dawson water in the future, and, as discussed below, that indirection might also make it easier for the FVPD to amend the development plan in the future.

As you know, the FVPD has clearly indicated it will use the Dawson water if necessary. In a letter to the FCCII dated August 23, 2016, FVPD states that "the owners of FVPD cannot accommodate the request of the HOA's to restrict the future use of the Upper or Lower Dawson Aquifers. It is water that they own. Maintaining the right to utilize this aquifer may be necessary should the water supply plan needs [*sic*] to be modified in the future." The FVPD presentation at the June 19 Planning Commission hearing indicated a similar intent to turn to the Dawson water should that prove necessary in the future. *See* Transcript at 13. Thus, while the FVPD and the County highlight Commitment 1.B. as a significant concession, they are not really taking the Dawson water off the table. They have instead, "kicked the can" as to the Dawson water so that it could be used to serve the FVPD down the road if, for example, they later learn

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that the Laramie Fox-Hills water quality is worse than expected, or the yield of water from the identified aquifers is less than expected, or some other similarly not unforeseeable event occurs. While we believe the development plan for the FVPD would have to be amended to include the Dawson water, as explained above, the politics and pressures on the County will be very different if that occurs after the development has been built and occupied and the water is being used there and to serve the school and for other purposes. The process for any future amendment is therefore very important.

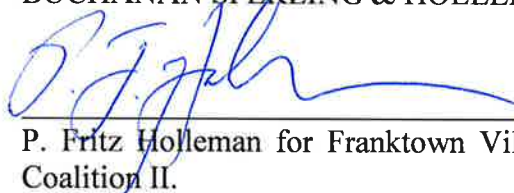
There are two types of amendments to development plans under the DCZR – “major” amendments and “administrative” amendments. Pursuant to Section 15 of the DCZR, the director of planning decides whether a future amendment is a simple administrative amendment or is a major amendment. DCZR1512. A major amendment is processed pursuant to Sections 1519 through 1523 of the DCZR, and requires more formal notice and comment procedures, including, among other things, a public hearing before the Planning Commission and approval by the Board. By contrast, an administrative amendment does not necessarily require public notice, does not require a public hearing, and is decided only by the director. *See* DCZR 1513-1518. A future amendment to simply add the Dawson as a source of supply might slip through as an “administrative” amendment to the current language. Such an addition to the current language is likely more easily processed than the complete reversal that would be required if the commitment language in the development plan that is initially approved clearly states that the Dawson water cannot be used for the FVPD.

If the FVPD is going to highlight Commitment 1.B. to secure approval now, which it has done and is doing, it is our recommendation that it must be equally clear that any future amendment to that commitment must be considered a “major” amendment to the development plan under the DCZR, requiring full public notice and process and Board approval. It would also be much clearer now if the commitment was restated to explicitly state that the Dawson aquifer will not be used.

Thank you for considering the foregoing analysis. We look forward to working with the Board on these water issues.

Sincerely,

BUCHANAN SPERLING & HOLLEMAN PC



P. Fritz Holleman for Franktown Village Citizens
Coalition II.

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