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GOLDEN DOOR PROPERTIES, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

GOLDEN DOOR PROPERTIES, LLC, a California limited liability company, and DOES 1-10, inclusive,

Petitioner and Plaintiff,

v.

COUNTY OF SAN DIEGO, a political subdivision of the State of California, and DOES 11-20, inclusive,

Respondent and Defendant.

CASE NO. 37-2018-00013324-CU-TT-CTL

Related Cases:
No. 37-2012-101054, Sierra Club v. COSD
No. 37-2016-037402, Golden Door v. COSD
No. 37-2018-014081, Sierra Club v. COSD

Hon. Timothy Taylor, Dept. C-72

PETITIONER/PLAINTIFF GOLDEN DOOR PROPERTIES, LLC'S NOTICE OF APPLICATION AND APPLICATION FOR STAY, OR IN THE ALTERNATIVE, MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[IMAGED FILE]

[Pub. Res Code § 21667.8, subd. (f)]

Date Filed: March 14, 2018
Hearing Date: September 14, 2018
Time: 1:30 p.m.

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD,

PLEASE TAKE NOTICE that on September 14, 2018 at 1:30 p.m., in Department C-72 of the San Diego County Superior Court at 330 West Broadway, San Diego, California, Petitioner/Plaintiff Golden Door Properties, LLC will and does hereby does apply to the Court, the Honorable Timothy Taylor, for an order granting Plaintiff's application for a stay order, or in the alternative, will and hereby does move the Court for an order issuing a preliminary injunction (the "Motion").

The Motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the Declaration of Taiga Takahashi, the exhibits attached thereto, the [Proposed] Order granting Plaintiff's motion for a stay order, the complete files and records in this action, and such oral argument as the Court may consider in deciding this Motion.

Dated: August 22, 2018

Respectfully submitted,

LATHAM & WATKINS LLP

By /s/ Taiga Takahashi
Taiga Takahashi
Attorneys for Petitioner and Plaintiff
GOLDEN DOOR PROPERTIES, LLC, a
California limited liability company

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I. INTRODUCTION

The Golden Door Properties, LLC ("Golden Door") seeks to set aside the Respondent and Defendant County of San Diego's ("County") adoption of the 2018 Climate Action Plan ("CAP"). The County made a serious and prejudicial error in adopting the new CAP—in short, by adopting a program for carbon offsets that would allow in-process and future General Plan amendment projects to ***increase*** GHG emissions within the County, in exchange for the purchase of carbon offset credits applicable to another location in California, the United States, or the world, without considering requirements of the General Plan (even as amended) or undertaking the appropriate analysis to understand the effect of this program. The approvals under these circumstances violated the General Plan's requirements to ***reduce*** GHG emissions within the County and violated CEQA. This policy choice to allow increased local GHG emissions in exchange for emissions reductions in other locations across the State, nation, and world was not required by the County's 2011 General Plan or General Plan environmental impact report. It is a new proposal that was not considered as part of the County's previous attempt to approve a CAP (which was set aside as a result of litigation) and has been included with the 2018 CAP without any analysis of this program's own environmental impacts. As such, in violation of CEQA, the County failed to produce an adequate informational document that disclosed and analyzed the potential environmental impacts of this new offset program. The Golden Door seeks the Court's order to impose a stay, or in the alternative, to issue a preliminary injunction, prohibiting the County from using its new offset proposal for approvals of pending General Plan amendments until resolution of this litigation. A stay is appropriate because the Golden Door is likely to succeed on the merits, and the public will not be harmed by prohibiting the County from using the program in any pending General Plan amendments.

II. BACKGROUND

A. The County's 2011 General Plan and Subsequent 2012 CAP

In 2011, the County approved an update to its General Plan ("General Plan Update" or "2011 Update"), which took approximately ten years to complete, involved substantial input

from numerous stakeholders and citizens groups, and cost approximately $18 million in taxpayer money. In the 2011 Update EIR, the County concluded that the GHG and climate change impacts from the County's operations and from community sources were "potentially significant" with regard to AB 32 compliance. (Declaration of Taiga Takahashi ("Takahashi Dec.") ¶ 2, Exhibit A, p. 14.) The 2011 Update EIR included mitigation measures for GHG and climate change impacts. In particular, Mitigation Measure CC-1.2 required the County to:

> Prepare a County Climate Change Action Plan with an update[d] baseline inventory of greenhouse gas emissions from all sources, more detailed greenhouse gas emissions reduction targets and deadlines; and a comprehensive and enforceable GHG emissions reduction measures that will achieve a 17% reduction in emissions from County operations from 2006 by 2020 and a 9% reduction in community emissions between 2006 and 2020.

The County's General Plan Update also included provisions requiring the certification of a CAP and related thresholds of significance. Policy COS-20.1 required preparation of a CAP. The County's General Plan Implementation Plan required preparation of a CAP and related thresholds of significance. Further, the General Plan's Mitigation Monitoring and Reporting Program ("MMRP"), approved by the County along with the General Plan Update, also includes provisions requiring the County to prepare a CAP (6.9.1.A), work with SANDAG to achieve regional GHG reduction goals (6.9.1.C), reduce vehicle trips (6.9.2), and revise its thresholds of significance based on its CAP (6.9.3.A). (Takahashi Dec. ¶ 3, Exhibit B, p. 17.)

Pursuant to these mitigation measures, the County developed and adopted a CAP in 2012 (the "2012 CAP"), intended to serve as a mitigation measure to otherwise offset significant adverse impacts resulting from the County's General Plan Update. The 2012 CAP was ultimately set aside by the Superior Court. The Court of Appeal affirmed the judgment in *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152.

B. The 2018 CAP Project

1. CAP Approval Process

On February 14, 2018, the County adopted a CAP and related CEQA significance thresholds pursuant to the Superior Court's Supplemental Writ of Mandate (see Takahashi Dec. ¶ 4, Exhibit C, pp. 24-26 [Items 1.2.1 through 1.2., collectively, the ("CAP Project")]; see also ¶ 5,

Exhibit D.), and also included significant amendments to the County's General Plan (*id.*, ¶ 4, Exhibit C, p. 26) and authorizations related to grant funding and further study (*ibid.*). Pursuant to CEQA, the County prepared and certified a SEIR for the CAP Project. The County's consideration and adoption of the 2018 CAP was ostensibly "[i]n response to the court's decision [in Case No. 37-2012-00101054-CU-TT-CTL and *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152] and considering changes that have occurred since preparation of the 2012 CAP …." (*id.*, ¶ 6, Exhibit E, p. 232.) As part of the ultimate approvals for the 2018 CAP Project, the County amended MM CC-1.2, which the Superior Court and Court of Appeal previously found to be an enforceable mitigation measure and General Plan Goal COS-20 and General Policy COS-20.1 as part of the CAP Project approvals. These amendments incorporated a requirement for "the reduction of community-wide (i.e., unincorporated County)" GHG emissions. (*Id.*, ¶ 7, Exhibit F, p. 238.) The Golden Door and many interested community members submitted numerous comment letters regarding the sufficiency of the SEIR and 2018 CAP prior to the Board of Supervisors' certification.

2. Mitigation Measure M-GHG-1

In certifying the final SEIR for the CAP Project, the County found that the project's potential impact regarding GHG emissions was potentially significant, as in-process and future applications for General Plan amendments could alter the General Plan's underlying emissions forecasts. In recognition of this potentially significant impact, the County devised "CAP Mitigation Measure M-GHG-1," in an attempt to "ensure that CAP emissions forecasts are not substantially altered such that attainment of GHG reduction targets could not be achieved." (Takahashi Dec., ¶ 8, Exhibit G, p. 279.) CAP Mitigation Measure M-GHG-1 offered two pathways to mitigating this potentially significant environmental impact for pending and future General Plan amendments: the "no net increase" option; and the "net zero" option. In general, the "no net increase" option required applicants to demonstrate that the increase in GHG emissions for the project would be no greater than GHG emissions forecasted for the project area in the 2011 General Plan Update; the "net zero" option similarly required applicants to demonstrate that the increase in GHG emissions for the project would be no greater than GHG

emissions over existing baseline conditions. For either option, CAP Mitigation Measure M-GHG-1 permitted applicants to demonstrate "no net increase" or "net zero" through on-site and off-site project design features and mitigation measures. As one option, an applicant could purchase carbon offset credits to be used in the accounting for a project's net GHG emissions: "Offsite mitigation, including purchase of carbon offset credits, would be allowed after all feasible on-site design features and mitigation measures have been incorporated." (*Ibid.*) As explained in the CAP Project's SEIR, "A carbon offset project is created when a specific action is taken that reduces, avoids, or sequesters GHG emissions." (Takahashi Dec., ¶ 8, Exhibit G, p. 265.) In short, a project applicant could purchase a commitment from another third party that the third party would reduce GHG emissions somewhere else, so that the project applicant could count this as a reduction in the project's accounting of GHG emissions from the project itself.

Despite the fact that the County adopted, concurrently with the 2018 CAP, amendments to the General Plan that required "the reduction of community-wide (i.e., unincorporated County)" GHG emissions, CAP Mitigation Measure M-GHG-1 departed from this clear directive. One of the key features of CAP Mitigation Measure M-GHG-1 was the "geographic priorities" provision for GHG mitigation, which allowed "credit" for GHG reductions that took place outside of the area of the unincorporated County, including within the County but inside incorporated cities not under the land use jurisdiction of the County (but which may be subject to a different CAP adopted by another jurisdiction), and throughout the state, nation, and world, so long as the Director of Planning is satisfied. (Takahashi Dec., ¶ 8, Exhibit G, p. 279.) To the extent that CAP Mitigation Measure M-GHG-1's "geographic priorities for GHG reduction features" required carbon offsets to result in GHG reductions within the County, this requirement is illusory. According to the SEIR, only one project (a reforestation project) within San Diego County is included on the approved registries for offset projects. (*Id.*, ¶ 9, Exhibit H, p. 340.) At this time, however, credits are not available from that project, because the trees have not reached maturity. (*Ibid.*) Based on this novel approach, the County determined that, "With implementation of the above mitigation measure [CAP Mitigation Measure M-GHG-1], the incremental increase in GHG emissions from in-process or future GPAs would be offset such

that CAP emission forecasts would not be affected. Impacts would be reduced to a **less than considerable level**." (*Id*., ¶ 8, Exhibit G, p. 281.)

III. LEGAL STANDARD

A. Stay

Code of Civil Procedure section 1094.5(g) states that: "[T]he court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. … However, no such stay shall be imposed or continued if the court is satisfied that it is against the public interest."

A factual showing explaining why the public will not be harmed if the stay is granted will satisfy the court's inquiry into whether the public interest will suffer. (*California Administrative Mandamus* § 11.8.) In fact, when a court denies a stay, it is essentially making a preliminary determination that the public interest ***will*** suffer ***and*** that the agency is likely to succeed on the merits. (See *id*., § 11.7.)

B. Preliminary Injunction

The decision to grant a preliminary injunction "rests in the sound discretion of the trial court." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.) Courts consider two factors when deciding to issue a preliminary injunction: (1) whether the moving party will suffer greater injury if the injunction is denied than the non-moving party will if it is granted; and (2) whether there is "a reasonable probability" that the moving party will prevail on the merits. (*Robbins v. Super. Ct.* (1985) 38 Cal.3d 199, 206.) The decision to issue a preliminary injunction is guided by a mix of these two factors; the greater the showing on one factor, the less is required on the other. (*Butt v. State of Cal.* (1992) 4 Cal.4th 668, 678.) A court must exercise its discretion in favor of the party more likely to be injured. (*Robbins*, *supra*, 38 Cal.3d at p. 205.)

IV. GOLDEN DOOR IS LIKELY TO SUCCEED ON THE MERITS

The County made a serious and prejudicial error in adopting the new CAP by adopting a program for carbon offsets that would allow in-process and future General Plan amendment projects to ***increase*** GHG emissions within the County, in exchange for the purchase of carbon

offset credits applicable to another location outside the County, without considering requirements of the General Plan (even as amended) or undertaking the appropriate analysis to understand the effect of this program, especially considering the emphasis on achieving reductions through reducing VMT. The approvals under these circumstances violated the General Plan's requirements to ***reduce*** GHG emissions within the County and violated CEQA. As such, the Golden Door is likely to succeed on the merits.

A. The County Failed to Adequately Analyze Vehicle Miles Traveled Impacts, and Resulting Implications for the San Diego Region's SB 375 Planning and Goals

In violation of CEQA, the County failed to analyze potential VMT impacts of CAP MM M-GHG-1 and its effect on the ability of SANDAG to meet the State-mandated VMT reductions requirements if the County continues to allow sprawl development without any corresponding reductions to VMT.

1. Caselaw and State Law Require an Analysis of the CAP's VMT Impacts and Consistency with VMT Reduction Goals

Despite the express mandates provided by CARB and State climate change policies, the County failed to analyze the 2018 CAP Project's consistency with SB 375's VMT reduction goals, resulting in a deficient environmental document under CEQA. As n Guidelines section 15121 explains, "an EIR is an informational document which will inform public agency decision makers and the public generally of the significant environmental effect of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project." (See also Pub. Res. Code § 21061.) "Omitting or ignoring contrary information is not the way to produce an adequate informational document." (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 105.) And as the Supreme Court emphasized last year in *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 942, public agencies must provide relevant information about "related regulations" of other agencies and their impacts on a proposed project, rather than ignore those agencies and their regulations. The Supreme Court stated in *Banning Ranch Conservancy*:

To be prejudicial, a failure to account for related regulations must

> substantially impair the EIR's informational function. Here, the City's failure to discuss ESHA requirements and impacts was neither insubstantial nor merely technical. The omission resulted in inadequate evaluation of project alternatives and mitigation measures.

(2 Cal.5th, *supra*, at 942.) Pursuant to SB 375, SANDAG's current RTP/SCS plans for GHG emissions reductions and establishes specific GHG reductions in the San Diego region of 15% per capita by 2020 and 21% per capita by 2035 from the transportation sector. Such reductions may come from reductions in VMT, under the policies outlined in CARB's recent Scoping Plan. As explained in greater detail below, by not analyzing the CAP's VMT impacts and the potential ramifications on SANDAG's ability to meet is SB 375-mandated reductions due to the CAP's failure to require VMT reductions for General Plan amendments, the County has committed a similar informational error as in *Banning Ranch*.

2. The 2018 CAP SEIR Fails to Analyze the CAP's Consistency with State-Mandated VMT Reduction Targets

The 2018 CAP SEIR fails to adequately analyze consistency with VMT reduction targets in SB 375, in violation of CEQA. SANDAG's RTP/SCS model for the unincorporated County is based on land use inputs from the County's approved 2011 General Plan Update. (Takahashi Dec., ¶ 10, Exhibit I, p. 347.) The land use designations in the 2011 General Plan Update are the product of over a decade of community input and stakeholder negotiations and are generally considered to adhere to smart-growth principles of locating new density near existing infrastructure and transit. (*Id*., p. 355.) Any amendment to the County's 2011 General Plan Update, such as the current pending General Plan amendments before the County, would necessarily alter the VMT modeling performed by SANDAG to determine its VMT reductions in the current RTP/SCS. This is because General Plan amendments proposed on unincorporated County lands typically require densification of rural lands farther from existing infrastructure and transit than the 2011 General Plan Update's planned density. For example, the proposed Newland Sierra project includes a General Plan Amendment that would facilitate the addition of over 2,100 homes in an area zoned for only 99 homes in the General Plan. (*Id*., ¶ 11, Exhibit J,

pp. 360.) The Newland project is more than six miles from the nearest transit center. (*Id*., p. 364.) As such, General Plan amendments proposed in the unincorporated County such as Newland Sierra, by their nature, add long vehicle trips over and above those considered in the RTP/SCS model, which relied on the 2011 General Plan Update's land use designations. (See *id*., ¶ 9, p. 316 ["[T]he nature of the unincorporated county is low-density development that is not conducive to non-driving trips. Trip distances are longer in the unincorporated county because of this low-density nature and intervening distance between land uses."].)

Indeed, SANDAG submitted a comment letter to the County regarding the CAP and specifically requested that the CAP consider smart-growth policies. (Takahashi Dec., ¶ 15, Exhibit N, pp. 574-577.) In response to this comment, the County indicated that its CAP adheres to smart-growth principles because it is consistent with the existing General Plan. (*Id*., p. 575.) The County's response, however, ignored that the CAP's mitigation plan for General Plan amendments would allow for new sprawl projects that contradict the underlying smart-growth principles in the General Plan. (*Id*., ¶ 10, p. 347.) Instead, the County allows for sprawl development in exchange for the purchase of offset credits that are not de facto substitutes for the reduction of VMT. (*Id*., pp. 354-355; see also *Cleveland National Forest Foundation v. San Diego Association of Governments* (2015) 231 Cal.App.4th 1056, 1083 [analysis of VMT reduction alternative required in addition to short-term GHG reductions from congestion relief]).

Because these General Plan amendment projects would necessarily alter the underlying inputs for SANDAG's previous VMT analysis and because no VMT reduction is required by the CAP for General Plan amendment projects, the 2018 CAP SEIR should have included a VMT analysis according to a separate model and evaluated the addition of the land use densities for the General Plan amendments currently in process with the County and any other relevant scenarios to be a sufficient informational document. (See *Cleveland National Forest Foundation*, *supra*, 231 Cal.App.4th at 1083.) However, the 2018 CAP SEIR failed to include this analysis.

3. The County's Failure to Analyze How Anticipated Projects Could Increase VMT and Interfere with State-Mandated VMT Reductions Goals

The County's failure to analyze how its expected new projects (which are allowed to

move forward with GHG offsets alone under CAP Mitigation Measure M-GHG-1) could increase VMT and interfere with the "related regulations" of SANDAG's attainment of VMT reductions required by CARB's goals constituted a prejudicial informational error. (*Banning Ranch Conservancy*, *supra*, 2 Cal.5th at 942.) If the County had obtained the proper information about the impact of these projects on SANDAG's efforts to reduce VMT, the County could have considered mitigation measures and alternatives in its CAP which would support SANDAG's efforts, rather than thwart them. Instead, with this VMT information missing, no such mitigation measures or alternatives were considered. Indeed, no analysis was conducted to determine the extent that increased VMT resulting from the contemplated new projects would increase associated GHG emissions inevitably resulting from increased VMT.

Rather than addressing any VMT reduction goals or requirements or demonstrating their consistency with SANDAG's existing adopted VMT reduction strategy, the 2018 CAP SEIR relies on CAP Mitigation Measure M-GHG-1. CAP Mitigation Measure M-GHG-1 does not consider project siting or VMT reduction strategies as mitigation for in-process or future General Plan amendment projects. (Takahashi Dec., ¶ 8, Exhibit G; see also *id*., ¶ 12, Exhibit K, pp. 547-548.) Instead, CAP Mitigation Measure M-GHG-1 allows General Plan amendment projects to meet their GHG mitigation requirement by merely purchasing commitments (i.e., carbon offset credits) to decrease GHG emissions from anywhere in the world. (*Id*., ¶ 8, Exhibit G, pp. 279-281 ["The County will consider . . . the following geographic priorities . . .1) project design features/on-site reduction measures; 2) off-site within the unincorporated [County]; 3) off-site within the County . . . 4) off-site within the State . . . 5) off-site within the United States; and 6) off-site internationally."].) In other words, CAP Mitigation Measure M-GHG-1 facilitates the approval of sprawl projects through reliance on purchasing carbon offset credits, while ignoring local VMT reduction and consistency with SANDAG's VMT-reduction plans.

4. <u>"Consistency" With the CAP as a Threshold of Significance Allows Future Development to Proceed Without VMT Reductions</u>

As part of the 2018 CAP Project approvals, the County approved a new GHG threshold guidance document, which states:

> The County's CAP is also intended to be used for future project-specific GHG emissions analyses by being prepared consistent with the tiering and streamlining provisions of Section 15183.5 of the CEQA Guidelines. The Supplemental Environmental Impact Report (SEIR) for the CAP provides the appropriate level of environmental review to allow future projects to tier from and streamline their analysis of GHG emissions pursuant to CEQA Guidelines Section 15183.5(b)(2).

(Takahashi Dec., ¶ 14, Exhibit M, p. 569.) The County's new significance threshold is simply "consistency" with the new CAP: "A proposed project would have a less than significant cumulatively considerable contribution to climate change impacts if it is found to be consistent with the County's Climate Action Plan; and, would normally have a cumulatively considerable contribution to climate change impacts if it is found to be inconsistent with the County's Climate Action Plan." (*Ibid*.) The GHG threshold guidance continues to describe a process for evaluating impacts for future General Plan amendment projects that is essentially the same as CAP Mitigation Measure M-GHG-1, allowing applicants to purchase carbon offsets as mitigation for any potential GHG emissions not covered by the CAP. (*Id*., pp. 570-572.)

As such, an applicant may either tier or obtain streamlined CEQA review under the County's new significance threshold, or simply purchase offsets to mitigate any GHG impacts for General Plan amendments, and because the CAP does not require reductions in VMT, all in-process and future General Plan amendment projects may now rely on purchasing carbon offset credits while ignoring local VMT reduction and consistency with SANDAG's VMT-reduction plans. The County has not analyzed the impacts of this approach on County-wide VMT or on SANDAG's ability to meet its SB 375 requirements, contrary to the requirements of *Banning Ranch*. (*Banning Ranch*, *supra*, 2 Cal.5th at 942 [failure to discuss ESHA requirements and impacts was neither insubstantial nor merely technical, but the omission resulted in inadequate evaluation of project alternatives and mitigation measures].) Failure to consider these impacts therefore has resulted in an inadequate evaluation of potential mitigation measures that may have been better suited to assist SANDAG in meeting its SB 375 requirements, or provided the County's citizens with important co-benefits of reducing VMTs.

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B. The County's EIR for the CAP Failed to Analyze Cumulative GHG Emissions Impacts

The County's EIR failed to adequately discuss cumulative impacts related to GHG emissions, attempting to use at the same time two conflicting geographic scopes for the analysis of cumulative GHG emissions. At times, the County used a "Countywide" geographic scope of cumulative GHG emissions, and at other times it used a "global" geographic scope of cumulative GHG emissions. (See e.g. Takahashi Dec., ¶ 8, Exhibit G, p. 257 ["cumulative impact analysis . . . was identified as the entire unincorporated County"] *contra* 257 [""global climate change is inherently a cumulative issue"].) This inconsistency violates CEQA Guidelines 15130(b), which requires agencies to define a consistent geographic scope for their cumulative impacts analyses. (See also *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1216 [noting that CEQA requires an agency to "define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used."].) The County cannot provide a reasonable explanation for this geographic limitation pursuant to CEQA, because it cannot keep the geographic limitation consistent within its own documents.

Likewise, failure to consider the cumulative impacts on approval of the pending General Plan amendments on the SANDAG and the State's ability to reach its emissions targets results in an additional violation of CEQA. (*Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 872 ["[T]his EIR should have, but did not, consider whether the proposed curtailments in Eel River diversions would lead to significant cumulative impacts in combination with the Project. The absence of this analysis makes the EIR an inadequate informational document."].)

C. The County Failed to Comply with Its General Plan and Adopted Mitigation Measures

1. <u>The County Cannot Implement General Plan Mitigation Measure CC-1.2 If It Incorporates an Out-of-County Offset Program</u>

The County is unable to implement General Plan Mitigation Measure CC-1.2 by

incorporating an out-of-County carbon offset credit program as part of the 2018 CAP approvals. The County cannot use out-of-County carbon offset credits, rather than on-site or community-level GHG emissions reductions, to discount the significance of GHG emissions impacts of development proposals on unincorporated County lands, without further analysis of enforceability and effectiveness pursuant to CEQA. (CEQA Guidelines § 15125.4(a)(2) ["Mitigation measures must be fully enforceable. . ."].) Because the 2018 CAP approvals constitute a comprehensive approach to GHG mitigation, the County's performance of CEQA review for development proposals on unincorporated County lands pursuant to the 2018 CAP approvals prejudices the consideration and implementation of MM CC-1.2.

In addition, the 2018 CAP and SEIR include only general reductions of GHG emissions that are supposedly "consistent with CEQA Guidelines Section 15183.5." Section 15183.5(b)(1)(A) requires that a plan prepared pursuant to this section must "[q]uantify greenhouse gas emissions, both existing and projected over a specified time period, resulting from activities within a defined geographic area." The 2018 CAP approvals and SEIR do not quantify the GHG emissions from in-process General Plan Amendments, even though the 2018 CAP approvals include the carbon offset credit program to provide for all such Amendments.

The General Plan also includes provisions requiring GHG reductions to be local. While the CAP proposes to amend these provisions to remove the word "local," it continues to require emissions reductions to be within the unincorporated County by requiring reduction of "community-wide (i.e., unincorporated County)" emissions. Even with the CAP's proposed amendments to these General Plan provisions, emissions reductions are required to remain within the unincorporated County. MM M-GHG-1, however, allows for the purchase of unlimited carbon credits from other continents. As such, the County's authorization for offsets outside of San Diego County violates Mitigation Measure CC-1.2, which requires a CAP that reduces GHG emissions from "County operations" and "community activities."

2. The County Failed to Comply with the General Plan

As the Court of Appeal explained in *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 998, "Government Code section 65302 requires charter as well as general law

cities to adopt a general plan containing specified mandatory elements. In setting forth these requirements the Legislature must have intended that the city would comply with whatever general plan elements it had adopted." "The Legislature did not limit this policy to decisions regarding proposed private developments; it encompasses all decisions involving the future growth of the state, …. All such decisions are to be guided by an effective planning process that includes the local general plan." (*Ibid*.)

Moreover, the State Planning and Zoning Law requires the County's project approvals to be consistent with the General Plan. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570–71.) "A project is inconsistent with a general plan 'if it conflicts with a general plan policy that is fundamental, mandatory, and clear.'" (*Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal.App.4th 91, 100 [citing *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782]; see also *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 635–636 [finding General Plan inconsistency for failure to abide by its "mandatory" policy requiring coordination with State and federal wildlife agencies to mitigate impacts to special status species].)

Rather than complying with the General Plan and its policies, by adopting a CAP with the inclusion of MM M-GHG-1, the County has failed to comply with Government Code sections 65030.1 and 65302. The County's General Plan requires a GHG emissions reduction within San Diego County. The General Plan's EIR found that the GHG and climate change impacts from the County's operations and from community sources were "potentially significant" – that without mitigation the County would fail to comply with AB 32. As a result, the General Plan EIR includes mitigation measures for GHG and climate change impacts, such as the adoption of a CAP. (Takahashi Dec. ¶ 2, Exhibit A, p. 11.) The CAP, therefore, is required ***to reduce impacts from GHG emissions within San Diego County***, but the CAP Project approved by the County ***may actually result in an increase of GHG emissions within the County***.

D. The County Improperly Delegated Feasibility Findings to the Planning Director

CAP Mitigation Measure M-GHG-1 delegates to the Director of Planning and

Development Services findings of feasibility for on-site and off-site mitigation measures for in-process and future General Plan amendment projects. Specifically, CAP Mitigation Measure M-GHG-1 delegates to the Director of Planning and Development Services the determination of "geographic priorities for GHG reduction features, and GHG reduction projects and programs." (Takahashi Dec., ¶ 8, Exhibit G, p. 279.) CAP Mitigation Measure M-GHG-1 also delegates to the Director of Planning and Development Services the determination of when non-standard carbon offset credits may be applied to a project. Such feasibility determinations would be made after project approval, in violation of CEQA. This provision authorizing, and in fact requiring, delegation by the decision-making bodies to a staff member to make a later decision on CEQA feasibility determinations for individual projects violated CEQA's provisions regarding the approval of and determination of feasibility of mitigation measures.

V. The Public Will not Suffer An Injury if the Stay Is Granted

The proposed stay is narrowly defined. The Golden Door is not seeking to enjoin the use of the CAP in its entirety for all potential development, only its application as a significance threshold to proposed projects that fall outside of the 2011 General Plan. Any applicant may proceed with their proposed General Plan amendment, but would only be precluded from relying on the CAP's offset program provided under MM GHG-1. The County is free to consider any such project that does not require reliance on this offset program. Moreover, the County has taken an extraordinary step to include the offset program. The 2011 General Plan only required the County to prepare and adopt a CAP to mitigate potential impacts from development contemplated within the General Plan. The General Plan included a specific goal that such mitigation occur within the County. Rather than simply comply with this requirement, the County amended the policy that has been in place since 2011 and created a CAP that not only applied to the 2011 General Plan Update but also to ***all future General Plan Amendment projects in perpetuity***.

Accordingly, this stay is narrowly tailored to ensure that the County is precluded from violating General Plan policies and approving projects that are reliant on out of county offsets. The County may still proceed with approval of the 60,000 units contemplated within the General

Plan, but it may not proceed with unplanned development outside of the General Plan in reliance on the County's new policy proposal in the 2018 CAP. The public will not be harmed by a stay prohibiting the County from implementing a new offsets program not considered part of the County's 2011 General Plan Update, particularly when this program was included within the 2018 CAP Project without any analysis of the offset program's environmental impacts. Moreover, the County may approve projects in the absence of a CAP, and therefore the public will not be harmed by a stay of the offset program's use for pending General Plan amendments.

Should the Court determine that a stay is inappropriate, a preliminary injunction may issue. There may be irreparable harm to the environment if the County is not prohibited from relying on the offset program in Mitigation Measure GHG-1 to approve General Plan amendments. Approving projects utilizing the offset program may result in 139,485 MTCO2e of construction-related GHG emissions (for just five recently approved and/or pending General Plan amendment projects alone) being released into the atmosphere, which may persist in the atmosphere for long periods of time. (See Declaration of Phyllis Fox ¶ 3, Exhibit B.) These emissions should be accounted for and/or properly mitigated within San Diego County pursuant to the General Plan's requirements, with assurances that the emissions reductions will be realized. Otherwise, such emissions exceed all of the County's CAP-related reductions by 2020, would turn the County's compliance with 2030 targets from compliant to non-complaint, and would exacerbate non-compliance with 2040 targets for GHG emissions reductions. (Compare *id.*, with Takahashi Dec. ¶ 5, Exhibit D, p. 81.) In addition, the informational injury that would result from approval of projects using this offset program is irreparable. There is no manner to determine whether compliance with the different State-mandated reduction targets will be actualized, and any harm to the County is insignificant in light of these harms. The County will simply be tasked with refraining from using the 2018 CAP Project as a significance threshold for General Plan Amendment projects, but its processing of projects may still proceed.

VI. CONCLUSION

For the reasons stated above, Golden Door respectfully asks the Court to issue a stay, or in the alternative, a preliminary injunction as set forth in the Proposed Order.

Dated: August 22, 2018

Respectfully submitted,

LATHAM & WATKINS LLP

By /s/ *Taiga Takahashi*
Taiga Takahashi

Attorneys for Petitioner Golden Door Properties

PROPOSED ORDER

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

GOLDEN DOOR PROPERTIES, LLC, a California limited liability company, and DOES 1-10, inclusive,

Petitioner and Plaintiff,

v.

COUNTY OF SAN DIEGO, a political subdivision of the State of California; and DOES 11-20, inclusive,

Respondent and Defendant.

CASE NO. 37-2018-00013324-CU-TT-CTL

Related Cases:
No. 37-2012-101054, Sierra Club v. COSD
No. 37-2016-013324, Golden Door v. COSD
No. 37-2018-014081, Sierra Club v. COSD

Hon. Timothy Taylor, Dept. C-72

[PROPOSED] ORDER AFTER HEARING

[IMAGED FILE]

[CALIFORNIA ENVIRONMENTAL QUALITY ACT]

Action Filed: March 15, 2018
Date of Hearing: September 14, 2018
Time of Hearing: 1:30 p.m.

Upon noticed motion, briefing, and argument by the parties, and upon good cause shown, **IT IS NOW ORDERED** that upon service of this Order:

1. The effectiveness of the "County of San Diego | Guidelines for Determining Significance | Climate Change," dated January 2018, also denoted as Action 1.2, No. 2, in the Respondent and Defendant County of San Diego (or "County") Board of Supervisors February 14, 2018 Minute Order No. 1 (the "2018 Guidelines"), is hereby stayed. The effectiveness of County Board of Supervisors Resolution No. 18-020, entitled "Resolution of the County of San Diego Board of Supervisors Adopting the Greenhouse Gas Threshold of Significance, dated January 2018" is also hereby stayed.

2. Respondent is prohibited from using the 2018 Guidelines and/or Resolution No. 18-020 for California Environmental Quality Act ("CEQA") review of greenhouse gas ("GHG") impacts for development proposals on unincorporated County lands. This Order does not prohibit planning activities. By the issuance of this Order, the 2018 Guidelines and its "Procedures for General Plan Amendments," or the procedures for General Plan Amendments as referred to and/or contained within the 2018 Guidelines or the 2018 Climate Action Plan, may not be used to provide the basis for CEQA review of GHG impacts of development proposals on unincorporated County lands.

3. This Order may be served upon Respondent pursuant to the Code of Civil Procedure, section 1010.6. Service shall also include the Petitioners in the related cases.

4. Respondent shall file and serve a status statement within 60 days of service of this Order describing its compliance therewith. Petitioner shall have 15 days from the date of the return to file any objections.

5. This Order shall automatically terminate upon the Court's final judgment in this action.

SO ORDERED.

Date: _____, 2018

_____
Hon. Timothy B. Taylor
JUDGE OF THE SUPERIOR COURT