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EIR Addendum Was Sufficient for Project Within Scope of Earlier Program EIR



The Court of Appeal upheld the City of Newport Beach's reliance on an EIR addendum to approve a residential project whose impacts had been evaluated in a 2006 Program EIR for a general plan update. *Olen Properties Corp. v. City of Newport Beach*, 93 Cal. App. 5th 270 (2023).



Olen Properties, the owner of the Koll Center in Newport Beach, challenged the City's approval of a 312-unit residential project on a surface parking lot serving the Koll Center's commercial tenants. Olen argued that the City could not rely upon an addendum to the 2006 Program EIR and was instead required to prepare a subsequent EIR addressing impacts from traffic, hazardous materials, geology and soils, as well as inconsistencies with the Koll Center's CC&Rs.

The appellate court determined that the appropriate standard of review was the deferential substantial evidence standard, not the "reverse substantial evidence test" in *Sierra Club v. County of Sonoma*, 6 Cal. App. 4th 1307, 1319 (1992), as Olen had argued. The latter standard, the court observed, applied only when a subsequent project was proposed that was not "the same as or within the scope of the project, program, or plan described in the program EIR," which was not the case here.

The court then considered and rejected each of the specific challenges to the City's addendum. As to traffic, Olen argued that the City erred by using the Level of Service (LOS) measure of traffic impact, despite California's adoption of CEQA Guidelines section 15064.3, which requires use of the Vehicle Miles Traveled (VMT) method. The court found that the City was not required to undertake a VMT study of the traffic impacts because the City had used the LOS measure in the 2006 EIR and CEQA Guidelines section 15064.3 only operates "prospectively," hence the change did not constitute "new information" requiring a new EIR.

As to hazardous materials, Olen contended the City's conclusion that there was no environmental impact from hazardous waste was erroneous because Olen had presented expert opinion that the project would disturb hazardous waste and create environmental problems. The court rejected this on the ground that the City's expert opinion constituted substantial evidence in support of the City's position, which was sufficient to sustain the City's decision under the standard of review.

As to Olen's contention that the project would violate existing CC&Rs, the court said that Olen identified no authority that requires consideration of CC&Rs in an EIR and that, in any case, the CC&Rs in question predated the 2006 EIR and hence did not constitute changes in the project or "new information" mandating a further EIR.

Lastly, Olen argued that the project's geotechnical report, which identified certain technical recommendations for project construction, implied that the project had significant geology and soils impacts and that project-specific mitigation measures were required to reduce impacts to less-than-significant levels. The court disagreed, reasoning that the recommendations were not aimed at mitigating environmental or soil issues but rather at ensuring that the project could be successfully built and remain intact. The recommendations did not constitute a substantial change to the project or new information requiring preparation of a subsequent or supplemental EIR.

## Authors

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