

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE**

Civil Complex Center  
751 W. Santa Ana Blvd  
Santa Ana, CA 92701

**SHORT TITLE:** IBC BUSINESS OWNERS FOR SENSIBLE DEVELOPMENT vs. CITY OF IRVINE, a California municipal corporation

**CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE**

**CASE NUMBER:**  
**30-2020-01155214-CU-WM-CXC**

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SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF ORANGE  
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 08/25/2021

TIME: 11:01:00 AM

DEPT: CX103

JUDICIAL OFFICER PRESIDING: Kirk H. Nakamura

CLERK: Javier Espino

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT: None

CASE NO: **30-2020-01155214-CU-WM-CXC** CASE INIT.DATE: 08/14/2020

CASE TITLE: **IBC BUSINESS OWNERS FOR SENSIBLE DEVELOPMENT vs. CITY OF IRVINE, a California municipal corporation**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

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EVENT ID/DOCUMENT ID: 73594897

EVENT TYPE: Under Submission Ruling

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**APPEARANCES**

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*Court's Ruling on IBC Business Owners for Sensible Development v. City of Irvine, et. al.*

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 8/2/2021 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as attached hereto and incorporated herein by reference.

Court orders Clerk to give notice.

Court's Ruling on IBC Business Owners for Sensible Development v. City of Irvine, et. al.

"It ain't over 'til it's over" – Yogi Berra

In a case replete with quotations in both the briefs submitted and in the oral argument on the petition, perhaps this quotation best summates this court's proposed decision in this case, particularly with respect to the arguments surrounding the City's failure to conduct a traffic study under the Vehicle Miles Traveled (VMT) analysis and its contentions that the Petitioner's request for appellate review should not extend the time during which the City's findings were final.

FACUTAL SUMMARY

Petitioner IBC Business Owners for Sensible Development ("Petitioner") argues the City of Irvine ("City") failed to properly comply with CEQA in approving an office complex development (the "Gemdale Proposal") proposed by RealParty in Interest Gemdale 2400 Barranca Holdings, LLC ("RPI" or "Gemdale") at 2400 Barranca Parkway (the "Site").

The Site is within a highly developed area of the City known as the Irvine Business Complex ("IBC"). The IBC is governed by a Vision Plan that was adopted as part of the City's General Plan in 2010 and limits the overall development intensity within the IBC. (AR 6, 502-504, 57184, 57412.) In connection with its adoption of the Vision Plan, the City certified a program EIR (the "Vision Plan EIR") that analyzed the potential environmental impacts associated with the development under the Vision Plan. Petitioner has represented in oral argument, and there has been no contrary assertion, that the Vision Plan was adopted in response to the City of Irvine's desire to incorporate residential use in the IBC and also in response to a court ruling by Judge Steven Sundvold in May of 2008 which expressly held that the then existing Project Supplemental EIR (SEIR) failed to adequately analyze and disclose the environmental effect that could be caused by transferring development rights from one area of the IBC to another. (Ruling 8, Statement of Decision.) It is also generally agreed among the parties that the Vision Plan has elements of a Program EIR and a Project EIR in that the IBC was not fully developed and certain specific projects that were in development were analyzed in detail. The Gemdale Proposal, which occurred later was not one of the projects analyzed in detail.

Upon initial review of the proposal, the City asserts that it determined it would qualify for the Class 32 categorical exemption ("Infill Exemption"), which applies to certain infill development on sites that do not exceed five acres. (See CEQA Guidelines 15332). Nevertheless, the City ultimately analyzed the

Gemdale Proposal under CEQA's subsequent review procedures, to determine if it would not have any significant impacts that were not analyzed in the Vision Plan EIR. (AR 16336.) The City and its consultants thereafter prepared technical studies to analyze the potential environmental impacts of the Gemdale Proposal. (See AR 8171-8180 [Shadow Study]; AR 8181-8276 [Glare Analysis]; AR 8277-8580 [Air Quality and Greenhouse Gas Emissions Analysis]; AR 8593-8626 [Geotechnical Recommendations Revised Memorandum]; AR 8627-8666 [Phase 1 Environmental Analysis]; AR 8801-8868 [Noise Impact Analysis]; AR 8869-8871 [Public Services and Utilities]; AR 8885-9268 [Traffic Impact Analysis].) Based on those studies and the

City's review of the proposal, the City ultimately concluded: (1) the Gemdale Proposal was within the scope of the Vision Plan EIR (and thus, did not require preparation of a separate "project-level" EIR); and (2) none of the conditions requiring further review under Section 21166 were present. (See Guidelines §§ 15162, 15168; AR 8083; AR 16335.) Those conclusions were set forth and explained in an addendum to the Vision Plan EIR (the "Addendum"). (Guidelines § 15164; AR 8047-8170.) Notably absent, however, was a traffic study based on Vehicle Miles Travelled (VMT.)

The Gemdale project was approved by the City Planning Commission. The decision was appealed and, after continuances, the City Council, by a 3-2 vote, approved the project on July 14, 2021.

#### Petitioners' Contentions

Petitioner Irvine Business Owners for Sensible Development ("Petitioner" or "IBOSD") contends that Respondents City of Irvine and City Council of Irvine (collectively, the "City") should have developed a site-specific EIR instead of relying on the 10-year-old IBC Vision Plan Program EIR (the "2010 PEIR") to serve as the foundational CEQA document to evaluate the environmental effects of Master Plan Application No. 00790906-PMPC (the "MPA"), submitted by Real Party In Interest Gemdale 2400 Barranca Holdings, LLC ("Gemdale"). The Gemdale project purports to develop a 275,000 SF office complex and a seven-story 318,000 SF parking structure (collectively, the "Gemdale Project" or "Project"), as depicted in the 2020 Addendum to the 2010 PEIR (AR008075) and is the largest single transfer of development rights ("TDR") in the history of the IBC—i.e., 221,014 square feet ("SF") of development intensity rights ("DIVs")—from a site on the southernmost edge of the IBC to a site on the northeastern edge of the IBC.

Specifically, the Petitioner contends, *inter alia*, that the City was required to perform a VMT analysis before approving the addendum to the EIR and that the City's finding of no Greenhouse Gas (GHG) impacts were not supported by evidence.

#### Respondents and Real Party and Interests' (Gemdale's) Contentions.

The City and RPI contends that the City was not required under CEQA to prepare an updated EIR for the Gemdale Project. They contend that the Gemdale Project qualifies for a Class 32 categorical exemption ("Infill Exemption"), so no further rulings or analysis is required as to the Project's compliance with CEQA.

The City and RPI also contends that both traffic impacts and GHG impacts were adequately analyzed. With respect to traffic studies, although the City admits that no traffic analysis was done under VMT, it argues as of the date of the Planning Commission approval, it was not required to do so. They contend that Petitioners' appeal, which was ultimately heard after the date requiring a VMT study, did not extend the date of approval.

The City and RPI further contend that the decision made by the City to the effect that a EIR was not required should be determined by a substantial evidence standard and that the planning and zoning claims should be reviewed under an abuse of discretion standard.

## COURT RULINGS

### **The City erred in using an addendum to the 2010 EIR instead of preparing a new EIR**

Case law interpreting CEQA clearly holds that with narrow exception, an EIR must be prepared to examine the effects that a project has on the environment, and that the public be informed of the content of the EIR.

As set forth in *Sierra Club v. County of Fresno* (2018) 6 Cal.5<sup>th</sup> 502, 511-512:

"With narrow exception, CEQA requires an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment (citations) The basic purpose of an EIR is to "provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list way in which the significant effect of such a project might be minimized; and to indicate alternatives to such a project... CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action..."

In this case the City proceeded under CEQA section 21166, which allows a lead agency to proceed by addendum rather than an EIR. An addendum is not subject to public circulation and review. (CEQA Guideline 15164(d)).

Case law has noted that "... the absence of public review reflects the nature of an addendum as a document describing project revisions too insubstantial in their effect to require subsequent environmental review. (*Save Our Heritage Organization v. City of San Diego* (2018) 28 Cal.App.5<sup>th</sup> 656, 668.)

As pointed out by Petitioner,

By choosing to prepare an Addendum rather than an EIR, the City was able to circumvent four critically-important steps in the CEQA process that would have greatly informed and benefited the public and would have satisfied one of the key policies of CEQA by "demonstrat[ing] to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (CEQA

Guidelines, § 15003(d) [all references to CEQA Guidelines are to 14 Cal. Code Regs]). The four steps that the City purposely avoided were as follows:

- (1) Analyzing the pros and cons of reasonable project alternatives that would reduce the size, and lessen the environmental impacts, of the huge Gemdale Project, while still allowing for a very profitable development to be built;
- (2) Studying the feasible and cost-effective measures that could be implemented to mitigate or avoid the obvious traffic nightmares that will be caused by adding an estimated 3,800 daily vehicle trips to the already over-burdened side streets and cross streets serving the long-standing business owners in the area immediately adjacent to the Gemdale site;
- (3) Preparing and publicly circulating an EIR to address the site-specific impacts associated with the huge Gemdale project (e.g., air quality, greenhouse gas ("GHG")), aesthetics, light and glare, traffic safety hazards, vehicle miles travelled, land use compatibility conflicts, etc.); and
- (4) Providing the requisite public notice to surrounding business owners informing them about the Gemdale project and affording them the opportunity to exercise their statutory rights under CEQA to comment on whether the draft and final versions of the site-specific EIR adequately analyzed the significant environmental effects, reasonable project alternatives, and feasible mitigation measures relating to Gemdale's Project

(Petitioner's Brief, pp 15-16.)

The City's Resolution approving the Gemdale project relied explicitly on the 2010 Program EIR for the IBC Vision Plan (Section 4; AR 000195).

**No substantial evidence supports the City's findings of no substantial changes from the 2010 EIR and the Gemdale Project that supports its decision not to prepare a new EIR**

The history of the prior 2010 PEIR demonstrates that land use and specifically traffic impacts need to be addressed; they were, but in a fashion that designated this particular Transportation Analysis Zone as "fixed". As provided in the 2010 PEIR, 44,010 of office use and 32,862 SF of manufacturing use was supposed to remain "fixed" at the 2400 Barranca site through buildout of the IBC Vision Plan through 2030. Petitioner points out that the Gemdale project is a 275,000 SF office complex plus a 318,00 SF parking lot, which represents a 525% increase in total office space and a 670% increase in total SF.

As provided in the 2010 PEIR (AR002371, AR002416), for the entirety of TAZ 420, consisting of 15 different project sites spread over 27.5 gross acres, no more than **130,522 SF** of office intensity was supposed to be developed in that TAZ through buildout in 2030. However, notwithstanding what the 2010 PEIR expressly stated, Gemdale proposes to develop **275,000 SF** of office intensity on the 2400 Barranca site, itself, even though the site is less than five acres in size.

As stated in the 2010 PEIR (AR002420), of the 21,838 SF of zoning potential office use remaining at the 2400 Barranca site, the 2010 PEIR projected that only **13,000 SF** of additional office use would actually

be developed at the site through buildout in 2030. However, Gemdale is proposing to develop approximately **240,000 SF** of additional office intensity at the site, representing a whopping *1800% increase* in the amount of additional office use projected in the 2010 PEIR.

As provided in the 2010 PEIR (AR002328, AR002376), no more than 758 average daily trips (“ADT”) were projected in the 2010 PEIR to be generated by the office and manufacturing uses at the 2400 Barranca site through buildout in 2030. Gemdale intends to “exceed the IBC DIV budget for this site” (AR008893) by generating 3,787 “daily DIVs” (*id.*), representing an entirely unanticipated *400% increase* in the trip budget specified for that site in the 2010 PEIR.

### **The Gemdale Project is Inconsistent with the Prior Ruling of Judge Sunvold requiring an updated EIR in 2010 to Analyze and Disclose the Environmental Effects of Transferring Development Rights**

In 2008, the Orange County Superior Court determined that it was a violation of CEQA for the City to try to rely on a 16-year-old program EIR in approving a site-specific project because the project was not “contemplated by”: and was “inconsistent with” the program EIR, and, furthermore, the program EIR was “irrelevant” to the project (AR046905 p.7, lines 14, 18-23, 26-27.)

In May 2008, in the consolidated litigation brought by Allergan Pharmaceuticals and the Cities of Newport Beach and Tustin, the Hon. Stephen J. Sunvold, entered judgment (AR046928) against the City in a case similar to this one. (The court emphasizes that Judge Sunvold’s decision is not discussed herein for the purpose using it as *legal* unpublished authority—which would be improper-- but rather to delineate the history behind the ultimate reasons and the purpose of the relevant 2010 EIR herein.)

Judge Sunvold ordered the City to set aside its certification of a subsequent EIR (“SEIR”) for a proposed project in the IBC that was relying on a TDR to obtain the development rights necessary to replace a four-story office building with an 82-unit four-story condominium project and a parking garage (AR046901, p.3, lines 10-17).

One of the reasons articulated in Judge Sunvold’s Statement of Decision, filed May 23, 2008, as a basis for finding that the SEIR did not comply with CEQA was that **“The Project SEIR failed to adequately analyze and disclose the environmental effects that would be caused by transferring development rights from one area of the IBC to another.”** (AR046907, P9, lines 5-11, emphasis added.)

Similarly, in this case, despite an EIR which attempted to carefully set forth specific TAZs with many, including this one, having a “FIXED” site through 2030 in the 2010 EIR, the City argues that the prior 2010 EIR sufficiently addresses the transfer of development rights. The court disagrees.

The City went to great lengths in the 2010 PEIR to point out that, in evaluating the environmental effects of the buildout of the IBC Vision Plan, (1) no TDRs between TAZs would be assumed, (AR000035, ¶2.) and (2) any future projects that involved a TDR between TAZs would be inconsistent with the environmental analysis in the 2010 PEIR. (AR007066, Response No. 04-7.)

Both in the “Project Description” section of the 2010 PEIR (AR000518, ¶2) and in the City Council Resolution No. 10-79 certifying the 2010 PEIR (AR000035, ¶2), the City made it exceedingly clear that any project that was “not consistent with the Vision Plan land use model assumptions” would have to

undergo a "review" to determine if any conditions of approval could be imposed on the project, presumably to bring the project into compliance with the land use assumptions. If not, then another environmental review would have to be undertaken "in accordance with existing city policies and traffic study procedures." The exact language from the 2010 PEIR and Resolution 10-79 was as follows:

"Projects not consistent with the Vision Plan land use model assumptions will be reviewed in accordance with existing city policies and traffic study procedures to determine whether additional conditions of approval or environmental review are necessary." (*Id.*)

In this case, it is clear that the Gemdale Project is *per se* inconsistent with the 2010 PEIR and is far outside the scope of the 2010 PEIR due to the massive TDR that the project depends on for its very existence. Accordingly, the court finds it a violation of CEQA to use the 2010 PEIR to evaluate the environmental effects of the Gemdale Project. The City should have prepared a site-specific EIR for the Gemdale Project, instead of relying on the 2010 PEIR and preparing a 1200-page Addendum which was not circulated for public review and comment as an EIR would have been.

### **The Failure of the City to Analyze the Traffic Impact Under VMT Requires an Updated EIR**

The new CEQA Guidelines (Section 15064.3, Determining the Significance of Transportation Impacts) generally require that VMT-based metrics be used to evaluate transportation impacts beginning July 1, 2020. The City has admitted that after July 1, 2020 it would be required to measure transportation related CEQA impacts with VMT. (AR0029910). The City's traffic impact analysis is a level of service (LOS) type analysis. (AR008894). This was relied upon by the City to approve the access points along Barranca Parkway and Gates Avenue and potential impacts to the surrounding circulation system (AR000194).

New regulations generally apply when an action is taken under CEQA. (CEQA Guidelines 15007(b); 15002(e)). The City denied the appeal of the project and approved the Gemdale project on July 14, 2020, after the effective date of the new VMT regulations. (AR00003).

The City and RPI contend that under CEQA Guideline section 15007(c) documents need not be revised to conform to any new content requirements in guideline amendment when the document is sent out for public review. However, addendums to EIRS are not required to be sent out for public review. Moreover, the City's notice of hearing on the Gemdale Project did not even disclose the fact that an addendum was even going to be considered. (See *Defend Out Waterfront*, supra at 583-587) No starting date and ending date of any public review period was noticed, no written response to public comments were provided, and a fee of nearly \$17,000 was charged to one of Petitioners' members for the appeal and apparently was the only member allowed to appeal the ruling.

The City contends that the Petitioner's appeal and request for continuance delaying the final approval of the Gemdale Project to a date which required a VMT based traffic analysis should not extend the date of the approval beyond the Traffic Commission's recommendation or at the latest the initial appeal hearing date. It is agreed that the extension was for the purpose of continuing settlement discussions. There is no evidence that the actions of the Petitioners were to gain an advantage in this matter nor were any of their rights waived explicitly or implicitly. Settlement discussions were for the benefit of all parties



involved and all parties were represented throughout the proceedings. There is no basis supporting an argument that the petitioner should be estopped from arguing noncompliance with the new VMT traffic rules. The proceedings were not concluded until there was an approval by the City Council. They were not over until they were over.

Lastly, there is substantial evidence of a significant VMT impact. The City's Air Quality Analysis indicates that the Gemdale Project will result in 8,626,754 annual VMTs and 2,677.9 Daily VMTs. The City's own CEQA manual states that the screening level for VMTs is only 250 daily VMTs.

### **Case Law Requires the City to Perform a New EIR**

Petitioner argues, and the Court adopts, the three arguments separately and disjunctively, three pathways which require the City to prepare a new EIR for this project they are:

First, as stated in *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 960 ("*San Mateo Gardens*"), "If the subsequent project is not consistent with the program or plan, it is treated as a new project and must be fully analyzed in a project [EIR]—or another tiered EIR if it may have a significant effect on the environment." (*Friends of Mammoth*, at pp. 528–529.) (Emphasis added.) The Gemdale Project was not consistent with the IBC Vision Plan and thus a new project EIR should have been prepared.

Second, as stated in *Martis Camp Community Assn. v. County of Placer* (2020) 53 Cal.App.5th 569, 604:

"If one of the conditions described in section 21166 applies, the lead agency must prepare either a subsequent EIR or a supplemental EIR. If major changes are required to make the previous EIR adequate, the agency must prepare a subsequent EIR. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1199–1200.) If only minor additions or changes are necessary to make the original EIR adequate, the agency may prepare a supplement to the EIR. (*Id.* at p. 1200; see also CEQA Guidelines, § 15163, subd. (a).) An addendum to an EIR is appropriate to document an agency's determination that a subsequent EIR or a supplemental EIR is not required. (*San Mateo Gardens, supra*, 1 Cal.5th at p. 946; CEQA Guidelines, § 15164, subd. (a).)" (Emphasis added.)

As demonstrated below, the conditions set forth in CEQA section 21166 and Guidelines sections 15162 and 15163 that would have required the preparation of a subsequent or supplemental EIR were clearly satisfied in this case because, among other things, the Gemdale project (a) would cause significant new impacts relating to GHG emissions, vehicle miles travelled ("VMT"), aesthetics (including light and glare), land use compatibility, etc., that would require major revisions to the 2010 PEIR; (b) would involve substantial changes to the circumstances under which the project is undertaken (i.e., permitting a TDR to occur between TAZs) that would require major revisions to the 2010 PEIR; and (c) would involve new, previously unknown information, not only regarding the significant impacts of

the Gemdale Project, but also regarding traffic safety mitigation measures and reasonable project alternatives that were proposed to, but rejected by, Gemdale.

Third, as stated in *San Mateo Gardens, supra*, 1 Cal.5th at 960:

“The *Sierra Club* court concluded that when a program EIR is employed, if a later proposal is not ‘either the same as or within the scope of the project ... described in the program EIR,’ then review of the proposal is not governed by section 21166’s deferential substantial evidence standard. (*Sierra Club, supra*, 6 Cal.App.4th at p. 1321, citing CEQA Guidelines, § 15168, subd. (c)(5).) Instead, under Public Resources Code section 21094, the agency is required to apply a more exacting standard to determine whether the later project might cause significant environmental effects that were not fully examined in the initial program EIR. (*Sierra Club*, at p. 1321; Pub. Resources Code, § 21094, subd. (c).)” (Emphasis added.)

As explained previously, since the massive TDR underlying the Gemdale Project was clearly outside the scope of the IBC Vision Plan, then the standard to be applied under CEQA section 21094 in determining whether a site-specific EIR should be prepared is whether the Gemdale Project “may” cause significant effects on the environment and the “fair argument” test applies in making that determination.

**The Class 32 categorical exemption (“Infill Exemption”) Does not Apply Because Traffic Impacts to the Project Were Not Analyzed Using the Vehicle Miles Travelled (VMT) Method**

As indicated above, the City and RPI contends that the Gemdale Project qualifies for a Class 32 categorical exemption (“Infill Exemption”). If this is so, all parties agree that no further rulings or analysis is required as to the Project’s compliance with CEQA.

There is also agreement on the requirements for the Class 32 exemption to apply. As set forth in the City’s Opposition Brief at pps. 31 to 35, the requirements under Guideline 15332 are that:

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulation
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses
- (c) The project site has no value, as habitat for endangered, rare or threatened species
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality
- (e) The site can be adequately served by all required utilities and public services.

Petitioner contends, inter alia, that (1) the Project’s Greenhouse Gas Impacts and failure to adequately discuss and disclose those impacts requires reversal of the addendum and project approvals (Petitioner’s Brief pp 46-57) and that (2) the Project would Result in New Significant Traffic Impacts . Specifically, the contention that the City was required and did not analyze the traffic impacts under a Vehicle Miles Traveled (VMT) analysis (3) the change in aesthetics were not sufficiently analyzed.

Petitioner also contends that under 14 CCR 15300.2(c) A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

The analysis here with respect to determining whether the approval of the project results in any "significant effects" relating to traffic, noise, air quality or water quality is similar, to those discussed above in the Court's analysis in determining whether there has been any "substantial changes" from the 2010 EIR to the Gemdale Project which requires an EIR. The Court answers this question in the affirmative with respect to traffic safety impacts and land use and planning impacts as discussed above.

Petitioner points out that again, the City resolution relies upon a traffic study that does not comply with the law and fails to use VMT. This fact the Court finds undisputed. The City should prepare a site-specific EIR for the Gemdale Project addressing these issues.

The Court expresses no opinion on the arguments relating to GHG, aesthetics, glare and shadow, or issues not otherwise expressly ruled upon.

The Court hereby grants the Petitioner's Writ.



Dated: August 25, 2021

Kirk H. Nakamura

Judge of the Superior Court\*

\*In oral argument Petitioner counsel identified the Judge as a Planning Commissioner. This is untrue and would be a violation of Judicial Canon 4C(1). Judge Nakamura resigned as Planning Commissioner of the City of Yorba Linda before his appointment to the bench in November of 2001.