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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

VILLAS AT SANTANA PARK HOMEOWNERS ASSOCIATION, Plaintiff and Appellant, v. CITY OF SAN JOSE et al., Defendants and Respondents.	H045644 (Santa Clara County Super. Ct. No. 16CV299964)

Appellant Villas at Santana Park Homeowners Association (Villas) is a non-profit corporation of 124 homes located next to a portion of Santana Row in San Jose. Largely invoking the provisions of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.),[1] Villas unsuccessfully challenged the City of San Jose (City)'s issuance of a planned development permit for construction of a large building at Santana Row, which, when completed, will be five-and-a-half stories tall.

In its environmental review, the City proceeded under CEQA's subsequent review provisions which apply where a project already has been subject to initial CEQA review, and determined a subsequent or supplemental environmental impact report was not required. Appellant contends the City erred in so doing and instead should have analyzed the building as a new project and prepared a new environmental impact report (EIR) for

[1] Unspecified statutory references are to the Public Resources Code.

it. Alternatively, appellant argues that, in light of the proposed building's height, design, and location, the City prejudicially erred in its application of CEQA's subsequent review provision when it concluded it did not need to prepare a subsequent or supplemental EIR for the project. Appellant also alleges that the City violated a municipal code provision by failing to consider several policies in the City's general plan when it issued the permit.

For reasons that we will explain, we affirm the trial court's judgment.

I. FACTS AND PROCEDURAL BACKGROUND

A. *Project*

As described in the permit issued by the City, the residential housing project at issue involves the construction of a five-and-a-half-story building (nearly 73 feet high at its highest point) with up to 258 residential units, including above- and below-grade parking, as well as the removal of seven large trees. The 2.94 acre project site sits on one lot ("lot 12") in the larger Santana Row residential and commercial redevelopment project and also forms part of what is referred to as the "Valley Fair/Santana Row Urban Village." We refer to the proposed residential project on lot 12 as the "project" or the "lot 12 project."

Respondent City is the lead agency responsible for undertaking CEQA review of the lot 12 project. Respondent real party in interest FRIT San Jose Town & Country Village, LLC (FRIT) is a private developer that owns the land at issue and is the proponent of the lot 12 project. In May 2016, the City issued a permit to FRIT to construct the project.

Lot 12 is located near existing residential housing, including 124 homes to the east of lot 12. Villas represents those homes and contends the lot 12 project will adversely affect the environment, primarily because of the height of the building and its close proximity to the houses. Villas does not oppose development on lot 12 or challenge the number of residential units included in the project.

Lot 12 has formed part of Santana Row since its inception. Santana Row itself is a mixed-use redevelopment that, when the lot 12 permit was issued in 2016, covered 42.53 acres. Since its first environmental review in 1998, Santana Row has been the subject of a number of environmental documents prepared by the City. We describe below relevant documents from the administrative record, beginning with the EIR certified in 1998.

B. *1998 EIR*

In 1998, the City completed an environmental impact report (1998 EIR) related to Santana Row, which was to be located on a 39-acre site of a former shopping center called Town and Country Village. Under "Description of the Project," the 1998 EIR stated "The project proposes rezoning the project site from C-3 to C-3(PD) to allow the redevelopment of the existing Town and Country Village with a mixed use development. The maximum development allowed by this proposed rezoning would be 650,000 square feet of commercial/retail space, 1,200 residential units, and two 100-room hotels. This amount of development would be distributed over the entire project site."

The "land use plan" for the 1998 EIR[2] divided the Santana Row development into six areas. The 1998 EIR contained several figures along with written discussion explaining those figures that described how the development of Santana Row would proceed, including a "conceptual" site plan that showed how the amount of development would be distributed over the entire project site. The project site included the parcel of land now known as lot 12.[3] According to the 1998 EIR, the conceptual site plan "represents one possible development scenario that conforms to those development standards; actual development may, however, be different than what is shown in the Conceptual Site Plan. At the time [planned development] Permit applications are

[2] We focus on language from the original 1998 EIR. We note that there were six addenda to the 1998 EIR between 2001 and 2008 for various other projects, but they did not involve lot 12.

[3] For clarity, we refer to the site at issue in this appeal as "lot 12," although it was referred to as "area 3" throughout the 1998 EIR.

submitted to the City, additional environmental review will be required to determine if this EIR provides adequate clearance."

Addressing lot 12 specifically, the 1998 EIR noted that it was located in the "easterly portion of the project site" and the conceptual plan for that site, while noting that "other buildings could be developed there," provided for one structure that "is identified as 'free-standing' residential" and that "will range in height from 30 feet to a maximum of 50 feet." The 1998 EIR stated that "[i]n total" lot 12 "could contain" between 125 and 250 residential units and 268 to 537 parking spaces.

At the time of the preparation of the 1998 EIR, the residential buildings to the east of the project site (which have since been completed and are appellant Villas), were under construction. In a section titled "Land Use Conflicts," the 1998 EIR stated, "The residential uses located to the east and northeast of the project site are generally considered a sensitive land use. [¶] [Lot 12] of the proposed project, which is located nearest these residential properties, has been designed with residential-only buildings in that area. The density of the development proposed in [lot 12] is greater than the density on either of the adjacent residential sites. The residential units currently under construction along the easterly property boundary are approximately 25 feet in height . . . . One residential building is proposed by the project in [lot 12] adjacent to the easterly boundary. . . . The building [on lot 12] will range in height from 30 feet to a maximum of height [*sic*] of 50 feet . . . . A 25 foot separation will be maintained between the proposed building and the adjacent residences currently under construction. The proposed buildings and the residential units under construction to the east are similar enough in height, mass, and building separation to be considered compatible."

With respect to the "Urban Design Goals" of the overall Santana Row project, the 1998 EIR asserted, "This mixed-use project would be developed under a master Planned Development zoning and will include between 800 and 1,200 dwelling units on a 39 acre site, and no structures will be higher than 90 feet."

Among many other topics, the 1998 EIR analyzed the "Visual and Aesthetic Quality" of the project, including whether the project would substantially block existing views of "scenic vistas or resources," "produce substantial light or glare," or would "detract f[ro]m the integrity, character and/or aesthetic environment of this neighborhood." The EIR concluded that the visual and aesthetic changes resulting from development of the project would not constitute a significant environmental impact.

The 1998 EIR did find certain unavoidable significant environmental impacts, including on traffic and air quality, and implemented certain mitigation measures. Following certification of the 1998 EIR, much of the Santana Row development was constructed, but no building was built on lot 12. At some point, lot 12 was developed into a surface parking lot containing approximately 285 parking spaces.

C. *General Plan EIR and Urban Villages*

In 2011, the City approved the San Jose 2040 General Plan, which the City described as "a long-range program for the future growth of the City." The general plan focuses on new housing growth within identified areas, including new " 'Urban Villages,' " that "propose intensified urban redevelopment of underutilized commercial lands to accommodate new growth."

In connection with this long-range program, the City prepared an environmental impact report to assess the planned growth under the plan (the 2011 General Plan EIR), but which did not address any specific development projects. The 2011 General Plan EIR included Santana Row and classified the general Santana Row area as part of an " 'Urban Village.' " Regarding the land use designation of "Urban Village," the EIR envisioned a greater density than other areas of the City, and noted a floor-to-area ratio (or "FAR") as "[u]p to 10.0 (3 to 10 stories)."

D. *2012 Rezoning and MND*

In 2012, the City rezoned certain areas in Santana Row to allow for additional office, entertainment, and retail space, as well as residential units. In addition, the City

issued a planned development permit for an office building on another property (lot 11). For that project (entitled "Santana Row Planned Development Rezoning and Office Building"), the City prepared a mitigated negative declaration (MND).[4]

The MND did not address lot 12 specifically or analyze the height limits of structures in Santana Row. The MND was recorded in August 2012. In late August 2012, the city council adopted an ordinance (which took effect shortly thereafter) that rezoned Santana Row and adopted FRIT's development plan for it. The ordinance noted that the MND addressed "the area encompassed by the subject rezoning." Regarding the development plan, the administrative record contains a July 24, 2012 document entitled "Santana Row Development Standards," outlining standards for the development of Santana Row, including allowances relating to minimum setbacks, open space requirements, and maximum height. The maximum height provision of the document references lot 12 and states "[t]he overall maximum height of buildings on Lot 12 shall be 90 feet."

E. *2015 EIR*

In 2015, the City prepared another EIR related to the Santana Row site that played a major role in the City's subsequent environmental analysis of the permit for the development of lot 12 at issue in this appeal. In the course of that review, the City evaluated proposed changes to the Santana Row site and prepared a draft environmental impact report and two amendments to that report, which we refer to collectively as the 2015 EIR.

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[4] A" '[m]itigated negative declaration' " means a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (§ 21064.5.)

The 2015 EIR did not address the particular project at issue here on lot 12, which was not proposed until after its certification. Villas provided comments on the draft 2015 EIR, including asserting that the project would negatively impact two intersections that residents used for ingress and egress to their homes but did not make any comments related to lot 12 specifically. In September 2015, the city council certified the 2015 EIR. We address the 2015 EIR in further detail below.

F. *2016 Determination of Consistency*

A few months after certification of the 2015 EIR, FRIT submitted an application for a permit to construct the residential project on lot 12 at issue in this appeal. Several residents from Villas who live near lot 12 wrote to the City in opposition to FRIT's permit application. For example, residents from the Villas expressed concern that the proposed building was incompatible with the adjacent, two-story, single family homes and would negatively impact traffic, air quality, privacy, noise, and security.

On May 16, 2016, the City's Department of Planning, Building and Code Enforcement issued a two-page document entitled "City of San José Determination of Consistency with the Santana Row Expansion Project Final Environment Impact Report" (Determination of Consistency) (bold and some capitalization omitted). The Determination of Consistency summarized the City's determination under CEQA Guidelines section 15162[5] that the project would not involve new significant effects beyond those analyzed in the 2015 EIR. In addition, the project would not involve "an

[5] This section pertains to "CEQA's subsequent review provisions (see § 21166; CEQA Guidelines, § 15162)." (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 953 (*Friends of College of San Mateo Gardens*).) In general, the CEQA Guidelines refer "to CEQA's implementing regulations, codified at title 14, division 6, chapter 3 of the California Code of Regulations." (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1184, fn. 2 (*Union of Medical Marijuana Patients*).) We refer to CEQA's implementing regulations as "Guidelines." "Through long practice, we 'afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA.' " (*Id.* at p. 1184.)

increase in the significance of a previously identified significant impact analyzed" in that EIR. The City concluded it could "take action on the project as being within the scope of the [2015 EIR]."

The Determination of Consistency asserted that "[t]he proposed residential development is part of the original Santana Row project evaluated in the Town and Country Village EIR, which was certified by the City Council in June 1998." It further stated, "In September 2015, [the] City Council adopted the Santana Row Expansion Project Final Environmental Impact Report (Santana Row Expansion FEIR) and approved a rezoning of the project site to expand the size of the Santana Row site and increase the office and retail development capacity. . . . This FEIR replaced the [1998] Town and Country EIR . . . . The [2015] Santana Row Expansion FEIR incorporated applicable mitigation measures from the [1998] Town and Country EIR and identified new mitigation measures resulting from changes to the project."

To support its conclusion that the project was within the scope of prior environmental review, the City listed five points. First, it stated that "[t]raffic generated by the project was evaluated in the 'Background' and 'Background plus Project Conditions' sections of the Traffic Impact Analysis as the residential units are previously entitled and are part of the City of San Jose's Approved Trips Inventory." Second, "the project's air quality impacts related to operational air emissions and toxic air contaminants were included in the analysis of full build out of the Santana Row zoning." Third, the City noted "[c]onstruction period air quality and noise impacts will remain the same as those evaluated in the [2015 EIR]." Fourth, "[m]itigation measures identified in the [2015 EIR] relating to traffic, air quality, biology, and geology will continue to apply to the project." Fifth, "[t]he density, height, and setbacks of the project comply with the development standards of the approved Planned Development zoning, upon which the analysis in the FEIR is based."

Shortly after issuing its Determination of Consistency, the City approved and issued a planned development permit (permit) for the lot 12 project. The permit recited several factual findings, including that the "proposed project is within the scope of the certified [2015] EIR and related addendum." It further contained an analysis of how the permit "furthers the policies" of the City's general plan.

Following the issuance of the permit for the project, Villas appealed to the City Council. Villas argued that the City erred in not ordering an environmental study before issuing the permit. The city council denied the appeal and found there was no substantial evidence pursuant to section 21166, CEQA Guideline section 15162 "or other applicable provisions of CEQA requiring a supplemental or subsequent environmental impact report and/or any additional analysis."

G. *Villas's Petition*

On September 15, 2016, Villas filed a verified petition for a peremptory writ of mandate (petition) in the Santa Clara County Superior Court. The petition generally alleges the City violated CEQA by failing to prepare an EIR that covers the project. The petition also alleges a non-CEQA claim based on the City's purported violation of San Jose Municipal Code section 20.100.940, which requires that a planned development permit be consistent with the City's "general plan." The petition seeks to vacate the City's issuance of the permit for the project and requests an order requiring the City to prepare an EIR for it.

Both the City and real party in interest FRIT opposed the petition. Following briefing and oral argument by the parties, the trial court issued a written decision denying it.

In its written decision, the trial court rejected all of Villa's claims. Regarding Villa's CEQA claims, the trial court concluded that the petition, "while couched as a challenge to the later approval of the PD Permit," was in effect a "time-barred attack on the 2015 EIR and earlier CEQA documents setting forth standards applicable to Lot 12."

To the extent the petition sought to challenge prior environmental determinations, including the 2015 EIR, the trial court determined such a challenge was time-barred under section 21167. The trial court therefore concluded the only viable claim in the petition was whether the City acted properly under section 21166, which concerns the circumstances under which a lead agency must issue a subsequent or supplemental EIR when a prior EIR already exists. Addressing section 21166, the trial court found substantial evidence supported the City's determination that no additional EIR should be prepared before the proposed building on lot 12 could be built, in part because there was no "project change" allowed or proposed by the permit. Finally, addressing Villas's non-CEQA claim, the trial court found there was no Municipal Code violation in connection with the permit.

The trial court entered judgment against Villas and in favor of the City and awarded costs and disbursements to FRIT. Villas filed a timely notice of appeal of the judgment.

II. DISCUSSION

Villas raises a number of issues on appeal. It first contends the trial court improperly ruled that most of its CEQA claims in its petition were time-barred. Second, Villas argues the City erred by proceeding under section 21166, applicable to subsequent and supplemental environmental reviews, rather than section 21151, applicable to new projects, because the City's determination that the 2015 EIR encompassed the lot 12 project lacks substantial evidence. Third, Villas argues that—even if section 21166 applies—the City was still required under that statute to prepare a subsequent or supplemental EIR because the height of the building in the lot 12 project represents a substantial change from the relevant earlier environmental review, which Villas identifies as the 1998 EIR. Finally, as to the non-CEQA claim alleging violation of the City's Municipal Code, Villas argues the City's determination that it complied with the code was not supported by substantial evidence, as it failed to consider several policies in the

City's general plan, especially regarding the footprint and visibility of the parking areas in the project.

A. *Standard of Review*

In reviewing the City's compliance with CEQA, we apply the abuse of discretion standard. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426.) An agency abuses its discretion "either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. (§ 21168.5.)" (*Id*. at p. 435.) An appellate court reviews the agency's action, not the trial court's decision. (*Id*. at p. 427.)

B. *Statute of Limitations*

Before undertaking our review of the City's CEQA determinations, we address Villa's contention that the trial court erred in finding many of its CEQA claims were time-barred. As noted above, the trial court construed Villas's petition as largely a "time-barred attack on the 2015 EIR and earlier CEQA documents setting forth standards applicable to Lot 12." In reaching its conclusion, the trial court applied section 21167, which "establishes the usual limitations periods for CEQA challenges." (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1322.) If an action is not timely brought, an EIR is conclusively presumed valid for all CEQA purposes. (§ 21167.2.) "This presumption acts to preclude reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1130.)

Villas neither argues the trial court misinterpreted section 21167, which governs the statute of limitations, nor challenges the trial court's finding that the 2015 EIR was conclusively presumed valid under the law. Rather, Villas contends the trial court erred by misconstruing its claims in the petition as primarily challenging the sufficiency of the 2015 EIR and prior environmental documents. In its briefing on appeal, Villas repeatedly

asserts that it is *not* challenging the sufficiency of the 2015 EIR or any prior environmental document, but rather contesting the City's decision to issue the permit in 2016 "without first evaluating, disclosing or mitigating the Project's environmental impacts."

There is no dispute that Villas timely challenged the 2016 permit. However, respondents also contend that Villas failed to exhaust administrative remedies as required by section 21177 with respect to its claim that the City should have reviewed the lot 12 project under section 21151 governing CEQA review of new projects instead of under section 21166, which applies to successive projects. Villas disputes that contention and further notes that, while section 21177 requires a person to first present its "alleged grounds for noncompliance" before the agency in the first instance, this does not require a project opponent to present the legal standard of review. (§ 21177, subd. (a).) In its appeal to the City over issuance of the permit, Villas argued the City erred in not ordering an environmental study and asserted that prior environmental documents never discussed the lot 12 project. Taken together, these comments fairly apprised the City of Villas's concerns. (See *Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 684–685.) By contrast, in the case cited by respondents to support its contention that Villas failed to exhaust administrative remedies, the project opponents failed to apprise the agency of its noncompliance with CEQA. (See *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536–537.) Under these circumstances, we conclude that Villas exhausted its administrative remedies with respect to its claim that the City should have reviewed the lot 12 project under section 21151.

Villas limits its arguments on appeal to the City's decision with respect to the 2016 permit, and there is no dispute that Villas timely challenged that action. Therefore, we conclude Villas's claims are not time-barred. Whether the trial court correctly concluded that Villas's legal challenge is effectively an attack on the sufficiency of the

2015 EIR is inextricably intertwined with the merits of Villas's contentions that the City violated CEQA in its issuance of the 2016 permit. We turn now to that question.

C. *CEQA Claims*

Villas makes two arguments that the City abused its discretion under CEQA. First, it challenges the City's determination that section 21166 applies. Villas maintains that the lot 12 project was essentially a new project, which triggered the more rigorous standards of section 21151. In the alternative, Villas contends that, even if section 21166 applies to the project, the City erred in determining it need not prepare a subsequent or supplemental EIR.

1. Legal Principles

The procedures established by CEQA " ' "[e]nsure that the long-term protection of the environment shall be the guiding criterion in public decisions." ' " (*Friends of College of San Mateo Gardens*, *supra*, 1 Cal.5th 937, 944.) CEQA applies to " 'projects.' " (*Union of Medical Marijuana Patients*, *supra*, 7 Cal.5th 1171, 1180.) "In general, a project is an activity that (1) is undertaken or funded by, or subject to the approval of a public agency and (2) may cause 'either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.' (Pub. Res. Code, § 21065.)" (*Ibid*.)

In the case of a new project, section 21151 requires a lead agency to prepare an EIR "before approving a new project that 'may have a significant effect on the environment.' " (*Friends of College of San Mateo Gardens*, *supra*, 1 Cal.5th at p. 943.) " 'This test establishes a low threshold for initial preparation of an EIR, which reflects a preference for resolving doubts in favor of environmental review.' " (*Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 805.)

When a project also involves future expansion, the "EIR must include a[n] analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or

action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Absent these two circumstances, the future expansion need not be considered in the EIR for the proposed project. Of course, if the future action is not considered at that time, it will have to be discussed in a subsequent EIR before the future action can be approved under CEQA. [¶] This standard is consistent with the principle that 'environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.' [Citation.] The standard also gives due deference to the fact that premature environmental analysis may be meaningless and financially wasteful." (*Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 396.)

In contrast to section 21151, which applies to new projects, section 21166 governs "[w]hen changes are proposed to a project for which an EIR has already been prepared." (*Friends of College of San Mateo Gardens, supra*, 1 Cal.5th at p. 943.) Pursuant to section 21166, "the agency must prepare a subsequent or supplemental EIR [(SEIR)] only if the changes are '[s]ubstantial' and require 'major revisions' of the previous EIR." (*Friends of College of San Mateo Gardens*, at p. 943.)

"When reviewing an agency's decision not to require an SEIR, the 'low threshold' fair argument test 'for requiring the preparation of an EIR in the first instance is no longer applicable; instead, agencies are prohibited from requiring further environmental review unless the stated conditions are met.' " (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1398 (*Mani Brothers*).) "The rationale for limiting the circumstances under which a supplemental or subsequent EIR may be prepared is 'precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired (§ 21167, subd. (c)), and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process.' [Citation.] Therefore, section 21166 'provides a

balance against the burdens created by the environmental review process and accords a reasonable measure of finality and certainty to the results achieved. [Citation.] At this point, the interests of finality are favored over the policy favoring public comment.' " (*Id*. at pp. 1398–1399, italics omitted.)

The California Supreme Court's decision in *Friends of College of San Mateo Gardens*, describes the process a court must follow when reviewing a CEQA challenge to a project an agency has approved pursuant to section 21166. The reviewing court must first determine whether substantial evidence supports "an agency's decision to proceed under CEQA's subsequent review provisions." (*Friends of College of San Mateo Gardens, supra*, at p. 953.) "Once a court determines that substantial evidence supports an agency's decision to proceed under CEQA's subsequent review provisions (see § 21166; CEQA Guidelines § 15162), the next—and critical—step is to determine whether the agency has properly determined *how* to comply with its obligations under those provisions. In particular, where, 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." (*Ibid*.)

"[F]or purposes of determining whether an agency may proceed under CEQA's subsequent review provisions, the question is not whether an agency's proposed changes render a project new in an abstract sense. Nor does the inquiry turn on the identity of the project proponent, the provenance of the drawings, or other matters unrelated to the environmental consequences associated with the project. [Citation.] Rather, under CEQA, when there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations 'turn[ ] on the value of the new information to the still pending decisionmaking process.' [Citation.] If the original environmental document retains *some informational value* despite the proposed changes, then the agency proceeds to decide under CEQA's

subsequent review provisions whether project changes will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects." (*Friends of College of San Mateo Gardens*, *supra*, 1 Cal.5th at pp. 951–952, italics added.)

The California Supreme Court has made clear that whether an agency may proceed under the subsequent review provisions of section 21166 or whether it must adhere to the section 21151 standards because a project is "new" is primarily a factual question. "[W]hether an initial environmental document remains relevant despite changed plans or circumstances—like the question whether an initial environmental document requires major revisions due to changed plans or circumstances—is a predominantly factual question. It is thus a question for the agency to answer in the first instance, drawing on its particular expertise. [Citation.] A court's task on review is then to decide whether the agency's determination is supported by substantial evidence; the court's job ' " 'is not to weigh conflicting evidence and determine who has the better argument.' " ' " (*Friends of College of San Mateo Gardens*, *supra*, 1 Cal.5th at pp. 952–953.)

The California Supreme Court has further observed that "[w]e expect occasions when a court finds no substantial evidence to support an agency's decision to proceed under CEQA's subsequent review provisions will be rare, and rightly so; 'a court should tread with extraordinary care' before reversing an agency's determination, whether implicit or explicit, that its initial environmental document retains some relevance to the decisionmaking process." (*Friends of College of San Mateo Gardens*, *supra*, 1 Cal.5th at p. 953.) "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. [Citation.] The court defers to the agency as finder of fact, and indulges all reasonable inferences from the evidence that support the agency's findings, and resolves conflicts in the evidence in favor of the agency's decision." (*Committee for*

Re-Evaluation of T-Line Loop v. San Francisco Municipal Transportation Agency (2016) 6 Cal.App.5th 1237, 1247 (*Committee for Re-Evaluation of T-Line Loop*).)

With these principles in mind, we turn to our substantive review of the City's determinations under CEQA that Villas now challenges.

2. City's Determination to Proceed Under CEQA's Subsequent Review Provision (§ 21166)

First, we evaluate whether substantial evidence supports the City's determination to proceed under section 21166, rather than section 21151, which Villas argues is the applicable statutory provision. More particularly, we evaluate whether substantial evidence supports the City's conclusion, implicit in its decision to proceed under section 21166, that prior environmental documents analyzed the lot 12 project and retained "some informational value" to it. (*Friends of College of San Mateo Gardens*, *supra*, 1 Cal.5th at p. 951.)

"The CEQA Guidelines define 'substantial evidence' as 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. . . . Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.' (Guidelines, § 15384, subd. (a).) Additionally, '[s]ubstantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.' (Guidelines, § 15384, subd. (b).)" (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1569 (*Pfeiffer*).)

In the Determination of Consistency that explained the City's CEQA analysis of the lot 12 project, the City identified the 2015 EIR as the prior environmental report that had been prepared for the project. (See § 21166, subd. (a).) The City concluded that the lot 12 project "does not involve new significant effects beyond those analyzed" in the

2015 EIR. For the reasons explained below, we conclude the City did not abuse its discretion in its implied finding that the 2015 EIR retained some informational value for the lot 12 project. (*See Friends of College of San Mateo Gardens, supra*, 1 Cal.5th at pp. 951–952.)

The 2015 EIR examined the proposed expansion of Santana Row and rezoning that would allow a maximum height of 120 feet for the buildings located there. The proposed zoning reaffirmed the lower height for any building on lot 12 (consistent with the development plans in 2012), which was limited to 90 feet. In reaching its conclusions about any environmental impacts of the proposed expansion and rezoning, the 2015 EIR relied in part on findings in the 2011 General Plan EIR that "evaluated potential land use impacts resulting from high intensity development within Urban Villages adjacent to low density residential neighborhoods," including impacts such as "visual intrusion from building height, shade and shadow impacts, noise, litter, and parking spillover." The 2011 General Plan EIR specifically applied to Santana Row.

The 2015 EIR also referenced the 2012 MND, which described zoning changes adopted by the City that allow for increased density of development at Santana Row and determined those changes would not have a negative effect on the environment. Further, the 2012 MND itself included a supporting document describing the development standards for Santana Row that explicitly articulated a maximum building height of 90 feet for lot 12. Villas points out that the reference in the 2012 MND documents to lot 12 is "in very small print" but does not dispute its existence. Villas has not explained how font size bears legal relevance to the analysis under section 21166, and we determine the City did not abuse its discretion in its implicit reliance on the 2012 documents when concluding the 2015 EIR retained some informational value to the City's evaluation of the lot 12 project.

The 2015 EIR generally analyzes environmental factors relevant to lot 12, including traffic, air quality, biology, and geology. For example, regarding air quality

impacts, the 2015 EIR noted that a detailed air quality assessment was completed to address air quality impacts from the proposed increase in development on site, while noting that the project was also currently entitled to build an additional 348 residential units. The 2015 EIR found that construction of all buildings permitted pursuant to the proposed zoning would have significant air quality impacts, especially with respect to carbon monoxide emissions largely stemming from congested intersections. The EIR proposed mitigation measures at certain intersections to reduce congestion.

In addition, the 2015 EIR expressly incorporated by reference the 2011 General Plan EIR and stated the 2015 EIR would "tier" from the 2011 General Plan EIR and its environmental analyses. With respect to the concerns Villas identifies about the effects of the lot 12 project, the 2015 EIR acknowledged that each development location in Santana Row had "specific issues related to the surrounding land uses, particularly development sites along the eastern boundary of the project site adjacent to existing housing." Largely based on the 2011 General Plan EIR evaluating Urban Villages such as Santana Row, the 2015 EIR found "[f]uture development on the Santana Row site will comply with all applicable City policies, actions and ordinances, and will be consistent with adopted design guidelines. Future development on-site would have a less than significant impact on surrounding land uses. (Less Than Significant Impact)" (emphasis omitted).

Villas argues that the 2015 EIR did not evaluate the environmental impacts of developing lot 12 specifically and therefore substantial evidence does not support the City's reliance on it as having some informational value to the lot 12 project. Villas correctly points out that the lengthy 2015 EIR only mentions lot 12 once by name, and does not include lot 12 within the " 'project description,' " on any maps or diagrams, or in the figure depicting the " 'project boundary.' " Respondents counter that the 2015 EIR did concern lot 12 based on the text of the project location which "encompass[es] the *entire* Santana Row" of which lot 12 is a part. They concede one figure in the 2015 EIR

failed to accurately reflect the project boundary but contend this was a minor error that does not undermine the City's factual conclusions.

While appellants point to deficiencies in the project description and the figure depicting the project boundary, we are not persuaded that the asserted deficiencies alone show the City abused its discretion in concluding the 2015 EIR (certified in September 2015) retained informational value for the lot 12 project, which the City considered less than one year later. While these errors might have provided evidence supporting a counterfactual determination by the City, they do not compel such a conclusion. On appeal, we may not " ' " 'weigh conflicting evidence and determine who has the better argument.' " ' " (*Friends of College of San Mateo Garden*s, *supra*, 1 Cal.5th at p. 953.) The question for us is not whether the City could have reached a different conclusion with respect to whether the 2015 EIR retained some informational value for the lot 12 project. Our sole task is to examine whether substantial evidence supports the conclusion it did reach.

Villas asserts the trial court "seemed swayed" to rule in respondents favor because the project complied with the applicable zoning allowances for the project. Villas correctly points out that mere compliance with zoning standards does not otherwise excuse a failure to conduct environmental review of a project. (See *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 320321.) While Villas accurately states the law, it does not explain how that observation is relevant here, where the City had conducted prior environmental review.

For these reasons, we determine substantial evidence supports the City's conclusion that the 2015 EIR had some informational value for the lot 12 project and therefore it constituted "an environmental impact report [that had] been prepared for [the lot 12] project." (§ 21166; *Friends of College of San Mateo Gardens, supra*, 1 Cal.5th at pp. 951–952.) The City did not err in proceeding under section 21166.

3. City's Determination That No Subsequent or Supplemental EIR Was Required

Having determined that the City did not err in analyzing the lot 12 project under section 21166, we now proceed to the second, "critical" step of determining whether substantial evidence supports the City's determination that it was not required to prepare a subsequent or supplemental EIR under that provision. (*Friends of College of San Mateo Gardens, supra*, 1 Cal.5th at p. 950.) "[A] subsequent or supplemental EIR is prepared under section 21166 only where it is necessary to explore the environmental ramifications of a substantial change not considered in the original EIR." (*Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1544.) On appeal, Villas has the burden to demonstrate that "that there is not sufficient evidence in the record to justify the City's action." (*Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 112.)

Section 21166 states: "When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs: [¶] (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report. [¶] (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report. [¶] (c) 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."

Villas's argument that the City erred in its application of section 21166 focuses on section 21166, subdivision (a). Villas contends that the height of the building proposed in the lot 12 project constitutes a substantial change triggering the requirement that the City prepare a subsequent or supplemental EIR. The parties disagree about the

appropriate baseline from which to measure whether any change was substantial—that is, the 1998 or 2015 EIR. The City argues that the relevant baseline is the 2015 EIR, which the City stated in the Determination of Consistency "replaced" the 1998 EIR. Villas disagrees, arguing that the 2015 EIR is not the correct baseline because it does not evaluate the impacts of the lot 12 project and "[n]o evidence, let alone substantial evidence, supports" the finding that the 2015 EIR replaced the 1998 EIR. Villas argues that the 40% increase in height was a substantial change *from the 1998 EIR* and requires "major revisions" to the 1998 EIR. Therefore, the city was required to prepare a subsequent or supplemental EIR under section 21166.

In light of the California Supreme Court's general approach to section 21166 in *Friends of College of San Mateo Gardens*, which focuses on whether substantial evidence supports agency determinations (*Friends of College of San Mateo Gardens, supra,* 1 Cal.5th at p. 953), we decide that whether the 2015 EIR replaced the 1998 EIR is a factual question we review for substantial evidence. Further, in reviewing the City's decision, we draw reasonable inferences and resolve conflicting evidence in favor of the City's factfinding. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.)

We determine substantial evidence supports the City's finding that the 2015 EIR replaced the 1998 EIR for the purpose of the section 21166 analysis for the lot 12 project. The 2015 EIR comprehensively evaluated the entire Santana Row site in light of proposed zoning changes and anticipated expansion of the site. Moreover, the 2015 EIR was prepared nearly two decades after the 1998 EIR and followed other significant changes, such as the designation of the general area of Santana Row as an "Urban Village." The 2015 EIR summarized past environmental reviews and standards and noted that the maximum building height for lot 12 had previously been set at 90 feet.

While Villas argues that it "makes sense" to evaluate changes based on the 1998 EIR, it provides no authority to support its position that the City was *required* to

disregard the 2015 EIR in favor of the 1998 EIR. As we have detailed above, Villas's contention that the 1998 EIR was the only environmental document that identified any limitations on a building height for lot 12 is factually incorrect. The 2015 EIR, and the development plans associated with the 2012 MND referenced therein, describe the height limit for any building on lot 12 as 90 feet. Just as the City did not abuse its discretion in concluding the 2015 EIR constituted a prior EIR that had been prepared for the lot 12 project (§ 21166, subd. (a)), substantial evidence also supports the City's use of the 2015 EIR as the baseline for considering whether the lot 12 project proposed "[s]ubstantial changes" it had not considered in the prior EIR.[6] (§ 21166, subd. (a).)

Turning to whether the lot 12 project proposed "[s]ubstantial changes" from the 2015 EIR, the administrative record supports the City's conclusion that it did not. The 2015 EIR reaffirmed the 90-foot-high allowance for lot 12 and discussed the prior environmental reviews for Santana Row, including referencing the 1998 EIR and 2012 MND. While the 1998 EIR conceptualized a plan for a 50-foot building on lot 12, the subsequent plans for Santana Row envisioned higher and denser structures as part of making Santana Row an "Urban Village," and the documents (including associated with the 2012 MND) evidence development plans to include a structure that was up to 90 feet high on lot 12. Villas has not met its burden of showing that the lot 12 project entails "[s]ubstantial changes" that require preparation of a subsequent or supplemental EIR under section 21166.[7]

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[6] Having reached the conclusion that substantial evidence supports the City's determination that the 2015 EIR replaced the 1998 EIR, we need not address whether the 1998 EIR is a program or project EIR or Villas's contention that section 21094 applies to the 1998 EIR. Villas does not claim the 2015 EIR is a program EIR, and the trial court observed that Villas acknowledged that the 2015 EIR was a project EIR. As the 2015 EIR was a project EIR, the section 21166 substantial evidence standard applies here. (See *Committee for Re-Evaluation of T-Line Loop, supra*, 6 Cal.App.5th at p. 1252.)

[7] Based on this conclusion there are no underlying project changes, we need not address whether any of the other requirements for a subsequent EIR were met, such as

The facts here are distinguishable from the cases upon which Villas primarily rely, which involved changes of greater magnitude not referenced in any earlier environmental document. For instance, the new plans in those cases involved changing a shopping center to a "supercenter" (*American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1073), changing the height and location of a building after passage of more than 10 years since the EIR (*Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429, 431–432), and expanding the size of an amphitheater by four acres, expanding capacity from 5,000 fixed seats to 7,000, and reorienting the stage, after passage of about two years (*Concerned Citizens of Costa Mesa v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 934–935). In *Ventura Foothill Neighbors*, the case most factually similar as it involved a challenge to the height of a building, the building not only had changed in height but was also relocated, and the EIR at issue did not mention that the increased height was allowed. Here, as we have noted, the 2015 EIR expressly referenced the 90-foot maximum height for any building on lot 12.

In addition to identifying the height of the building in the lot 12 project as a substantial change, Villas also mentions blocked "views and sightlines" and the elimination of a dog park and trees. While Villas asserts these effects constitute "substantial changes" from the prior environmental reviews, it cites no authority finding similar changes to be sufficiently substantial to trigger preparation of a subsequent or supplemental environmental impact report. In any event, there is substantial evidence that the 2015 EIR considered the removal and replacement of trees related to future development on Santana Row. Villas has not persuaded us that, given the record before us and under the circumstances here, elimination of the dog park or changes to shadow,

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whether any proposed changes require significant revisions to the prior EIR or involve new or more significant impacts resulting from those changes. (Cal. Code Regs., tit. 14, § 15162(a)(1).)

light, or privacy constitute substantial changes warranting a supplemental or subsequent EIR. Accordingly, Villas has failed to carry its burden of showing the City erred under section 21166 in finding no substantial change between the lot 12 project and the 2015 EIR. (*Mani Brothers*, *supra*, 153 Cal.App.4th at p. 1397.)

For these reasons, the trial court properly rejected Villas's CEQA claims.

D. *Municipal Code Claims*

Turning to Villas's non-CEQA claim, Villas contends the City abused its discretion in finding the project complied with San Jose Municipal Code section 20.100.940, which requires that a planned development permit be consistent with the City's "general plan."[8] Villas argues the City failed to consider several fundamental policies in the general plan, including those related to minimizing the footprint and visibility of parking areas.

1. Legal Principles

"Local land use and development decisions must be consistent with the applicable general plan." (*East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 304 (*East Sacramento*).) "The general plan consists of a

[8] When the permit was issued in May 2016, San Jose Municipal Code section 20.100.940, subdivision A, stated: "The director, the planning commission on appeal, or the city council as appropriate, may issue a planned development permit only if all of the following findings are made: [¶] 1. The planned development permit, as issued, is consistent with and furthers the policies of the general plan; and [¶] 2. The planned development permit, as issued, conforms in all respects to the planned development zoning of the property; and [¶] 3. The planned development permit, as approved, is consistent with applicable city council policies, or counterbalancing considerations justify the inconsistency; and [¶] 4. The interrelationship between the orientation, location, mass and scale of building volumes, and elevations of proposed buildings, structures and other uses on-site are appropriate, compatible and aesthetically harmonious; and [¶] 5. The environmental impacts of the project, including, but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative effect on adjacent property or properties."

‘statement of development policies . . . setting forth objectives, principles, standards, and plan proposals’ ” that guides “future local land use decisions.” (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773.)

“A project is consistent with the general plan ‘ “if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.” ’ ” (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336.) Although a “project need not be in perfect conformity with each and every general plan policy,” the project must be “ ‘compatible with’ the objectives, policies, general land uses and programs specified in the general plan.” (*Ibid.*)

The applicable standard of review for consistency with the general plan is abuse of discretion. (*Pfeiffer, supra,* 200 Cal.App.4th at p. 1563.) “ ‘When we review an agency’s decision for consistency with its own general plan, we accord great deference to the agency’s determination. This is because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citation.] Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan’s policies when applying them, and it has broad discretion to construe its policies in light of the plan’s purposes. [Citations.] A reviewing court’s role “is simply to decide whether the City officials considered the applicable policies and the extent to which the proposed project conforms with those policies.” ’ ” (*East Sacramento, supra,* 5 Cal.App.5th 281, 305.) “ ‘Once a general plan is in place, it is the province of elected City officials to examine the specifics of a proposed project to determine whether it would be “in harmony” with the policies stated in the plan. [Citation.] It is, emphatically, not the role of the courts to micromanage these development decisions.’ ” (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 638, italics omitted.)

Consistent with the substantial deference afforded to a City's Determination of Consistency with the general plan " '[a] city's findings . . . can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion.' " (*Holden v. City of San Diego* (2019) 43 Cal.App.5th 404, 412.) "Further, the party challenging a public agency's determination of general plan consistency has the burden to show why that determination is unreasonable." (*Id.* at p. 413.)

2. Analysis

Villas argues the City failed to consider several "fundamental" policies in the general plan and particularly emphasizes the policy of minimizing the footprint and visibility of parking areas.[9]

In the permit findings, the City concluded that the permit for the project "furthers the policies of the General Plan" and discussed and analyzed several (but not all) policies in connection with the project. Villas concedes that the City was not required to make specific findings for each policy in the general plan.[10] Moreover, Villas has not persuaded us that the City failed to "consider" the parking areas policy. To the contrary, substantial evidence supports the conclusion that the City considered this policy in the context of the project.

Regarding parking in general, the permit conditions for the project notes that lot 12 was currently developed with a surface parking lot. The project as approved would include above- and below-grade parking (providing 355 on-site parking spaces for the

[9] The pertinent policy (Policy CD-1.17) states: "Minimize the footprint and visibility of parking areas. Where parking areas are necessary, provide aesthetically pleasing and visually interesting parking garages with clearly identified pedestrian entrances and walkways. Encourage designs that encapsulate parking facilities behind active building space or screen parked vehicles from view from the public realm. Ensure that garage lighting does not impact adjacent uses, and to the extent feasible, avoid impacts of headlights on adjacent land uses."

[10] In the permit for the project, the City detailed several policies from the general plan (for example, related to urban village design) and explained how the project was consistent with those policies. Those particular policies are not at issue here.

258-unit residential development), as required by the existing parking ratio (1.3 parking spaces per unit). Moreover, the City's director of planning who approved the permit issued a memorandum to the City's mayor approximately one month after the director issued the permit, provided further context on the issue of parking, and observed that "[u]nlike the existing parking lot, the parking structure would not span the entire length of Lot 12 and would be screened by vegetation and architectural design features."[11] The administrative record thus contains substantial evidence that the City considered the policy of minimizing the footprint of parking areas.

Villas also points to the policy that requires " 'the highest standards of architecture and site design.' "[12] There is substantial evidence that this policy was considered, even if the City did not mention this specific policy or analyze it in detail. The permit conditions note that the architectural design of the project was consistent with certain architectural standards and states, for example, that the project "provides two vertical open space breaks at the rear of the building to reduce the massing of the portion of the building facing the adjacent residential development."

Finally, Villas points to a general plan policy of ensuring that new or remodeled structures are consistent with the "surrounding neighborhood fabric."[13] The permit

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[11] In its reply brief, Villas asserts we may not credit information from this memorandum because the memorandum is dated after the permit was issued. Villas cites to no authority for this contention. The memorandum is included in the administrative record, and it is relevant to the City's determinations in issuing the permit. We therefore may rely upon it in our analysis. (See *Snarled Traffic Obstructs Progress v. City & County of San Francisco* (1999) 74 Cal.App.4th 793, 802.)

[12] The pertinent policy (Policy CD-1.1) states: "Require the highest standards of architecture and site design, and apply strong design controls for all development projects, both public and private, for the enhancement and development of community character and for the proper transition between areas with different types of land uses."

[13] The pertinent policy (Policy CD-4.9) states: "For development subject to design review, ensure the design of new or remodeled structures is consistent or complementary with the surrounding neighborhood fabric (including but not limited to prevalent building scale, building materials, and orientation of structures to the street)."

establishes that the neighborhood, including the inclusion of lot 12 in the urban village, were considered by the City. For instance, the permit noted that the project "will provide additional residential development to complement and support the existing retail, commercial, and office development within Santana Row." (Italics omitted.)

In its reply brief, Villas raises additional examples of other policies that it alleges the City "failed to consider" that relate to urban conservation, preserving the scenic backdrop, and running a sustainable City by conserving natural resources. Villas does not present any authority or persuasive argument to support its contention that the City failed to consider these policies. In any event, the record contains substantial evidence to support the conclusion that the City implicitly considered them. For instance, the permit requires the project to receive a minimum "green" building certification.

For these reasons, we reject Villas's assertion that the City acted unreasonably when it determined that the issued permit for the project furthers the policies of the City's general plan.

III. DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

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Danner, J.

WE CONCUR:

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Elia, Acting P.J.

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Bamattre-Manoukian, J.

H045644
Villas at Santana Park Homeowners Association v. City of San Jose et al.