

## Appellate Decision Enables Public – Private Partnerships

February 6, 2007

In a well-reasoned opinion, the Third Appellate District affirmed that there is flexibility in the timing of the environmental review associated with public – private partnerships and projects. This decision should aid public agencies and businesses in developing successful projects, while providing the roadmap for proper compliance with the California Environmental Quality Act (CEQA). In *Concerned McCloud Citizens v. McCloud Community Services District* (2007 WL 4442 (Cal.App. 3 Dist.)), the appellate court ruled that public agencies, businesses and developers may enter into agreements that enable them to conduct due diligence and assess project feasibility before conducting costly environmental review.

This is the first case to deal with an agreement that contained CEQA compliance as a condition precedent to the underlying project agreement. The McCloud Community Services District entered into an agreement for the sale of spring water with a private party that was expressly contingent on numerous future conditions. The Court held that the District could enter into an agreement with a private entity for a project without taking an action that constituted “approval of a project” under CEQA. In this case, the District retained the right through the agreement “to participate in and approve or disapprove of or modify major aspects of the prospective project.”

Specifically, the underlying project agreement was carefully crafted to ensure that all required modifications to the proposed project would be integrated into any project approval based on the appropriate environmental review. The Court reasoned that the agreement “expressly recognizes the ultimate water bottling project is subject to CEQA, will be reviewed pursuant to CEQA, and the agreement may be modified as a result.” The Court further noted that the agreement does not preclude the District “from considering a full range of options depending on subsequent CEQA review,” including consideration of a “no project” alternative.

In other words, the contract provided sufficient contingencies and safeguards of the District's future exercise of discretion over the project so that entering into the agreement itself did not constitute ultimate project approval.

The court's opinion provides a detailed explanation of specific contract provisions. The opinion also provides a thorough review of the factors that a public agency and

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private party should include in an agreement whose effectiveness is contingent on CEQA.

In sum, the court's ruling provides valuable guidance to agencies and companies that want to appropriately defer environmental review while they conduct due diligence. Most importantly, the ruling will facilitate entering into public-private partnerships, while ultimately ensuring environmental issues are addressed before any project proceeds. For more information regarding the case, contact: Liz Rothman or Diane De Felice at (310) 500-4616; [L.Rothman@hatchparent.com](mailto:L.Rothman@hatchparent.com), [DDefelice@hatchparent.com](mailto:DDefelice@hatchparent.com).