



REAL ESTATE CLIENT ALERT

When does a Preliminary Agreement between a Public Entity and a Developer Constitute Approval of a “Project” under CEQA?

According to the California Supreme Court in *Save Tara v. City of West Hollywood*, S151402 (October 30, 2008), whether a preliminary agreement between a public entity and a developer constitutes approval of a "project" under CEQA depends on both the terms of the agreement and the surrounding circumstances. The bottom line is that a condition requiring CEQA compliance will not save an agreement from being considered an "approval" requiring prior environmental review if all of the surrounding circumstances indicate that, as a practical matter, the public agency is committed to a definite course of action.

Under CEQA, an EIR must be prepared for any project which a public agency "proposes to carry out or approve that may have a significant effect on the environment."¹ Under the CEQA Guidelines, "approval" means any decision by a public agency "which commits the agency to a definite course of action" in regard to the project.² The Court acknowledged that "[t]he problem is to determine when an agency's favoring of and assistance to a project ripens into a commitment."³

In *Save Tara*, the City of West Hollywood ("City") entered into an agreement with a nonprofit housing developer that conditioned the conveyance of City-owned property on future CEQA compliance. The developer planned to use the property for a low-income senior housing project, and needed to demonstrate that it had control of the project site to receive a pre-development planning grant from the United States Department of Housing and Urban Development ("HUD").

The Court explained that a reviewing court must "look not only to the terms of the agreement but to the surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular feature, 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. In this analysis, the contract's conditioning of final approval on CEQA compliance is relevant but not determinative."⁴

The *Tara* Court found that, although the City retained the legal right not to proceed with the project, a number of facts suggested that the City had, as a practical matter, committed itself to approving the project. For example, the stated purpose of the agreement between the City and the developer was to "cause the reuse and redevelopment" of the property in accordance with the project as outlined in the HUD application (senior housing project).⁵ The City also loaned the developer almost half a million dollars to fund pre-development costs, such as economic and

¹ CEQA Section 21100(a).

² CEQA Guidelines Section 15352(a).

³ Slip. Op. 15 (internal quotations omitted).

⁴ Slip. Op. 26-27 (citing CEQA Guidelines Section 15126.6).

⁵ Slip. Op. 28.



environmental studies.⁶ In addition, the City Council resolution approving the draft agreement stated that its intent was to "facilitate development of the project" while allowing further input on details of the project design, effectively precluding a "no-project" alternative.⁷

The Court also focused on a series of statements made by various City officials in support of the project. For example, the City Manager told HUD that the City "[had] approved the sale of the property" and "will commit" up to \$1 million in financial aid.⁸ The City Housing Manager stated at a public hearing that while there were "options to consider" regarding project design, other project alternatives had already been ruled out (park, library, cultural center).⁹ Finally, the Court noted that the City proceeded with the tenant relocation process on the assumption that the property would be redeveloped as proposed.¹⁰

Public-Private Agreements after Save Tara

The Court was careful to limit its holding to the facts of the case. It acknowledged that "cities often reach purchase option agreements, memoranda of understanding, exclusive negotiating agreements, or other arrangements. . . before deciding on the specifics of the project" and that ". . . preliminary or tentative agreements may be needed in order for the project proponent to gather financial resources for environmental or technical studies, to seek needed grants or permits from other governmental entities, or to test interest among prospective commercial tenants."¹¹ As such, future cases will turn on specific facts related to the terms of the agreement and the surrounding circumstances, rather than the form of the agreement. However, a CEQA compliance condition alone will not save an agreement from being considered an "approval" if the surrounding circumstances otherwise show that the public agency is committed to approving the project.

The *Save Tara* decision should be considered carefully before entering into a preliminary contract or agreement with a public agency, such as an Exclusive Negotiating Rights Agreement, Memorandum of Understanding or Option Agreement.

If you have any questions about this client alert, please contact real estate attorneys Tay Via (415-772-5715), Charles Higley (415-772-5766) or Caroline Guibert (415-772-5793).

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⁶ Slip. Op. 29.

⁷ Slip. Op. 28-29.

⁸ Slip. Op. 31.

⁹ *Id.*

¹⁰ *Id.* Under the executed development agreement, tenants would be relocated before final project approval. The Court cited this as evidence that the City's commitment was not contingent. Slip. Op. 32.

¹¹ Slip. Op. 24.