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[COUNTY APPROVAL OF CONDITIONAL SITING AGREEMENT NOT A PROJECT APPROVAL UNDER CEQA](#)

[City of Santee v. County of San Diego, No. D055310 \(4th Dist. June 7, 2010\)](#)

By [Michael Wilmar](#) and Alex Merritt

Last month the California Court of Appeal for the Fourth District provided important guidance on the issue of when approval of an agreement affecting a development constitutes approval of a “project” that requires review under the California Environmental Quality Act (“CEQA”). In *City of Santee v. County of San Diego*, the Fourth District held that a siting agreement between the County of San Diego and the California Department of Corrections and Rehabilitation (“DCR”) for a state prison facility did not commit the County to a definite course of action, and therefore did not constitute a project approval requiring CEQA review. The court reached this conclusion after noting that the agreement did not preclude any alternatives or mitigation measures, and that implementation of the agreement was contingent on a number of factors, including future environmental review.

The case arose when the County and DCR entered into a siting agreement under the Public Safety and Offender Rehabilitation Services Act of 2007 for a DCR reentry facility, which is a facility that prepare inmates to transition into society. Under the siting agreement, the County agreed to identify up to three sites within its boundaries that DCR could potentially use for a reentry facility. If DCR selected a site proposed by the County, it agreed to give the County preferential access to \$100 million for use in financing County jail projects. Importantly, the siting agreement provided that if DCR selected a County-owned site, then the County would be obligated to convey that property to DCR. The agreement also made eventual construction of the reentry facility contingent on environmental review under CEQA. After entering the agreement, the County identified two potential sites for the reentry facility, one owned by the County and one owned by the state.

The City of Santee filed a petition for writ of mandate. It alleged that the siting agreement was a project requiring review under CEQA because it committed the County to a definite course of action. The County, joined by DCR, filed a demurrer. The trial court sustained the demurrer without leave to amend, and Santee appealed.

On appeal, Santee argued that the County had committed itself to the reentry facility by agreeing to convey land to DCR. Santee further argued that by committing itself to the reentry facility, the County had also

committed itself to the expansion of a County jail located within Santee city limits. The details of Santee's second argument were unclear from the opinion, but the County had apparently made plans to expand its jail in Santee. Santee argued that by committing a County-owned site to the state reentry facility, the County had eliminated a potential alternative to expanding the jail. In Santee's view, by eliminating an alternative to the expansion, the County had effectively committed itself to the expansion.

The legal dispute hinged on whether approval of the siting agreement required CEQA review. Under CEQA, a public agency must prepare an environmental impact report whenever it proposes to approve or carry out a project that may have a significant effect on the environment. A public agency "approves" a project when it makes a decision that commits it to a definite course of action. In *Santee*, if the siting agreement committed the County to a definite course of action, then it was a project approval within the meaning of CEQA, and the County was required to conduct environmental review before entering into the agreement.

In deciding whether the siting agreement constituted a project approval that triggered CEQA review, the court had to navigate the precedent set by two recent cases. In the first case, *Save Tara v. City of West Hollywood*, 45 Cal.4th 116 (2008), the California Supreme Court considered whether a development agreement between a city and low-income housing developer constituted a project approval requiring environmental review under CEQA. The court noted that "[c]hoosing the precise time for CEQA compliance involves a balance of competing factors," and it declined to announce a bright-line test for determining whether a development agreement is a project approval for purposes of CEQA. Instead, it set forth the general principle that courts should examine the terms of the development agreement and the surrounding circumstances "to determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternative or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project If, as a practical matter, the agency has foreclosed any meaningful options to going forward with the project, then for purposes of CEQA the agency has 'approved' the project."

Applying this principle, the supreme court decided that the development agreement, although conditional, committed the city to a definite course of action, and therefore required CEQA review. The court cited the following factors as evidence of commitment: (1) the agreement provided the developers with \$450,000 in financing, which was not contingent on CEQA review, and which the developer would not have repaid if the city disapproved the project; (2) city officials publicly announced their intention to have the project built; (3) the city took steps to relocate the tenants who lived in the existing building on the proposed project site; and (4) in the initial development agreement (later revised), the city council effectively delegated its authority over CEQA review to the city manager.

In the second case, *Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara County Assn.*, 179 Cal.App.4th 113 (2009), a court of appeal applied the principles of *Save Tara* to a financing plan adopted by a local transportation agency. The financing plan identified local transportation projects which the

agency planned to finance with new tax revenues. Applying *Save Tara*, the court found that the plan was not a commitment to any of the proposed projects because the projects were described in general terms, their construction was conditioned on securing additional financing, the list of proposed projects was subject to amendment, and all the projects were subject to future CEQA review. In short, any proposed project may have been "modified or not implemented depending upon a number of factors, including CEQA environmental review."

Against the backdrop of these two opinions, the *Santee* court had to decide whether the siting agreement committed the County to a project and thus required CEQA review. After reviewing the facts, the court decided that the contested siting agreement did not commit either the County or DCR to either the state reentry facility or to the expansion of the County jail. In the court's view, nothing in the siting agreement or the surrounding circumstances committed the agencies to any particular sites, or foreclosed consideration of any alternatives or mitigation measures.

With regard to site selection, the court decided that the agreement did not select any particular location for the reentry facility. The court acknowledged that if DCR selected a County-owned site, then the County would be obligated to convey it to DCR. Nonetheless, the court found this arrangement conditional on two grounds. First, it depended on DCR selecting one of the proposed sites, and second, it depended on the proposed site being owned by the County.

In addition, the court rejected the purported connection between the reentry facility and the expansion of the County jail in *Santee*. It noted that the siting agreement did not expressly mention the expansion, and it found that the site proposed for the reentry facility had "only the most tangential and entirely conditional impact on the . . . expansion."

The court also found the financial and environmental aspects of the siting agreement to be indefinite. First, the financing preference DCR offered to the County was not guaranteed—it was contingent on DCR selecting one of the County's proposed sites. Second, because the site selection was conditional, nothing in the siting agreement foreclosed consideration of alternatives to any project or mitigation measures for those projects.

Given the conditional nature of the siting agreement, the court found that it failed to describe a project that could be subject to any meaningful CEQA analysis. The court stated that "the face of the agreement places it squarely in the realm of preliminary agreements needed to explore and formulate projects and for which CEQA review would be entirely premature."

In conclusion, *Santee* is an important decision because it applies the principles set forth in *Save Tara* to a siting agreement, and reaffirms that agreements which do not commit agencies to a definite course of action are not project approvals for purposes of CEQA. It also provides helpful guidance to developers and municipalities wrangling with the difficult problem of deciding when in the development process to initiate

CEQA review.

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