Local Water Supply Policies as a Growth Control

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Slow-growth advocates often use voter initiatives and legislative efforts in their ongoing fight to curb urban expansion. A new tactic in this fight has recently emerged – the use (some would say, imposition) of local and regional water supply policies as a method of controlling growth. This article briefly discusses the use of local and regional water policy as a growth control, and the conflict between these policies and the State Engineer's historic authority over water rights and their use.

In general terms, it is not possible for growth to outpace a region's water supply. Pragmatically, a house cannot be sold unless there is adequate water to service it. There are also legal protections in place to ensure concurrency of water supply and growth – namely, that necessary building and planning approvals such as final subdivision maps cannot be granted until the developer has shown sufficient water rights.[1]

Oversimplifying matters, a developer must dedicate sufficient water rights to the local water purveyor in exchange for that water purveyor's promise to serve the development.[2] Without the water purveyor's promise to provide service (the "will serve" letter) the developer cannot move forward. In Northern Nevada, a developer typically satisfies this requirement by obtaining sufficient water rights (as determined by the State Engineer) to service its proposed development, and transferring those rights to the water purveyor in exchange for water banking credits that can later be used to obtain will serve letters.[3] If the State Enginneer has granted sufficient water rights to the developer, the development is generally free to move forward.

In Northern Nevada, this framework was recently changed by a voter initiative (Washoe County Ballot Question 3 (2008) "WC-3"). WC-3, which was backed primarily by the Progressive Leadership Alliance of Nevada ("PLAN")[4], sought to insert a "sustainable water" requirement into local and regional land use planning. As presented to the electorate, WC-3 read as follows:

> Shall The Truckee Meadows Regional Plan[5] [hereinafter "Regional Plan"] be amended to reflect and to include a policy or policies requiring that local government land use plans be based upon and in balance with identified and sustainable water resources available in Washoe County?

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[1] *See, e.g.,* "Water and Growth: Questions and Answers", Truckee Meadows Regional Planning Agency (2009).

[2] *See,* "Frequently Asked Questions About Sustainable Water Resources and Growth in the Truckee Meadows", Truckee Meadows Water Authority (June 1, 2008).

[3] *See, e.g.,* "Water Topics in Our Community: Water Rights", Truckee Meadows Water Authority (Jan. 1, 2008).

[4] Kellene Stockwell, "Closer Look at Washoe County Ballot Question 3", KTVN-2 News (October 28, 2008).

[5] The Truckee Meadows Regional Plan is the umbrella planning document governing land use issues in Reno, Sparks, and Washoe County. Local Master Plans must conform with the Regional Plan. NRS 278.0282.

Essentially, WC-3 requires that the Regional Plan identify "sustainable" water resources within Washoe County, and to create policies that would only allow growth to these sustainable limits, *regardless of the water rights that the State Engineer may have permitted in the area*.

WC-3 passed with 73% of the vote. Given the skillful drafting of the ballot question, it is not difficult to see why. Who would vote against requiring local land use plans to be "in balance with … sustainable water resources"? It just seems like a good idea. The issue, as discussed more fully below, is that terms such as "in balance with" and "sustainable" were not defined in WC-3 (or AB 119) and will, therefore, be largely subject to the interpretation of regional planners as WC-3's mandated amendments are adopted into the Regional Plan. Whether, and to what extent, WC-3's requirements cause conflict with the State Engineer is not yet known, but the potential for such conflicts is apparent.

A legislative attempt to codify the material provisions of WC-3 was passed by both houses, but was ultimately vetoed by Governor Gibbons. Assembly Bill 119 ("AB 119"), as enrolled, would have required the Regional Plan to "[s]et forth the total population of the region that may be supported by the *sustainable water resources* identified in the [Western Regional Water Commission Comprehensive Plan]."[6] In other words, the regional water planning commission would have been required to set a population cap based on *its* estimate of the "identified and sustainable" water resources of the region, rather than the water rights permitted by the State Engineer. Because the Western Water Regional Commission has not yet adopted its formal Comprehensive Plan, it is impossible to estimate what these projections would have been based on.[7] This estimate would have then be used to create the "pattern of development" for the region.[8] AB 119 would have further required that each local master plan be consistent with the "pattern of development" adopted in the Regional Plan.[9]

The primary opposition to AB 119 came from the building and development communities. This opposition was predicated upon three main points – namely, that the bill was unnecessary because the law already required sufficient water rights as a predicate to construction (e.g., that a final map could not be approved unless sufficient water had been shown); that undefined terms such as "sustainable water resources" and "development pattern" were ambiguous and could be interpreted in multiple ways; and that a requirement to prove sufficient water resources when a master plan, zoning change, or special use permit was requested (rather than at final map application) would effectively kill major developments in Northern Nevada.[10] Regarding the third point, the primary concern of the development

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[6] Assembly Bill 119, § 2(1), FIRST REPRINT (April 20, 2009).

[7] The Water Planning Commission is not required to adopt the initial comprehensive plan until January 1, 2011. See, Western Water Regional Commission Act, § 41(1) (adopted June 14, 2007). The foundation of the initial comprehensive plan is provided in the Western Regional Water Commission's January 9, 2009 "Amendment to the Comprehensive Regional Water Management Plan."

[8] Id. at § 2(4)(c).

[9] Id. at § 2(4)(f).

[10] See, Testimony of Gregory Peek (Builders Association of Northern Nevada) ("I can give you a real-life example of why this does not work. I just obtained a special use permit for 420 units of apartments. I would not have been able to do that if I had to bring 420 units of water up front for that special use permit. That water is definitely available, but we will buy it in phases. We will build 100 units, and buy another 100 units worth of water. We will

community was that AB 119 would require water to be obtained when the development itself was not guaranteed to move forward.[11] An additional area of concern was that, because AB 119 limited growth to water resources identified by the Regional Plan, that water importation projects would not be considered as increasing the supply of sustainable water for entitlement purposes.[12] Put more succinctly, the development community opposed AB 119 because it would likely curtail growth by mandating that sufficient water supplies be proved much earlier in the development process and because the bill did not appear to contemplate water importation as a potential resolution to supply problems.

AB 119 was also initially opposed by the State Engineer. During the initial hearing on AB 119, Jason King, the Deputy State Engineer opposed the bill on the basis that it would "[r]esult in an incorrect interpretation that Washoe County [rather than the State Engineer] is … responsible for establishing the sustainable yield of water resources in the county".[13] Mr. King's example of the how local water controls would interfere with the State Engineer's powers pursuant to NRS 533 was that "[the State Engineer] could be approving subdivisions … only to potentially have Washoe County deny the approvals based on their differing estimates of sustainable yield."[14] The State Engineer ultimately dropped its opposition to AB 119 after the bill was clarified to state that the State Engineer's authority was not abrogated by AB 119; however, the basic policy conflict between state-level permitting and local estimates would have still posed an issue had AB 119 not been vetoed.[15]

As it stands, WC-3 is effective, but has not yet been adopted as part of the Regional Plan. Until WC-3 is ultimately adopted as part of the Regional Plan, it is impossible to know what type of effect this ballot initiative will have on development projects. Further, until WC-3 has been effective for a few years, it is unknown what type of conflicts will arise from the intrusion of regional planning into the historic purview of the State Engineer. What is certain is that WC-3 will likely not be the last attempt to enhance local jurisdiction over resource issues, and that this interplay will likely result in numerous and significant conflicts in the coming years.

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then build another 100 after that, and another after that, as they are absorbed. But to be required to bring $2 million worth of water up front, that is a deal killer. I just cannot do that, and that would absolutely chill investment in our community."), and Randal Walter (Places Consulting Services, Inc.), Assembly Committee on Government Affairs (March 16, 2009).

[11] When a project reaches the final map stage, it is "ready-to-build"; conversely, entitlements such as zoning changes, and especially master plan amendments, often precede the building phase by years, if the building stage ever even comes to pass. Accordingly, it is obvious why requiring water supply to be shown at the entitlement phase is a major concern of the building and development community (*see*, footnote 10, *above*).

[12] See, Testimony of Patricia Wade (Wade Development Company), Senate Committee on Government Affairs (May 8, 2009).

[13] See, Testimony of Jason King, Assembly Committee on Government Affairs (March 16, 2009)

[14] Id.

[15] See, e.g., Testimony of Alex J. Flangas, Senate Committee on Government Affairs (May 8, 2009).