

Neighbors for Fair Planning v. City and County of San Francisco (June 25, 2013) 217 Cal.App.4th 540

The case involves a proposal to demolish the existing Booker T. Washington Community Service Center and replace it with a mixed use project that would both expand the community center and provide 48 new units of affordable housing. The City Board of Supervisors approved the project on appeal, with modifications to reduce the building's visual mass, noise levels, and impacts on immediate neighbors, and certified the related EIR. The Board also approved the rezoning of the site to a "special use district" (SUD) that allowed the requested density and building height.

Neighbors sued, alleging that the City's involvement in the project in the years prior to certification of the EIR constituted de facto project approval. This included funding and design assistance from the Mayor's Office of Housing (MOH). In Neighbors' view, the EIR should have been certified earlier in that process. In the published portion of its decision, the Court of Appeal rejected this claim and held in the City's favor.

The California Supreme Court's *Save Tara* decision is the leading light on the issue of the timing of CEQA review. Accordingly, the Court of Appeal carefully reviewed the *Save Tara* reasoning when making its decision. A key passage from that decision is: "courts should look not only to the terms of the agreement but to 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 alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project."

Five months prior to the Planning Commission's approval of the project, the MOH entered into an agreement to loan the Center \$788,000 (about 4% of the project's total cost), of which up to \$550,000 could be disbursed prior to completion of the CEQA document. This money was to be used for architectural and engineering design, survey and appraisal preparation, preparation of CEQA and NEPA documents, legal expenses, and related administrative work. If the proposed development was not approved by a date certain, the loan would come due immediately. The agreement stated that it was not committing the City to the project:

By entering into this Agreement, MOH and Borrower intend to preserve the possibility of developing the Project as affordable housing by lending funds to Borrower for the Predevelopment Activities. The City does not, however, commit to or otherwise endorse the Project by entering into this Agreement. The Project remains subject to review by City agencies and City discretion to disapprove or modify the Project.

The Court found that this agreement was distinguishable from the City of West Hollywood agreement that was found to be impermissible in *Save Tara*. First, West Hollywood's agreement explicitly stated that its purpose was to cause the reuse and redevelopment of the property consistent with the project outlined in the agreement. The MOH made no such commitment. Second, although both the MOH and West Hollywood

agreements loaned money for specific projects, the Tara developer was not required to repay its loan (approximately \$1 million) unless the project received final approval from the city. This was not the case with the MOH's loan to the Center. In addition, the money loaned by the MOH was "expressly restricted to such exploratory and development costs recognized in *Save Tara* not to require CEQA review." Third, West Hollywood's agreement limited that city's authority to enforce CEQA by allowing its city manager to waive CEQA requirements. The MOH agreement explicitly required completion of the CEQA process. Fourth, statements and actions by West Hollywood, including initiation of tenant relocation prior to certification of an EIR, indicated that the city was committed to the project. No such concrete commitment was made by the MOH.

As stated by the Court, "in this case, the activities funded by the City's loan are limited to studies, are not irreversible, and will not cause any disruptions of the current activities on the Site or physical changes in the environment."

Neighbors also contended that *introduction* of the SUD ordinance prior to certification of an EIR was impermissible under CEQA. The Court disagreed. It found that there is no authority supporting the claim that introduction of an ordinance is the same as approval of an ordinance (which requires completion of CEQA).

In the final issue addressed in the published portion of the decision, Neighbors claimed that various statements made by a City Supervisor, City staff's review and comment on project design, and statements made by the project proponent in favor of their project constituted evidence that the City had pre-approved this project before completing CEQA review. The Court rejected each of these contentions. In the Court's view, staff involvement in the project's design "is neither unusual, suspicious, nor demonstrative of preapproval." Further, "[n]either Supervisor Alioto-Pier's advocacy of the Project, a lone e-mail from a nonprofit organization soliciting support for it, albeit inadvertently sent from a City e-mail address, nor the Center's publications promoting the Project indicate the City improperly committed to the Project prior to the requisite environmental review."