

LL-22
Latham & Watkins LLP
on behalf of the Golden Door Properties, LLC
Dated: May 31, 2018

1. Introduction

The comment letter submitted by Latham & Watkins on behalf of the Golden Door Properties, LLC, dated May 31, 2018, is a late letter that does not require a written response from 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 31, 2018, letter from Latham & Watkins. (See, CEQA Guidelines, §15088(a)).

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

The comment letter states that there are many procedural and substantive deficiencies in the draft EIR and project application materials. The comment letter outlines ten issues which are each responded to as follows.

2. The project's impacts to RPO wetlands would be mitigated to less than significant.

The draft EIR acknowledges that impacts to Resource Protection Ordinance (RPO) wetlands would be significant per the County significance criteria 4.2(e) (**Impact P-1**). The requested amendment to the RPO for the Project Site, while exempting the proposed Project from RPO, is based on the findings that the proposed Resource Management Plans (Appendices L and M to Appendix H, Biological Resources Report) and Resource Protection Plan would be functionally equivalent to the RPO. The requested exemption would be consistent with the County's practices for granting an exemption subject to the finding of functional equivalency.

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Please also refer to **Topical Response BIO-3 [Resource Protection Ordinance]**. The project development areas have been planned to minimize impacts to the Environmentally Sensitive Lands, both on and off-site. The project's grading footprint onsite would be limited to approximately 540 acres of the 1,985-acre Site (27% of the Site). The project would create a 1,209-acre open space preserve and set aside an additional approximately 235 acres of native habitat that would not be graded or irrigated but selectively thinned for fuel management purposes. The project's neighborhoods have been designed to minimize impacts to the Site's natural topography and preserve prominent ridgelines and rock outcroppings.

The project's proposed impacts to existing floodway and floodplain fringe areas comply with the above criteria outlined in the Resource Protection Ordinance and are related to the improvements to Sarver Lane and Deer Springs Road. The project's proposed improvements to these two road facilities would eliminate the existing flooding/overtopping condition that can occur during severe rainfall events and implement stormwater quality treatment and detention facilities where none exist today (improving the water quality of runoff from the roads compared to the existing condition). The County also refers the reader to **Response to Comments O-2.1-20 through O-2.1-26**.

3. The project's impacts to biological analysis is complete and complies with CEQA.

The letter states that the project does not resolve impacts to the natural fire regime because there is no discussion on the project's impact on natural fire regimes and refers to **Impact BI-C-1** which deals, in part, with too frequent or too infrequent fire events having negative biological impacts. The comment letter the EIR does not address this impact. The County does not agree.

The EIR identifies the impact and identifies mitigation measures M-BIO-8A through M-BIO-8E. Impact BI-C-1 addresses the project's indirect impacts to altering the natural fire regime which can lead to indirect cumulative impacts to the project's proposed preserve area. As addressed in **Response to Late Letter LL-12**, with implementation of the project's mitigation measures, the project will have a minimal effect on increasing the frequency of fires occurring within the project's proposed preserve areas. As it relates to the project potentially resulting in a decrease in the frequency of fire events, as the project is not a fire district or agency or functioning in any such capacity, the project itself would not be expected to decrease the frequency of fires (either onsite or offsite). In the interest of public safety, fire districts and agencies suppress wildland fires and the County acknowledges that this vital governmental function can, in some cases, have the longer-term unintended effect of creating overly mature/senescent habitats. The County also notes that the habitat on the project Site has not experienced a fire for such an extended period of time that a significant amount of the chaparral habitat on the project Site today could be described as very mature/senescent. Therefore, even if the project were to have the potential to decrease the frequency of fires in the project's proposed preserve areas, which the commenter has not provided

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any evidence to support this suggestion, given the existing condition of the habitat on the project Site, this would not result in a material change to the existing condition.

4. The project's proposed interchange improvements would be confined to the location of the existing interchange and connecting County roads and would not be expected to result in any new significant biological impacts.

The County refers the reader to **Response to Comments O-1-19** and **O-1.5-21**.

5. The project's impacts to wetlands are addressed in the EIR.

Deer Springs Road Option A and Option B will both result in the same amount of impacts to RPO wetlands. Option B increases the width of Deer Springs Road on the northern edge of the road which will cause an increase in upland habitat impacts. All RPO wetlands are on the southern side of the road alignment, which is identical for both options. Additionally, the Preliminary Grading Plan has been revised to reduce impacts to RPO wetlands along the side side of the road. Refer to **Topical Response BIO-3 [Resource Protection Ordinance]**.

Further, the project would mitigate its impacts to wetlands to less than significant. The project's request for an exemption from the Resource Protection Ordinance is narrowly confined to the project's impacts to RPO wetlands, there is existing precedent in the County for granting an exemption from the County's RPO when a project would implement a Resource Management Plan as the functional equivalent to RPO, and the requested exemption does not make the project inconsistent with the General Plan. For further responsive information, please see **Responses to Comments O-1-115** and **O-1-452** and **Topical Response BIO-3 [Resource Protection Ordinance]**.

6. The County's South County MSCP Subarea Plan Biological Mitigation Ordinance (BMO) does not apply to the project.

The Draft North County Plan will have a BMO as an implementing ordinance, but no such ordinance is applicable today to the project Site. Instead, the EIR has analyzed the project's consistency with Planning Agreement in the absence of adopted North County Plan. See point #11 below.

7. The project's impacts to the California gnatcatcher is limited to a single pair near the Town Center area of the project Site.

The County refers the reader to **Response to Comment I-348-1**.

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8. The Project analyzes impacts to oak root zones.

Impacts to oak root zones are analyzed in Draft EIR Section 2.4, Table 2.4-27. Those impacts are also disclosed in the associated figures in the Draft EIR.

9. The project has addressed its impacts to wildlife crossings.

The County refers the reader to **Topical Response BIO-2 [Wildlife Corridors]**, Draft EIR Section 2.4.12.4, as well as **Response to Comment Letter O-1.5**.

10. All of the project alternatives constitute non-MSCP hardline alternatives.

The letter states that the project EIR impermissibly fails to evaluate a “non-MSCP hardline” alternative; that the Draft EIR improperly assumes the project will be included in the “hardline” areas for the Draft North County Multiple Species Conservation Program (MSCP) Subarea Plan; and that by not evaluating a non-MSCP hardline alternative, the County is conceding that the project is going to be included in the North County Plan hardline area. Thus, according to the letter, the EIR and/or the project violate CEQA’s rule against piecemealing project approvals, and also violate General Plan Policies COS-1.4 and COS-1.10. The County does not agree with these assertions.

All of the project alternatives constitute non-MSCP hardline alternatives. The EIR includes 9 project alternatives, all of which are non-MSCP hardline alternatives to the project because none of them are included in the Draft North County MSCP Subarea Plan (“Draft North County Plan”) as proposed hardline areas. Further, neither the project nor any of the project alternatives specifically rely on the adoption of the North County Plan for the determination of impacts or required mitigation. Therefore, the EIR does not fail to include project alternatives that are non-MSCP hardline alternatives. To the contrary, *all* of the project alternatives analyzed in the EIR constitute non-MSCP hardline alternatives because none of them are included in the Draft North County Plan as hardline areas and none of them rely on adoption of the North County Plan.

The EIR addresses the Draft North County Plan as a potential future plan but does not reply upon it. Chapter 1, Project Description, of the EIR, page 1-21, properly discloses that the project site has been included as a proposed hardline area in the Draft North County Plan, stating:

“The proposed project has been identified as a proposed hardline area in the draft North County Plan (see Figure 2.4-4, Regional Context), which means that the proposed development areas and proposed biological open space areas have been incorporated into the overall conservation strategy of the County’s draft North County Plan.”

The Draft North County Plan includes the project’s proposed development and preserve areas in its conservation framework. Such inclusion is appropriate and justified because the project is being processed in the County for approval, is going through the County’s CEQA compliance review,

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and the EIR has concluded the project will have less than significant direct and cumulative impacts on biological resources. The project does not jeopardize the viability or impede the completion and implementation of the Draft North County Plan. To the contrary, including the project site as a hardline area creates more certainty around the conservation outcome of the Draft North County Plan. Conversely, failure to include the project site as a hardline area could result in an inaccurate or incomplete conservation analysis, which, in turn, could harm the quality and accuracy of the conservation analysis, thereby weakening the overall quality and durability of the Draft North County Plan.

As to the project's relationship to the Draft North County Plan, the EIR does not assume or rely upon the project's inclusion as a hardline area in the Draft North County Plan or implementation of the Draft Plan for determining impacts and mitigation. Of the project's 13 biological mitigation measures (M-BIO-1 through M-BIO-13), only one (M-BIO-1.p), Construction Monitoring) contains a reference to the MSCP, as follows (*emphasis added*):

M-BIO-1 CONSTRUCTION MONITORING: To prevent inadvertent disturbance to areas outside the limits of grading, all grading shall be monitored by a biologist. A "Project Biologist" approved by the County of San Diego (County) shall be contracted to perform biological monitoring during all grading, clearing, grubbing, trenching, and construction activities.

The following shall be completed:

1. The Project Biologist shall perform the monitoring duties before, during, and after construction pursuant to the most current version of the County of San Diego Report Format and Content Requirements, Biological Resources. The contract provided to the County shall include an agreement that this will be completed, and a Memorandum of Understanding (MOU) between the biological consulting company and the County shall be executed. The contract shall include a cost estimate for the monitoring work and reporting. In addition to performing monitoring duties pursuant to the most current version of the County of San Diego Report Format and Content Requirements, Biological Resources, the Project Biologist shall perform the following duties:
 - p. Make monthly updates available to the Wildlife Agencies and County based on the daily monitoring notes described above, *until such time as the North County MSCP Plan is adopted, after which the MSCP plan provisions will replace this measure.*

Rather than rely on the adoption of the MSCP, this mitigation measure identifies the required mitigation the project must implement unless and until the North County Plan is adopted. Under

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standard MSCP reporting requirements, once the North County Plan is approved, the project would then make monthly updates to the County and the County provides annual reporting to the Wildlife Agencies. All of the monitoring requirements outlined in this mitigation measure would remain unchanged whether the North County Plan is adopted or not.

11. The EIR addresses the application of the Planning Agreement to the project in the absence of an approved North County Plan.

Contrary to statements made in the letter, the EIR does not assume or rely on approval of the Draft North County Plan. Instead, the EIR assumes that the Planning Agreement will apply to the project in the event the Draft North County Plan is not finalized. Specifically, in the Biological Resources Chapter, Section 2.4.3, Regional Context, page 2.4-5, the EIR states clearly that the Planning Agreement between the County and the Wildlife Agencies applies to the project, as follows (*emphasis added*):

The draft North County Plan of the MSCP is a comprehensive habitat conservation planning program and development take permit that attempts to preserve native habitat for a multitude of sensitive species and guides development for which the County, USFWS, and CDFW entered into a Planning Agreement (County of San Diego 2008a and 2014). The proposed project is a proposed hardline area in the draft North County Plan; *however, until the North County Plan is approved, the Planning Agreement between the County and the Agencies (County of San Diego 2008a and 2014) remains in place and applies to the project.*

The EIR contains other references to the Draft North County Plan in Chapter 2.4 of the EIR, and this was done to provide factual background information or to evaluate whether the project would impede preparation and implementation of the Draft North County Plan. For example, when describing the project's proposed 212-acre off-site mitigation parcel in Ramona, page 2.4-77 of the EIR provides factual background information relating to the mitigation parcel as follows:

The off-site open space located in Ramona *within the draft North County MSCP area* provides a 211.8-acre block of continuous habitat situated between segments of the Cleveland National Forest and San Diego County Parks land. (*Emphasis added.*)

Rather than relying on the Draft North County Plan, the EIR follows the County's Guidelines for the Determination of Significance which specifically address "lands outside of the Multiple Species Conservation Plan" and whether a project would preclude or prevent the preparation of the subregional NCCP (i.e., the Draft North County Plan). (EIR, Section 2.4.15.5, Local Policies, Ordinances and Adopted Plans, Guidelines for Determination of Significance, pp. 2.4-82 *et seq.*) Consistent with the County's Guidelines, the EIR addresses this specific issue and concludes impacts would be less than significant because "[t]he proposed project would not preclude or prevent the preparation of the subregional NCCP because the project has been planned in

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accordance with the planning principles of the draft North County Plan, the proposed project has been developed consistent with the Preliminary Conservation Objectives in the Planning Agreement for the North County Plan, (and) the proposed project was designed to be consistent with (the Planning Agreement preserve design) principles (for evaluating Interim Projects).” (EIR Section 2.4.15.5, page 2.4-82) Ultimately, the EIR determines that, because the project will not impede preparation or implementation of the subregional NCCP (i.e., the North County Plan), its impacts on such regional planning would be less than significant. (EIR Section 2.4.15.5, page 2.4-82)

Beginning on page 2.4-83, the EIR analyzes the project’s consistency with the eight (8) Interim Project Preserve Design Principles that apply to the project because the North County Plan is in preparation. Therefore, the EIR analyzes the project’s consistency with these principles and does so in a way that shows the project will not preclude or prevent the preparation and ultimate adoption of the Draft North County Plan. This, however, does not mean that the project is relying on the adoption of the North County Plan for the determination of impacts or mitigation.

12. The EIR identifies four possible permitting pathways for the project to receive take authorization.

Although take authorization is not a CEQA issue, the EIR does provide information relevant to the topic. Note, however, that the EIR, when discussing take authorization, does not assume the project will be included as a hardline area in the Draft North County Plan; nor does it rely on the potential future adoption of this Plan. Instead, the EIR identifies multiple pathways for the project to receive take authorization. Compliance with the North County Plan, whether as a hardline project in the Plan or not, is just one of them. The EIR also identifies the County’s Habitat Loss Permit (HLP) process (Federal ESA 4(d) Rule), the Section 7 process (Federal ESA Section 7) administered by the Army Corps of Engineers, or the Section 10(a) process (Federal ESA Section 10) as three other ways the project can obtain take authorization for impacts to federally threatened and endangered species (in the case of the project, the California gnatcatcher).

13. Identifying the North County Plan as a possible permitting mechanism for the project does not constitute piecemealing.

The letter asserts that the project’s reliance on the Draft North County Plan constitutes piecemealing of the project’s approvals. This is incorrect. As stated above, the County has made it clear that including the project’s open space design in the Draft North County Plan does not, in any manner, indicate support for the project or give the project an approval advantage. Planning Director Mark Wardlaw, in his letter to Chris Garrett dated June 5, 2017, was emphatic on this point:

The Project’s inclusion in the Draft Plan reflects the County’s view that the Project’s proposed development footprint and open space preserve area should be

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considered within the conservation analysis for the Draft [North County MSCP] Plan but does not give the project any preferential treatment or eliminate any mitigation requirements.

(Wardlaw letter, June 5, 2017, p. 4.)

Director Wardlaw also explained that the County, in order to prepare the Draft North County Plan, needed to conduct a “conservation analysis” which took into account “potential projects that are currently expected to occur within the planning area of the Draft Plan.” (Wardlaw letter, p. 4.) This necessarily required that the conservation analysis take into account the proposed Newland Sierra project. Had it not done so, the conservation analysis would have been in error, largely meaningless, and of no value to the larger planning effort. Again, as stated in Director Wardlaw’s letter, “[t]he main purpose of identifying projects and including them as proposed hardlines is so they can be properly incorporated into the conservation analysis of the Draft Plan.” (Wardlaw letter, p. 4.)

Nevertheless, it is equally clear that the project does not rely on the ultimate adoption of the Draft North County Plan; nor does the EIR’s impact analyses assume such adoption. Thus, no piecemealing has occurred. Further, even if the project were to require adoption of the Draft North County Plan prior to receiving take authorization, reliance upon the adoption of a future plan (or permit) does not constitute piecemealing under CEQA. To the contrary, this condition exists for most projects which must get subsequent 404, 401, and 1602 permits from the resource agencies (Army Corps of Engineers, the Regional Water Quality Control Board, and the California Department of Fish & Wildlife) after local approval of the project (e.g., by the County). In fact, the resource agencies will generally not finalize a permit application without a certified EIR by the lead agency. Therefore, the assertion that the project is attempting to piecemeal its approvals is unsubstantiated.

14. Wildlife Agency concurrence is not required for the inclusion of properties or project sites as hardline areas in Draft HCP/Subregional NCCP Plans.

The County is the applicant for the Draft North County Plan (i.e., the Habitat Conservation Plan under Section 10 of the Federal ESA and the Subregional NCCP under Section 2800 of the California NCCP Act). The federal and state agencies do not have land use authority to dictate specific development and preserve areas; that is the County’s purview. Thus, the official concurrence of the Wildlife Agencies for the inclusion of a project site or property as a hardline area in a Draft HCP/subregional NCCP Plan is not required.

The specific process steps pertaining to the preparation of a Draft HCP/NCCP Plan clarify why this is the case. The process includes: (1) the preparation of a Draft HCP/Subregional NCCP Plan, an associated Implementing Agreement (IA), and a CEQA/NEPA document (with the County as the lead agency for CEQA and USFWS for NEPA); (2) public review of the Draft Plan and

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CEQA/NEPA document; (3) finalization of the HCP/NCCP Plan, IA and CEQA/NEPA document; and (4) submission of these documents to the County Planning Commission and Board of Supervisors for approval. The HCP/NCCP Plan can include hardline areas, reflect properties or projects subject to a hardline agreement, or not. Following approval of the HCP/NCCP Plan and IA, and certification of the CEQA/NEPA document by the County, these documents are then submitted to the Wildlife Agencies. The U.S. Fish & Wildlife Service (USFWS) issues a Biological Opinion on the Plan with findings and conditions. The California Department of Fish & Wildlife (CDFW) issues its findings and the take permit under the NCCP Act (Section 2835) and California ESA (Section 2081).

In summary, the County is the applicant and has the sole authority to propose specific hardline areas. The Wildlife Agencies can either approve the HCP/Subregional NCCP, approve it with conditions, or deny it altogether, but they do not have the authority to tell the County what lands to place within the proposed hardline areas. Again, that is a land use decision wholly within the County's province. Thus, the inclusion of a specific project site or property as a hardline area in the Draft Plan is a County decision and does not require Wildlife Agency concurrence prior to that Draft Plan being released to the public for review or even prior to the Plan going before the Board of Supervisors for approval. As another example, the projects included as hardline areas in the Draft City of Chula Vista MSCP Subarea Plan did not have Wildlife Agency concurrence prior to that Draft HCP/Subregional NCCP Plan being released for public review. The same approach is being taken today with the City of Santee's Draft MSCP Subarea Plan.

15. General Plan Conservation Element Policies COS-1.4 and COS-1.10 apply to the County, not the Newland Sierra project or the project applicant, and the County's ongoing conservation planning efforts are consistent with these policies.

As to County General Plan Policies COS-1.4 and COS-1.10, neither of those policies apply specifically to the project or the project applicant. Instead, those policies require the County to “collaborate with other jurisdictions and trustee agencies to achieve well-defined common resource preservation and management goals” and to “ensure an open, transparent, and inclusive decision-making process by involving the public through the course of planning and implementation of habitat conservation plans and resource management plans.” Contrary to the assertions made in Golden Door's letter, including the Newland Sierra Project Site as a hardline area in the Draft North County Plan does not violate either of these policies. As explained above, the County has land use authority over the inclusion of project sites and properties as hardline areas in the Draft North County Plan. Further, the County has been “collaborating with other jurisdictions and trustee agencies to achieve well-defined common resource preservation and management goals”; however, “collaboration” neither requires nor equates to capitulation or complete concurrence. For a more detailed response on how the County has a 25-year-long track record of collaboration with the Wildlife Agencies and other trustee agencies (i.e., complying with General Plan Policy COS-1.4), please see the **Response to the Late Comment Letter LL-20**.

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Consistent with Policy COS-1.10, the County has also “ensured an open, transparent, and inclusive decision-making process by involving the public through the course of planning and implementation of habitat conservation plans.” In accordance with Section 6.4.1 of the Planning Agreement and specifically related to the Draft North County Plan, the County has formed a Steering Committee of interested stakeholders including representatives from the Wildlife Agencies, environmental organizations, the building industry, and landowner interests to obtain valuable input and feedback on the preparation of the Draft North County Plan. Nine (9) separate Steering Committee meetings open to the public were held in 2017 to further the preparation of the Draft Plan, which is now being drafted. The County also maintains various documents pertaining to the Draft North County Plan available on the County’s public website¹ and updates this information as appropriate.

¹ The County maintains a public webpage with information on the Draft North County Plan and links to documents and information on the Draft Plan: <https://www.sandiegocounty.gov/content/sdc/pds/mscp/nc.html>.