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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

EAST SACRAMENTO PARTNERSHIP FOR A
LIVABLE CITY,

Plaintiff and Appellant,

v.

CITY OF SACRAMENTO et al.,

Defendants and Respondents.

ENCORE McKINLEY VILLAGE, LLC,

Real Party In Interest and Respondent.

C085551

(Super. Ct. No. 34-2014-
80001851-CU-WM-GDS)

Real Party in Interest Encore McKinley Village, LLC (Encore) proposed and has now partially constructed a residential infill project, the McKinley Village Project (the Project), in the East Sacramento neighborhood near downtown Sacramento. Plaintiff

East Sacramento Partnerships for a Livable City (ESPLC) challenged the City of Sacramento's approval of the Project, contending it violated the California Environmental Quality Act (CEQA) (Pub. Res. Code, § 2100 et seq.).

In *East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281 (*ESPLC I*), we found one defect in the Project's environmental impact report (EIR) relating to the City's threshold of significance for traffic impacts. The City had relied on the mobility element of the City's 2030 general plan, specifically the flexible level of service (LOS) traffic standard for the core area of the city, but the EIR failed to explain or provide substantial evidence that under this threshold there were no significant traffic impacts. We found there was evidence that the Project caused significant traffic impacts at certain intersections in the core area and remanded for issuance of a writ of mandate to set aside certification of the final EIR and to take necessary actions to bring the EIR into compliance with CEQA.

The trial court issued the required writ of mandate. After the City revised the EIR for the Project, providing additional explanation and evidence to support the selection of the threshold of significance for traffic impacts, the City again approved the Project and certified the revised EIR. The trial court found satisfactory compliance with the writ and issued an order discharging the writ of mandate. ESPLC objected, by way of a motion for reconsideration, and the court denied the motion. ESPLC appeals from the order discharging the writ and the ruling denying reconsideration.

On appeal, ESPLC contends the City failed to provide substantial evidence to support the conclusion that the Project's impacts on traffic are insignificant. ESPLC contends that merely providing evidence and explanation to support the choice of the threshold of significance for traffic impacts was insufficient. Instead, ESPLC contends, the City had to provide evidence of the insignificance of the Project's traffic impacts through a new traffic study. The City and Encore contend there is substantial evidence to

support the City's choice of the threshold of significance for traffic impacts and that was all *ESPLC I* required. They further contend the appeal should be dismissed as untimely.

As we explain, the order discharging the writ was a postjudgment order, not a final judgment that deprived the trial court of jurisdiction. The postjudgment order was subject to a motion for reconsideration that extended the time for filing a notice of appeal; therefore, the appeal was timely. We find the City provided sufficient explanation and substantial evidence to support its selection of the threshold of significance for traffic impacts. Thus, substantial evidence supports its determination that there are no significant traffic impacts at the challenged intersections. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Project and its Traffic Impacts

The Project is a 328-unit residential development located on a football-shaped piece of land, sandwiched between Interstate 80 Business Route and the Union Pacific Railroad tracks. (*ESPLC I, supra*, 5 Cal.App.5th at pp. 286-287.) There are two points of access to the Project; one across an upgraded A Street bridge to 28th Street in midtown and a second across C Street to the residential East Sacramento neighborhood. (*Id.* at p. 288.)

Traffic was a primary issue and the EIR analyzed traffic impacts of the Project using the level of service (LOS) method, with a scale of A to F. LOS A is free flowing traffic and LOS F is congested, "stop and go" traffic. (*ESPLC I, supra*, 5 Cal.App.5th at p. 288.) The EIR found the level of service on 28th Street and its intersection with E Street went from LOS C to LOS E for the street, and LOS A to LOS D for the intersection in the morning. The intersection at E Street and 29th Street went from LOS C to LOS E in the morning. The impacts were greater, in some cases rating LOS F, under the cumulative plus project conditions. (*Id.* at p. 300.)

The EIR found no significant impacts based on mobility element policy M 1.2.2 of the 2030 general plan which allows for flexible LOS standards. Under this policy, LOS F conditions are acceptable during peak hours in the core area, bounded by C Street, the Sacramento River, 30th Street, and X Street (including 28th and 29th Streets at E Street). (*ESPLC I, supra*, 5 Cal.App.5th at p. 300.) In response to a comment questioning the City’s discretion in establishing the LOS thresholds of significance, the final EIR declared those LOS thresholds reflected “community values.” (*Id.* at p. 302.)

In April 2014 the City certified the EIR and approved the Project. (*ESPLC I, supra*, 5 Cal.App.5th at p. 288.)

ESPLC’s Challenge

“The following month, ESPLC filed a petition for writ of mandate and complaint for declaratory and injunctive relief, challenging the City’s decision to approve the Project. ESPLC contended there were numerous violations of CEQA, and approval of the Project violated the City’s general plan. ESPLC sought a declaration that the Project approval was invalid and an injunction against any further action on the project.”

(*ESPLC I, supra*, 5 Cal.App.5th at p. 288.) “The trial court denied the petition and ESPLC appealed.” (*Id.* at p. 289.)

ESPLC I

In *ESPLC I*, we rejected all but one of ESPLC’s many challenges to the Project and its EIR. Relying on *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099 (*Amador Waterways*), we held it was error to rely on the mobility element of the 2030 general plan as an automatic determinate that traffic effects were not significant, where there was evidence that they were indeed significant. (*ESPLC I, supra*, 5 Cal.App.5th at p. 302.) We noted there was evidence that increased LOS conditions above D-E were significant traffic impacts. Such impacts were found to be “significant and unavoidable” in the master EIR for the 2030 general plan and the

Project’s EIR found similar changes to LOS conditions in East Sacramento were significant impacts requiring mitigation. (*Ibid.*)

We concluded: “The general plan alone does not constitute substantial evidence that there is no significant impact. ‘[T]he fact that a particular environmental effect meets a particular threshold cannot be used as an automatic determinant that the effect is or is not significant. To paraphrase our decision in *Communities [for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, overruled on another ground in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1109, fn. 3], a threshold of significance cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant. [Citation.]’ (*Amador Waterways, supra*, 116 Cal.App.4th at p. 1109.)” (*ESPLC I, supra*, 5 Cal.App.5th at pp 302-303.)

We reversed the trial court’s denial of ESPLC’s petition for a writ of mandate because the EIR failed “to explain or provide substantial evidence to support the finding of no significant traffic impact” at the intersections at issue. (*ESPLC I, supra*, 5 Cal.App.5th at p. 303.)

Although neither Encore nor the City petitioned for review of our decision in *ESPLC I*, they requested depublication of the opinion. Our Supreme Court denied all such requests, declined to review the matter on its own motion, and declared the matter final.

Revised EIR

On remand, the trial court entered judgment in favor of ESPLC and issued a peremptory writ of mandate to rescind and set aside certification of the Project’s EIR and related Project approvals. The writ commanded the City to take action necessary to bring the transportation and circulation section of the EIR for the Project into compliance with CEQA, CEQA guidelines, and *ESPLC I*.

In anticipation of the trial court's judgment and writ, the City had already prepared and circulated a revised draft EIR. The revised draft EIR explained that in developing the mobility policy of the 2030 general plan, "the City evaluated the benefits of allowing lower levels of service [LOS] in order to promote infill development within an urbanized high density area of the city that reduces [vehicle miles traveled] and supports more transportation alternatives, including biking, walking, and transit, as compared to requiring a higher [LOS] that would accommodate more cars, but may also require widening roads and would result in increased vehicle miles traveled and greenhouse gas emissions. Based on this evaluation, the City determines that LOS E and F are considered acceptable during peak hours within the core area, provided that the project provides improvements to other parts of the citywide transportation system within the project site vicinity (or within the area affected by the project's vehicular traffic impacts) to improve transportation-system-wide roadway capacity, to make intersection improvements, or to enhance non-auto travel modes in furtherance of the General Plan goals. Road widening or other improvements to road segments are not required for roads within the Core Area."

The revised draft EIR included Appendix A, transportation and circulation supporting information. Appendix A cited research that showed dense urban land use was associated with decreased per capita vehicle travel. Increasing roadway capacity resulted in increased vehicle miles traveled (VMT) while increased travel time, such as increased delay, was associated with shifts to transit, bicycling, and walking. In allowing LOS F in the core area, the City differentiated the core area from other parts of the City due to its walkable, transit-oriented, higher density infill development. This differentiation explained why LOS F was acceptable in the core area but not in other parts of the City.

Appendix A explained that the City's flexible LOS policy was just one of several policies in the general plan designed to promote infill development. This policy was in

accord with several pieces of legislation. Assembly Bill No. 32, enacted in 2006, established a goal of reducing greenhouse gas emissions to 1990 levels by 2020. To achieve this goal, the Air Resources Board adopted a Climate Change Scoping Plan, part of which focused on efficient land use patterns to reduce vehicle travel.

Senate Bill No. 375 (2007-2008 Reg. Sess.) requires each regional agency to develop a sustainable communities strategy (strategy) to reduce emissions from automobiles and light trucks. For the Sacramento area, the Sacramento Area Council of Governments (the Council) prepares a combined metropolitan transportation plan (plan) and strategy. The plan/strategy explains that even with improved vehicle efficiency and new fuel formulations, it is still necessary to reduce VMT. The 2012 plan/strategy analyzed VMT by type of community. Both the Project and the core area are classified as a Center and Corridor Community; that classification has the lowest VMT of any community type. The 2016 plan/strategy confirms the concentrated growth supported by the Council's planning efforts was working to reduce VMT.

Additionally, Senate Bills Nos. 226 and 743 promoted infill development. Senate Bill No. 226 (2011-2012 Reg. Sess.) called for streamlined environmental review for qualified infill development. Senate Bill No. 743 (2013-2014 Reg. Sess.) indicated the LOS metric was outdated and called upon the Office of Planning and Research to revise CEQA Guidelines to establish new criteria for determining the significance of transportation impacts that promote the reduction of greenhouse gas emissions. Once these guidelines are completed, automobile delay, as measured by LOS, shall not be considered a significant impact on the environment. The State CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.) implement the provisions of CEQA and are accorded "great weight except where they are clearly unauthorized or erroneous."¹ (*Vineyard*

¹ The proposed new CEQA Guideline for determining the significance of traffic impacts (new Cal. Code Regs., tit. 14, § 15064.3) declares: "Generally, [VMT] is the most

Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 428, fn. 5 (*Vineyard*).

Appendix A also listed the several improvements that Encore had committed to provide to the citywide transportation system, as well as mitigation measures to improve roadway capacity or intersections. Based on modeling studies, the Project did not result in any transportation-related impacts to air quality, noise, or safety.

The final revised EIR included comments and responses to the draft revised EIR. It noted that the Council and Sacramento's Regional Transit District (RT) had sent letters in support of the City's flexible LOS standards. The VMT for the residents of McKinley Village was anticipated to be in the range of 11.3 (the VMT for the core area) and 13.5 (the VMT for East Sacramento); the VMT would be a nine to 24 percent reduction over the City average. The new focus on VMT supported the City's conclusion that increased traffic congestion in the core area should not be treated as a significant effect on the environment. "This conclusion is not simply based on the applicable general plan policy, but on the determination that the physical effects on the environment that may result from increased congestion would not result in a substantial, or potentially substantial, adverse change in the physical conditions within the area affected by the project."

The final revised EIR included a new Appendix A of supplemental materials prepared by a consulting firm analyzing VMT and LOS in the City.

The City Council adopted various items for the approval of the Project.

appropriate measure of transportation impacts." Land use projects near major transit stops or high-quality transit corridors should be presumed to cause a less than significant traffic impact. Land use projects that decrease VMT in the project area compared to existing conditions should be considered to have a less than significant transportation impact.

The City's Approval and ESPLC's Challenge

The City provided this material with its return to the writ, contending it had complied with the writ. The trial court issued an order discharging the peremptory writ of mandate.

ESPLC moved for reconsideration of the order, arguing the City failed to correct the deficiencies because it failed to undertake any new analysis. ESPLC claimed the final revised EIR was simply an attempt to justify reliance on the mobility element of the general plan.

The trial court articulated the two competing interpretations of *ESPLC I*. In ESPLC's view, the City had to perform a new traffic study independent of the mobility study. The City and Encore argued that our decision merely required an explanation and substantial evidence for the City's determination to use the flexible LOS standard in the core area. The trial court found the second interpretation more persuasive. It found the explanation of how the flexible LOS policy promotes infill development and achieves environmental benefits of reduced VMT and greenhouse gas emissions was sufficient. This conclusion was supported by staff opinions, legislation, studies of flexible LOS, evidence of VMT in the core area, and comments from the Council and RT. The court denied the motion for reconsideration.

ESPLC appealed from both the order discharging the writ and the ruling on the motion for reconsideration.

Before the record in this case was filed, the City and Encore moved to dismiss the appeal as untimely. We denied the motion.

DISCUSSION

I

Timeliness of Appeal

The City and Encore again contend we should dismiss the appeal as untimely because ESPLC did not file the notice of appeal within 60 days after entry of the order discharging the writ. We again disagree.

The order discharging the peremptory writ of mandate was entered and served on May 30, 2017. ESPLC did not file a notice of appeal until September 5, 2017. Generally, under California Rules of Court, rule 8.104(a), the notice of appeal had to be filed within 60 days. A valid motion for reconsideration, however, will extend the time for filing a notice of appeal. (*Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) A valid motion to reconsider an appealable order will extend the time to appeal until the earliest of (1) 30 days after service or entry of an order denying the motion; (2) 90 days after the first motion for reconsideration is filed; or (3) 180 days after entry of the appealable order. (Cal. Rules of Court, rule 8.108(e)(1).) The court ruled on the motion for reconsideration on September 5, 2017.

The City and Encore contend the motion for reconsideration did not extend the time to appeal because it was not a valid motion. They reason that an order discharging a writ is a final judgment and a motion for reconsideration cannot be brought to reconsider a judgment because the trial court has lost jurisdiction. “It is well settled that entry of judgment divests the trial court of authority to rule on a motion for reconsideration.” (*Safeco Ins. Co. v. Architectural Facades Unlimited, Inc.* (2005) 134 Cal.App.4th 1477, 1482.)

This contention is premised on the assertion that an order discharging a writ is a judgment, not a postjudgment order. The City and Encore rely on *Baldwin v. City of Los Angeles* (1999) 70 Cal.App.4th 819 and *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1987) 193 Cal.App.3d 1544 to characterize the discharge

order as such. Both cases, in the background sections, refer to a discharge order as a judgment. (*Baldwin*, at p. 834 [discharge order “in legal effect a judgment”]; *San Franciscans*, at p. 1546 [appeal “from a judgment discharging a writ of administrative mandate”].) Neither case provides any analysis of the nature of a discharge order.

In contrast, in *City of Carmel-By-The-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964, at page 971 (*Carmel-By-The-Sea*), the appellate court examined the question of the appealability of an “order following hearing on adequacy of respondent’s return to peremptory writ of mandate.” The court reasoned: “Where an order after an appealable judgment simply leaves the judgment intact and neither adds to nor subtracts from it, the order is not appealable. But where the order relates to enforcement of a judgment, it is appealable. [Citation.] We deem an order regarding adequacy of a return as one relating to enforcement of a judgment and therefore conclude that it is appealable.” (*Ibid.*, fn. omitted; accord *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 464, fn. 2.)

We find the reasoning of *Carmel-By-The-Sea* persuasive. The discharge order, finding the return to the writ was adequate, was an appealable postjudgment order. As such, it was subject to a motion for reconsideration and that motion extended the time to appeal. Because the notice of appeal was filed immediately after the ruling on the motion for reconsideration, the appeal was timely. (Cal. Rules of Court, rule 8.108(e)(1).)

II

Adequacy of Return to Writ

A. Standard of Review

The adequacy of the return to the writ is governed by the abuse of discretion standard of review because the “attempt to comply with the writ is, for all practical purposes, an attempt to comply with CEQA.” (*POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 62.) In the CEQA context, an abuse of discretion “is established ‘if the agency has not proceeded in a manner required by law or if the

determination or decision is not supported by substantial evidence.’ [Citations.]”
(*Vineyard, supra*, 40 Cal.4th 412, 426.)

“ ‘Substantial evidence’ in the context of CEQA is defined 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.’ (Guidelines, § 15384, subd. (a).)” (*Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092, 1101.)

The abuse of discretion standard also applies to a court’s denial of a motion for reconsideration. (*Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392, 408.)

B. *Selection of Threshold of Significance*

In *ESPLC I*, we remanded the case because the City’s threshold of significance for traffic impacts--and thus its finding of no significant traffic impacts in the core area--was not supported by substantial evidence. The City improperly used the flexible LOS standard from the 2030 general plan as an automatic determinate. (*ESPLC I, supra*, 5 Cal.App.5th at pp. 300-301.)

“A threshold of significance is an identifiable, quantitative, qualitative, or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.” (Cal. Code Regs., tit. 14, § 15064.7 subd. (a).)

“California’s CEQA Guidelines likewise recognize that an agency’s adoption of a threshold of significance requires an exercise of reasoned judgment. ‘The determination of whether a project may have a significant effect on the environment calls for a careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data.’ (CEQA Guidelines, § 15064, subd. (b).) ‘CEQA grants agencies discretion to develop their own thresholds of significance’ and an agency’s choice of a significance threshold will be upheld if founded on substantial evidence.

[Citation.]” (*Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 206 (*Mission Bay*)). A public agency may choose between differing expert opinions and may also rely upon the opinion of its staff in reaching decisions; such opinions have been recognized as constituting substantial evidence. (*Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 866.)

“When the basis for an EIR’s finding that an impact is less than significant is not apparent from the facts and circumstances, the EIR must explain the reasons for the finding. An unsubstantiated conclusion that an impact is not significant, without supporting information or explanatory analysis, is insufficient; the reasoning supporting the determination of insignificance must be disclosed. [Citations.]” (1 Kostka & Zichke, Practice under the Cal. Environmental Quality Act (Cont.Ed.Bar 2018) Significant Environmental Effects, § 13.31.)

C. Substantial Evidence Supporting Use of the Threshold of Significance

Using a threshold of significance based on the general plan as an automatic determinate without supporting information or explanatory analysis was the error we found in *ESPLC I*. The City corrected this error in the revised EIR. Instead of simply relying on the flexible LOS standard of the 2030 general plan, the City provided an explanation of why a higher LOS in the core area should not be considered a significant traffic impact and supported that explanation with substantial evidence.

The revised EIR explained that vehicle delay is not a physical impact on the environment and is preferable to roadway expansion (necessary to provide a better LOS) which studies show increases VMT. It explained that a flexible LOS policy reduces VMT, resulting in environmental benefits including improved air quality and reduced greenhouse gas emissions, especially when coupled with other improvements to the citywide transportation system provided, as here, by the project developer. Further, it provided an explanation for differentiating between the core area and other parts of the

City. The core area had higher density, greater access to transit, and was more amenable to walking or bicycling.

This explanatory analysis was supported by substantial evidence. There was a summary of legislation aimed at reducing greenhouse gas emissions and encouraging infill development. The revised EIR cited to studies that supported the use of flexible LOS standards and provided evidence that the core area had the lowest VMT in the City. A letter from the Council supported the use of flexible LOS standards, and provided justifications for permitting greater levels of congestion in the core area than in other areas of the City. Sacramento's RT also supported the use of flexible LOS standards to benefit the environment, increase transit ridership, and reduce VMT.

“Where, as here, ‘ “ ‘the agency determines that a project impact is insignificant, an EIR need only contain a brief statement addressing the reasons for that conclusion.’ ” ’ [Citations.]” (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 637 (*North Coast*)). For example, in *Amador Waterways*, plaintiff challenged the conclusion that reduction in stream flow would not have a significant impact on riparian habitat. This court found a one-sentence statement that “riparian habitat will ‘ “continue to thrive along local streamcourses if canal leakage is eliminated” ’ constitutes a valid statement of reasons for the Agency’s significance determination.” (*Amador Waterways, supra*, 116 Cal.App.4th at p. 1113.) All that is required is “sufficient information and analysis to enable the public to discern the analytic route the agency traveled from evidence to action.” (*Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1397.)

Here, the revised EIR provided sufficient information and analysis, explaining and supporting the determination that greater traffic congestion in the core area was not a significant environmental impact.

ESPLC argues that the EIR’s only change was to explain its reliance on the mobility element of the 2030 general plan.

Ordinances, plans, policies, and regulations adopted by the lead agency can provide guidance to a lead agency in setting thresholds of significance in an EIR. (1 Kostka & Zichke, Practice under the Cal. Environmental Quality Act, *supra*, Significant Environmental Effects, § 13.11.) For example, in *Mission Bay*, *supra*, 6 Cal.App.5th at page 193, the court upheld a noise threshold that was based on incremental increase in noise over ambient conditions, based in part on local noise ordinance. In *North Coast*, *supra*, 216 Cal.App.4th at page 651, the county's goals for reduction of greenhouse gas emissions was used to determine the threshold of significance for greenhouse gas emissions impacts. In *National Parks & Conserv. Ass'n v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1358, the court found a substantial basis for the use of the county residential noise standards as standard for assessing significance of project's noise impacts to nonwilderness areas of national park and found a basis for distinguishing between wilderness and nonwilderness areas.

Here, the revised EIR did not simply rely on the mobility element of the 2030 general plan but explained why the use of the mobility element as a threshold of significance was appropriate in this case. "CEQA simply requires that the public and public agencies be presented with adequate information to ensure that 'decisions be informed, and therefore balanced.' [Citation.]" (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 748.) The revised EIR met that standard.

ESPLC contends the revised EIR should have studied and quantified the alleged reductions in VMT and greenhouse gas emissions in the Project area. In determining whether substantial evidence supports the City's decision, we accord deference to the agency's substantive factual conclusions. (*Vineyard*, *supra*, 47 Cal.4th at p. 435.) "The fact that different inferences or conclusions could be drawn, or that different methods of gathering and compiling statistics could have been employed, is not determinative in a substantial evidence review." (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123,

1148.) The substantial evidence test does not require that the City conclusively establish beyond question that the traffic impacts are not significant. Under CEQA, substantial evidence “means 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.” (Guidelines, § 15384.)

D. Evidence the City Has Found Similar Traffic Impacts Significant

In its reply brief, ESPLC contends the City and Encore ignore evidence that the project’s traffic impacts are significant. Specifically, the master EIR for the City’s 2030 general plan finds traffic increases above LOS D and E were “significant and unavoidable.” ESPLC contends the City has thus admitted the traffic impacts of the Project are significant and therefore the revised EIR fails to comply with CEQA.

Encore argued this argument was raised for the first time in the reply brief and has moved to strike the portions of that brief which raise this issue. ESPLC replies it is simply responding to the argument that there is substantial evidence to support the finding of no significant traffic impacts. We agree with Encore and grant the motion to strike as to this argument and decline to consider it.

“We will not ordinarily consider issues raised for the first time in a reply brief. [Citation.] An issue is new if it does more than elaborate on issues raised in the opening brief or rebut arguments made by the respondent in respondent’s brief. Fairness militates against allowing an appellant to raise an issue for the first time in a reply brief because consideration of the issue deprives the respondent of the opportunity to counter the appellant by raising opposing arguments about the new issue. [Citation.]” (*American Indian Model Schools v. Oakland Unified School Dist.* (2014) 227 Cal.App.4th 258, 275-276.) “Hence, the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.” (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 723, p. 790.)

ESPLC has provided no reason why this argument could not have been presented earlier. The existence of this evidence of a significant traffic impact was part of the basis of finding error in *ESPLC I, supra*, 5 Cal.App.5th at page 302; thus, this issue was evident. Accordingly, we deny ESPLC’s request to file a supplemental brief.

Moreover, we find no binding admission as to the significance of the traffic impacts. The master EIR for the 2030 general plan considered citywide impacts, not just increased congestion in the core area. As the revised EIR for the Project explains, there is a valid basis for differentiating between the core area and other parts of the City. Further, as we noted in *ESPLC I*, the City has adopted a new 2035 general plan, so arguments based on noncompliance with 2030 plan are moot. (*ESPLC I, supra*, 5 Cal.App.5th at pp. 305-306.) The EIR for the 2035 general plan finds no significant traffic impacts in allowing LOS F conditions in the core area.

DISPOSITION

The judgment is affirmed. The City and Encore shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Murray, J.