
Saving Private Partnerships: Court Upholds P3 Project against CEQA Challenge under *Save Tara*

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*A 2008 California Supreme Court decision, *Save Tara v. City of West Hollywood*,¹ cast doubt on local governments' ability to enter into agreements with private developers prior to completing project review under the California Environmental Quality Act (CEQA). In a pair of recent decisions,² the Fourth District Court of Appeal upheld a public-private partnership (P3) water project against two CEQA challenges. In the first case, the court found that an agreement among the private and public partners and another public agency was not an improper pre-CEQA commitment under *Save Tara*. Focusing on the agency's reservation of discretion to reject or modify the project, the court took a practical approach which may be applied to a wide range of agreements between public agencies and private entities, including but not limited to P3s. In the second case, the court held that the public partner properly acted as CEQA lead agency, notwithstanding its interest in the P3 project.*

The Cadiz Water Project and Its Two MOUs

The Cadiz water project is a public-private partnership between the Santa Margarita Water District (Santa Margarita) and Cadiz, Inc., a private agriculture and water storage company, to extract groundwater under Cadiz' property for use by Santa Margarita and other water suppliers. Fenner Valley Mutual Water Company (Fenner), a nonprofit entity, was formed by Cadiz to manage and operate the project facilities.

¹ 45 Cal. 4th 116 (2008).

² *Delaware Tetra Technologies, Inc. v. County of San Bernardino*, 247 Cal. App. 4th 352.(2016); *Center for Biological Diversity v. County of San Bernardino*, 247 Cal. App. 4th 326 (2016).

The project is subject to San Bernardino County's groundwater management ordinance which, with certain exceptions, requires a County permit.

As the public partner in the P3, Santa Margarita's numerous responsibilities in carrying out the project include obtaining financing, acquiring and holding property interests, approving the design and construction of wells, pipelines and conveyance facilities, negotiating terms for water conveyance and (in a later phase of the project) water storage, managing and overseeing project operation, providing staff for day-to-day operation, maintenance, bookkeeping and administration, and supervising the actions of Fenner and a related joint powers authority, including Fenner's full implementation of regulatory and mitigation obligations. Cadiz, as the private partner, undertook to finance the design and construction and, under a water purchase and sale agreement, has the right to sell water to the various member participants, using the revenue to pay down the debt Cadiz incurred to develop the project.³

Santa Margarita and the County entered into a Memorandum of Understanding (MOU 1) naming Santa Margarita as CEQA lead agency for the project and the County as a responsible agency. Under CEQA, the lead agency prepares the Environmental Impact Report (EIR) for a project, while responsible agencies rely on the EIR to issue subsequent approvals.⁴ Santa Margarita issued a Draft EIR for public comment, then executed a second Memorandum of Understanding with the County, Cadiz and Fenner (MOU 2), providing for development of a groundwater management plan based on the Final EIR. MOU 2 also provided that compliance with its terms and the groundwater plan would qualify for an exception from the County permit requirement. Santa Margarita then completed the Final EIR and adopted the project and groundwater plan.

No Improper Pre-CEQA Commitment under *Save Tara*

Delaware Tetra Technologies, a competing groundwater user, sued the County, alleging that its execution of MOU 2 prior to completion of the Final EIR was an illegal pre-CEQA commitment under *Save Tara*. Public agencies and private developers regularly enter into a variety of agreements prior to embarking on joint projects, including but not limited to projects formally structured as P3s. Yet for state and local agencies in California, the practical need for such agreements may conflict with their obligation to complete, and consider the results of, CEQA review before approving a project. To reconcile that conflict, project agreements commonly contain a condition providing that proceeding with the project is contingent on completing the CEQA process. However, this practice—sometimes referred to as “CEQA clearance”—was criticized as a *de facto* commitment to carry out the project once the “clearance” was complete, or to reject the “no project” alternative which agencies must consider under CEQA.

In *Save Tara v. City of West Hollywood*, the California Supreme Court held that a CEQA condition “could be a legitimate ingredient” in an agreement, but that “if the agreement, viewed in light of all the surrounding circumstances, commits the publicly 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.”⁵ The Supreme Court declined to adopt any bright-line rule for identifying such improper pre-commitments, however, leaving it to case-by-case consideration by the lower courts. Later cases such as *Cedar Fair v. City of Santa Clara*⁶ took up the challenge. In *Cedar Fair*, the court upheld a pre-CEQA term sheet for development of the San Francisco 49ers stadium in Santa Clara, which specified

³ See <http://www.smwd.com/operations/cadiz-project.html>

⁴ CEQA Guidelines §§ 15050, 15096. Regulations implementing CEQA are known as the “CEQA Guidelines,” at 14 Cal. Code Regs. §§ 15000 *et seq.*

⁵ 45 Cal. 4th at 132.

⁶ 194 Cal. App. 4th 1150 (2011).

in detail the precise site and stadium capacity; creation of a joint powers authority and a special tax district; the structure, rent and term of a ground lease; operational responsibilities and division of revenues—but expressly characterized all these as a “framework for good faith negotiations” rather than a binding agreement. With that disclaimer, the *Cedar Fair* court found, the City of Santa Clara had avoided any improper pre-CEQA commitment.

In *Delaware Tetra Technologies, Inc. v. County of San Bernardino*, the court similarly held that the County made no pre-CEQA commitment by executing MOU 2. MOU 2, the court found, was more like the term sheet in *Cedar Fair* than the agreement in *Save Tara*. MOU 2 provided that the project would only proceed if the EIR and groundwater plan were finalized. Like the *Cedar Fair* termsheet, MOU 2 established the “framework” of a process for completing the plan and expressly stated that the County retained full discretion to approve or disapprove the project, require additional mitigation measures or alternatives, or modify the MOU itself depending on the mitigation measures necessitated by CEQA. In addition, in a staff report and recommendation to the Board of Supervisors, County staff carefully explained that:

The County, at this time, is not committing to approve or undertake the Cadiz Project. And while [MOU 2] sets a framework for development and enforcement of the [groundwater plan] if approved, [MOU 2] reserves to the County all necessary discretionary authority to approve, deny, or condition the Cadiz Project, including the authority to adopt any mitigation measures or alternatives necessary to avoid or substantially lessen the environmental impacts of the Project. Any approval of the Cadiz Project itself is expressly conditioned on final CEQA review. The County's approval of [MOU 2] therefore does not constitute an approval of the Project, and is not a decision subject to CEQA.

The staff report went on to describe the further steps prior to any binding commitment by the County: completion of the Final EIR; completion of the groundwater plan; and independent consideration of the Final EIR and plan by the County. The County also reserved its right, if it did not agree that the Final EIR and plan were adequate, to challenge them in court.

The P3 Public Partner Was a Proper CEQA Lead Agency

In addition, Center for Biological Diversity and other environmental groups (collectively, CBD) sued Santa Margarita and the County, objecting to their agreement in MOU 1 that Santa Margarita would act as CEQA lead agency.⁷ CEQA Guidelines § 15051 sets out several criteria for identifying the appropriate lead agency to prepare an EIR. If an agency proposes to carry out a public project, that agency is the lead agency. For a private project, if several agencies will issue permits, leases and other approvals to the private applicant, the lead agency is the agency with greatest responsibility for supervising or approving the project as a whole, and normally is an agency with general governmental powers such as a city or county, rather than an agency with a single or limited role such as issuing a wastewater discharge permit. If multiple agencies have a “substantial claim” to serve as lead agency under these criteria, they may agree among themselves which one will do so.

In *Center for Biological Diversity v. County of San Bernardino*, the court applied CEQA Guidelines § 15051 to the P3 project, concluding that:

if a project will be carried out jointly in a partnership between a public agency and a nongovernmental person or entity, the agency that will serve as the lead agency for purposes of

⁷ CBD also alleged deficiencies in the EIR, which the court rejected and are not discussed here.

the environmental review for the project may be (1) the public agency that is a part of the public/private partnership, or (2) the public agency with the greatest responsibility for supervising or approving the project as a whole.⁸

Santa Margarita, the court found, was correctly designated as lead agency under either test.

The trial court had agreed with CBD that “CEQA’s underpinnings of accountability and stewardship support the conclusion that the County should have instead served as lead agency. The County was in the best position to objectively balance the benefits and risks of the project rather than the purchaser of the water, [Santa Margarita].”⁹ The Court of Appeal rejected that reasoning, however, noting that public agencies inevitably have an “interest” when they pursue their own public infrastructure projects. In this case, “Santa Margarita’s interest in the Project did not automatically make it an improper lead agency. Rather Santa Margarita was in fact the agency carrying out the project, and like any other public agency that proposed to carry out a project, it was required to prepare the EIR.”¹⁰ Moreover, as Santa Margarita had at least a “substantial claim” to be lead agency, the agencies were entitled to agree in MOU 1 that Santa Margarita would assume the lead role.¹¹

Guidance for P3 Projects and Other Agreements between Agencies and Private Entities

The two decisions provide valuable new guidance on CEQA compliance for P3 projects in California. *Center for Biological Diversity* explains the application of the lead agency criteria to P3 projects and approves the designation of the P3’s public partner as the lead. In addition, the MOU and staff report in *Delaware Tetra Technologies* provide a useful model for agencies considering P3 and similar agreements prior to completion of the CEQA process. More broadly, *Delaware Tetra Technologies*, endorsing the practical approach of *Cedar Fair*, may be applied to a wide range of agreements between public agencies and private entities, not limited to the P3 context. Even detailed agreements specifying the anticipated arrangements between agencies and applicants should be upheld, so long as the agency clearly reserves full discretion to reject or modify the project and avoids any express or implied pre-CEQA commitment to an outcome.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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⁸ 247 Cal. App. 4th at 340.

⁹ *Id.* at 339, quoting trial court decision.

¹⁰ *Id.* at 345.

¹¹ In a pending update to the CEQA Guidelines, the Governor’s Office of Planning and Research has proposed a clarifying amendment to Guidelines § 15051. Proposed Updates to the CEQA Guidelines: Preliminary Discussion Draft (August 11, 2015), at 112

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