CALIFORNIA

# Environmental Law Reporter

MAY 2009
VOLUME 2009 • ISSUE NO. 5



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## TIMING IS EVERYTHING: ENSURING MEANINGFUL CEQA REVIEW BY AVOIDING IMPROPER "PRECOMMITMENT" TO A PROJECT

*By*

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### I. Introduction: The need to strike the right balance on when to begin CEQA review.

The California Environmental Quality Act (CEQA, Pub. Res. Code Section 21000 et seq.) serves two basic, interrelated functions: ensuring environmental protection and encouraging governmental transparency. (*Citizens of Goleta Valley v. Bd. Of Supervisors* (1990) 52 Cal. 3d 553, 564 ("*Goleta*"). Both functions are well served by a vigorous commitment to public input into the environmental protection process.

This dual purpose raises the important issue of at what point in the planning process it is appropriate for an agency to undertake CEQA review. If CEQA review happens too early, there may not be enough information for a meaningful public review process, and any CEQA documents could be hopelessly speculative, full of vapid boilerplate, or both. On the other hand (and in practice a far more common problem), beginning CEQA review too late can mean that the agency no longer comes to the project with an open mind, and that opportunities to implement feasible alternatives and mitigation measures will have been lost. In such a case, the agency has "precommitted" to the project. Precommitment can occur under various circumstances, for example, conducting CEQA review after the agency has already made up its mind to go forward with a project; or when the agency has made such an investment of staff time and resources that the momentum for the project becomes so great that, as a practical matter, the agency's evaluation of alternatives is limited; or potentially when the agency has approved

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certain action which moves the project forward even though it technically reserves the right to reconsider its commitment to the entire project. Precommitment to a project has been repeatedly condemned by the California Supreme Court as rendering the CEQA review process little more than a post hoc rationalization for a decision already made and defeating the fundamental purposes of CEQA.

The California Supreme Court recently made its most detailed ruling on the issue of the proper timing of CEQA review in a unanimous decision in *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116 ("*Save Tara*"). California Courts of Appeal have been mixed in their application of Supreme Court precedent on precommitment, although the recent *Save Tara* decision has already prompted one Court of Appeal to interpret the case as a broad and vigorous prohibition on precommitment that greatly limits prior (and in many ways inconsistent) decisions from various Courts of Appeal. This article traces the development of case law in providing guidance on the question of the proper time for CEQA review, and suggests some ways in which agencies can strike the right balance in the timing of the CEQA review process in light of the *Save Tara* decision.

## II. Timing Requirements in CEQA and the CEQA Guidelines.

CEQA requires that governmental agencies proposing or intending to carry out, finance, or permit projects study the environmental impacts of their actions, to evaluate reasonable alternatives, and to mitigate environmental impacts to the maximum extent feasible. CEQA is both an "information forcing" statute, requiring disclosure of impacts, and an "action forcing" statute, requiring substantive uses of that information. (See, for example, Pub. Res. Code § 21002; Pub. Res. Code § 21002.1.) The Environmental Impact Report (EIR)—a detailed discussion of impacts, alternatives, and mitigation—lies at the "heart of CEQA" and is the chief mechanism to effectuate the purposes of the statute. (*In Re Bay-Delta Programmatic EIR Coordinated Proceedings* (2008) 43 Cal. 4th 1143, 1162 ("*In Re Bay-Delta*").

The CEQA statute itself has relatively little to say on the proper timing of an EIR, although it is clear that the EIR process must precede approval of the project by an agency. "[L]ead agencies shall prepare . . . and certify the completion of, an environmental impact report on any project which they *propose to carry out or approve* that may have a significant effect on the environment." (Pub. Res. Code § 21100(a) emphasis added; see also Pub. Res. Code § 21151(a).) In addition, CEQA assumes approval of a

project will not occur until an EIR "has been completed." (Pub. Res. Code § 21081.)

The California Resource Agency Guidelines for implementing CEQA ("Guidelines," 14 Cal Code Regs. Section 15000 et seq.) provide more detail, but do not include a definitive answer on when to begin the EIR process. "Choosing the precise time for CEQA compliance involves a balancing of competing factors"—the need to begin early, so that environmental considerations influence project design, "yet late enough to provide meaningful information for environmental assessment." (Guidelines § 15004(b).) Section 15004 also implicitly recognizes that proper timing will prove trickier for public projects (including public-private partnerships) than for private projects. In the case of public projects, the agency undertaking the review has more control over project design, is likely proposing the project to meet some perceived pressing public need, and may not have a definite timeline for action. The definition of "approval" in Guidelines Section 15352 also captures the special difficulties presented by public projects. The approval of a private project can be tied to issuance of a contract, permit, or similar entitlement. (See Guidelines § 15352(b).) However, in the general case, which includes public projects and public-private partnerships, approval occurs upon "the decision by a public agency which commits the agency to a definite course of action." (Guidelines § 15352(a).) This ambiguity in defining the exact moment of project approval makes published case law particularly important for providing guidance to public agencies on the proper timing of CEQA review.

## III. The Supreme Court has consistently stressed the need for timely CEQA review.

The California Supreme Court has consistently and frequently warned of the dangers of precommitment to a project. The wording of the prohibition on precommitment has varied slightly over the years, but from the earliest days of interpreting CEQA the Court has repeatedly condemned the practice. In the Supreme Court's earliest case interpreting CEQA, the Court stressed the public accountability function of avoiding precommitment to a project:

> The impact report must be specially prepared in written form *before* the governmental entity makes its decision. This will give members of the public and other concerned parties an opportunity to provide input both in the making of the report and in the ultimate governmental decision based, in part, on that report.

(*Friends of Mammoth v. Bd. of Supervisors of Mono County* (1972) 8 Cal. 3d 247, 264, fn. 8, emphasis added ("*Friends of Mammoth*").) Two years later, the Supreme Court cited to this passage, again stressing governmental accountability in decision making when it ruled that a decision against preparation of an EIR must take the form of a written Negative Declaration. (*No Oil Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 79–80



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CALIFORNIA ENVIRONMENTAL LAW REPORTER (USPS 008-116, ISSN 1061-365X) Is published monthly for $630 per year by Matthew Bender & Co. Inc., 1275 Broadway, Albany, NY 12204-2694. Periodicals postage is paid at Albany, NY and at additional mailing offices.

POSTMASTER: Send address changes to CALIFORNIA ENVIRONMENTAL LAW REPORTER, 136 Carlin Rd. Conklin, NY 13748-1531.

("*No Oil*").) The *No Oil* decision also explained that the transparency-forcing function of an EIR was to "demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action." (*Id.* at 86.)

Later decisions continued to build on this strong doctrinal foundation. The Supreme Court again stressed accountability in *Bozung v. Local Agency Formation Commission of Ventura County* (1975) 13 Cal. 3d 263 ("*Bozung*"). Here, the Court made its first explicit discussion of the potential for precommitment to bias the results of the CEQA review process, in holding that an annexation approval by LAFCO must be preceded by an EIR, even though the development proposal that was the impetus for the annexation would be subject to CEQA at a later point in time by the municipality to which the land was annexed. The Court, at page 283, held that waiting to evaluate the indirect impacts of the annexation until the project that was the impetus for the annexation went through the EIR process would be too late, linking the untimeliness of the environmental review to potential for bias and physical environmental harm:

> At the very least, however, the People have a right to expect that those who must decide will approach their task neutrally, with no parochial interest at stake ... it seems clear that the officials of a municipality, which has cooperated with a developer to the extent that it requests an annexation of that developer's property for the express purpose of converting it from agricultural land into an urban subdivision, may find it difficult, if not impossible, to put regional environmental considerations above the narrow selfish interests of their city.

In *Bozung*, the Court also set out the important general proposition (which appears in almost identical form in Guidelines Section 15044(b)(1)) that the environmental analysis must be done "at the earliest possible stage." (*Bozung, supra*, 13 Cal 3d at 282.) The Court would cite to this holding eight years later when it ruled that the State Board of Education must analyze the environmental effects of creating a new unified school district by dividing an existing one, prior to authorizing an election by voters in the proposed new district. (*Fullerton Joint Union High School District v. State Bd. Of Education* (1982) 32 Cal 3d. 779, 797 ("*Fullerton*").) Continuing the trend of addressing the issue of precommitment every few years, and of linking precommitment with a lack of transparency, the Court stated in 1986 that the public holds a "privileged position" in the CEQA process and that therefore "a project must be open for public discussion and subject to agency modification during the CEQA process." (*Concerned Citizens of Costa Mesa v. 32nd District Agricultural Ass'n.* (1986) 42 Cal. 3d 929, 936 ("*Concerned Citizens of Costa Mesa*") internal quotations omitted.)

The Court continued to vigorously develop its anti-precommitment doctrine at virtually every opportunity. In the landmark case of *Laurel Heights Imp. Ass'n. v. Regents of the University of California* (1988) 47 Cal. 3d 376 ("*Laurel Heights*"), the Court invoked the integrity of the CEQA statute itself as reason to guard against precommitment to a project: "the EIR ... is a document of accountability." (*Id.* at 392.) "If postapproval environmental review were allowed, EIRs would likely become nothing more than *post hoc* rationalizations to support action already taken." (*Id.* at 394.) The Court cited to both *No Oil* and *Bozung* for support, making it clear that the Court saw the prohibition against precommitment as an established part of CEQA. The Court would cite to *Laurel Heights* and the prohibition on precommitment in its next CEQA case as well, stressing that precommitment to a project undercuts both of CEQA?s central functions. (*Goleta, supra*, 52 Cal. 3d at 564. ["The EIR process protects not only the environment but also informed self-government."])

The Court next extended its holdings against precommitment to certified regulatory programs. "Certified regulatory programs" are review processes that perform all of the functions of CEQA review and are subject to the substantive requirements of CEQA. (See Pub. Res. Code § 21080.5; Guidelines §§ 15250-15253.) In *Sierra Club v. Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1229 ("*Sierra Club*"), the Court cited to its previous holdings on precommitment in ruling that the State Board of Forestry had the authority to require information required by CEQA, but not by its own regulations, in a Timber Harvesting Plan. In *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal. 4th 105, 133 ("*Mountain Lion*"), the Court cited to the "policy of citizen input underlying CEQA" in holding that environmental consequences must be taken into account *before* the Commission makes a project approval. The Court recently reaffirmed the vitality of these holdings. (See *Environmental Protection and Info. Ctr. v. Cal. Dept. of Forestry and Fire Protection* (2008) 44 Cal. 4th, 459, 486, 503 ("*EPIC*").)

In *Friends of Sierra Madre v. City of Sierra Madre* (2001) Cal. 4th 165 ("*Sierra Madre*"), the Court did not cite to any of its previous precommitment precedents, but nonetheless extended the rule against precommitment to encompass ballot initiatives initiated by public agencies. The rationale was "informed self government" at the most basic level: "Requiring CEQA compliance before placing a city-council-generated initiative on the ballot does no more than ensure that the electorate is informed of any potential substantial impact the measure could have on the environment." (*Id* at 190, fn 16.) In *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal. 4th 412 ("*Vineyard*"), the Court

would describe the EIR as an "environmental alarm bell" whose purpose was to warn of environmental consequences "before the project has taken on overwhelming bureaucratic and financial momentum." (*Id.* at 441, citing to *Laurel Heights, supra*, 47 Cal. 3d at 392, 395, internal quotation marks omitted.) In *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal. 4th 372 ("*Muzzy Ranch*"), the Court cited to *Fullerton* to support the holding that an agency has improperly approved a project if it has taken "an essential step leading to potential environmental impacts" before conducting CEQA review. (*Muzzy Ranch, supra,* 41 Cal. 4th at 383.)

## IV. Decisions in the Courts of Appeal on precommitment were inconsistent.

Given the unambiguous and frequent holdings of the Supreme Court against precommitment, in decisions every few years from *Friends of Mammoth* to *EPIC*, the pre-*Save Tara* decisions by the California Courts of Appeal had a decidedly mixed record in ensuring that a project underwent CEQA review before the project developed "overwhelming bureaucratic and financial momentum." Perhaps because the Supreme Court holdings on the matter were so broad, Courts of Appeal were able to make small legal or factual distinctions in cases that resulted in upholding agency decisions made prior to environmental review. Several Courts of Appeal allowed agencies to use contractual arrangements of making project approval subject to subsequent compliance with CEQA, justifying the arrangement under the theory that the agency would maintain a completely open mind on ultimate approval as project design advanced without prior CEQA review. This line of cases also gave great deference to agency decisions on when to conduct required CEQA review, in some cases allowing agencies to postpone the CEQA review until long after critical project decisions were taken.

The foundation for this line of appellate decisions is *Mount Sutro Defense Committee v. Regents of the University of California* (1st Dist.1978) 77 Cal. App. 3d 20 ("*Mt. Sutro*"). In *Mt. Sutro*, the University of California planning staff had begun expending funds in planning for a dental school and medical facility at its San Francisco campus, the Master Plan for which predated CEQA but was revised after CEQA came into effect. By the time the Regents certified the EIRs for the projects, about 2% of the project budget had already been expended advancing project design. (*Id.* at 39.) The Court of Appeal found that the expenditure of the funds did not constitute an improper approval of the project prior to certification of the EIR. Although the Court cited to *Friends of Mammoth* on the issue of proper timing, the Court refused to impose what it considered an "absolute and inflexible time requirement" (*Mt Sutro, supra,* 77 Cal. App. 3d at 39) and instead left the issue of proper timing to the discretion of the agency, "which decision must be respected in the absence of manifest abuse." (*Id* at 40.)

In *Stand Tall On Principles v. Shasta Union High School District* (3rd Dist.1991) 235 Cal. App. 3d 772 ("*Stand Tall on Principles*"), the Court of Appeal allowed preparation of an EIR to proceed *after* the school district had selected a preferred site for a new school following a year and a half long site selection process. The District Board authorized a formal purchase of the preferred site at the completion of the selection process, albeit "contingent on the completion of the EIR process and final state approval." (*Id* at 777.) A citizens group sued on the grounds that selection of a proper site should be an important part of the EIR process and any alternatives analysis completed after site selection would likely be a post hoc rationalization of the preferred site. (*Id* at 778.) The Court of Appeal cited the Supreme Court's holdings in *Laurel Heights* and *Goleta* (*Stand Tall on Principles, supra,* 235 Cal. App. 3d at 783), but noted timing of an EIR involves balancing factors (*Id.* at 782, quoting Guidelines Section 15004(b)) and ultimately adopted the deferential approach to EIR timing from *Mt. Sutro*. (*Stand tall on Principles,* 235 Cal. App. 3d at 784 ["we cannot say the District abused its discretion in selecting the preferred site before preparing an EIR"] .) The Court of Appeal even saw the need to distinguish *Fullerton* as involving only a threshold environmental assessment—a ground that "we concede is somewhat superficial." (*Stand Tall on Principles, supra,* 235 Cal. App. 3d at 785.) In a small concession to the citizens group, the Court admonished the District that the alternatives analysis eventually to be conducted must be more than a post hoc rationalization of the already selected preferred site. (*Ibid.*)

Another Court of Appeal decision adopting the *Mt. Sutro* standard on timing of EIR preparation involved a challenge to the redevelopment of a naval station as a shipping terminal at the Port of Long Beach. In *City of Vernon v. Bd. Of Harbor Commissioners* (2nd Dist.1998) 63 Cal. App. 4th 677 ("*Vernon*"), the Executive Director of the Port of Long Beach entered into a detailed Statement of Intent with the intended lessee, and the City developed extensive reuse plans for the area prior to undertaking environmental review. However, the Court of Appeal found that these actions did not constitute project approval, and adopted the *Mt. Sutro* deferential standard on timing of EIR preparation. (*Vernon, supra.* 63 Cal. App. 4th at 690.) Moreover, the Court of Appeal noted that when a public agency proposes a project, it will inevitably have some bias in favor of project approval. (*Id* at 688.)

In *Concerned McCloud Citizens v. McCloud Community Services District* (3rd Dist. 2007) 147 Cal. App. 4th 181 ("*McCloud*"), the Court of Appeal upheld an agreement between a water district and a bottled water distributor that approved the sale and purchase of district water but made the project conditional on later CEQA compliance. Despite citations to Supreme Court cases such as *No Oil* (*McCloud* at 190), *Mountain Lion* and *Friends of Mammoth* (*McCloud,* at 191), and *Laurel Heights* (*McCloud* at 196), the Court found the reasoning of *Stand Tall on Principles* persuasive- that an approval that that is conditioned on future CEQA compliance is not an approval requiring prior CEQA review. (*McCloud, supra,* 147 Cal. App. 4th at 194.) The *McCloud* Court also cited to *Mt. Sutro* and *Stand Tall on Principles* on the issue of deference to agency decisions regarding timing of CEQA review, indicating that the *Mt. Sutro* line of cases, with its deferential standard on timing of CEQA review, had become well established in the Courts of Appeal, the frequent pronouncements of the Supreme Court against precommitment notwithstanding. As *McCloud* demonstrates, some Courts of Appeal found it quite easy to avoid the long line of Supreme Court cases by giving great deference to agencies on timing of CEQA review, or by essentially redefining approval as non-approval if an otherwise binding agreement was made conditional on post-approval CEQA compliance.

Another recent case used the CEQA definition of "project" to effectively allow deferral of environmental review until after project approval. In *Friends of Sierra Railroad v. Tuolumne Park and Recreation District* (5th Dist. 2007) 147 Cal. App. 4th 643 ("*Sierra Railroad*"), an Indian tribe purchased land from a county agency, but claimed that it had no definitive plans to develop the land. The Court of Appeal ruled that any environmental analysis would be speculative and premature, until definitive development plans were advanced by the tribe, and that the transfer was therefore not a "project" within the meaning of CEQA. (*Id* at 647.) While factually quite different from the projects at issue in the *Mt. Sutro* line of cases, the *Sierra Railroad* case shows how the definition of "project" can also be used to defer CEQA review. The Supreme Court recognized the close relationship between the issues of what constitutes a project and whether the project has been approved in *Save Tara*, supra 45 Cal. 4th at 135, although the Court did not discuss or cite to *Sierra Railroad* in the decision. However, since purchasing land is clearly an "essential step" towards developing that land, the outcome in *Sierra Railroad* is difficult to reconcile with the numerous instances, discussed *supra*, where the Supreme Court has condemned approval of a project prior to CEQA review. The outcome is also quite difficult to reconcile with the broad definition of "project" under CEQA. (See, for example, *Muzzy Ranch, supra*, 41 Cal. 4th 372.)

At the same time, another line of cases in the Courts of Appeal showed less deference to agencies on the issue of timing and did not consider conditional approval based on subsequent environmental review to be consistent with CEQA. In *City of Carmel-by-the-Sea v. Bd. Of Supervisors of Monterey County* (6th Dist. 1986) 183 Cal. App. 3d 229 ("*Carmel*"), the Court of Appeal reaffirmed the vitality of *Bozung*'s requirement for an EIR at the "earliest possible stage" in holding that a rezoning project required an EIR, even though the subsequent development of the site would be subject to CEQA at a later time. (*Carmel, supra,* 183 Cal. App. 3d at 249–250.) In *City of Santee v. County of San Diego* (4th Dist. 1989) 214 Cal. App. 3d 1438, 1456 ("*Santee*"), the Court of Appeal cited to *Laurel Heights* and stressed that an EIR "must not attempt to give *post hoc* rationalizations for actions already taken in violation of CEQA, even if done in good faith." In *Stanislaus Natural Heritage Project v. County of Stanislaus* (5th Dist. 1996) 48 Cal. App. 4th 182, 196 ("*Stanislaus*"), the Court of Appeal formulated the rule against precommitment to mean that "CEQA does, however, guarantee or at least attempt to assure that the environmental consequences of a government decision on whether to approve a project will be considered before, not after, that decision is made."

In *Citizens for Responsible Government v. City of Albany* (1st Dist.1997) 56 Cal. App. 4th 1199 ("*City of Albany*"), a Court of Appeal voided an extensive but unexecuted Development Agreement that the City placed on the ballot for approval prior to conducting CEQA review on the agreement. (*Id* at 1223.) The Court cited to *Friends of Mammoth* (*City of Albany* at 1220), *Bozung* (*City of Albany* at 1221,) *Laurel Heights* (*City of Albany* at 1221) and *Fullerton* (*City of Albany* at 1218) for support of its conclusion that "[T]he appropriate time to introduce environmental considerations into the decision making process was during the negotiation of the Development Agreement" and that CEQA review should not happen so late in the development process as to require "a burdensome reconsideration of decisions already made." (*Id* at 1221.) In *Natural Resources Defense Council v. City of Los Angeles* (2nd Dist. 2002) 103 Cal. App. 4th 268 ("*NRDC*"), the Court of Appeal cited to the *Bozung* formulation of the rule against precommitment (*NRDC, supra,* 103 Cal. App. 4th at 271) in holding that the City violated CEQA by entering into a lease for a container terminal prior to undertaking the analysis of all phases of development of the terminal. The Court styled its decision as a ruling about improper project segmentation, although the citation to *Bozung* demonstrates that the case was also to a large extent about improper precommitment to a

project before completion of an EIR. Also of note in *NRDC* is that the Court of Appeal did not apply a deferential substantial evidence standard to the City's decision on timing of review, but rather treated the segmentation issue that arose out of the timing of the EIR as a per se violation of CEQA. (*NRDC, supra,* 103 Cal. App. 4th at 272.)

The Court of Appeal in *Save Tara v. City of West Hollywood* (2nd Dist. 2007) 54 Cal. Rptr. 3d 856, (previously published at 147 Cal. App. 4th 1091; depublished by operation of Rules of Court upon Supreme Court grant of review) relied heavily upon *Bozung* and *Laurel Heights* to invalidate a detailed Development Agreement between a housing developer and the city. The city, which had prevailed at trial, argued that because the development agreement was made conditional upon later CEQA review, that no final decision had been made and that no CEQA violation had occurred. The Court of Appeal, at 54 Cal. Rptr. 868, harshly criticized this logic:

> The trial court's error is two-fold. First, an EIR is not to be delayed until a "final" decision has been made. Second, the finding that the agreement was "expressly conditioned on compliance with CEQA" indicates a misunderstanding of the EIR review process. That process is intended to be part of the decisionmaking process itself, and not an examination, *after the decision has been made*, of the possible environmental consequences of the decision.

While *Save Tara* is somewhat factually distinguishable from *McCloud* (the agreement at issue in *McCloud* did not include a detailed project description), the two cases, issued just a few weeks apart in early 2007, capture the large philosophical gap in the different lines of Courts of Appeal decisions regarding the precommitment issue.

## V. With the *Save Tara* decision, the Supreme Court lays out its most detailed ruling on precommitment to date, and unanimously reaffirms its previous holdings.

With the *Save Tara* decision, the California Supreme Court unanimously reaffirmed its previous language on precommitment from *No Oil* (*Save Tara* at 129), *Fullerton* (*Save Tara* at 130), *Laurel Heights* (*Save Tara* at 130), and *Vineyard* (*Save Tara* at 130). See also *Save Tara* at 136 ["postponing EIR preparation until after a binding agreement for development has been reached would tend to undermine CEQA's goal of transparency in environmental decisionmaking."] The Court claimed that it was not passing judgment on the correctness of the decisions below on the facts of the cases below. (*Id* at 133, 138, naming *Stand Tall on Principles*, *McCloud*, and *City of Albany*). Critically, however, the Court undercut one of the major legal underpinnings of the *Mt. Sutro-Stand Tall on Principles-Vernon* line of cases, by expressly disapproving the entire line of cases on the point of treating the timing of the CEQA process under a deferential standard of review. (*Save Tara, supra,* 45 Cal. 4th at 131, fn 10; see also *Id.* at 131–32 ["To accord overly deferential review of agencies' timing decisions could allow agencies to evade CEQA's central commands."]) Without deferring to agency decisions on timing of CEQA review, it is much less likely that future courts could reach the same outcome as the *Mt. Sutro* court. The *Mt. Sutro* line of cases thus appears to be very close to a doctrinal dead end.

The Court then addressed the question of whether agreements for development of a project that were made contingent on subsequent CEQA compliance resulted in improper precommitment to a project. (*Save Tara* involved a Development Agreement, but the Supreme Court's ruling could equally apply to "Will Serve" letters, Exclusive Negotiation Agreements, Memorandums of Understanding or Agreement, Purchase and Sale Agreements, or similar arrangements if the agency commits itself.) The Court stated that it would not create a per se rule that conditional agreements automatically violated CEQA ["we have emphasized the practical over the formal," *Save Tara, supra,* 45 Cal. 4th at 135], even going so far as to quote from *Vernon* that some agency bias is inevitable. (*Save Tara, supra,* 45 Cal. 4th at 136–137.) Nonetheless, the test the Supreme Court applied to analysis of conditional agreements is not deferential the question is "predominantly one of improper procedure." (*Id.* at 131, quoting *Vineyard, supra,* 40 Cal. 4th at 435.). With language that fit comfortably into the long line of holdings on precommitment, the Supreme Court in *Save Tara*, at 135, held that:

> When an agency has not only expressed its inclination to favor a project, but has increased the political stakes by publicly defending it over objections, putting its official weight behind it, devoting substantial public resources to it, and announcing a detailed agreement to go forward with the project, the agency will not be easily deterred from taking whatever steps remain toward the project's final approval.

While couched as a "totality of the circumstances" test (*Save Tara* at 132), judicial review of development agreements post-*Save Tara* should prove rigorous in practice. When both an approved detailed agreement and public statements by agency officials are found in the record, the logic of the *Save Tara* decision will likely lead a reviewing court to conclude that the agency has committed itself to a project. If the circumstances surrounding an agreement suggest that an agency has "effectively preclude[d] any alternatives or mitigation measures that CEQA would otherwise require to be considered,

including the alternative of not going forward with the project," then the agreement represents an improper precommitment to the project. (*Id.* at 139.) Furthermore, if an agency has so committed itself, "the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review." (*Id.* at 132.) The agreement has to be at least somewhat definitive to be worth entering into in the first place. Human nature will likely also lead to instances of relevant officials publicly speaking of the project in terms that suggest the agency is committed to the project. As recognized in *Vernon*, *supra*, 63 Cal. App. 4th at 688 and *Save Tara*, *supra*, 45 Cal. 4th at 136–137, the administrative record for virtually any public or public project or public-private partnership, such as the project at issue in *Save Tara*, will likely contain numerous statements by agency officials supporting the project. Post *Save Tara*, the inclusion of details in approved development agreements and supportive statements by agency officials will both be problematic for an agency arguing that it has not precommited itself to a project.

The application of the general principles against precommitment announced in the decision to the specific facts of *Save Tara* also supports the view that the Supreme Court test is rigorous. The Court looked at the language of the agreement, which expressed commitment to carrying out the project and created a financial incentive for the City to approve the project. (*Save Tara, supra*, 45 Cal. 4th at 140, 141.) But the Court also looked at extrinsic public statements by City officials to federal funding agencies, and to "public relations" statements by City's housing manager to the general public that presumed implementation of the project as specified in the development agreement. (*Id* at 123, 141.) The combination led logically to the conclusion that the City had improperly precommitted itself to the project.

## VI. The one published post-*Save Tara* precommitment case from the Court of Appeal suggests courts will not be as permissive about allowing agencies to defer CEQA review.

To date, one published Court of Appeal case has interpreted the substantive findings of the *Save Tara* decision. (*RiverWatch et al. v. Olivenhain Municipal Water District* (4th Dist. 2009) 170 Cal. App. 4th 1186 ("*RiverWatch*"). The case involved the agreement between a water district and a landfill operator that would provide recycled water for the landfill site. The agreement placed sole responsibility for ensuring CEQA compliance on the landfill operator, although another agency was preparing an EIR on the landfill project. The Court of Appeal determined that the Water District was a "responsible agency" (i.e., had permitting responsibilities for the project even though it was not the "lead agency" preparing the environmental review documents for the larger landfill project) under Pub. Res. Code Section 21069 and Guidelines Section 15381. The Court then applied the *Save Tara* test to the District's actions, looked at the text of the agreement as well as statements made at the Water District Board meeting approving the agreement, and found that the agreement easily met the test as a definite commitment requiring prior environmental review. (*RiverWatch*, *supra*, 170 Cal. App. 4th at 1212.) The court further held that the clause regarding CEQA compliance as the sole responsibility of the landfill operator did not and could not excuse the Water District from considering the EIR prepared by the lead agency prior to approving the water supply for the landfill. (*Id.* at 1213.)

*RiverWatch* is important as an extension of *Save Tara*'s precommitment test to responsible agencies. *RiverWatch* is also important because the Court of Appeal expressly recognized that the *Save Tara* decision limited the holdings of *Stand Tall on Principles* and *McCloud* to the particular facts of those cases, and that neither case should be interpreted broadly. (*RiverWatch, supra*, 170 Cal. App. 4th at 1209.) The RiverWatch decision provides some insight into how lower courts are likely to apply the *Save Tara* decision, and that the application of *Save Tara* will be rigorous in disfavoring deferral of environmental review. A recent unpublished opinion also recognized that *Vernon* has been disapproved (*Taxpayers for Responsible Land Use v. City of San Diego* 4th Dist 2009, 2009 WL 389965, p. 22), and it is reasonable to anticipate that numerous Courts of Appeal will look to *Save Tara* for guidance and reach similar conclusions.

## VII. How can agencies incorporate *Save Tara* into their project planning?

In response to *Save Tara*, the best advice to an agency would be to initiate CEQA review prior to entering agreements such as Development Agreements (or any functionally similar arrangement that could commit the agency to a project). To best insulate itself from a legal challenge based on *Save Tara*, an agency should conduct CEQA review as soon as possible after an agency has internally fleshed out a project proposal in enough detail to permit meaningful environmental review, especially if the agency is proposing the project itself or proposing to enter a public-private partnership for a project. Otherwise, projects that an agency has identified as needed can be delayed for years, and set back to square one, because of improper precommitment, and the public can be left feeling disaffected and excluded from the decision

making process. The type of certainty and detail that Development Agreements are meant to provide will almost certainly mean that an agency has enough detail on a project to conduct CEQA review, so if an agency is at the stage where it is contemplating entering into a Development Agreement or similar arrangement, such a situation argues that CEQA review should have already been initiated. At the very least, in such a situation the agency should initiate CEQA review before advancing the project any further.

The key for the agency should be evaluating whether the agency is committing itself to a project through its actions. The *Save Tara* decision recognized that mere agency interest in a project is not a commitment, and that CEQA already contains exemptions for feasibility studies. (*Save Tara*, *supra*, 45 Cal. 4th at 136.) It also hinted that some preliminary agreements may be appropriate in some circumstances, citing to an amicus brief by the League of California Cities. (*Id* at 137.) Thus, agencies at least maintain the flexibility to conduct feasibility studies prior to undertaking CEQA review, and in the case of public-private partnerships, these studies could be integrated with preliminary discussions with potential developers. However, once the project passes the feasibility study stage, the agency should complete CEQA review before entering into the types of agreement described above, or making significant financial investments, outside of the planning process that, as a practical matter, foreclose alternatives.

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. In the past few years the Supreme Court has repeatedly stressed the value of an appropriately tiered environmental analysis. (*Vineyard, supra*, 40 Cal. 4th 435; *In Re Bay-Delta, supra*, 43 Cal. 4th at 1170; *EPIC, supra*, 44 Cal. 4th at 503; see also Pub. Res. Code § 21093(b) [EIRs "shall be tiered whenever feasible"] and Guidelines § 15385(b).) The Supreme Court suggested in *Save Tara* that tiered analysis may provide the flexibility agencies need for planning needed projects, without the risk that the agency will improperly precommit to a project. (*Save Tara, supra*, 45 Cal. 4th at 139.) Given the Supreme Court's recognition of the validity of feasibility studies, the safest course of action for an agency may be to initiate the first tier of environmental review after determining that a project is feasible and that the agency wishes to pursue the project further.

Managers of an agency considering a project should also make it clear to their planning staffs that initial inquiries into project feasibility should not be construed as definitive commitments to a project, and that, even if a project is perceived as needed, agency officials should always temper any natural enthusiasm for the project with the need for timely CEQA review. As the experience of West Hollywood shows, officials should avoid implying to the public that a project is a "done deal" if environmental review has not been completed. This lesson from *Save Tara* is in some ways the most obvious, but perhaps requires the most institutional change in approach to project planning. However, this approach is clearly mandated by CEQA. (Pub. Res. Code § 21006 ["CEQA is integral to agency decision making"].) In the long run, complying with CEQA, including its recently reaffirmed rule against precommitment, is the best tool an agency has to advance a socially useful project in a legally compliant manner.

## VIII. Conclusion: CEQA's rule against precommitment is more vibrant than ever.

The Supreme Court in *Save Tara* unanimously reaffirmed, in its most extensive treatment of the subject to date, that precommitment to a project violates CEQA. It is also clear, from the Court's overt disapproval of deferential review of agency timing of CEQA review, from the inquiry into language of the agreement, and from consideration of extrinsic evidence such as public statements by agency officials, that a public agency entering into an agreement about a project prior to CEQA compliance raises a serious specter of improperly committing itself to a project without first undertaking CEQA review. Furthermore, as evidenced by RiverWatch, lower Courts will likely take a newly critical look at precommitment issues and recognize the limitations on conditional agreements, made subject to future CEQA compliance, that were previously condoned in some appellate decisions. An agency would be well advised to avoid conditional agreements predicated on future CEQA review, and instead to rely on tiered CEQA review, with an initial focus on site selection or alternative use issues. As a result of the *Save Tara* decision, the rule against precommitment to a project is more vibrant than ever, as is CEQA's closely related requirement that environmental protection and governmental transparency be fully integrated into project planning.