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COX CASTLE & NICHOLSON LLP 2010 SECOND QUARTER CEQA CASE LAW UPDATE

There was substantial CEQA activity in the Courts of Appeal and California Supreme Court during the last three months, with ten new decisions summarized in this Update. Most importantly, in the *Stockton Citizens* case, the Supreme Court affirmed CEQA's 30-day statute of limitations, one of the relatively few areas of certainty in CEQA practice. Among the appellate decisions, the first decision evaluating greenhouse gas emissions under CEQA was issued by the First District (*CBE v. City of Richmond*). In the continuing saga of CEQA Wal-Mart decisions, the court in *Melom v. City of Madera* held that modifying a project to include a "supercenter" store does not automatically trigger a supplemental EIR. Finally, a significant decision from the Fourth District indicates that the scope of an agency's CEQA review is limited by the scope of the agency's discretion (*San Diego Navy Broadway Complex v. City of San Diego*); on that basis, the court held that a follow-up design review did not trigger a requirement to evaluate climate change impacts.

Also, the California Supreme Court granted review in the case of *Save the Plastic Bag v. City of Manhattan Beach*, summarized in the last quarterly update. There, the Court of Appeal held that enacting a plastic bag ban required an EIR, due to the potential impacts of mandating paper bags instead of plastic. That is now the one CEQA case pending before the California Supreme Court.

California Supreme Court Upholds CEQA's Statute of Limitations: *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481.

In the first case of the calendar quarter, the Supreme Court on April 1 upheld CEQA's statute of limitations, and confirmed that project opponents cannot avoid the statutory time limits by arguing that the underlying project approvals were invalid. This decision is important because it upholds one of the relatively few areas of certainty in CEQA practice – namely, the requirement that lawsuits must be brought within a short time following the lead

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CASES IN THIS ISSUE:

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agency's posting of a notice that it has made a CEQA determination.

The dispute arose out of a staff-level approval for a Wal-Mart store. Staff determined that the Wal-Mart project was consistent with prior approvals that had been evaluated under CEQA, and also determined that the City was required to approve the Wal-Mart project on the basis of its consistency with the prior approvals. For this reason, the City determined that the approval was ministerial and thus exempt from CEQA, and posted a notice of exemption to that effect. The notice of exemption triggered a 35-day time limit for bringing a lawsuit.

Project opponents filed suit some months after the 35-day period expired, and argued that the statute of limitations was not triggered because the staff-level approval was not valid. Both the trial court and the Court of Appeal accepted these arguments and ruled in favor of the project opponents.

The Supreme Court overturned the Court of Appeal's decision, holding that the project opponents could challenge the validity of the City's approvals, but only within the 35-day statute of limitations period. The Court held that claims about the validity of the underlying project approval could not be used to evade the statutory time limit for challenging that approval. The Court noted that the purpose of the statute of limitations is to provide certainty, and that the statute of limitations necessarily operates across the board, barring both well-founded and ill-founded claims if they are not brought in time.

The project opponents also argued that the notice of exemption itself was inadequate, and thus did not trigger the 35-day time period. The Court rejected this argument, noting that CEQA only requires a "brief" description of the approved project. The Court concluded that the notice could have been clearer, but because it minimally complied with CEQA, it was effective to trigger the 35-day limitations period.¹

Proposal for a Supercenter Does Not Automatically Require Preparation of a Supplemental EIR: *Melom v. City of Madera* (2010) 183 Cal.App.4th 41.

Petitioners challenged the City of Madera's decision not to require a supplemental EIR for approval of a revised site plan, which revision allowed construction of a Wal-Mart Supercenter. In 2006 the City had certified an EIR for a retail center and in 2007 the developer submitted a revised site plan for the retail center reflecting the inclusion of the Supercenter. The City prepared an Addendum to support the approval of the revised site plan, finding that no supplemental EIR was required.

Petitioners claimed that, because the City was considering a discretionary approval for a supercenter, a supplemental EIR was automatically required, based on two prior cases that rejected approval of supercenters on CEQA grounds, *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, and *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062. The Court of Appeal rejected this claim. It noted petitioners failed to demonstrate that any record evidence suggested that the revisions to the site plan would result in urban decay impacts – the impacts associated with the supercenters in the *Bakersfield Citizens* and *American Canyon* decisions. Further, the Court took the opportunity to clarify its decision in *Bakersfield Citizens*, stating that the decision "should not be construed as holding that" the inclusion of a "supercenter" in a retail project "necessarily triggers an examination of some particularized theoretical environmental effect or effects."

EIR Upheld Against Challenges to Alternatives Analysis and Agency Decision to Reject Alternatives as Infeasible: *Jones v. Regents of the University of California* (2010) 183 Cal.App.4th 818.

In this case, an EIR prepared for the long-range development plan at the Lawrence Berkeley National Laboratory was upheld against a two-pronged attack based on the analysis of project alternatives in the EIR. The case is important in that it affirms that agencies need not evaluate project alternatives that are inconsistent with project objectives, and also confirms that agency decisions about whether to

¹ Michael Zischke and Scott Birkey represented the California building Industry Association as *amicus curiae* in this case.

adopt or reject the alternative as infeasible are to be upheld if supported by substantial evidence.

Berkeley Lab is a research campus operated by the University of California for the U.S. Department of Energy. As a UC campus, the Lab must prepare an EIR before it adopts a long range development plan, pursuant to Public Resources Code 21080.09. The Lab prepared a programmatic EIR evaluating anticipated development of research facilities through 2025. One of the principal issues considered by the EIR, and pursued by some members of the surrounding neighborhoods, was whether further development should be pursued on the Lab's hill site, above the UC Berkeley campus, or whether new development should instead be pursued at another site, such as the Richmond field station operated by UC Berkeley.

The EIR considered several alternatives to the proposed development plan, including the required no project alternative, an alternative that avoided destruction of the historical Bevatron facility, two reduced growth alternatives, and an off-site alternative with most new development at the Richmond Field station site, but some new development on the Lab's hill site. Petitioners claimed that this range of alternatives was inadequate because the EIR did not consider a "true off-site" alternative with all new development away from the Lab's hill site. The court rejected this claim, noting that many of the project objectives called for expanding collaboration among scientists and accommodating multiple disciplines in research facilities. The court stated that an alternative with no development at the hill site would prevent realization of the project's primary objective of creating a campus-like setting at the hill site, and would frustrate most of the other objectives as well, given the focus on collaborative science and multidisciplinary work. Both on this basis, and because EIRs do not need to consider every possible

variation of alternatives, the analysis in the EIR was adequate.

Petitioners also challenged the Regents' decision on the merits of the project, arguing that the off-site alternative in the EIR was rejected on the basis of project objectives that were inadequately described and too narrowly defined. The court rejected this claim, finding that the Regents' decision to reject the alternative was supported by ample substantial evidence that the off-site alternative would not achieve the goals of creating a more campus-like setting to enhance collaboration, productivity and efficiency.

Finally, in an unpublished portion of the opinion, the court rejected a climate change challenge to the EIR. Petitioners argued that the EIR was required to be recirculated due to the addition of information to the Final EIR about climate change, but the court found that petitioners failed to exhaust their remedies on this point. (This case was heard by the First District on the same day as the *CBE v Richmond* case summarized below, so the Court of Appeal heard the first two appellate cases raising CEQA climate change issues on the same day).²

EIR for General Plan That Contemplates Development Near Airport Must Adequately Analyze Impacts on Aviation and Evaluate a Reasonable Range of Alternatives: *Watsonville Pilots Association v. City of Watsonville* (2010) 183 Cal.App.4th 1059.

In this case, the Sixth District Court of Appeal invalidated the City of Watsonville's approval of an EIR for the City's 2030 General Plan update. The 2030 General Plan contemplated development of 2,250 single-family and multifamily dwelling units in an unincorporated area of Santa Cruz County known as Buena Vista that is located adjacent to the Watsonville Municipal Airport. The Watsonville Pilots Association challenged the City's certification of the EIR on the basis that it failed to adequately analyze (i)

² Michael Zischke and Chad Hales represented the Berkeley Lab and the Regents in the preparation of the EIR in this case, and in the trial and appellate litigation.

the 2030 General Plan's impact on aviation related to the Watsonville Airport, (ii) a reasonable range of alternatives, and (iii) the impact of supplying water to new development contemplated by the 2030 General Plan. The court agreed with Watsonville Pilots with respect to the EIR's analysis of aviation impacts, but upheld the EIR's analysis of water supply impacts. The court also found that the EIR failed to adequately analyze a reasonable range of project alternatives.

With respect to aviation impacts, the EIR acknowledged that portions of the Buena Vista planning area would be located within the Airport's flight zone and, therefore, the Airport had the potential to create a safety hazard for people working and residing in the planning area. However, the EIR deferred consideration of this potential impact to a future specific plan for the Buena Vista area and asserted that implementation measures and policies of the 2030 General Plan would protect adjacent development from airport safety hazards.

According to the court, the EIR's analysis of aviation safety hazards relating to future growth was inadequate, but not on the theory that the analysis was improperly deferred for future consideration. Instead, the court faulted the EIR for its failure to address safety criteria set forth in the Airport Planning Land Use Handbook prepared by the Aeronautics Division of the California Department of Transportation (Handbook). According to the court, state aeronautics law required the City to incorporate into the 2030 General Plan the safety criteria set forth in the Handbook because an Airport Land Use Commission had not been formed in Santa Cruz County. Since the 2030 General Plan did not incorporate the required safety criteria, the EIR never discussed conflicts between such safety criteria and the contemplated development of the Buena Vista planning area. In the court's view, without such discussion, the EIR failed to adequately analyze the project's impacts related to aviation safety.

The court also considered a challenge to the adequacy of the EIR's alternatives analysis. As certified, the EIR evaluated three alternatives to the 2030 General

Plan. Alternative 1 would have the same level of development, but all new development would be within the City's existing city limits. Alternative 2 would have the same level of development, but only half of the new development would be located in the City's future growth areas, with the balance to be located within the City's existing city limits. Alternative 3 was the statutorily mandated "no project" alternative. The Watsonville Pilots Association argued that the EIR was also required to analyze a "reduced density" alternative and the court agreed.

In defense of the EIR's alternative analysis, the City argued that CEQA did not require the EIR to include a reduced density alternative because such an alternative would not meet the project objective of accommodating future demand for housing and employment consistent with regional growth projections. As noted by the court, however, CEQA Guideline 15126.6(a) requires an EIR to consider those alternatives that will attain most of the project objectives while avoiding or substantially reducing the environmental impacts of the project. The court found that a reduced density alternative would substantially reduce the environmental impacts of the 2030 General Plan, particularly those impacts related to water supply and farmland conversion, while also satisfying 10 of the 12 project objectives set forth in the EIR. Since a reduced density alternative could reduce project impacts while meeting "most" of the project objectives, the court held that the EIR's alternatives analysis was unreasonably restricted and therefore violated CEQA.

Although the court faulted the EIR's aviation impact and alternatives analyses, it upheld the EIR's analysis of water supply impacts. Citing *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, the court held that the burden of identifying likely water sources for a project varies with the stage of project approval involved; the necessary degree of confidence involved for approval of a General Plan, for example, is much lower than for issuance of building permits. According to the court, the ultimate question under

CEQA is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable impacts of supplying water to the project, taking into account the uncertainties inherent in long-term land use and water supply planning. The court determined that the EIR adequately acknowledged the degree of uncertainty involved in supplying new development with water from a groundwater basin experiencing overdraft conditions, adequately considered the steps the City would take to address the overdraft conditions, and adequately considered the reasonably foreseeable impacts of supplying such water to the project. Accordingly, the court upheld the water supply analysis even though it did not pinpoint a solution to the overdraft problem, a task the court held was beyond the scope of the EIR.

Court Upholds Adequacy of Functional Equivalent Document Pursuant to CEQA's Certified Regulatory Program Provisions: *San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Board* (2010) 183 Cal.App.4th 1110.

Plaintiffs who supply irrigation water to farmers in the San Joaquin Valley challenged two decisions by the State Water Resources Control Board (Board) by which the Board amended the Water Quality Control Plan for the Sacramento and San Joaquin River Basins. In particular, the Board amended the total maximum daily load (TMDL) limits for salt and boron in a portion of the San Joaquin River and amended the rules for dissolved oxygen (DO) in a stretch of the river called the Ship Channel.

The salt/boron TMDL required dischargers to select from available pollution control techniques to meet the new TMDL. The DO standard called for further studies intended to lead to a new TMDL for DO, which would be adopted, subject to CEQA compliance, in the future. Plaintiffs raised a series of Clean Water Act and procedural objections to the new standards, as well as CEQA claims, each of which was rejected by the trial court. The Court of Appeal affirmed on all grounds.

The CEQA analysis for the new salt/boron TMDL and DO studies was prepared under CEQA's provisions for certified regulatory programs, which require the functional equivalent of an EIR or negative declaration,

but exempt the documents from the purely procedural CEQA requirements. There are several holdings on the adequacy of the functional equivalent analysis in this case:

The plaintiffs objected that the environmental baseline and alternatives were inadequate because the Board did not have authority to impose new TMDLs. Having already rejected the substantive challenges under water law earlier in the opinion, the court summarily rejected the CEQA argument based on the same contentions.

The plaintiffs also contended that the Board violated Public Records Code §21159(a) (requiring enumerated regulatory agencies, including the Board to analyze the reasonably foreseeable environmental impacts of compliance with a new pollution control rule). The court rejected this contention and distinguished the case from *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, where a discharge regulation was set aside because the Board had used the functional equivalent of a negative declaration, not an EIR.

The court agreed that the Board could not speculate about specific impacts of imposing new salt/boron controls because the dischargers had 15 different methods to choose from to meet the new TMDL, and the specific impacts would depend on the dischargers' choices. Plaintiffs objected that the Board's suggestion that river flows could be supplemented with additional fresh water flows to compensate for reduced irrigation return flows violated the Supreme Court's *Vineyard Area Citizens* holding regarding the need to evaluate the availability of future water supplies. The court rejected this contention finding the recommendation for possible supplemental flows unlike the need to have reasonable certainty in future municipal water supplies.

The court dismissed as "flights of fancy" the plaintiffs' contention that the Board should have evaluated whether the new salt/boron TMDL was growth inducing because it might make farming uneconomical and thereby hasten the sale of farmland to urban development.

The court also rejected the contention that the DO Amendment deferred CEQA analysis under the guise of ordering further studies. It found that the studies themselves would not cause environmental impact and it was appropriate to gather data before formulating a new DO standard. Further, the court rejected the contention that the Board failed to analyze the cumulative impacts of adopting both salt/boron standards and a DO standard especially with respect to impacts on overall water flow into the river system. The court found the Board had examined this issue and had reached reasonable conclusions.

California’s First Published Case on CEQA and Greenhouse Gas Emissions Sets Aside “Cursorily Described” Mitigation Measures: *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70.

The First District Court of Appeal set aside the EIR for Chevron’s Richmond refinery upgrade, in part because the EIR did not adequately describe mitigation measures for greenhouse gas emissions. The court also ruled that the EIR’s project description was inadequate and misleading in describing the type of crude oil to be processed at the upgraded refinery. The court rejected a claim that a pipeline to transport excess hydrogen from the refinery was required to be evaluated in the EIR as part of the refinery upgrade project.

This decision is the first California appellate ruling on greenhouse gas mitigation measures. The court applied existing CEQA rules on mitigation measures in determining that the mitigation was inadequate. In brief, although the EIR proposed a “no net increase” plan that was ambitious in setting an objective of no net increase of GHG emissions, the court found that the mitigation plan was insufficiently defined.

The Draft EIR had concluded that the project could result in a net increase in CO₂ emissions of approximately 898,000 metric tons per year, and initially declined to determine whether those emissions constituted a significant environmental impact. The City later revised that conclusion and determined that

project’s greenhouse gas emissions were significant, thus triggering the obligation to consider and adopt feasible measures to reduce the identified impact. The mitigation plan that was adopted required Chevron to hire an expert to prepare an inventory of greenhouse gas emissions and to identify emissions reduction opportunities. Chevron was required to consider various measures that were specified in the EIR, and to submit to the City a proposed plan to achieve a complete reduction of the increased greenhouse gas emissions from the project.

The court held that this mitigation scheme impermissibly deferred the required formulation of mitigation measures. The court characterized the EIR as relying on a tentative plan for future mitigation after completion of the CEQA process. The court indicated that the final EIR proposed only a generalized goal of “no net increase” and set out a “handful of cursorily described mitigation measures for future consideration” with no effort to calculate the reductions that might result from the vaguely described mitigation measures. The court further described the measures as “non exclusive, undefined, untested and of unknown efficacy.”

The court rejected Chevron’s arguments that the City had proceeded appropriately by setting a performance standard and setting forth a menu of potential mitigation measures. Even though several cases have allowed such an approach, the court said that the city here delayed making a significance finding until late in the CEQA process, divulged little or no information about how it quantified the project’s emissions, offered no assurance that the plan was feasible and efficacious, and created no objective criteria for determining the success of the measures.

With respect to the project description, the court found that it inconsistently and inaccurately described the project, and was therefore inadequate as a matter of law. The EIR at times stated that the project was designed to allow more flexibility in processing streams of crude oil, and at other times stated that the project

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would not allow processing of heavier crude oil (which results in greater emission of pollutants). The court particularly noted that Chevron had stated in a filing with the Securities and Exchange Commission that the purpose of the project was to allow the processing of heavier crude. By giving such inconsistent descriptions, the court found the EIR project description was fundamentally inadequate and misleading.

Chevron argued that expert information before the city confirmed the adequacy of the project description. The court rejected this argument, in part because the information was prepared after the EIR, and in part because the expert information confirming the project description was based on confidential information about crude oil used at the refinery which was not shared with anyone else. The court held that reliance on confidential information not shared with the public or with decision makers was inconsistent with CEQA's information disclosure goals.

Finally, the court ruled a hydrogen pipeline to supply excess hydrogen from the refinery to hydrogen consumers was not a part of the refinery project. The court characterized the pipeline as an independent project, proposed by a different proponent, and properly considered in a separate EIR. The court rejected an argument that this constituted improper "piecemealing" or "project-chopping" under CEQA.

Approval of Composting Facility Set Aside for Failure to Sufficiently Support Determination That Project Alternative Was Infeasible, and Failure to Prepare Water Supply Assessment: *Center For Biological Diversity v. County of San Bernardino* (Fourth District Case No. D056652, May 25, 2010) 2010 WL 2539847.

Here, the court set aside the County of San Bernardino's approval of an EIR for a 160-acre, open-air waste-composting facility because there was insufficient evidence in the administrative record to support the County's finding that it would be infeasible to develop an enclosed composting facility as an alternative to the open-air project. The court also ruled that the EIR's water supply analysis was fatally flawed

because the County did not prepare a water supply assessment for the project, as required by Water Code §10910, commonly referred to as SB 610.

The EIR evaluated three alternatives to the proposed open-air composting facility: (i) the statutorily mandated "no project" alternative; (ii) a reduced capacity alternative; and (iii) an open-air project located at an alternative project site. Although the EIR determined that the project would have significant and unavoidable air quality impacts, and that an enclosed composting facility would reduce some project air emissions by 80 percent, the EIR rejected an enclosed facility alternative as financially and technologically infeasible.

In finding that the enclosed facility alternative was financially infeasible, the County relied on a memorandum prepared by its environmental consultant. The memorandum compared the cost of constructing and operating an open-air facility against the cost of constructing and operating the Inland Empire Regional Composting Facility, a publically operated enclosed facility then being constructed in the City of Rancho Cucamonga, but which had been subject to ongoing construction delays and cost overruns. Based on this comparison, the memorandum determined that the construction cost of an enclosed facility would be 28 to 41 times the construction cost of an open-air facility, and that the operating cost of an enclosed facility would be 62.5 percent greater than the operating cost of an open-air facility. Accordingly, the memorandum determined that an enclosed facility alternative was financially infeasible.

In rejecting the County's finding that the enclosed facility alternative was financially infeasible, the court found that the County's conclusion was based entirely on a cost comparison between the proposed open-air facility and a single enclosed facility that the consultant acknowledged had been beset by unexplained construction delays and cost overruns. Since there was evidence in the record that other enclosed composting facilities were being profitably operated at numerous locations throughout the country, evidence that the consultant and EIR ignored, the

court concluded that the EIR failed to provide the meaningful economic comparative data required to support the County's finding that an enclosed facility was financially infeasible.

To support its finding that the enclosed facility alternative was technologically infeasible, the County relied on the EIR's determination that an enclosed facility would require the construction of an extremely large building with huge, electric air-circulation fans. Since the project site was not served by an electricity provider, the County determined that an enclosed facility was technologically infeasible. According to the court, the fact that the project site was not currently served by an electricity provider was insufficient evidence to support the County's finding that the enclosed facility alternative was technologically infeasible. Since the administrative record did not suggest that electricity cannot be supplied to the project site, and since the EIR did not address the cost of bringing electricity to the site or the time involved in doing so, the court determined that there was insufficient evidence in the record to support the County's finding that the enclosed facility alternative was technologically infeasible.

The court also found that the EIR's water supply analysis was inadequate because, in preparing the EIR, the County failed to comply with SB 610. SB 610 requires a water supply assessment in connection with the CEQA review of, among other large projects, any "processing plant" on more than 40 acres of land. In defending its decision not to prepare such an assessment, the County argued that SB 610 applies only to "large scale buildings located on large square footage or plots of land." The court rejected this argument, holding that a processing facility is a "project" within the meaning of SB 610 if it meets the 40-acre threshold, even if only small structures will be constructed on-site.

The County also argued that, even if the open-air composting facility triggers SB 610 compliance, a water supply assessment is required only if the project's water demands exceed the water demand associated with a 500-unit residential project. The

court rejected this argument, based on what it termed the "plain language" of SB 610, which includes no water usage limitation for processing plants.

Finally, the court rejected the County's claim that it had no obligation to engage in a water supply consultation, as required by SB 610, because there was no independent "public water system" charged with supplying water to the project. Again relying upon the language of SB 610, the court concluded that, where no independent public water system exists, a lead agency has an obligation under SB 610 to prepare its own water supply assessment.

In-Fill Exemption Can Only Be Employed by a City; Exhaustion of Remedies Not Required for Categorical Exemptions: *Tomlinson v. County of Alameda* (First District Case No. A125471, June 18, 2010) 2010 WL 2433234.

Petitioners challenged the approval of a residential subdivision in an unincorporated area of Alameda County under the categorical exemption for in-fill development (CEQA Guideline 15332), contending, among other things, that this exemption is limited by its terms to projects located "within city limits." Though petitioners had participated in the County's administrative proceedings, they failed to raise this precise issue. The court, relying on *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, held that the requirement to exhaust remedies did not apply because there is no CEQA comment period for an exemption.

On the merits, the court concluded that the language of the exemption is plainly limited to projects that will be developed within city limits. Because the subdivision at issue was not located within city limits, the County could not properly rely on this exemption to support approval of the proposed subdivision. The County argued that the project was located in a dense urban area and thus constituted in-fill, but the court rejected the argument, citing the CEQA principle that exemptions cannot be expanded beyond their terms.

Scope of Environmental Review Can Be Limited Where Discretion of Lead Agency Is Limited: *San Diego Navy Broadway Complex Coalition v. City of San Diego* (Fourth District Case No. D055699, June 23, 2010) 2010 WL 2404379.

Here, the court concluded that the City of San Diego was not required to conduct supplemental CEQA review to consider climate change impacts when approving construction plans for a previously approved project. Petitioner argued that further CEQA review was required before the aesthetics of the design could be approved, because the original EIR for the project did not consider climate change impacts.

All parties to the lawsuit agreed that review and approval of the construction plans was discretionary, and also that such review was limited to consideration of aesthetics issues relating to the construction plans. The court rejected the argument that, if the agency approval was discretionary in any respect, then any CEQA impact issues could be raised. Instead, based on the prior case law involving the scope of discretionary approvals, the court held that the scope of the agency's discretion limits the scope of the CEQA review. Here, the agency had no discretion to consider climate change impacts, as the scope of discretion extended only to aesthetics. Based on this, the court held that further CEQA review to address climate change impacts was not required, because the agency had no authority to shape the project in any way that could mitigate for environmental damage related to climate change.

Under *Save Tara*, Preliminary Agreement on Potential Siting of a Facility Does Not Trigger CEQA Review: *City of Santee v. County of San Diego* (Fourth District Case No. D055310, June 29, 2010) 2010 WL 2573193.

The City of Santee and the County of San Diego have long litigated various CEQA issues relating to the County jail facilities. In this case, the court evaluated whether a siting agreement between the County and

the State constituted "approval" of a specific project, thus triggering CEQA review. Under the agreement, the County identified two potential sites for a prison reentry facility, the State agreed that the County would have preferential access to funding if one of the sites was selected, and the County committed to convey land if one of the sites was selected. The City argued that the agreement committed the County to a site for the facility and also committed the County to expand its own jail located within the City limits because the agreement effectively eliminated consideration of an alternate site.

Under *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, the Court of Appeal held that CEQA review is required only when an agency takes an action that significantly furthers a project in a manner that forecloses alternatives or mitigation measures. Looking both to the agreement itself and the circumstances surrounding the agreement, the court determined that nothing in the record supported the conclusion that the siting agreement committed either the County or the State to either a reentry facility or a County jail expansion within the City. By its terms, the agreement did not select a location for the reentry facility, did not refer at all to the County jail expansion, did not obligate the State to select any site, and did not provide the County with any financing preference if none of the County sites were selected. The County obligation to convey land was entirely conditional upon State selection and did not suggest any commitment by the County to any particular site, especially when the County also identified a site that it does not own.