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Real Estate Alert

Who is affected?

- **CEQA Lead Agencies**, including cities and counties;
- **Water Suppliers and Wholesalers**; and
- **Project Applicants**, including residential, commercial, retail, hotel, office and industrial developers if you are proposing to build a qualified development project in California.

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California Appellate Court removes intermediate hurdle to project approval with recent water supply ruling

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On April 16, 2008, Division Seven of the Second Appellate District issued its opinion in *California Water Impact Network (C-WIN) v. Newhall County Water District*, and rejected a direct challenge to the adequacy of a water supply assessment (WSA) as premature. WSAs, which are prepared by water suppliers in California, analyze available water supplies for a proposed project.

A WSA is a technical, informational, advisory opinion only

Before the *C-WIN v. Newhall County Water District* decision was handed down, no one knew whether a WSA was a commitment to provide water to a project or just an informational document. It was also unclear how and when a WSA could be challenged. WSAs are required for development projects that meet the criteria set forth in the Water Code, such as residential projects over 500 units; certain shopping centers, business establishments and commercial office building; hotels and motels with more than 500 rooms; various industrial, manufacturing or processing plants or industrial parks; and some mixed-use projects.

If a project's approval is subject to the California Environmental Quality Act (CEQA), the lead agency must ask the public water supplier to prepare a WSA to determine whether there is a 20-year water supply *available* for the proposed project. Water suppliers have been preparing WSAs since the WSA law was codified in 1995, but until the Court ruled last week, the finality of a WSA was up in the air.

Now, water suppliers and project proponents know that the WSA is just part of the CEQA process, not an end in itself. Because the C-WIN Court decided that a WSA is a merely a **technical, informational, advisory opinion of the water supplier**, a project opponent cannot file a lawsuit against a water supplier simply for preparing one at the request of a lead agency.

According to the Appellate Court, a WSA is another piece of supporting evidence for an environmental impact report (EIR), like a traffic study or a geotechnical report; it is not a commitment by the public water supplier to provide water to the project. It is up to the

lead agency to evaluate the adequacy of the WSA and make the ultimate decision on the sufficiency of water supplies. Only after the lead agency determines there is enough water available and approves the project can opponents challenge the entire project, including the WSA, under CEQA.

What the case means to development in California

In effect, the C-WIN opinion removed the threat of additional litigation that had been hanging over lead agencies, project proponents and water suppliers. Had the Court allowed C-WIN to challenge the issuance of a WSA, development projects could be halted in mid-stream, before CEQA review is completed and well before a project is approved. Requiring all challenges to wait until the end will conserve everyone's time and money, since it makes no sense to fight over a technical opinion that water is available to serve a project, when the project may or may not be approved in the long run.

About the case

In this case, C-WIN objected to the second WSA prepared by the Newhall County Water District for the GateKing project, a 584-acre industrial/business park in Santa Clarita. The project, which was being reviewed by the City of Santa Clarita (City), had been the subject of an earlier CEQA challenge. *See*, *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219.

During the initial CEQA challenge, the project's EIR was held invalid on water supply issues. After remand, the City asked the Water District for a second WSA. Before the second WSA was adopted, and before the City could incorporate the WSA into the revised EIR, C-WIN challenged issuance of the WSA in court.

On appeal, the Court found that C-WIN's petition was premature. After a review of the Water Code sections that govern WSAs, the Court determined that a WSA is not final for purposes of judicial review when it is issued by a water supplier. As created by the Legislature, *the WSA is a technical, informational, advisory opinion of the water supplier only*. It does not impose any duty on a water supplier to provide water to a project.

The final determination on whether adequate water exists for a proposed project lies with the CEQA lead agency. Lead agencies evaluate the information included in a WSA, but they are not required to accept the WSA's conclusions. Because the ultimate decision, based on the whole record – including the WSA – whether water supplies are sufficient for a project lies with the lead agency, not the water supplier, a WSA cannot be independently litigated. Opponents must wait until after an EIR is approved before challenging a project, including the WSA, as a violation of CEQA.

To view the complete case filing, please visit the link below:

California Water Impact Network v. Newhall County Water District

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