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SAVE TARA AND THE MODERN STATE OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

*Todd Nelson**

The California Environmental Quality Act (CEQA) requires public review of all public and private projects that are subject to a public agency's approval. Unlike many other states' environmental laws, CEQA requires that projects that create significant environmental impacts not be approved if feasible mitigation measures or project alternatives exist that would reduce or eliminate those impacts. However, although CEQA was adopted more than forty years ago and has been the subject of approximately six hundred published decisions, there remains much uncertainty as to what agencies and project proponents must do to comply with CEQA and avoid judicial reversal. One of the most critical contested issues is the question of what constitutes a project for purposes of requiring CEQA analysis. This uncertainty was at the heart of Save Tara v. City of West Hollywood*, a recent California Supreme Court case that set forth a new, flexible test for determining what actions by public agencies will constitute a CEQA project. This Note describes the current state of CEQA following* Save Tara*, identifies the decision's costly impacts on previously exempt public-agency activities, offers suggested legislative reforms to the existing law, and suggests best practices for project proponents and public agencies that seek to comply with CEQA while avoiding frivolous lawsuits.*

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I. INTRODUCTION

The California legislature adopted the California Environmental Quality Act[1] (CEQA) in 1970 following the federal government's adoption of the National Environmental Policy Act[2] (NEPA) in 1969. Like NEPA, CEQA requires public agencies to review and take into account the environmental impacts of their actions.[3] However, unlike NEPA, CEQA contains a substantive mandate that prohibits public agencies from approving public or private projects with significant environmental impacts if there are feasible mitigation measures or project alternatives that would lessen or eliminate those impacts.[4] Accordingly, California agencies, when deciding to undertake or approve a project,[5] must conduct environmental review and certify an environmental analysis ensuring that these impacts have been eliminated or mitigated to a level of insignificance.[6]

1. CAL. PUB. RES. CODE §§ 21000–21177 (West 2007).

2. 42 U.S.C. §§ 4321–4370(f) (2006).

3. PUB. RES. § 21000; Friends of Mammoth v. Bd. of Supervisors, 502 P.2d 1049, 1054–55 (Cal. 1972); Daniel P. Selmi, *Themes in the Development of the State Environmental Policy Acts*, 38 URB. LAW. 949, 982 (2006).

4. PUB. RES. §§ 21002, 21081; Mountain Lion Found. v. Fish & Game Comm'n, 939 P.2d 1280, 1298 (Cal. 1997).

5. CEQA defines a project as:

> [A]n activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:
>
> (a) An activity directly undertaken by any public agency.
>
> (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
>
> (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

PUB. RES. § 21065. As this Note describes, this definition, as well as the state's CEQA guidelines' definition of project, has been the subject of extensive judicial interpretation.

6. Mitigation of environmental impacts might include avoiding a proposed action altogether, limiting the degree of a proposed action, rectifying the impact of the action, or compensating for the impact of the action. CAL. CODE REGS. tit. 14, § 15370 (2011). Note that CEQA only requires mitigation measures that are feasible, and a project that creates significant and unavoidable impacts may still be approved if the approving agency makes certain required findings and adopts a "statement of overriding considerations." PUB. RES. § 21081; tit. 14, § 15091.

In its forty years of existence, CEQA's statutory requirements and accompanying regulatory guidelines[7] have produced an environmental review process where members of the public interact with public agencies to ensure that these agencies are fully informed of the potential environmental effects of their decisions.[8] Unsurprisingly, given CEQA's tremendous reach into so many of the decisions that public agencies make, an enormous cadre of consultants, lawyers, development advocates, and environmentalists specializing in CEQA analysis has developed. To date, CEQA is the subject of approximately six hundred published judicial decisions,[9] which have further defined the reach and limits of the original statute, and have exposed some of CEQA's inherent tensions. Many project opponents continue to complain that the environmental protections that CEQA has promised do not go far enough.[10] On the other side, project advocates and sponsors often complain that the balancing of environmental and other public needs that CEQA has contemplated has been ignored, and that the statute has become an effective tool to oppose projects for reasons other than environmental concerns.[11]

Despite numerous California appellate and supreme court CEQA decisions, there remains a great deal of uncertainty in the law regarding what agencies need to do to comply with CEQA to prevent judicial reversal.[12] This uncertainty may create significant costs for agencies, as CEQA challenges have become an effective tool to block projects that opponents deem undesirable, even if the reasons for their opposition are seemingly unrelated to environmental

7. California first adopted statewide CEQA guidelines in 1973 pursuant to the authority granted in Public Resources Code section 21083. The guidelines are prepared by the Governor's Office of Planning and Research and are written to encompass both the specific statutory requirements of CEQA and judicial interpretations of the statutory language. The procedures that public agencies adopt to implement CEQA must be consistent with these guidelines. PUB. RES. §§ 21082, 21083; MICHAEL H. REMY ET AL., GUIDE TO CEQA 6–7 (11th ed. 2007). The CEQA Guidelines appear as title 14, chapter 3 of the California Code of Regulations. CAL. CODE REGS. tit. 14, §§ 15000–15387 (2011).

8. Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 764 P.2d 278, 282–83 (Cal. 1988).

9. Lisabeth D. Rothman, *CEQA Turns 40: The More Things Change, the More They Remain the Same*, ST. B. CAL. ENVTL. L. NEWS, Winter 2011, at 2, *available at* http://www.bhfs.com/portalresource/lookup/wosid/contentpilot-core-2301-19708/pdfCopy.name=/LA.

10. *Id.*

11. *Id.* at 3.

12. *Id.*

impacts.[13] To defend against such challenges, environmental impact reports (EIRs) and the supporting environmental analyses that public agencies produce continue to lengthen as agencies and project applicants attempt to provide more detail to create defensible documents.[14] Longer EIRs take more resources and time to draft and review, which increases the amount of time a project proponent must wait until an agency approves a final EIR.[15] Finally, project proponents often pay the agency's costs for preparing an EIR and for litigation.[16]

This Note examines *Save Tara v. City of West Hollywood*,[17] a significant recent California Supreme Court decision dealing with a threshold question under CEQA—namely, what constitutes a project for purposes of requiring CEQA analysis? In answering this question, the court in *Save Tara* set forth a flexible and open-ended standard that has expanded CEQA's reach to potentially include previously exempt public agency activities. This Note argues that the *Save Tara* decision has exceeded the reasonable scope of CEQA's statutory language and requires a legislative remedy to ensure that this decision does not inordinately burden public agencies and private project applicants.

Part II provides an overview of CEQA's purposes, policies, and mechanisms, and it introduces some of the tensions that are inherent in this law. Part III first reviews several important recent decisions regarding the definition of a project under CEQA and then closely examines the facts, holding, and reasoning of the *Save Tara* decision. Part IV looks at the ramifications of *Save Tara* and its effects on the actions of public agencies. Finally, Part V proposes remedies that the California legislature and public agencies should pursue in order to fix the impacts of *Save Tara*.

13. *Id.* at 12.

14. *Id.* at 13. Private sector proponents must pay the carrying costs of holding their property as they await approval of their projects, while delays in public projects can hinder bond financing and lead to increased costs through rate increases. *Id.*

15. *Id.*

16. *Id.*

17. 194 P.3d 344 (Cal. 2008).

II. OVERVIEW OF CEQA AND ITS SCOPE

A. Purposes of CEQA

CEQA is a comprehensive legislative scheme designed to provide long-term protection to California's environment.[18] As the statutory language sets forth, the California legislature found and declared that it is the state's policy to "[d]evelop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state."[19] Other closely related policies include providing Californians with clean air and water, enjoyment of aesthetic, scenic and historical environmental qualities, and freedom from excessive noise;[20] preserving fish and wildlife;[21] and requiring government agencies to develop standards and procedures to protect the environment.[22] In addition to these clear goals, the statutory language includes more complicated statements that may reveal a policy tension at the heart of CEQA. For example, CEQA includes statements of purpose that emphasize the importance of meeting residents' housing needs, which may directly conflict with the typical environmental protections that CEQA also embodies.[23] As this example indicates, the drafters of CEQA contemplated the need to balance efforts to protect the environment with other practical considerations that California residents face.[24] The California courts have also attempted to balance these competing goals, and CEQA's

18. Mountain Lion Found. v. Fish & Game Comm'n, 939 P.2d 1280, 1284 (Cal. 1997).

19. CAL. PUB. RES. CODE § 21001(a) (West 2007).

20. *Id*. § 21001(b).

21. *Id.* § 21001(c).

22. *Id.* § 21001(f).

23. The statutory language of CEQA states:

> [A]ll agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, *while providing a decent home and satisfying living environment for every Californian*.

Id. § 21000(g) (emphasis added). Furthermore, another stated policy of CEQA is to "[e]nsure that the long-term protection of the environment, *consistent with the provision of a decent home and suitable living environment for every Californian*, shall be the guiding criterion in public decisions." *Id.* § 21001(d) (emphasis added).

24. REMY ET AL., *supra* note 7, at 17.

extensive litigation history has produced the statute's predominant interpretive principle.

B. Interpreting CEQA

The California Supreme Court first interpreted CEQA's statutory framework in 1972 in *Friends of Mammoth v. Board of Supervisors*.[25] There, the court held that CEQA should be interpreted so as to afford "the fullest possible protection to the environment within the reasonable scope of the statutory language."[26] This holding—requiring the broad construction of CEQA's substantive and procedural requirements while simultaneously limiting that construction to what can be reasonably inferred from the text of the statute—captures the interpretive principle that has come to characterize CEQA analysis.[27] As an indication of the importance of this judicial principle, the *Friends of Mammoth* holding has been incorporated into the CEQA Guidelines' "Policies" section.[28]

Other indications of tension between the broad application of CEQA and a more limited interpretation of its applicability exist in the statutory language. For example, Section 21003(f) of the California Public Resources Code requires that:

> All persons and public agencies involved in the environmental review process be responsible for carrying out the process in the *most efficient, expeditious manner* in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment.[29]

25. 502 P.2d 1049 (Cal. 1972) (en banc).

26. *Id.* at 1056.

27. REMY ET AL., *supra* note 7, at 4.

28. CAL. CODE REGS. tit. 14, § 15003(f) (2011). Other relevant court cases that speak to this inherent tension in CEQA are *Laurel Heights Improvement Ass'n v. Regents of the University of California*, 864 P.2d 502 (Cal. 1993) and *Citizens of Goleta Valley v. Board of Supervisors*, 801 P.2d 1161 (Cal. 1990), which together provide the policy listed under title 14, section 15003(j) of the California Code of Regulations ("CEQA requires that decisions be informed and balanced. It must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development or advancement.").

29. CAL. PUB. RES. CODE § 21003(f) (West 2007) (emphasis added).

Additionally, section 21083.1 states:

> It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner *which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines*.[30]

Thus, *Friends of Mammoth*'s holding that CEQA be broadly construed to protect the environment is limited by any CEQA provision or adopted state CEQA guideline that explicitly restricts CEQA's breadth or requires the consideration of the economic costs of CEQA compliance.[31]

C. Procedures of CEQA Review and Policies of Environmental Impact Reports

A CEQA analysis begins with a public agency's initial determination as to whether a proposed activity is subject to environmental review or is exempt.[32] Once the agency deems an activity to be subject to CEQA, the initial procedural steps of the CEQA review process include the preparation of an initial study regarding the proposed activity and potential resulting impacts to the environment,[33] and a decision to prepare either a negative declaration, mitigated negative declaration, or EIR.[34] If an EIR is to

30. *Id.* § 21083.1 (emphasis added).

31. REMY ET AL., *supra* note 7, at 4–5.

32. An activity may be exempt from CEQA because it does not constitute a project, or because it fits within one of CEQA's designated exemptions. REMY ET AL., *supra* note 7, at 69–70; Selmi, *supra* note 3, at 960.

33. An initial study may take the form of a questionnaire, checklist, or narrative report regarding the characteristics of the proposed project or activity. tit. 14, §§ 15060, 15063, 15102, 15365.

34. If the lead agency determines that no significant environmental impacts will result from the proposed activity, a negative declaration may be adopted. A variation of the negative declaration is known as a "mitigated negative declaration," which finds that no significant environmental impacts will result after certain specified mitigation measures are imposed on the project. If significant environmental impacts may exist that cannot be mitigated, an EIR must be prepared. *See* PUB. RES. §§ 21064, 21064.5, 21080(c); tit. 14, §§ 15002(k)(2), 15070–15075, 15369.5, 15371. *See also* REMY ET AL., *supra* note 7, at 249–50, 312–13 (describing negative declarations, mitigated negative declarations, and applicable thresholds for determining the significance of environmental impacts).

be prepared, the lead agency[35] issues a notice of preparation of an EIR,[36] prepares a draft EIR,[37] and circulates the draft EIR for public review and comment.[38] After the close of the public comment period, the lead agency prepares written responses to the comments on the draft EIR and prepares a final EIR incorporating these written comments and responses.[39] In conjunction with the agency's approval of the proposed project, the agency must certify the final EIR,[40] which includes the adoption of findings regarding CEQA compliance,[41] the adoption of a mitigation reporting or monitoring program,[42] and the potential adoption of a statement of overriding considerations.[43] After a final EIR is certified, a party objecting to the lead agency's CEQA determination may file a petition for a writ of mandate seeking injunctive relief from the courts.[44]

The purpose of the EIR is to identify the significant environmental impacts of a project, identify alternatives to the project, and, if possible, indicate ways that the significant impacts can be avoided.[45] As the "heart of CEQA," the EIR informs the public of the possible environmental impacts of the proposed

35. The lead agency is either the agency carrying out the proposed project or, in the case of a private project, the agency with the greatest responsibility for supervising or approving the project as a whole. tit. 14, §§ 15051(a), 15051(b)(1).

36. PUB. RES. § 21080.4(a); tit. 14, §§ 15082, 15375.

37. PUB. RES. § 21100; tit. 14, §§ 15084, 15086, 15120–15131.

38. PUB. RES. § 21091; tit. 14, §§ 15072–15073, 15087, 15105, 15200–15209.

39. PUB. RES. §§ 21091(d)(2), 21104, 21153; tit. 14, §§ 15072–15073, 15087, 15105, 15200–15209.

40. To certify a final EIR, a lead agency must conclude that the EIR has been completed in compliance with CEQA, that the agency has reviewed and considered the information in the EIR prior to approving the project, and that the final EIR reflects the lead agency's independent judgment and analysis. PUB. RES. § 21082.1(c)(3); tit. 14, § 15090(a).

41. PUB. RES. § 21081(a); tit. 14, §§ 15091(a), 15096(h).

42. PUB. RES. §§ 21081.6(a)(1), 21081.7; tit. 14, §§ 15091(d), 15097.

43. Mitigation monitoring programs are the mechanisms by which agencies ensure compliance with the mitigation measures included in the certified EIR. *See* PUB. RES. § 21081.6(a); tit. 14, §§ 15091(d), 15097(a); REMY ET AL., *supra* note 7, at 391–92. A statement of overriding considerations may be adopted by a public agency when it finds that a significant environmental impact cannot be mitigated to a level of insignificance, but that the effects of those impacts are outweighed by other identified benefits. PUB. RES. § 21081(b); tit. 14, § 15093.

44. A detailed discussion of the mechanism of legal challenges to CEQA approvals is outside the scope of this Note. For an overview of this process and related issues, see REMY ET AL., *supra* note 7, at 887–921.

45. *See* REMY ET AL., *supra* note 7, at 35–36; *see also* PUB. RES. § 21061 (defining environmental impact report).

project.[46] Accordingly, it fosters "informed self-government" while protecting the environment.[47] Importantly, environmental review is intended to inform the public and public officials "of the environmental consequences of their decisions *before* they are made."[48] Therefore, EIRs are to "be prepared *as early as feasible* in the planning process to enable environmental considerations to influence project program and design and *yet late enough* to provide meaningful information for environmental assessment."[49]

Generally, deciding when to prepare an EIR is left to the agency's reasonable judgment.[50] Agencies should avoid preparing an EIR too early, for a proposed project may not be sufficiently well defined for its environmental impacts to be fully known.[51] However, agencies should also avoid waiting too long to prepare an EIR, for the public and the lead agency are supposed to understand a project's potential environmental impacts so that they can make informed decisions regarding the project before it is approved.[52] At the heart of this timing decision is the question of when a project arises for purposes of CEQA.

D. CEQA's Applicability to Projects

CEQA applies to "discretionary[53] projects proposed to be carried out or approved by public agencies . . . ."[54] This statutory language requires a two-part analysis to determine whether CEQA applies to

46. tit. 14, § 15003(a) (citing Cnty. of Inyo v. Yorty, 108 Cal. Rptr. 377 (Ct. App. 1973)).

47. *See* Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 764 P.2d 278, 283 (Cal. 1988).

48. Citizens of Goleta Valley v. Bd. of Supervisors, 801 P.2d 1161, 1167 (Cal. 1990).

49. tit. 14, § 15004(b) (emphasis added).

50. REMY ET AL., *supra* note 7, at 17. "The question of timing of the preparation of an EIR [is] basically an administrative decision to be made by a public agency consistent with the overall objectives of CEQA." Mount Sutro Def. Comm. v. Regents of the Univ. of Cal., 143 Cal. Rptr. 365, 374 (Ct. App. 1978).

51. REMY ET AL., *supra* note 7, at 17. "[W]here future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences." Lake Cnty. Energy Council v. Cnty. of Lake, 139 Cal. Rptr. 176, 178 (Ct. App. 1977).

52. *Laurel Heights Improvement Ass'n*, 764 P.2d at 282–83 (Cal. 1988).

53. A discretionary action requires "deliberation, decision and judgment," while a ministerial action is equivalent to the "performance of a duty in which the officer is left no choice of his own." Johnson v. State, 447 P.2d 352, 356–57 (Cal. 1968) (quoting Morgan v. Cnty. of Yuba, 41 Cal. Rptr. 508, 511 (Ct. App. 1964)); *see also* tit. 14, §§ 15357, 15369 (defining discretionary and ministerial actions, respectively).

54. CAL. PUB. RES. CODE § 21080(a) (West 2007).

an agency action—first, whether the agency has decided to approve an action, and second, whether the action constitutes a project.[55]

While CEQA's statutory language does not define approval, the CEQA Guidelines define the term as "the decision by a public agency *which commits the agency to a definite course of action* in regard to a project intended to be carried out by any person."[56] For private projects, "approval occurs upon the *earliest* commitment to issue or the issuance by the public agency of a discretionary contract . . . or other form of financial assistance . . . or other entitlement for use of the project."[57] As the courts have interpreted this language, an approval occurs when an agency has in fact foreclosed any meaningful options to going forward with the project.[58]

CEQA's statutory language defines a project as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . ."[59] The CEQA Guidelines add some significant detail in defining a project as "the *whole* of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . ."[60] However, this is far from a clear standard and regularly causes concerns for agencies and project proponents.[61] The environmental review process can be very lengthy and very expensive. As a practical matter, some project proponents will require some form of preliminary indication from a city or other agency that their project may at least be potentially feasible before the proponents decide to move forward with a formal project

55. Lexington Hills Ass'n v. State, 246 Cal. Rptr. 97, 104–06 (Ct. App. 1988); REMY ET AL., *supra* note 7, at 70. Note also that actions deemed to be exempt are not subject to CEQA. An action may be exempt because it does not constitute approval of a project, or because it is categorically or statutorily exempt from CEQA. For more discussion of categorical exemptions, which are beyond the scope of this Note, see REMY ET AL., *supra* note 7, at 69–70, and Deborah Behles, *Why CEQA Exemption Decisions Need Additional Notice Requirements*, 33 ENVIRONS ENVTL. L. & POL'Y J. 111 (2009).

56. tit. 14, § 15352(a) (emphasis added).

57. *Id.* § 15352(b) (emphasis added).

58. REMY ET AL., *supra* note 7, at 71 (citing tit. 14, §§ 15004(b), 15352).

59. PUB. RES. § 21065.

60. tit. 14, § 15378(a) (emphasis added).

61. *See* REMY ET AL., *supra* note 7, at 77–82.

proposal and request for agency approval.[62] However, an agency's indication of support for a project may rise to the level of a project approval if it commits the agency to a sufficiently definite course of action.[63] As a result of such preliminary agency support, CEQA review may be required for a project that is not yet fully realized, which may be contrary to the purposes of CEQA.[64] The precise moment when a project comes into existence for CEQA purposes and what might constitute an agency's approval of such a project has been consistently disputed and litigated since CEQA's adoption.[65]

E. Previous Court Interpretations of Project Approvals

California CEQA court decisions have marked the beginning of the "whole of the action" as the point at which the first "essential step culminating in an action that may affect the environment" occurs.[66] In *Bozung v. Local Agency Formation Commission of Ventura County*,[67] the California Supreme Court held that a proposed annexation of property by a city required an EIR, even though a development project proposed for the property would receive its own CEQA review at some unspecified time in the future.[68] In reaching this decision, the court held that the purpose of CEQA is:

> [N]ot to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations. At the very least, however, the People have a right to expect that those who must

62. Application of the League of California Cities to File Amicus Curiae Brief in Support of Defendant/Respondent City of West Hollywood; and Proposed Brief of Amicus Curiae at 7–8, Save Tara v. City of W. Hollywood, 194 P.3d 344 (Cal. 2008) (No. S151402) [hereinafter Brief for League of California Cities].

63. tit. 14, § 15352(a).

64. "[W]here future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences." Lake Cnty. Energy Council v. Cnty. of Lake, 139 Cal. Rptr. 176, 178 (Ct. App. 1977).

65. *See* REMY ET AL., *supra* note 7, at 16–18.

66. Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ., 654 P.2d 168, 180 (Cal. 1982) (citing Bozung v. Local Agency Formation Comm'n, 529 P.2d 1017 (Cal. 1975)); *see also* tit. 14, § 15378(a) (defining project).

67. 529 P.2d 1017 (Cal. 1975) (en banc).

68. *Id.* at 1029–30.

> decide will approach their task neutrally, with no parochial interest at stake.[69]

The court reaffirmed *Bozung* in *Fullerton Joint Union High School District v. State Board of Education*.[70] The court found that the State Board of Education must analyze the environmental effects of creating a new unified school district before dividing an existing district and must complete this analysis before authorizing an election by voters in the proposed new district.[71]

Following the court's decisions in *Bozung* and *Fullerton*, several California Court of Appeal decisions took up the issue of when a project approval had occurred, with varying results. In *Stand Tall on Principles v. Shasta Union High School District*,[72] a school board passed resolutions recommending a specific development site and authorizing the purchase of that property for a new high school, "contingent upon completion of the EIR process and final state approval."[73] The court of appeal held that the school board had not "approved" the project because the resolutions did not "commit the District to a *definite course* of action."[74] Conversely, in *Citizens for Responsible Government v. City of Albany*,[75] the court of appeal stopped a city from entering into a development agreement for a horse-racing track without first completing CEQA review.[76] The agreement contained provisions for a CEQA review process, but called for the review to be performed after voters approved the agreement and several related gambling measures.[77] In reaching its decision, the court found that the development agreement gave the developer of the racetrack a vested right to proceed with the project "within certain clear and narrowly defined parameters."[78] Additionally, notwithstanding the election provisions, the city had

69. *Id.* at 1030.

70. 654 P.2d 168 (Cal. 1982) (en banc).

71. *Id.* at 171.

72. 1 Cal. Rptr. 2d 107 (Ct. App. 1991).

73. *Id.* at 108.

74. *Id.* at 111. Note that the court suggested that an EIR would be required before the school district actually acquired the property. *Id.*

75. 66 Cal. Rptr. 2d 102 (Ct. App. 1997).

76. *Id.* at 116.

77. *Id.* at 105–06.

78. *Id.* at 111.

"committed . . . to a definite course of action"[79] and had "contracted away its power to consider the full range of alternatives."[80]

One year after *Citizens for Responsible Government*, another court of appeal decision swung back in the other direction in *City of Vernon v. Board of Harbor Commissioners.*[81] Prior to adopting a final EIR, the board adopted a reuse plan for certain Navy properties and entered into a statement of intent with a shipping company regarding the parties' intent to enter into a lease for the properties.[82] The trial court found that the board had not complied with CEQA because project approval was a "foregone conclusion . . . throughout the CEQA process."[83] However, the court of appeal reversed, finding that the reuse plan could be amended if necessary to mitigate environmental impacts identified in the project's EIR and that the statement of intent to enter into a lease did not create a vested right.[84]

In 2007, the court of appeal heard four CEQA cases regarding whether an agency action constituted approval of a project. Each of these four cases also involved agreements between cities and project proponents conditioned on future compliance with CEQA. Of these four cases, *Concerned McCloud Citizens v. McCloud Community Services District*[85] (*McCloud*) and *Save Tara v. City of West Hollywood*[86] would prove to be the most significant.[87]

In *McCloud*, a citizens' group filed a petition for a writ of mandate regarding an agreement between the McCloud Community

79. *Id.* at 114.

80. *Id.* at 115.

81. 74 Cal. Rptr. 2d 497 (Ct. App. 1998).

82. *Id.* at 500.

83. *Id.* at 501.

84. *Id.* at 503–04.

85. 54 Cal. Rptr. 3d 1 (Ct. App. 2007).

86. 54 Cal. Rptr. 3d 856 (Ct. App. 2007).

87. The two other appellate court cases from 2007 were *Friends of the Sierra Railroad v. Tuolumne Park and Recreation District*, 54 Cal. Rptr. 3d 500 (Ct. App. 2007), and *County of Amador v. City of Plymouth*, 57 Cal. Rptr. 3d 704 (Ct. App. 2007). In *Friends of the Sierra Railroad*, the court found that sale of land, to allegedly facilitate a proposed casino development that was conditioned on future compliance with CEQA, was not itself a project subject to CEQA, because no particular development plans had been announced and because any discussion of proposed development in conjunction with the sale of the property was too speculative to trigger CEQA analysis. 54 Cal. Rptr. 3d at 501, 504–05. In *County of Amador*, the court found that a municipal services agreement between the city and Indian tribe, which would have required the city to vacate a portion of a public road to provide access to a proposed casino, committed the city to a definite course of action, and thereby constituted an approval of a project requiring CEQA analysis. 57 Cal. Rptr. 3d at 706–07.

Services District, which supplied the town of McCloud with its drinking water supply, and Nestle Waters North America. The agreement, which would have run for an initial fifty-year period with a guaranteed right of renewal for another fifty years, provided that the district would sell 1,600 acre-feet of spring water each year to Nestle for bottling and sale.[88] The agreement required Nestle to comply with a number of conditions, including locating a suitable site for a required bottling plant, designing a new separate water collection and delivery system so as not to interrupt the district's other water delivery obligations, and obtaining all required discretionary permits and performing environmental review under CEQA.[89]

The *McCloud* trial court found that the agreement constituted an "initial and integral stage of a project within the meaning of CEQA,"[90] because the approval of the agreement amounted to "the creation of an entitlement for Nestle and committed the District to a definite course of action."[91] On review, the court of appeal agreed that Nestle's "ultimate" purchase of spring water—which would involve constructing a new local bottling facility, trucking or piping the water to this proposed facility, potentially digging new groundwater wells, and other related activities—would "amount to a project requiring CEQA compliance."[92] However, the court found that the execution of the agreement did not constitute an "approval" of a project, nor did it commit the district to a particular course of action, due to the multiple contingencies in the agreement, the fact that neither party was bound to the agreement until CEQA review and compliance were completed, and the fact that the district was not prevented from considering (and imposing as conditions of approval) all feasible mitigation measures.[93]

In *Save Tara v. City of West Hollywood*,[94] the court of appeal rejected a city's approval of an agreement conditioned on future CEQA review. The facts of *Save Tara* recalled many of the same

88. *McCloud*, 54 Cal. Rptr. 3d at 3–6.
89. *Id.* at 3–4.
90. *Id.* at 5.
91. *Id.*
92. *Id.* at 8.
93. *Id.*
94. 54 Cal. Rptr. 3d 856 (Ct. App. 2007).

concepts that were at issue in *McCloud*, but the appellate decisions were in clear conflict with each other.[95] Recognizing this analytical divide, the California Supreme Court granted review to *Save Tara*.

III. THE *SAVE TARA* DECISION AND THE NEW LANDSCAPE OF CEQA

A. Save Tara *Case Background and Holding*

In 1997, the City of West Hollywood (the "City") received a donation of a large colonial-revival-style house located at 1343 North Laurel Avenue.[96] The house was originally constructed in 1923 and was designated as a local cultural resource in 1994.[97] At the time of its donation to the City, the house had been converted into four apartment units.[98] In 2003, two nonprofit community housing developers proposed the development of approximately thirty-five low-income housing units for senior citizens on the property and approached the City for assistance with the developers' grant application to the United States Department of Housing and Urban Development (HUD).[99] On June 9, 2003, the city council approved the granting of a purchase option to the developers in order for the developers to demonstrate to HUD that they were in control of the project site.[100] In a June 10, 2003, letter in support of the HUD grant application, the city manager stated that the City had approved the sale of the property to the developers at a negligible cost and would commit an additional $1 million toward development costs.[101]

95. Todd W. Smith, Save Tara *and* Concerned McCloud Citizens*: When Do Conditional Agreements Require CEQA Review?*, ABA ENVTL. IMPACT ASSESSMENT COMMITTEE NEWSL., May 2008, at 11, 12.

96. Save Tara v. City of W. Hollywood, 194 P.3d 344, 349 (Cal. 2008). The house had been nicknamed "Tara" by longtime owner and resident Elsie Weisman (whose favorite movie was *Gone with the Wind*) for its look of a grand Southern manor. Allegra Allison, Op-Ed., *Accidental Activist*, WEHONEWS.COM (Apr. 22, 2010), http://wehonews.com/z/wehonews/archive/page.php?articleID=4703.

97. *Save Tara*, 194 P.3d at 349.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

In late 2003, HUD approved a $4.2 million grant to the developers.[102] The City sent e-mail and newsletter announcements to residents regarding the grant, explaining that it "will be used to build 35 affordable senior residential units, rehabilitate a historic house, and provide a public pocket park on Laurel Avenue."[103] Shortly after the City announced the grant award, a City housing manager told a tenant of the property that she would be relocated in connection with the new project.[104]

In April 2004, the City announced an upcoming public hearing to consider the approval of an agreement to facilitate the development of the project, which would be "subject to environmental review" and other required approvals.[105] A group of City residents, calling themselves "Save Tara," wrote to the City to urge that CEQA review be performed before the City approved any new agreement or made any further commitment to the proposed project.[106] At its May 2004 meeting, the City proceeded to approve the proposed agreement. This agreement expressly withheld the City's commitment to a definite course of action regarding the project, and explicitly conditioned the property's final conveyance on the satisfaction of "all applicable requirements of CEQA."[107] Notably, however, the agreement allowed the city manager to waive these conditions.[108] In July 2004, Save Tara filed a petition for a writ of mandate; the group alleged that the City had violated CEQA by failing to prepare an EIR prior to its May approval of the conditional agreement.[109]

The trial court denied Save Tara's petition, but the court of appeal later reversed, finding that the proposed project was well-enough defined so as to allow meaningful analysis under CEQA and

102. *Id.*

103. *Id.* The e-mail described the project as a "win-win-win" for the city. *Id.*

104. *Id.* at 350.

105. *Id.*

106. *Id.*

107. *Id.* at 355. This agreement was identified as a "Conditional Agreement for Conveyance and Development of Property." *Id.* at 350. It contained details of the exterior and interior design of the project, the phases of development, the City's conveyance of the property, and a City loan to the developer. *Id.*

108. *Id.* at 351.

109. In August 2004, the City executed a revised agreement that removed the city manager's discretion to waive the contingent CEQA analysis. *Id.* This did not cause the Save Tara organization to withdraw their lawsuit. *Id.*

that this analysis should have occurred between the awarding of the HUD grant in 2003 and the City's 2004 approval of the conditional agreement.[110] Attempting to define a bright-line rule, the court of appeal held that *any* agreement, whether conditional or unconditional, would constitute an approval requiring CEQA analysis if the project were sufficiently well defined at the time of the agreement.[111] In 2007, the California Supreme Court granted the City's petition for review to take up the substantive question of whether an EIR was required before the City's approval of the conditional agreement.[112]

1. Supreme Court's Review of EIR Timing Requirements

The court first looked at the CEQA Guidelines' statement that an "approval" of a private project "occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan or other form of financial assistance . . . ."[113] The court also noted that the Guidelines require agencies to balance the timing of CEQA analysis—an agency should not require an EIR until the project is sufficiently defined to permit a meaningful environmental assessment, but should not delay preparing an EIR for so long that it fails to serve its intended function as a tool to aid an agency in making a fully informed decision on a project.[114]

On review, the court determined that Save Tara's challenge to the City both postponing its EIR preparation and making CEQA analysis of the project contingent on future conditions involved predominantly procedural issues.[115] In addition, the court framed this timing question by asking whether the City's approval of the

110. *Id.* at 352.

111. *Id.* at 358.

112. *Id.* at 352. Note that while this lawsuit was making its way through the courts, the City did in fact certify an EIR for the project in 2006, causing one court of appeal justice to write a dissenting opinion, arguing that Save Tara's suit was moot. The supreme court agreed to hear the City's mootness argument but quickly dismissed it, noting that no irreversible changes had occurred to the property during the pendency of the lawsuit, and that Save Tara could still receive the relief it was seeking (i.e., for the City to rescind its approvals of the project). *Id.* at 352–53.

113. CAL. CODE REGS. tit. 14, § 15352(b) (2011).

114. *Save Tara*, 194 P.3d at 353–54 (citing tit. 14, § 15004(b)).

115. *Id.* at 355.

conditional agreement was in fact a project for CEQA purposes.[116] As a result, the court could independently review the City's action on a de novo basis with heightened scrutiny.[117] As the court explained, this review ensures that agencies cannot evade the central purposes of CEQA by establishing procedures that allow for the approval of a project to occur prior to the EIR preparation.[118] Therefore, the court needed to closely examine the specifics of the City's conditional agreement.

2. Was the City's Conditional CEQA Compliance Allowed?

The California Supreme Court did not follow the court of appeal's holding that any agreement, conditional or unconditional, would necessarily trigger CEQA analysis.[119] Nor did it agree with the City that the conditional agreement in question satisfied CEQA, or that an agency commitment constituting a CEQA approval should be limited to unconditional agreements that irrevocably vest development rights and bind the agency to a definite course of action.[120] Instead, the court adopted an intermediate test. It held that while a CEQA compliance condition can be a legitimate ingredient in a "preliminary public-private agreement for exploration of a proposed project" if the agreement, "viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project," the insertion of a CEQA compliance condition will not prevent the agreement from being considered an approval requiring CEQA review.[121]

The court justified its holding by noting that if CEQA analysis were only limited to unconditional agency commitments that vested specific development rights for a project, by the time such actions occur, the project may have already acquired so much "bureaucratic

116. *Id.* (citing Muzzy Ranch v. Solano Cnty. Airport Land Use Comm'n, 160 P.3d 116 (Cal. 2007)).

117. *Id.* (citing Citizens of Goleta Valley v. Bd. of Supervisors, 801 P.2d 1161 (Cal. 1990), and Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 150 P.3d 709 (Cal. 2007)).

118. *Id.* ("While an agency may certainly adjust its rules so as to set '[t]he exact date of approval,' . . . an agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR." (alteration in original) (citation omitted)).

119. *Id.* at 358–59.

120. *Id.* at 360.

121. *Id.* at 356.

and financial momentum" that a strong incentive would exist to ignore environmental concerns.[122] Additionally, postponing the EIR process until a binding development agreement exists would undermine CEQA's goal of demonstrating to the public that the environmental implications of a project have in fact been analyzed.[123] Instead, such postponement creates a risk that the EIR will be viewed as a post hoc rationalization of the agency's action.[124]

3. Did the City Approve or Commit to the Project?

To apply its new intermediate test, the court stated that the terms of the agreement itself, as well as the surrounding circumstances, should be analyzed to determine whether the City committed itself to the project.[125] Applying this approach to the facts of the case, the court found that the City's May and August agreements showed commitment to the project.[126] The City repeatedly stated that the project would be developed as outlined in the HUD application, and allowed a nearly $500,000 loan to the developers that was not conditioned on CEQA compliance and would not be repaid if the City did not give final approval to the project.[127] Furthermore, the May agreement limited the City's discretion over the CEQA process by granting the city manager the authority to waive CEQA requirements.[128] Although this provision was revised in the August agreement so that the city manager no longer had the authority to determine or waive CEQA compliance, the court held that the city council's prior approval of the May agreement "had shown a willingness to give up further authority over CEQA compliance in favor of dependence on the city manager's determination."[129] Finally, the agreements included language that the "'requirements of CEQA' be 'satisfied,'" raising questions as to whether the City would be able

122. *Id.* at 358 (citing Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 764 P.2d 278 (Cal. 1988)).

123. *Id.*

124. *Id.* at 359–60 (citing Citizens for Responsible Gov't v. City of Albany, 66 Cal. Rptr. 2d 102 (Ct. App. 1997)).

125. *Id.* at 360.

126. *Id.* at 361.

127. *Id.*

128. *Id.*

129. *Id.* at 362.

to reject the project on substantive grounds even if it found the EIR legally adequate.[130]

Furthermore, the court found evidence of the City's approval of the project in the overall circumstances surrounding the conditional agreement. Specifically, the court pointed to the City's public e-mails and newsletters unequivocally advancing support for the project, preliminary tenant relocation actions, and willingness to condition its obligation to convey the property based on whether CEQA was satisfied as "reasonably determined" by the city manager.[131] Ultimately, the provisions in the City's agreements and the surrounding factual circumstances convinced the court that the City had improperly "committed itself to a definite course of action regarding the project before fully evaluating its environmental effects."[132]

4. Distinction from Precedent Decisions

The *Save Tara* court briefly discussed the *Stand Tall* and *McCloud* decisions, and "without questioning the[ir] correctness" on their facts, noted that each of those cases involved particular circumstances that limited their reaches.[133] According to the court, the agreement at the center of *McCloud* did not contain sufficiently definite detail regarding the proposed water bottling plant, and this lack of detail would cause any environmental analysis to be premature and speculative.[134] Thus, the court's reading of *McCloud* requires a court to look at issues of "definiteness" when it is examining an agency's commitment to a project.

In distinguishing *Stand Tall*, the *Save Tara* court noted that this case involved a property purchase agreement that may, "as a practical matter in a competitive real estate market," sometimes need to be initiated before completing CEQA analysis.[135] In fact, Section 15004(b)(2)(A) of the CEQA Guidelines makes a specific exception for these types of purchase agreements.[136] While agencies may not

130. *Id.* at 361.
131. *Id.* at 362–63.
132. *Id.* at 363.
133. *Id.* at 356.
134. *Id.* at 356–57.
135. *Id.* at 357.
136. CAL. CODE REGS. tit. 14, § 15004(b)(2)(A) (2011).

"make a decision to proceed with the use of a site for facilities which would require CEQA review" before conducting such review, agencies are explicitly authorized to "designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance."[137] The *Save Tara* court generously stated that the CEQA Guidelines' exception for land purchases is a "reasonable interpretation of CEQA," but warned that this exception, which *Stand Tall* relied on, should not "swallow the general rule (reflected in the same regulation) that a development decision having potentially significant environmental effects must be *preceded*, not *followed*, by CEQA review."[138] The *Save Tara* decision thus cabins both the previously clearly understood meaning of Section 15004(b)(2)(A) of the CEQA Guidelines and the precedent holdings in *McCloud* and *Stand Tall*, and imposes its new fact-specific inquiry on future conditional agreements.

5. Is the *Save Tara* Test Workable?

The *Save Tara* court explicitly refrained from establishing a bright-line rule that would require *any* agreement pertaining to the development of a well-defined project to be subject to CEQA, and the court declined to limit its holding to unconditional agreements that irrevocably vest development rights.[139] As a result, the *Save Tara* test that the court required is a fact-specific inquiry where an agreement's conditioning of final approval on CEQA compliance is relevant but not determinative of whether the agreement constitutes a project for CEQA purposes.[140] The court did acknowledge that cities, particularly with respect to projects on public land, often reach arrangements with potential developers—including purchase option agreements, memoranda of understanding, and exclusive negotiating agreements—before they decide on the specifics of a project.[141] However, because the court declined to set forth a clear threshold for analyzing these particular forms of agreement to determine whether such agreements would constitute approval of a project, it remains

137. *Save Tara*, 194 P.3d at 357 (quoting tit. 14, § 15004(b)(2)(A)).

138. *Id.*

139. *Id.* at 360.

140. *Id.*

141. *Id.* at 359.

unclear when, for example, a redevelopment agency must undertake environmental review in connection with an exclusive negotiation agreement or when a transportation agency leasing land for development must undertake environmental review if the agency has publicly stated its support for a future project or provided any other sort of tangible support.

B. Subsequent Application of the Save Tara *Test*

California courts of appeal have subsequently applied the flexible *Save Tara* test in several cases, and each decision proves that determining whether a development-related agreement constitutes a project approval under CEQA is highly dependent on the particular facts of the agreement.

In *RiverWatch v. Olivenhain Municipal Water District*,[142] a water district entered into an agreement with a county agency to truck water to a landfill site without considering an EIR that the agency prepared for the landfill project.[143] Following *Save Tara*, the court of appeal examined the specific terms of the agreement and the circumstances surrounding the agreement.[144] It found that the agreement itself constituted an approval of the landfill project because it set forth specific details about the district's obligation to deliver water and construct roadway improvements to allow the deliveries.[145]

The court's finding of a CEQA violation in the *RiverWatch* case contrasts with the courts of appeal's other applications of the *Save Tara* test to date. In *Parchester Village Neighborhood Council v. City of Richmond*,[146] a city entered into a municipal services agreement with a tribe, which required the tribe to pay the city for certain fire, police, and public works services, in return for the city's support of the tribe's casino application to federal authorities.[147]

142. 88 Cal. Rptr. 3d 625 (Ct. App. 2009).

143. As a responsible agency, the water district had a responsibility to consider those aspects of the project that were subject to its jurisdiction. *Id.* at 638–39 (citing CAL. CODE REGS. tit. 14, § 15381 (2011)).

144. *Id.* at 644.

145. *Id.* The court also examined the district's actions while reviewing and approving the agreement, and found that these actions constituted a "commitment" to the project. *Id.*

146. 105 Cal. Rptr. 3d 736 (Ct. App. 2010).

147. *Id.* at 739–40.

While the agreement did not require the city to commit to any changes in the environment, it provided that if the city did make any such changes, the city would perform CEQA analysis.[148] In addition to finding that the casino was not a project of the city's within the meaning of CEQA,[149] the court held that this agreement simply constituted a city-funding mechanism and did not represent a commitment to any particular project at any particular time.[150]

The court of appeals upheld another preliminary agreement in *City of Santee v. County of San Diego*.[151] There, the city and county executed an agreement that identified two potential sites for a prison reentry facility, acknowledged that the county would have preferential access to state funding if one of the sites was selected, and committed the county to convey land if one of the sites was selected.[152] The agreement also contained a contingent CEQA analysis provision.[153] The court held that this agreement did not commit the county to a definite course of action because it did not select any single location for the reentry facility, did not reference any particular jail facility for which the funding would be used, and did not obligate the county to select any of the sites.[154]

To date, a court of appeal's most detailed application of the *Save Tara* test has been *Cedar Fair L.P. v. City of Santa Clara.*[155] In conjunction with the planned development of a new football stadium for the San Francisco 49ers, the city and its redevelopment agency adopted by public vote a thirty-nine-page "stadium term sheet" that described a well-defined proposed project.[156] The term sheet specified various city obligations pertaining to the proposed stadium, including the responsibility of creating the stadium authority to build, own, and operate the stadium, and to form a community facilities

148. *Id.* at 740.

149. *Id.* at 742 ("In our view, the Tribe's casino development does not constitute a 'project' of the City under CEQA because the City has no legal authority over the property upon which the casino will be situated.").

150. *Id.* at 745.

151. 111 Cal. Rptr. 3d 47 (Ct. App. 2010).

152. *Id.* at 49.

153. *Id.*

154. *Id.* at 54–55.

155. 123 Cal. Rptr. 3d 667 (Ct. App. 2011).

156. *Id.* at 679–81. The term sheet described the proposed stadium's location, seating capacity, ownership structure, lease terms, and anticipated economic benefits to accrue to the city. *Id.* at 679.

district for special taxation purposes.[157] City officials publicly discussed the possibility of a new stadium in the city, and the city was allegedly a vocal and vigorous advocate of the proposed project.[158]

However, the term sheet also explicitly stated that its purpose was to memorialize *preliminary* terms that had been negotiated to date.[159] Furthermore, the term sheet provided that the stadium shall not proceed unless full agreements were executed "based upon information produced from the CEQA environmental review process . . . ."[160] The term sheet itself and the agenda reports from the city's approval of the term sheet indicate that the city retained the flexibility to approve a different project, or no project at all.[161] Finally, the term sheet explicitly stated that it was not intended "to create any binding contractual obligations" nor "commit any Party to a particular course of action."[162]

In reviewing the term sheet and the city's actions, the court of appeal applied the *Save Tara* test and closely compared the facts of that case to the *Cedar Fair* facts. The court acknowledged that "[d]etermining on which side of the *Save Tara* line the term sheet falls is not an easy judgment call,"[163] and it recited the extensive project details that were contained in the term sheet.[164] The court ultimately held, however, that the term sheet merely memorialized various preliminary negotiating terms and only mandated that the parties use the term sheet as the framework for future negotiations.[165] Therefore, approval of the term sheet did not trigger CEQA review.

These opinions show that the fact-specific, open-ended *Save Tara* test provides flexibility for project proponents and detractors to make arguments regarding CEQA compliance. It also demonstrates a lack of certainty regarding whether agency actions may be subject to CEQA. Although the *Save Tara* decision noted that certain

157. *Id.* at 680.
158. *Id.* at 683.
159. *Id.* at 679.
160. *Id.*
161. *Id.* at 681.
162. *Id.*
163. *Id.* at 679.
164. *Id.* at 679–81.
165. *Id.* at 681.

preliminary agreements with potential developers may not trigger the expensive EIR process and that certain agreements have been upheld in *Parchester*, *Santee*, and *Cedar Fair*, the lack of a bright-line test means that alleged violations of CEQA under a *Save Tara* test will likely continue to be litigated on a case-by-case basis.

IV. *SAVE TARA*'S UNCERTAINTY HAS HIGH COSTS

Nonprofit affordable-housing providers frequently use conditional agreements, such as the agreement at issue in *Save Tara*, to demonstrate that they have sufficient "site control" over proposed affordable-housing sites to secure the funds that are needed to go through the lengthy and costly process of seeking land use entitlements and participating in the review process that CEQA requires.[166] Rather than constituting approval of a project, "these agreements merely give nonprofit, affordable-housing providers the ability to chase financing for the proposed project and, once obtained, to maintain it during the often very lengthy land use entitlement and CEQA assessment process."[167] While previous court decisions interpreting Section 15004(b)(2)(A) of the CEQA Guidelines, including the *Stand Tall* decision, may have once been relied on to exempt such land acquisition agreements, now a court must perform a fact-specific inquiry into potential "commitment" under *Save Tara*. As a result, affordable-housing providers may find that cities are less willing to enter into such agreements, thereby hindering housing developers from successfully obtaining funding. Moreover, following *Cedar Fair*, these agreements may need to be limited to preliminary negotiating points and contain a basic level of flexibility regarding the scope of the proposed project. In order to restructure precedent agreements so as to avoid any semblance of city or agency "precommitment" to a project, affordable-housing developers will be required to expend more of their limited time and resources on such predevelopment activities, which may delay or

166. Application of Housing California and the Southern California Association of Nonprofit Housing to File Amici Curiae Brief in Support of Appellant City of West Hollywood; Proposed Brief of Amici Curiae at 2, Save Tara v. City of W. Hollywood, 194 P.3d 344 (Cal. 2008) (No. S151402) [hereinafter Brief for Housing California].

167. *Id.* at 11.

otherwise obstruct the ultimate success of their proposed housing projects.

Additionally, beyond the scope of a specific agreement with a city or other agency, these providers must also demonstrate the feasibility of a proposed project to public agencies and potential funders, which requires the preparation of design concepts, financial proformas, and community outreach efforts.[168] If these materials are shared and made publicly available as part of an agency's decision to enter into a conditional agreement, they could become part of the "circumstances" that a court takes into account when it determines whether a project approval has occurred under *Save Tara*.

As a result, because the *Save Tara* test may require that such conditional agreements constitute some evidence of a project "approval," affordable-housing providers may be required to "devote their scarce resources to participating in CEQA review before they even know whether they can secure all of the funding required to pursue the affordable-housing projects or whether they will be permitted to construct on publicly-owned land."[169] This reprioritization will burden affordable-housing providers with substantial new barriers, making it even more difficult to provide needed housing for low-income populations.

Beyond affordable-housing projects, many cities offer processes to provide developers with predevelopment application consultations to assist the developers with their development-proposal submittals. Local governments often established these processes to meet the California Permit Streamlining Act.[170] Predevelopment submissions "typically contain conceptual site plans, square footage information for buildings, renderings, floor layouts, parking layouts, on-site traffic circulation, parking, space requirements, setbacks, building heights and other detailed information."[171] City staff, after looking at a developer's submission, "can then provide preliminary review and

168. *Id.* at 8–9.

169. *Id.* at 3.

170. CAL. GOVT. CODE §§ 65920–65964 (West 2009). The Permit Streamlining Act attempts to provide relief for project applicants by prohibiting protracted and unjustified delays in the processing of permit applications. *Id.* (explaining the purpose of the Permit Streamlining Act in the statute's "Notes of Decisions"). For a discussion of the Permit Streamlining Act's relation to CEQA, see REMY ET AL., *supra* note 7, at 707–26.

171. Brief for League of California Cities, *supra* note 62, at 7–8.

feedback."[172] Some cities may even suggest public workshops and community presentations so the developer can gather input and potentially redesign the project to be more acceptable to the community. It may only be after all of these steps that the developer precisely determines what the proposed project may be, and that it formally submits an application for that specific project to the city for review, at which point the CEQA analysis will be performed.[173] If a city were to require CEQA review at the moment that a preliminary, speculative project is first presented to city staff, many potentially beneficial projects would fail to advance beyond this initial stage as a result of the delayed timeline and increased costs of CEQA compliance.

In addition to increased costs and development obstacles for project proponents, the *Save Tara* decision will result in additional costs to cities and public agencies. In order to comply with *Save Tara*, agencies have already revisited their internal policies and procedures regarding exclusive negotiating agreements and memoranda of understanding, and they have required these agreements to be less specific regarding proposed projects and more explicit regarding withholding approval until CEQA analysis is completed.[174] However, even after such revisions to internal policies are made, the threat of a *Save Tara* violation may compel an agency to prematurely undertake CEQA review "before a potential project's impacts can be reasonably foreseen."[175] Furthermore, the *Save Tara* holding gives project opponents a simple tool that they can use to threaten a public agency with a lawsuit, resulting in slower, more deliberate agency action.[176]

172. *Id*. at 8.

173. *Id.*

174. *See, e.g.*, Memorandum on Exclusive Negotiating Agreement and Predevelopment Loan with Affordable Housing Associates to the City of Sonoma City Council (May 20, 2009) [hereinafter Memorandum to the City of Sonoma City Council], *available at* http://www.sonomacity.org/Uploads/19121.pdf (city council staff report stating that a proposed exclusive negotiating agreement is explicitly contingent on future CEQA compliance and does not constitute approval of any defined project).

175. Brief for League of California Cities, *supra* note 62, at 2.

176. *See, e.g.*, Memorandum of Affordable Housing Loan Program Guidelines from Jennifer Estrella, Senior Fin. Analyst, City of Elk Grove, to City of Elk Grove City Council (Oct. 13, 2010), *available at* http://www.elkgrovecity.org/documents/agendas/attachments/attachments/2010/10-13-10_10.3.pdf (city staff recommending that the city council proceed cautiously with all future affordable housing predevelopment and loan application matters in light of the *Save Tara* decision).

It is not surprising that *Save Tara* has become a watchword for both project opponents and antidevelopment advocates and that many CEQA lawsuits that these parties threaten point to the arguments that the court set forth in *Save Tara*.[177] As a result, cities and public agencies have responded by changing internal policies regarding entering into conditional agreements.[178] Generally, in an effort to avoid the appearance of premature commitment to a project, cities and agencies have ensured that many preliminary conditional agreements now contain less specific information regarding potential projects, including less discussion of why the project may be beneficial to the city or agency.[179] In addition, agencies may become more reticent to make any public statements about projects that could be interpreted as supporting the project prior to any official approval.[180] One potential and undesirable cumulative effect of these changes is that less information may be publicly available regarding potential projects, in direct conflict with CEQA's purpose of informing the public of potential environmental issues.

The *Cedar Fair* decision indicates that a city or other public agency may approve a detailed preliminary agreement regarding a project without violating *Save Tara*, so long as the approval remains an "agreement to agree" that is nonbinding, that is conditioned on future CEQA review, and that preserves a city's flexibility regarding the project.[181] However, under the *Save Tara* test, the facts of each

177. *See, e.g.*, Letter from Amy L. White, Interim Exec. Dir., LandWatch Monterey Cnty., to Lou Calcagno, Chair, Monterey Cnty. Bd. of Supervisors (Apr. 28, 2009), *available at* http://www.landwatch.org/pages/issuesactions/coastal/042809bosletter.html (opposing any water-rights memorandum of agreement on the basis of an alleged *Save Tara* violation); *see also* Letter from We Are Marina Del Rey to L.A. Cnty. Reg'l Planning Comm'n (Oct. 21, 2009), *available at* http://www.wearemdr.com/projects/public-comments-letter-on-senior-uxury-retirement-hotel~print.shtml (opposing the conceptual approval of a proposed mixed-use project on the basis of an alleged *Save Tara* violation).

178. *See, e.g.*, Memorandum of Revised Joint Development Policies and Procedures from Nelia S. Custodio, Transp. Planning Manager, to the L.A. Cnty. Metro. Transp. Auth. (Oct. 14, 2009), *available at* http://boardarchives.metro.net/Items/2009/10_October/20091014P&PItem6.pdf (public agency staff report recommending changes to agency policies regarding exclusive negotiating agreements to make contingent CEQA compliance more explicit and to eliminate the checklist requirement for proposed project details).

179. *Id.*

180. *See, e.g.*, Memorandum on CEQA Analysis of KBRA and KHSA from Thomas P. Guarino, Cnty. Counsel, Office of Siskiyou Cnty. Counsel (Mar. 17, 2010), *available at* http://www.co.siskiyou.ca.us/BOS/DOCS/KBRA/All%20Parties%20and%20Persons_Release%20of%20CEQA%20Analysis%2003_17_10%20MEM%20with%20Analysis%20Attached.pdf.

181. Jennifer Hernandez et al., *California Appeals Court Offers Guidance on When an Agency's Agreement with a Developer Requires Environmental Review Under CEQA*, HOLLAND

potential project approval are unique, and the facts pertaining to the proposed development of a National Football League (NFL) stadium in *Cedar Fair*—a huge, politically advantaged project requiring years of negotiation between multiple parties—are very different from the facts typically surrounding smaller, less politically advantaged projects.[182] Given the political and economic momentum that can build up behind such large projects, the flexibility that the city retained to modify or reject the stadium project in *Cedar Fair* may not have seriously jeopardized the negotiations between the city, the NFL, and other stakeholders, while similar flexibility that a city or other public agency retains regarding a smaller project may threaten the necessary funding or political support for that project.[183] Accordingly, *Cedar Fair* provides guidance to cities and project applicants for drafting some preliminary agreements that are made conditional on CEQA compliance. Nevertheless, under *Save Tara*, a court may still determine that regardless of such conditional CEQA compliance language, a preliminary agreement, as a practical matter, may commit the agency to the project, and would therefore be subject to environmental review.

& KNIGHT ENV'T. ALERT, 1, 2 (May 17, 2011), http://www.hklaw.com/default.aspx?id=24660&PublicationId=3121&ReturnId=31&ContentId=55541&pdf=yes.

182. A detailed discussion of the political and economic momentum that can build behind such large projects is beyond the scope of this Note; however, two recently proposed football stadiums in Southern California provide relevant examples of this phenomenon. After a CEQA lawsuit was filed against Majestic Realty's proposed NFL stadium in the City of Industry, the developer successfully lobbied state legislators to grant a statutory exemption from any such CEQA action. Jeremy H. Danney, Comment, *Sacking CEQA: How NFL Stadium Developers May Have Tackled the California Environmental Quality Act*, 19 PENN ST. ENVTL. L. REV. 131, 143–45 (2011). Similarly, Anschutz Entertainment Group recently obtained approval of a bill that would fast-track any CEQA lawsuit filed against its proposed downtown Los Angeles stadium directly to an appellate court, potentially shortening the CEQA approval process for this project by years. *Los Angeles Football Stadium Plan Gets Boost*, USATODAY.COM (Sept. 28, 2011, 10:02 AM), http://www.usatoday.com/sports/football/nfl/story/2011-09-28/los-angeles-stadium-bill/50583414/1.

183. *See* Brief for Housing California, *supra* note 166, at 2. *See, e.g.*, Karen S. Christensen, *The Challenge of Affordable Housing in 21st Century California: Constraints and Opportunities in the Nonprofit Housing Sector* 21–27 (Inst. of Urban & Reg'l Dev., Univ. of Cal. Berkeley, Working Paper No. 2000-04, 2000), *available at* http://escholarship.org/uc/item/5bn582sf (describing the significant funding and timing obstacles facing nonprofit housing developers, especially those proposing smaller projects).

V. PROPOSAL

A. Legislative Amendment of CEQA Guidelines

Given the high costs of CEQA compliance and the even more burdensome costs of CEQA litigation, the legislature should amend specific sections of the CEQA Guidelines to reflect the *Save Tara* decision and to set forth clearer standards regarding when a project has been approved. First, the legislature should amend Section 15004(b)(2) of the CEQA Guidelines,[184] which purports to set forth an exception to CEQA for land acquisition agreements that are conditioned on future CEQA compliance, but which was severely limited by *Save Tara*.[185] The legislature should move section 15004(b)(2)(A)'s language exempting certain land-acquisition agreements to the CEQA Guidelines' definition of "approval,"[186] and broaden the language to reference funding agreements and other preliminary agreements entered into by a lead agency that constitute

184. Section 15004(b)(2) states:

> [P]ublic agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance. For example, agencies shall not:
>
> (A) Formally make a decision to proceed with the use of a site for facilities which would require CEQA review, regardless of whether the agency has made any final purchase of the site for these facilities, *except that agencies may designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance*.
>
> (B) Otherwise take any action which gives impetus to a planned or foreseeable project *in a manner that forecloses alternatives or mitigation measures* that would ordinarily be part of CEQA review of that public project.

CAL. CODE. REGS. tit. 14, § 15004(b)(2) (2011) (emphasis added).

185. Save Tara v. City of W. Hollywood, 194 P.3d 344, 357 (Cal. 2008) ("The Guidelines' exception for land purchases is a reasonable interpretation of CEQA, but it should not swallow the general rule (reflected in the same regulation) that a development decision having potentially significant environmental effects must be *preceded*, not *followed*, by CEQA review.").

186. Section 15352 states:

> (a) "Approval" means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person. The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval. (b) With private projects, approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project.

tit. 14, § 15352.

specific exceptions from project approvals that trigger CEQA review.

Additionally, the legislature should amend section 15352's definition of *approval* to more accurately capture the applicable standard of *commitment* to a project.[187] Currently, subparagraph (a) of this section purports to grant agencies the discretion of determining when approval is granted, but the courts have consistently interpreted this discretion away from agencies when they have determined that such discretion violates the intent of CEQA. Adding a new subparagraph (c) to this section that describes *approval* and *commitment* in terms of an agency foreclosing alternatives or mitigation measures would provide greater guidance to these agencies.

As a result of these changes, section 15004(b)(2) would continue to set forth the clear principle that 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."[188] Additionally, section 15352 would now define *approval* so that informed agencies and project proponents would understand the limits of their discretion. Section 15352 would also contain specific exceptions for land acquisition agreements, funding mechanisms, exclusive negotiating agreements, and other conditional agreements that are conditioned on future CEQA compliance, so long as those agreements do not foreclose any future project alternatives or mitigation measures.

While these proposed changes to the CEQA Guidelines may seem minor, they would add valuable CEQA policies that have been established through court decisions to the Guidelines and therefore improve the ability of the Guidelines to inform and guide agency and public action regarding the commencement of environmental review. Moreover, these low-cost changes would set forth a clearer principle regarding the timing of environmental review and would better capture the flexible, fact-specific inquiry that *Save Tara* requires into whether a project has been approved.

187. *Id.*

188. tit. 14, § 15004(b)(2)(b).

B. Best Practices for Agencies

If agencies have not already done so following *Save Tara*, they must review internal policies regarding preliminary agreements, exclusive negotiating agreements, memoranda of understanding, and other actions pertaining to predevelopment activities. In revising any of these policies, agencies should adopt consistent definitions of "project," "approval," and "commitment" that reflect the language of the CEQA guidelines and the California courts' interpretations of these terms. The *Cedar Fair* decision provides guidance for agencies regarding these issues.[189]

Agencies should also establish clear policies stating that initial feasibility studies of projects, which may be exempt from review under both CEQA's statutory language and *Save Tara*,[190] are clearly distinct from agency commitment to any project. Moreover, agency staff and officials should temper potential enthusiasm for a proposed project, because public statements supporting such a project may indicate an improper commitment prior to CEQA review.[191] Following the intact holdings of *McCloud* and *Santee*, agencies may wish to refrain from developing detailed project descriptions as part of any preliminary feasibility study or conditional agreement. Any such agreement should not only include a range of alternatives but also include a clear statement that the agreement does not foreclose any alternatives or mitigation measures.[192] Again, *Cedar Fair* provides guidance here.[193]

A more drastic approach for agencies wishing to seek further protections from CEQA lawsuits could be to add additional steps in their customary approval processes. One option would be to require multiple stages of agency approval for preliminary negotiating and funding loan agreements.[194] Another option would be for agencies to

189. Cedar Fair L.P. v. City of Santa Clara, 123 Cal. Rptr. 3d 667, 679 (Ct. App. 2011).

190. tit 14, § 15262; *Save Tara*, 194 P.3d at 359.

191. *See* Arthur Pugsley, *Timing Is Everything: Ensuring Meaningful CEQA Review by Avoiding Improper "Precommitment" to a Project*, 2009 CAL. ENVTL. L. REP. 243, 251 (2009).

192. *See* City of Santee v. Cnty. of San Diego, 111 Cal. Rptr. 3d 47, 64 (Ct. App. 2010); Concerned McCloud Citizens v. McCloud Cmty. Servs. Dist., 54 Cal. Rptr. 3d 1, 9 (Ct. App. 2007).

193. *Cedar Fair*, 123 Cal. Rptr. 3d at 680.

194. *See, e.g.*, Memorandum to the City of Sonoma City Council, *supra* note 174.

> Staff was then directed to negotiate an agreement that would enable them to proceed with conducting neighborhood and community outreach, designing and engineering a

consider undertaking tiered environmental review for proposed projects.[195] Under such a tiering process, an agency would conduct initial CEQA review for site selection and alternatives, which could then be followed by more detailed, site- and project-specific environmental review after the proponent has determined more characteristics of the project.[196] The court in *Save Tara* also suggested that staged EIRs or some other form of tiering may allow agencies to postpone the evaluation of certain project details that are not reasonably foreseeable when the agency first approves the project.[197] Of course, tiered environmental analysis involves an early commitment to preparing an EIR, and many agencies and project proponents would likely resist these additional costs and potential for delay. Additionally, while some advocates of a tiering approach claim that agencies and applicants could potentially enjoy greater protections from litigation at the end of the CEQA process,[198] others have pointed out that tiering has not reduced the number of challenges to projects.[199]

VI. CONCLUSION

There is no easy fix to prevent future litigation over CEQA's applicability to agency actions. Legislative amendments to CEQA

> project proposal, applying for development review, and completing environmental review. The proposed Exclusive Negotiating Agreement (ENA) and Predevelopment Loan would accomplish this direction. However, the ENA and the loan agreement are also structured to avoid pre-judging the outcome of the planning and environmental review process. For this reason, if a project is ultimately approved by the Planning Commission it would then be necessary to enter into a subsequent agreement with AHA in order to proceed with implementation. The ENA and the Loan Agreement were prepared by the CDA's redevelopment counsel who has confirmed that they do not do not raise the pre-approval issue that was at the heart of the "Save Tara" case.

Id.

195. For a discussion of tiered environmental review as authorized and encouraged by CEQA, see REMY ET AL., *supra* note 7, at 603–10; *see also* CAL. PUB. RES. CODE § 21093(b) (West 2007) ("[E]nvironmental impact reports shall be tiered whenever feasible, as determined by the lead agency.").

196. *See* REMY ET AL., *supra* note 7, at 606.

197. Save Tara v. City of W. Hollywood, 194 P.3d 344, 361 (Cal. 2008); *see also* Pugsley, *supra* note 191, at 251 ("Before entering any type of agreement on a specific site, the agency should also strongly consider undertaking tiered environmental review, with an initial CEQA review for site selection and alternatives, followed by a more detailed, site specific environmental review when more details about the specific project are known.").

198. Pugsley, *supra* note 191, at 251.

199. Rothman, *supra* note 9, at 15–16.

are proposed every year, and while minor tweaks along the lines that this Note suggests may be possible, wholesale revisions are unlikely. As a result, the California Supreme Court's interpretation of "approval" of a project as it set forth in *Save Tara* will remain in effect unless the court issues a superseding opinion. However, given the near certainty of continued litigation around the CEQA timing issues that are at the heart of *Save Tara*, further changes to CEQA's treatment of project approvals are likely in store.