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Attorneys for Petitioner OLEN PROPERTIES CORP.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CIVIL COMPLEX

OLEN PROPERTIES CORP., a Florida corporation;,

Petitioner,

vs.

CITY OF NEWPORT BEACH, a municipal corporation; and DOES 1 through 10, inclusive,

Respondents.

TPG (KCN) ACQUISITION, LLC, a Delaware limited liability company; and DOES 11 through 20, inclusive,

Real Parties in Interest.

Case No. 30-2021-01185991-CU-WM-CXC

Assigned for all purposes to:
Hon. Kirk Nakamura

**PETITIONER'S OPPOSITION TO MOTION FOR LEAVE TO INTERVENE; DECLARATION OF GEOFFREY WILLIS; EXHIBITS**

**[Objections to Interveners' Evidence filed concurrently herewith]**

**Reservation No. 73559333**

Date: August 5, 2021
Time: 2:00 p.m.
Dept.: CX103

Action Filed: February 25, 2021
Trial Date: None set

## I. INTRODUCTION

Interveners lay bare their true motives in what is more a propaganda piece than a motion. They exist to advocate for affordable housing. While that is a laudable goal, it has nothing to do with this action, which is solely based on the City of Newport Beach's (the "City") violation of the California Environmental Quality Act ("CEQA") by using an addendum to a fifteen-year-old Environmental Impact Report ("EIR") that did not specifically study the proposed project.

Interveners are not directly interested in this action as the City and Real Party will adequately represent their interests since both the City and Real Party have a vital interest in upholding the project's environmental review given the required affordable housing component. Moreover, Interveners incorrectly claim that their involvement will not enlarge the issues in this case. However, Intervenors' participation in this case exposes Petitioner to a claim of attorneys' fees that will not exist unless intervention is granted. Neither Respondent nor Real Party qualify for an award of attorneys' fees, but Interveners are seeking attorneys' fees under Code of Civil Procedure Section 1021.5. Finally, if the Court grants Interveners' Motion, the Court should order that Interveners be included in the oppositions' page limit already established by the Court.

Accordingly, the Court should not sanction Interveners' efforts to promote their agenda in a lawsuit that is unrelated to their expressed goals and deny the Motion.

## II. LEGAL ARGUMENT

To support permissive intervention, it is well settled that the proposed intervener's interest in the litigation must be direct rather than consequential, and it must be an interest that is capable of determination in the action. (*City and County of San Francisco v. State of Calif.* (2005) 128 Cal.App.4th 1030, 1037.) The requirement of a direct and immediate interest means that the interest must be of such a direct and immediate nature that the moving party "'will either gain or lose by the direct legal operation and effect of the judgment.' [Citation.]" (*Jersey Maid Milk Products Co. v. Brock* (1939) 13 Cal.2d 661, 663.) "A person has a direct interest justifying intervention in litigation where the judgment in the action of itself adds to or detracts from his legal rights without reference to rights and duties not involved in the litigation. [Citation.]" (*Continental Vinyl Products Corp. v. Mead Corp.* (1972) 27 Cal.App.3d 543, 549.) Conversely, an interest is insufficient for intervention "when the action in which intervention is

sought does not directly affect it although the results of the action may indirectly benefit or harm its owner." (*Id.*, at p. 550.)

Interveners cannot prove a direct interest in this action. Contrary to Interveners repeated false claim, Petitioner's action does not stop the construction of the project. (Mem., p. 5, line 23; p. 16, lines 3-4; p. 17, line 14.) The Petition merely seeks to require compliance with CEQA and to hold the City accountable for its failure to conduct proper environmental review for the project.[1] If the City conducts proper environmental review, no one can stop the project from being constructed. Moreover, to the extent the Court grants Interveners' motion, it should require that Interveners share in the page limit the Court established for the opposing parties.

**A. Interveners Have No Direct Interest In This Action**

Interveners have, at best, a passing interest in the action that is far from direct. The proposed intervener's interest in the litigation must be of such a direct and immediate character that it "will either gain or lose by the direct legal operation and effect of the judgment." (*Fireman's Fund Ins. Co. v. Gerlach* (1976) 56 Cal.App.3d 299, 303. Contrary to Interveners' claims, none of them have a direct interest in the litigation.

Interveners claim that the City and Real Party do not adequately represent their interest. (Mem., p. 16, lines 9-10.) Interveners are wrong. As Interveners claim extensively in their brief and supporting evidence, they exist to advance the availability of affordable housing. Both the City and Real Party have emphasized the importance of the affordable housing component of the project. (Declaration of Geoffrey Willis, Exs. A-C.) The project includes 312 affordable housing apartments, including 13 very low-income units. (*Id.*, Ex. B, p. 2.) Indeed, Real Party cannot build the project without the low-housing as it is mandated by the City. (*Id.*, Ex. A, p. 2 [Resolution No. 2021-3 (Affordable Housing Implementation Plan)]; Ex. C, p. 5.) Moreover, Real Party presented a Power Point at the January 26, 2021, City Council hearing that emphasized its community outreach on critical affordable housing needs. (Ex. C, pp. 3-6.) Accordingly, both the City and Real Party are adequately representing Interveners' interest in providing affordable housing through the project.

[1] As a purported advocate for housing, Interveners should be concerned that the project is proposed to be built on or near an underground toxic waste plume.

Finally, the authority cited by Interveners regarding courts that have allowed parties to intervene in actions is either inapplicable or distinguishable. Both *Calif. Building Industry Ass'n v. City of San Jose* (2015) 61 Cal.4th 435 and *Home Builders Ass'n of Northern Calif. v. City of Napa* (2001) 90 Cal.App.4th 188 were challenges to city ordinances. While the courts granted the interveners' motion in those cases, there is no discussion of the reasons why intervention was allowed, and the cases are entirely inapplicable to any of Interveners' arguments here. *Simpson Redwood Co. v. State of Calif.* (1987) 196 Cal.App.3d 1192 was a dispute over land ownership and the court granted the intervener's motion because its members frequented the park, the intervener had donated the land to the State with a condition that it only be used for park purposes, and if the land were no longer used for park purposes, the intervener's reputation could be damaged. (*Id.*, at pp. 1200-1201.) None of those factors apply to Interveners here. Finally, in *U.S. Ecology, Inc. v. State of Calif.* (2001) 92 Cal.App.4th 113, the trial court allowed a party to intervene because there were both mandamus and damages claims in the complaint and the intervener was concerned the respondent would be more focused on defending against damages while the intervener was more concerned with the mandamus action. (*Id.*, at pp. 139-140.) Here, all of Petitioner's claims are based in mandamus and there is no danger that the City and Real Party will not vigorously defend all of Petitioner's claims.[2]

Accordingly, Interveners have no direct interest in this action.

**B. <u>The Intervention Will Enlarge The Issues In The Action</u>**

Interveners are wrong that their inclusion in the action will not enlarge the issues. In fact, Interveners' proposed answer requests attorneys' fees in its prayer for relief. (Declaration of Kenneth Stahl, ¶ 3, Prayer for Relief.) However, neither the City nor the applicant (Real Party) can obtain an award of attorneys' fees, even if they were to prevail here. Code of Civil Procedure section 1021.5 only allows a public entity like the City to obtain an award of attorneys' fees against another public entity. (Code Civ. Proc., § 1021.5; *State Water Resources Bd. Control Cases* (2008) 161 Cal.App.4th 304, 314.) Moreover, like here, the real party in interest in CEQA litigation is typically motivated by its personal stake in the outcome and thus would usually be disqualified under the burden of private enforcement test.

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[2]The four cases referenced above are the only cases Interveners cite that involve intervention issues. None of the other cases Interveners cite address intervention issues.

(*Jobe v. City of Orange* (2001) 88 Cal.App.4th 412, 416-17.) Accordingly, any award to a real party under Code of Civil Procedure section 1021.5 would only be available if a real party is the sponsor of a project that itself advances an important public interest and defends a CEQA proceeding primarily to advance that public interest rather than personal interests. (*Id.*, at p. 417.) As the developer of the project who stands to make millions off the project, TPG is completely self-interested in the outcome of this case and it, therefore, is disqualified from obtaining any fee award. (*Id.*, at p. 416 [the Court is aware of no CEQA case in which the real party in interest has been awarded its attorney fees under Code of Civil Procedure section 1021.5].)

Accordingly, if the Court grants Interveners' Motion, Petitioner faces the specter of having to prevail on every one of its claims or face the potential of having to pay attorneys' fees to Interveners. Petitioner does not face that possibility with the existing parties and granting the Motion would thus improperly enlarge the issues in the action. The Court should deny Interveners Motion.

### C. If The Court Allows Intervention, It Should Require Interveners To Share In The Page Limits Established By The Court

Because the Court has discretion to accept or deny a Motion made under the permissive intervention statute, a court "may impose various conditions or restrictions on the scope of intervention." (*Carlsbad Police Officers Ass'n v. City of Carlsbad* (2020) 49 Cal.App.5th 135, 152.) Interveners claim that Petitioner will not be prejudiced if their Motion is granted. (Mem., p. 19, line 5.) While Petitioner already has shown it will be prejudiced by potentially having to defend against Interveners' request for attorneys' fees, Petitioner will also be prejudiced should Interveners be granted the ability to submit a brief in excess of the combined total of 30 pages already set by the Court.[3]

Accordingly, Petitioner requests that, if the Court grants Interveners' Motion, that it order that Interveners must be included in the total opposition pages currently available to the City and Real Party, per the Court's earlier order.

## III. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court deny Interveners'

[3] The Court set the opposition's total number of pages at the July 8, 2021, hearing.

Motion. To the extent the Court grants the Motion, Petitioner requests that the Court order that Interveners are bound by the 30 total opposition page limit.

Dated: July 22, 2021

Law Offices of Geoffrey Willis

By: Geoffrey K. Willis
Attorneys for Petitioner

## DECLARATION OF GEOFFREY WILLIS

I, Geoffrey Willis, declare as follows:

1. I am an attorney licensed to practice law before all courts of the State of California, and I am the owner of the Law Offices of Geoffrey Willis, counsel of record for Petitioner in this action. I make this Declaration in support of Petitioner's Opposition to Motion to Intervene. The following facts are based on my personal knowledge and my review of pertinent documents. If called as a witness, I could and would testify competently to these facts under oath.

2. A true and correct copy of a portion of the staff report for the City of Newport Beach's January 12, 2021, City Council meeting regarding Real Party's proposed project is attached hereto as Exhibit A.

3. A true and correct copy of a portion of the Power Point presentation the city staff made at its January 26, 2021, City Council hearing is attached hereto as Exhibit B.

4. A true and correct copy of a portion of the Power Point presentation the Real Party made at its January 26, 2021, City Council hearing is attached hereto as Exhibit C.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 22nd day of July, 2021, at Nampa, Idaho.

Geoffrey Willis

# EXHIBIT A

CITY OF

# NEWPORT BEACH

## City Council Staff Report

January 12, 2021
Agenda Item No. 10

| | |
|---|---|
| **TO:** | HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL |
| **FROM:** | Seimone Jurjis, Community Development Director - 949-644-3232, sjurjis@newportbeachca.gov |
| **PREPARED BY:** | Rosalinh Ung, Principal Planner, rung@newportbeachca.gov |
| **PHONE:** | 949-644-3208 |
| **TITLE:** | Ordinance Nos. 2021-1 and 2021-2: Land Use Entitlement Applications for the Residences at 4400 Von Karman Project (PA2020-061) |


**ABSTRACT:**

The applicant is processing several entitlement applications that would allow for the future development of a 13-acre property with up to 312 dwelling units (260 base units and 52 density bonus units) atop an 825-space parking structure, approximately one-acre public park, and a 284-space freestanding parking structure within the Koll Center Newport Professional and Business Office Site B, generally located between Von Karman Avenue and Birch Street in the vicinity of John Wayne Airport.

For City Council's consideration is the adoption of the environmental clearance and planning applications for the project, and introduction of two ordinances to amend the Planned Community Development Plan and approval of a Development Agreement. If approved, the item will return to City Council on January 26, 2021 for final adoption of the two ordinances.


**RECOMMENDATION:**

a) Conduct a public hearing;

b) Adopt Resolution 2021-2, *A Resolution of the City Council of the City of Newport Beach, California, Adopting Addendum No. ER2020-003 to the 2006 General Plan Update Program Environmental Impact Report and the 2008-2014 City of Newport Beach Housing Element Update Initial Study/Negative Declaration for the Residences at 4400 Von Karman Project Located at 4400 Von Karman Avenue (PA2020-061);*

c) Waive full reading, direct the City Clerk to read by title only, introduce Ordinance No. 2021-1, *An Ordinance of the City Council of the City of Newport Beach, California, Approving Planned Community Development Plan Amendment No. PD2020-001 for the Residences at 4400 Von Karman Project Located at 4400 Von Karman Avenue (PA2020-061)*, and pass to second reading on January 26, 2021;

d) Adopt Resolution No. 2021-3, *A Resolution of the City Council of the City of Newport Beach, California, Approving Major Site Development Review No. SD2020-006, Lot Line Adjustment No. LA2020-002, Affordable Housing Implementation Plan No. AH2020-003, and Traffic Study No. TS2020-001 for the Residences at 4400 Von Karman Project Located at 4400 Von Karman Avenue (PA2020-061)*; and

e) Waive full reading, direct the City Clerk to read by title only, and introduce Ordinance No. 2021-2, *An Ordinance of the City Council of the City of Newport Beach, California, Approving Development Agreement No. DA2020-002 for the Residences at 4400 Von Karman Project Located at 4400 Von Karman Avenue (PA2020-061)*, and pass to second reading on January 26, 2021.

## FUNDING REQUIREMENTS:

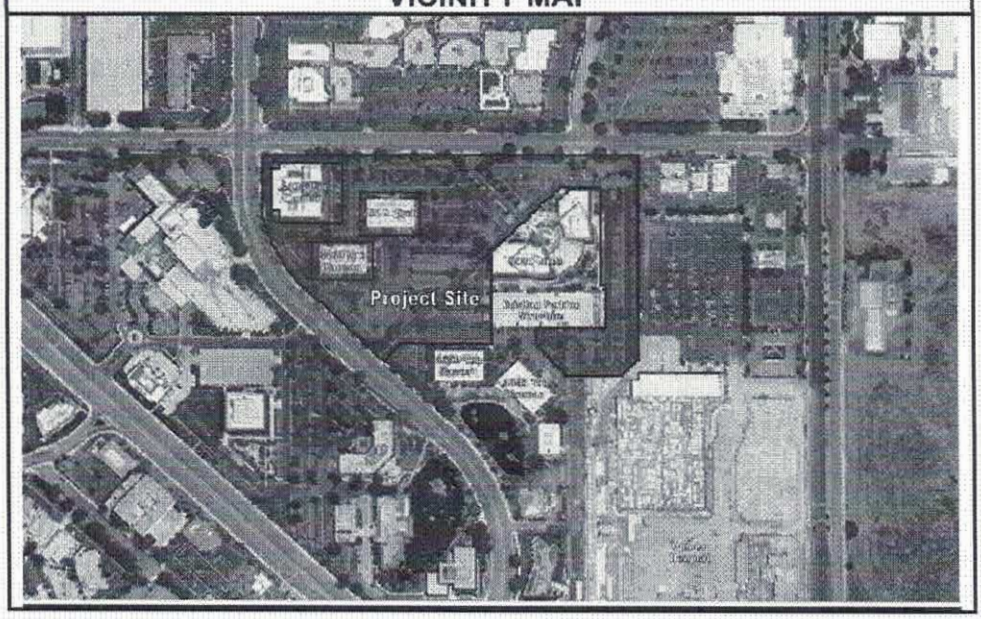
The applicant is required to reimburse the City for all costs associated with the review of the application. The applicant has agreed to the draft Development Agreement that requires the payment of $8,000,000 to the City in addition to all required permit fees.

## INTRODUCTION:

### Project Setting

The subject property is located within a portion of Professional and Business Office Site B (Office Site B) of the Koll Center Newport Business Park, and approximately 13 acres in size. It is an irregularly shaped property generally bordered by Birch Street to the northeast, Von Karman Avenue to the west, and existing office uses and associated surface parking lots and parking structures to the east and south. The two-story office building located at 4490 Von Karman Avenue, the four-story office building located 4910 Birch Street and the three-story 4440 Von Karman Avenue office building, located within the project boundaries, are not a part of the project. The project site wraps around, and does not include, an existing 11-story office building at 5000 Birch Street.

**VICINITY MAP**



Project Description

The applicant, TPG (KCN) Acquisition, LLC (The Picerne Group), proposes to demolish existing surface parking areas and landscaping within the project site and construct: 1) 312 apartment units atop an 825-space parking structure, 2) an approximately one-acre public park, and 3) a 284-space free-standing parking structure to replace parking displaced by the residential building and park. Primary vehicular access will be provided by a new internal street that will be open to the public, allowing access from Von Karman Avenue to Birch Street. The internal street will also allow access to the existing office complex. The base density allotted to this site by the General Plan is 260 units and the applicant requests a 20 percent increase in density pursuant to Newport Beach Municipal Code (NBMC) Chapter 20.32 (Density Bonus) and Government Code Section 65915 (State Density Bonus law). The reconfiguration of existing surface parking lots within the project area is also proposed.

The applicant's project description and project plans are available online at the City's website at: https://www.newportbeachca.gov/government/departments/community-development/planning-division/current-projects-and-cases/residences-at-4440-von-karman

The application consists of the following components:

- **Planned Community Development Plan Amendment No. PD2020-001:** An amendment to Planned Community Development Plan #15 (Koll Center Newport Planned Community) for the creation of a residential overlay zone to allow residential use and a public park in Professional and Business Office Site B;
- **Major Site Development Review No. SD2020-006:** A site development review in accordance with the amended Koll Center Newport Planned Community and Section 20.52.80 (Site Development Reviews) of the Newport Beach Municipal Code (NBMC) for the construction of the project;
- **Traffic Study No. TS2020-001:** A traffic study pursuant to NBMC Chapter 15.40 (Traffic Phasing Ordinance), which is required for projects that generate in excess of 300 new average daily trips;
- **Lot Line Adjustment No. LA2020-002:** To adjust the lot lines of two underlying parcels that comprise the project pursuant to NBMC Chapter 19.76 (Lot Line Adjustments);
- **Affordable Housing Implementation Plan No. AH2020-003:** A program specifying how the proposed project would meet the City's affordable housing requirements, in exchange for a request of 20 percent increase in density. The applicant seeks a development concession related to the mix of affordable unit types;
- **Development Agreement No. DA2020-002:** An agreement between the applicant and the City, which would provide vested rights to develop the proposed project, while also providing negotiated public benefits; and

- **Addendum No. 4 (ER2020-003) to the 2006 General Plan Update Program Environmental Impact Report and the 2008-2014 City of Newport Beach Housing Element Initial Study/Negative Declaration:** Pursuant to the California Environmental Quality Act (CEQA), the addendum will address reasonably foreseeable environmental impacts resulting from the proposed project.

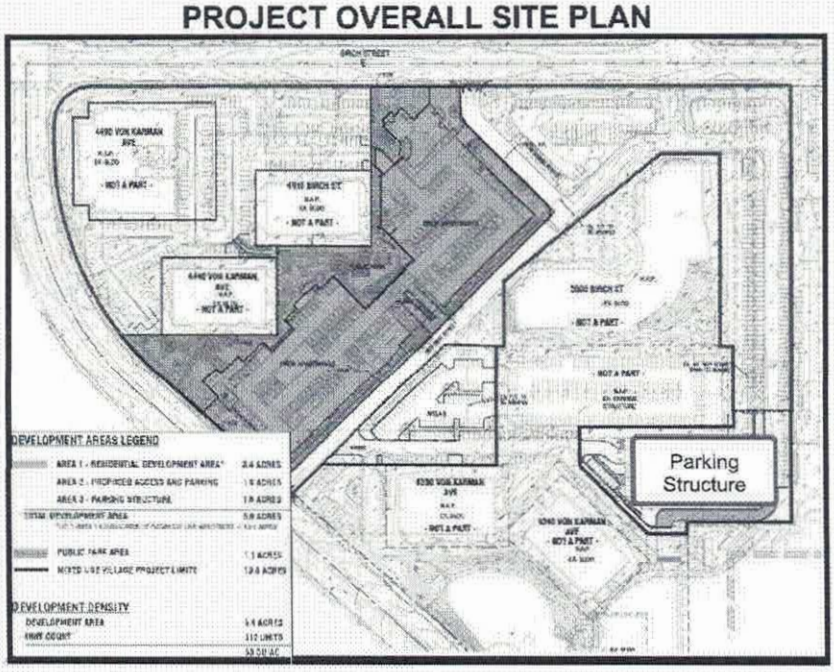
*Residential Units*

The proposed rectangular-shaped, multiple-unit residential building is designed as a "podium style" structure that would be four stories over one level of on-grade parking and two levels of below grade parking with an overall building height of 71 feet.

The 312 rental units consist of 55 studio units, 149 one-bedroom units, and 108 two-bedroom units. The studios would range in size from 515 square feet to 628 square feet. The one-bedroom units would range from 665 square feet to 1,025 square feet. The two-bedroom units would range from 1,000 square feet to 1,413 square feet. Of the 312 rental units, five percent of the base units, or 13 units, will be affordable and restricted to very low-income households for 55 years and the remaining 299 units will be market-rate rentals. The proposed unit mix for the affordable units is 3 studio units, 9 one-bedroom units, and 1 two-bedroom unit. The affordable units will consist of the same size and amenities as the market-rate units and will be distributed throughout the project.

The proposed project includes a variety of private on-site recreation and amenities for future residents and their guests including courtyards, a roof terrace, a clubroom, fitness center, private balconies, a dog washroom and a bike shop. In addition to these private amenities, the residents and their guests also have access to all open spaces, walking paths and the proposed public park.

**PROJECT OVERALL SITE PLAN**



# EXHIBIT B

January 26, 2021
Item No. 11



# Residences at 4400 Von Karman Avenue

PA2020-061

## City Council
## Public Hearing
**January 26, 2021**

# Introduction



- 312 apartments (13 affordable – VL income)
  - 835-space parking garage for residents and adjacent offices
  - 260 General Plan base units
  - 52 density bonus units
- A one-acre public park dedicated to the City
- 284-space parking structure for offices
- Reconfiguration of surface parking lots
- Construction duration: 32 months approx.

# EXHIBIT C

THE PICERNE GROUP

January 26, 2021
Item No. 11



# 4400

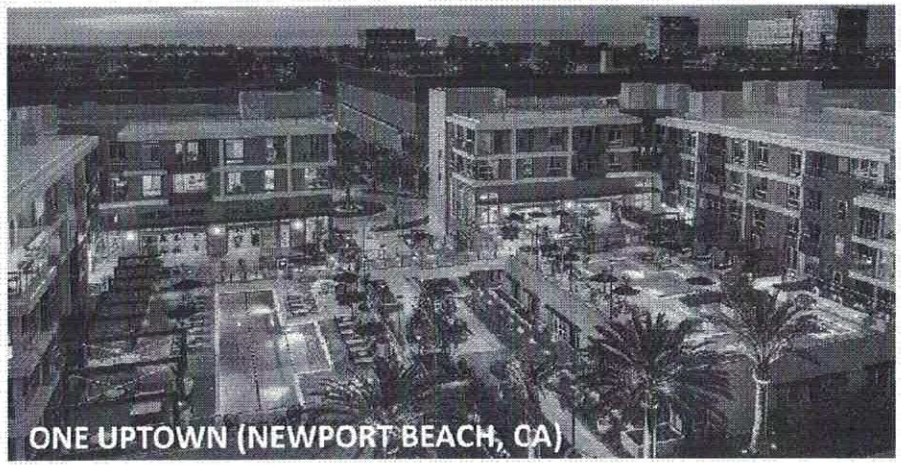
# Residences at Von Karman

City Council, 1/26/21

# About Us

THE PICERNE GROUP

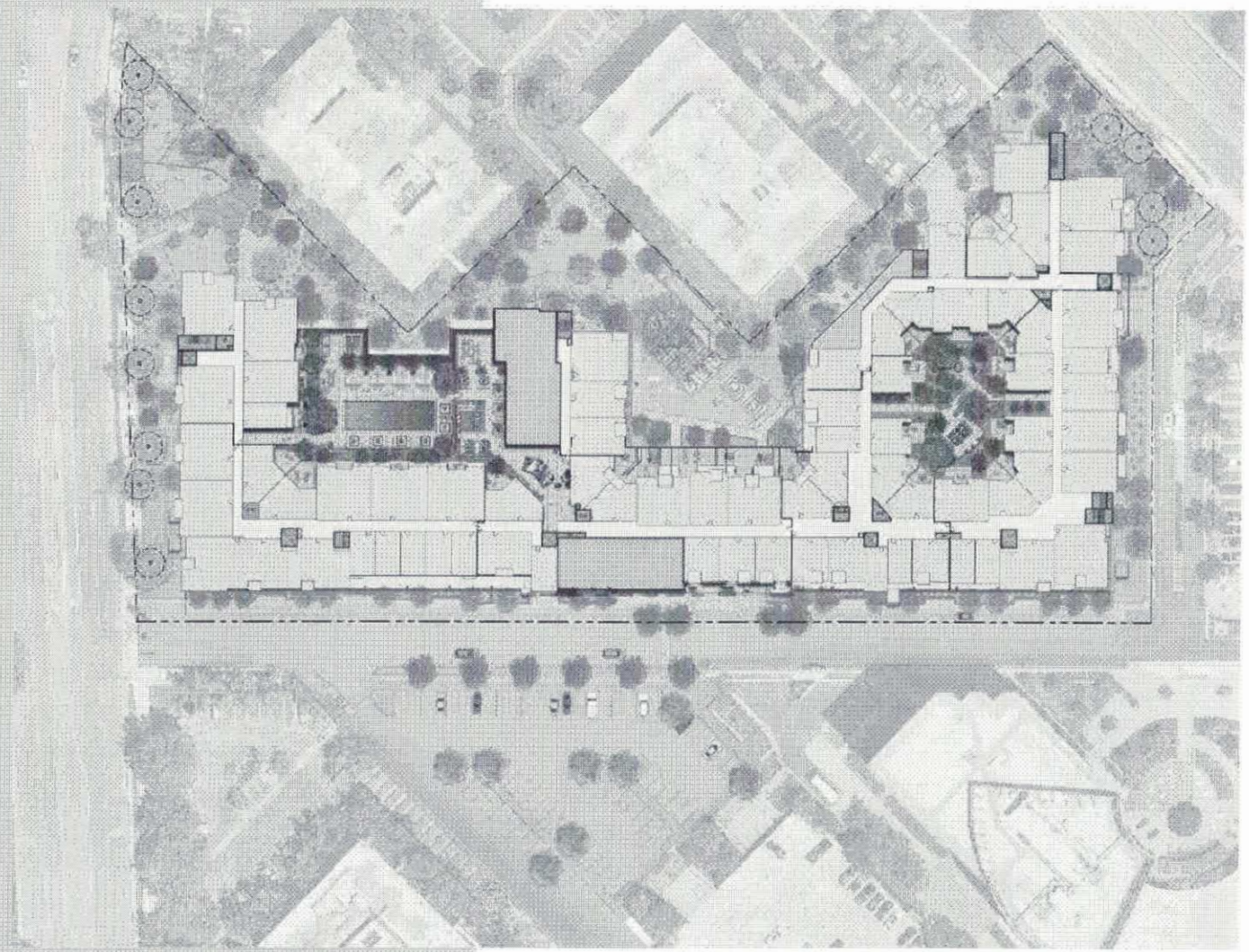
- Stable:
  - Founded in 1988
  - Privately-owned and self-funded, family office headquartered in Newport Beach, California
- Reliable:
  - Long-term ownership
  - Proven track record in Newport Beach as developer of One Uptown Newport
- Community-Minded:
  - Community involvement and investment through the Picerne Family Foundation
  - Thoughtful urban planners and community developers
- Experienced:
  - Executive Team comprised of leading industry professionals


ONE UPTOWN (NEWPORT BEACH, CA)


BLU (LAGUNA NIGUEL, CA)

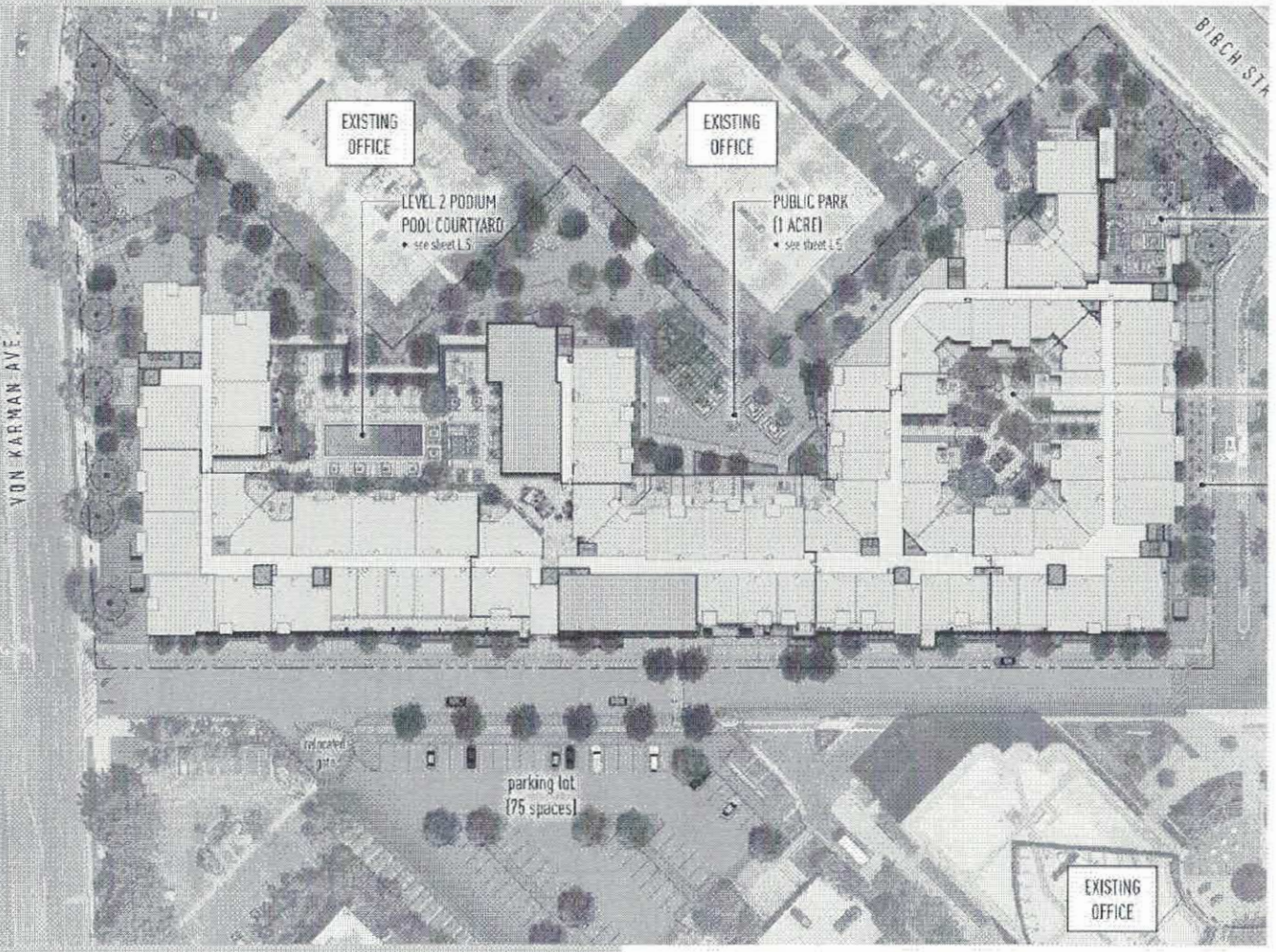

ELEVEN10 (ORANGE, CA)

# Executive Summary



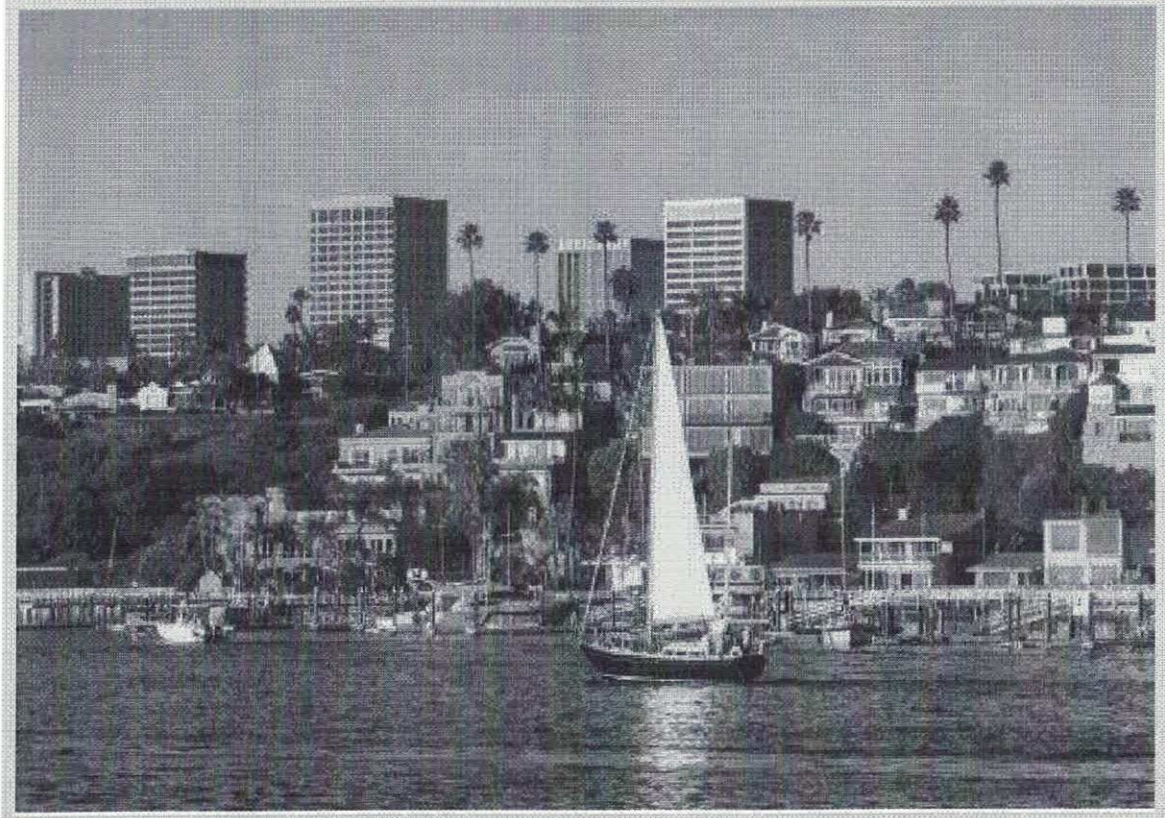
- In 2010 the City unanimously adopted a plan allowing the ability to develop residential within the Koll Center which is in complete compliance with its CC&Rs
- A collaborative community outreach process resulted in a project design that encompasses the desires of the community as a whole (affordability, proper scale and spatial arrangement, and a Public Central Park)
- Addresses critical housing needs

# Response to Community Input



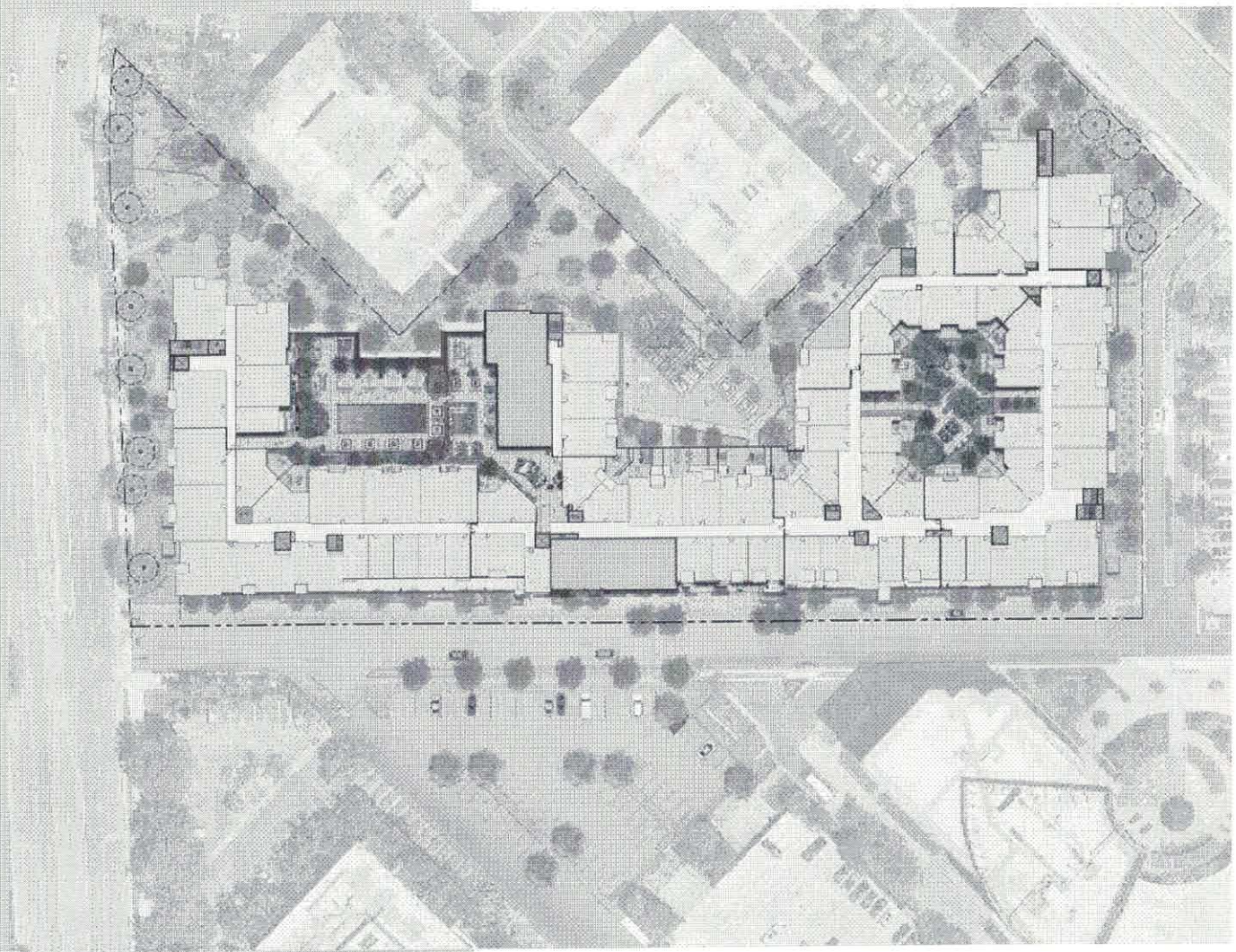

- Mid-rise development (70' to 75') vs the previous applicant's high-rise development (156')
- Integrated 1-acre central public park vs a separate isolated park
- Scale and spatial arrangement is harmonious and consistent with Koll Center development and design standards
- Every parking space eliminated by virtue of our building footprint and the freestanding garage will be replaced
- Critical housing needs -

# Critical Housing Needs in Newport Beach



- State mandated RHNA requirement of 4,834 market rate and affordable housing units
- Limited land opportunities
  - High land values
  - Fully developed
- Meaningful community-based hurdles to meeting RHNA requirements

# Conclusion



- In 2010 the City unanimously adopted a plan allowing the ability to develop residential within the Koll Center which is in complete compliance with its CC&Rs
- A collaborative community outreach process resulted in a project design that encompasses the desires of the community as a whole (affordability, proper scale and spatial arrangement, and a Public Central Park)
- Addresses critical housing needs

## PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is Law Offices of Geoffrey Willis, 9891 Irvine Center Drive, Suite 200, Irvine, California 92618.

On July 22, 2021, I served the following described as:

**PETITIONER'S OPPOSITION TO MOTION FOR LEAVE TO INTERVENE; DECLARATION OF GEOFFREY WILLIS; EXHIBITS**

on the interested parties in this by having a copy sent to the address listed below:

| | |
|---|---|
| Ginetta L. Giovinco<br>Richards, Watson & Gershon<br>350 S. Grand Ave., 37th Floor<br>Los Angeles, CA 90071<br>Tel.: (213) 626-8484<br>Fax: (213) 626-0078<br>email: ggiovinco@rwglaw.com<br>Attorneys for Respondent City of Newport Beach | Jennifer L. Hernandez<br>Holland & Knight LLP<br>50 California St., Suite 2800<br>San Francisco, CA 94111<br>Tel.: (415) 743-6927<br>Fax: (415) 743-6910<br>email: jennifer.hernandez@hklaw.com<br>Attorneys for Real Party in Interest TPG (KCN) Acquisition, LLC |
| Matthew C. Henderson<br>Miller Starr Regalia<br>1331 N. California<br>Walnut Creek, CA 94596<br>Tel.: (925) 935-9400<br>email: matthew.henderson@msrlegal.com<br>Attorneys for Interveners YIMY Law and People for Housing Orange County | Matthew P. Gelfand<br>Californians for Homeownership, Inc.<br>525 S. Virgil Ave.<br>Los Angeles, CA 90020<br>Tel.: (213) 739-8206<br>email: matt@caforhomes.org<br>Attorneys for Intervener Californians for Homeownership, Inc. |

[] **(BY U.S. MAIL)**: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[✔] **(BY EMAIL)**: The foregoing document(s) were served via electronic mail to the email address(es) listed above. The transmissions were made without any errors being noted in our office's email program.

[✔] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 22, 2021, at Dana Point, California.

Madison Killebrew

Madison Killebrew