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MATTHEW C. HENDERSON (Bar No. 229259)
KENNETH A. STAHL (Bar No. 326495)
MILLER STARR REGALIA
A Professional Law Corporation
1331 N. California Blvd., Fifth Floor
Walnut Creek, California 94596
Telephone: 925 935 9400
Facsimile: 925 933 4126
Email: matthew.henderson@msrlegal.com
ken.stahl@msrlegal.com

Attorneys for Intervenors YIMBY LAW and PEOPLE FOR HOUSING ORANGE COUNTY (A CHAPTER OF YIMBY ACTION)

CALIFORNIANS FOR HOMEOWNERSHIP, INC.
MATTHEW P. GELFAND (Bar No. 297910)
ALLYSON H. RICHMAN (Bar No. 339822)
525 S. Virgil Avenue
Los Angeles, CA 90020
Telephone: 213 739 8206
Email: matt@caforhomes.org

Attorneys for Intervenor CALIFORNIANS FOR HOMEOWNERSHIP, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE - CIVIL COMPLEX

OLEN PROPERTIES CORP., a Florida corporation, Petitioner, v. CITY OF NEWPORT BEACH, and DOES 1-10, inclusive, Respondents.	Case No. 30-2021-01185991-CU-WM-CXC ASSIGNED FOR ALL PURPOSES TO: HON. WILLIAM H. CLASTER DEPARTMENT CX-104 OPPOSITION OF INTERVENORS YIMBY LAW, PEOPLE FOR HOUSING ORANGE COUNTY (A CHAPTER OF YIMBY ACTION), AND CALIFORNIANS FOR HOMEOWNERSHIP, INC. TO PETITIONER'S OPENING BRIEF
TPG (KCN) ACQUISITION, LLC, a Delaware limited liability company, and DOES 11-20, inclusive, Real Parties in Interest.	Judge: Hon. William H. Claster Date: March 11, 2022 Time: 9:00 a.m. Dept.: CX-104
YIMBY LAW, PEOPLE FOR HOUSING ORANGE COUNTY (A CHAPTER OF YIMBY ACTION), AND CALIFORNIANS FOR HOMEOWNERSHIP, INC., Intervenors.	Reservation No. 73631685 Action Filed: February 25, 2021 Trial Date: None Set.

TABLE OF CONTENTS

Page

I. INTRODUCTION. 5

II. LEGAL ARGUMENT. 6

A. To Address California's Historic Housing Crisis, The Legislature Has Adopted An Interconnected System For Facilitating Residential Development. 6

1. California Is Experiencing A Housing Crisis Of Historic Proportions. 7

2. California's Cities Have Precipitated The Housing Crisis By Enacting Exclusionary Land Use Policies That Favor The Preferences Of Residents Over Regional Housing Needs. 9

3. California's RHNA And Housing Element Laws Require Cities To Plan For Sufficient Housing To Meet Regional Needs. 9

4. To Address Efforts To Undermine The Effectiveness Of The RHNA And Housing Element Planning Process, The Legislature Adopted The Revised Housing Accountability Act. 10

5. To Additionally Incentivize The Development Of Income-Restricted Affordable Housing, The Legislature Adopted The State Density Bonus Law. 11

B. The 4400 Von Karmen Project Provides Desperately Needed Housing, Including Income-Restricted Housing, Exactly Where It Is Needed The Most. 12

1. Southern California—And Orange County And Newport Beach In Particular—Desperately Needs New Housing For Families At All Income Levels. 12

2. The Project Is Exactly The Sort Of Housing Development, On Exactly The Sort Of Development Site, That The City Needs To Accomplish Its Housing Goals. 13

C. Because The Project Complies With All Applicable Development Standards, The City Was Required To Approve It Under The DBL And The HAA. 14

1. The Project Complies With The DBL. 14

2. The City Was Required To Approve The Project Under The HAA. 15

D. Petitioner's CEQA Claims Lack Merit and Should Be Denied. 15

1. The City's CEQA Determinations Are Supported by Substantial Evidence. 16

2. The City's Use of an Addendum Was Proper. 17

3. Petitioner's Other CEQA Claims Are Meritless. 19

III. CONCLUSION. 19

TABLE OF AUTHORITIES

Page

CASES

*American Canyon Community United for Responsible Growth v. City of American Canyo*n (2006)
145 Cal.App.4th 1062 17

Assn. for Protection etc. Values v. City of Ukiah (1991)
2 Cal.App.4th 720 18

California Building Industry Association v. Bay Area Air Quality Management District (2015)
62 Cal.4th 369 17

California Oak Foundation v. City of Santa Clarita (2005)
133 Cal.App.4th 1219 16

Citizens Against Airport Pollution v. City of San Jose (2014)
227 Cal.App.4th 788 18

Citizens for Responsible Equitable Envt'l Dev. v. City of San Diego (2011) 515 18

Concerned Dublin Citizens v. City of Dublin (2013) 214 Cal.App.4th 1301 18

Edna Valley Watch v. County of San Luis Obispo (2011)
197 Cal.App.4th 1312 ..... 16, 19

Friends of Santa Clara River v. Castaic Water Agency (2002)
95 Cal.App.4th 1373 16

Santa Monica Chamber of Commerce v. City of Santa Monica (2002) 101 Cal.App.4th 786 17

Santa Teresa Citizens v. City of San Jose (2003)
114 Cal.App.4th 689 16

Topanga Beach Renters Assn. v. Dept. of General Services (1976)
58 Cal.App.3d 188 18

STATUTES

Government Code Section 65583 9
Section 65583(c) 10
Section 65583.2 9
Section 65583.2(h) 10
Section 65584.01 9
Section 65584.05 9
Section 65588 9
Section 65589.5(a)(1) 7
Section 65589.5(a)(1)(C) 9
Section 65589.5(a)(2) 7
Section 65589.5(a)(2)(A) 8

TABLE OF AUTHORITIES
(Continued)

Page

Section 65589.5(c)(1) 7, 11
Section 65589.5(h)(8) 15
Section 65589.5(j) 10
Section 65589.5(j)(1) 5, 6, 15
Section 65589.5(j)(1)(A) 15
Section 65589.5(j)(3) 15
Section 65915 11
Section 65915(b)(1) 11
Section 65915(f) 11
Section 65915(j)(1) 11

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Stats. 2017 c. 378 [AB 1515] § 1.5 10

Stats. 2020 c. 197 [A.B. 2345] 12

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McKinsey & Company, *A Tool Kit to Close California's Housing Gap: 3.5 Million Homes By 2025* (2016), *available at* https://www.mckinsey.com/~/media/McKinsey/Industries/Public and Social Sector/Our Insights/Closing Californias housing gap/Closing-Californias-housing-gap-Full-report.pdf at document page 6 9

Paul M. Ong & Chhandara Pech, *The COVID-19 Pandemic Housing Crisis: Identifying Owner-Vulnerable Neighborhoods in California* (2021), *available at* https://knowledge.luskin.ucla.edu/wp-content/uploads/2021/05/UCLA_CNK_OVI_v06.pdf 8

Sarah Crump & Jenny Schuetz, *What the Great Recession Can Teach Us About the Post-Pandemic Housing Market*, Brookings, Mar. 29, 2021, *available at* https://www.brookings.edu/research/what-the-great-recession-can-teach-us-about-the-post-pandemic-housing-market/; Emily Badger & Quoctrung Bui, *Where Have All the Houses Gone?*, N.Y. Times, Feb. 26, 2021, *available at* https://www.nytimes.com/2021/02/26/upshot/where-have-all-the-houses-gone.html 8

I. INTRODUCTION.

This case is a poorly disguised effort to circumvent state housing law and prevent the City of Newport Beach from entitling desperately needed housing in one of the few areas of the City where such housing can feasibly be constructed. The most salient fact here, which Petitioner's brief wholly neglects to acknowledge, is that the City was *required* to approve this Project by two powerful state laws designed to address the state's severe housing crisis: the Housing Accountability Act ("HAA") and the Density Bonus Law ("DBL."). The HAA provides that a city must approve a housing project if the project is consistent with all applicable objective development criteria and the city cannot prove that the project poses a specific adverse health and safety impact. Gov. Code § 65589.5(j)(1). The DBL provides that if a housing developer dedicates a percentage of the homes in a project to affordable housing, the developer qualifies for a "density bonus" that entitles it to exceed the base density provided in the city's zoning ordinance or General Plan. The two laws work in tandem. Under the HAA, a city may not consider a project inconsistent with applicable development standards on the grounds that the project qualifies for a density bonus under the DBL. As subdivision (c)(1) of the HAA states, "the receipt of a density bonus . . . shall not constitute a valid basis on which to find that a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision."

In this case, the City had no evidence that the Project posed a specific adverse health and safety impact, and the Project complied with all applicable objective development standards. Though Petitioner argues that the Project proposes 52 more homes than the unit cap in the General Plan, the General Plan's unit cap is not *applicable* because the Project provides 13 affordable homes and is therefore entitled to a density bonus of 52 homes. For that reason, although the base density permitted in the General Plan for this site is 260 homes, the HAA required the City to approve a housing project on this site with 312 homes (260 base units plus 52 density bonus units). Petitioner's brief consistently ignores this fact, faulting the City for entitling 312 units when the general plan permits 260 homes on this site. Petitioner even goes on to state that the General Plan does not "allow for additional units based on a density bonus," (Opening Br.

at 32). But Petitioner misses the point. State law *required* the City to approve a project with 312 homes, regardless of the base density permitted by the City's General Plan. Had the City denied this Project, it would have been subjected to lawsuits by the developer and housing organizations like the Intervenors.

Petitioner attempts to evade the effects of state housing law by falling back onto a litany of asserted environmental impacts that it claims were not properly studied by the City under the California Environmental Quality Act (CEQA). Many of these, such as the impact of COVID-19 and the Project's alleged violation of private covenants, conditions, and restrictions (CC&Rs) are not considered environmental impacts under CEQA. The remaining impacts were adequately studied by the Addendum for the Project and did not require any additional environmental review. The CEQA arguments are simply a pretextual means for Petitioner to secure a de facto denial of this Project through delays and increased costs in the face of strong new state laws demanding that the Project be approved.

II. LEGAL ARGUMENT.

A. To Address California's Historic Housing Crisis, The Legislature Has Adopted An Interconnected System For Facilitating Residential Development.

This lawsuit is a perfect example of why our state is experiencing a housing crisis—a Project neighbor filed frivolous litigation to block desperately needed new housing in an ideal location, despite the fact that *state law requires* the Project to be approved. The Project site is in an area of Newport Beach that is well-suited for high-density housing, and was designated in the City's General Plan over 10 years ago as appropriate for high-density housing. The Project is consistent with all relevant land use standards and qualifies for a density bonus because it provides 13 homes that are affordable for low-income families. All of the relevant environmental impacts were fully studied years ago when the City adopted the General Plan Environmental Impact Report (EIR). Under the HAA, the City is *prohibited* from denying this Project because it meets all applicable, objective land use standards. Gov. Code § 65589.5(j)(1). Though Petitioner harps on the fact that the Project's 312 homes exceed the General Plan's base density of 260 units, the Project only exceeds the base density because it qualifies for a density bonus of 52 units under the

DBL. The HAA is clear that a project may not be considered inconsistent with applicable, objective land use standards on the basis that the project qualifies for a density bonus under the DBL. Gov. Code § 65589.5(c)(1). Accordingly, the City approved the Project, as state law requires. The City also identified the Project in the Housing Element of its General Plan as a project that would count toward meeting the City's state-mandated affordable housing goals. Nevertheless, Petitioner now tries to prevent state housing law from taking effect by filing this lawsuit.

If Petitioner were to succeed in this litigation, it would defeat the carefully considered intent of the state Legislature to address the ongoing housing crisis by facilitating the approval and production of new housing.

1. California Is Experiencing A Housing Crisis Of Historic Proportions.

It is no mystery why the Legislature provided that cities must approve housing developments like the Project at issue in this case. The state is facing a grave housing shortage, largely because it has become nearly impossible to build needed dense housing in affluent cities like Newport Beach. For that reason, the state has given developers broad incentives to build denser housing and dramatically limited the circumstances in which cities can deny projects providing such housing.

In extremely comprehensive findings of fact, the Legislature that enacted the HAA found that for decades, California has experienced a significant housing access and affordability crisis. (Gov. Code § 65589.5(a)(1) [legislative findings describing crisis as of 1990].) In recent years, this crisis has reached "historic proportions." (Gov. Code § 65589.5(a)(2) [additional legislative findings describing crisis as of 2017].)

As a result of the housing affordability crisis, younger Californians are being denied the opportunities for housing security and homeownership that were afforded to previous generations. Families across economic strata are being forced to rent rather than experience the wealth-building benefits of homeownership.[1] Many middle and lower income families devote

[1] California Department of Housing and Community Development, *California's Housing Future: Challenges and Opportunities: Final Statewide Housing Assessment 2025* (2018), (footnote continued)

more than half of their take-home pay to rent, leaving little money to pay for transportation, food, healthcare and other necessities.[2] Unable to set aside money for savings, these families are also at risk of losing their housing in the event of a medical issue, car trouble, or other personal emergency. Indeed, housing insecurity in California has led to a mounting homelessness crisis.[3] In the HAA's findings of fact, the Legislature observed:

> The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives.[4]

The housing crisis has only been exacerbated by the COVID-19 pandemic. The large-scale economic impacts have created financial difficulties for renters and homeowners, leaving many unable to pay their rent or mortgage payments.[5] The prices of homes have increased while the inventory of for-sale homes has decreased as homeowners remain uncertain about the future.[6] Higher costs have also increased crowding in homes, creating negative health effects in the context of the pandemic, but also in ordinary times.[7]

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available at http://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf, at pp. 18-19.

[2] *Id.* at p. 27.

[3] *Id.* at pp. 3, 48-50.

[4] Gov. Code § 65589.5(a)(2)(A).

[5] Paul M. Ong & Chhandara Pech, *The COVID-19 Pandemic Housing Crisis: Identifying Owner-Vulnerable Neighborhoods in California* (2021), *available at* https://knowledge.luskin.ucla.edu/wp-content/uploads/2021/05/UCLA_CNK_OVI_v06.pdf.

[6] Sarah Crump & Jenny Schuetz, *What the Great Recession Can Teach Us About the Post-Pandemic Housing Market*, Brookings, Mar. 29, 2021, *available at* https://www.brookings.edu/research/what-the-great-recession-can-teach-us-about-the-post-pandemic-housing-market/; Emily Badger & Quoctrung Bui, *Where Have All the Houses Gone?*, N.Y. Times, Feb. 26, 2021, *available at* https://www.nytimes.com/2021/02/26/upshot/where-have-all-the-houses-gone.html

[7] Crump & Scheutz, *supra* note 6.

At the core of California's affordable housing crisis is a failure to build enough housing. Today, California ranks 49th out of the 50 states in existing housing units per capita.[8]

2. California's Cities Have Precipitated The Housing Crisis By Enacting Exclusionary Land Use Policies That Favor The Preferences Of Residents Over Regional Housing Needs.

According to the HAA's findings of fact: "The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing . . . . Among the consequences of those actions are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration." (Gov. Code § 65589.5(a)(1)(C).) The term "NIMBY"—or "Not in My Backyard"—is used to describe these policies. NIMBY policies are used across California to delay, reject, and downsize housing development projects, especially projects that might increase access to affordable housing.

3. California's RHNA And Housing Element Laws Require Cities To Plan For Sufficient Housing To Meet Regional Needs.

Over the last five decades, the Legislature has increasingly sought to address the reluctance of local governments to approve needed housing. The most important state policy addressing the housing crisis is the Regional Housing Needs Allocation ("RHNA") and Housing Element law. Under the RHNA law, each city in the state is required to update the Housing Element of its General Plan every eight years to make plans for accommodating its fair share of the regional need for housing at several different levels of affordability. (Gov. Code §§ 65583, 65583.2, 65584.01, 65584.05, 65588.) The Housing Element must provide an inventory of sites available for residential development and assess constraints and market realities that affect the likely development activity at those sites, including local land use regulations. (*Id.*) Localities

[8] McKinsey & Company, *A Tool Kit to Close California's Housing Gap: 3.5 Million Homes By 2025* (2016), *available at* https://www.mckinsey.com/~/media/McKinsey/Industries/Public and Social Sector/Our Insights/Closing Californias housing gap/Closing-Californias-housing-gap-Full-report.pdf at document page 6.

must make changes to their land use rules, including by rezoning land, if needed to enable housing sufficient to meet their RHNA goals. (Gov. Code § 65583(c), 65583.2(h).)

4. To Address Efforts To Undermine The Effectiveness Of The RHNA And Housing Element Planning Process, The Legislature Adopted The Revised Housing Accountability Act.

The RHNA and Housing Element laws are effective at eliminating straightforward, explicit efforts to limit housing production. But because local governments control most of the RHNA and Housing Element planning process, the process requires their good faith cooperation to succeed. Many cities instead work to undermine the system, treating it as an inconvenient chore rather than a serious effort to develop good housing policy. Through these efforts, cities have successfully subverted the RHNA and Housing Element planning process and have continued to engage in land use policies designed to exclude new housing construction.

In recent years, the Legislature has responded with an expansive package of housing-related bills. Among these were key enhancements to the Housing Accountability Act ("HAA"). First passed in the 1980s, the HAA aims to eliminate local project-specific vetoes by limiting the right of localities to reject zoning-compliant housing development projects. The law was rarely invoked, but in 2017 the Legislature breathed new life into it by adding additional penalties for non-compliance, changing the burdens and standards of proof, and providing a statutory right of action for nonprofit organizations to sue to enforce the law. (Stats. 2016 c. 420 [AB 2584] § 1; Stats. 2017 c. 378 [AB 1515] § 1.5.)

Today, the HAA limits local review of standards-compliant housing development projects in several key ways. Most critically, the HAA requires cities to apply *objective* rather than *subjective* criteria to determine whether a project qualifies as standards-compliant. If a city considers a project out of compliance with its objective land use standards, it must make specific findings to that effect within a prescribed period. Otherwise, the project is deemed compliant. (Gov. Code § 65589.5(j).) A city can only reject a standards-compliant project if it "would have a specific, adverse impact upon the public health or safety" unless disapproved. (*Ibid.*)

These limits require cities to adopt high-quality, specific land use rules that housing

developers and city staff can reliably use to guide the creation of standards-compliant housing development proposals.

5. To Additionally Incentivize The Development Of Income-Restricted Affordable Housing, The Legislature Adopted The State Density Bonus Law.

Even with these measures in place, California's cities and counties have consistently underproduced housing that is restricted to and affordable for low-income families. To address this problem, the Legislature adopted and has subsequently enhanced the state Density Bonus Law ("DBL"), codified primarily in Government Code Section 65915.

Under the DBL, a housing developer that dedicates a portion of a housing development project as income-restricted housing is entitled to significant modifications of local planning rules. A project is entitled to standards modifications under the DBL if it dedicates at least 5% of its units to housing for very low-income families, or a higher proportion to low-income or moderate-income families, transitional housing, or certain other types of income-restricted housing. (Gov. Code § 65915(b)(1).)

The primary benefit provided under the DBL is a "density bonus"—an increase in the unit count that would otherwise be permitted for the project under base density limitations in the reviewing city or county's zoning rules. The amount of the bonus is provided on a sliding scale based on the amount of income-restricted housing provided by the development. (Gov. Code § 65915(f).)

Practically speaking, and from the perspective of state housing law, the DBL simply changes the local development standards applicable to DBL-eligible projects. When a project receives a density bonus under the DBL, it does not constitute a change to the city or county's zoning or general plan standards and does not require a discretionary act by the local government. (Gov. Code § 65915(j)(1).) And under the HAA, the "applicable" standards that a local government must apply when considering a housing development project are the city or county's standards *as modified by the DBL*. (Gov. Code § 65589.5(c)(1) ["[T]he receipt of a density bonus . . . shall not constitute a valid basis on which to find that a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable

plan, program, policy, ordinance, standard, requirement, or other similar provision."].)

In recent years, the Legislature has significantly enhanced the DBL. For example, it has amended the law to provide more significant density bonuses for DBL-eligible projects. (Stats. 2020 c. 197 [A.B. 2345].)

* * *

Taken together, the RHNA and Housing Element process, the modern HAA, and the DBL form an interconnected system for addressing the role of local governments in California's housing crisis. The RHNA and Housing Element laws require cities to assess and modify their land use policies to ensure that they can accommodate necessary additional housing. The HAA ensures that cities live up to those land use rules in the years that follow, and that the rules set forth objective criteria that housing developers can understand and to which they can conform their proposals. And the Density Bonus Law adjusts land use rules statewide to ensure that proper incentives exist for the development of income-restricted housing development projects despite local development standards that might otherwise render those projects infeasible.

B. The 4400 Von Karmen Project Provides Desperately Needed Housing, Including Income-Restricted Housing, Exactly Where It Is Needed The Most.

The Project at issue in this case is exactly the kind of project that state housing law exists to facilitate. The RHNA process is designed to ensure that affluent, coastal cities like Newport Beach entitle high-density, affordable housing, and the City has accordingly identified this Project in its Housing Element as providing low-income housing that will count toward the City's RHNA goals. The Project meets all applicable objective criteria and qualifies for a density bonus under the DBL; therefore, the City was required to approve the Project under the HAA. If Petitioner can now use this meritless CEQA lawsuit to effectively defeat the Project, state housing law will be seriously weakened and Newport Beach will have little chance of meeting its housing goals.

1. Southern California—And Orange County And Newport Beach In Particular—Desperately Needs New Housing For Families At All Income Levels.

The Southern California Region is one of the primary epicenters of California's

affordable housing crisis. As part of the RHNA process, the state recently mandated that the region make plans to accommodate 1.3 million new homes over the next eight years. (Request for Judicial Notice in Support of Motion to Intervene ("RJN"), Exhibit B (SCAG Final RHNA Allocation Methodology.)[9] The Southern California Association of Governments ("SCAG"), which is the regional agency charged with distributing the 1.3 million new homes across the local governments in the southern California region, adopted a methodology that requires many affluent coastal cities, especially those in close proximity to transit and jobs, to accommodate a much higher share of the regional need for housing over the next eight year cycle than they did in previous cycles. (Id.)

In light of this methodology, many coastal cities have seen large increases in the number of homes they are required to accommodate within their land use plans over the next eight years. Many of these homes must be affordable to low income households, either naturally through market conditions or as income-restricted units. Newport Beach is just the sort of city that SCAG has determined should be accommodating significant additional affordable housing. It is an affluent coastal city in Orange County with proximity to jobs and good schools, as well as a city that has had minimal population growth for the last many years and virtually no new housing construction. For the current, eight-year RHNA cycle (2013-2021), Newport Beach was required to accommodate just 5 new homes. But in the upcoming 2021-2029 RHNA cycle, Newport Beach has been assigned a RHNA allocation of 4,845 homes, including 1,456 very low-income homes and 930 low-income homes. (RJN Exhibit C (SCAG 6th Cycle Final RHNA Allocation Plan.)[10]

2. <u>The Project Is Exactly The Sort Of Housing Development, On Exactly The Sort Of Development Site, That The City Needs To Accomplish Its Housing</u>

[9] See SCAG Final RHNA Allocation Methodology. Available at: https://scag.ca.gov/sites/main/files/file-attachments/scag-final-rhna-methodology-030520.pdf?1602189316

[10] Available at: https://scag.ca.gov/sites/main/files/file-attachments/6th-cycle-rhna-proposed-final-allocation-plan.pdf?1614911196

Goals.

As part of the Housing Element process, the City must now find realistic sites for the development of all of these homes. Finding realistic sites is difficult because most residential neighborhoods in the City are built out and would require lengthy rezoning processes. (AR 23866.) The site of the proposed Project, by contrast, is a parking lot in a commercial business park and is already entitled for dense housing, having been so designated in the City's General Plan over 10 years ago. The City has, therefore, identified this Project as one that is very likely to be developed during the next RHNA cycle and credits the 13 very low income homes towards its very-low income RHNA share. (RJN Exh. E (City of Newport Beach Draft Housing Element March 10, 2021.)[11]

If this Project on this site does not move forward, it's difficult to see how the City of Newport Beach has any chance of meeting its RHNA goals and doing its part to address the state's housing crisis.

C. Because The Project Complies With All Applicable Development Standards, The City Was Required To Approve It Under The DBL And The HAA.

1. The Project Complies With The DBL.

After a lengthy consultation and public hearing process, the City determined that the Project met the requirements of the state DBL and the City's local implementing policies. (AR 14180, 15927.) The City was therefore required by the HAA to approve this Project with 312 homes, and it did so.

Petitioner does not dispute this finding. Instead, Petitioner's brief simply ignores its consequences, faulting the City for entitling 312 homes when the General Plan permits 260 homes on this site. Petitioner even goes on to state that "[n]either the General Plan nor the ICDP allow for additional units based on a density bonus." (Opening Br. at 32.)

This fundamentally misses the point of state housing law, and the DBL in

[11] Available at: https://www.newportbeachca.gov/government/departments/community-development/planning-division/general-plan-codes-and-regulations/general-plan-update/housing-element-screencheck-draft-march-10-2020.

particular. A DBL-eligible project is subject to different density limits than other housing development projects, by right, under the local zoning standards as modified by state law. The maximum unit count applicable to the Project is 312 units, not 260 units. State law *required* the City to approve a project with 312 homes, regardless of the base density permitted by the City's General Plan or the ICDP.

2. The City Was Required To Approve The Project Under The HAA.

The City determined that the Project met all of the City's applicable, objective zoning and general plan standards, as modified by the DBL. (AR 488-495.) The City was therefore required to approve the Project unless it could determine that the Project "would have a specific, adverse impact upon the public health or safety" that could not be mitigated except by disapproval of the Project. (Gov. Code § 65589.5(j)(1); see Gov. Code § 65589.5(j)(3) [DBL standards control under the HAA].)

The bar for an adverse health or safety impact under the HAA is extremely high. Such an impact must be "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." (Gov. Code § 65589.5(j)(1)(A).) In this context, "objective" means "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." (Gov. Code § 65589.5(h)(8).)

In this case, the City had no evidence that the Project would have any negative health or safety impact, let alone an impact meeting this standard. Thus, the HAA required approval of the Project, and the City met that requirement by approving it.

D. Petitioner's CEQA Claims Lack Merit and Should Be Denied.

Confronting the full force of state housing law that required the City to approve this Project, Petitioner attempts to delay the inevitable by claiming that the Project has significant environmental impacts that were not studied by the 2006 General Plan EIR. This is untrue. The

CEQA claims are patently meritless and are a thinly-disguised effort to thwart the Project and its badly-needed affordable housing. It is well known that CEQA plaintiffs bring lawsuits and continue them on appeal for the purpose of delaying projects from proceeding, in the hopes that project proponents will give up or lose necessary funding. (E.g., Hernandez, California Environmental Quality Act Lawsuits and California's Housing Crisis (2018) 24 HASTINGS ENVTL. L. J. 21, 41 ["CEQA lawsuits provide a uniquely powerful legal tool to block, delay, or leverage economic and other agendas after a project is approved"].) Simply put, CEQA plaintiffs know that litigation delay or expense alone can kill projects and, of course, that is the aim of the NIMBYs; as stated in one case, the Court need not "feign naiveté as to plaintiff's true purpose in bringing an action. Abandonment of a project is hardly a unique result in a CEQA action. There is very little doubt the permanent termination of the project was the result [Petitioner] hope[s] for in this case." (*Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312, 1321.)

The case at bar is a case in point. Petitioner's multiple CEQA claims consist of the proverbial spaghetti thrown at the metaphorical wall in an effort to get something to stick. But none of these rhetorical noodles have any legal or factual purchase, and Petitioner's CEQA cause of action fails accordingly.

1. <u>The City's CEQA Determinations Are Supported by Substantial Evidence.</u>

The first issue with Petitioners' CEQA claims is that they are not tailored to the appropriate standard of review. Tiering off a prior EIR via addendum is permitted. (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1229 fn. 6; *Friends of Santa Clara River v. Castaic Water Agency* (2002) 95 Cal.App.4th 1373, 1387-1388.) Thus, the question is whether the City correctly determined that no subsequent or supplemental EIR was required for the Project. The City's determination in this regard is subject to the substantial evidence standard of review. (*Santa Teresa Citizens v. City of San Jose* (2003) 114 Cal.App.4th 689, 703.) "This deferential standard is a reflection of the fact that in-depth review has already occurred." (*Ibid.*, citation omitted.) And Petitioner has the burden to prove the negative – i.e., that

the City's decision is not supported by substantial evidence. "The burden is on the appellant to show there is no substantial evidence to support the findings of the agency." (*American Canyon Community United for Responsible Growth v. City of American Canyo*n (2006) 145 Cal.App.4th 1062, 1070, citation omitted.)

Turning to the substance of the CEQA claims, Petitioner demonstrates their lack of merit at the outset by arguing that the Project will cause greater environmental impacts than anticipated in the General Plan EIR because the General Plan anticipates a maximum of 2,200 total homes in the Airport Area, whereas this Project will cause the City to exceed that number by 150 units. What Petitioner fails to mention, however, is that the General Plan EIR anticipated a much higher number of 4,400 homes in the Airport Area, and fully studied the environmental impacts of those 4,400 units. (AR 5287, 5313.) Thus, the Project is well within the scope of the General Plan EIR.

2. <u>The City's Use of an Addendum Was Proper.</u>

In arguing that the Project could not be approved by addendum, Petitioner alleges five areas that purportedly rise to the level requiring a supplemental or subsequent EIR under Guidelines sections 15162 or 15163: COVID-19, greenhouse gasses, traffic, hazards and hazardous waste, and the center's CC&Rs. None of these arguments have merit.

With respect to the COVID-19 and CC&R claims, these are non-cognizable under CEQA for several reasons. First, CEQA isn't concerned about the impacts of the environment on the Project. (*California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, 386.) Any impact of COVID-19 on the Project falls under this rule, and need not be considered in the Addendum. Second, effects relating to COVID-19 and the CC&Rs represent "social or economic impacts which do not contribute to or are not caused by physical impacts on the environment" are not substantial evidence of an environmental impact. (Guidelines, § 15384(a); *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 799.) And with respect to the CC&Rs more specifically, CEQA does not address impacts on individuals or small groups uniquely impacted by an activity, but to the environment as a whole. While Petitioner argues that "[t]his is NOT a private matter," it also

notes that "[t]he CC&Rs are known use restrictions and valuable property rights" and that "[t]he CC&R violations from the Project will have devastating impacts on Petitioner." (Pet. Op. Brf., p. 16:10-13, 21-22.) This is as much as to admit that any supposed impacts relating to the CC&Rs redound only to Petitioner and are thus not cognizable under CEQA:

> In examining this exception, we must differentiate between adverse impacts upon particular persons and adverse impacts upon the environment of persons in general… All governmental activity has some direct or indirect adverse effect on some persons. The issue is not whether the project will adversely affect particular persons but whether the project will adversely affect the environment of persons in general….

(*Assn. for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 734. See also *Topanga Beach Renters Assn. v. Dept. of General Services* (1976) 58 Cal.App.3d 188, 195 [holding demolition of structures evicting 55 petitioners not impact on the environment].)

Next are the claims relating to GHGs and traffic. Petitioner's claims here are essentially the same: that the 2006 General Plan EIR did not study GHGs or the vehicle miles traveled (VMT) traffic standard as neither analysis was required in 2006, and thus those subjects had to be addressed in a supplemental or subsequent EIR. The law is to the contrary.

This is because impacts relating to both GHG emissions and traffic (whether analyzed under level of service or VMT) were known in 2006, and thus do not constitute "new information." (*Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 807 ["the potential environmental impact of greenhouse gas emissions has been known since the 1970's"]; *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1320; *Citizens for Responsible Equitable Envt'l Dev. v. City of San Diego* (2011) 515, 531-532 ["information on the effect of greenhouse gas emissions on climate was known long before the City approved the 1994 FEIR"].) And the subsequent adoption of guidelines relating to these impacts does not affect this analysis. "New legal enactments such as the adoption of regulations or guidelines do not constitute new information if the information about the underlying issue was known or should have been known at the time the original EIR was certified." (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2021) § 19.19, p. 19-20, citations omitted.)

Finally, the hazards and hazardous wastes issue was specifically addressed in the 2006 General Plan EIR. (AR 20616.) Thus, it cannot be "new" information requiring the preparation of a supplemental or subsequent EIR.

Accordingly, it is clear that the City properly prepared and approved the Addendum.

3. Petitioner's Other CEQA Claims Are Meritless.

Petitioner turns from its failed procedural attack on the Addendum to launch no fewer than thirteen separate salvoes against the substance of the analysis. Given the limited space allotted to Intervenors it is not possible to exhaustively rebut each of these claims. However, it is worth noting that many of Petitioner's allegations are simply factually erroneous. For instance, Petitioner mixes and matches the City's General Plan treatment of the Project area (AR 13529) with the more specific Airport Business Are Integrated Conceptual Development Plan's analysis (AR 5107). (Pet. Op. Brf., p. 17.) These are patently not the same thing, and this attempted sleight of hand reflects the lack of substance to all of Petitioner's claims.

The potpourri of remaining claims have virtually all been addressed in the City's responses to comments in the administrative process. (AR 5284-5329.) Intervenors will not repeat what the City and Real Party will cover in their briefing, but will emphasize that the City's adoption of the Addendum is supported by substantial evidence and that Petitioner has not met its burden of showing otherwise. In the final analysis, the CEQA claims are not a bona fide attempt to obtain further environmental review, but an unwarranted attack on the Project itself. (See *Edna Valley Watch v. County of San Luis Obispo*, *supra*, 197 Cal.App.4th at p. 1321.) The Court should see this effort for what it is and decline Petitioner's invitation to throw out the Project approvals and deny Orange County residents the additional housing they so badly need.

III. CONCLUSION.

Intervenors respectfully request that the Court deny the Petition.

Dated: December 20, 2021

MILLER STARR REGALIA

By: 

KENNETH A. STAHL
Attorneys for Intervenors YIMBY LAW and PEOPLE FOR HOUSING-ORANGE COUNTY (A CHAPTER OF YIMBY ACTION)

Dated: December 20, 2021

CALIFORNIANS FOR HOMEOWNERSHIP, INC.

By: 

MATTHEW P. GELFAND
Attorneys for Intervenor CALIFORNIANS FOR HOMEOWNERSHIP, INC

PROOF OF SERVICE

Olen Properties Corp. v. City of Newport Beach
Orange County Superior Court, Case No. 30-2021-01185991-CU-WM-CXC

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Contra Costa, State of California. My business address is 1331 N. California Blvd., Fifth Floor, Walnut Creek, CA 94596.

On December 20, 2021, I served true copies of the following document(s) described as **OPPOSITION OF INTERVENORS YIMBY LAW, PEOPLE FOR HOUSING ORANGE COUNTY (A CHAPTER OF YIMBY ACTION), AND CALIFORNIANS FOR HOMEOWNERSHIP, INC. TO PETITIONER'S OPENING BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the One Legal system. Participants in the case who are registered users will be served by the One Legal system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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

Executed on December 20, 2021, at Martinez, California.



Karen L. Irias

SERVICE LIST
Olen Properties Corp. v. City of Newport Beach
Orange County Superior Court, Case No. 30-2021-01185991-CU-WM-CXC

Geoffrey K. Willis Law Offices of Geoffrey Willis Geoff Willis, A Professional Corporation 9891 Irvine Center Drive, Suite 200 Irvine, CA 92618 Tel: (949) 374-3815 Email: gwillis@geoffwillislaw.com Gregory E. Woodard Woodard Legal PC 7700 Irvine Center Drive, Suite 800, PMB#156 Irvine, CA 92618 Tel: (949) 878-6615 Fax: (949) 769-6603 Email: gw@woodardlegal.com *Attorneys for Petitioner, Olen Properties Corp.*	Ginetta Giovinco Marvin Bonilla Richards, Watson & Gershon A Professional Corporation 350 South Grand Avenue, 37th Floor Los Angeles, CA 90071 Tel: 213.626.8484 Fax: 213.626.0078 Email: ggiovinco@rwglaw.com mbonilla@rwglaw.com *Attorneys for Respondent City of Newport Beach*
Jennifer Hernandez Jessica Laughlin Holland & Knight LLP 50 California Street, Suite 2800 San Francisco, California 94111 Tel: (415) 743-6995 Fax: (415) 743-6910 Email: jennifer.hernandez@hklaw.com jessica.laughlin@hklaw.com *Attorneys for Real Party in Interest, TPG (KCN) Acquisition, LLC*	