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When Does a Development Proposal Become a "Project"?

California Supreme Court Clarifies When Pre-Development Approvals Trigger CEQA Review

Camas J. Steinmetz

In an effort to provide and promote housing, the City of West Hollywood ("City") approved a conditional agreement that would pave the way for conveyance of City-owned property to be redeveloped for a 35-unit, affordable housing project for seniors called "Laurel Place". Today, the California Supreme Court held that this agreement violated the California Environmental Quality Act ("CEQA") because the City failed to complete an environmental impact report ("EIR") before entering into that conditional agreement. The case, ***Save Tara v. City of West Hollywood* (Waset, Inc., et al., Real Parties in Interest), S151402 (October 30, 2008)**, clarifies when a proposal becomes a "project" and how soon in the process a governmental agency must initiate CEQA compliance. In reaching its decision, the Court adopted the general principle that *"before conducting CEQA review, agencies must not take any action that significantly furthers a project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project."* (Slip Op. 26.)

The agreement in the *Save Tara* case was a contingent agreement that described in detail the transfer and development of City-owned property to a nonprofit housing developer and the provision of a $1 million loan to facilitate development and tenant relocation within 30 days of the execution date. The agreement expressly withheld the City's commitment to a definite course of action and was conditioned upon compliance with CEQA, but its stated purpose was "to cause the reuse and redevelopment" of Laurel Place. In fact, the City's resolution approving the Conditional Agreement stated the intent to "facilitate

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development of the project."

The Conditional Agreement was entered into after approval of the developer's application to the U.S. Department of Housing and Urban Development ("HUD") for $4.2 million of funding for the project. The City's mayor assisted in the application by telling HUD that the City "has approved the sale of the property" and "will commit" up to $1 million in financial aid. After the HUD grant was awarded, the mayor announced and the City's newsletter stated that the grant "will be used" for the Laurel Place project. The HUD application described in great detail the proposed architectural layout, design and landscaping of the project and included a professional architect's rendition of floor plans and layout of the entire project. The Conditional Agreement included these architectural details in its terms.

The Court's decision that the Conditional Agreement constituted "approval" of a "project" triggering environmental review under CEQA has important implications for developers that enter into contingent agreements, such as Exclusive Negotiation Rights Agreements, Memoranda of Understanding, and Option Agreements that seek to secure preliminary assurances for future development and redevelopment activities from cities and other public agencies without committing the agency to a definite course of action. These routine agreements allow public and private partnerships to reach agreement on critical components, allow the funding of the entitlement process, and support the full satisfaction of CEQA requirements without obligating the public agency to ultimately approve the project.

The result of today's decision could seriously impede the development and financing of affordable housing and other development and redevelopment projects, because without preliminary assurances from cities and redevelopment agencies through these agreements, developers have little financial incentive to prepare site-development plans and undertake other costly predevelopment activities, including the financing of required CEQA analysis.

In reaching its decision, the Court acknowledged that CEQA analysis must not be conducted "so early that the burden of environmental review impedes the exploration and formulation of potentially meritorious projects, nor so late that such review loses its power to influence key public decisions about those projects." (Slip Op. 15.) The Court rejected the lower court's suggestion that "any agreement, conditional or unconditional, would be an 'approval' requiring prior preparation of CEQA documentation if at the time it was made

the project was sufficiently well defined to provide 'meaningful information for environmental assessment." (Slip Op. 15.)

Instead, the Court adopted the general principle that "before conducting CEQA review, agencies must not take any action that significantly furthers a project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project." (Slip Op. 26.) It advised that in applying this principle to conditional development agreements, courts should look not only to the terms of the agreement, but also to the surrounding circumstances to determine where, as a practical matter, the agency has committed itself to the project as a whole or to any particular features so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project. (Slip Op. 27.)

The Court stated that its ruling "does not require CEQA analysis before a definite project has been formulated and proposed to the agency." (Slip Op. 27.)

The Court's decision offers the following framework for determining when an agency's "favoring of and assistance to a project ripens into a commitment" of a definite course of action requiring prior CEQA analysis:

- **Does the agreement when viewed against all surrounding circumstances commit the agency to a course of action?** "A CEQA compliance condition can be a legitimate ingredient in a preliminary public-private agreement for exploration of a proposed project, but if the agreement, viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review." (Slip Op. 17.)

- **Has a "definite project" been formulated and proposed to the agency?** "An agency cannot be deemed to have approved a project . . . unless the proposal before it is well enough defined 'to provide meaningful information for environmental assessment.'" (Slip Op. 27-28.)

- **Not every agreement equates to an "approval".** "Approval . . . cannot be equated with the agency's mere interest in, or inclination to support, a project no matter how well defined." (Slip Op. 23.) The Court cited an agency's preliminary assistance to conduct feasibility or planning studies as a form of support not triggering

CEQA review.

- **Examine agency commitments carefully.** "A public entity that, in theory, retains legal discretion to reject a proposed project may, by executing a detailed and definite agreement with the private developer and by lending its political and financial assistance to the project, have as a practical matter committed itself to the project." The Court cited as examples of agency commitment, publicly defending a proposed project, devoting substantial public resources to it, and announcing a detailed agreement to go forward with the project. (Slip Op. 21.)

In addressing the practical implications of an agency's commitment that mandates environmental analysis relatively early in the planning stage, the Court advised that "the agency may assess the project's potential effects with corresponding generality" and that "a staged EIR or some other appropriate tiering may be used to postpone to a later planning stage the evaluation of... project details that are not reasonably foreseeable when the agency first approves the project. (Slip Op. 28.)

Finally, between the filing of the CEQA challenge and the Supreme Court's decision, the City prepared and certified an EIR for the Laurel Place project, and argued that the case was now moot. The Court held that the certification of the EIR did not render the litigation moot because no "irreversible physical or legal change has occurred," and therefore the relief sought by the Save Tara organization could still be awarded. The Court did leave open, however, the issue as to whether the City was required to prepare a new or supplemental EIR before reconsidering the project.

back to top

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