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May 31, 2018

VIA EMAIL

Ashley Smith
Planning and Development Services
County of San Diego
5510 Overland Avenue, Suite 310
San Diego, CA 92123

Re: Newland Sierra (Log No. PDS2015-ER-15-08-001; SCH No. 2015021036, Project Numbers: PDS2015-GPA-15-001, PDS2015-SP-15-001, PDS2015-REZ-15-001, PDS2015-TM-5597, PDSXXXX-HLP-XXX) – Failure to Properly Analyze and Mitigate Biological Impacts

Dear Ms. Smith:

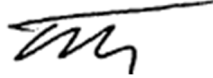
As you are aware, we represent Golden Door Properties, LLC (“Golden Door”), a world-class resort and agricultural operation in rural Twin Oaks Valley. The Golden Door has restored farming and beekeeping, including replanting many new trees, on its property, and shares its products through a community Farm Stand and other retail operations. The Golden Door has raised many concerns with the County about the proposed Newland Sierra Project and the impacts of adding urban density the size of the City of Del Mar in our rural community.

We write today with respect to the Project’s biological resources impacts, as follow-up to our letters dated May 22, 2017 (to the County) and May 21, 2018 (to the U.S. Fish & Wildlife Service, on which County staff were copied) and County staff’s letters to us dated June 5 and August 25, 2017 regarding the North County MSCP. As noted in the attached memorandum, there are many procedural and substantive deficiencies in the draft EIR and project application materials. We believe that these defects are of sufficient severity that the project application cannot proceed until these defects are corrected and the project’s environmental review documents are re-published to the public for review and comment under CEQA and other laws.

LATHAM & WATKINS^{LLP}

Thank you for your time and attention to our comments. Please do not hesitate to contact us should you have any questions or comments.

Best regards,



Taiga Takahashi
of LATHAM & WATKINS LLP

Enclosure

cc: Darin Neufeld, County Planning and Development Services
Mark Slovick, County Planning and Development Services
William W. Witt, Office of County Counsel
Claudia Silva, Office of County Counsel
Dan Silver, Endangered Habitats League
George Courser, Sierra Club
Stephanie Saathoff, Clay Co.
Denise Price, Clay Co.
Christopher Garrett, Latham & Watkins
Kathy Van Ness, Golden Door

I. THE PROJECT'S EXEMPTION FROM THE RESOURCE PROTECTION ORDINANCE CANNOT EXEMPT IT FROM THE CEQA SIGNIFICANCE THRESHOLDS.

The significance threshold for biological resources is clear. As stated on page 2.4-81 of the draft EIR, "A significant impact would result if: ... The project would conflict with one or more local policies or ordinances protecting biological resources ... The project would impact any amount of wetlands or sensitive habitat lands as outlined in the Resource Protection Ordinance (RPO)." The Resource Protection Ordinance defines "sensitive habitat lands" as including not only wetlands, but also "steep slope lands." (County Code § 86.602(c).)

The Draft EIR erroneously asserts that "Impacts would be reduced to less than significant with implementation of M-BIO-8D, M-BIO-8A, and M-BIO-12" (draft EIR at pp. 2.4-134–135) but fails to discuss or analyze the fact that the Project's Resource Protection Plan admits that the project is not consistent with the RPO. (Dudek Resource Protection Plan for the Newland Sierra Project (April 2017) at pp. 4-5 ["County Staff and the Wildlife Agencies agree that the proposed Newland Sierra Project (project) is not feasible to implement if the County RPO is strictly applied to areas outside of the designated biological open space"]; see also draft EIR at p. 3.3-39 ["The project must also be in conformance with the RPO. However, the project is not strictly in conformance with RPO"].) Clearly, if the Newland project cannot be implemented due to the RPO, the project is necessarily fundamentally inconsistent and incompatible with the RPO's requirements. This is undoubtedly a significant impact under the County's CEQA significance thresholds. Newland's proposed exemption from the RPO, which would only take place after project approval, cannot exempt it from the significance threshold, which is applied before project approval.

II. THE PROJECT'S BIOLOGICAL ANALYSIS IS MISSING CRUCIAL INFORMATION.

A. The Project analysis does not resolve impacts to the natural fire regime.

Page 2.4-97 of the draft EIR states that "If the natural fire regime is suppressed, longer-than-natural fire return intervals can result in excessive buildup of fuel loads so that when fires do occur, they are catastrophic. Unnaturally long fire intervals can also result in senescence of plant communities, such as chaparral, that rely on shorter intervals for rejuvenation. The potential cumulative indirect project impacts would be **significant (Impact BI-C-1)**." (See also p. 2.4-65.)

The Draft EIR goes on to summarily conclude that "Potential cumulative indirect impacts would be significant and would be reduced to less than significant through mitigation measures M-BIO-8A through M-BIO-8E, which would provide for habitat management and conservation of open space areas that would allow for unimpeded wildlife movement and use. This impact would also be mitigated through M-BIO-10 through M-BIO-12." There is no discussion of the project's impacts on natural fire regimes. (See also Jennings, 2018: "Both scenarios (too little fire, too frequent fire) present potential threats for species and community dynamics in southern California as shifts in the natural fire regime, coupled with increasing habitat fragmentation, have the potential to impact wildlife populations, communities, and entire ecosystems.").

Only two mitigation measures address fire (M-BIO-8C and M-BIO-11) but neither discuss the project's impacts on natural fire regimes. In fact, if the project does indeed attain its goal "To minimize the potential exposure of the project Site to fire hazards" (p. 2.4-120), this would constitute creating "Unnaturally long fire intervals [which] can also result in senescence of plant communities, such as chaparral, that rely on shorter intervals for rejuvenation." Nothing in the

draft EIR addresses this impact, and its failure to do so prevents the EIR from providing a legally adequate CEQA analysis.

B. The Project analysis does not conduct an adequate biological analysis of the impacts of the new interchange and instead illegally defers this analysis to another agency.

Page 2.4-123 of the draft EIR provides a deferred mitigation measure for the impacts of the new interchange, which the draft EIR concedes “may have the potential to impact or remove biological resources, including RPO wetlands.” The draft EIR then concludes that further study by Caltrans will “ensure potential impacts to biological resources remain less than significant.” This a classic example of illegally deferred mitigation.

It is axiomatic that in the right circumstances, an agency may defer the implementation of mitigation measures provided that the mitigation is enforceable and effective. What the agency may not do, however, is purport to make a significance conclusion based on the future study of the impact. That is exactly what the draft EIR does here. M-BIO-13 only states that Caltrans “should prepare, or cause to be prepared, a biological resources study to evaluate these potential impacts.” The County cannot make a significance conclusion based on a future study. In addition, M-BIO-13 contains no provisions to “ensure potential impacts to biological resources remain less than significant.”

The impropriety of M-BIO-13 is even clearer when the draft EIR itself discloses that the Newland clearly does know some detail of the scope and nature of the new interchange. For example, Figure 6D of the RPP clearly shows the outline of some design of the new interchange – accordingly, the draft EIR must analyze these impacts and not defer them for future study by another agency.

C. The Project's analysis regarding off-site wetlands is not supported by substantial evidence.

Table 3 of the RPP at page 22 asserts that impacts of off-site RPO wetlands is identical for either Option A or Option B. This appears to define common sense, given that Option A proposes “approximately 6,600-foot-long section of the segment of Deer Springs Road between Sarver Lane and Mesa Rock Road to a 2.1B Community Collector (two lanes of travel with a continuous center turn lane). The balance of the road southwest into the city of San Marcos and east to I-15, including its intersections with Sarver Lane and Mesa Rock Road, would be improved to a 4.1A Major Road (a four-lane road with a raised median),” whereas Option B proposes to “construct the entire length of the road from the I-15 interchange to its intersection with Twin Oaks Valley Road as a four-lane road, with an approximately 7,600-foot-long section of the road between Sarver Lane and Mesa Rock Road as a 4.1B Major Road (four lanes of travel with a continuous center turn lane), and the balance of the road, including its intersections with Sarver Lane and Mesa Rock Road, as a 4.1A Major Road.” Because Option A and Option B propose different widths to Deer Springs Road, the impacts to wetlands should also be different. But the RPP asserts the impact is identical. This cannot be the case unless Option A and Option B were identical, which they are not. Indeed, except for this one table, the entirety of the 70-page RPP makes no distinction between Option A and Option B—a severe informational deficiency that renders the draft EIR to be fundamentally incomplete and unable to legally proceed in its current form under CEQA.

This, along with other inconsistencies identified in our other correspond, render the draft EIR fundamentally inadequate under CEQA and it requires substantial revision and recirculation before proceeding on for further review.

D. The Project analysis fails to identify or analyze inconsistency with the General Plan's resource protection requirements.

The General Plan generally requires compliance with the County's Resource Protection Ordinance. (See 2017 County General Plan Implementation Plan, at pp. 30, 36, 39.)¹ The project proposes to exempt itself from the Resource Protection Ordinance; therefore, it cannot be deemed to have complied with the applicable General Plan Policies. (As noted in the Implementation Plan, these include M-2.3, M-4.5, LU-6.1, COS-2.1, COS-2.2, COS-2.3, COS-3.1, COS-3.2, LU-7.2, COS-6.3, COS-6.4, S-3.1, S-3.2, S-3.3, LU-6.8, COS-5.3, COS-12.2, S-8.1, S-8.2, and S-9.6.)

Though the draft EIR asserts that the project's RPP is the "functional equivalent" to the RPO, as noted in our August 2017 comment letter, there is no analysis or evidence that substantiates this conclusory assertion. Similarly, there is no analysis or evidence that the RPP complies with the applicable General Plan Policies noted herein.

E. The Project analysis fails to analyze the project under the County's Biological Mitigation Ordinance.

The EIR is also defective because it does not include an appropriate analysis of Biological Mitigation Ordinance requirements. Page 2.4-90 of the draft EIR claims that "The Biological Mitigation Ordinance does not apply to the draft North County Plan planning area. Therefore, no impacts to Biological Resource Core Areas would occur." This is an improper analysis under CEQA. The current publicly available draft North County MSCP (<https://www.sandiegocounty.gov/content/dam/sdc/pds/mscp/docs/MSCPNorthCountyPlan.pdf>) at pages 13-14 states that "The County's BMO (Appendix A) will be the primary instrument for determining mitigation requirements for discretionary development projects." Appendix A (<https://www.sandiegocounty.gov/content/dam/sdc/pds/mscp/docs/AppendixANCBMO.pdf>) presents draft Biological Mitigation Ordinance requirements for the North County MSCP area. If the project is going to take "credit" for being in the draft North County MSCP area (which it does, see, for example, page 3.3-44 of the draft EIR, asserting that "The proposed project is currently designated as 'Proposed Hardline Area' in the North County MSCP"), then it must also analyze the requirements of the current draft, including the draft Biological Mitigation Ordinance for the North County MSCP area. Otherwise, it is a defective analysis that does not meet CEQA's requirements. (See, e.g., *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 941 ["For all the reasons stated above, the Banning Ranch EIR is insufficient. The City did provide a detailed biological analysis of project impacts, which may have been adequate were Banning Ranch not in the coastal zone. But, however technically accurate the City's analysis might otherwise be, it fell short by failing to account for the Coastal Act's ESHA protections."].)

¹ Available at https://www.sandiegocounty.gov/content/dam/sdc/pds/gpupdate/docs/GP/Implementation%20Plan_v2017.pdf.

F. The Project's analysis of impacts to California gnatcatcher is not supported by substantial evidence.

The draft EIR notes that a large portion of the project site (over 700 acres) is designated as "critical habitat" for the California gnatcatcher, which is a federally protected species under the Endangered Species Act. (Draft EIR at p. 2.4-28.) The draft EIR then dismisses the critical habitat designation and concludes there will be a less than significant impact because "the project was designed to avoid 33 percent (25.2 acres) of the suitable habitat" (*Id.* at p. 2.4-93.) The threshold for significance makes no mention of "suitable habitat" – rather, it states broadly that an impact will be significant if the project "would reduce the likelihood of survival and recovery of listed species in the wild." (*Id.* at p. 2.4-81.) The draft EIR fails to provide any analysis regarding whether the project's impact on "*critical habitat*" "would reduce the likelihood of survival and recovery" of California gnatcatcher. The draft EIR cannot dismiss the critical habitat designation and focus only on "suitable habitat for nesting." As noted by the U.S. Fish & Wildlife Service, critical habitat "contain[s] features essential to the conservation of an endangered or threatened species and that may require special management and protection. Critical habitat may also include areas that are not currently occupied by the species but will be needed for its recovery."² "Nesting" is not the only important factor in the "survival and recovery of listed species in the wild"; "physical or biological features needed for life processes" must also be considered. These include: "space for individual and population growth and for normal behavior; cover or shelter; food, water, air, light, minerals, or other nutritional or physiological requirements; sites for breeding and rearing offspring; and habitats that are protected from disturbances or are representative of the historical geographical and ecological distributions of a species ... unoccupied areas that are essential for the conservation of the species." The draft EIR's failure to consider these factors renders it an inadequate document under CEQA.

G. The Project does not adequately mitigate for impacts to oak root zones.

The draft EIR states that there will be a requirement for 58.8 acres of mitigation for the project's impacts to oak root zones. (Draft EIR at p. 2.4-173.) The draft EIR also asserts that the project will provide "excess" mitigation of 2.1 acres. (*Ibid.*) This is a clear informational error that requires correction and recirculation, because the discrepancy in the calculation cannot be dismissed by mere "rounding error." The mitigation table discloses that the project will mitigate approximately 38.5 acres (21.7 on-site and 16.8 off-site). The mitigation requirement is approximately 58.8 acres; accordingly there is a mitigation *deficit of 21 acres*, not an excess of "2.1" acres. This failure to properly analyze and mitigate these impacts is sufficient to find the draft EIR legally inadequate. (See, e.g., *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645.)

H. The Project analysis' conclusory assertion regarding impacts to wildlife crossings is not supported by substantial evidence.

Even though the project proposes to substantially expand the width of Deer Springs Road (to double or even triple its current size, from 2 lanes to 4 or 6 lanes), the draft EIR concludes, without any evidence, that "Wildlife are expected to cross Deer Springs Road and Twin Oaks Valley Road similar to current conditions, because the open space configuration would allow for continued movement to the south and west." Open space to the north and east does not determine the viability of wildlife crossings; rather, as noted by biological experts,

² See <https://www.fws.gov/endangered/what-we-do/critical-habitats-faq.html>.

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wildlife crossings are also impacted by the width of the road and traffic volumes, both of which the project proposes to substantially increase. These impacts require mitigation, but the project proposes none other than “open space”:

- “to adequately ensure there is functional connectivity for wildlife to move to and from the open space in the San Marcos Mountains, appropriately sited and designed wildlife crossing structures need to be installed along Twin Oaks Valley Road.” (Jennings, 2017);
- “The proposed increase in the size of Deer Springs Road, the improvements to the I-15 interchange, as well as the expansion of the footprint of development in the immediate vicinity of the I-15 interchange would be exceptionally difficult to plan so that wildlife could continue to move through the area, particularly given the importance of north-south movement through this area ... Appropriately sized, spaced, sited, and designed structures must be included in the design of the road to allow for wildlife movement to avoid increasing the mortality effect of the road and limit the degree of the barrier effect that will occur when the road is widened. Furthermore, incorporating the addition of wildlife crossing structure.” (Jennings, 2017);
- “Other roads of concern in the proposed project are Camino Mayor and the proposed section of Mesa Rock Road that would bisect the proposed central section of “open space”. These two roads would also need to incorporate appropriate wildlife crossing structures to limit the impacts of these roadways on habitat and movement.” (Jennings, 2017).

However, having “open space” does not address the actual increased physical difficulty of wildlife crossing what is currently a 2-lane road as compared to what the project proposes to be at least a 4-lane road or even 6-lane road. There is simply no substantial evidence in the record that “Wildlife are expected to cross Deer Springs Road and Twin Oaks Valley Road similar to current conditions” even when Deer Springs Road is widened to double or triple its current size.

I. The Project analysis impermissibly fails to include an evaluation of a “non-MSCP hardline” alternative.

Planning Director Mark Wardlaw wrote in a letter dated June 5, 2017, that:

In order for a project to be included as a hardline within the approved Multiple Species Conservation Plan - North County Plan (Final Plan), the project footprint to be developed and the footprint to be preserved, including any offsite mitigation areas, must be concurred upon by the Wildlife Agencies, the project proponent, and the County. While the Project is the only proposed project included within the current Draft Plan that has not yet received Board approval, inclusion of the Project in the Draft Plan does not, in any manner, indicate County support for the Project or provide the Project with an approval advantage.

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(See also Letter from R. Talleh, Deputy Director, Planning & Development Services, County of San Diego, *RE: Response to "North County MSCP Steering Committee Presentation"* (Aug. 25, 2017).)

However, the Newland Project draft EIR assumes the Project's inclusion in the "hardline" areas in the draft North County MSCP. Because the North County MSCP is still in draft form and still requires concurrence from federal and state wildlife agencies—and if it is indeed true that "inclusion of the Project in the Draft Plan does not, in any manner, indicate County support for the Project or provide the Project with an approval advantage"—the Project's environmental review documents must evaluate a "non-MSCP hardline" alternative. This alternative would analyze the Project under the possibility that the project site is not included with the MSCP hardline areas.

Failure to include a "non-MSCP hardline" alternative effectively concedes that the Project is going to be included within the North County MSCP hardline area and therefore is a violation of CEQA's rule against piecemealing project approvals. Assuming that the Project site will be designated as "hardline" in the North County MSCP does, in fact, "indicate County support for the Project or provide the Project with an approval advantage" if there is no evaluation of an alternative that does not assume the hardline designation.

Further, failure to analyze a "non-MSCP hardline" alternative or continuing to assume that the Newland Project will be designated as "hardline" in the final North County MSCP violates several mandatory general plan policies. First, as noted in our May 21 letter, General Plan Policy COS-1.4 requires the County to "collaborate," with federal and state wildlife agencies regarding resource preservation. Assuming the inclusion of the Newland project within the MSCP hardline areas before the North County MSCP has been approved violates this policy. Similarly, assuming the inclusion of the Project within the MSCP hardline areas prior to public review and comment on the current draft of the North County MSCP violates General Plan Policy COS-1.10. General Plan Policy COS-1.10 requires the County to "Ensure an open, transparent, and inclusive decision-making process by involving the public throughout the course of planning and implementation of habitat conservation plans and resource management plans." The County's assumption that the Newland Project will be approved as a hardline area in the North County MSCP effectively evades public involvement and input regarding whether the Project Site should be included as a hardline area.

To remedy these errors, the Newland EIR must either include the evaluation of a "non-MSCP hardline" alternative or it must be delayed until after the draft North County MSCP has been approved.