THE RECORDER

129TH YEAR NO. 157 www.callaw.com MONDAY, AUGUST 15, 2005 ALM

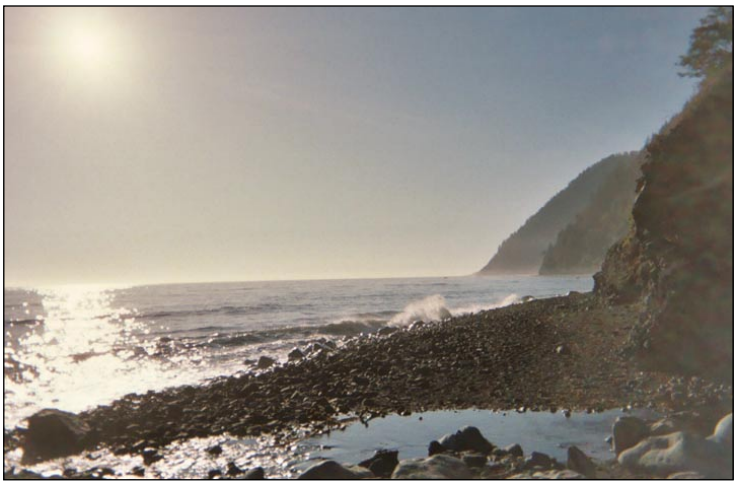
REAL ESTATE

WHERE'S the WATER

LAND-USE PROJECTS ARE NOW INEXTRICABLY LINKED TO WATER RESOURCES

BY DAVID L. OSIAS

In the great western migration that occurred in the United States during the latter years of the 19th century, settlers were confronted with vast expanses of dry land that made up much of the frontier. According to the Oxford History of the American West, "Real estate agents, officers of land-grant railroads, state officials and immigration agents assured the farmers who moved into the plains country during the 1870s and 1880s that 'rain followed the plow.'"



This promising notion was fueled by the hopeful, albeit naive, belief that the planting of crops and trees would cause an increase in rainfall. However, after recurrent droughts and failed attempts to develop "dry" farming — agriculture that was reliant on natural precipitation — many in the West were heard to mutter that "dry farming works best in wet years."

One hundred years later, the rapid urbanization of the West involved similarly hopeful, and still naive, beliefs about the availability of water for real estate developments built to accommodate explosive population growth. Water projects that were officially proposed or "planned for" were relied upon by developers and cities and counties involved in the land-use approval process under the hope that "water followed the construction." Water suppliers, for their part, were notoriously uninvolved, proclaiming that their limited mission of supplying reliable long-term water supplies was not part of the land-use approval process. Again, recurrent drought, shortages and either the failure or "indefinite" postponement of the construction or addition of large-scale water projects resulted in a new reality.

Eventually, it fell to courts to bluntly point out the obvious: "An environmental impact report for a housing development must contain a thorough analysis that reasonably informs the reader of the amount of water available. This dream of water entitlements from the incomplete State Water Project (SWP) is no substitute for the reality of

David L. Osias, a partner in the San Diego office of Allen Matkins Leck Gamble & Mallory, specializes in matters involving water resources. He and other lawyers at the firm represent Chadmar Development Inc. in a pending development project referred to in this article.

actual water the SWP can deliver ... . The entitlements represent nothing more than the hopes, expectations, water futures or, as the parties refer to them, 'paper water' ... . Consequently, there is a huge gap between what is promised, and what can be delivered." *Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, 106 Cal.App.4th 715 (2003).

California now has embarked on a path that weds the land-use project approval process with a water-supply source and reliability process and makes both interdependent on each other. Known by their original bill numbers — SB 610 and SB 221 — these California laws, which went into effect on Jan. 1, 2002, require the integration of land use and water planning. Urban Water Management Plans (UWMPs) must be prepared and updated every five years by water suppliers with 3,000 or more service connections. These plans must describe the past, present and future demand for water; how that demand will be satisfied, including consideration of groundwater sources and impacts; the reliability of supplies; steps to be taken in the event of a shortage; and conservation efforts and recycling opportunities.

Water Supply Assessments (WSAs) from the proposed suppliers of water for proposed new real estate projects are required for all projects that are subject to the California Environmental Quality Act and that involve 500 or more units or at least 250,000 square feet of office space. A tentative map for such a project must include a condition that a "sufficient water supply" will be available to serve the project. Approval of a final map is prohibited without evidence that this condition has been satisfied.

If the projected water demand from the proposed new project was accounted for in the most recently-adopted UWMP, the WSA may incorporate the required information. If the projected new demand was not accounted for, the WSA must project total water supplies available. In either event, projected total water supplies must cover a 20-year horizon, in five-year increments, and describe whether such supplies are adequate in normal water years, single dry years and multiple dry years. Supplies from all projected sources require documentary support, including copies of water rights, contracts, capital outlay programs, federal, state and local permits for water and conveyance infrastructure, and other regulatory approvals.

Nowhere is this new integration process more acutely observed or felt than on the Monterey Peninsula with respect to the attempt to "redevelop" the former Fort Ord army base. Water supply is a critical and limiting factor for new development. A portion of the Army's former supply has been allocated to different cities for use in their respective jurisdictions on the former base. That allocation itself took years to negotiate.

But that process was just the beginning. The city of Marina was allocated 1,175 acre-feet per year, plus the right to temporarily borrow an additional 150 acre-feet per year. In reviewing proposed new development projects, the city of Marina has received Water Supply Assessments from the Marina Coast Water District that project a long-term supply shortfall as compared to the proposed new developments on the books. Thus, every project is scrutinized in detail. Estimates are developed for interior domestic use that can vary by type of water using appliances projected or required to be installed. Water savings from tankless water heaters are predicted. Strict design requirements for exterior landscaping and reclaimed water-use areas are mandated.

As one would expect in cases like this where such a fine magnifying glass is focused on projected water use, expert opinions vary. Projections of water use by projects that involve more than 1,000 new residential units varied by as little as 50 to 100 acre-feet per year. Such variations, however, can be the difference between a project's approval or denial. Or they can lead to a reduction in the maximum number of allowed units that could affect the project's economic viability. Numerous hearings have been held by the city of Marina to sort through these relatively small but critically important differences in opinion about projected use.

As noted by Chuck Lande, president of Chadmar Development Inc., the first developer to have a project approved at the Fort Ord site, "Clearly water is a scarce resource in California, and the government agencies are 100 percent correct in making sure that there is an adequate water supply for each development project. It behooves developers to figure out every possible way to conserve water and encourage the end users, whether homeowners or other types of users, to conserve as much water as possible as well."

Over the long term, water supply augmentation for the former Fort Ord base is required. Desalination, reclamation, groundwater conjunctive use and storage are all being explored as options. A final environmental impact report for the augmentation project was certified earlier this year by the Marina Coast Water District. The district is contemplating a new 2,400 acre-feet per year supply from a new desalination plant and a recycled water project with seasonal surface storage.

All agree that augmentation of some kind will occur. However, the debate is now underway on how far along planning efforts, financing arrangements and approval permits must be before the new augmented supplies are deemed reliable enough to support the approval of a land-use project.

The pendulum has indeed swung. The situation today is a far cry from the assumptions of just a decade or so ago that "if you build it, the water will arrive."■

Allen Matkins