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Fourth District Holds Addendum To 2010 Program EIR For Irvine Business Complex Vision Plan Violated CEQA Because Conclusion That Large Infill Project's GHG Emissions Would Be Less Than Significant Lacked Substantial Evidence And Project Was Not Exempt

By Arthur F. Coon on February 21, 2023

In a published opinion filed February 6, 2023, the Fourth District Court of Appeal (Div. 3) affirmed a judgment setting aside an addendum to a 2010 program EIR (PEIR) and accompanying approvals for a 275,000-square foot office complex on a 4.95-acre parcel (the "Gemdale project" or "project") within the 2,800-acre Irvine Business Complex (IBC). *IBC Business Owners for Sensible Development v. City of Irvine (Gemdale 2400 Barranca Holdings, LLC, Real Party in Interest*) (2023) ___ Cal.App.5th ___. The Court held that the City's approval of the Addendum was improper because substantial evidence did not support the conclusion that the project's GHG emissions were within the scope of the PEIR and would have less than significant impacts; further, the project was unusually large and dense due to its utilization of transfers of development rights (TDRs) of over 220,000 square feet – by far the largest ever approved in the IBC's history – and thus could not qualify for the Class 32 infill exemption due to the unusual circumstances exception.

Factual and Procedural Background

The 2,800-acre IBC, adjacent to the John Wayne Airport, was developed in the 1970s as a regional economic and employment base; it is currently designated mostly for office, industrial, and warehouse uses, with scattered high-density residential uses (i.e., mid-to-high-rise condominiums). The City adopted the IBC Vision Plan and Mixed Use Overlay Zoning Code Planning Process (Vision Plan) as a 2010 General Plan amendment, and certified the 2010 PEIR as its CEQA compliance for that action. The Vision Plan sought to create a mixed-use community with urban neighborhoods that would provide more housing to address demand. The PEIR analyzed the environmental effects of total buildout of the Vision Plan, and "was expressly designed to provide environmental clearance for future site-specific

development projects within the IBC." Future review of such projects would determine what, if any, further CEQA document would be required for their approval.

The Vision Plan capped full IBC buildout development, planned to occur post-2030, at 17,038 residential units and 48,787,662 square feet of non-residential development, assigning each parcel in the IBC a "development budget," referred to as a "development intensity value" or "DIV," with DIV allocations tracked in a database. Maximum development intensity allocations for each site are expressed in terms of traffic generation, i.e., "AM and PM peak hours and average automobile DIV." The City can approve TDRs between parcels within the IBC, allowing unused DIV budget allocations to be moved from one site to another without increasing the IBC's total, overall development intensity budget. The City only approves TDR applications if the project will not adversely affect infrastructure and City services and not cause adverse impact on the surrounding traffic circulation system.

The 2010 PEIR made numerous assumptions about existing conditions and how future development would proceed in the IBC; divided the IBC into about 150 Traffic Analysis Zones; and developed a land use mix and analyzed environmental impacts for each zone based on the mix. The PEIR only assumed TDRs for projects that had applications pending when it was prepared. It contemplated that additional TDRs not accounted for in the PEIR's land use assumptions were possible in the future and stated that additional traffic analysis and CEQA review would be necessary if and when the same were proposed.

The PEIR determined most of the Vision Plan's environmental effects would be insignificant or less-than-significant with mitigation, but that Air Quality, Noise, Land Use Planning, and Traffic impacts would remain significant and unavoidable even with adoption of all feasible mitigation measures, and the City adopted a statement of overriding considerations as to those impacts.

The proposed Gemdale project would develop the 4.95-acre parcel in the IBC's "zone 420" from its existing 69,780-square foot two-story office/warehouse building with surface parking into a 275,000-square foot office complex with a 5-story office building, a 6-story office building, and a 7-story parking structure. To do so, it required TDRs from a sending site on the other side of the IBC that were equivalent to 287 AM peak-hour, 305 PM peak-hour, and 3,043 daily DIVs – which were the equivalent of 221,014 square feet of office space and nearly double the largest approved TDR in the IBC's history.

While City's staff initially believed the Gemdale project could be CEQA-exempt, it prepared an addendum concluding its impacts were adequately analyzed in and mitigated pursuant to the PEIR such that no further environmental review was required; City's Planning Commission, and its Council on appeal, found the addendum adequate and that no subsequent or supplemental EIR was required, and approved the project. In so finding, the City concluded based on a 2019 Traffic Impact Analysis that, with inclusion of its design features, the project would have no adverse impact on the surrounding circulation system.

The trial court granted Petitioner's petition for writ of mandate ordering the City to set aside the project approvals, the TDR, the addendum, and any CEQA exemption finding. The City and real party Gemdale appealed and the Court of Appeal affirmed.

The Court of Appeal's Opinion

Based on its conclusions that the Project's GHG emissions were not adequately analyzed in the 2010 PEIR and that the project was not categorically exempt, the Court held the addendum was improper and affirmed the judgment and writ setting it aside. However, the Court rejected petitioner's arguments as to the standard of review, the applicability of mandatory VMT analysis, and whether the Project's traffic impacts were adequately analyzed.

General Principles of Program EIRs and The Standard of Review for "Within the Scope" Determinations

The Court of Appeal found that the "first primary question raised by th[e] appeal… [was] whether the Gemdale project is consistent with the 2010 PEIR" and that the question entailed two sub-issues, i.e., (1) did substantial evidence support the finding of no significant traffic impacts?; and (2) did substantial evidence show the project's GHG emissions are within the scope of the 2010 PEIR? The Court answered "yes" to the first sub-issue and "no" to the second, but first reviewed general principles governing the use of program EIRs and the standard of review.

Noting that a program EIR allows an agency to analyze a series of related actions that can be characterized as one large project, and permits consideration of broad policy alternatives and program-wide mitigation measures at an early stage (thus allowing greater flexibility to deal with basic problems or cumulative impacts), the Court observed such EIRs are routinely used to avoid preparing multiple EIRs for a series of actions. Thus, if a later site-specific activity will not create effects or require mitigation not discussed in the program EIR, no other site-specific document need be prepared.

Per the Court: "When determining whether later activities are within the scope of a *program* EIR, the [CEQA] Guidelines adopt an approach used to determine whether a *project* EIR requires a subsequent EIR." (Citing CEQA Guidelines, § 15168(c)(2) ["[i]f the agency finds that pursuant to Section 15162, no subsequent EIR would be required, [it] can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document [is] required."], and § 15168(c)(4) [recommending use of written checklist "to determine whether the environmental effects of [site-specific activities are] within the scope of the program EIR."].) In turn, an addendum to a previously certified EIR is properly prepared for minor technical changes or additions to a project, where some EIR changes or additions are necessary, but none of section 15162's conditions calling for a subsequent EIR have occurred.

Where the later site-specific activity would have effects not analyzed in the prior program EIR, tiered review – using an initial study and a later EIR or negative declaration – is the appropriate CEQA approach.

The appropriate standard of review for reviewing an agency's determination that a subsequent activity is within the scope of a program EIR is the "substantial evidence," not the "fair argument," standard. (Citing, inter alia, *Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 174, my 12/5/16 post on which can be found *here*.) This deferential standard of review requires all conflicts in the evidence to be resolved and all reasonable inferences indulged to support the agency's decision not to require a subsequent EIR because the activity's effects were adequately addressed in the program EIR.

VMT Analysis Was Not Required

In applying the above standards to the first sub-issue, the Court rejected petitioner's argument that City's CEQA review of the project was inadequate because it failed to perform a mandatory vehicle miles traveled (VMT) analysis. The addendum did not conduct a VMT analysis, but instead employed the same level of service (LOS) methodology employed by the 2010 PEIR to analyze and conclude the Gemdale project's traffic impacts were within the scope of the PEIR and would not be significant. The Court held these conclusions were supported by substantial evidence and that no VMT analysis was required as a matter of law. It so held despite the facts that the CEQA VMT Guideline (§ 15064.3(c)) mandated VMT

analysis on a Statewide basis effective as of July 1, 2020, and the addendum here was not finally approved by the City until July 14, 2020.

In reaching its conclusion, the Court of Appeal analyzed the VMT statute and the language of related and relevant CEQA guidelines and provided useful clarification on how that new VMT law applies in the context of an ongoing CEQA process. Public Resources Code § 21099, enacted in 2013, required OPR to revise the CEQA Guidelines to recommend new transportation impact metrics, and provided that upon certification of the revised guidelines, impacts measured by LOS (and similar traffic delay or congestion-based metrics) would no longer be considered significant environmental impacts under CEQA. In 2018, Guidelines § 15064.3 was adopted and it established VMT as the most appropriate transportation impact metric, provided criteria for VMT analysis, and specified that beginning on July 1, 2020, its provisions would apply statewide. Another relevant section of the Guidelines, § 15007(b), provides that "[a]mendments to the guidelines apply prospectively only" and that "[n]ew requirements in amendments *will apply to steps in the CEQA process not yet undertaken* by the date when agencies must comply with the amendments." (CEQA Guidelines, § 15007(b), emph. added.) Because the City did not finally approve the addendum until July 14, 2020, petitioner argued that document's final review was "not yet undertaken" when the VMT Guideline became effective statewide on July 1, 2020, and thus City was required to comply and perform a VMT analysis.

But the Court rejected petitioner's reasoning, and specifically the unduly narrow meaning petitioner ascribed to the phrase "steps in the CEQA process." Relying on precedent describing CEQA as a "three-step process" – i.e., (1) analysis of whether a proposed action is a "project," (2) review for exemptions and initial study/negative declarations, and (3) preparation of an EIR – the Court held that a "step" in the CEQA process covers a broader range of activities than argued by petitioner. More specifically, it held that a "step" in the CEQA process covers an entire review procedure, e.g., preparation of an EIR. Thus, per the Court: "Clearly, final approval of an addendum itself does not constitute its own CEQA step. At the very least, the CEQA step at issue here is the entire addendum process from start to finish, meaning we must evaluate whether that process was "undertaken" before the VMT Guideline became applicable on July 1, 2020." Employing an ordinary dictionary definition of "undertake" as meaning "to do or begin to do something, especially something that will take a long time or be difficult," the Court had no trouble concluding that the City's addendum process began well before the VMT Guideline's July 1, 2020 effective date because email correspondence dating back to October 2019 discussed the addendum and the City's 400-page traffic study in connection with it was prepared in December 2019: "Thus, the City did not have to comply with the VMT Guideline because the addendum process had already been "undertaken" by the time it became applicable." The Court noted this interpretation also avoided the capricious application of the new VMT requirements that could result from petitioner's interpretation, under which a mere procedural delay in a City hearing on final addendum approval could require a VMT analysis not otherwise required.

Having thus settled the legal issue whether the VMT requirement even applied, and holding it did not, the Court went on to hold the City's traffic findings based on LOS analysis were supported by substantial evidence, and that lack of a VMT analysis provided no ground to require additional CEQA review of traffic impacts.

"Beyond Common Knowledge": City's Findings That Project's GHG Emissions Were Within 2010 PEIR's Scope Lacked Substantial Evidence Support

After briefly reviewing the origin and background of CEQA GHG analysis, the Court noted that the CEQA Guidelines allow an agency to analyze and mitigate the significant effects of GHG emissions at a programmatic level, such as through a program EIR (citing Guidelines, § 15183.5(a)), after the adoption

of which it can assess the significance of an individual project's GHG effects by analyzing the project's consistency with the broader plan. (Citing *McCann v. City of San Diego* (2021) 70 Cal.App.5th 51, 92, my 10/21/21 post on which can be found *here*.)

The 2010 PEIR analyzed the IBC's 2008 GHG emissions as 909,352 metric tons (MTons) per year, with 683,499 MTons being from transportation and 225,853 MTons from nontransportation sources, and established a threshold of significance under the Vision Plan of "net zero" emissions, meaning that to be considered less than significant, GHG emissions would have to remain equal to or less than 909,352 MTons through full buildout of the IBC post-2030. It identified City, State and Federal plans, programs or policies (PPPs), project design features (PDFs) and other mitigation measures that if implemented and met it concluded would achieve the net zero emissions goal, and, in fact, achieve a 17% reduction below the 2008 amount of GHG emissions; it thus found the Vision Plan's impact to global climate change would be less than significant.

The addendum found the project's GHG emissions would be less than significant because (1) they would be consistent with the PEIR, and (2) they would comply with draft thresholds of the South Coast Air Quality Management District (SCAQMD).

The Court rejected the addendum's first conclusion as unsupported by substantial evidence. It reasoned that even if the project incorporated all mitigation measures, its large-scale nature, combined with the fact that the PEIR did not analyze the effects of TDRs as GHG emissions, cast doubt on whether the project was consistent with achieving the PDEIR's net zero emissions target. The Court criticized the addendum for not addressing the project's impact on the "net zero emissions at full buildout" threshold and not even quantifying the amount of GHG emissions the project will produce. Per the Court: "To demonstrate the Gemdale project is within the scope of the 2010 PEIR's emissions plan, the City must analyze the Gemdale project's emissions within the context of present and future development in the IBC. The analysis must show its emissions will not prevent the IBC from achieving its goal of net zero emissions at full buildout."

The Court rejected the City's position that consistency with the 2010 PEIR was demonstrated because the project merely shifted development intensity allowed under the Vision Plan between sites with no change in overall development intensity. Per the Court: "It is unclear from the record whether TDRs simply shift the source of [GHG] emissions or may impact total emissions…. [w]e have not been cited anything in the record to support this assertion [that the TDR will not increase total emissions], which is beyond common knowledge."

The Court bolstered these conclusions by noting there was contrary evidence in the record – showing the project's emissions might have significant environmental effects – because draft documents indicated the City performed a study showing the project would emit 5,563 MTons of GHGs annually, a total that would be four times greater than SCAQMD's draft guidance screening value of 1,400 MTons annually for commercial land uses. Further, an earlier version of the addendum concluded that, using the SCAQMD screening value as a significance threshold, it was "highly unlikely [that] any level of mitigation measures could reduce… [its] annual operational [GHG] emissions [– which were mostly from mobile sources –] to a less-than-significant level." In light of this, the Court found it was unclear, and that the addendum had failed to show, that the IBC as a whole would remain on track to achieve its net zero goal.

The Project Was Not Categorically Exempt Under The Class 32 Infill Exemption

The Court's final holding was its rejection, as a matter of law, of the City's argument that the project was categorically exempt from CEQA under the Guidelines' infill exemption. (Guidelines, § 15332.) It found it did not need to examine all the exemption's elements because it found applicable section 15300.2(c)'s "unusual circumstances" exception, which provides that "[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."

As explained in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 (my 3/3/15 post on which can be found *here*), this exception has two elements that are reviewed under different standards of review. First, the project must have some feature, such as size or location, that distinguishes it from others in the exempt class (a determination by the lead agency that is deferentially reviewed for substantial evidence). Second, there must be a reasonable possibility of a significant effect on the environment *due to* the unusual circumstance (a determination reviewed under the nondeferential, low-threshold "fair argument" standard).

Here, while the City made no express findings on either element to explain why it believed the exception did not apply, its invocation of the exemption constituted an implied finding that no exceptions existed. (Citing, *inter alia, San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1022-1023, my 6/2/14 post on which can be found *here*.) However, an agency's reliance on implied findings constrains a court's ability to affirm since it cannot know whether the agency found against the project opponent on the first element, the second, or both; a court must therefore assume the agency found there were unusual circumstances *if* substantial evidence of such exists, but concluded under the exception's second element that they did not support a fair argument of a reasonable possibility of a significant environmental effect. (Citing *Respect Life South San Francisco v. City of South San Francisco* (2017) 15 Cal.App.5th 449, 457-458, my 9/21/17 post on which can be found *here*.)

Applying these standards, the Court had no trouble concluding that the project's massive size and density in the context of the IBC constituted substantial evidence of unusual circumstances: as visually depicted in renderings included in the Court's opinion, the "project would tower over the neighboring buildings" and it would "more than double the amount of office space originally allocated to *all* of zone 420." It would also nearly double the second largest approved TDR in the Vision Plan's history, and increase the site's floor area ratio (FAR) from 0.25 to 1.03, the largest FAR transfer in the Vision Plan's history by a significant quantum. Per the Court: "Given the size of the Gemdale project, the scale of the TDR that was required to make it possible, and the resulting density, there is sufficient evidence in the record to support a finding of unusual circumstances."

Following this first prong finding, it was like the proverbial "shooting fish in a barrel" for the Court to hold there was evidence supporting a fair argument of a reasonable possibility the project may have a significant effect on the environment attributable to the unusual circumstances. It looked no further than the previously mentioned evidence showing: the project's annual operational GHG emissions greatly exceeded SCAQMD's Tier 3 screening threshold; City's consultants' admissions in internal emails that this impact would be considered significant and unavoidable; and the draft addendum finding it highly unlikely that any level of mitigation measures could reduce this effect to a less-than-significant level.

Conclusions and Implications

The Opinion is a mixed bag for CEQA practitioners and the regulated community. The Court's analysis of when new Guidelines requirements – in this case, the paradigm-shifting VMT analysis requirement that became effective on July 1, 2020 – can be applied to "steps" in the CEQA process provides an important interpretation and clarification that will be useful to CEQA consultants and practitioners. Its explanation of the functions of program EIRs and the required agency analysis for determining a later site-specific project's consistency with them, and the standard of judicial review (substantial evidence) applicable to such determinations, are also helpful contributions to the CEQA case law. The opinion's review of the operation of the unusual circumstances exception to categorical exemptions in the context of implied agency findings, and the different standards of review that apply to each of its two elements, also provides a helpful refresher to CEQA practitioners in a complex area of the law (as well as an implicit practical reminder to agencies to make express findings on the exception's elements in order to maximize the chances of upholding an exemption in the event of a judicial challenge).

Less clear to me is the value (or validity) of the Court's reasoning and analysis with respect to whether the project's GHG emissions were consistent with those contemplated and analyzed in the 2010 PEIR. On its face, the City's argument that the Vision Plan's authorized TDRs merely allow a shift of already analyzed development intensity (and concomitant impacts) from one site to another within the IBC, with no overall increase in intensity or impacts, appears to be a reasonable position, but the Court just wasn't buying it. To me, the Court's reasons for rejecting it – i.e., the PEIR didn't analyze TDRs' impacts on GHGs, the project was unusually large and dense for the site, the project didn't meet draft SCAQMD screening criteria for stand-alone commercial projects and its impacts would likely be considered significant and unavoidable using those criteria as a threshold of significance, etc. – themselves didn't necessarily clearly and logically relate to the issue whether the PEIR already analyzed and accounted for the GHGs at issue in the context of its "net zero emissions at post-2030 buildout" threshold. But obviously the Court was unpersuaded that the required substantial evidence connected all the GHG dots, and the record contained what could be viewed by a court as damning evidence that, analyzed under other methodologies, the project's GHG emissions impacts would be significant and unavoidable; while it is not the court's role to weigh conflicting substantial evidence in this context, perhaps these "bad facts" increased the Court's "gut level" discomfort with a PEIR consistency analysis that was never explained to its satisfaction, and/or which it never fully understood. In any event, the Court obviously perceived a fatal analytic "gap," between the record evidence and the City's PEIR consistency conclusion, very reminiscent of the lack of substantial evidence and cogent explanation found by the Supreme Court in its landmark Newhall Ranch GHG decision, my 12/2/15 post on which can be found *here*.

One gets the sense that the "devil is in the details" here, and that all the relevant details are not fully explicated in the Opinion. Still, the Court also pointedly emphasizes the narrowness of its holding, stating in its Opinion's concluding Disposition section that "we do not hold that the City must perform additional environmental review or prepare a new EIR or a negative declaration. Nor does our ruling require the City to evaluate the Gemdale project's greenhouse gas emissions under any specific approach. Our ruling is limited: the City erred in approving the addendum, the Gemdale project, and the required TDR because it incorrectly determined the Gemdale project's greenhouse gas emissions would have less than significant environmental effects." The Court further added that "we express no opinion on the specific method the City should use to evaluate the significance of the Gemdale project's greenhouse gas emissions (e.g., consistency with the 2010 PEIR, the District's draft guidance, or some other metric). We leave it in City's discretion to choose an allowable method of analysis under CEQA."

Hence, the Opinion's possible errors are somewhat ameliorated, and the distinct possibility remains that the City's conclusion regarding GHGs was actually correct, and that its fatal CEQA error here was simply

not “showing its work” by cogently explaining or pointing to the substantial evidence that supported its conclusion. Whether the Court improperly weighed conflicting substantial evidence in the record in the course of reaching its GHG analysis conclusions is still at least debatable. But, again, the “devil” would appear to lie in the undisclosed “details,” with just two things appearing relatively certain: (1) the City’s project approvals and any exemption are set aside; and (2) the City’s consultants will be flyspecking the details of the GHG analysis if and when the project or a modified version of it again comes before the City for approval.

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