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December 1, 2017

VIA U.S. MAIL AND EMAIL

San Diego County Planning Commission
County of San Diego
Planning & Development Services
5510 Overland Avenue, Suite 110
San Diego, CA 92123

Re: Concerns Regarding Unstable Project Description Following County Staff
Statements at the October 20, 2017 Planning Commission Informational
Meeting on the Climate Action Plan

Dear Commissioners Brooks, Pallinger, Barnhart, Beck, Edwards, Seiler, and Woods:

We represent the Golden Door Spa ("Golden Door"). The Golden Door is committed to reducing greenhouse gas ("GHG") emissions to combat the threat of global climate change. This is an important issue for the Golden Door, and we have been in communication with the County about its Climate Action Plan ("CAP") and potential GHG emissions from the proposed Newland Sierra Project since January 2015. We submitted comments on the CAP's draft supplemental environmental impact report ("DSEIR") and draft environmental impact report for the proposed Newland Sierra Project.

We attended the recent Planning Commission informational meeting on the CAP on October 20, 2017, and are concerned about comments made by County staff at that meeting indicating that GHG emissions reduction measures included in the County's draft CAP have not yet been finally identified or determined. Staff indicated in their comments that they were still in the process of deciding what measures would be included in the staff-proposed CAP project based on a cost-benefit analysis that was not included in the CAP's DSEIR because the cost-benefit analysis is currently being drafted.

Staff's comments at the Planning Commission meeting suggest that County staff has not yet decided on the contents of the proposed project—despite staff previously releasing the DSEIR for the project. We have several concerns about staff's continuing efforts to define the "project" that is being studied in the DSEIR. We are providing these concerns now, before the County staff completes the Final EIR and then makes decisions on the contents of the CAP based on their later cost benefit studies, to allow the County staff the maximum time to recirculate the draft EIR without further delaying the CAP process.

Such an approach risks repeating the same errors noted by the Court of Appeal in *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152 which invalidated the County's first attempt to prepare a CAP for failure to accurately quantify GHG reduction measures:

Quantifying GHG reduction measures is not synonymous with implementing them. Whether a measure is effective requires not just quantification, but also an assessment of the likelihood of implementation. There is no evidence in the record that the above referenced mitigation measures will make any contribution to achieving GHG emissions reductions by 2020.

(*Id.* at 1170.)

At the October 20 meeting, which was noticed as an opportunity to provide information on the Draft CAP and its environmental impact report to the Planning Commission, County staff noted that its main intent in the meeting was "to listen" as it would only "be able to provide some responses" because "not all of the information that [they are] working on now is complete." (See October 20, 2017 Transcript at p. 1, attached hereto as **Exhibit A.**) Staff's comments indicate that County staff is actually determining whether implementation of policies and measures in the CAP are feasible:

When the planning commission considers those measures, you may wish to de-emphasize some policies versus others. It will have to end up resulting in that same quantified reduction over that period of time, knowing that we'll have some amount of time in those 12 years to have a reasonable implementation program. . . . So, when one segment of this pie moves, when we de-emphasize one policy program, then it emphasizes another. And so the challenge is how do we have a balanced program that's providing cost effective strategies and a reasonable policy perspective through the range of subjects that have to be categorized. So that will be the challenge throughout this program about who's paying for it, is it effective, and is it advancing or holding back other policies of the county. So it will be a difficult subject to balance.

(October 20, 2017 Transcript at p. 15.)

Based on County staff's comments, it appears that studies are underway by staff to determine what measures will be included in the CAP and that such studies will not be presented to the public until early next year. There is no indication staff plans to provide the public review and comment period required by the California Environmental Quality Act ("CEQA") for these studies or any other documentation or analyses used to determine which GHG emissions reduction measures will be implemented as part of the CAP.

The county is completing two technical studies to analyze the cost associated with implementing the draft climate action plan. We're

preparing a cost effectiveness study to quantify the net benefits received from implementing the proposed measures. The study will develop an estimate of county implementation costs for the CAP and quantify the net benefits received from implementing the proposed measures evaluated against the net cost to participants over the lifetime of all the measures. We're also in the process of conducting an assessment of direct investments to evaluate the cost effectiveness of possible local projects. This study will identify local project types for potential direct investment as detailed in the draft supplemental environmental impact report. And this feasibility study will evaluate the cost effectiveness of direct investments. These studies will be completed before the end of the year and presented to the planning commission and the board in early 2018.

(October 20, 2017 Transcript at p. 8.) It is unclear why this analysis to determine which measures will be used to implement the CAP is only being performed after the close of the public comment period.

In addition, the County stated that it would be “conducting a more rigorous assessment of the methodologies associated with one of the large programmatic measures in the CAP” and would be “preparing a cost effectiveness study to quantify the net benefits received from implementing the proposed measures.” (October 20, 2017 Transcript at p. 8.) It is unclear why this information was not included with the draft CAP published in August or its DSEIR.

The County Appears to Have Presented a “Menu” of Options, in Violation of *Sierra Club v. County of San Diego*. In light of the statements above, it appears the County staff is unclear which strategies described in the CAP may actually be deployed, as the CAP was presented as a “menu” of strategies that the County *could* use if it decided to do so following additional analysis. In *Sierra Club v. County of San Diego, supra*, 231 Cal.App.4th at 1173, the Court of Appeal invalidated the first CAP for failing to incorporate precise mitigation measures directly into the CAP. Here, the County appears to be making the same mistakes as it did in the first CAP. Rather than providing stable mitigation measures, the County appears to have drafted aspirational “options” from which they may now pick and choose to implement the CAP. The mitigation measures included in the CAP may not be actually adopted if the County’s later analysis determines that they are cost prohibitive, and therefore are not “fully enforceable” as required by CEQA. (*Ibid.*)

In addition, the Court of Appeal criticized the County’s first CAP for failure to provide an analysis of the effectiveness of a mitigation measure by “not just quantification, but also an assessment of the likelihood of implementation.” (*Sierra Club, supra*, 231 Cal.App.4th at 1169.) Additional information regarding the likelihood of implementation, therefore, must be included in the Draft CAP and be subject to CEQA’s public review and comment requirements.

Here, CEQA’s requirements that mitigation be enforceable and that a lead agency ensures implementation are even more pronounced because the CAP is a mitigation measures in its own

right. The County's General Plan Update EIR included Mitigation Measure CC-1.2, which required preparation of a CAP. The CAP, therefore, is a "project" under CEQA, but is also a mitigation measure for the General Plan Update's climate change impacts. The CAP's GHG emissions reduction measures must be enforceable, and the County must ensure their implementation. A mere hodgepodge buffet-style menu of mitigation proposals from which the County will later pick and choose falls short of CEQA's requirements. (See *Environmental Council of Sacramento v City of Sacramento* (2006) 142 Cal.App.4th 1018, 1035; *Federation of Hillside & Canyon Ass'ns v City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261.)

The Project Description Must Be Stable. Our second concern is that a stable project description is required under CEQA to inform decision makers and the public during the CEQA process. An agency may not prepare a Draft EIR without first deciding what the proposed project will be that is going to be studied in that Draft EIR.

A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the 'no project' alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.

(*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192, 193.)

By stating publicly that the County is still analyzing the implementation of the strategies and mitigation measures contained in the CAP, it appears as if the County staff is unsure what measures will actually be included in the CAP, because they will be relying on additional analysis later to determine the exact content. As a result, County staff has indicated that they anticipate changes to the project description based on the cost benefit analysis that was not available to the public during the circulation of the initial DSEIR, depriving the public the ability to accurately analyze the proposed measures.

The recent decision in *Washoe Meadows Community v. Department of Parks and Recreation*, California Court of Appeal Case No. A145576 (Nov. 15, 2017) emphasized this point. There, the Court of Appeal ruled that simply providing several different potential alternative actions as the agency's proposed project violated CEQA. It appears that San Diego County staff has done the same thing with the proposed CAP based on staff's description of the CAP to the Planning Commission. As described by the staff, the CAP at this point appears to be a "grab bag" of various alternative GHG control measures, rather than an accurate, stable and finite plan of action to control GHGs. "When an EIR contains unstable or shifting descriptions of the project, meaningful public participation is stultified." (*Washoe Meadows*, Slip Opinion at p. 11, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656.) We urge the staff to complete their cost benefit analysis, and then reach a decision as

to a single proposed project. At that point, the identified proposed project should be described in a recirculated DSEIR to allow for public participation.

Adding or Removing Mitigation Measures and Additional Analysis May Require Recirculation. We are also concerned that the County did not analyze the feasibility of the mitigation measures in advance of publishing the Draft CAP and its EIR. The public should be granted the opportunity to comment on the additional information the County is preparing to present to the Planning Commission for their approval, and should have had this opportunity during the initial public comment period on the Draft CAP. If the County substantially changes the measures contained in the Draft CAP, it may need to recirculate the Draft CAP's EIR for additional public comment. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95 [adoption of a mitigation plan required recirculation as approval of the project should have been deferred "until proposed mitigation measures were fully developed, clearly defined, and made available to the public and interested agencies for review and comment."]; see also CEQA Guidelines § 150855.5 [where a mitigation measure becomes feasible that the agency declines to adopt, recirculation is required].)

Thank you for your time and attention to our comments. We ask that you include these comments in the CAP's administrative record and request that staff provide responses to the points raised above and recirculate the CAP's DSEIR once the project description becomes stable. Please do not hesitate to contact us should you have any questions or comments.

Best regards,



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of LATHAM & WATKINS LLP

cc: Kathy Van Ness, Golden Door
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