SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
Civil Complex Center
751 W. Santa Ana Blvd
Santa Ana, CA 92701

SHORT TITLE: Olen Properties Corp. vs. City of Newport Beach

CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: **30-2021-01185991-CU-WM-CXC**

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CIVIL COMPLEX CENTER

OLEN PROPERTIES CORP., a Florida Corporation,

Petitioner,

v.

CITY OF NEWPORT BEACH,

Respondents.

TPG (KCN) ACQUISITION, LLC, a Delaware limited liability company,

Real Parties in Interest.

No. 30-2021-01185991

RULING ON PETITION FOR WRIT OF MANDATE

Respondent City of Newport Beach ("City") issued a series of approvals for a residential development to be built by Real Party in Interest TPG (KCN) Acquisition, LLC ("TPG"). Petitioner Olen Properties Corp. ("Olen") petitions the Court for a writ of mandate overturning those approvals. For the reasons set forth below, Olen's petition is DENIED.

Olen's opening request for judicial notice, which is unopposed, is GRANTED. Olen's reply request for judicial notice is DENIED because there is no

evidence the Caltrans study guide was part of the administrative record before the City. (See *Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307 fn. 18.)

I. FACTUAL BACKGROUND

This matter concerns a multifamily residential development known as the Residences at 4400 Von Karman ("Project"). The Project is to be built in the Koll Center, an existing office park in the City. (AR5100.) At the present time, the Koll Center is devoted solely to business/office use. (Pet. ¶ 24.) Olen owns a building located at 4910 Birch Street in the Koll Center, near the Project site. (Pet. ¶ 4.) The Koll Center is located in an planning subarea of the City referred to as the Airport Area. (AR5100.)

In 2006, the City adopted an updated General Plan. The General Plan was supported by a programmatic EIR ("PEIR"). Notably, while the General Plan as approved allowed for 2,200 residential units in the Airport Area, the PEIR analyzed the environmental impact of 4,300 units. (AR4695.) The Project site is also governed by the Airport Business Area Integrated Conceptual Development Plan ("ICDP"), which allocates a maximum of 260 residential units to the site. (AR489.) The Airport Business Area to which the ICDP applies is a subset of the overall Airport Area. (AR13530-13532.)

The Project consists of a 312-unit building and a parking structure built on 3.41 acres at the Koll Center, as well as an adjacent 1.1-acre park that runs between the Project buildings and adjacent buildings in the Koll Center. (AR13641.) The City considers the total project development site to be about 13 acres of land. (AR5196.) In order to build 312 units rather than the 260 permitted

by the ICDP, the Project designates 13 units for very-low-income housing, allowing for a density bonus of 52 units. (AR5108.)

Rather than prepare a subsequent or supplemental EIR ("SEIR") for the Project, the City elected to prepare an addendum (the "Addendum"), dated October 2020. (AR5088-5282.) After the Addendum was published in the City Council's agenda for January 12, 2021, the City took public comments and prepared responses to those comments. (AR5283-5363.) At its meeting on January 26, 2021, the City Council adopted Resolution No. 2021-2, issuing all approvals necessary for the Project. (AR488-495.)

Olen filed the present action on February 25, 2021. Shortly thereafter, it filed a companion case against TPG and the Koll Center's owner, *Olen Properties Corp. v. KCN A Management, LLC*, No. 21-01190139. (KCN is not party to this proceeding.) Intervenors YIMBY Law, People for Housing-Orange County (a Chapter of YIMBY Action), and Californians for Homeownership, Inc. were granted leave to intervene on August 6, 2021. (ROA 100.)

II. SCOPE OF PETITION

Olen petitions for a writ of mandate to set aside the City's approvals for the Project. The petition contains three causes of action:

First, Olen contends the City violated CEQA by using an Addendum to the 2006 PEIR rather than preparing a SEIR.

Second, Olen contends the Addendum itself is so defective as to be a CEQA violation. That is, even if the City could use an Addendum rather than

prepare a SEIR, the Addendum still fails to satisfy CEQA.

Third, Olen brings a non-CEQA claim alleging the City abused its discretion in finding the Project consistent with the General Plan and the ICDP.

III. GENERAL PLAN/ICDP CONSISTENCY (3rd COA)

The Court begins by addressing the third cause of action: whether the Project is consistent with governing land use policies. Specifically, Olen challenges the City's findings of consistency with respect to General Plan land use policies LU 6.15.5, 6.15.6, and 6.15.13 (which apply to the broader Airport Area), and the ICDP (which applies to the narrower Airport Business Area).

A. Standard of Review

The Court's review of the City's determination of consistency is limited to "whether the [City] has acted arbitrarily, capriciously, or without evidentiary basis." (*San Franciscans Upholding the Downtown Plan v. City & County of S.F.* (2002) 102 Cal.App.4th 656, 677 (citation omitted) (*San Franciscans*).) Because "it is nearly, if not absolutely, impossible for a project to be in perfect conformity" with every aspect of a general plan, "State law does not require perfect conformity between a proposed project and the applicable general plan." (*S.F. Tomorrow v. City & County of S.F.* (2014) 229 Cal.App.4th 498, 514 (citations omitted) (*S.F. Tomorrow*).)

Put another way, the Court reviews the City's determination for abuse of discretion. "The city council's determination that the [project] is consistent with the [general plan] comes to this [C]ourt with a strong presumption of regularity.

(Citation.) To overcome that presumption, an abuse of discretion must be shown. (Citations.) An abuse of discretion is established only if the city council has not proceeded in a manner required by law, its decision is not supported by findings, or the findings are not supported by substantial evidence. (Citation.) [The Court] may neither substitute [its] view for that of the city council, nor re-weigh conflicting evidence presented to that body." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717.)

But the City's discretion, while broad, is not unlimited. In particular, the law recognizes a difference between land use policies that are "amorphous in nature" and those that are "mandatory and anything but amorphous." (*Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Sup'rs* (1998) 62 Cal.App.4th 1332, 1341 (*Families Unafraid*).) As to those general plan policies that are general in nature or amorphous, courts defer to the discretionary approval of projects that the city council (or other approving agency) deem consistent with the policies. (*Old East Davis Neighborhood Ass'n v. City of Davis* (2021) 73 Cal. App. 5th 895, 908-09 (approving a project as consistent with policies calling for "maintaining scale transition" and an "architectural fit)"; *S.F. Tomorrow, supra* at 517-21 (*e.g.*, approving a project as not being inconsistent with a policy of preserving "the existing housing and neighborhood character" of neighborhoods.) However, courts will not approve a project that is clearly inconsistent with a specific, mandatory general plan policy. (*E.g., Spring Valley Lake Ass'n v. City of Victorville* (2016) 248 Cal. App. 4th 91, 101 (rejecting a project for not complying with a mandatory policy that required all new commercial projects to generate electricity on site to the maximum extent feasible.)

B. <u>LU 6.15.5/ICDP's 260-Unit Cap</u>

LU 6.15.5, "Residential and Supporting Uses," provides in relevant part: "Accommodate the development of a maximum of 2,200 multi-family residential units [in the Airport Area], including work force housing, and mixed-use buildings that integrate residential with ground level office or retail uses, along with supporting retail, grocery stores, and parklands." (AR13553.) The ICDP similarly allocates a maximum of 260 units to the Project site. (AR13531.)

Olen principally argues that by approving 312 units at the Project, the City not only exceeds the ICDP's allocation for the Project site, but also (when taken with other density bonus approvals in the Airport Area) exceeds the broader Airport Area's 2,200-unit allocation.

This argument is without merit. There is no dispute that the Project in fact qualifies for a density bonus by allocating 13 units (5% of 260) to very-low-income housing. As a result, the law *requires* additional units above and beyond what applicable zoning permits. (*See* Gov. Code, § 65915(b)(1) [density bonus "shall" be granted if project qualifies], (f) ["density bonus" means "a density increase over the otherwise maximum allowable gross residential density"].) Olen's argument that neither the General Plan cap of 2,200 units nor the ICDP cap of 260 units allows for density bonus exceptions fails to properly account for the operation of the Density Bonus Law. The Density Bonus Law *requires* additional units beyond the caps, whether or not the caps contain exceptions. The Project is not 52 units over 260 because those 52 units do not count against the 260-unit cap in the first place. The same is true of the 2,200-unit Airport Area cap: no density bonus units at this Project or at other developments count against it.

In its reply briefs, Olen points out that Density Bonus Law and the Housing Accountability Act do not excuse the City's duty to comply with CEQA.

(Gov. Code, § 65589.5(e).) That is true, but it's irrelevant to the issue of consistency with the General Plan and the ICDP. The Density Bonus Law required approval of additional units regardless of whether the City had to exercise discretion to determine CEQA compliance.

Olen also argues that because the Project consists of only a residential building, parking structure, and a park, it is inconsistent with the goal of "including . . . mixed-use buildings that integrate residential with ground level office or retail uses, along with supporting retail, grocery stores, and parklands." The Court disagrees with Olen's implicit argument that the inclusion of retail and grocery stores is mandatory. This portion of LU 6.15.5 is better read to ensure that mixed-use developments aren't excluded solely because of their mixed-use nature. The City was within its discretion to find the Project consistent with this language.

C. LU 6.15.6

LU 6.15.6, "Size of Residential Villages," provides in relevant part: "Allow development of mixed-use residential villages, each containing a minimum of 10 acres and centered on a neighborhood park and other amenities." (AR13554.) The City Planning Commission's findings in Resolution No. PC2020-040, which were referred to in the City Council's Resolution No. 2021-2, refer to the Project as being "approximately 13.0 acres in size." Olen notes, however, that the construction itself will cover only 3.41 acres. Olen argues the City cannot simply add nearby Koll Center acreage to total 13 acres and satisfy the 10-acre minimum of LU 6.15.6.

In its opposition briefing, the City points out that nothing in the land use

policy says "Residential Village" is defined to mean only the building pad of a Residential Village. (Indeed, Residential Villages are supposed to include parks, and the 1.1-acre park to be developed as part of the Project is not included in Olen's 3.41-acre calculation.) At the hearing, the City confirmed, and Olen did not dispute, that "Residential Village" has no specific definition in the land use policies. Accordingly, the Court must "accord great deference to the [City's] determination" of consistency. (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1563.)

Substantial evidence in the record supports the City's conclusion that the Project is a Residential Village that satisfies LU 6.15.6. The Planning Commission's staff report regarding the Project explained that the Project was "designed to be adjacent and proximate to existing office, commercial, and transit uses to facilitate a mixed-use environment where future residents could walk or bike to work, retail locations, and the [sic] transit," and would include "a pedestrian linkage system to provide a convenient connection throughout the project site and to adjacent Uptown Newport Planned Community." (AR13555.) The Court may neither re-weigh the evidence nor substitute its own judgment for that of the City. The City was within its discretion to find the Project consistent with LU 6.15.6.

D. LU 6.15.13

LU 6.15.13, "Neighborhood Parks Standards," provides in relevant part: "To provide a focus and identity for the entire neighborhood . . . require dedication and improvement of at least 8 percent of the gross land area (exclusive of existing rights-of-way) of the first phase development in each neighborhood, or ½ acre, whichever is greater, as a neighborhood park. [¶] In every case, the neighborhood park shall be at least 8 percent of the total Residential Village Area

or one acre in area, whichever is greater, and shall have a minimum dimension of 150 feet." (AR13557.)

Olen challenges the finding of consistency in two ways. First, it notes that in the Addendum, the discussion of General Plan consistency states, "The Project does not include a neighborhood park; it does include a 1.1-acre public park that would be accessible during daytime hours." (AR5195-5196.) Olen reasons that because the Addendum says the park isn't a neighborhood park, the City abused its discretion by finding the Project consistent with the requirement of a neighborhood park. It is not clear from the record why the consistency analysis came to this conclusion. Indeed, other than the 150-foot minimum dimension requirement, there is no specific definition of what constitutes a neighborhood park.

Were the record limited to this one statement in the Addendum, the Court might agree. But the City was entitled to rely on the entire administrative record, not just this part of the addendum, in finding consistency. In this regard, a statement in the City's January 2021 responses to comments to the Addendum notes that the Project, including the neighborhood park, is consistent with LU 6.15.6. (AR5314) Moreover, the findings in Planning Commission Resolution No. PC2020-040 provide that the park "will be developed as a neighborhood park." (AR13558.) This resolution was referred to in the recitals of City Council Resolution No. 2021-2. (AR489-490.) Importantly, the Planning Commission resolution from November 2020 postdates the Addendum from October 2020. Olen cites no authority, and the Court is aware of none, holding that the Planning Commission (and later the City Council) was bound by the Addendum's initial discussion of General Plan consistency. Put another way, nothing prevents the Planning Commission or City Council from reviewing the same evidence as the

person or persons who prepared the Addendum and finding that the park will be developed as a neighborhood park. Again, the Court may neither re-weigh the evidence nor substitute its own judgment for that of the City. The City was within its discretion to find the park was consistent with the requirement of a neighborhood park.

Olen's second argument focuses on a specific standard for neighborhood parks: even if this park could be considered a neighborhood park, LU 6.15.13 provides that a neighborhood park "shall have a minimum dimension of 150 feet." The language of this standard is mandatory; "shall" means "shall."

Significantly, the above requirement refers to a minimum "dimension" not "dimensions." While it is tempting to assume that this provision requires a square or rectangular-shaped park with each side being at least 150 feet and no part of the park falling below this standard at any location, that arguably would be required only if the plural term "dimensions" were used. Given that the singular "dimension" is used, the City has broad discretion to approve a park of virtually any shape, including one that has portions that are less than 150 feet in length.

The schematic drawing submitted to the City for approvals show the proposed park is a jigsaw puzzle piece-shaped plot made up of intersecting triangles. Per the scale in the drawing, it appears there are several places where the park boundary will be much closer than 150 feet from the nearest building. (AR13832.) Olen therefore argues the City abused its discretion in finding the park has a minimum dimension of 150 feet.

The Court is persuaded otherwise by two arguments made at the hearing. First, suppose the park were an equilateral triangle that is 500 feet in

length at its base. Because each side is also 500 feet long, it could be said that each dimension is at least 150 feet. But suppose one were to consider the "width" of the triangle at various points—a straight line, parallel to the base, drawn from one side to the opposite side. As those lines get closer and closer to the corner where the two sides join, the "width" of the triangle will eventually be less than 150 feet. Does this mean the triangle has a dimension of less than 150 feet, such that a triangular park 500 feet on each side violates LU 6.15.13? The Court doubts this is the case, which suggests the term "dimension" in the policy is ambiguous and open to interpretation by the City.

Second, Intervenors draw the Court's attention to *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820 (*California Renters*). There, the Court of Appeal examined the application of a portion of the Housing Accountability Act that prevents a local agency from disapproving a housing development unless approval would have "a specific adverse impact upon the public health or safety . . . based on objective . . . standards." (Gov. Code § 65589.5(j)(1)(A).) "Objective" is defined as "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).)

California Renters involved a city's denial of approval for a housing project based on design guidelines the Court of Appeal concluded were not objective. The Court of Appeal accordingly directed the trial court to issue a writ of mandate setting aside the denial. (*California Renters, supra*, 68 Cal.App.5th at pp. 854-55.) Intervenors argue, following *California Renters*, that if the 150-foot minimum isn't objective, the City cannot deny approval of the Project on the

grounds of inconsistency with that policy. For the reasons discussed in the triangular park example, the Court questions whether "minimum dimension" is an objective criterion that could serve as a basis for a finding of inconsistency.

But the Court need not resolve specific question. It suffices to say that for the foregoing reasons, that the City was within its discretion to find the park consistent with the 150-foot requirement.

E. ICDP Consistency

Per page 34 of Olen's opening brief, its argument that the Project is inconsistent with the ICDP is largely derivative of its arguments that the Project is inconsistent with the General Plan. That argument fails for the same reasons set forth above. To the extent Olen complains that the ICDP itself is inconsistent with the General Plan, this is a challenge that should have been made when the City approved the ICDP.

IV. FAILURE TO PREPARE SEIR (1st COA)

The Court next addresses Olen's first cause of action, that the City was required to prepare a SEIR rather than use the Addendum.

A. Standard of Review

Public Resources Code § 21166 provides that a SEIR is not required unless (1) substantial changes are proposed in the project that require major revisions to the EIR; (2) substantial changes to the project's circumstances will require major revisions to the EIR; or (3) new information becomes available that

was not (and could not have been) known when the original EIR was certified. These requirements are discussed in more detail at CEQA Guidelines § 15162.[1] CEQA Guidelines § 15164(a) provides in turn that an addendum may be used in lieu of a SEIR only if "none of the conditions described in section 15162 calling for preparation of a subsequent EIR have occurred."

The parties dispute the applicable standard of review to the City's decision to use the Addendum rather than prepare a SEIR. Olen describes *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307 as applying a "reverse substantial evidence test": "In other words, if there is substantial evidence in the record that the later project may arguably have a significant adverse effect on the environment which was not examined in the prior program EIR, doubts must be resolved in favor of environmental review and the agency must prepare a new tiered EIR, notwithstanding the existence of contrary evidence." (*Id.*, at p. 1319.)

The City relies on case law holding that "[i]n reviewing an agency's decision not to require additional environmental review 'pursuant to section 21166, courts "are not reviewing the record to determine whether it demonstrates a possibility of environmental impact, but are viewing it in a light most favorable to the [agency's] decision in order to determine whether substantial evidence supports the decision not to require additional review."'" (*Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th 650, 675 (citations omitted).) Furthermore, "[a] party challenging an agency's decision under section 21166 has the burden to demonstrate that the agency's decision is not supported by substantial evidence and is therefore improper." (*Com. for Re-Evaluation of T-Line Loop v. S.F. Mun. Transportation Agency* (2016) 6 Cal.App.5th 1237, 1247.)

[1] Citations to "CEQA Guidelines" refer to Cal. Code Regs., tit. 14, § 15000 et seq.

TPG cites a case holding that "[w]hen an agency has already prepared an EIR, its decision not to prepare an SEIR for a later project is reviewed under the deferential substantial evidence standard." (*Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 804 (*Citizens*).) In short, the City and TPG contend Olen bears the burden of proving the decision to use an addendum is not supported by substantial evidence.

The Court agrees with the City and TPG about the proper standard of review. The standard advocated by Olen arises from Pub. Resources Code § 21094, and that statute only applies to projects that are not subject to § 21166. (See Pub. Resources Code § 21904(b).) The preliminary question—whether § 21166 applies—is governed by the substantial evidence standard, as *Abatti* explains. In *Sierra Club v. County of Sonoma*, § 21666 was inapplicable because substantial changes were proposed in the project as compared to the original EIR. (*Sierra Club v. County of Sonoma, supra*, 6 Cal.App.4th at pp. 1320-21.) As a result, what Olen calls the "reverse substantial evidence test" applied.

If Olen can meet its burden under *Abatti* and similar cases, then the standard from *Sierra Club v. County of Sonoma* applies. But to get there, Olen must first show the City's decision to use the Addendum is not supported by substantial evidence.

B. COVID-19

Olen first claims an SEIR is required because COVID-19 is a "substantial change[] . . . with respect to the circumstances under which the project is being undertaken which will require major revisions in the" EIR. (Pub. Resources Code § 21166(b).) COVID-19 has doubtless affected some aspects of the Project. For

example, Olen points out that materials costs have tripled in price during the pandemic, and work forces have become destabilized. As Olen puts it, "A discussion of COVID-19 and its *impacts on the project* must be discussed for any CEQA document to be adequate in today's world." (Olen Opening Br. at p. 10 (emphasis added).)

But as TPG notes in opposition, CEQA "does not contain language directing agencies to analyze the environment's effect on a project." (*Cal. Bldg. Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 387.) The effects of COVID-19 that Olen mentions all go to the Project, not the wider environment. If materials are three times as expensive, that means materials will cost TPG three times as much to procure, and its construction costs will go up. If the workforce is unstable and inconsistent, this too means TPG's construction costs will go up. In neither case is COVID-19's effect on TPG's bottom line a topic for CEQA analysis.

In reply, Olen tries to walk back its comments about COVID-19's impact on the project, suggesting that workforce uncertainty and supply chain difficulties could affect the timing of construction, which in turn could cause environmental impacts (because construction takes longer than planned). But in its final paragraph on COVID-19, Olen again focuses on the effect of COVID-19 on the Project, not the effect of the Project on the environment: "There can be no dispute that COVID is a significant existing condition. Its economic impact (materials cost) and human impact (work force issues, medical issues) is undoubtedly *significant to the Project*." (Olen Reply Br. to City & TPG at p. 7 (emphasis added).)

From a review of Olen's papers, the Court agrees with TPG that Olen's

true complaint is the City's failure to assess COVID-19's effect on the Project, not the Project's effect on the wider environment. Because CEQA does not require the City to analyze the environment's effect on the Project, the failure to discuss COVID-19 doesn't require preparation of a SEIR.

C. Greenhouse Gases

Per its reply, Olen has withdrawn all arguments regarding greenhouse gases. The Court therefore does not consider them.

D. Traffic

Olen makes two arguments about traffic being "new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available." (Pub. Resources Code § 21166(c).)

1. VMT Analysis

When the 2006 EIR was approved, agencies were required to analyze traffic in terms of level of service, or LOS. Broadly speaking, LOS considers how freely traffic flows at an intersection. (AR5245.) In 2013, SB 743 was signed into law. Its implementing regulations were adopted in 2018 and became effective on July 1, 2020. As a result of these changes, agencies are now required to analyze traffic in terms of vehicle miles traveled, or VMT. (*Ibid.*) It is undisputed that the Addendum does not contain a new VMT analysis even though new projects must be evaluated using VMT.

Olen contends that the new VMT regulations are "new information" that requires the preparation of a SEIR. At first glance, this argument has some appeal. After all, the VMT regulations didn't exist in 2006 and thus couldn't have been considered in preparing the 2006 EIR.

The City and Intervenors argue otherwise. The City relies on *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301. There, an original EIR was prepared in 2002 that analyzed greenhouse gas emissions under then-applicable Bay Area AQMD standards. In 2011, Dublin approved a housing development. It determined the housing development was exempt from CEQA review under Gov. Code § 65457. The petitioners challenged the exemption. They noted that the Bay Area AQMD had changed its greenhouse gas standards in 2010. They argued that because the new greenhouse gas standards were "new information" within the meaning of Pub. Resources Code § 21166(c), the housing development couldn't be exempted from CEQA review. (*Concerned Dublin Citizens, supra*, 214 Cal.App.4th at pp. 1318-19.)

The Court of Appeal rejected the petitioners' argument. It explained that "the adoption of guidelines for analyzing and evaluating the significance of data does not constitute new information if the underlying information was otherwise known or should have been known at the time the EIR was certified." (*Id.* at p. 1320.) A staff report in the record explained in detail that the potential effects of greenhouse gas emissions were widely known in 2002, so "substantial evidence support[ed] the city's finding that the potential effects of GHGs were known and could have been addressed in conjunction with the certification of the EIR in 2002. Therefore, the city properly concluded that the issuance of new threshold guidelines was not new information that requires the preparation of a supplemental environmental report." (*Ibid.*)

Intervenors, for their part, quote a CEQA treatise explaining: "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 (Kostka & Zischke).)

In reply, Olen resists application of *Concerned Dublin Citizens*, arguing the trial court in that case made "detailed factual findings chronicling the development of facts and conditions relating to" greenhouse gas emissions. (Olen Reply Br. to City & TPG, p. 2.) This statement does not accurately describe what happened in *Concerned Dublin Citizens*. The "detailed factual findings" were simply copied at length from an underlying staff report. (See *Concerned Dublin Citizens*, *supra*, 214 Cal.App.4th at p. 1319 ["The court relied on a planning commission staff report that states, 'In 2002, information about the potential impacts of GHGs was widely known. . . .'"].) Neither the trial court nor the Court of Appeal engaged in its own factfinding about what information was well known at what time. They simply found that there was substantial evidence to support Dublin's finding that the effects of greenhouse gases were well known in 2002.

Following *Concerned Dublin Citizens* and the Kostka & Zischke treatise, the Court concludes the new VMT requirement, standing alone, does not require preparation of a SEIR. Rather, an Addendum may be used if "information about the underlying issue was known or should have been known at the time the original EIR was certified." Traffic was clearly a known issue at the time of the 2006 EIR, which contains a 63-page analysis of the new General Plan's transportation and traffic impacts throughout the City, including at specific

intersections near the site of the Project. (*See* AR20854-20916.) This is substantial evidence to support the City's conclusion that traffic was a well-known issue at the time of the 2006 EIR. As a result, the City was not required to prepare an SEIR containing a VMT traffic analysis.

2. 2007 CEQA Litigation Against Irvine

In 2007, the City filed a CEQA suit against the City of Irvine relating to Irvine's approval of a multi-family residential project at 2851 Alton Parkway, an area that had previously been designated the Irvine Business Complex. (See *City of Newport Beach v. City of Irvine*, No. 07CC01265.) In the prior suit, the City argued Irvine's SEIR both (1) failed adequately to analyze traffic impacts, and (2) failed to adopt necessary traffic mitigation measures. (See AR32694-32703.) Specifically regarding traffic analysis, the City argued Irvine relied on assumptions about roadway and intersection improvements that were either undefined or speculative. (See AR32701.)

Because the City's lawsuit against Irvine postdates the 2006 EIR, Olen argues that the statements in the City's briefing about Irvine's SEIR are new information that the City should have considered in this Project approval process, and therefore the City should have prepared an SEIR instead of an addendum.

The City argues in opposition that its comments in the Irvine litigation are irrelevant. The Court agrees. The Irvine lawsuit concerned a different project, a different jurisdiction (several miles away and on the other side of Interstate 405), and a different SEIR and underlying EIR. Nothing the City said in the Irvine litigation concerns this project, Koll Center-adjacent traffic flow generally, or the PEIR. Even if the City's general concerns about traffic are in some way relevant,

substantial evidence supports the City's decision not to consider those comments now. As the City explained in responses to Olen's comments, the Addendum analyzes "currently existing and planned road conditions and the current status of development in the area." (AR5290.) The City's more up-to-date, more specific study outweighs 14-year-old generalized concerns about traffic.

E. Hazards and Hazardous Waste

Olen argues VOC (volatile organic compound) contamination in soils and groundwater from the nearby Jazz Semiconductor/Conexant site has spread to the Project site and the Koll Center more generally, and that an SEIR is needed to evaluate the potential effect of excavating contaminated or groundwater as part of construction. Relying on the opinion of its retained expert, Olen argues (1) it is "highly likely" the RWQCB will order a soils management program, (2) it is "almost certain" construction activities will disturb the contaminated soil and groundwater and potentially spread the contamination further, and (3) VOCs in the soils will present a "major vapor challenge" for the safe construction and safe future use of any underground parking structures.

Olen's argument overstates the expert's actual conclusions. He says "there is a *potential* that the RWQCB will require the preparation of a Soil Management Plan." Not "highly likely." He says this plan may be required "*if* VOC soil or groundwater impacts are encountered during this construction." Not "almost certain." And he says VOCs create "a *potential* risk of indoor air contamination impacts [that] *should be* evaluated." Not a "major vapor challenge." (AR32657-32658 (emphasis added).) The language actually used by Olen's expert may be so speculative that it's not evidence at all. (See *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 756

("[S]peculative possibilities are not substantial evidence of environmental impact.").)

Furthermore, as TPG points out in its opposition, an expert retained by TPG also evaluated contamination associated with the site. TPG's expert concluded that Olen's expert relied on "pre-remediation data" and made "assertions . . . largely unsupported by fact [that] appear to ignore the current data on the Conexant site." (AR5333.) TPG's expert then proceeded to offer three specific rebuttal opinions. (AR5333-5335.) This is substantial evidence upon which the City can base a decision to issue an Addendum instead of an SEIR.

F. CC&Rs

Olen contends the CC&Rs governing the Koll Center are "significant new information that is unique to this Project and obviously not considered in any way in the 2006 EIR." (Olen Opening Br. at p. 16; compare Pub. Resources Code § 21166(c).) But the CC&Rs date to *June 18, 1973*, decades before the PEIR was prepared. (Olen 1st RJN, Ex. C, at p. 1.) The CC&Rs themselves cannot reasonably be considered new information.

The Court therefore assumes that Olen means as follows: the Project proposes to violate the CC&Rs, and that those violations are "new information." As so construed, the argument still fails. As TPG points out in opposition, CC&Rs are private contracts between private parties. They are not "the environment." Olen's remedy for the Project's claimed violation of the CC&Rs is to sue TPG for violation of the CC&Rs, which it has done.

Intervenors also note that while Olen insists CC&R-related effects are a

public matter, the opening brief describes the CC&Rs as "valuable property rights." (Olen Opening Br. at p. 16.) Property rights belong to identifiable persons or entities, not the public at large. Furthermore, while insisting the harm at issue is public, Olen writes, "The CC&R violations from the Project will have devastating impacts *on Petitioner*." (*Ibid.* (emphasis added).) The CC&Rs are a purely private issue involving those persons subject to the CC&Rs, and CEQA doesn't concern itself with effects on specific persons. (See *Topanga Beach Renters Assn. v. Dept. of Gen. Services* (1976) 58 Cal.App.3d 188, 195 ("Adverse effect on persons evicted from Topanga Beach cannot alone invoke the requirements of CEQA, for all government activity has some direct or indirect adverse effect on some persons. The issue is not whether demolition of structures will adversely affect particular persons but whether demolition of structures will adversely affect the environment of persons in general.").)

Furthermore, Olen's argument is puzzling. It quotes the CC&Rs as follows: "Improvements and uses which are neither specifically prohibited nor specifically authorized in the Development Standards may be permitted in specific cases by Declarant. Approval or disapproval of such use and improvement shall be based upon the effects of such use or improvements on other portions of the Property or upon the Owners or Occupants thereof." (Olen 1st RJN, Ex. C, § 3.04.)

From this quotation, Olen argues "this Project can only move forward WHEN [TPG] establishes that the Project is in the best interest of the other building owners." (Olen Opening Br. at p. 16 (capitalization original).) But Olen omits the remainder of § 3.04, which says that plans for improvements "shall be submitted for approval in the manner set forth in Section 4.01 hereof." Section 4.01, in turn, provides that no improvements may be built until "approved in writing *by Declarant*," i.e., KCN. (Olen 1st RJN, Ex. C, § 4.01 (emphasis added).)

There is no role for the City in this process at all, let alone a role that would require the City to prepare an SEIR. Ensuring compliance with the CC&Rs is KCN's job. If Olen believes KCN has violated the CC&Rs by approving the Project, it is free to sue KCN. As noted above, it has done so.

V. DEFECTIVE ADDENDUM (2nd COA)

In its second cause of action, Olen argues that even if the City only had to prepare an addendum, the Addendum actually prepared was defective.

A. Standard of Review

CEQA Guidelines § 15164(e) provides, "A brief explanation of the decision not to prepare a subsequent EIR pursuant to Section 15162 should be included in an addendum to an EIR, the lead agency's required findings on the project, or elsewhere in the record. The explanation must be supported by substantial evidence." "[W]here, as here, the agency has determined that project changes will not require 'major revisions' to its initial environmental document, such that no subsequent or supplemental EIR is required, the reviewing court must then proceed to ask whether substantial evidence supports that determination." (*Friends of College of San Mateo Gardens v. San Mateo Community College Dist.* (2016) 1 Cal.5th 937, 953.)

Olen advances 13 reasons the Addendum is allegedly defective. (There are actually more, but Olen groups them into 13 categories.) The Court addresses each in turn.

B. Project Description

Olen contends the Addendum doesn't accurately or sufficiently describe the Project for seven separate reasons. It notes that "[a]n accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) As TPG points out in opposition, however, *County of Inyo* concerns an EIR, not an addendum.

First, Olen argues the Project description understates the number of residential units approved in the area, listing 1,504 approved units when there have actually been 2,038. (Compare AR5018 [Addendum listing 1,504] with AR13529 [staff report listing 2,038].) This argument is without merit because the two tables Olen compares don't show the same thing. The table at AR5018 shows units approved in the Airport Business Area ICDP. The table at AR13529 shows units approved in the entire Airport Area. As discussed above, the Airport Business Area ICDP covers only a portion of the Airport Area. Accordingly, there is no discrepancy.

Second, Olen notes the Project description fails to mention the CC&Rs. But as discussed above, the CC&Rs are not a CEQA issue. They are a private issue among Koll Center owners and occupants.

Third, Olen takes issue with the discussion of supportive retail use in the Addendum. But Olen's argument on this point isn't directed to the discussion of supportive retail use in the Project description. Rather, Olen takes issue with the Addendum's analysis: "In reality, there are no supportive retail uses and there is no analysis of these supportive retail uses in the Addendum and their impacts are neither conditioned nor mitigated in violation of CEQA." (Olen Opening Br. at p.

18.) As discussed above, Olen misinterprets LU 6.15.5 as requiring mixed-use developments with supportive retail rather than *not excluding* mixed-use developments for including supportive retail.

Fourth, Olen argues the Project description fails to mention off-site construction staging areas and parking. As Olen puts it: "Since the phasing of the Project does not allow for the reduction in parking spaces beyond that described in the Phasing Plan, and since the Project proponent does not control any additional areas, off-site staging and parking must be assumed. Despite all of this, no staging areas or parking areas are described in the Project Description or analyzed anywhere in the Addendum." (Olen Opening Br. at p. 18.) But the City's responses to comments explain that staging and parking will be on-site, contrary to Olen's mistaken assumption. (AR5293.)

Fifth, Olen argues the Project description inadequately addresses the hauling away of waste. It says 114,000 cubic yards of material will be hauled away during construction (AR05123), but never mentions where they will be taken. While Olen pitches this as a challenge to the description, it's more properly considered a challenge to the analysis. Insofar as this challenge is based on air quality effects from haul truck trips, the Court discusses it below. As to where material will be hauled, the Addendum accurately describes and analyzes this elsewhere. Per AR5270, waste will be hauled to the Bowerman Landfill, which has 205,000,000 cubic yards of capacity remaining. The Addendum further explains that (1) the waste expected with this project is consistent with the City's development assumptions; (2) the County uses the City's assumptions to plan for landfill capacity; and (3) the County's long-term landfill planning follows applicable CalRecycle requirements. (AR5270.)

Sixth, Olen argues the Project description inadequately describes how storm flow will be managed. Again, this is really a challenge to the analysis of storm flow, not the description of storm flow management. The Court discusses it below.

Seventh, Olen argues the Project description notes that parking for the surrounding offices will be replaced, but it fails to note that the replacement parking will be off-site, not adjacent to the affected building. (In the context of this case, "off-site" means "in the parking structure that will be built as part of the Project rather than directly adjacent to the affected building," not "outside the Koll Center.") Olen contends this violates both the Newport Beach Municipal Code and the CC&Rs, which require on-site parking. Neither of these alleged violations is a CEQA issue. Olen does not claim that the change in parking will affect the environment (e.g., by causing more traffic or more pollution). It claims the change in parking violates the municipal code and the CC&Rs. These are social impacts, not environmental ones. (See *San Franciscans, supra*, 102 Cal.App.4th at p. 697 ("The social inconvenience of having to hunt for scarce parking spaces is not an environmental impact; the secondary effect of scarce parking on traffic and air quality *is*. Under CEQA, a project's social impacts need not be treated as significant impacts on the environment. An EIR need only address the *secondary physical* impacts that could be triggered by a social impact.") (emphasis in original).)

C. Aesthetics

Olen makes several aesthetics-related complaints. It first argues that the Project will cause the City to exceed the number of units allocated to this area in the General Plan, meaning the City cannot simply rely on consistency with the

General Plan's previous discussion of "intensification" (i.e., redeveloping at higher densities than past uses). But as explained above, under the Density Bonus Law, density bonus units do not count against the amount allocated in the General Plan. Furthermore, Olen ignores the fact that while the General Plan allocated only 2,200 units to the Airport Area, the supporting PEIR examined the environmental impact of 4,300 units, well in excess of the number of units that will exist as a result of the Project's approval.

Olen next argues that the Addendum fails to address the impact of inserting a "monolithic" residential structure into an office environment, glare from headlights, and additional traffic movement in an area that is usually dormant after business hours. But as with "intensification," this argument depends on inconsistency with the General Plan: "the Addendum does not consider these impacts at all, relying instead on General Plan policies which were developed for the City as a whole, with no thought to individual project impacts when a project exceeds the General Plan's parameters." (Olen Opening Br. at p. 20.) But again, the Project *does not* exceed the General Plan's parameters by operation of the Density Bonus Law, and even if it does, it remains well within the parameters of the PEIR's analysis.

Olen next argues that the Addendum improperly defers mitigation of lighting spillover to the building permit stage. Specifically, prior to issuance of a building permit, TPG must prepare a photometric study and submit a final lighting plan to the City for approval. (AR5131.) Olen contends this must be addressed at the Addendum stage, not the building permit stage.

In opposition, TPG points to *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, where the Court of Appeal wrote: "[F]or kinds of

impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process . . . the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated." (*Id.*, at pp. 1028-29 [quoting Remy, Thomas, Duggan & Moose, *Guide to the California Environmental Quality Act* (1991 ed.), pp. 200–01].)

Here, the Addendum requires TPG to "satisfy specific performance criteria." It provides that "Lighting shall be in compliance with applicable standards of the Zoning Code." (AR5130.) Responses to comments make clear that this refers to Newport Beach Municipal Code § 20.30.070, which governs outdoor lighting. (AR5529.) And practical considerations prohibit specific mitigation measures at this stage. The City has approved the Project, but until there are finalized blueprints and the like (e.g., documents that specify exactly where lights will be placed), the actual expected impacts of exterior lighting are unknown. The City may reasonably rely on TPG's commitment to follow the Zoning Code's lighting requirements as adequate mitigation of any lighting impacts.

D. Air Quality

Olen makes several arguments about air quality. First, it notes that the 2006 General Plan EIR relied on the SCAQMD's 2003 Air Quality Management Plan ("AQMP"). In 2016, the SCAQMD released a new AQMP that superseded the 2003 version. Olen argues that because the Addendum ties back to the 2006 PEIR,

which relied on the 2003 AQMP, the Addendum necessarily fails to take into account the standards in the 2016 AQMP. But as TPG points out in opposition, the 2016 AQMP incorporates the 2006 PEIR. (AR5132.) Thus, as the Addendum concludes, because the Project is well within the limits of the PEIR, it is within the growth assumptions in the 2016 AQMP. (AR5133.) Ultimately, Olen's argument depends on the proposition that the Project is inconsistent with the General Plan because it contains too many units. Once again, the Project is not inconsistent with the General Plan, and even if it were, the PEIR, incorporated into the 2016 AQMP, considered the environmental impact of nearly twice as many units.

Next, Olen argues that the air quality analysis ignores the roughly 7,000 haul truck trips that will be required to remove 114,000 cubic yards of material from the Project site. Specifically, Table 3.2-3, which discusses off-road construction equipment, makes no mention of haul trucks. (AR5137.) But the City's response to comments notes that under SCAQMD guidelines, haul trucks are considered on-road equipment, not off-road equipment. (AR5298.) As such, they don't belong in Table 3.2-3. In any event, the air quality analysis in the record included 14,375 hauling trips, well in excess of what Olen claims is necessary. (AR5758.)

Olen then argues the Addendum failed to analyze the effect of air emissions on nearby employees and residents, as the California Supreme Court required in *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502. In that case, it was determined that the project would cause emissions at seven to ten times the threshold of significance. The EIR concluded significant emissions impacts were unavoidable, but included only a general discussion of health effects rather than a discussion of the magnitude of impacts associated with such a large increase in emissions. (*Id.*, at pp. 517-22.) Here, on the other hand, because the Addendum

explains that Project-related emissions will not exceed SCAQMD's thresholds of significance, there is no need for a discussion of their impact. (AR5300.) Olen bears the burden of showing a lack of substantial evidence to support the determination that emissions will not exceed SCAQMD thresholds. It has not met this burden.

Finally, Olen argues the Addendum ignores air quality issues that will result from excavating the soil contaminated by VOCs that migrated from Jazz Semiconductor. For the reasons discussed above, there is substantial evidence in the record to counter the conclusions of Olen's expert's analysis.

E. Cultural and Tribal Resources

Olen faults the City for failing to account for its obligations under SB 18 and AB 52, which impose certain consultation requirements with Native American tribes. Olen is correct that the Addendum does not mention tribal consultation at all.

SB 18 applies to projects that require a general plan amendment. (See Gov. Code, § 65352.3(a)(1).) Olen asserts without explanation that because the Project requires the 2006 General Plan to be amended, SB 18 compliance is required. The Court assumes Olen is referring to the number of units at issue. As discussed above, the Project is not inconsistent with the General Plan, meaning no amendment is needed, and SB 18 is inapplicable.

As to AB 52, it was not enacted until 2014, well after the 2006 General Plan. Again, "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, *supra*, § 19.19.) The underlying issue of the effects of construction on tribal historical resources was known in 2006, as SB 18 was already in effect at that time. AB 52 isn't new information that has to be addressed in a SEIR. (Even though Olen groups this with its arguments about defects in the Addendum, it argues AB 52 requires an SEIR.)

Finally, Olen argues that the Addendum is internally inconsistent in its treatment of historical resources. General Plan policy HR 2.2 requires a paleontologist or archeologist to "monitor all grading and/or excavation where there is a potential to affect" historical resources, while Standard Condition SC CULT-1 requires "a qualified archaeologist to periodically monitor ground-disturbing activities onsite." (AR5151-5152.) As TPG argues in opposition, there is no conflict between these policies. HR 2.2 requires monitoring, but it says nothing about the frequency of monitoring. Olen's assumption that it requires constant monitoring is a misreading of the policy. SC CULT-1 regulates the timing of monitoring. The two policies can be read harmoniously.

F. Energy

Olen admits the Addendum contains a discussion of energy, but it criticizes that discussion as defective. Its first argument is questionable. The Addendum states, "SCE forecasts that it would have adequate electricity to meet the expected growth in its service area through 2026." (AR5156.) Olen interprets this statement to mean that at the end of 2026 (if not earlier), Southern California Edison will be unable to supply electricity to the Project. If Olen really has evidence of this, it is an issue that should be considered at much higher levels of government than a city's housing development approvals. But Olen cites no

evidence that SCE will be unable to provide electricity in the service area after 2026. It simply takes the least charitable reading possible and demands the City provide evidence that one of the nation's largest utilities will still be providing service in 2027.

In any event, as TPG points out in opposition, the PEIR discussed utilities (just not under the heading "energy"), and it did so in the context of nearly twice as many units as were actually approved in the General Plan. The PEIR found SCE's forecasts allowed for that much growth—well more than this Project would entail. (AR5154.)

Olen next contends the City ignored energy use (i.e., fuel consumption) from the expected 7,000+ haul truck trips. This argument appears to be based on Olen's mistaken assumption, discussed above, that the absence of haul trucks from the table regarding off-road vehicles meant haul trucks were omitted entirely, when they were instead considered on-road vehicles. Thus, there is no evidence haul trucks have been excluded from any analysis. Fuel use by construction vehicles is discussed at AR5154-5156, and Olen presents no argument that this discussion is deficient other than its mistaken assumption that haul trucks weren't considered.

Finally, Olen persists in its argument that the Project goes far beyond what the General Plan permits. Again, the project isn't inconsistent with the General Plan, and the PEIR analyzed nearly twice as many units as were actually approved, well in excess of what this Project would add to the area.

G. <u>Geology and Soils</u>

Olen first argues that while the Addendum says the City's standard conditions are sufficient mitigation, TPG's own geotechnical engineer recommended a number of specific mitigation measures not found in the Addendum. (Compare AR5167-5158 with AR5868-AR5881.) TPG's response is that the engineering firm was retained to determine whether the Project was technically feasible, not whether the Project would have an impact on geology and soils, and that the report contains only "recommendations" for making construction technically feasible, not mitigation measures for geological impacts.

In a series of questions issued to the parties before the hearing, the Court expressed concern with this argument, because one of the engineer's recommendations appeared to focus on the effects that excavation work might have on adjacent properties and improvements, not the technical feasibility of the Project itself—that is, impact on the environment, not the Project. Specifically, the engineer recommended: "Shoring systems, if used, may yield during excavation causing adjacent facilities and improvements to settle slightly. . . . A monitoring program should be established to evaluate the effects of shoring construction on other facilities." (AR5876.)

At the hearing, TPG explained that shoring is required and heavily regulated by CalOSHA standards because the collapse of an excavated area is a serious workplace hazard. That is, while shoring systems may afford protection to adjacent properties, the principal purpose of shoring is to ensure a safe workplace and functional construction site. In light of CalOSHA's close regulation of shoring systems, and in light of the reasonable expectation that TPG will comply with CalOSHA regulations on the worksite, the Court finds the City had substantial evidence to determine the concerns of TPG's geotechnical engineer did not require an SEIR.

Olen next argues the paleontological mitigation measures are inconsistent with General Plan policies. This mirrors the concerns about tribal and cultural resources, and it fails for the same reasons: HR 2.2 simply requires monitoring. It doesn't require constant physical presence as Olen claims. SC GEO-3, which requires a paleontologist be available on call, suffices to provide the required monitoring. (AR5167-5168.)

H. Hazards and Hazardous Materials

This argument simply repeats arguments about the Jazz Semiconductor site the Court has already rejected.

I. Hydrology and Water Quality

Olen first argues the Addendum fails adequately to describe the evidence and calculations underlying the discussion of hydrology issues at AR5181-5185. But it cites no authority for the proposition that this description must be in the Addendum itself, rather than in the record the Addendum relies upon. Furthermore, Olen, which bears the burden of proving a lack of substantial evidence, makes no argument that the record lacks this underlying information.

Olen next argues the Addendum doesn't adequately describe the environmental impact of rebuilding a storm drain that will be demolished during construction and either replaced in situ or moved to a new location. Based on the Court's review of the Addendum (AR5184), the City's responses to comments (AR5304), and counsel's clarification at the hearing, the Court finds Olen has failed to meet its burden of showing a lack of substantial evidence on this issue.

Olen then argues the Addendum is internally contradictory, in that the discussion at AR5181-5185 regarding stormwater (discussing only connection with the City's system) is inconsistent with the features discussed at AR5122, which include a wetlands system for runoff in addition to the stormwater drainage system. The Court doubts there is any inconsistency, as stormwater runoff is a subset of runoff overall. Furthermore, as counsel explained at the hearing, the inclusion of a wetland system necessarily means there will be less drainage into the City's stormwater system, inasmuch as the wetland system will replace what is currently an impermeable parking lot.

Finally, Olen argues the Addendum fails adequately to address groundwater pollution resulting from the subterranean parking garage's drainage system. The only document it cites in support of this is four pages of maps and figures about groundwater, prepared by its expert and found at AR32660-32663. These drawings are sufficient to show that the parking structure may have an effect on groundwater. But at no point do these documents state that *drainage from the garage* will have an effect on groundwater. That is, for Olen to meet its burden, it must at least show something that provides evidence of the specific impact asserted, which it has not done.

J. Land Use and Planning

Olen contends the Addendum's discussion of land use and planning violates CEQA because the Project is not consistent with the General Plan. Stated another way, the Addendum is defective because it states the Project is consistent with the General Plan, meaning the Addendum needs to be set aside.

As discussed above, the Project is consistent with the General Plan, or at least the City was within its discretion to so conclude. But Olen is correct that the Density Bonus Law and Housing Accountability Act do not excuse CEQA compliance. The City might permissibly find the Project consistent yet still violate CEQA in the Addendum's discussion of the Project's land use compliance.

The City argues that Olen confuses alleged inconsistency with the General Plan with environmental impacts that are the stuff of CEQA analysis. That is, Olen cannot simply point to alleged inconsistencies and say the Addendum violates CEQA. It must show that the inconsistency leads to a significant environmental impact. According to the City, Olen never connects the dots; instead, it assumes inconsistency is automatically a significant impact.

Case law supports the City's argument. *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2015) 1 Cal.App.5th 677 explains that it is wrong to assume that "*any* claim of inconsistency with an applicable land use plan or policy requires an environmental impact report." (*Id.*, at p. 695 (emphasis original).) Rather, inconsistency "with *land use standards adopted to mitigate environmental impacts*" is the sort of inconsistency that points to a significant environmental impact. (*Ibid.* (emphasis original).) The land use policy at issue in that case was an "economic development goal," not one "adopted to mitigate environmental impacts." (*Ibid.*) As a result, inconsistency between the project and the land use policy "simply [did] not implicate CEQA." (*Ibid.*)

Here, Olen makes no reasoned argument that the land use policies at issue were adopted to mitigate environmental impacts. Absent such argument, the Court cannot say Addendum lacks a substantial evidentiary basis.

K. Noise

Olen first argues the Project is inconsistent with the General Plan, so reliance on the PEIR is improper. Again, the Project is not inconsistent with the General Plan, and the PEIR considered the impact of nearly twice as many units as are now at issue in the Airport Area.

Olen next notes the Addendum doesn't include an evaluation of noise levels for Birch Street. (See table at AR5129.) It argues this is a problem because there are "units adjacent to Birch Street . . . as close as 29 feet from the back of curb" that could be impacted by noise. (Olen Opening Br. at p. 28.) But Olen cites no record evidence for the proposition that there are apartments 29 feet away from the Project. In any event, TPG points out that the closest apartments identified in the Addendum are 100 feet away, and the Addendum contains analysis relating to them. (AR5221-5222.)

Finally, Olen launches a wholesale attack on the methodology used to calculate noise, calling it inconsistent with industry standards. Olen goes on to describe what it contends to be industry standards, and how a competent noise engineer would conduct a study. But Olen cites no record evidence, no judicially noticeable documents, etc. Absent evidence that the allegedly "proper" methodology was before the City, the Court cannot conclude that the Addendum lacks a basis in substantial evidence.

L. Transportation

Olen raises three arguments about transportation. First, it argues the Project site was studied for only 128 units in the PEIR, not 260 as repeatedly

claimed. (AR5249.) This is incorrect. As the City explains, the Newport Beach Traffic Model used in the PEIR listed the Project Site as being in TAZ 1405. TAZ 1405 was listed as containing 128 residential units. 128 wasn't the number used for *all purposes*, it was the number used for the traffic model. The new traffic study for the Project re-ran the numbers with the additional 184 units (totaling 312 with density bonus). (AR5323, see also AR13673 [current traffic study discussing scenarios].) The new study then compared the projections from the PEIR study to the projections with the 184 additional units.

Second, the traffic study examines intersection capacity utilization, or "ICU," as a measure of operating levels at intersections. An increase in ICU of 1%, or 0.01, is considered significant. (AR5246.) Table 3-16.9 identifies three intersections (MacArthur/Jamboree, Jamboree/Birch, and Bristol North/Campus) that have an ICU increase of 0.01 at AM Peak when the no-Project and with-Project scenarios are compared. (AR5257.) Olen argues the Addendum falsely states there is no significant traffic impact—the table shows three intersections with significant impact. But as the City points out in opposition, this is an effect of rounding. The full figures are at AR8570. On AR5257, ICU at MacArthur/Jamboree is listed as 0.93 no-Project and 0.94 with-Project, an increase of 0.01. On AR8570, however, the intersection is at 0.932 no-Project and 0.935 with-Project, an increase of 0.003 that *appears to be* 0.01 when the figures are rounded to two digits. The same is true of the remaining intersections, whose true ICU changes are 0.005 and 0.002.

Third, Olen faults the City for not using the VMT traffic study method. This was not required for reasons discussed above.

Finally, Olen faults the City for not analyzing construction traffic and its

impacts in the addendum. The City does address it at AR5258, which Olen acknowledges. The Court, based upon its own review of AR5258, finds the Addendum's analysis sufficient. It appears Olen's argument is based principally on its erroneous assumption that the Addendum never considers the impact of haul trucks.

M. Utilities and Service Systems

This argument is based on alleged inconsistency with the General Plan because of the number of units in the Airport Area. Again, the Project is not inconsistent with the General Plan, and in any event, the PEIR considered the environmental impact of nearly twice as many units in the Airport Area.

N. Findings

As with utilities and service systems, this argument is based on alleged inconsistency with the General Plan. It fails for the same reasons.

IV. CONCLUSION

The City shall serve and file a proposed judgment in accordance with this ruling.

Dated: March 15, 2022

William Claster, Superior Court Judge