

LL-19
Latham & Watkins LLP
on behalf of the Golden Door Properties, LLC
Dated: May 14, 2018

1. Introduction

The letter submitted by Latham & Watkins on behalf of the Golden Door Properties, LLC, dated May 14, 2018, is a late letter in response to the Newland Sierra Draft EIR that does not require a written response from the County.

Under CEQA Guidelines section 15105, the County was legally required to provide a 45-day public review period on the Draft EIR. In order to provide additional time, the County instead afforded 60 days for public review and comment. The public comment period for the Draft EIR began on June 15, 2017, and ended on August 14, 2017. All comment letters received after expiration of the public review and comment period ending on August 14, 2017, are considered late comments.

A lead agency is required to consider comments on the Draft EIR and to prepare written responses if a comment is received within the public comment period. (Pub. Resources Code, §21091(d); CEQA Guidelines, §15088.) When a comment letter is received after the close of the public comment period, however, a lead agency does not have an obligation to respond. (Pub. Resources Code, §21091(d)(1); Pub. Resources Code, §21092.5(c).) Accordingly, the County is not required to provide a written response to late comment letters, including the May 14, 2018, letter from Latham & Watkins. (See, CEQA Guidelines, §15088(a)).

Nonetheless, for information purposes, the County has elected to respond to such letters, but without waiving its position that written responses to late comment letters are not required by law.

2. Summary of Letter/Comments

The May 14, 2018 letter states that the County has used “unauthorized/unapproved consultants” for the Newland Sierra project EIR in violation of the *County of San Diego CEQA Guidelines* (County CEQA Guidelines). In particular, the letter references the following five technical studies and the consultants that prepared them, and states that no Memoranda of Understanding (MOU) were disclosed by the County in response to Golden Door’s October 10, 2017, Public Records Act request:

- (1) EIR Appendix GG, Newland Sierra Agricultural Alternative Report, prepared by Ecology Artisans;

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- (2) EIR Appendix J-4, Groundwater Resources, Newland Sierra, San Diego County, California, prepared by Leighton & Associates;
- (3) EIR Appendix HH, Newland Sierra Parkway Feasibility Study, Evaluation of Alternatives to Widening of Deer Springs Road, prepared by Fuscoe Engineering
- (4) EIR Appendix R-2, Newland Sierra VMT Analysis to Respond to SB 743, prepared by Fehr & Peers; and
- (5) EIR Appendix R-3, Newland Sierra TDM Program – VMT Reduction Evaluation, prepared by Fehr & Peers.

The letter identifies two options available to the County to allegedly correct the “problem” and both options call for the “halt” in “processing of the Newland project.” The letter requested a response by May 23, 2018, and suggested that “[j]udicial intervention is warranted presently[.]” (Letter, p. 4.) The County does not concur with these comments.

3. Relevant Background

As background, the County’s Board of Supervisors adopted the County CEQA Guidelines, as amended, on October 21, 2009. The County CEQA Guidelines “provide objectives, criteria, and procedures for the orderly evaluation” of projects and documents prepared pursuant to CEQA and the State CEQA Guidelines. (County CEQA Guidelines, Section 1, p. 1.)

The County CEQA Guidelines state that the Department of Planning and Development Services will maintain a CEQA Consultant List for privately initiated projects and that technical studies and EIRs must be prepared by consultants on the list unless the County exercises its discretion to use consultants selected by the applicant. (County CEQA Guidelines, Section 17, pp. 8-9 and Attachment A, p. A-1.) Per the County CEQA Guidelines, project applicants select and contract directly with the consultants to prepare such documents. The applicant, consultant, and County execute a MOU or similar agreement that “defines the roles, limitations, and requirements of the parties involved.” (County CEQA Guidelines, Attachment A, p. A-1.)

The County’s CEQA Consultant List identifies 13 subject areas for which consultants listed are typically required to author technical reports for privately-initiated projects. Based on County staff’s data, consultants on the County’s CEQA Consultant List prepared 11 of 13 subject area CEQA documents (including the Draft EIR itself) pursuant to executed MOUs for the Newland Sierra project. (The remaining two CEQA subject areas are not applicable because no technical reports were prepared for those subject matter areas.)

The County CEQA Guidelines also identify “subject areas not listed.” (County CEQA Guidelines, Attachment A, Section 1(A), p. A-2.) These subject areas have two categories: (i) technical reports

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where no list is maintained because the reports are prepared by licensed, registered, or certified professionals; and (ii) technical reports in other subject areas that are required in certain circumstances. Each type of technical report is discussed below.

First, the County CEQA Guidelines identify examples of subject areas where no list is maintained by the County (e.g., geologic hazards, hazardous materials and existing contamination, hydrology, and stormwater management planning). No list is maintained by the County for preparation of such reports because they must be completed by registered engineers or other certified professionals. Those individuals are qualified to prepare such reports due to their licensing, registrations, or certifications. For those consultants, no MOU is required.

Second, the County's CEQA Guidelines state that "[u]nder certain circumstances, a need may arise for technical studies to be prepared in other subject areas" beyond those listed in the County's Consultant List. (County's CEQA Guidelines, Attachment A, Section 1(A), p. A-2.) For those consultants, the applicant recommends a consultant subject to the discretion of the Director of Planning and Development Services, and the parties execute an MOU in a form approved by County Counsel, and shown as an example in Attachment B to the County's CEQA Guidelines.

Based on County staff's data, certain technical studies for the Newland Sierra project were prepared for topics falling into both of the above categories. No MOUs were executed for the first category of technical studies because, as stated, such studies were prepared by specified licensed individuals, such as registered engineers or certified professionals.

Other technical reports were prepared on subject areas not listed on the County's CEQA Consultants List. For example, the applicant did not prepare, nor select the consultant that prepared, the Newland Sierra project's Water Supply Assessment (WSA). Instead, the Vallecitos Water District's outside engineer prepared the WSA and the WSA is required by law (Water Code section 10910). For these reasons, no MOU is required under the County's CEQA Guidelines for the WSA. For other technical reports prepared on subject areas not listed on the County's CEQA Consultants List, the County determined that an MOU needed to be executed. For that reason, the County required 7 consultants to execute MOUs, each of which obligated the consultant to affirm and ratify that the technical studies were prepared in accordance with the requirements set forth in the MOUs. Requiring each such consultant to affirm and ratify that their studies were prepared in accordance with the requirements set forth in the MOUs represents a reasonable means of achieving the underlying purposes of the County's CEQA Guidelines. Further, County staff independently reviewed and evaluated each such study, and found each study to provide sufficient, objective information useful to the public and the decision makers.

4. Further County Response

Apart from this response, the County separately responded to the May 14, 2018 letter. Specifically, on May 30, 2018, the County's Office of County Counsel (Inga B. Lintvedt, Senior Deputy)

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provided a thorough written response to Golden Door's May 14, 2018 letter. The County incorporates by reference its letter dated May 30, 2018, along with the two attachments to that letter response (i.e., Attachments A and B). The letter and attachments are available for public review and inspection upon request to the County. The County's letter disagrees with the contentions made by Golden Door, and responds specifically to the five allegedly improper technical reports.

5. Ensuing Litigation

On June 19, 2018, Golden Door filed a lawsuit against the County captioned, "Verified Petition for Peremptory Writ of Mandate and Complaint for Declaratory and Injunctive Relief," in San Diego Superior Court, Case No. 37-2018-00030460-CU-TT-CTL, assigned to the Hon. Joel R. Wohlfeil. The petition alleges four claims. The first two claims contend that the County "improperly" used consultants that either (a) were not on the County's list of approved consultants, and/or (b) did not properly sign a MOU with the County. The last two claims contend the County's document retention policies violate CEQA and the California Public Records Act (PRA), including a claim that the County failed to respond to Golden Door's October 10, 2017 PRA request referenced in footnote 6 of the May 14, 2018 letter.

The exhibits to the petition include County Counsel's letter response, dated May 30, 2018 (Exhibit W). Such exhibits also include Golden Door's October 10, 2017 PRA request letter (Exhibit P); and County letters and e-mail exchanges between Latham & Watkins and the County concerning the PRA requests (e.g., Exhibits Q, R, S, U, V, and X).

In this litigation, the County contends that the claims lack merit. The County also is in the process of defending against all claims raised in the litigation, including the County's demurrer to the complaint in the lawsuit and its opposition to Golden Door's request for injunctive relief.¹ At this time, however, the litigation is ongoing and no further response is required or can be provided.

6. Batching Comments

The May 14, 2018 letter makes reference to "controversy" surrounding the County's "plan to 'bundle' or 'batch' several General Plan Amendment applications ... to avoid new potential Supervisors and/or potential voter initiatives that may be chosen by the voters this fall," citing a newspaper article. The letter also contends that batching is "unprecedented" and causing the County to "rush" to approve projects resulting in "short-circuiting" County planning practices (e.g., community sponsor group involvement) and other practices (e.g., use of "unauthorized" consultants). The County does not concur with these comments.

¹ The County incorporates by reference its demurrer and supporting legal memorandum, along with its written opposition to Golden Door's injunctive relief request. Such documents are part of the court files in Case No. 37-2018-00030460-CU-TT-CTL. Such documents are available for public review and inspection upon request to the County.

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First, the letter does not indicate that “batching” is violating any law or regulation. To the contrary, Government Code section 65358 provides that more than one change may be made at a time to the General Plan and the change or changes may be considered as a single amendment to such plan. (See Gov. Code, §65358(b); *Karlson v. Camarillo* (1980) 100 Cal.App.3d 789, 808; 68 Ops. Cal.Atty.Gen. 258 (1983).)

Second, the County addressed its General Plan Amendment batching processes and procedures, noting it has been used in prior years (e.g., 2009, 2010); and, thus, it is not “unprecedented.” Please refer to County Memorandum to Supervisors from Sarah E. Aghassi, Deputy Chief Administrative Officer, dated May 15, 2018 (Aghassi memorandum).²

Third, the County has not “rushed” through its customary processes and procedures to accommodate “batching,” as shown in the Aghassi memorandum. Those processes and procedures include adequate notifications, input from advisory sponsor groups, public input, project analyses, and public hearings. The County’s processes and procedures are consistent with Government Code section 65358 and its legislative history.

² This memorandum is incorporated by reference and available for public review and inspection upon request to the County.