

LL-9
Latham & Watkins LLP
on behalf of the Golden Door Properties, LLC
Dated: March 5, 2018

1. Introduction

The comment letter submitted by Latham & Watkins on behalf of the Golden Door Properties, LLC, dated March 5, 2018, is a late letter 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 March 5, 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.

2. The Project Is Consistent With The General Plan, Including Its Newly Amended Provisions

The comments state that the County should suspend processing the Newland Sierra project because it “flatly conflict[s]” with the County’s General Plan Conservation and Open Space Element. The comments also state that no analysis of the project’s consistency with the General Plan Conservation and Open Space Element has been provided to the public. The County does not concur with these comments for the reasons that follow.

First, contrary to the commenter’s assertion, the Draft EIR did incorporate a General Plan consistency analysis. Please see **Section 3.3**, Land Use and Planning, of the Draft EIR, and **Appendix DD** thereto. The General Plan Conservation and Open Space Element is specifically addressed in **Appendix DD** on pages DD-13 through DD-64. Of relevance to the responses to this

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late letter, **Appendix DD** explains why the project is consistent with Goal COS-20 as adopted in 2011:

“The proposed project would reduce GHG emissions contributing to climate change by exceeding requirements of the Global Warming Solutions Act of 2006 (AB 32). The project has committed to offset all of its greenhouse gas emissions to achieve and maintain carbon neutrality (i.e. net zero emissions) for the life of the project. This initiative would make the project the first large-scale planned community in San Diego County to achieve a 100 percent reduction in the project’s construction and operational GHG emissions through the life of the project.”

Second, subsequent to circulation of the project’s Draft EIR and in February 2018, the County adopted several amendments to its General Plan in conjunction with its adoption of the 2018 Climate Action Plan (CAP). Therefore, Table DD-1 within **Appendix DD** has been supplemented in the Final EIR to address the General Plan amendments adopted as part of the CAP (i.e., amendments to Goal COS-20 and Policy COS-20.1).¹ As shown, the project would continue to be consistent with the General Plan, as recently amended.

Third, California courts have held that, in order to establish consistency with the General Plan, projects must demonstrate harmony with its policies, not precise satisfaction of every policy.

“[N]o project could completely satisfy every policy stated in the [general plan], and ... state law does not impose such a requirement. [Citations.] A general plan must try to accommodate a wide range of competing interests—including those of developers, neighboring homeowners, prospective homebuyers, environmentalists, current and prospective business owners, jobseekers, taxpayers, and providers and recipients of all types of city-provided services—and to present a clear and comprehensive set of principles to guide development decisions. Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be “in harmony” with the policies stated in the plan. [Citation.]”

(*San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 517-518.)

¹ The CAP General Plan Amendment can be located here: <https://www.sandiegocounty.gov/content/dam/sdc/pds/advance/cap/publicreviewdocuments/PostBOSDocs/General%20Plan%20Amendment%20PDS2016-GPA-16-007.pdf>

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Hence, even if the County were to accept the commenter's premise that the project did not satisfy certain General Plan policies (a premise the County does not accept), the project may still be found consistent with the General Plan overall.

Fourth, the County is given "great deference" in interpreting and evaluating consistency with its own general plan. "Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes." (*Save Our Peninsula Comm. v. County of Monterey* (2001) 87 Cal.App.4th 99, 142.) For reasons discussed below in Section 3 of these responses, the County's interpretation of its General Plan is reasoned and supported.

Fifth and lastly, nothing requires the County to halt processing a project prior to such time as its decision-makers exercise their discretion to determine whether a project is consistent with the General Plan. The commenter cites no legal authority in support of its demand.

For each of these reasons, the County does not concur that the project conflicts with the County's General Plan and has determined not to cease processing the Newland Sierra project.

3. The General Plan Does Not Require GHG Emissions From The Project To Exclusively Be Reduced Through In-County Offsets

The comments state that the General Plan requires all of the project's GHG emissions to be reduced within the geographic boundaries of San Diego County, opining that the project "contravenes the General Plan EIR's mitigation measures CC-1.2 and CC-1.8 and General Plan Goal COS-20 because its offsets may come from outside the County." The commenter contends that the General Plan's alleged requirements for in-County reductions are distinct from CEQA's mitigation requirements (see CEQA Guidelines, §15126.4(c)), which it acknowledges, in footnote 1 of its letter, may be met by the purchase of off-site mitigation credits.² However, as discussed below, the commenter misinterprets the language of the General Plan EIR's mitigation measures and General Plan Goal COS-20. Neither the mitigation measures nor policy goal exclusively require reduction of GHG emissions through locally deployed methods or offsets.

Initially, the County acknowledges the commenter has previously raised this issue in comment letters submitted on the project, the CAP, as well as in the lawsuit filed by the Golden Door Properties, LLC titled, *Golden Door Properties, LLC v. County of San Diego* on March 15, 2018.³

² The commenter also acknowledges, in footnote 3 of its letter, that the California Air Resources Board (CARB) has "approved of other land use projects which have utilized emissions from outside the local County or jurisdiction."

³ The County notes that the filing of petitions by Golden Door, Sierra Club, and other groups does not automatically stay operation of the CAP. (*Kriebel v. City Council* (1980) 112 Cal.App.3d 693, 702, Pub. Res. Code § 21167.3, Guidelines § 15112.) Under CEQA, an EIR is presumed adequate and the County's decision to certify the

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The County refers the commenter to: (i) **Response to Comment O-1-142** in the project's Final EIR, which responds to this issue where it was raised in the commenter's August 14, 2017 letter; and (ii) the responses provided to the late comment letter dated September 25, 2017 (refer to **Responses to Late Comment Letter LL-1**). Relevant information is also excerpted below.

The County does not concur with the comment's interpretation of General Plan Goal COS-20 as exclusively requiring local reduction of GHG emissions. As originally adopted in 2011, Goal COS-20 stated, "Reduction of local GHG emissions contributing to climate change that meet or exceed requirements of the *Global Warming Solutions Act of 2006*" (emphasis in original). As part of its development of the 2018 CAP, the County modified the verbiage of Goal COS-20, replacing the term "local" with "community-wide (i.e., unincorporated County) and County Operations." The intent of the County's policy (as originally adopted and amended) is to reduce locally generated GHG emissions, *not* to limit the manner in which emissions reductions may occur from private development projects. Indeed, the commenter's interpretation of Goal COS-20 only would be supported if the subject goal read *local* reduction of *local* GHG emissions; but, the goal does not provide as much. Additionally, the County's CAP provides 26 GHG Reduction Measures to reduce emissions "community-wide" and from "County Operations" in compliance with Goal COS-20 and Policy COS-20.1.

Particularly in the scientific realm of global climate change, the commenter's interpretation of the goal as exclusively requiring in-County reductions is overly broad and unsupported. Scientifically speaking, GHG emissions impacts can be effectively mitigated via the purchase of carbon offsets that represent reductions achieved at off-site locations. The global nature of the impact has been recognized by the California Supreme Court in its 2015 decision in the *Center for Biological Diversity v. California Department of Fish and Wildlife* (62 Cal. 4th 204 (2015)) matter:

"[T]he 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. For many air pollutants, the significance of their environmental impact may depend greatly on *where* they are emitted; for greenhouse gases, it does not."

Contrary to the commenter's misinterpretation, the County's intent was *not* to establish a policy framework that is unsupported by science, inconsistent with the recognized global attributes of the environmental problem, or different from the GHG emissions mitigation framework established under CEQA⁴ and recognized by CARB and other subject matter experts in the field. Instead, the

EIR is presumed correct; plaintiffs have the burden to prove otherwise. (*Id.*, *Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1617, *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530.)

⁴ As recognized by the commenter, CEQA Guidelines Section 15126.4(c) does not establish a hierarchy of allowable mitigation options – there are no limits imposed on the geographic or locational attributes of the mitigation options, and there is no imperative to secure additional on-site reductions before utilizing carbon offsets. As background, on page 50 of the *Final Statement of Reasons for Regulatory Action: Amendments to the State CEQA*

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County's intent was to focus on reducing locally-generated emissions through whatever means are recognized as effective and feasible, which include the utilization of off-site reduction projects.⁵

As a point of reference, turning to carbon offset projects located beyond the borders of the United States is consistent with the spirit of the Kyoto Protocol, an international agreement linked to the United Nations Framework Convention on Climate Change. For example, under Article 10(c), parties to the Kyoto Protocol shall:

“Cooperate in the promotion of effective modalities for the development, application and diffusion of, and take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies, know-how, practices and processes pertinent to climate change, in particular to developing countries ...”

(See also Kyoto Protocol, Article 11(2)(b).)

Additionally, General Plan EIR mitigation measure CC-1.2 required preparation of a CAP, and mitigation measure CC-1.8 required the County to revise its CEQA guidelines for determining the significance of GHG emissions based on the CAP. These measures do not require individual projects undergoing CEQA review to limit their mitigation reduction opportunities to San Diego County.⁶

Here, although the General Plan does not require GHG reductions to be exclusively located within the County, the proposed project includes 32 PDFs that would be implemented within the proposed community to reduce GHG emissions:

- A Transportation Demand Management (TDM) Program to reduce vehicle miles travelled (PDF-1 through PDF-20);

Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB 97 (December 2009), the California Natural Resources Agency expressly rejected invitations to establish any sort of mitigation hierarchy in CEQA Guidelines Section 15126.4(c):

“Several comments, for example, suggested that the Guidelines provide a specific ‘hierarchy’ of mitigation requiring lead agencies to mitigate GHG emissions on-site where possible, and to allow consideration and use of off-site mitigation only if on-site mitigation is impossible or insufficient. OPR and the Resources Agency recognize that there may be circumstances in which requiring on-site mitigation may result in various co-benefits for the project and local community, and that monitoring the implementation of such measures may be easier. However, CEQA leaves the determination of the precise method of mitigation to the discretion of lead agencies.”

⁵ For additional information on the project's utilization of carbon offsets, please see **Topical Response GHG-1: Use of Carbon Offsets** of the project's Final EIR.

⁶ In connection with development of the 2018 CAP, mitigation measure CC-1.2 was revised to remove the specific emissions reductions and was replaced with reference to updated Goal COS-20, which includes the emissions reduction targets included in SB 32.

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- Solar photovoltaic panels on all residences (PDF-22);
- Electric vehicle chargers in all single-family and multi-family residential garages (PDF-23);
- Water efficient landscaping and irrigation equipment to reduce water usage (PDF-24 and PDF-25);
- Pre-plumbing for the use of greywater systems (PDF-26);
- Energy-efficient appliances (PDF-31); and,
- Other features to reduce energy usage, reduce water consumption, and limit GHG emissions.

EIR Table 2.7-6 shows that the annual GHG emissions before implementation of the PDFs and mitigation would be approximately 52,986 MT CO₂E per year. After accounting for implementation of the quantified PDFs (EIR Table 2.7-7), project emissions would be approximately 43,498 MT CO₂E per year, as shown in EIR Table 2.7-8. Thus, the combined reductions from implementation of the quantified PDFs would reduce emissions within San Diego County by approximately 17.9 percent annually.⁷

Further, although the General Plan does not require GHG reductions to be exclusively located within the County, it is noted that the project's remaining GHG reductions achieved via implementation of M-GHG-1 and M-GHG-2 would be subject to a geographic priority system that prioritizes emissions reductions in San Diego County, consistent with Mitigation Measure GHG-1 from the Supplemental EIR (SEIR) prepared for the County's Final CAP, as adopted in February 2018 and as identified in **Response to Comment O-1-137** of the Final EIR. This geographic priority system recognizes that the locational attributes of available carbon offsets should be determined on a "real time," as-needed basis because the market conditions for carbon offsets are constantly changing.⁸

Also of note is **Appendix JJ-2** (Newland Sierra AQ/GHG CARB Scoping Plan Consistency Analysis) to the project's Final EIR, which contains an assessment of the project's implementation of applicable mitigation concepts for land use development projects identified by CARB in

⁷ As provided in the Draft EIR, not all PDFs were assigned a quantifiable emissions reduction; this approach is considered conservative and serves to result in the overestimation of project emissions.

⁸ The commenter states that GHG emission reductions in the County would result in important co-benefits for County residents. The County concurs, hence geographic priorities are included in the project's mitigation measures M-GHG-1 and M-GHG-2 that would focus first on local reduction features. However, the County also recognizes that it may not be feasible to secure all offsets needed within the County's boundaries due to market availability constraints and other factors.

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Appendix B of its *2017 Climate Change Scoping Plan*. As illustrated therein, the project implements a wide range of strategies that will reduce GHG emissions both on the Project site and within the County of San Diego.

4. The Project Does Not Tier From The CAP

The comments state that General Plan Amendment (GPA) projects, such as the Newland Sierra project, do not tier from the CAP. The County concurs that the Newland Sierra project does not tier from the CAP. The CEQA analysis prepared for the project was not linked to the County's separate CAP development process, in part, because the draft version of the CAP was not published until *after* release of the project's Draft EIR. The Draft EIR for the Newland Sierra Project uses thresholds from Appendix G of the CEQA Guidelines, rather than those contained in the 2018 CAP's implementing documents. As such, the project is not tiering from the CAP or otherwise reliant on that document, but instead has been processed separately from the County's CAP.

Additionally, because the Newland Sierra Project requires a GPA, the CAP would not afford the project any streamlining benefits under CEQA Guidelines Section 15183.5, which allows certain, non-GPA projects to tier from and incorporate by reference the GHG emissions analysis presented in the CAP SEIR. Instead, the project is required to prepare a project-specific GHG emissions analysis; demonstrate consistency with relevant CAP measures outlined in the CAP Checklist; and reduce the increase in emissions in accordance with one of the two options set forth in Mitigation Measure M-GHG-1 of the CAP's SEIR. Those two options include: (1) Option 1: achieve no net increase in GHG emissions from additional density above the 2011 General Plan Update, or (2) Option 2: achieve a reduction in GHG emissions to no net increase over baseline conditions (net zero).

The County acknowledges that, now that the CAP has been adopted, any inconsistency with the CAP or the corresponding General Plan Amendments associated with its approval process that has environmental consequences would be an impact under Appendix G of the CEQA Guidelines. As discussed in **Topical Response GHG-3** of the Final EIR, the project would comply with relevant measures in the CAP Checklist. In addition, because the project achieves carbon neutrality (i.e., a net zero emissions level) thereby resulting in no net increase in GHG emissions relative to existing environmental conditions, the project would not conflict with the CAP. The project's commitment to the achievement of carbon neutrality is consistent with Option 2 (Net Zero) of CAP SEIR Mitigation Measure M-GHG-1.

5. The Comment Letter, In Part, Addresses The County's CAP, Not Issues Specifically Associated With This Project

First, the County notes that the comment concerning the County's "new program for General Plan Amendment projects" does not address the adequacy of the environmental analysis prepared for the Newland Sierra project, but instead addresses the County's CAP. As such, the comment

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appears to be conflating two separate projects and processes. The County is aware that Latham & Watkins has raised numerous issues and questions regarding the CAP, and has filed a lawsuit challenging the adequacy of the CAP. The commenter is referred to the County's website for the 2018 CAP and responses prepared by the County to the commenter's input on that undertaking: https://www.sandiegocounty.gov/content/sdc/pds/ceqa/Climate_Action_Plan_Public_Review.html.

Second, the County does not concur with the comment that it adopted a "new program" that would allow projects requiring GPAs to rely "almost exclusively" on carbon offset credit purchases from anywhere in the world. The commenter is referring to the *Guidelines for Determining Significance: Climate Change*, which were adopted in conjunction with the 2018 CAP. Relative to projects requiring GPAs, the Guidelines were designed to ensure that individual development projects proposed for approval after the CAP's adoption do not obstruct attainment of the CAP's reduction targets. Like the "net zero" approach proposed for the Newland Sierra project, the Guidelines require GPA projects to achieve "no net increase in GHG emissions from additional density above the 2011 GPU [General Plan Update]" or "no net increase over baseline conditions (carbon neutrality)." The County's SEIR for the 2018 CAP determined that implementation of this approach—which is required by M-GHG-1 in that SEIR—would ensure that GHG emissions from in-process and future General Plan amendment projects would be offset such that the CAP's emissions inventories would not be affected. CAP Mitigation Measure M-GHG-1 allows GHG emissions resulting from GPAs to be offset through the purchase of carbon offset credits after all feasible on-site reductions are provided.

Concerning the location of the purchase of offset credits, the County specifically addressed this issue in Section 8.4.12 of the CAP's Revised Final SEIR, Master Response 12 - Mitigation Hierarchy and Use of Carbon Offset Credits. Chapter 8.0 of the Revised Final SEIR is available online at: <https://www.sandiegocounty.gov/content/dam/sdc/pds/advance/cap/publicreviewdocuments/FinalPublicReviewDocs/FinalBoardDocs/Chapter%208.0%20Revised%20Final.pdf>. Additionally, Master Response 12 and Responses to Comment Letter O14 (Latham & Watkins comment letter on CAP) are appended to the Newland Sierra project's Final EIR in **Appendix JJ-21**.

Third, as discussed above, the County disagrees with the commenter's assertion the language of General Plan Goal COS-20 and Policy COS-20.1 requires the reduction of all "community-wide" and County emissions to occur within the County (i.e., locally). The County's interpretation of its own General Plan is consistent within the global context of climate change. As noted by the County in the CAP's Revised Final SEIR, Response to Comment O22-8:

"The use of carbon offset credits from outside the County in compliance with the mitigation hierarchy outlined in the Draft SEIR for cumulative GPA projects, is consistent with the intent of 2011 GPU Policy COS-20 and 2011 GPU PEIR

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Mitigation Measure CC-1.2 to address *global* warming as required by the State in legislation including AB 32 and SB 32 (Global Warming Solutions Act). In fact, both COS-20 and the 2011 GPU PEIR mitigation specifically refer to AB 32, the Global Warming Solutions Act, and global warming in general (2011 GPU EIR pages S-20, 2.17-1 et seq., and 7-80; 2011 GPU pages 5-31-33, 38). It is important to note that GHG emissions are a global, cumulative impact.”

The Response to Comment Letter O22 is available online at: <https://www.sandiegocounty.gov/content/dam/sdc/pds/advance/cap/publicreviewdocuments/FinalPublicReviewDocs/RTCs/O22%20Sierra%20Club-main%20letter.pdf>, and is appended to the Newland Sierra project’s Final EIR in **Appendix JJ-21**.

6. Conclusion

As neither the County’s General Plan nor the CEQA Guidelines impose a mandate that all GHG reductions be achieved within the County’s boundaries, it is within the discretion of the County, acting as the lead agency for the proposed project, to select the portfolio of mitigation measures it finds are appropriate and supported by substantial evidence. While the County acknowledges CARB’s support for the prioritization of on-site reduction strategies, where further on-site project design or regional investments are infeasible or ineffective, CARB recognizes it may be appropriate and feasible to mitigate project emissions through purchasing and retiring carbon credits.⁹ Here, **Section 2.7**, Greenhouse Gas Emissions, of the Draft EIR recommended mitigation measures that, in combination with identified project design features, would reduce the project’s GHG emissions to net zero, supporting a determination that project impacts would be less than significant. As discussed in the Draft EIR, the necessary GHG reductions would be achieved through a combination of on- and off-site reduction strategies, an approach which is not in conflict with the County’s General Plan, CEQA’s requirements or CARB’s recommendations on the subject.

⁹ See page 102 and Appendix B of CARB’s *California’s 2017 Climate Change Scoping Plan* (November 2017).