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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.

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

Real Parties in Interest.

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

ASSIGNED FOR ALL PURPOSES TO:
HON. KIRK H. NAKAMURA
DEPARTMENT CX-103

REPLY IN SUPPORT OF YIMBY LAW, PEOPLE FOR HOUSING ORANGE COUNTY (A CHAPTER OF YIMBY ACTION), AND CALIFORNIANS FOR HOMEOWNERSHIP, INC.'S MOTION FOR LEAVE TO INTERVENE AS REAL PARTIES IN INTEREST

Date: August 5, 2021
Time: 2:00 p.m.
Dept: CX-103

Reservation No.: 73559333

Action Filed: February 25, 2021
Trial Date: None Set.

## I. INTRODUCTION.

This lawsuit under the California Environmental Quality Act ("CEQA") aims to block the provision of much needed housing in Newport Beach. If it succeeds, this suit would greatly harm the families in need of housing for whose interests the Intervenors advocate. For that reason, Intervenors have a direct and immediate interest in this case. In opposition, Petitioner asserts that it does not seek to block housing but only to secure compliance with CEQA. (Opposition ("Opp.") at pp. 1, 2.) Appellate courts have been clear, however, that trial courts need not "feign naivete" about the real purpose and effect of a CEQA lawsuit, which in this case is undoubtedly to make the project infeasible. (*Edna Valley Watch v. Cty. Of San Luis Obispo* (2011) 197 Cal.App.4th 1312, 1321.) Petitioner also claims that Intervenors' interest is adequately represented by the existing respondents (Opp. at pp. 2-3), but "adequate representation" is not a factor in determining whether discretionary intervention is appropriate. (Code Civ. Proc., § 387, subd. (d)(2).) Moreover, as demonstrated in their moving papers, Intervenors have very distinct interests from the existing respondents and are not adequately represented by them.

Petitioner next argues that intervention would improperly enlarge the issues in litigation because Intervenors seek attorney fees under Code Civ. Proc., section 1021.5. (Opp. at pp. 3-4.) But it is not an improper enlargement of the issues for an intervenor to seek attorney fees under section 1021.5 because section 1021.5 exists to ensure issues of great public importance are litigated. (*Carlsbad Police Officers Assn. v. City of Carlsbad* (2020) 49 Cal.App.5th 135, 154 ["Given the weighty policy considerations that motivated the enactment of section 1021.5, we struggle to see how a court could reasonably condition even permissive intervention on entirely forgoing private attorney general fees."].) Finally, Petitioner baselessly seeks to force the Intervenors to share the existing page limits with the respondents, a patently inappropriate request given Intervenors independent, distinct, and compelling interests that the Court deserves to hear fully and independently.

## II. ARGUMENT.

### A. Intervenors Have Demonstrated a Direct and Immediate Interest in the Substance of this Litigation that Warrants Discretionary Intervention Given that the Relief Petitioner Seeks Would Negatively Impact Families in Need of Affordable Housing.

In their opening brief, Intervenors established that they have a direct and immediate interest in this case because if cities could be prevented from meeting their state-mandated housing goals due to dubious CEQA lawsuits like this one, the Intervenors' mission to address the housing crisis would be hindered, and the families in need of housing on whose behalf the Intervenors advocate will continue to suffer from a lack of adequate and affordable housing. (Opening Br. at p. 6.) In opposition, Petitioner claims that Intervenors do not have a direct and immediate interest in this matter because the case does not seek to block any housing, only to ensure compliance with CEQA. (Opp. at pp. 1, 2.) But the court has no reason to accept this glib assertion at face value. In *Edna Valley Watch v. Cty. Of San Luis Obispo* (2011) 197 Cal.App.4th 1312, 1321, the court rejected a CEQA petitioner's contention that his petition sought only compliance with CEQA and did not seek to block the project. The court found that it was not required to "confine its analysis to the face of the pleadings and to feign naivete as to plaintiff's true purpose in bringing an action." (*Ibid.*) The court observed, with some understatement, that "[a]bandonment of a project is hardly a unique result in a CEQA action." (*Ibid.*) Likewise, regardless of how the Petitioner in this case has attempted to characterize its lawsuit, the practical result of Petitioner's victory would be to block the project or at the very least to significantly delay it and raise the cost of its construction. Either one of these outcomes would significantly harm the Intervenors' interests in affordable housing.

Petitioner also asserts that Intervenors' interest is adequately protected by the existing respondents. (Opp. at pp. 2-3.) But an applicant for *discretionary* intervention does not need to prove that its interests are inadequately represented, only that it has an interest in the litigation. (Code Civ. Proc., § 387, subd. (d)(2); *Truck Ins. Exchange v. Superior Court* (1997) 60 Cal.App.4th 342, 346.) That interest has been amply demonstrated in Intervenor's moving papers and supporting declarations and Petitioner has failed to rebut that demonstration. In any event, the

Intervenors' interests are not adequately represented by the existing respondents. Neither the city nor the developer TPG represent the interest of families in need of housing, and they cannot speak to the broad public interest in approving projects like the one at issue in this case. Only the Intervenors can do that. Moreover, while the respondents are interested in having this development approved, they also potentially have an incentive to shrink the project if it were to settle this litigation. Such a settlement could harm the interests of families in need of housing by reducing the supply of needed homes in Newport Beach. Intervenors' participation in this lawsuit will ensure that the interests of families in need of housing are protected.[1]

**B. Intervenors' Request for Attorneys' Fees Under Code of Civil Procedure Section 1021.5 Does Not Enlarge the Issues in the Case.**

Petitioner also argues that Intervenors will improperly enlarge the issues in the litigation by seeking to recover attorney fees under Code Civ. Proc., section 1021.5 (Opp. at 3-4.) However, attorney fees are not an "issue" in the case and therefore it is not an impermissible enlargement of the issues for an intervenor to seek attorney fees under section 1021.5. In *Carlsbad Police Officers Assn. v. City of Carlsbad* (2020) 49 Cal.App.5th 135 the court rejected an argument very similar to the argument Petitioner raises here, finding that the trial court abused its discretion in conditioning intervention on the intervenor forgoing statutory attorney fees under section 1021.5. The trial court concluded that the intervenor's request for attorney fees would expand the issues in the litigation, but the appellate court reversed, reasoning that to preclude the intervenor from pursuing attorney fees would run contrary to both the purpose of section 1021.5 to encourage public interest litigation and the purpose of intervention to streamline litigation. Although the case dealt with intervention as of right, the court stated that: "Given the weighty

[1] Petitioner's separate objections to the Intervenors' declarations are immaterial and largely redundant of the opposition brief. Though Petitioner claims it is not challenging the affordable housing part of the project (Objections at *passim*), the practical result of its victory would be to significantly raise the costs of the project, which would likely make the affordable housing component of the project infeasible. The political climate and potential locations for housing (Objections at *passim*) are relevant to this motion because they establish the Intervenors' interest in participating in this litigation, as established in the opening brief.

policy considerations that motivated the enactment of section 1021.5, we struggle to see how a court could reasonably condition even permissive intervention on entirely forgoing private attorney general fees." Id. at 154. Therefore, Petitioner cannot oppose the motion on the grounds that the Intervenors' request for attorney fees under section 1021.5 will enlarge the issues.

**C. Petitioner Will Not Be Prejudiced by Intervention Because Intervenors Will Consolidate Briefing and Agree to Reasonable Page Limits, and Petitioner Will Have the Opportunity to Brief and Argue All Points Intervenors Raise.**

Finally, Petitioner requests that if intervention is granted, the Intervenors should be required to share with the respondents the total number of pages the court has already allocated for the opposition brief, and not be granted any additional pages for its opposition. (Opp. at pp. 4-5.) Intervenors oppose this request. As discussed above, Intervenors' interests are separate and distinct from those of the respondents, and the whole reason Intervenors seek to intervene is to introduce separate and additional perspectives that will assist the court in resolving the litigation. Furthermore, the respondents should not be prejudiced by having their page space reduced. Whatever inconvenience Petitioner may suffer from having to respond to an additional set of arguments is outweighed by the strong public interest in ensuring that Intervenors' perspective on this litigation is heard. The Intervenors would be amenable to the Petitioner being granted a separate reply brief to the Intervenors' opposition, and would also be amenable to limits on the length of their briefs if the court found that were necessary to avoid imposing too great a burden on Petitioner.

## III. CONCLUSION.

YIMBY Law, People for Housing and Californians respectfully request that the Court grant their motion for leave to intervene as Real Parties In Interests/Defendants.

Dated: July 29, 2021

MILLER STARR REGALIA

By: _____

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

Dated: July 29, 2021

CALIFORNIANS FOR HOMEOWNERSHIP, INC.

By: _____

MATTHEW P. GELFAND
Attorneys for Intervenors 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 July 29, 2021, I served true copies of the following document(s) described as **REPLY IN SUPPORT OF YIMBY LAW, PEOPLE FOR HOUSING ORANGE COUNTY (A CHAPTER OF YIMBY ACTION), AND CALIFORNIANS FOR HOMEOWNERSHIP, INC.'S MOTION FOR LEAVE TO INTERVENE AS REAL PARTIES IN INTEREST** 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.

**BY OVERNIGHT DELIVERY:** I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

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

Executed on July 29, 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**

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