

## Supreme Court Strikes Down New Development EIR Based on Uncertain Water Supply

February 5, 2007

On February 1, 2007, the California Supreme Court entered the fray of water supply availability for specific plans enacted for real estate developments. The Court's decision in the case of *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* is the first Supreme Court decision following adoption of SB 610 (Costa) and 221 (Kuehl) that considers the sufficiency of water supply analysis in an environmental impact report (EIR) under the California Environmental Quality Act (CEQA). Even though SB 610 and 221 were not directly at issue in this case that did not address water supply issues for an individual development, the Court set forth several principles under which future and existing developments at the community and specific plan levels will be judged for adequacy of their proposed water supply.

The case involved the adequacy of a water supply analysis contained in an EIR for community and specific plan areas in Sacramento County. Because at full build out, the development would have been served by water supplies to be developed in the future, the Court declared that the "principal disputed issue is how firmly future water supplies for a proposed project must be identified or, to put the question in reverse, what level of uncertainty regarding the availability of water supplies can be tolerated in an EIR for a land use plan." While the Court upheld the adequacy of the EIR's evaluation of the near-term groundwater supply for the proposed project, the Court concluded the EIR had failed to demonstrate that a long-term water supply was likely to be available to serve the project. As such, the Court reversed the Court of Appeal's decision upholding the EIR and remanded the case to that court.

**Legal Rules.** The Court summarized the "general principles" established in prior cases. First, an EIR cannot ignore or assume a solution to water supply problems. Second, an EIR for a community or specific plan, which by definition contemplates build-out over a period of years, cannot limit its analysis to water supplies needed

for the first stage or first few years, but must assume the entire project will be built and analyze the impacts of supplying water to the entire project. Third, future water supplies must be likely; speculative sources and unrealistic allocations (frequently called "paper water") are insufficient. An EIR must include a reasoned analysis of the circumstances affecting the likelihood of the water's availability and analyze the environmental impacts of possible alternative supplies to backstop any uncertainty. The EIR may not simply provide that if the primary future water supply fails, the development will not proceed, although the opinion provided the circumstances under which such a proviso properly could be included in an EIR.

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**The Vineyard Development.** The development at issue in the *Vineyard* case was a large project covering 6,000 acres and containing more than 22,000 residential units for as many as 60,000 people at buildout. The first phase analyzed in the contested EIR would require approximately 8,500 acre-feet per year (AFY), while the total development would require just over 22,000 AFY. Water needs were to be met through conjunctive use of local groundwater and surface water supplies from the American River. The project EIR relied heavily on an EIR previously prepared for a cooperative Sacramento-area water planning effort known as the Water Forum.

# Case Alert

The Court upheld the EIR's analysis of near-term groundwater supplies based on substantial evidence in the administrative record and the fact that the EIR did not violate any of the general principles described above. The Court found, however, that the EIR did not demonstrate a level of certainty for future groundwater supplies that was sufficient to satisfy the requirements of a written verification prepared under SB 221. Thus, additional certainty would need to be created before final approval of any subdivision map for the project.

Regarding surface water, the Court held the EIR's analysis of several potential water supplies for the project to be adequate, because it properly identified the uncertainties inherent in and the impacts of using each supply. The Court held the EIR to be inadequate, however, for its discussion of the total long-term water supply and demand of the Sacramento County Water Agency's Zone 40, which includes the community and specific plan areas, based on findings that: the disputed EIR and Water Forum EIR contained unexplained factual inconsistencies and a general lack of clarity; the disputed EIR inappropriately relied on information to be provided as part of a future Zone 40 master plan update; the disputed EIR did not clearly state its relationship to the earlier Water Forum EIR, particularly whether the former tiered from or incorporated the latter; the timing of development did not match the timing of new water supplies; and discussion of potential future projects that might compete with those in the community plan at issue for long-term water supplies within Zone 40 was insufficient because it failed to demonstrate a rough balance between total water supply and demand.

**Conclusions.** The Court's decision in *Vineyard* applied the holdings of several earlier cases, described as "general principles" above, to EIRs for specific and community plans, adding to the level of certainty of water supplies required for these types of planning documents. The Court suggested in dicta that the water supply analysis

required in a specific or community plan EIR and a written verification completed at the time of final subdivision map approval are different, so that significant water supply uncertainties may remain in any early EIR even though they must be eliminated for a subsequent written verification. In addition, as noted by Justice Baxter in his dissent, the Court appeared to require EIRs for projects without dedicated supplies to demonstrate a long-term balancing of water supply and demand for the entire service area of the relevant water purveyor, including any potential future developments that fall within the scope of the area's general plan. In many areas, that could be a difficult requirement to satisfy. Water providers and developers should carefully consider the documentation of water supply in EIRs for planning documents and how they may be viewed if challenged.

Finally, the Court's critical analysis of the Water Forum and its EIR on which the EIR at issue in *Vineyard* relied demonstrates the risk that may be associated with water management plans that do not rely on traditional water right allocations. For more information about the case, contact: Wes Strickland at (805) 882-1490 or [WStrickland@hatchparent.com](mailto:WStrickland@hatchparent.com), or Liz Rothman at (310) 500-4616 or [LRothman@hatchparent.com](mailto:LRothman@hatchparent.com).