SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUNSET SKY RANCH PILOTS ASSOCIATION, et al., Petitioners/Plaintiffs and Appellants, v. THE COUNTY OF SACRAMENTO, et al., Defendants and Respondents, JOHN TAYLOR, et al., Real Parties in Interest and Respondents.	No. S165861 Court of Appeal No. C055224 Sacramento Superior Court Case No. 06CS00265

SUPREME COURT
FILED
OCT 30 2008
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Deputy

Appeal from the Judgment of the Superior Court of the State of California in and for the County of Sacramento,

Honorable Jack V. Sapunor, Judge

OPENING BRIEF

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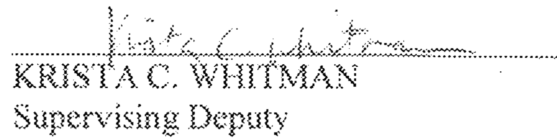
Declaration Certifying Word Count

I declare that the foregoing brief, including footnotes, contains 3,959 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed on October 30, 2008, at Sacramento, California.



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STATEMENT OF THE ISSUES

This Court granted respondents' John Taylor, Taylor & Wiley, and County of Sacramento's petitions for review, and denied appellant's Sunset Sky Ranch Pilots Association's petition for review. The issues identified by the Court are (1) whether a county's denial of an application to renew a conditional use permit renewal is a "project" subject to the California Environmental Quality Act (Public Resources Code section 21000 et seq.), and (2) if the denial of such an application is a project, is it nonetheless exempt from the Act.

STATEMENT OF THE CASE

A. Nature of the Action

This is a petition for writ of mandate and complaint for injunctive relief and damages filed by appellants Sunset Sky Ranch Pilots Association and Daniel Lang against respondents County of Sacramento and its Board of Supervisors. Real Parties in Interest John M. Taylor and the law firm of Taylor and Wiley represented the unnamed developer who appealed the decision of the County's Project Planning Commission to the County Board of Supervisors. In their writ petition and complaint, appellants alleged that the County's denial of a conditional use permit renewal was preempted by the State Aeronautics Act, and that the denial violated the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA), was unsupported by substantial evidence, and resulted in an unconstitutional taking of private property without just compensation.

B. Summary of Facts Material to the CEQA Claim

On January 25, 2006, the Sacramento County Board of Supervisors ("Board") denied appellants' request to renew an expired conditional use permit ("use permit" or "CUP") for the Sunset Sky Ranch Airport ("Airport"). This decision was the culmination of a long history of entitlement requests and accompanying litigation concerning the Airport.

That history began when a use permit for the facility was first issued in 1971 with an expiration date of two years from the date of issuance. (AR 1:171.)[1] When that use permit expired in 1973, no effort was made to renew it. (AR 1:007.) Hence, between 1973 and 1999, the Airport operated illegally without a use permit. (*Id.*) Nor was any effort made to end this illegal status until the County commenced a zoning enforcement action. (AR 1:007.) That enforcement action finally resulted in the Airport filing an application for a use permit in 1999, but only after petitioning the Sacramento County Superior Court alleging that it had a vested grandfathered right to operate the Airport without obtaining a use permit. (TCF I:59.)[2] After the petition was denied by the Superior Court, the owner appealed to the Third District Court of Appeal, which similarly concluded that he was without a vested grandfathered right and that he was required to obtain a use permit. (TCF I:69-70.) It was only then that the application for the use permit was filed. (AR 1:007.) On October 6, 1999, the Board approved the requested use permit for the Airport for a period of five years. (AR 1:007.) In granting this request, the Board imposed a condition requiring that the Airport operator inform the tenants as to the limited duration of the use permit. (AR 1:143-145.)

On September 22, 2004, the Airport applied for renewal of the 1999 use permit, which was set to expire on October 6, 2004. (AR 1:008.) The County prepared a CEQA categorical exemption appropriate for approval of the project under CEQA Guidelines section 15301, Class 1. (Cal. Code

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[1] Citations to the Administrative Record are designated by the acronym "AR" followed by the volume and page number in the following format: "AR [volume]:[page]."

2 The parties stipulated to using the original Superior Court's file rather than a clerk`s transcript as the record on appeal. Citations to the Superior Court's file are designated by the acronym "TCF" followed by the volume and page number in the following format: "TCF [volume]:[page(s)]."

Regs., tit. 14, § 15000 et seq. (Guidelines) (operation, repair, maintenance, or minor alteration of existing structures or facilities).) (AR 1:140.)

On July 25, 2005, the Project Planning Commission approved renewal of the use permit for a two year period, with the understanding that no further extensions would be granted. (AR 7:801-805.) Real parties appealed this decision. (AR 8:810-936.) On January 25, 2006, the Board took final action to deny the requested use permit and adopt findings reflecting that decision. (AR 8:971-972.) The Board found that "the renewal request is incompatible with the existence of the many new residential neighborhoods which have been constructed pursuant to the East Elk Grove Specific Plan." (AR 1:008, Finding 1.) In addition, the Board found that the continued operation of the Airport was jeopardizing efforts by the Elk Grove United School District to locate a much needed school within the East Elk Grove Specific Plan area south of Elk Grove Boulevard. (AR 1:008, Finding 2.) The Board did not take action on the categorical exemption, as the project was denied.

C. Relief Sought

Appellants sought a writ of mandate and complaint for injunctive relief and monetary damages, alleging that the County's decision to deny the use permit renewal was preempted by the State Aeronautics Act and not supported by substantial evidence in the administrative record, and that the decision violated CEQA as the County did not conduct an initial study to analyze the environmental effects of closing the Airport. Appellants also sought damages for an allegedly unconstitutional taking.

D. Trial Court's Decision

The trial court entered a judgment denying the petition for writ of mandate and the complaint in their entirety, and entered a judgment in favor of the County and real parties in interest. (TCF II:519.) The trial court concluded that denial of the use permit renewal was not preempted by or

violative of the State Aeronautics Act, and the denial of the renewal request was not a project under CEQA. The trial court further held that there was substantial evidence in the record that the Airport was hindering the acquisition and construction of an elementary school, and that the takings claim was ripe but denial of the use permit renewal did not result in a governmental taking of private property. Appellants appealed to the Third District Court of Appeal.

E. Appellate Court's Decision and Reasoning

In a decision published July 2, 2008, the Third District Court of Appeal affirmed in part and reversed in part. The Court held that the County's decision to deny the use permit renewal was not preempted by or contrary to the State Aeronautics Act. However, the Court held that the County's action constituted a CEQA project requiring preparation of an initial study. The Court reasoned that this case does not involve a mere denial of a project exempt from CEQA under Guidelines section 15270, but instead was a denial of a use permit renewal that would indisputably result in closure of an airport, which the County intended to enforce within 180 days. (Slip Op., pp. 42-43.)

The Court relied on two cases holding that public agency action resulting in closure of facilities may implicate CEQA – *Association for a Cleaner Environment v. Yosemite Community College District* (2004) 116 Cal.App.4th 629, 637 (*ACE*), involving closure and removal of a community college's shooting range, and *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley United School District* (2006) 139 Cal.App.4th 1356, 1377 (*San Lorenzo*), involving closure of two schools requiring transfer of students to other schools. While acknowledging that the two cases are distinguishable, the Court determined the County's action in denying the permit would lead to the closure of the Airport with possible environmental impacts associated with the pilots who

currently use the Airport being required to transfer to other airports. (Slip Op., pp. 44-45.) The Court did not address the statutory exemption for project denials (Public Resources Code section 21080), but held that the categorical exemption for denials (Guidelines section 15270) did not apply because denial of the CUP renewal would result in closure of the Airport. (Slip Op., pp. 42-43.)

Respondents filed a timely petition for rehearing, which was denied on July 24, 2008. This Court granted review on October 1, 2008.

ARGUMENT

The CEQA process requires the lead agency to conduct preliminary review of the proposed activity to determine first, whether it is a "project"; second, whether it is exempt under the "common sense exemption" because it cannot possibly have a significant effect on the environment; third, whether it is discretionary; fourth, whether it is subject to a statutory exemption; and finally, whether it is subject to a categorical exemption. (Kostka & Zischke, *Practice Under the California Environmental Quality Act* (2d ed. 2008) § 4.1, p. 154.) The second and third steps are not relevant here.

Here, the Third District erred by skipping over the threshold question of whether the denial constituted a project, and instead determined that the denial of the use permit renewal was a project *because* it could have a significant effect on the environment. The Court further erred by ignoring the express language in both the CEQA statutes and the Guidelines that only project approvals are subject to CEQA.

A. Denial of CUP Renewal Was Not a "Project" Under CEQA

The Third District erred in concluding that the denial was a project requiring CEQA review. CEQA compliance is required only where an agency proposes to approve a project. Here, denial of the CUP renewal does not meet the definition of "project" because it is not an approval.

Under Public Resources Code section 21080(a), CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies," unless they are otherwise exempt. The term "project" is defined to include three types of agency actions: *activities* directly undertaken by a public agency (Pub. Resources Code § 21065(a); Guidelines § 15378(a)(1)); *activities* supported in whole or in part by public agencies (Pub. Resources Code § 21065(b); Guidelines §§ 15002(c), 15377); and *activities* involving the issuance of a lease, permit, license, certificate, or other entitlement for use by a public agency (Pub. Resources Code § 21065(c)).

Public Resources Code section 21100 requires that lead agencies "prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any *project which they propose to carry out or approve* that may have a significant effect on the environment." The same language is found in Public Resources Code section 21151, which requires preparation of an environmental impact report for any project that a local agency intends to *carry out or approve* which may have a significant effect on the environment. See also Public Resources Code section 21108, requiring filing of a notice of determination when a state agency *approves or determines to carry out* a project subject to CEQA.

In *Main San Gabriel Basin Watermaster v. State Water Resources Control Board* (1993) 12 Cal.App.4th 1371 (*Main San Gabriel*), the court held that these and other provisions of CEQA "leave little doubt that the requirement of an EIR is not even triggered unless a public agency *proposes to carry out or approve* a project which may have a significant effect on the environment." (*Id.* at p. 1380 (emphasis in original).)

CEQA applies at the time a public agency proposes to approve a project. The term "approval" refers to a public agency decision that commits it to a definite course of action in regard to a project. (Guidelines

§ 15352(a).) Public agency approval of private projects is deemed to occur upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project. (Guidelines § 15352(b); see also Kostka & Zischke, *Practice Under the California Environmental Quality Act, supra*, § 4.15, p. 164.)

Here, of course, there was no approval of a project; there was only a denial of a request to renew a use permit. When there is no project, there is no need to proceed with the remaining CEQA analysis regarding whether the project is discretionary and whether exemptions apply. CEQA cases and authorities recognize that the existence of a "project approval" is a necessary prerequisite to the applicability of CEQA. (*Lexington Hills Assn.*, 200 Cal.App.3d at pp. 430-433; Remy, et al., *Guide to CEQA* (11th ed. 2007) pp. 69-70; Kostka and Zischke, *Practice Under the California Environmental Quality Act, supra*, §§ 4.16, 5.12.)[3] CEQA simply does not apply here.

B. Denials of Projects are Statutorily Exempt from CEQA

As discussed above, denial of a CUP renewal is not a project under CEQA and the Court therefore need not determine whether the denial was exempt from CEQA. However, even if the Court does decide that the denial was a project, it is abundantly clear that the project was statutorily exempt.

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[3] As one of these authorities notes:

> CEQA generally applies to "discretionary *projects* proposed to be carried out or *approved* by public agencies..." Pub. Resources Code § 21080, subd. (a) (italics added). The CEQA Guidelines and case law have interpreted this quoted language to require a threshold, two-part analysis to determine the applicability of CEQA. The relevant inquiry is whether an agency proposes (1) to "approve," (2) a "project." (Remy, et al., *Guide to CEQA* (11th ed. 2007) p. 70.)

Public Resources Code section 21080(b)(5) plainly states that CEQA does not apply to "projects which a public agency rejects or disapproves." The legislature has exempted many types of projects from CEQA by statute. Because CEQA is a legislative enactment, the legislature is free to create exemptions regardless of their consistency with CEQA's environmental purposes. (Kostka & Zischke, *Practice under the California Environmental Quality Act, supra*, § 5.5, p. 196.)

> [T]he general rule that CEQA provisions must be interpreted to give the fullest possible protection to the environment does not control the interpretation of a statutory exemption. See *Napa Valley Wine Train, Inc. v. PUC* [(1990) 50 Cal.3d 370]. Statutory exemptions are enacted to lift the burden of environmental review from specified classes of projects that may have significant effects; limiting a statutory exemption to projects that will not adversely affect the environment would defeat the purposes of the exemption. (*Id.*)

Yet this is precisely what the Third District did – it noted the exemption for disapproved projects (albeit the categorical rather than the statutory exemption), but then held that the County's denial was nevertheless subject to CEQA because the decision could result in adverse environmental consequences.

Such a holding is in direct conflict with *Main San Gabriel.* In that case, the State Water Resources Control Board (SWRCB) disapproved a proposed landfill expansion without CEQA compliance. The project proponent contended that SWRCB should have complied with CEQA and prepared an EIR before disapproving the application. The Second District rejected this argument, noting that all project disapprovals by a public agency are exempt from CEQA review, regardless of any potential for negative environmental consequences. As the court noted:

> In making its various public policy arguments, ALR generally assumes that disapproval of the landfill expansion project will result in serious adverse environmental consequences, including highway degradation, traffic congestion, fuel consumption and air pollution, due to the rerouting of waste previously disposed of at ALR's landfill. Whether or not true, the same point could be made for many forms of government inaction. Yet the Legislature has determined for reasons of policy to exempt project disapprovals from environmental review under CEQA. Our state legislators evidently concluded that public agencies should not be forced to commit their resources to the costly and time-consuming environmental review process for proposed private development projects slated for rejection, whatever the reason for agency disapproval. This court does not sit in judgment of the Legislature's wisdom in balancing such competing public policies. (*Id.* at pp. 1383-1384, emphasis added.)

Main San Gabriel clearly holds that, even if a denial decision will have residual environmental impacts (such as the transfer of pilots to another airport location), such a determination is nevertheless exempt from environmental review under CEQA. Additionally, *Main San Gabriel* establishes that the exemption does not apply only to "initial screenings"; rather, an agency is entitled to make a determination to disapprove a proposal "at any time prior to the initiation of full CEQA review," just as the County did in this instance. (*Main San Gabriel*, 12 Cal.App.4th 1371, 1380.) The Third District's holding that an initial study was required before the Board could deny renewal of the Airport's use permit is directly contrary to the principles enunciated in *Main San Gabriel* and should not stand.

Based on the premise that denial of the use permit renewal was tantamount to closing the Airport, the Court analogized to two cases in which a public agency's decision to close certain facilities implicated CEQA: *ACE* and *San Lorenzo*. The Court concluded that, as in these

cases, an initial study should have been prepared before the County denied the Airport's request. (Slip Op. at p. 45.)

However, both of those cases involved an affirmative decision by the public agency to close an existing public facility and therefore are inapplicable here. In *ACE,* a school district voted to close and remove an existing shooting range located at a community college. (*ACE*, 116 Cal.App.4th at p. 635.) Likewise, *San Lorenzo* involved a school district's decision to close two of its existing elementary schools and to transfer the students from those schools to other campuses within the district. (*San Lorenzo*, 139 Cal.App.4th at p. 1369.) Importantly, in both of these cases, the public entity did not deny a private party's application; rather, the entity itself *approved* the closure of an existing public facility. By contrast, in the case at bench, the Board was presented with, considered, and eventually denied a private party's request for renewal of its expired CUP. Neither of those cases stand for the proposition that denial of a private application triggers CEQA.

The Court's opinion briefly mentions Respondents' argument that denial of the CUP request was not a project approval requiring compliance with CEQA, but failed to resolve this crucial threshold issue. (Slip Op. at 42.) The Court instead jumped forward in its analysis, analogizing to inapposite cases involving affirmative decisions to close existing public facilities and discussing the potential environmental impacts of the County's determination to enforce its zoning code to support its conclusion that an initial study was required. (Slip Op. at pp. 43-45.) While the Court notes that there may be some environmental impacts associated with the County's removal of airport facilities and the transfer of pilots to other airports, these activities were not part of the "project" before the Board and, thus, the Board was not required to analyze the potential impacts associated with these activities prior to denying the CUP.

C. Denials of Projects are Categorically Exempt from CEQA

The Guidelines contain many categorical exemptions from CEQA, codifying the classes of projects the Secretary of the Resources Agency has determined do not have a significant effect on the environment. (Pub. Resources Code § 21084(a); Guidelines § 15300.) Public agencies are not required to prepare an environmental document for a project that is categorically exempt unless the activity falls within one of the exceptions to the categorical exemptions. (Pub. Resources Code § 21084; Guidelines § 15300.)

In this case, the CUP denial was statutorily exempt, thus ending the CEQA analysis. The project denial, however, is also categorically exempt pursuant to Guidelines section 15270, which mirrors the statutory exemption in providing that CEQA does not apply to projects which a public agency rejects or disapproves. Thus, the Secretary of the Resources Agency categorically exempted project denials because they do not have a significant effect on the environment, even though the Legislature had already determined that denials are statutorily exempt regardless of their possible environmental consequences. This "belt and suspenders" approach leaves no doubt that *all* project denials are exempt from CEQA.

D. This Court Should Adopt the Reasoning in *Main San Gabriel* to Avoid Greatly Expanding the Type of Projects Subject to CEQA Review

This Court should adopt the Second District's reasoning in *Main San Gabriel* and hold that all project denials are not subject to CEQA. That case correctly determined that by creating a statutory exemption for project denials, the Legislature determined that all denials are exempt regardless of the possible environmental consequences flowing from the project denial. (*Main San Gabriel*, 12 Cal.App.4th at pp. 1383-1384.) Commentators, governmental agencies and practitioners have for many years relied on the

express statutory and categorical exemptions, and should be entitled to continue to do so, absent a legislative change.

Furthermore, if this Court were to adopt the reasoning of the Third District, there will be serious consequences for governmental bodies making land use decisions within their jurisdictions. The effect of the Court's decision is to create a new requirement that public agencies must examine the environmental impacts of deciding *not* to take action, in addition to conducting CEQA review of projects which it chooses to approve. For example, in this case, had the Board decided to approve the CUP renewal request, the appropriate environmental document would have been a categorical exemption under Section 15301 of the CEQA Guidelines. (AR 1:140.) No further environmental review would have been required or even authorized. (Pub. Resources Code § 21084; Guidelines § 15300.) Yet the Court's opinion would require a *higher* level of environmental review – an initial study followed by either a negative declaration or EIR – in order to *deny* the project. Thus, the County would have either had to prepare two different environmental documents for a single project application, or prepare a single initial study with its attendant costs and delays, analyzing both the effects of approval and denial, despite the fact that the County had already determined that renewing the CUP would have no environmental consequences. The Legislature clearly did not intend such a bizarre and entirely unprecedented result.

Two examples illustrate the serious implications of the Third District's decision. With respect to proposed housing projects, the opinion would appear to require a public entity to examine the environmental impacts of *not* approving such a proposal since such a denial could presumably result in environmental impacts where that housing, needed to accommodate population growth, might otherwise be located. EIR preparers would accordingly be required to identify and examine the

impacts associated with where that housing might otherwise be located before a public entity could deny a proposed housing project. Failure to conduct this analysis would, moreover, be grounds for the courts to invalidate a public entity's decision not to approve a project.

The Court's opinion would also require public entities to conduct an initial study prior to revoking use permits for existing businesses that are not in compliance with those permits. In those cases, the public entity would be required to study any potential environmental impacts associated with the transfer of patrons to other businesses as well as, potentially, the impacts of other uses that may replace the prior business. Such endless analysis was clearly never intended by the Legislature when it enacted CEQA.[4] Moreover, the practical difficulties of requiring a public entity to conduct two levels of environmental review cannot be overstated.

Perhaps most troubling, the Court's holding raises a host of new, unanswered questions. For example, must CEQA analysis occur when a permit expires by its own terms, as here, but the permittee does *not* seek renewal or extension of that permit? The Court's holding seems to imply

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[4] Several CEQA decisions have expressed concern that an overly broad definition of "project" would place too onerous a burden on public agencies. (*Lexington Hills Assn. v. State of California* (1988) 200 Cal.App.3d 415, 435; *City of Agoura Hills v. Local Agency Formation Com.* (1988) 198 Cal.App.3d 480, 494.) For example, the Second District Court of Appeal has recognized:

> CEQA was not intended to make and cannot reasonably be considered to make a project of every activity of a public agency, regardless of the nature and objective of such activity. Such a construction would involve the expensive and time-consuming procedures required to complete at least a negative declaration in respect of virtually every action of a public agency. It is difficult to conceive of any such action which could not have a 'potential for significant environmental effect.' (*Simi Valley Recreation & Park Dist. v. Local Agency Formation Com.* (1975) 51 Cal.App.3d 648, 663.)

that the mere expiration of a use permit, coupled with a public entity's enforcement of its municipal codes following such a lapse, can be viewed as an affirmative "closure" for which environmental analysis is required. Is it now the responsibility of a governmental agency to monitor all permits issued by its legislative body and ensure that CEQA analysis occurs prior to the expiration of those permits? This Court should take the opportunity to resolve these important issues.

CONCLUSION

This case presents the first time a published decision has held that a project denial requires preparation of an initial study under CEQA. Yet the Legislature has determined that all project denials are statutorily exempt from CEQA, *regardless* of their possible adverse environmental consequences. The Third District ignored the plain language of the CEQA statutes and Guidelines in determining that a project denial is subject to CEQA if there is an existing use. This Court should reverse that decision in order to clarify that project denials are statutorily and categorically exempt under CEQA even where the practical result of such denial may lead to adverse environmental consequences.

DATED: October 30, 2008 Respectfully submitted,

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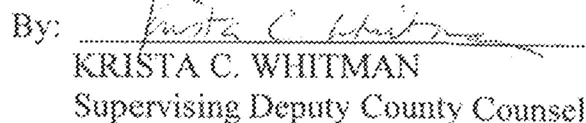
By: 
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PROOF OF SERVICE

I, ELISIA DE BORD, declare:

I am over the age of 18 years, and not a party to the above-entitled action. I am employed in the County of Sacramento and my business address is 700 H Street, Suite 2650, Sacramento, California 95814.

On October 30, 2008, I served a copy of the following document:

OPENING BRIEF

on interested parties in this action by:

X **mail** by enclosing a true copy in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. I am readily familiar with the business practices of the Office of the Sacramento County Counsel for collection and processing of correspondence for mailing with the United States Postal Service, and correspondence so collected and processed is deposited with the United States Postal Service on the same date in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 30, 2008, at Sacramento, California.

ELISIA DE BORD

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