Remy Thomas Moose & Manley LLP

455 Capitol Mall, Suite 210
Sacramento, CA 95814

Whitman F. Manley
wmanley@rtmmlaw.com

April 25, 2011

VIA FEDERAL EXPRESS

The Honorable Conrad L. Rushing, Presiding Justice
The Honorable Franklin Daniel Elia, Associate Justice
The Honorable Eugene M. Premo, Associate Justice
California Court of Appeal, Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, California 95113-1717

Re: Request for Publication:
Cedar Fair, L.P. v. City of Santa Clara
(Sixth District Court of Appeal Case No. H035619)

Dear Justices Rushing, Elia and Premo:

Pursuant to California Rules of Court, rule 8.1120(a), we respectfully request publication of the opinion issued by this Court in *Cedar Fair, L.P. v. City of Santa Clara*, Case No. H035619, filed on April 6, 2011 (the "Opinion").

We submit this letter on behalf of the California State Association of Counties ("CSAC") and the League of California Cities ("League"). This letter sets forth CSAC's and the League's interest in publication and the reasons CSAC and the League believe the Opinion meets the standards for publication set forth in California Rules of Court, rule 8.1105, subdivision (c).

The parties to the appeal have not authored this letter in whole or in part, nor have the parties to the appeal made a monetary contribution for the preparation of this letter.

As described in more detail below, the Opinion discusses at length the elements of a term sheet and concludes that "the term sheet, even considered together with the alleged circumstances [surrounding its approval], did not preclude any alternative or mitigation measure that would ordinarily be part of CEQA review." (Slip Opinion, p. 25.) In reaching this conclusion, the Court applies the analysis in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 ("*Save Tara*") to circumstances that (1) have not yet been considered in a published opinion, and (2) are frequently encountered by public agencies contemplating public/private development partnerships. For this reason, the Opinion is of continuing public interest as it is relevant to public agencies that contemplate entering term sheets or other preliminary agreements involving public/private projects.

1. **CSAC and the League have an interest in publication of the *Cedar Fair* Opinion. (California Rules of Court, Rule 8.1120, subdivision (a)(2).)**

We submit this request for publication on behalf of CSAC and the League. CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case concerns matters affecting all counties.

The League of California Cities is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

CSAC and the League have an interest in the development of case law under the California Environmental Quality Act ("CEQA"). (Pub. Resources Code, § 21000 *et seq*.) In particular, CSAC and the League have an interest in understanding those actions that constitute "approval" of a "project," triggering the environmental review requirements of CEQA.

The leading case concerning the meaning of "approval" of a "project" under CEQA is the Supreme Court's decision in *Save Tara*, in which the Court provides a succinct explanation of the importance of this issue to cities and counties.

> As amicus curiae League of California Cities explains, cities often reach purchase option agreements, memoranda of understanding, exclusive negotiating agreements, or other arrangements with potential developers, especially for projects on public land, before deciding on the specifics of a project. Such preliminary or tentative agreements may be needed in order for the project proponent to gather financial resources for environmental and technical studies, to seek needed grants or permits from other government agencies, or to test interest among prospective commercial tenants. While we express no opinion on whether any particular form of agreement, other than those involved in this case, constitutes project approval, we take the League's point that requiring agencies to engage in the often lengthy and expensive process of EIR preparation before reaching even preliminary agreements with developers could unnecessarily burden public and private planning. CEQA review was not intended to be only an

> afterthought to project approval, but neither was it intended to place unneeded obstacles in the path of project formulation and development.

(*Save Tara*, *supra*, 45 Cal.4th at p. 137.)

The continued development of case law addressing this issue assists California counties and cities in complying with CEQA while avoiding the expenditure of public money on premature CEQA review of preliminary project concepts that may fail to materialize. (See, e.g., Slip Opinion, p. 22, *citing Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1253, 1255, for the proposition that "complex business agreements are not the product of 'discrete offers, counter-offers and acceptances' but 'result from a gradual flow of information between the parties followed by a series of compromises and tentative agreements on major points'".)

2. The Opinion should be published because it applies an existing rule of law to a set of facts significantly different from those stated in published opinions. (California Rules of Court, Rule 8.1105, subdivision (c)(2).)

The Court in *Save Tara* held there is no "bright-line test" to determine when a project approval occurs. Instead, the decision holds a reviewing court should consider the circumstances in a given case to determine whether, as a practical matter, the agency has committed itself to a project. (*Save Tara*, *supra*, 45 Cal.4th at pp. 138-139.) Because the Court in *Save Tara* held that defining a project approval under CEQA requires a fact-specific analysis, it is important for published opinions to conduct this analysis in the context of various contexts to provide guidance for agencies and trial courts.

That is particularly true in light of the standard of judicial review applicable to litigation involving this issue. According to the Court "[d]rawing [the] line" between pre-approval and approval "raises predominantly a legal question, which we answer independently from the agency whose decision is under review." (*Id*. at p. 131.)

Thus, *Save Tara* establishes both an amorphous legal test, and a standard of review in which the courts will show no deference to agencies' decisions. That is a recipe for uncertainty and, therefore, litigation.

Post-*Save Tara* experience has borne that out. In less than three years since the Supreme Court issued its decision, four decisions have been published by the Courts of Appeal that apply the *Save Tara* test to various agency actions: *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186; *Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara County Assn. of Governments* (2009) 179 Cal.App.4th 113; *Parchester Village Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305; *City of Santee v. County of San Diego* (2010) 186 Cal.App.4th 55.

Given the relative abundance of published post-*Save Tara* decisions, it is reasonable to ask whether there is reason to publish a fifth. There is.

The Opinion involves application of *Save Tara* test to a set of circumstances that published opinions have not previously addressed. Indeed, the Opinion states that the "term sheet is different from the conditional development agreements set forth in *Save Tara. . . .*" (Slip Opinion, p. 21; see also Slip Opinion, p. 22.) None of the other decisions applying the *Save Tara* test involved a term sheet or comparable action:

- *RiverWatch v. Olivenhain Municipal Water Dist.* involved water district's decision to approve an agreement to provide recycled water to a landfill operator.

- *Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara County Assn. of Governments* involved a transportation agency's decision to place a sales tax extension on the ballot.

- *Parchester Village Neighborhood Council v. City of Richmond* concerned a municipal services memorandum of understanding between a city and a Native American Tribe proposing a casino located outside of the city.

- *City of Santee v. County of San Diego* involved a memorandum of understanding between a county and the California Department of Corrections and Rehabilitation concerning potential sites for jail facilities.

In particular, none of these cases involves a preliminary agreement between a local land-use authority and a private developer establishing a business framework – i.e., terms – designed to enable the private developer to make the considerable investment necessary for the environmental review and entitlement processes to move forward. The *Save Tara* decision noted that a local agency ought to have discretion to enter into such an agreement prior to completing the CEQA process, provided that in reaching the agreement the local agency does not, as a practical matter, commit itself to the project, such that CEQA review would be rendered an afterthought. The issue then becomes how much of a commitment is too much.

The only case remotely like *Cedar Fair* is *Save Tara* itself. In that case, the City of West Hollywood entered into agreements committing to convey city-owned property to a developer, commenced efforts to relocate existing tenants, announced the city was proceeding with the project, and invested significant money that would be lost if the project did not go forward. The Supreme Court held the City of West Hollywood went too far. (45 Cal.4th at p. 142.)

Publication of *Cedar Fair* would provide a useful counterpoint. Significantly, the Opinion distinguishes between the commitment created though a "contract to negotiate an

agreement" and an "ultimate agreement," and establishes that an agency's commitment to "continue negotiating in good faith" as memorialized in a term sheet does not constitute the level of commitment requiring prior CEQA review. (Slip Opinion, p. 21.) The Opinion also distinguishes between expenditures by an agency that are dedicated to the exploration of a potential project and expenditures demonstrating a "legal commitment to any feature of . . . [a] project that effectively foreclose[s] meaningful environmental review." (*Id*. at p. 24.)

Furthermore, unlike *Save Tara* and the four published decisions applying its principles, the *Cedar Fair* Opinion provides guidance to trial courts asked to judicially notice purported evidence of commitment relating to events occurring after the agency's approval of the term sheet. Specifically, the Court explains that actions "occurring many months after execution of the term sheet . . . do not demonstrate that the preliminary agreement to the term sheet effectively ruled out any mitigation measure or alternative to the project." (Id. at p. 26.)

In sum, *Save Tara* illustrates how far is too far. *Cedar Fair*, if published, exemplifies the type of preliminary agreement that can precede the CEQA process.

Cities and counties need to be able to have discretion to enter into preliminary terms necessary for public/private partnerships to succeed. Cities and counties also want to be able to meet their obligations under CEQA. The test under *Save Tara* may not be a "bright line," but if the courts provide cities and counties with guidance regarding the boundary between preliminary agreements and "project approval," cities and counties will be less likely to inadvertently stray over that line, petitioners will be less likely to file lawsuits challenging preliminary agreements, and the burden on the courts will be reduced.

CSAC and the League respectfully submit that the Cedar Fair Opinion warrants publication under California Rules of Court, Rule 8.1105, subdivision (c)(2).

3. The Opinion involves a legal issue of continuing public interest. (California Rules of Court, Rule 8.1105, subdivision (c)(6).)

The existing economic environment has resulted in fiscal challenges for CSAC's member counties and the League's member cities. Due to these challenges, cities and counties are even more averse to taking actions in the face of threatened CEQA litigation. Based on the experience of the memberships of CSAC and the League, it is not uncommon for opponents of controversial projects to allege CEQA violations caused by an agency's approval of a term sheet or other preliminary agreement; such allegations often create substantial uncertainty and unnecessary delays in formalizing term sheets or similar devices. By providing new guidance on the application of CEQA to term sheets in light of the analysis in *Save Tara*, the *Cedar Fair* Opinion makes a significant contribution to the legal literature concerning CEQA compliance.

4. Conclusion

CSAC and the League believe the *Cedar Fair* Opinion meets several of the standards for publication set forth in California Rules of Court, rule 8.1105, subdivision (c). On behalf of CSAC and the League, we respectfully request that the Court certify the *Cedar Fair* Opinion for publication.

Very truly yours,

REMY, THOMAS, MOOSE and MANLEY, LLP

Whitman F. Manley

cc: All counsel of record
Proof of service attached