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## SUPREME COURT SETS ASIDE LAND USE PLAN EIR FOR FAILURE TO ADEQUATELY ASSESS LONG-TERM WATER SUPPLIES

### Decision Clarifies Principles Governing CEQA Review of Water Supplies For Real Estate Development

The California Supreme Court on February 1, 2007, issued a long-awaited decision concerning assessment of water supplies during California Environmental Quality Act ("CEQA") review of proposed land-use plans.

The Court's decision in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, Slip. Op. S132972 (February 1, 2007), addresses "what level of uncertainty regarding the availability of water supplies can be tolerated in an environmental impact report ["EIR"] for a land use plan." The two plans at issue in the case—a broad Community Plan and a narrower Specific Plan—contemplated 60,000 new residents living in more than 22,000 new housing units to be built on more than 6,000 acres of rural land in the Vineyard Area of eastern Sacramento County.

Focusing solely on water-related issues, the Court decided that the EIR prepared for the two land use plans is adequate in certain respects but inadequate in others, thus affirming and reversing the Court of Appeal and Superior Court decisions holding the EIR to be fully adequate. Slip. Op. at 2, 44.

### Principles Governing CEQA Review of Water Supply Adequacy

The Court reviewed existing case law arising from CEQA review of water supplies for development projects, distilling "certain principles of analytical adequacy under

CEQA" with which the Court agreed.

First, the Court held that "CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project." Slip. Op. at 16 (citing *Santiago County Water Dist. v. County of Orange*, 118 Cal.App.3d 818 (1981)).

Second, the Court held that "an adequate environmental impact analysis for a large project, to be built and occupied over a number of years, cannot be limited to the water supply for the first stage or the first few years." *Id.* (citing *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48 Cal.App.4th 182 (1996)). The Court explained that "proper tiering of environmental review allows an agency to defer analysis of certain details of later phases of long-term linked or complex projects until those phases are up for approval, CEQA's demand for meaningful information 'is not satisfied by simply stating information will be provided in the future.'" *Id.* (citing *Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, 106 Cal.App.4th 715 (2003)). The Court held that "an EIR evaluating a planned land use project must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project." Slip. Op. at 17.

Third, the Court held that "CEQA should not be understood to require assurances of

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certainty regarding long-term future water supplies at an early phase of planning for large land development projects.” Slip. Op. at 19. Thus, an EIR for a broad land-use plan is not required to demonstrate that all development contemplated by the plan “is definitely assured water through signed, enforceable agreements with a provider and already built or approved treatment and delivery facilities.” Slip. Op. at 18. The Court reasoned that “[r]equiring certainty when a long-term, large-scale development project is initially approved would likely be unworkable, as it would require water planning to far outpace land use planning.” *Id.*

Fourth, the Court held that “future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations (‘paper water’) are insufficient bases for decisionmaking under CEQA.” Slip. Op. at 17. A full discussion of likely future water sources “must include a reasoned analysis of circumstances affecting the likelihood of the water’s availability.” Slip. Op. at 18. And where that discussion leaves some uncertainty regarding actual availability of the anticipated future water sources, “CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies.” *Id.*

The Court assessed the utility during CEQA review of prescribing mitigation measures that prohibit issuance of building permits or otherwise prevent development under a land-use plan if anticipated future water supplies fail to materialize. The Court held that “where an EIR makes a sincere and reasoned attempt to analyze the water sources the project is likely to use, but acknowledges the remaining uncertainty, a measure for curtailing development if the intended sources fail to materialize may play a role in the impact analysis.” *Id.*

After reviewing CEQA case law and statutes (S.B. 610 and S.B. 221) specifying procedures to better coordinate land-use decisions with water supply planning, the Court held that this body of law supports the concept that “water supplies must be identified with more specificity at each step as land use planning and water supply planning move forward from general phases to more specific phases.” Slip. Op. at 20. Estimates and plans for future water supplies that pass muster under the Water Supply Assessment procedure established by S.B. 610, Water Code § 10910 *et seq.*, “must be replaced by firm assurances at the subdivision map approval stage” under the Water Sufficiency Verification procedure established by S.B. 221, Gov’t Code § 66473.7. *Id.*

**Court Applies Principles Governing CEQA Review of Water Supply Adequacy**

*EIR Adequately Reviewed Near-term Water Supplies.* The Court found adequate the EIR’s assessment of water supplies expected to be available in the near term to support development under the 2,600-acre SunRidge Specific Plan calling for development of 9,886 residential units and other development, all within the broader 6,000-acre Sunrise Douglas Community Plan. Slip. Op. at 3.

The EIR projected that build-out of the Specific Plan area would require some 8,539 acre-feet per year of water (“afy”) and that build-out of the remaining area within the Community Plan would require some 13,564 afy of water, resulting in a total long-term average water demand of some 22,103 afy.

The EIR projected that initial water supplies would come from development of a new County well field that would produce some 5,527 afy of water from a groundwater source considered adequate to produce at least 10,000 afy of water. Although that

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water was not limited exclusively for use within the Specific Plan area, the EIR explained that Specific Plan needs beyond those satisfied from the well field would later be met by surface water diverted from the American River. The Sacramento County Water Agency, which has a 15,000 afy water service contract with the federal Central Valley Project and is pursuing additional surface water supplies, would operate both the groundwater and surface water development facilities “conjunctively,” using more surface water in wetter years and more groundwater in dryer years. Slip. Op. at 4-5.

The EIR projected that supplying water to the planned development would cause groundwater levels near the aquifer to fall 10-15 feet, a potentially significant amount that would be mitigated by the County’s conjunctive use approach and potentially by deepening certain local wells or connecting their users to the County’s water distribution system. Because the Community Plan proponents lacked legal rights to future well field and surface water resources, and because the water distribution and treatment facilities were yet to be built, the EIR prescribed a mitigation measure prohibiting approval of subdivision maps, parcel maps, use permits, building permits and other ground-level entitlements, “unless agreements and financing for supplemental water supplies are in place.” Slip. Op. at 5-6.

The petitioners challenged the EIR’s analysis, arguing that the future water supply identified for the land-use plans was too uncertain and that competition for the water from other planned development would deprive the Specific Plan area of the water it needs. The Court rejected the theory, holding that “[w]hile much uncertainty remains, [ ] the record contains substantial evidence demonstrating a reasonable likelihood that a water source the provider plans to use for the Sunrise Douglas project . . . will indeed be available

at least in substantial part to supply the Sunrise Douglas project’s near-term needs.” Slip. Op. at 25-26. “Although the FEIR did not demonstrate a level of certainty regarding future supplies comparable to that required for subdivision approval under Government Code section 66473.7, CEQA does not demand such certainty at the relatively early planning stage involved here.” Slip. Op. at 26.

The Court acknowledged the possibility that significant new information could arise in the future, showing that sufficient water supplies will not be available. However, the Court noted that only relatively broad land-use plans had been approved, and that such new information and the further discretionary approvals required to start construction could trigger CEQA’s provisions governing performance of further environmental review. Slip Op. at 27 (citing Pub. Res. Code § 21166). To the extent final subdivision maps would be requested in the future, the Court noted that the S.B. 221 water sufficiency verification procedure also would operate as a check against construction of new development without adequate water supplies. *Id.*

***EIR Failed to Adequately Review Long-term Water Supplies.*** The Court found inadequate the EIR’s assessment of water supplies expected to be available in the long term to support build-out of the entire 6,000-acre Sunrise Douglas Community Plan. Slip. Op. 2, 40. “Factual inconsistencies and lack of clarity in the FEIR leave the reader—and the decision makers—without substantial evidence for concluding that sufficient water is, in fact, likely to be available for the Sunrise Douglas project at full build-out.” Slip. Op. at 28.

The Court focused upon the EIR’s failure to provide a “consistent and coherent description of the future demand for new water due to growth” projected to occur throughout the County Water Agency’s

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service area zone encompassing the Community Plan. *Id.* Further, the EIR failed to provide a consistent and coherent description “of the amount of new surface water that is potentially available to serve that growth.” *Id.* The Court held that the EIR is inadequate for failing to make clear how a future available water supply is expected to meet total demand over the longer term and, hence, why a sufficient amount of the identified water should reasonably be expected to be available for the Community Plan. Slip. Op. at 29.

The Court noted that the County Water Agency had been preparing an update to its master water supply plan for the area encompassing the Community Plan at the time the Community Plan EIR was being prepared. The Court held that the Community Plan EIR “could” have waited for completion of the master water supply plan EIR, so that it could tier or incorporate from that EIR. Slip. Op. at 30. Alternatively, the Court held that “[i]f the environmental impact analysis the Water Agency expects to perform on its [ ] master plan update is important to understanding the long-term water supply for the Sunrise Douglas project, it should be performed in the Sunrise Douglas project FEIR even though that might result in subsequent duplication by the master plan update.” *Id.*

Elaborating, the Court held that the Community Plan EIR’s burden “was not necessary to demonstrate with certainty that the County’s total water supply in the year 2030 would be sufficient to meet its total demand . . . .” Slip. Op. at 31. However, “some discussion of total supply and demand is necessary to evaluate ‘the long-term cumulative impact of development on water supply,’” so that the EIR would show “a *likelihood* water would be available, over the long term, for this project.” Slip. Op. at 31-32 (emphasis in original). Absent “an explanation that shows at least an approximate long-term sufficiency in total supply,

the public and decision makers could have no confidence that the identified sources were actually likely to fully serve this extraordinarily large development project.” Slip. Op. at 32. The Court concluded:

An EIR that neglects to explain the likely sources of water and analyze their impacts, but leaves long-term water supply considerations to later stages of the project, does not serve the purpose of sounding an [ ] “environmental alarm bell” [ ] before the project has taken on overwhelming “bureaucratic and financial momentum.”

*Id.* (internal quotation and citation omitted).

Although the EIR included substantial evidence that competing users would not deprive the Community Plan of most of its planned groundwater from the well field, the EIR contained “no evidence, other than the gross demand figures (which are, as noted, inconsistent) regarding the uses that might be expected to compete with Sunrise Douglas for the planned new surface water over the next 20 or more years.” *Id.* Accordingly, the EIR “could not demonstrate a likelihood of adequate long-term supply for Sunrise Douglas without showing that plans for the [County master plan service area] call for at least a rough balance between water supply and demand . . . .” Slip. Op. at 38.

**Public Comments On Potential Fish Impacts From Groundwater Pumping Required Draft EIR Recirculation**

The Court found the Draft EIR contained no discussion of the impact that planned groundwater pumping would have on Cosumnes River streamflows providing habitat for steelhead and salmon protected under the federal Endangered Species Act. Slip. Op. at 41. Comments on the Draft EIR submitted by the U.S. Fish and Wildlife

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Service, the National Marine Fisheries Service, the Nature Conservancy and others alleged that groundwater pumping to support Community Plan development would reduce Cosumnes River flows, causing larger and longer-lasting dry river reaches that would impair spawning required to perpetuate the species. Slip. Op. at 7-8.

The Court found that the Final EIR's response to these comments conceded that the river might remain dryer longer in the year and over a longer reach of the river—including when and where salmon would be migrating. Slip. Op. at 43. Citing section

15065(a) of the CEQA Guidelines, the Court held that "given the sensitivity and listed status of the resident salmon species, the County's failure to address loss of Cosumnes River stream flows in the Draft EIR [] deprived the public . . . of meaningful participation.[]" *Id.* (internal quotations omitted).

The Court held that, under CEQA Guidelines section 15088.5(c), the burden of revising and recirculating the Draft EIR to address the fishery impact issue "is limited by the narrowness of the issue . . ." Slip. Op. at 44.

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