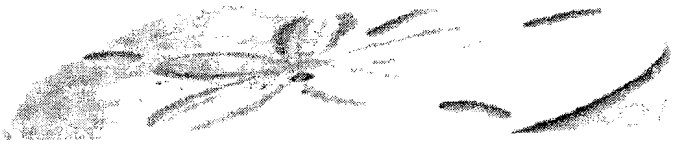

COLORADO
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HB 08-1141: SUFFICIENT WATER SUPPLIES FOR LAND USE APPROVAL

A Review and Analysis for the Pikes Peak Regional Water Authority

Richard G. Brown
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www.coloradopublicpolicystrategies.com

The Mirror of Erised

"So", said Dumbledore, "you, like hundreds before you, have discovered the delights of the Mirror of Erised."

"I didn't know it was called that, sir."

"But I expect you've realized by now what it does?"

"It – well – it shows me my family – "

"And it shows your friend Ron himself as head boy."

"How did you know -?"

"I don't need a cloak to become invisible," said Dumbledore gently. "Now, can you think what the Mirror of Erised shows us all?"

Harry shook his head.

"Let me explain. The happiest man on earth would be able to use the Mirror of Erised as a normal mirror, that is, he would look into it and see himself exactly as he is. Does that help?"

Harry thought. Then he said slowly, "It shows us what we want....whatever we want...."

"Yes and no," said Dumbledore quietly. "It shows us nothing more or less than the deepest, most desperate desire of our hearts. You, who have never known your family, see them standing around you. Ronald Weasley, who has always been overshadowed by his brothers, sees himself standing alone, the best of all of them. However, this mirror will give us neither knowledge or truth. Men have wasted away before it, entranced by what they have seen, or been driven mad, not knowing if what it shows is real or even possible."

Exchange between Albus Dumbledore and Harry Potter in "Harry Potter and the Sorcerer's Stone."

Introduction

The members of the General Assembly, various interest groups and interested parties spend a great deal of time analyzing, discussing, interpreting and considering proposed laws. There is a natural human tendency to color those efforts in the context of what one believes the real world to be like. Legislation is usually pursued in an attempt to cure the imperfections in that perceived real world. The words "in the public interest" or "not in the public interest" are often spoken at the Capitol as the proponents and opponents of a bill attempt to sway others into seeing the world from their perspective and to agree with their interpretation of the attributes of the bill. The words are spoken as if there were some agreed upon external baseline called the "public interest." Editorial writers in particular are very fond of opining as to what is or is not in the public interest.

There is, of course, no *a priori* public interest. The American system is designed to elicit a working public interest from the interaction of special interests. It is the outcome that is the public interest. Protestations to the contrary notwithstanding, all groups that participate in the legislative process are special interest groups – no matter how noble they believe their cause to be. Trout Unlimited is as much a special interest group as is the Colorado Association of Home Builders.

Proposed laws are seldom as pernicious or disastrous as those who are opposed to them claim. And they are rarely as beneficial as those who support them hope. Most of the time, a new law does little more than modify behavioral relationships among parties who have some sort of shared interest in the interaction. People adjust to the new ground rules, and modify their approach to achieving what they desire. Those who are appalled at such behavior decry loopholes in the law. Those who have learned to adjust and succeed under the new ground rules refer to such activities as complying with the new law. The parties respectively see a new law as if they were gazing into the Mirror of Erised.

HB08-1141 is interesting as much for the process that it underwent as it is for the policy that it sets forth. It is a tribute to the sponsor, Rep. Curry, who supported an open dialogue and process that allowed a diverse set of participants with very divergent interests to meet to work toward an acceptable accommodation of those interests.

It is a tribute to the several very diverse interest groups that participated in the drafting sessions that they were knowledgeable and were able to educate each other about how the real world of providing water to communities operates. These groups met several times, with each meeting lasting several hours. They waded through multiple drafts and proposed amendments and

language. Eventually, the initial controversy over the provisions of the bill began to wane, and in the end the parties claimed satisfaction with the provisions – even if they believed that the bill went too far or did not go far enough.

It is also a tribute to the Colorado Water Congress for providing the logistical support to assist those interests in meeting without creating an atmosphere that was antagonistic to any of the parties involved. The role played by the Water Congress was much more important than simply being a good host. With the combined effects of legislative term limits and a legislative deadline system that elevates calendar compliance above policy, the only way that a bill with many diverse parties participating in its crafting can come together is outside the State Capitol.

This summary and analysis of the new Act is intended to discuss the provisions of the Act, how the members of the Pikes Peak Regional Water Authority might be able to utilize those provisions, and what the Act might mean to future policy developments that will affect water supply in Colorado. Like the Mirror of Erised, HB08-1141 lends itself to misleading the reader into seeing what is desired rather than what the legislation actually provides as public policy guidance. It is the nature of the legislative process that many people who are involved with a bill report what they think it might do or what others have said that it will do. Very often, the actual language of a bill fails to get an objective reading until it has become law and people begin the process of implementing its provisions.

HB08-1141 is a very good example of that legislative process dynamic. The underlying concern of the proponents was what they considered a woefully inadequate land use approval process that fails to connect proposed developments and the water supplies needed to sustain those developments. The proponents desired to increase that review process to ascertain how much water is expected to be needed for the development, where it is going to come from and how reliable it is. The emphasis was on housing developments and residential subdivisions, but, as will be discussed further on, the Act is not limited to housing developments.

HB08-1141: What the Act Does

Technically, HB08-1141 adds a new Part 3 to Article 20 of Title 29, Colorado Revised Statutes. It amends the preexisting definition of "development permit" that was contained in 29-20-101, and the new language added to the definition applies only to the new Part 3. The Act became effective on May 29, 2008 upon signature of the Governor, but applies only to applications for development permits that were submitted on or after the effective date of May 29, 2008. There is a specific exclusion for certain cluster developments in the context of a rural land process that is subject to the provisions of 30-28-401 et Seq., CRS The Act does not apply to any division of land which creates parcels of land that are at least 35 acres in size.

For perspective purposes, Article 20 of Title 29 is known as the "Local Government Land Use Control Act of 1974" which was enacted to provide local governments that are charged with land use planning and control within their jurisdictions with certain powers to exercise those responsibilities. As a general rule of thumb, these local governments are general purpose municipal and county governments. The article bestows its discretionary powers upon counties, cities and counties, territorial charter cities and cities and towns which are organized either as statutory or home rule.

HB08-1141 represents a slight change in legislative philosophy. Whereas the base law is replete with language reinforcing the discretionary nature of the provisions, HB08-1141 is structured to require certain local government reviews of proposed developments. Colorado local governments have historically guarded their land use regulatory jurisdiction very jealously and legislation that would have resulted in any increase in state authority over local land use has been vigorously opposed. The new Part 3 continues local government power but requires the affected local government to disapprove a development permit unless the applicant has demonstrated that the water supply that will serve the development is "adequate" as that term is defined in the Act and within the parameters set forth in the Act.

HB08-1141 is predicated on the recognition that development and provision of water are inextricably linked and that linkage may have extraterritorial effects beyond the parochial framework of local land use control. Depending upon the proposed development, those effects might extend beyond the county or city boundaries into the broader region and impact both intra-basin and inter-basin water resources. HB08-1141 seeks to have local government land use authorities take into consideration the adequacy of water supplies that would presumably be used to support new developments.

The new Act begins with the addition of two new definitions to the Local Government Land Use Control Enabling Act of 1974 that are specific and unique to the new Part 3:

"Adequate"

This term is defined in the Act as meaning a water supply that will be sufficient for build-out of the proposed development in terms of quality, quantity, dependability, and availability to provide a supply of water for the type of development proposed, and may include reasonable conservation measures and water demand management measures to account for hydrologic variability.

"Water supply entity"

This term is defined as being a municipality, county, special district, water conservancy district, water conservation district, water authority, or other public or private water supply company that supplies, distributes, or otherwise provides water at retail. The criterion of provision of water at retail is a very significant and important standard.

***The threshold requirement*:**

As a general construction of statute format, the Act begins with the threshold requirement that is imposed on applicants for a development permit. From that threshold requirement, the Act carves out special dispensation for applicants who are to secure their water supplies from certain water supply entities that meet specific criteria.

An applicant for a development permit is required to submit the estimated water supply requirements for the proposed development to the local government that is responsible for issuing the development permit. The information is to be set forth in a report that is prepared by a registered professional engineer or a water supply expert who is acceptable to the local government. The Act does not specify any particular professional expertise of the preparer, nor does the Act require that he or she be an independent consultant retained for the purposes of preparing the report. Under the Act, unless the local government objects, the preparer can be an employee of or a consultant to the applicant seeking the development permit.

The Act then specifies what, as a minimum, must be in the report:

> *There must be an estimate of the water supply requirements for the proposed development through its build-out.

A brief digression here is warranted.

As noted in a preceding section, the Act includes a modification of the preexisting definition of "development permit." The amended definition limits the term to an application regarding a specific project that includes new water use in an amount that is more than that used by 50 single-family equivalents as determined by the local government. The local government may also decrease this number to reflect its own local policies. Note that this definition does not apply solely to single family residential developments. The triggering criterion is that the development (perhaps a shopping center) seeking the local approval will demand new water in an amount that is greater than that which would be used by 50 single-family equivalents.

The Act does not establish a standard or a criterion that defines what amount of water would be used by a single-family equivalent unit. This determination is left to the local government, and it is not totally clear whether that determination is to be made by the entity reviewing the development permit application or the water supply entity that will be providing service to the development if it is approved. Nor does the standard give guidance as to whether the water amount is to be established narrowly with respect to the use needs of a single-family unit or more broadly to include common uses of water that would be averaged over all the residential units (e.g., park and open space irrigation, fire protection, etc.). Nor does the Act give any guidance as to whether this standard is a threshold standard

or whether it should address the natural per capita future increase in use of water.

In a conspicuous omission, the Act does not address how conservation protocols might be used to reduce the projected demand. While the Act requires the report to include information about water conservation plans or water demand management measures, it stops short of requiring that those protocols be adopted. Rather, the Act simply requires such information be included if those conservation or demand measures are in effect.

Water professionals may believe that the use of "single-family equivalents" is a commonly accepted standard in water system planning and design, but now that the term is included in statute it will be subject to definitions established by elected and appointed public officials. Most likely those definitions will be peculiar to the local government that is reviewing permit applications, and are very unlikely to be uniform across the state or even a sub-state region.

As a practical matter, this standard is likely to generate fierce debate during the permitting process. It is to the advantage of the permitting local government to secure as high a number as possible in order to build in a cushion against future demands. It is to the advantage of the developer to secure as low a number as possible so that he is not required to provide surplus water into the system and thereby subsidize other uses. The local government will be motivated to minimize its future risk by shifting the risk to the developer and to the water supply entity. The developer will be motivated to shift future risk to the local government and the water supply entity.

*A description of the physical source of water supply that will be used to serve the proposed development.

*An estimate of the amount of water yield projected from the proposed water supply under various hydrologic conditions (e.g., drought).

*The water conservation measures (if any – there is no mandate to include such measures) that may be implemented within the development.

*The water demand management measures (if any) that may be implemented within the development to account for hydrologic variability.

*Any other requirements that are established by the reviewing local government.

The Act has a specific provision that holds that the applicant is not required to either own or to have acquired the proposed water supply or to have constructed the actual physical plant and infrastructure at the time the application for permit is filed. The Act stops short of requiring the developer to physically provide the water, although it would be a very odd outcome of the detailed review of water adequacy that a development would be approved and allowed to proceed without some firm, and perhaps guaranteed, water supply.

Once the local government has received the application for a development permit, it may not approve the application until it is satisfied that the development will have an adequate water supply. The statute does not specify when during the review process such a determination must be made, and leaves that decision to the discretion of the reviewing local government. Unless the conditions specific to the proposed development change with respect to the water demand or supply, the local government is not required to make the determination more than once or at any particular series of stages of the review process. The Act does not require any future reviews to determine whether the water supply actually was delivered, nor any actions that might be taken in the event that the supply does not materialize.

Having set forth the threshold requirements, the Act then establishes two carve-out modifications to the requirements that are dependent upon the nature of the water supply entity.

The rationale for these modifications is easy to understand once the threshold provisions are understood to be focused to address a development which is intended to develop its own water supply, construct its own infrastructure and serve its own development. Such developments have often been used in Colorado, and usually result in the organization of a special district or other water utility to which the assets are deeded.

The First Modification – Water Service by a Water Supply Entity

The Act recognizes a development which would be served by a water supply entity. However, the Act does not require that the water supply entity be in existence at the time of the application. It is a fair reading of the Act that the permit application could be predicated upon the future organization of such a water supply entity if that is acceptable to the local government.

The Act permits, if the development is to be served by a water supply entity, the applicant to, with the approval of the local government, substitute a letter prepared by a professional engineer or by a water supply expert from the water supply entity that the entity is willing to commit to serving the development and that it has the ability to serve it for the report that would have been prepared and submitted under the general threshold requirements. It should be noted that the letter issued by the water supply entity must address the same issues as the report.

This seems an odd modification in that the threshold report option neither requires the developer to possess the water supply at the time of the filing, nor to actually deliver water to the development (although that can certainly be assumed from the provisions of the Act). Yet, if the developer seeks a relationship with a water supply entity for provision of water to the development, the arrangement becomes elevated to one of a commitment by the water supply entity.

It is also interesting that the Act provides that the water supply entity is required to prepare such a letter if requested by an applicant. The developer community may take solace from this provision, but it is far from certain that a water supply entity will become a rubber stamp for a project since the commitment to provide the water is a very substantial commitment that water supply entities are unlikely to undertake cavalierly. In fact, it is probably to the long run best interests of the entity to be very judicious in issuing such letters and to extract as many risk limiting concessions as possible from the developer. This provision should also be read in context with the legal mandate imposed upon the entity to provide service within its defined jurisdictional area whether the entity is a governmental entity or a private utility subject to the jurisdiction of the Public Utilities Commission. Keep in mind that the Act recognizes a multiplicity of entity types that would be considered water supply entities, but establishes the real working definition to be that the entity provides the water at retail.

The Second Modification – Water Service from a Water Entity That Meets Certain Prerequisites

The second carve-out from the general threshold filing requirement occurs if the development is to be serviced by a water supply entity that has a long standing water supply plan. The applicant would be relieved from the responsibility for preparation and submission of a water adequacy report or securing a letter of commitment if the water supply entity has a water supply plan that meets the following criteria:

*The water supply plan has been reviewed and updated within the previous ten years by the governing board of the water supply entity;

*The water supply plan has a minimum 20 year planning horizon;

*The water supply plan lists the water conservation measures (if any) that may be implemented within the development;

*The water supply plan lists the water demand management measures (if any) that may be implemented within the development;

*The water supply plan includes a general description of the water supply entity's water obligations;

*The water supply plan includes a general description of the water supply entity's water supplies; and,

*The water supply plan is on file with the local government.

This last provision seems to presume that the water supply entity is a municipality or a special district. However, it could be a private water utility regulated by the Public Utilities Commission since the defining criterion is that the water supply plan must have been reviewed and updated within the previous ten years by the governing board of the entity. The governing board may be a utility board, a city council, special district board or the board of directors of a private utility. Depending on the nature of the development, the entity that maintains the file copy could be a city or a county.

Thus, there are three options for the applicant depending upon the characteristics of the water supply entity that will be supplying the water to the proposed development:

*If the proposed development is a de novo development without a water supply entity, the full water supply adequacy report must be prepared and submitted for review;

*If the proposed development is to be served by an identified water supply entity (remember the definition of water supply entity requires that the entity must provide the water at retail), the local government may allow the water supply entity to provide a letter of commitment in lieu of the developer produced report; or,

*If the development is to occur within the jurisdiction of a water supply entity, and that water supply entity has an adopted water supply plan that meets the criteria set forth in the Act, the applicant can rely upon that plan and is not required to submit either a full report or secure a letter of commitment.

The reviewing local government has the sole discretion to determine whether the applicant has a water supply that is adequate, but the local government must take into consideration the following information as part of the review:

*The applicant has complied with the requirements of the Act to submit a water adequacy report as specified in the forgoing sections;

*The local government is specifically authorized to request a letter from the State Engineer commenting on the information provided by the applicant – this is not a mandate on the local government, it is a discretionary authority;

*Whether the applicant has paid a fee or charge to the water supply entity for the purposes of acquiring water for or expanding or constructing the infrastructure to serve the proposed development; and,

*Such other information that might be deemed relevant by the reviewing local government to determine whether the water supply for the proposed development is adequate.

Please keep in mind that the decision with respect to adequacy is in the sole discretion of the reviewing local government.

HB08-1141: How the Act Might Affect Reviews

Beyond general effects, it is not totally clear how the Act is likely to be used, and the open nature of the provisions has caused some hesitation and concern by some local governments. Garfield County, for example, has interpreted the provisions as being a strict mandate on the county that prohibits the approval of development permits unless it first finds that the developer has satisfactorily demonstrated that the proposed water supply for the proposed development is adequate. The Garfield County commissioners acted to grant the county attorney the authority to retain a water lawyer and a water engineer to assist in the review of requests for building permits and other matters. It appears that one of the motivating factors in granting the county attorney the authority to retain a water attorney was a concern that it might be difficult to locate a water attorney or engineer who did not have a conflict of interest because of work with developers and builders.

A recent situation in Norwood also shines some light on possible effects of the Act. A local developer, who also sits on the Norwood Water Commission Board, withdrew his proposal to annex a tract of land into the Town. His decision was based on a decision by the Water Commission that there were only 83 water taps in reserve, and the subdivisions as proposed would have required 250 water taps. According to local press accounts, the developer in his letter of withdrawal indicated that the decision was predicated on the apparent inability of the Town to implement and service its master plan. The developer also criticized the analysis done by the engineers that, in his opinion, failed to include financial considerations (e.g., tap fees) that could increase the Town's water system capacity.

There is, however, a separate issue in the Norwood situation that may complicate matters for many governmental water providers. That issue is the inadequacy of existing treatment plant capacity, and a lack of funding capacity for expansion or upgrade. As developers approach the water suppliers with requests for analysis and letters of commitment, some of the systems may become suspect based on their capital plant and capacity to treat and distribute water. It is possible that an overly cautious interpretation could result in a permit being denied because of adequacy concerns in the public system, which would in turn cause the community to

forego plant investment fees and other financial commitments from the developer that would have been used for overall system improvements.

The Norwood experience is an interesting commentary on the Mirror of Erised. Many of those who were involved in the discussions of the bill were focused on water rights and where the water supply would come from and did not seem to be all that interested in the system requirements for treatment and distribution of the water to the development. Several of those participants seemed to hold to the old Colorado land use control notion that water supply ultimately will control land use patterns. Other participants were appreciative of the physical plant issues. The Act, however, does not make a distinction. It requires the local government to make an adequacy determination and seems to require a review of the legal source of the water, the physical availability of the water and the ability to actually deliver wet water to the development.

There is no reason for a local government to interpret the Act as being unreasonably restrictive. In fact in its summary analysis of the Act, the Colorado Municipal League reported to its members:

> "Therefore, HB1141 really requires nothing new or more onerous than what municipalities already do when considering new developments." Reported in the CML "Statehouse Report" of May 9, 2008.

The Act leaves the establishment of criteria to be applied to the required information and the interpretation of that information solely in the hands of the local government. The Act does not set forth interpretative criteria, and makes it clear that such matters are matters of local judgment. The Act's major goal is to balance future water demands with future water supplies, and allows the local government great latitude in achieving that balance. For example, if a local government opted to have a developer secure water rights and place them in escrow to be used in a future plan of augmentation to satisfy the development's needs, the Act would not prohibit such an arrangement. While the local government cannot mandate such arrangement under the Act, the withholding of approval is a powerful incentive for the applicant to abide by the recommendations of the local government.

However, the local government should establish criteria for the review of the information that is submitted that will be consistent among similarly situated developments. For example, if there are two developments under review and one development is a standard single family residential subdivision with average size lots and the other has both standard single family residential neighborhoods and a section of larger single family residences that will be on two acre tracts, the local government should take care that it is reviewing the similar units on a comparable basis. It should be kept in mind that Part 2 of the Local Government Land Use Control Enabling Act of 1974 sets forth

standards for the equitable regulation of property rights. That Part 2 applies to the new Part 3.

Local governments that will be responsible for reviewing applications and determining the adequacy of water supplies will need to be cognizant of the water rights that are attached to the identified water supply. It is difficult to imagine how a local government tasked with the responsibility of determining the adequacy of a water supply for a proposed development can do so without a substantive review of the water rights that support the supply.

The Act does not shed light on what might be considered to be privileged or confidential information. Once information is turned over to a governmental entity, it becomes potentially a matter of public record and information. It is not uncommon in statute that there are express restrictions on public access to information that might be proprietary or for which there are public policy rationales for confidentiality. However, there is nothing in this Act that addresses such issues. Since the Act specifically states that the applicant is not required to own or have acquired the proposed water supply at the time of the application, it must be assumed that there will be circumstances under which the purchase or lease of water rights is under negotiation and that information is provided to the local government as part of the filing requirements. Water negotiations are notoriously difficult and often unpredictable. Premature disclosure of negotiations could have detrimental effects on those negotiations and could result in the application and the development being imperiled.

HB08-1141: What the Act Might Lead To

Increased Pressure on Inter-basin Water Transfers

The only reason for the legislation to have been enacted is to tighten the scrutiny of proposed developments with respect to their impacts on the state's water resources. Developers and water entities that are located in Douglas County expressed their concern that the Act was aimed directly at them, and reflected the desire of Western Slope interests to impede the transfer of water across the Continental Divide. There is probably some legitimacy to their concern, but it is not clear that the Western Slope communities that are facing very rapid growth as a result of the expansion of energy development might not face equally intense scrutiny.

Rather than deter inter-basin transfers, the Act may have the effect of increasing the pressure for such transfers. There may be an incentive for local governments to favor development of imported water resources rather than to develop ground water resources that they may wish to reserve for future uses. It is also possible that local governments, or affected water entities, might use the provisions of the Act as a catalyst for doing joint ventures to import water. Neither situation is inherently suspect, the result may be that scarce water resources are developed more thoroughly and used more efficiently.

Mutual Development and Storage Projects

While the Act does not favor a particular kind of development, the challenge of determining water supply adequacy is likely to have the effect of elevating large scale developments over medium size developments. Economies of scale become important. The Act creates an incentive for the development of water development projects that are broader than a single development. Projects such as reservoirs, multiple jurisdiction water treatment facilities and joint pipelines are likely to get more attention as developments and permitting authorities begin to see the economic importance of collective activities.

This potential outcome may become enhanced when water supply entities and permitting authorities begin to consider the regional impacts of the water supply entities that have long standing water supply plans, and which the Act holds harmless from the reviews. The Act assumes the adequacy of those water supplies while holding newer entities up for increased scrutiny. In an ironic way, the Act may serve to entrench existing land use patterns and developments while delaying or negatively impacting newer concepts.

Litigation

One of the strengths of the Act is that the sponsors refrained from making it too prescriptive. The Act is, in many respects, a canvas upon which local land use officials and local water entities can develop the policies and procedures that are expressly tailored for their needs. However, the open nature of the Act is likely to be anathema to interests that are desirous of limiting development and are hostile to growth.

Local officials are likely to find themselves challenged and second-guessed for their decisions to hold that a proposed development has an adequate water supply. The model for such challenges has been developed by opponents of various projects who have used the tactics of challenging environmental assessments and environmental impact analyses. Such challenges can be lengthy and costly, particularly if the opponents continue the challenge into the courts.

One of the areas of challenge to a development or to the local government might arise out of the state's Strategic Water Supply Initiative. SWSI provides the type of external standard that activists are particularly fond of using to cast doubt on decisions. Even though SWSI is not a legally binding analysis, it is one that can be easily manipulated and exploited to challenge a determination of adequacy.

But litigation is not likely to be limited to anti-development interests. Developers are just as likely to challenge the decision making of the local government if the decisions, or even the review process, impede their time tables for the development or become a cloud over the financing of the development. The likelihood of developer initiated litigation will be enhanced if a developer feels that one or more of his competitors is being treated more

leniently than he is or if he feels that the reviewing entity is using the adequacy test in a particularly arbitrary or predatory manner.

Summary and Conclusion

In many ways the Act is a reflection of the philosophy embodied in the real world application of the prior appropriation doctrine. As a legal structure, prior appropriation is an efficient and common sense based policy. Little thought is actually given to its mechanical implementation until there is a serious wet water shortage. Once there is a call executed under the doctrine, someone is potentially at risk of suffering great economic harm from the restriction on water use.

The Act also is a legal structure that is attractive in both its simplicity and also its common sense approach to comparing future water demands and water supplies as land use decisions are made. However, the nature of the Act will change dramatically as local governments begin to evaluate development schemes and make decisions which favor one development but penalize another. This is an Act that will undergo several implementing interpretations over time, and those interpretations will largely reflect what interested parties desire to see in its provisions.