

SHUTE, MIHALY & WEINBERGER LLP

ATTORNEYS AT LAW

E. CLEMENT SHUTE, JR.*
MARK I. WEINBERGER (1948-
2005)
FRAN M. LAYTON
RACHEL B. HOOPER
ELLEN J. GARBER
TAMARA S. GALANTER
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MATTHEW D. ZINN
CATHERINE C. ENGBERG
AMY J. BRICKER
GABRIEL M.B. ROSS
DEBORAH L. KEETH
WINTER KING
KEVIN P. BUNDY
*SENIOR COUNSEL

396 HAYES STREET
SAN FRANCISCO, CALIFORNIA
94102
TELEPHONE: (415) 552-7272
FACSIMILE: (415) 552-5816
WWW.SMWLAW.COM

AMANDA R. GARCIA
JEANNETTE M. MACMILLAN
ISAAC N. BOWERS
HEATHER M. MINNER
ERIN B. CHALMERS

LAUREL L. IMPETT, AICP
CARMEN J. BORG, AICP
URBAN PLANNERS

MEMORANDUM

TO: McCloud Watershed Council; California Trout; Trout Unlimited

FROM: Rachel B. Hooper and Kevin P. Bundy
Donald Mooney, Law Offices of Donald Mooney

DATE: August 21, 2009

RE: Effect of the California Supreme Court's Decision in *Save Tara v. City of West Hollywood* on Potential Nestle Contract

In *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 84 Cal.Rptr.3d 614, the California Supreme Court clarified that an agreement between a public agency and a private developer, even if expressly conditioned on compliance with the California Environmental Quality Act ("CEQA"), requires CEQA review before approval if the contract, as a practical matter, commits the agency to a particular course of action.¹

Save Tara changes the legal landscape governing the Nestle project. As discussed below, the decision means that the McCloud Community Services District ("MCSD") must comply with CEQA before entering into any new contract with Nestle Waters North America ("Nestle"). The Nestle project is now sufficiently well-defined to enable meaningful environmental review; indeed, a draft Environmental Impact Report ("EIR") already has been prepared. Moreover, prior actions and statements by MCSD provide additional confirmation that any new contract with Nestle would commit the agency to a particular course of action, and thus would represent an "approval" requiring CEQA review. Finally, under *Save Tara*, it does not matter that MCSD is not the "lead agency" under CEQA, or that other agencies would have to issue additional approvals for the project to go forward. As a public agency, MCSD must review the project's environmental consequences *before* approving it.

¹ Note that this citation refers to the Court's original opinion. The Court issued a minor modification to its opinion by order dated December 10, 2008. The Court's modification does not affect the judgment, nor does it change the analysis in this memorandum. This modified decision is now final, but the decision has not yet been republished.

I. *Save Tara* Clarifies the Principles Governing CEQA Review of Contracts and Other Agreements Between Public Agencies and Private Developers.

Because the specific factual circumstances of the case weighed heavily in the Supreme Court's decision, a brief discussion of the facts is helpful in understanding its holding. *Save Tara* involved a challenge to an agreement between the City of West Hollywood and a private developer regarding a proposed senior housing development on a piece of city-owned property.² The agreement authorized the City Manager to convey the property to the developer upon satisfaction of several conditions, including a requirement for CEQA compliance. (See *Save Tara*, 84 Cal.Rptr.3d at 621.) The agreement also provided an immediate loan from the city to the developer, to be used for preparation of environmental documents and permits. (*Id.*) Attached to the agreement was a discussion of the proposed development's design. (*Id.* at 621-22.)

Both before and after the City Council's approval of the agreement, city officials made several public statements indicating the city's intent to go forward with the project as planned, and the city began to make provisions for relocating the property's current tenants. (See *id.* at 620-22.) After a community group filed a lawsuit against the agreement on CEQA grounds, the city and the developer amended the agreement to make clear that the city retained "complete discretion" over any actions necessary to comply with CEQA. (*Id.* at 622.) The superior court rejected the community group's lawsuit, but the Court of Appeal reversed, holding that the city should have complied with CEQA before approving the agreement. (*Id.* at 622-23.) The city and the developer then sought review in the Supreme Court.

At the outset, the Supreme Court noted that the timing of environmental review reflects a balance of competing policies. On one hand, an EIR should not be prepared until a project is sufficiently well-developed to permit meaningful environmental review. On the other hand, review must occur early enough for the EIR to serve its intended purpose, which is to inform decision-makers of the environmental consequences of a project (and any alternatives or mitigation measures) *before* they approve it. (See *id.* at 625-26.) The Court emphasized that review must occur before the "bureaucratic and financial momentum" behind a project builds to the point that approval is a foregone conclusion, and the EIR becomes nothing more than a "*post hoc* rationalization[]" to support action already taken." (*Id.* at 626, quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394-95.)³

Turning to the primary question in the case—whether an agency can approve an agreement regarding a project before complying with CEQA, so long as the agreement itself is made conditional upon completion of CEQA review of the project—the Court did not announce a hard and fast rule. Rather, the Court adopted an "intermediate position":

² The existing house on the property is known as "Tara," either because its prior owner's favorite movie was "Gone With the Wind," or because of the house's estate-like appearance.

³ The Court also clarified that the timing of environmental review is not subject to the complete discretion of the agency involved, as some previous lower court decisions had suggested. (See *Save Tara*, 84 Cal.Rptr.3d at 627.) A court may not simply defer to an agency's decision, but rather must independently review the timing of EIR preparation as a legal matter. (See *id.*)

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.

(*Id.* at 627-28.) Accordingly, a court will look not only to an agreement's specific language, but also to surrounding circumstances such as the agency's public statements, offers of financial support, and devotion of public resources to the project, in determining whether the agreement commits the agency to a particular course of action *as a practical matter* despite being conditioned on future CEQA compliance. (See *id.* at 630.)

In reaching this conclusion, the Court in *Save Tara* specifically addressed *Concerned McCloud Citizens v. McCloud Community Services District* (2007) 147 Cal.App.4th 181, which upheld MCSD's prior contract with Nestle against a similar CEQA challenge. Although *Save Tara* did not overrule *Concerned McCloud Citizens*, it made clear that the earlier case "involved particular circumstances limiting the reach of its logic," specifically the lower court's finding that the prior contract lacked sufficient detail about the bottling project to permit meaningful environmental analysis. (*Save Tara*, 84 Cal.Rptr.3d at 628-29.)

According to the Supreme Court, therefore, *Concerned McCloud Citizens* does not mean that an agency may avoid CEQA review of its decision to enter an agreement merely by conditioning the agreement upon future CEQA compliance. (See *id.* at 629.) The question, rather, is whether considering all of the surrounding circumstances, the agreement as a practical matter commits the agency to a particular course of action that forecloses possible alternatives and mitigation measures, including the alternative of not approving the project at all. (See *id.* at 633.) In this context, a condition calling for future CEQA compliance is "relevant but not determinative." (*Id.*)

Applying these principles, the *Save Tara* Court concluded that the city should have prepared an EIR before approving the agreement. The stated purpose of the agreement was to facilitate a particular development project. (*Id.* at 634.) The agreement also provided a substantial loan that would be repaid only if the project were built, and arguably required the city to approve the project even if CEQA review showed that it would have significant, immitigable adverse effects. (See *id.* at 634-35.) Although the City Council attempted to fix some of these flaws by amending the agreement after the lawsuit was filed, the Court held that the city's approval of the earlier version of the agreement demonstrated a commitment to proceed with the project as planned. (See *id.* at 635.) Finally, the circumstances surrounding the agreement—including the city's public statements of support for the project—helped to confirm that the agreement was tantamount to a project approval. (*Id.* at 635-36.) Accordingly, the Court held that the city violated CEQA by failing to prepare an EIR *before* approving the agreement. (*Id.* at 636.)

II. *Save Tara's* Implications for CEQA Review of a New Nestle Contract

Save Tara strongly indicates that MCSD must comply with CEQA before approving any new contract with MCSD. First and foremost, *Concerned McCloud Citizens* no longer provides the determinative judicial standard as to whether CEQA review of a contract is required. According to the Supreme Court, the contract evaluated in *Concerned McCloud Citizens* did not contain enough specific and detailed information about the proposed bottling facility to permit environmental review. (*Save Tara*, 84 Cal.Rptr.3d at 629.) At present, it cannot be disputed that there is now more than enough information available concerning the project to support CEQA review; indeed, a draft EIR has been prepared and circulated for comment. Accordingly, the project is now definite enough to warrant meaningful environmental analysis.

In addition, although we would have to evaluate its actual language to provide a definitive answer, any new contract would very likely commit MCSD to providing water for the bottling facility as a practical matter, thus triggering the need for CEQA review. In fact, once MCSD authorizes delivery of the water under a new contract, it is not clear that any further action or approval from the agency would be required, and it is unlikely that the agency would retain any meaningful discretion to reverse course. *Save Tara* also confirms that CEQA review is required at the time of an agency's earliest approval of a project—that is, when it first exercises its discretion to execute a contract, not when its final discretionary decision is made. (*Id.* at 629.) Furthermore, under *Save Tara*, MCSD's approval of the prior Nestle contract would be a relevant circumstance demonstrating its commitment to the project, as would any official public announcements or other agency resources devoted to the project over the past several years. (See *id.* at 635-36.)

Finally, the fact that other agencies must issue approvals for the Nestle project does not relieve MCSD of its duties under CEQA. Although Siskiyou County has been designated the CEQA lead agency for the project, MCSD retains authority to approve the water contract. Accordingly, MCSD is a "responsible agency" under CEQA. (See Pub. Res. Code § 21069; CEQA Guidelines §§ 15051, 15381.) CEQA imposes significant duties on responsible agencies. Most importantly, CEQA demands that a responsible agency "consider[] the EIR" and "reach[] its *own* conclusions on whether and how to approve the project." (CEQA Guidelines § 15096(a) [emphasis added].) Responsible agencies also must independently make the written findings required by CEQA regarding a project's impacts and available mitigation measures, explain the rationale for those findings, and support those findings with substantial evidence in the record. (CEQA Guidelines §§ 15091(a)-(b), 15096(h); see also *Resource Defense Fund v. LAFCO* (1987) 191 Cal.App.3d 886, 896-898.) Obviously, MCSD cannot even begin to fulfill these responsibilities if it approves a new contract with Nestle before the EIR for the project is finalized and certified by Siskiyou County.

For all of these reasons, we believe that under the Supreme Court's ruling in *Save Tara*, MCSD must await completion of the Siskiyou County EIR—or conduct its own environmental review under CEQA—before approving any new contract with Nestle.