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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

GOLDEN DOOR PROPERTIES, LLC, Petitioner, v. COUNTY OF SAN DIEGO, Respondent.	No. 37-2018-00013324-CU-TT-CTL Action Filed: March 15, 2018 Related Cases: No. 37-2012-00101054-CU-TT-CTL No. 37-2018-00014081-CU-TT-CTL **RESPONDENT COUNTY OF SAN DIEGO'S OPPOSITION TO GOLDEN DOOR PROPERTIES, LLC'S MOTION FOR STAY OR, IN THE ALTERNATIVE, MOTION FOR PRELIMINARY INJUNCTION** Date: September 14, 2018 Time: 1:30 p.m. Dept: C-72 Judge: Hon. Timothy Taylor **IMAGED FILE**

Respondent County of San Diego ("County") submits the following brief in opposition to Petitioner Golden Door Properties, LLC's ("Golden Door") motion for a stay order or, in the alternative, motion for preliminary injunction.

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I. INTRODUCTION

900,000 metric tons of GHG emissions will be removed from the environment! That is the amount of GHG emissions in the unincorporated areas of the County and from County operations that will be reduced by 2030 pursuant to the County's Climate Action Plan ("CAP"). Petitioners do not dispute that number nor do they dispute that the County is on track to achieve its 2020 reduction target, which reduces the County's GHG emissions by 700,000 metric tons more than what the prior CAP would have achieved. All of the reductions from the CAP's 26 reduction measures come from the unincorporated areas and County operations. In their motions, Petitioners do not take issue with a single CAP reduction measure.

Instead, Petitioners take issue with a mitigation measure for a cumulative impact that requires general plan amendment projects to reduce their GHG emissions such that they will not interfere with the CAP – mitigation measure M-GHG-1. M-GHG-1 requires GPA projects to utilize all feasible on-site mitigation measures to reduce their GHG emissions. After exhausting all feasible on-site measures, GPA projects are required to reduce their GHG emissions using off-site measures, which can include purchasing carbon offset credits.

In their motions, Petitioners ask this Court to issue a "stay" under Code of Civil Procedure section 1094.5 or, in the alternative, issue a preliminary injunction. Petitioners cannot show that they are entitled to either a stay or a preliminary injunction.

Section 1094.5 applies to administrative mandamus actions to review an agency's quasi-judicial decisions, and does not apply to this case. The Board's adoption of the CAP was a legislative decision that can be reviewed only by traditional mandamus. Traditional mandamus (CCP § 1085) does not allow a court to stay a legislative action. Therefore, Petitioners' request for a "stay" must be denied.

Petitioners also cannot show that they are likely to succeed on the merits or that they will suffer irreparable harm. M-GHG-1 is an enforceable mitigation measure for a cumulative impact that complies with CEQA. CEQA Guidelines section 15126.4(c)(3) expressly authorizes the use of carbon offset credits to mitigate GHG emissions: "Measures to mitigate the significant effects of greenhouse gas emissions may include, among others: . . . Off-site measures, including offsets that are not otherwise required, to mitigate a project's emissions." The Final Supplemental Environmental Impact Report ("SEIR") for the 2018 CAP adequately discusses M-GHG-1, its consistency with the 2011 GPU, and its consistency with SANDAG's

Regional Plan. The SEIR adequately responded to all public comments, including those made by Petitioners, and discussed the reasons for the updates to some of the mitigation measures in the General Plan. In sum, Petitioners cannot show that the SEIR is inadequate.

Finally, Petitioners cannot show irreparable harm. Petitioners ask this Court to issue an injunction or stay to prevent the Board from considering in-process GPAs, and not allow in-process or future projects from using the Guidelines for Determining Significance, Thresholds of Significance, or carbon offsets. Petitioners reference specific projects they assert would be effected by their request, but do not name the applicants for those projects as parties. Petitioners seek nearly the same relief that Petitioners sought at the conclusion of the litigation regarding the 2016 Guidance Document. The Court denied Petitioners' request then and it should do so again here. Petitioners have an adequate remedy – they can challenge each project if it is approved by the Board. Moreover, there is no imminent threat of harm to the environment as none of the recently-approved projects will begin construction for at least a year. For all of these reasons, Petitioners' motions should be denied.

II. STATEMENT OF FACTS

The County incorporates by reference Section II its Opposition to Sierra Club's Motion for Stay or, in the Alternative, Motion for Preliminary Injunction in Case No. 37-2012-00101054-CU-TT-CTL.

III. THE COURT SHOULD DENY PETITIONERS' REQUEST FOR A STAY PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1094.5

A. Code of Civil Procedure Section 1094.5 Does Not Apply.

A petition for administrative mandamus under Code of Civil Procedure ("CCP") section 1094.5 is appropriate only to review an agency's quasi-judicial actions. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal.4th 559, 566-567 (1995) (*WSP Ass'n*). An agency's quasi-legislative actions are reviewed via a petition for traditional mandamus pursuant to CCP section 1085. *Id.* at 567; *see* Pub. Res. Code ("PRC") § 21168.5. "Because [petitioner] seeks review of a quasi-legislative action by the ARB—the adoption of air quality regulations—it is properly viewed as a petition for traditional mandamus. *Ibid.* "[Q]uasi-legislative actions must be challenged in traditional mandamus proceedings rather than in administrative mandamus proceedings even if the administrative agency was required by law to conduct a hearing and take evidence." *Ibid.*

A county's amendment of its zoning ordinance is a legislative act subject to review under traditional mandamus. *Fall River Wild Trout Foundation v. Cnty. of Shasta*, 70 Cal.App.4th 482, 488 (1999). Similarly, an "agency's decisions regarding project consistency with a general plan are reviewed by ordinary mandamus." *S.F. Tomorrow v. City & Cty. of S.F.*, 229 Cal.App.4th 498, 515 (2014).

Here, like in *WSP Ass'n*, the County's adoption of the CAP was a legislative decision that can only be reviewed under traditional mandamus pursuant to PRC section 21168.5 and CCP section 1085. Sierra Club's own actions confirm this. The original petition filed by Sierra Club to set aside the 2012 CAP was brought pursuant to PRC section 21168.5, *Sierra Club v. County of San Diego*, 231 Cal.App.4th 1152, 1163 (2014), and its current Third Supplemental Petition is brought solely pursuant to CCP section 1085 and PRC section 21168.5.

While Golden Door's petitions list CCP section 1094.5 under the various causes of action, Golden Door admits on the very first page of its motion that the Board's adoption of the CAP was a "policy choice." (Golden Door Motion ("GD Mtn."), 7:12.) Petitioners cannot reasonably contend that the approval of the CAP was anything other than a legislative decision.

Neither PRC section 21168.5 nor CCP section 1085 allow a party to seek a stay of a legislative action. Accordingly, Petitioners' request for a stay pursuant to CCP section 1094.5 should be dismissed because Section 1094.5 does not apply.

B. <u>The Public Will Suffer if the Court Grants a Stay.</u>

Even if CCP section 1094.5 applied, which it does not, the Court should deny the requested stay because the public would be harmed. There is a well-publicized housing crisis in the County. (Declaration of Darrin Neufeld ("Neufeld Dec."), ¶ 13, Exs. 8-9.) The housing crisis has the potential to lead to a regional economic crisis. (Neufeld Dec., Ex. 9.) Petitioners seek a stay that would prohibit the Board from considering the in-process GPAs that utilize carbon offsets legally authorized by CEQA Guidelines section 15126.4(c)(3) ignoring the public harm in exacerbating the housing crisis, and failing to balance the benefit that additional housing can provide to help alleviate that crisis. Further, granting the requested stay would create chaos. As discussed in the Neufeld Declaration, the Board approved one GPA in January before the CAP was adopted that utilizes carbon offsets. (Neufeld Dec., ¶ 3.) Petitioners seem to contend that that project could not begin construction pending this action. Similarly, Petitioners seem to

assert that granting the stay would effectively set aside the Board's approvals of the three projects approved in July without considering the merits of those projects. The County, the applicants, and the public would be left to wonder whether these projects can proceed or not.

Because CCP section 1094.5 does not apply and enjoining the Board from considering projects that utilize carbon offsets is not in the public's interest, the Court should deny Petitioners' request for a stay. Therefore, Petitioners must show that they are entitled to a preliminary injunction by demonstrating that they are likely to succeed on the merits *and* irreparable harm, a showing they cannot make.

IV. THE COURT SHOULD DENY PETITIONERS' REQUEST FOR AN INJUNCTION

A. Petitioners Must Meet a High Burden of Proof to Justify an Injunction.

"The power to enjoin is an extraordinary power that must be exercised with great caution" and, thus, "should rarely, if ever, be exercised in a doubtful case." 6 Witkin, *California Procedure*, 5th Ed., Provisional Remedies, § 274; *City of Tiburon v. Northwestern Pac. R.R. Co.*, 4 Cal.App.3d 160, 179 (1970). "The right must be clear, the injury impending and threatened, so as to be averted only by the protective preventive process of injunction." *City of Tiburon*, 4 Cal.App.3d at 179.

"In deciding whether to issue a preliminary injunction, a trial court must evaluate two interrelated factors: (i) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his claim, and (ii) the balance of harm presented, i.e., the comparative consequences of the issuance and nonissuance of the injunction. The scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at trial on the merits." *Common Cause v. Bd. Of Supervisors*, 49 Cal.3d 432, 441-42 (1989) (internal citations omitted). "A preliminary injunction will not issue where it is doubtful that the party seeking the preliminary injunction will ultimately prevail in the lawsuit." *Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp.*, 255 Cal.App.2d 300, 305 (1967).

Moreover, the "applicant must demonstrate a real threat of immediate and irreparable injury due to the inadequacy of legal remedies." *Triple A Machine Shop, Inc. v. State of California*, 213 Cal.App.3d 131, 138 (1989). The plaintiff bears the burden of producing *evidence* of irreparable interim injury. *Loder v. City of Glendale*, 216 Cal.App.3d. 777, 782-783 (1989). Mere conclusory allegations that such injury will result are not sufficient. *E.H. Renzel Co. v. Warehousemen's Union*, 16 Cal.2d 369, 373 (1940).

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When a plaintiff has an adequate remedy at law, the court should not issue an injunction. *Thayer Plymouth Ctr., Inc.*, 255 Cal.App.2d at 306. Particularly, where a plaintiff may seek a writ of mandate, the remedy of injunction should not issue. *Moore v. Sup. Ct.*, 6 Cal.2d 421, 423–424 (1936). A court should not grant a preliminary injunction when its effect would be to grant the moving party all of the injunctive relief requested in its complaint. *Santa Monica v. Superior Court of L.A. Cty.*, 231 Cal.App.2d 223, 227 (1964).

The injunction Petitioners seek would effectively grant Petitioners all of the relief they seek in the litigation. The injunction would force the County to (a) not allow any development projects to proceed, whether they are consistent with the 2011 GPU land uses or seek an amendment, (b) strip the Board of its discretionary authority to address matters of public interest such as the widely-publicized housing crisis in reviewing projects that are in process, and (c) require applicants of projects, who are not before this Court, that are currently in process to revise the sections of their EIRs addressing GHG emissions. Moreover, Petitioners have an adequate remedy – they can challenge the individual projects.

B. <u>M-GHG-1 Is Not a Program; It Is a Mitigation Measure for a Cumulative Impact that Will Be Applied to GPAs Along with the Other Mitigation Measures in the 2011 GPU that GPAs Must Implement.</u>

Before directly addressing the various claims asserted by Petitioners regarding the adequacy of the SEIR, it is important to set the record straight regarding exactly what M-GHG-1 is. Golden Door alleges that it is "a program for carbon offsets." (GD Mtn., 7:6.) This characterization is disingenuous at best. M-GHG-1 does not authorize any development nor is it a "program" (the County did not set up a new cap-and-trade system or carbon offset registry). **M-GHG-1 is a mitigation measure for cumulative impacts from future and in-process GPAs.** (Takahashi Dec., Ex. G, pp. 278-281.)

A program EIR, such as the SEIR here, need not be as detailed as an EIR for a construction project "because the effects of the construction can be predicted with greater accuracy." CEQA Guidelines § 15146(a). "An EIR shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable, as defined in section 15065(a)(3). Where a lead agency is examining a project with an incremental effect that is not 'cumulatively considerable,' a lead agency need not consider that effect significant, but shall briefly describe its basis for concluding that the incremental effect is not cumulatively considerable." CEQA Guidelines § 15130(a). "An EIR may determine that a project's contribution to a

significant cumulative impact will be rendered less than cumulatively considerable and thus is not significant. *A project's contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact*. The lead agency shall identify facts and analysis supporting its conclusion that the contribution will be rendered less than cumulatively considerable." CEQA Guidelines § 15130(a)(3) (italics added).

"The adequacy of an EIR's discussion of a project's cumulative impacts is determined by standards of practicality and reasonableness." *Preserve Wild Santee v. City of Santee*, 210 Cal.App.4th 260, 277 (2012). "The discussion must reflect the severity of the impacts and the likelihood of their occurrence, but need not contain the same degree of detail as the EIR's discussion of impacts attributable to the project alone. … The discussion may also rely upon previously approved land use documents, including general plans, specific plans, and local coastal plans." *Ibid.* (internal citations omitted).

As specified in the SEIR, a GPA applicant will be required to (a) conduct an independent GHG emissions analysis specific to its proposed project, (b) assess their consistency with the RTP/SCS independent of their GHG analysis, and (c) provide all feasible on -site measures to reduce GHGs, which would include VMT reduction strategies to aid in the reduction of GHGs. (Heinlein Dec., Exs. 2-4.) Consistent with CEQA Guideline 15130, the County determined that with the implementation of M-GHG-1, the CAP's "cumulative impact will be rendered less than cumulatively considerable and thus is not significant" and identified the "facts and analysis supporting its conclusion." The SEIR's description of M-GHG-1 and the facts and analysis set forth in the various Master Responses and responses to specific comment letters was more than adequate. The information, evidence, and analysis are all present to support M-GHG-1.

C. <u>Petitioners Fail to Show a Likelihood of Success on the Merits.</u>

Petitioners want this Court to believe that the SEIR is deficient because it failed to discuss a number of *purported* inconsistencies with the 2011 GPU and various other plans and statutes. Contrary to Petitioners' contentions, the CAP is consistent with CARB's guidance, the 2011 GPU, and other land use plans and statutes, and the SEIR adequately discusses these issues.

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1. Petitioners' Contentions Regarding SB 375 Are Meritless

a. The SEIR Adequately Analyzed and Discussed the CAP's Consistency with SANDAG's RTP/SCS.

"Determining whether a project is consistent with general plan policies is left to the lead agency; it is, emphatically, not the role of the courts to micromanage such decisions. While there is no requirement that an EIR itself be consistent with the relevant general plan, it must identify and discuss any inconsistencies between a proposed project and the governing general plan. Because EIRs are required only to evaluate 'any inconsistencies' with plans, no analysis should be required if the project is consistent with the relevant plans." *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors*, 216 Cal.App.4th 614, 632-633 (2013).

The SEIR contains Master Response 2, which discusses the relationship between the CAP and SB 375 at length. (Takahashi Dec., Ex. H, p. 301-304.) As discussed in Master Response 2, the CAP and SB 375 are inherently consistent. (*Id.*) In addition, the County provided responses to specific comment letters on the issue. (Heinlein Dec., Exs. 2-4.)

According to Golden Door, SANDAG submitted a comment letter contending that the CAP is inconsistent with the regional plan. (See Takahashi Dec., Ex. N.) Regarding "smart-growth policies," the SANDAG letter states:

> Please continue to take into consideration consistency with guiding plans for the region. The CAP measures reinforce the vision and goals for the County's General Plan Update of 2011; for example CAP measures support focusing density in and around existing unincorporated communities to reduce [VMT] and to achieve mixed-use and transit-oriented development. SANDAG supports these goals and measures, as it encourages smart, sustainable growth and reinforces principles sent forth in SANDAG's Regional Plan.

(*Id.*, p. 575 [emphasis added].) By using the word "continue," SANDAG is stating that the CAP is consistent with its Regional Plan. If SANDAG believed M-GHG-1 were inconsistent with the Regional Plan or "smart-growth policies," it would have said as much in its letter. Instead, SANDAG's letter commends the CAP's incorporation of such principles.

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b. The SEIR Was Not Required to Analyze the VMT Impacts of Individual GPAs.

As discussed above, the SEIR is a program-level EIR. "[A] 'program EIR' evaluates the broad policy direction of a planning document, such as a general plan, ***but does not examine the potential site-specific impacts of the many individual projects that may be proposed in the future*** consistent with the plan." *Citizens for a Sustainable Treasure Island v. City & Cty. of S.F.*, 227 Cal.App.4th 1036, 1047 (2014) (emphasis added and internal citations omitted). Petitioners' contention that the County was obligated to conduct a VMT analysis for each in-process GPA would require the County to do exactly that – examine the site-specific impacts of individual projects proposed in the future. The SEIR was not required to do so.

Golden Door's reliance on *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal.5th 918 (2017) (*Banning Ranch*) is misplaced. In *Banning Ranch*, the EIR for a development project ignored the potential presence of ESHA on the project site. By contrast, the SEIR is a program EIR and provides a robust discussion of SB 375. Each GPA is required to conduct a project-level VMT analysis for consistency with the SCS. To expect the CAP's SEIR to include a discussion of specific, project-level VMT impacts would be contrary to the purposes of a program EIR.

Golden Door also claims that M-GHG-1 "facilitates the approval of sprawl projects." As set forth in the SEIR, the CAP is not a land use plan nor does it authorize development. It is a method by which the County will reduce GHG emissions. GPAs cannot tier off the CAP; they must conduct their own GHG emissions, and show how they will mitigate their GHG emissions analysis, so as not to interfere with the CAP.

c. Consistency with the CAP as a Threshold of Significance Does Not Allow Future GPAs to Proceed Without VMT Reductions.

The EIR for the 2011 GPU contains an extensive discussion of transportation and traffic, and includes numerous policies and mitigation measures to reduce VMTs county-wide.[1] The CAP did not

[1] See San Diego County General Plan Update Final EIR, Chapter 2.15 and Chapter 7 Section 7.1.15. See Policies LU-5.1, LU-5.4, LU-5.5, LU-9.8, LU-11.6, LU-10.4, 11.8; M-1.1, M-3.1, M-5.1, M-8.1, M-8.2, M-8.3, M-8.4, M-8.5, M-8.6, M-8.7, M-9.2, M-9.3, M-9.4, M-10.1, M-10.2, M-10.4, M-11.1, M-11.2, M-11.3, M-11.4, M-11.5, M-11.6, M-11.7. See Mitigation Measures Tra-1.1, Tra-1.2, Tra-1.4, Tra-1.6, Tra-5.1, Tra-5.2, Tra-6.1, Tra-6.2, Tra-6.3, Tra-6.4, Tra-6.5, Tra-6.6, Tra-6.7, Tra-6.8, Tra-6.9.

amend or remove any of these policies or mitigation measures. With the land uses specified in the 2011 GPU, SANDAG is on track to substantially exceed the reduction targets specified by CARB pursuant to SB 375. (Takahashi Dec., Ex. H, p. 302.) Beyond that, the CAP itself contains measures designed to further reduce county-wide VMTs. (See CAP Strategies T-1, T-2, T-3 "Reduce Vehicle Miles Traveled," Takahashi Dec., Ex. D, pp. 86-113.) Petitioners do not dispute the efficacy of these measures. Instead, Petitioners assert that GPAs can tier off the CAP and ignore VMT reduction measures. (GD Mtn., pp. 15-16.) Petitioners' contention is demonstrably false.

GPAs cannot tier off the CAP. By definition, GPAs propose land uses that would amend the General Plan, and are therefore not accounted for in the CAP. (Takahashi Dec., Ex. G, p. 257, Ex. H, p. 338.) The CAP Consistency Review Checklist confirms this. The first question asks: "Is the proposed project consistent with the existing General Plan regional category, land use designations, and zoning designations?" (Checklist, p. A-5.) If the answer is "No," applicants must answer a second question: "Does the project include a land use element and/or zoning designation amendment that would result in an equivalent or less GHG-intensive project when compared to the existing designations?" (*Id.*) If the answer is "No," "the project must prepare a separate, more detailed project-level GHG analysis." (*Id.*)

The CAP Checklist then requires project applicants to address VMTs. After addressing Land Use Consistency, the next section of the Checklist is entitled "Reducing Vehicle Miles Traveled," followed by a section regarding "Shared and Reduced Parking." (Checklist, pp. A-6 – A-7.) Contrary to Petitioners' contentions, GPA applicants are required to address the very issues Petitioners complain about.

Consistent with these requirements, "each future GPA will also be required in the project-level CEQA documents prepared for them to assess their consistency with the Regional Plan." (Master Response 2, pp. 8-17.) M-GHG-1 requires all GPAs to implement all feasible on-site mitigation measures and project design features before they can implement off-site mitigation, such as the purchase of carbon offsets. (Takahashi Dec., Ex. G, p. 278 ["the County has determined that proposed GPAs shall provide for all feasible on-site design features/mitigation measures"], Ex. H, p. 339.) Such on-site mitigation measures and project design features include implementing the policies and mitigation measures specified in the General Plan to reduce VMTs. Thus, each individual project's consistency with the regional plan will be addressed in the only appropriate way – in that individual project's CEQA documents. To require the County to

conduct a VMT analysis for each specific GPA project would be contrary to the requirements of a program EIR. *Citizens for a Sustainable Treasure Island, supra*, 227 Cal.App.4th at 1047.

2. The CAP SEIR Does Not Use Conflicting Geographic Scopes

Golden Door contends that the County's cumulative impacts analysis uses two different geographic scopes. (GD Mtn., p. 17.) As discussed below, Golden Door's argument is irrational and contradicts the California Supreme Court. In addition, neither Golden Door nor any other person that commented on the CAP or its SEIR ever made a comment along such lines while the CAP was under consideration. In fact, this argument is so new that it is not set forth in Golden Door's petition in the 2018 case, its complaint and petition in intervention in the 2012 case, or in its draft Statement of Issues that it presented to the County on July 27, 2018. (Heinlein Dec., Exs. 6-8.) Golden Door apparently concocted this theory right before filing its final Statement of Issues on August 8, 2018. The Court should dismiss this contention out of hand because Golden Door cannot prove that it exhausted its administrative remedies.

Moreover, Golden Door's contention is illogical. A project's baseline is confined to the "environmental conditions in the vicinity of the project." CEQA Guidelines, § 15125(a); *Center for Biological Diversity v. Dep't of Fish & Wildlife*, 62 Cal.4th 204, 224 (2015). But, as enunciated by the California Supreme Court, a condition's impact may stretch well beyond that vicinity:

> [B]ecause of the global scale of climate change, any one project's contribution is unlikely to be significant by itself. The challenge for CEQA purposes is to determine whether the impact of the project's emissions of greenhouse gases is cumulatively considerable, in the sense that "the incremental effects of [the] individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." [Citations.] "With respect to climate change, an individual project's emissions will most likely not have any appreciable impact on the global problem by themselves, but they will contribute to the significant cumulative impact caused by greenhouse gas emissions from other sources around the globe. The question therefore becomes whether the project's incremental addition of greenhouse gases is 'cumulatively considerable' in light of the global problem, and thus significant." [Citations.]
>
> Second, the global scope of climate change and the fact that carbon dioxide and other greenhouse gases, once released into the atmosphere, are not contained in the local area of their emission means that the impacts to be evaluated are also global rather than local.

Center for Biological Diversity, 62 Cal.4th at 219-220. Thus, it makes perfect sense that the CAP would use its vicinity, i.e., County operations and the unincorporated areas, to conduct its GHG

inventory/baseline while at the same time discussing the global impact of climate change. These differing geographic scopes do not conflict; they pertain to two different inquiries – the baseline and the impact.

Further, the EIR for the 2011 GPU spelled this out in chapter 2.17 entitled **Global** Climate Change: "Climate change is a global phenomenon which is cumulative by nature, as it is the result of combined worldwide contributions of GHG to the atmosphere over many years. Therefore, significant direct impacts associated with the proposed General Plan Update discussed above also serve as the proposed project's cumulative impact." (2011 GPU Final EIR, pp. 2.17-27 – 28.) If Golden Door believed this geographic scope was improper, the time to challenge it was when the County adopted the 2011 GPU, not seven years later.

3. M-GHG-1 Is Consistent With The General Plan

The County incorporates by reference Section IV.C.3 of its Opposition to Sierra Club's Motion for Stay or, in the Alternative, Motion for Preliminary Injunction in Case No. 37-2012-00101054-CU-TT-CTL.

4. The County Did Not Delegate Feasibility Findings To The Planning Director

Regarding the involvement of the Planning Director, M-GHG-1 provides:

> The County will consider, to the satisfaction of the Director of Planning & Development Services (PDS), the following geographic priorities for GHG reduction features, and GHG reduction projects and programs: 1) project design features/on-site reduction measures; 2) off-site within the unincorporated areas of the County of San Diego; 3) off-site within the County of San Diego; 4) off-site within the State of California; 5) off-site within the United States; and 6) off-site internationally.
>
> Geographic priorities would focus first on local reduction features (including projects and programs that would reduce GHG emissions) to ensure that reduction efforts achieved locally would provide co-benefits. Depending on the carbon offset credit utilized, co-benefits may include reductions in criteria air pollutants, toxic air contaminants, energy demand, water consumption, health benefits, social benefits, and economic benefits. The GPA applicant or its designee shall first pursue offset projects and programs locally within unincorporated areas of the County of San Diego to the extent such carbon offset credits are available and are financially feasible, as reasonably determined by the Director of PDS.

(Takahashi Dec., Ex. G, pp. 279-280.) Thus, the Director is not making "feasibility" determinations under CEQA; the only determinations made by the Director will be whether offset credits are available and financially practicable according to the geographic hierarchy.

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It bears repeating: in their CEQA documents, GPA applicants are required to conduct an independent GHG analysis and specify how they will mitigate their emissions. The CEQA documents for a GPA must quantify the project's GHG emissions from both construction and operations, specify what on-site measures and design features will be utilized to mitigate those emissions and the extent of such mitigation, and then specify the quantity of carbon offset credits the applicant will be required to purchase. Such analysis will be subject to public review and comment through the normal CEQA process. The Director has no discretion to determine the amount of offsets a GPA would be required to purchase.

The Director is monitoring the applicant's compliance with the mitigation measure to ensure that the applicant purchases offsets at the appropriate time according to the geographic priorities, consistent with CEQA Guidelines section 15097. For example, a GPA applicant is not required to purchase carbon offsets at the time the project is approved; it must purchase such offsets at the appropriate stage, i.e., it must purchase sufficient credits to offset all of its construction-related GHG emissions prior starting construction. At the time it is ready to purchase offsets, the applicant would have to show proof to the Director that credits are not available in the unincorporated areas before purchasing credits available in other parts of the County. The Director is not determining the feasibility of a mitigation measure – that determination must be made as part of the CEQA process as part of the project approval.

This is no different than when a project proposes the acquisition of offsite mitigation property, but does not identify the location of such property in its EIR. *See Preserve Wild Santee, supra*, 210 Cal.App.4th at 279 ("an agency does not need to identify the exact location of offsite mitigation property for an EIR to comply with CEQA."). In that instance, staff of the local agency monitor the applicant to ensure they are acquiring the appropriate type and amount of mitigation property. In such a case, agency staff is not making a "feasibility determination" nor would the Director be doing so under M-GHG-1.

5. Carbon Offsets Are Effective And Enforceable

Sierra Club relies on a European Commission report for the CAP for the assertion that carbon offsets are not enforceable. Sierra Club's contention is meritless.

In the SEIR, the County discussed why the European Commission report is irrelevant to the purchase of carbon offset credits at issue here. (Response X33-6.) Additionally, in response to comment O14-13, the SEIR discusses the effectiveness and enforceability of carbon offsets in great detail.

(Response O14-13.) As discussed therein, under M-GHG-1, GPA applicants must purchase offsets from a CARB-approved registry or other similar registry that issues carbon offsets consistent with Health & Safety Code section 38562(d)(1). Such registries contain strict protocols that ensure their effectiveness and enforceability. *Our Children's Earth Foundation v. State Air Resources Bd.*, 234 Cal.App.4th 870, 889-890 (2015).

If carbon offset credits were not enforceable, CARB would not utilize them to implement the state's mandate to reduce GHG emissions. Petitioners rely heavily on the CARB Scoping Plan in support of their arguments, yet disregard the very carbon offset credit system that CARB has implemented to achieve the state's goals. The effectiveness and enforceability of carbon offset credits is well-established.

D. Petitioners Cannot Meet Their Burden to Prove Irreparable Harm.

Petitioners' only attempt to demonstrate irreparable harm is their claim that without an injunction, new projects approved by the Board or that are still being processed may emit GHG emissions. Petitioners' conclusory allegations of irreparable harm are meritless.

First, none of these projects will be able to start construction any time soon. The applicants for the three projects approved by the Board on July 25, 2018, must still obtain several permits before they can start construction, which will likely take at least 12-18 months to obtain. Newland Sierra and Warner Ranch have not been considered by the Board. If they are approved by the Board, the applicants for those projects will also have to then obtain several permits, which will likely take at least 12-18 months to obtain. (Neufeld Dec., ¶¶ 10-11.)

Second, **Petitioners have an adequate remedy** – they can file a CEQA challenge to a project if it is approved. Sierra Club and others have already filed CEQA actions regarding the three projects approved on July 25. (Request for Judicial Notice, Exs. 1-3.) Golden Door has already informed the County that it will file a CEQA action regarding Newland Sierra if that project is approved. (Heinlein Dec., ¶ 10.) If other projects are approved, Petitioners and others can file CEQA actions regarding those projects.

While Sierra Club claims it does not have the resources to do so, that does not make such harm irreparable. Under that logic, every individual that cannot afford an attorney but believes they may have a legitimate claim against the County in the future unless the County is enjoined from taking a particular action would be suffering "irreparable harm." That is not the law. An alleged harm is not irreparable

because a party purportedly lacks the resources to hire an attorney. Additionally, Golden Door does not claim to lack the necessary resources to file suit.

Third, the alleged "harm" that Petitioners claim they will suffer is not a harm at all. Each of applicants for the projects discussed in Ms. Fox's declaration have committed to net zero GHG emissions, meaning they will use on-site mitigation measures, project design features, and off-site mitigation measures to mitigate every metric ton of GHG generated by the projects. (Neufeld Dec., ¶¶ 3-9.) These projects are a net benefit to the environment because under the land uses specified for these project sites in the 2011 GPU and the CAP, each of these project sites are allowed a certain amount of GHG emissions. By going to net zero, these projects mitigate even those emissions that would be allowed under the 2011 GPU and the CAP.

Finally, granting the injunction would substantially harm the applicants. The applicants of the five projects discussed in Ms. Fox's declaration have paid nearly $5 million to the County alone. (Neufeld Dec., ¶ 12.) That does not include amounts paid to consultants and other costs they've incurred for these projects. Code of Civil Procedure section 389(a) states:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Petitioners seek an injunction that has the potential to severely impair or impede the applicants' interests, both monetarily and from an entitlements standpoint. As such, the applicants are necessary parties and the Court should not grant the relief requested absent joinder of the applicants.

E. <u>Petitioners' Motions Seek an End-Run Around Public Resources Code Section 21168.9.</u>

PRC section 21168.9(c) provides: "Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way." Yet, Petitioners ask this Court to order the Board to exercise their discretion in a very particular way – to deny projects that utilize carbon offsets as

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one mitigation measure for GHG emissions. Petitioners essentially seek an end run around 21168.9's limitations. The Court should not grant their request.

F. The Court Should Not Grant Petitioners' Motions, but if It Does, Petitioners Should Be Required to Post a Substantial Bond.

As discussed above, the Court should not grant Petitioners' motions. But if it does, it should require Petitioners to post a bond of at least $5 million – the amount the GPA applicants have paid to the County to process these projects.

V. CONCLUSION

CCP section 1094.5 does not apply; consequently, Petitioners must demonstrate that they are entitled to an injunction. Plaintiffs cannot make the requisite showing. The CAP and SEIR comply with CEQA. The CAP contains 26 reduction measures that will reduce GHG emissions by 900,000 metric tons. M-GHG-1 ensures that GPAs do not interfere with the County's ability to achieve this goal. Petitioners fail to prove otherwise. In addition, Petitioners cannot show irreparable harm. Accordingly, the Court should deny Petitioners' motion.

DATED: August 31, 2018

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