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# When Does Colorado Require Developers to Demonstrate an Adequate Water Supply?

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It's not news to anyone that an adequate water supply must be provided for new development. However, in Colorado, the question of *when* a water supply must be shown has recently been confirmed by new legislation. This is a question of prime importance to proposed master-planned communities and other large, multi-phase projects, where build-out is extended over long periods.

Imagine a proposed master-planned community, or MPC, designed to provide thousands of homes, retail, restaurants, entertainment and other commercial establishments, a hospital, a corporate campus, recreational facilities, and other uses. This proposed community is designed to minimize sprawl by employing higher densities and mixed-use neighborhoods. The project employs cutting-edge strategies to conserve water and reduce air pollution. Build-out is expected to take 25 years. Imagine that demographic analyses show the local population will grow by thousands within the next decade, but there is a lack of adequate housing. The local community and elected officials desire the proposed MPC be built because it will alleviate their housing shortage, and bring needed jobs, recreational facilities and tax revenue.

One problem: If applicable law requires the developer to demonstrate a water supply for the entire MPC project too early in the development approvals process, such as at rezoning, then the project is dead in its cradle due to the excessive amount of upfront capital required to make such a demonstration.

### When Must a Water Supply be Demonstrated in Colorado?

In Colorado, as elsewhere, developers are typically required to obtain a series of development approvals before construction can begin. The overall development permit approvals process usually includes rezoning, platting and site plan approvals. Theoretically, demonstrating the project's water supply could occur at any of these stages. However, as confirmed by a 2008 Colorado statute, and as further amplified by a 2013 amendment thereto, developers are not required by state law to demonstrate a water supply for a project at rezoning.

### The 2008 Statute

In 2008, Colorado amended the Local Government Land Use Control Enabling Act of 1974, by adding a new Part 3. Part 3 provides that "[a] local government shall not approve an application for a development permit [as defined below] unless it determines in its sole discretion ... that the applicant has satisfactorily demonstrated that the proposed water supply will be adequate ... A local government shall have the discretion to determine the stage in the development permit approval process at which such determination is made." The term "development permit" was defined to mean "any preliminary or final approval of an application for rezoning, planned unit development, conditional or special use permit, subdivision, development or site plan, or similar application for new construction."

During legislative debate on Part 3, the bill's sponsor, Rep. Kathleen Curry, emphasized that the bill would not set forth new mandates for local governments to require water adequacy determinations at any certain stage of the development permit approvals process. However, the resultant 2008 statute failed to define the term "development permit approval process." Based on this failure, in August 2012, a Colorado district court held the 2008 statute required developers to demonstrate an adequate water supply for the *entire* project during rezoning. If this ruling were to stand, large, cohesively planned projects would become an endangered species in Colorado.

### The 2013 Amendments

To effectively overrule the district court's ruling, in 2013, the Colorado Legislature and Gov. Hickenlooper amended Part 3 to restate and further clarify the intent of the 2008 statute that local governments are not required to demonstrate an adequate water supply at rezoning. The 2013 legislation stated the amendments were necessary to "clarify that ... [a local government] possesses the flexibility to determine at which stage in the development permit approval process the determination will be made ... to clarify that the stages of the development permit approval process are any of the applications, or any combination of the applications ... as determined by the local government, and that none of the stages are intended to constitute separate development permit approval processes ..." The 2013 amendments further provided "[e]ach application included in the definition of development permit constitutes a stage in the development permit approval process. ..."

Simply put, under the amended statute: (a) the development permit approval process is the set of one or more development approvals as determined by the local government, (b) developers must demonstrate an adequate water supply at a point during the development permit approval process determined by the local government, and (c) state law does not mandate that local governments require water adequacy determination at rezoning.

### Good Policy

In Colorado, local governments are free to defer the water adequacy demonstration until the platting process, which is good policy. From a planning standpoint, the policy is sensible because deferring the adequacy demonstration until platting still ensures that improvements will not be built without adequate water, but does not create unnecessary obstacles to development. Further, the actual improvements built, and thus the water demands for such improvements, are often not known until the platting stage; accordingly, making a determination of whether a sufficient water supply is demonstrated at the rezoning stage is guesswork at best. Moreover, under this policy, water supplies are not locked up for decades, for improvements that may never be built; instead, such water can be used by others needing it now.

Additionally, this policy allows local governments to implement water conservation strategies on a large scale. For example, many Colorado communities are trying to reduce dependence on non-tributary groundwater by requiring developers to move from groundwater-only supplies to conjunctive water supplies. A conjunctive water supply combines renewable tributary water supplies with non-tributary groundwater. This approach extends aquifer life by reducing reliance on groundwater, and by reducing evaporation loss from surface reservoir storage, thus making more water available. Renewable tributary water supplies are more expensive to acquire and develop. Requiring developers of multi-phase projects to have all their tributary water in hand and fully adjudicated for the entire project at the rezoning stage exacerbates the upfront-capital problem. Moreover, from a water law standpoint, attempting to adjudicate augmentation plans *prior* to rezoning raises speculation issues that could result in denial of water court applications.

In summary, Part 3 does not require water adequacy determinations at rezoning. Instead, it provides flexibility to local governments to approve well-planned projects and attain community goals as they see fit.