



SB 221 and SB 610: Still Not The Last Word

By Steven W. Weston and Paeter E. Garcia

As many in the legal and development community already know, on October 9, 2001, Governor Gray Davis signed Senate Bill 221 (Kuehl) and Senate Bill 610 (Costa) into law. Effective January 1, 2002, SB 221 prohibits a city or county from approving development agreements, parcel maps or tentative tract maps for any subdivision with more than 500 dwelling units unless a sufficient water supply is, or will be, available for the subdivision prior to its completion. SB 610 requires cities and counties to consider water supply assessments when considering approval of certain development projects to determine whether projected water supplies can meet the project's anticipated water demand. Together, these new laws are the tightest banding between land development and water supply availability that our state and, for that matter, the nation has ever seen.

The passage of SB 221 and SB 610 has created mixed responses and posed many questions among developers, cities and counties, water suppliers, and members of the public. For example: Do SB 221 and SB 610 merely duplicate SB 901 (Stats.1995; Water Code section 10910 et seq.)? Do they impose any requirements beyond those already in place under CEQA? Who will absorb the cost of compliance with SB 221 and SB 610? Will the new laws encourage residential piecemealing (i.e., 499 unit projects)? Rumors abound about whether various large-scale housing developments may be impacted and what lawsuits will be brought. Much writing has already focused on SB 221 and SB 610 - mostly concerning technical details. This article also explains certain technical provisions of the new laws yet, moreover, addresses the practical implications that SB 221 and SB 610 may have on land use planning, water providers, industry, and the California homebuyer.

Events Leading Up To SB 221 and SB 610 A Brief Review

This latest effort by the California Legislature to harmonize land development and available water supplies arrives on the steps of its own history. As noted in a recent article by Clark Morrison, Esq. and Daniel Doporto, Esq., the principal issues addressed in SB 221 and SB 610 were battled nearly ten years ago when a Northern California water district challenged a board of supervisors approval of an EIR for an 11,000 unit Master Plan Community. The water district challenged the county approval on grounds that insufficient water supplies existed to serve the development's projected water demand. In turn, the developer sued the

water district. Although the lawsuits were settled, the issues presented a platform sufficient to withstand the next ten years of debate in the State Capitol.

In 1995, the Legislature enacted Water Code section 10910 et seq. (SB 901) which required cities and counties, in connection with CEQA review for certain development projects, to request the applicable public water system to assess whether the system's projected water supplies were sufficient to meet the project's anticipated water demand. Reportedly, however, SB 901's requirements have been largely ignored. Clearly, SB 221 and SB 610 are modeled after SB 901 and, indeed, SB 610 amends Water Code section 10910 et seq. to assure that its requirements are no longer disregarded.

Previous measures similar to SB 221 and SB 610 failed in the Legislature under strong opposition by building and industry groups. However, such opposition faded in this instance as the bill underwent significant committee amendments, including: (1) removing a provision that defined subdivisions as having only 200 units; and (2) adding a provision that resolved potential conflict between SB 221 and the obligation of cities and counties to satisfy low-income housing needs. Furthermore, as proffered in a September 2001 letter from Senator Kuehl's office, the author and stakeholders of SB 221 agree that further legislation linking land use and water supplies will not be pursued for at least five years.

SB 221 The General Overview

SB 221 requires the legislative body of a city, county, or local agency to include as a condition in any tentative map that includes a subdivision a requirement that a sufficient water supply shall be available to serve the subdivision. The availability of a sufficient water supply is based on written verification from a water supplier with more than 3,000 service connections (prior to or as a result of serving a subdivision) which may provide water to the proposed project.

SB 221 defines "subdivision" as a proposed residential development of more than 500 dwelling units (a standard consonant with SB 901) or one that would increase, by at least ten percent, the number of service connections of a public water system having less than 5,000 connections. "Sufficient water supply" is the total water supplies available during normal, single-dry, and multiple-dry years within a 20-year projection that will meet the projected demand of a proposed subdivision. Moreover, and apparently as an

attempt to arrest reliance on “paper water” entitlements from the State Water Project, SB 221 further requires any verification of “projected” water supplies to be based on entitlement contracts, capital outlay programs, and regulatory permits and approvals regarding the right to and capability of delivering the projected supply. Taken together, these requirements appear to have transformed the once simple “will serve” letter into a pre-formulated administrative record.

SB 221 hinges on proof of a sufficient water supply, and the new law places the initial burden of establishing that proof on the public water system. Within five days after a development application is complete, the local agency must request from the water supplier a written verification for water availability. It appears that an affirmative duty is then imposed on the water supplier, since SB 221 subjects public water systems to a judicial writ proceeding for failure to provide the verification within 90 days of the initial request. Each verification must be based on several forms of substantial evidence, including, but not limited to: (a) the reasonably foreseeable impacts of the proposed subdivision on water availability for agricultural and industrial uses within the supplier’s service area; and (b) an evaluation of the legal rights of the water supplier and the overlying landowners to any groundwater that will be used to supply the project. Although these requirements may technically shift environmental review responsibility from the lead agency and project proponent to the water supplier, the fiscal component of these tasks will likely be shifted directly back to the developer.

In the event that a water supplier either fails to provide the requested verification or verifies that it is unable to provide a sufficient water supply for a proposed subdivision, the approving agency may still make a finding that additional water supplies not accounted for by the water provider are, or will be, available prior to the project’s completion. This provision of SB 221 allows cities and counties to retain approval authority over land use decisions in their jurisdictions. That is, the local agency can approve a tentative map or development agreement, notwithstanding conclusions made by a water provider concerning the availability and reliability of water supplies. This apparent veto power, however, is not unfettered. Any such overriding decision must be made on the record and supported by substantial evidence, which may be problematic without the water provider’s contribution. Finally, although a reviewing court may reject an attempt to distinguish standards of substantial evidence, SB 221 does not expressly require the city or county to consider the same factors of substantial evidence that must be included in the water supplier’s verification.

Pursuant to one of the last amendments made to SB 221, certain residential projects are excepted from its reach, including: (a) those within an urbanized area previously developed for urban uses; (b) those surrounded by immediately contiguous properties that are or have been developed for urban uses; and (c) those developed exclusively for very low and low-income housing.

SB 610

The General Overview

SB 610 requires additional factors to be considered in the preparation of urban water management plans and water supply assessments. Additionally, for any development project defined in Water Code section 10912 that is subject to CEQA, SB 610 requires a city or county to consider a water supply assessment prepared for that development to determine whether projected water supplies available to the proposed project are sufficient to meet the project’s anticipated demand. Notably, the only amendment to the CEQA

statute provides: “Whenever a city or county determines that a project, as defined in Section 10912 of the Water Code, is subject to this division, it shall comply with [Water Code section 10910].” This requirement does not appear to require any change in how CEQA applies to development projects.

SB 610 requires additional information to be included in urban water management plans. All urban water suppliers are required to prepare, adopt, and update an urban water management plan which, essentially, forecasts water demands and supplies within a certain service territory. (Water Code § 10631, as amended.) In particular, the new law provides that if groundwater is identified as an existing or planned source of water available to the supplier, all of the following must be considered: (a) a copy of any groundwater management plan adopted by the urban water supplier; (b) a description of any groundwater basin(s) from which the supplier extracts groundwater and, for those basins that have been adjudicated, a copy of the court order which details the supplier’s legal water right under the order – for those basins that are not adjudicated, the plan must describe whether the basin has been identified by the state as overdrafted or one that will become overdrafted; (c) a detailed analysis of groundwater pumped by the supplier over the preceding five years; and (d) a detailed analysis of the location, amount, and sufficiency of groundwater that will be produced by the water supplier. Furthermore, urban water management plans must now include a description of all water supply projects and programs that may be undertaken by the supplier to meet its total projected water use.

With regard to water supply assessments, SB 610 requires a city or county to evaluate whether total projected water supplies will meet the projected water demand for certain development projects that are otherwise subject to CEQA review. Existing law identifies those projects as: (a) a residential development of more than 500 dwelling units; (b) a shopping center or business employing more than 1,000 persons or having more than 500,000 square feet of floor space; (c) a commercial office building employing more than 1,000 persons or having more than 250,000 square feet; (d) a hotel or motel with more than 500 rooms; (e) an industrial or manufacturing establishment housing more than 1,000 persons or having more than 650,000 square feet or 40 acres; (f) a mixed use project containing any of the foregoing; or (g) any other project that would have a water demand at least equal to a 500 dwelling unit project.

For any of the foregoing projects, a city or county is required to consider information contained in a water supply assessment as part of the CEQA review process to determine whether projected water supplies are adequate to meet the project’s anticipated demand. If a water supplier cannot be identified to serve the project, the city or county must prepare the assessment in consultation with any agency providing water service in or adjacent to the project area and the local agency formation commission. If the water demand for the proposed development has been accounted for in a recently adopted urban water management plan, the water supplier may incorporate information contained in that plan to satisfy certain requirements of a water supply assessment. SB 610 adds many factors that must be considered in a water supply assessment, including the same types of information required for urban water management plans under SB 610 (Water Code § 10631, as amended) and water supply verifications under SB 221 (Water Code § 10910, as amended). If a sufficient water supply assessment has already been prepared for the proposed development, and no significant changes in water demand, availability or information have occurred with respect to the proposed project, then no additional assessment is required under SB 610.

As with SB 221, a water supplier is subject to a writ of man-

damus for failing to provide a water supply assessment to a city or county within 90 days of the initial request. Unlike SB 221, however, SB 610 allows a water supplier to request a maximum 30 day extension of time to prepare and adopt an assessment.

More Than Single-Family Homes Are At Stake

More than single-family residential housing projects are subject to the effects of SB 221 and SB 610. In all likelihood, efforts to enforce the provisions of one law will be supported by reference to the other, particularly from an anti-development position. Hence, local governments, water suppliers and industry may be ill-advised to narrowly interpret the scope of these new laws.

As set forth above, SB 221 applies to governmental actions taken on any development agreement or tentative map that includes a subdivision. "Subdivision" includes a proposed residential development of more than 500 dwelling units or one that would increase the number of service connections. This definition encompasses multifamily housing projects in two ways. First, the term "dwelling unit" makes no distinction between single-family and multifamily residential developments. Second, the determination of whether the project is a "subdivision" may depend simply on the number of service connections that will be added to the water supplier's system which, again, makes no distinction between single-family and multifamily projects.

Retail, commercial, industrial, and mixed-use projects find no harbor under the new law. SB 610 requires CEQA review for any of these development projects to include an analysis of whether the projected water supplies will meet the project's anticipated water demand. Notably, SB 610 illustrates that these laws do not focus on the type of urban development proposed (i.e., residential versus commercial or mixed use). Rather, they focus on the development's potential to consume water (i.e., a 500 room hotel or a business establishment employing more than 1,000 persons). In sum, it appears that the Legislature intended for SB 221 and SB 610, combined, to require demonstration of a sufficient water supply for all projects whose consumptive use is at least equivalent to the 500-unit threshold.

Lawsuits: Who, When and Why

In light of the different requirements and varying applicability of SB 221 and SB 610, the unfortunate truth is that the new laws may invite a host of legal challenges. Without elaborating on procedural details, the following actions could be lurking: Under SB 610, either the public water system or the city or county may be held legally accountable for the sufficiency of a water supply assessment prepared and adopted under Water Code section 10910. Also, as SB 610 requires specific additional analyses to be incorporated into urban water management plans, water suppliers will be accountable for the content, adoption, and update of those plans. Moreover, water suppliers are subject to a writ of mandamus for failing to provide a water supply assessment to a city or county within 90 days of the request (120 days with an extension).

Separately, SB 221 holds water suppliers legally accountable for the sufficiency and timing of verifications regarding sufficient water supplies. So too, where a city or county approves a subdivision and makes a determination regarding water supply sufficiency (i.e., in support of, in the absence of, or notwithstanding verification by the water provider), that decision is subject to legal challenge. Although the practical implications of being sued for adopting an allegedly inadequate water supply verification are yet untold, the mere process of being named in a lawsuit and drawn into court proceedings may have undesirable fiscal and political

consequences. Finally, as with SB 610, water suppliers are subject to a writ of mandamus for failing to provide a water supply verification to a city or county within 90 days of the request.

Warming Up To Increased Housing Prices Under SB 221 and SB 610 Can California's Economy Take The Heat?

It may be premature to declare who bears the cost of compliance with SB 221 and SB 610, or how our state economy will respond in the intermediate and long-terms. Predictions on this issue, however, look grim for the average California homebuyer. On the one hand, in spite of the obstacles posed by the new laws, California might be encouraged by the fact that improvements to its aging water supply infrastructure may be financed in part through private investors seeking to develop and deliver sufficient water supplies for their projects. On the other hand, it seems likely that the additional costs incurred by developers to supply project water will simply be factored into consumer housing prices. The Building Industry of America has already published figures concerning anticipated per unit marginal costs associated with SB 221/610 compliance, and the numbers indicate that new home prices could substantially escalate in response to the new laws.

How these trickle-down costs will impact the single-family and multifamily housing industries may be viewed in at least two separate lights. To the extent that the market economy can bear such increased developer costs (i.e., infrastructure, resource, legal, environmental, and contingency costs) being passed through as higher housing prices, developers may construct a greater proportion of more expensive, single-family residences in order to maximize per unit profits – a correlation that may significantly increase the price and decrease the availability of multifamily housing. Conversely, to the extent that a greater proportion of Californians can only afford to purchase within multifamily projects, developers may construct an increased proportion of multifamily dwellings in order to maximize profits on the basis of volume – a correlation that may improve the affordability and availability of multifamily housing, yet render a painful blow to the single-family residential industry. Whatever the result, it seems clear that the type and price of housing constructed in response to SB 221 and SB 610 may not align with California's need to accommodate its growing population. In passing these two laws, the state has shrugged its shoulders at the housing crisis, yet essentially guaranteed an increase in housing prices across the board. Touted as a big-picture approach, this fix falls far short.

Finally, SB 221 and SB 610 will likely impact the housing industry on a local planning level. As efforts emerge to develop areas that are linked to available water supplies, or to construct 499 unit projects, local governments will face increasing pressure to address urban sprawl and to scrutinize how single-family, multifamily, and mixed-use housing projects fit into their general plans. To the extent that local governments postpone broader planning issues, however, SB 221 and SB 610 will likely be applied on an inconsistent project-by-project basis, which will increase litigation and further frustrate the state's ability to provide adequate and affordable housing.

A Look Ahead

Recent census data indicate that California's population has grown to approximately 34 million. Some counties of the state, such as Riverside and San Bernardino, are expected to double their populations within the next 25 years. So, can restricting particular development projects stop growth? The answer to this question has nothing to do with a chicken or an egg – development is an

incidental and necessary response to growth. In spite and in light of SB 221 and SB 610, land development will continue. The state has to house its citizenry.

As the water supply paradigm shifts and we adjust to SB 221 and SB 610, several near-term goals should be embraced by local government, water suppliers, and developers: First, immediate steps should be taken to comply with the new laws, regardless of whether project approval is pending. SB 221 and SB 610 expressly itemize the factors and evidence needed for urban water management plans, water supply assessments, and water supply verifications. If an agency is unprepared to satisfy the statutory elements of the new laws, it should not even answer the knock at the door.

Second, now is the time to get serious about water conservation, recycling, and conjunctive use. These are no longer progressive ideas – they are required water supply management tools and they are required to address our state’s housing crisis. Section 1 to SB 610 provides: “There are a variety of measures for developing new water supplies including water reclamation, water conservation, conjunctive use, water transfers, seawater desalination, and surface water and groundwater storage.” Many people are already discussing the state’s next water bond, and private developers may need to define their future role in capital water projects.

Third, a new dialogue is required among local governments, water providers, developers, the public, and the State Legislature. In the end, these new laws pose additional burdens on all of us – and most particularly, average home-buying citizens. No matter how well intended, SB 221 and SB 610 only complicate the state’s housing dilemma. In lieu of educating local governments and neighboring states on managed growth (or formulating California’s role in national population growth), and instead of creating incentives to address the state’s growing population and accompanying housing crisis, the Legislature has shackled the very development projects that are beginning to satisfy California’s housing demand.

As a result of SB 221 and SB 610, housing prices will increase and the type and supply of housing may be significantly impacted. In light of these effects, we can only hope that the new laws do not create a backlash on the state economy. Clearly, California has a limited water supply. However, the new laws fail to strike a meaningful or sustainable balance with the undeniably larger issue of California’s need to house its population. SB 221 and SB 610 illustrate that we still need to formulate a solution that truly harmonizes population growth, necessary development, and available water supplies.



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