SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - April 27, 2017

EVENT DATE: 04/28/2017 EVENT TIME: 01:30:00 PM DEPT.: C-72

JUDICIAL OFFICER: Timothy Taylor

CASE NO.: 37-2016-00037402-CU-TT-CTL

CASE TITLE: PETITION OF GOLDEN DOOR PROPERTIES LLC [IMAGED]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

EVENT TYPE: Hearing on Petition
CAUSAL DOCUMENT/DATE FILED:

Tentative Rulings on 1) Second Amended/Supplemental Petition for Writ of Mandate; and 2) Petition for Writ of Mandate

Sierra Club v. County of San Diego, Case No. 2012-0101054
Golden Door Properties LLC v. County of San Diego, Case No. 2016-0037402

April 28, 2017, 1:30 p.m., Dept. 72

1. <u>Overview and Procedural Posture</u>.

In late 2012 and early 2013, the court was required to address, in two CEQA cases, the controversial topics of greenhouse gases and global climate change. The first was *Cleveland Nat'l. Forest Foundation v. SANDAG*, Case No. 2011-00101593; that case was the subject of a learned opinion of the 4th DCA, Div. 1 [D063288, 180 Cal.Rptr.3d 548 (2014)], and remains pending review by the California Supreme Court [No. S223603, 343 P.2d 903 (2015)]. The Court has limited the issue in that case to "Must the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S–3–05 to comply with the California Environmental Quality Act?" As of this writing, there has been extensive party and *amicus* briefing, and the High Court has set a date early next month for oral argument.

In the second 2012 case, the Sierra Club contended that the County of San Diego's June 20, 2012 "Climate Action Plan" (CAP), was insufficient and violated CEQA in several respects: it did not comply with mitigation measures spelled out in the County's 2011 Program EIR (PEIR), adopted in connection with the 2011 General Plan Update (GPU) (AR 0441 *ff*); it failed to satisfy the requirements for adopting thresholds of significance for greenhouse gas emissions (GHG); and it should have been set forth in a stand-alone environmental document rather than in an addendum to the PEIR. The County denied these claims, and asserted that the CEQA challenge was time-barred, the CAP complied with all legal requirements, the use of an addendum was appropriate, and that all relief was barred by the Sierra Club's failure to notify the AG as required by Pub. Res. Code section 21167.7.

A little more than four years ago, the court ruled in favor of the Sierra Club on the original petition. ROA 33. The County appealed. ROA 44. The parties thereafter stipulated to stay the case while it was on appeal. ROA 60. But before they did, the Sierra Club had filed a supplemental petition. ROA 54. The stipulated stay prevented consideration of that document. Subsequently, the parties filed a stipulation

regarding the disposition of the supplemental petition, depending on the disposition of the appeal. ROA 64.

In October of 2014, the 4th DCA, Div. 1 issued its learned opinion affirming this court, ultimately published at 231 Cal.App.4th 1152 (2014). On March 11, 2015, the Supreme Court denied review. A remittitur thereafter issued. ROA 105.

The parties were before the court on April 15, 2015. Petitioner asked that the stay be lifted, and that the case be restored to the civil active list. These requests were granted without objection.

The Sierra Club also wanted the court to sign an order, while the County wanted the court to sign a different order. There were two problems: first, the court had not received petitioner's version of the proposed order, nor had a chance to review the County's proposed order; and second, the parties were before the court while it was in the middle of a lengthy trial with jurors arriving shortly. The court continued the matter to the regular law and motion calendar of May 1, 2015. ROA 73.

The court thereafter reviewed the parties' competing submissions. The central problem was that a dispute had arisen regarding the intent, import and meaning of the December 11, 2014 stipulation (ROA 64). The court, following several submissions and argument, resolved the dispute in May of 2015. ROA 91-92.

The Sierra Club's counsel thereafter sought an award of attorneys' fees. ROA 95-104. The amended moving papers (ROA 116, 117) made clear that the County agreed petitioner was entitled to fees; the only question was how much. Petitioner sought a lodestar of over $661,000.00 with a multiplier of two, for a total of over $1.3 million, plus fees necessary for the fee motion.

The County filed opposition. ROA 122-125. After presenting very focused argument, the County ended by making several specific "suggestions" for reducing the fee award: a combination of cutting hours, reducing rates, and denial of any multiplier. Petitioner filed reply. ROA 126-130. The court, after it had reviewed all the briefing and heard argument, granted a fee award in the amount of over $961,000.00. ROA 133. Judgment was thereafter entered in this amount, plus additional costs not challenged by the County. ROA 135. This occurred in September of 2015; at this point, the court (perhaps naively) considered the case to have been concluded. Neither side sought further appellate review of the attorneys' fee ruling or the May 2015 ruling.

In early 2016 and again the following summer, the County filed returns on the supplemental writ. ROA 137, 138. Both sides changed counsel. ROA 136, 147.

The Sierra Club filed its second amended petition on September 26, 2016. ROA 140. The County demurred to it on two grounds, including non-justiciability (ripeness). ROA 142. Following briefing and argument, the court overruled the demurrer on January 6, 2017. ROA 160. The County thereafter answered. ROA 161-162.

Also at the January 6, 2017 hearing, the court allowed the parties' stipulation whereby a more recently filed case, *Golden Door Properties LLC v. County of San Diego*, Case No. 2016-0037402, would be transferred to Dept. 72 and heard with the *Sierra Club* 2012 case. ROA 160. Both the current iteration of the *Sierra Club* 2012 case and the *Golden Door* 2016 case challenge the County's 2016 Climate Change Analysis Guidance Recommended Content and Format for Climate Change Analysis Reports in Support of CEQA Documents ("2016 Guidance Document" or "2016 Significance Document") prepared by the County's Department of Planning & Development Services.

The parties subsequently stipulated to a briefing schedule, which the court also allowed. ROA 167.

The court has reviewed the following briefing:

Sierra Club's opening brief, request for judicial notice and joinder filed February 6, 2017 (ROA 169-173).

Golden Door's opening brief and request for judicial notice filed February 6, 2017 (ROA 24-25).

The County's answering briefs and supporting documents filed March 17, 2017 (ROA 30-34 and 180-184).

Sierra Club's reply brief, supporting documents, and joinder filed April 20, 2017 (ROA 85-189).

Golden Door's reply brief filed April 20, 2017 (ROA 36).

The court has also reviewed the administrative record materials submitted January 24, 2017 and April 14, 2017 (ROA 23, 35).

With its opposition brief in both cases, the County filed the Declaration of Peter Eichar (ROA 31, 181). With its reply brief, the Sierra Club filed the Declaration of Josh Chatten-Brown and the Declaration of Corey Briggs (ROA 186, 187). The Sierra Club also filed a tardy Second Declaration of Josh Chatten-Brown. ROA 190. The submission of the declarations is inconsistent with the oft-repeated rule in CEQA cases: "If it is not in the administrative record, it does not exist." *See Sierra Club v. Coastal Comm'n* (2005) 35 Cal.4th 839, 863; Code of Civil Procedure § 1094.5; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 565. Evidentiary objections were not interposed. The declarations were therefore considered.

2. Applicable Standards.

A. The court incorporates part 2 of its own ruling of April 19, 2013. ROA 33. The court incorporates the learned opinion of the Fourth District Court of Appeal, Div. 1, published at 231 Cal.App.4th 1152 (2014). The court also incorporates its own rulings from May of 2015. ROA 91-92.

B. The ripeness element of the doctrine of justiciability is intended to prevent courts from issuing purely advisory opinions. *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170. It is "primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Ibid.*) In an action for declaratory relief under Code of Civil Procedure section 1060, an " 'actual controversy' ... is one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, not suggest, what the parties may or may not do. [Citations.]" *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117; *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573-74.
During the summer of 2016, the Court of Appeal considered ripeness in the context of a CEQA petition in *California Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2016) 2 Cal.App.5th 1067, 1088-89 (*Cal. BIA*):

District relies on inapposite case law in which the courts declined to use the remedy of mandamus to set aside interim actions by an agency during a multilayered review process. (*California High–Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 708–713, 175 Cal.Rptr.3d 448 [no present duty to redo preliminary funding plan]; *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1486, 75 Cal.Rptr.3d 393 [water assessment report providing information to be included in EIR was not final determination as necessary to obtain relief by mandamus].) The District Guidelines are not interim steps in a larger review process; rather, they are interpretive guidelines for CEQA analyses promulgated by an air district that acts as either the lead agency or a responsible agency on projects within its jurisdictional boundaries.

For purposes of assessing the propriety of a writ of mandate, the District Guidelines are akin to the guidelines issued by the California Coastal Commission and challenged in *Pacific Legal Foundation*,

supra, 33 Cal.3d at page 163, 188 Cal.Rptr. 104, 655 P.2d 306. Those guidelines, though not binding on any agency, explained the Commission's interpretation of the public beach access provisions of the Coastal Act, and were asserted to be invalid on their face because they required property owners to dedicate easements giving beach access to the public as a condition of obtaining permit approval for proposed developments. Noting that the promulgation of the access guidelines was a quasi-legislative act reviewable by an action for declaratory relief or traditional mandamus (as opposed to administrative mandamus), the court went on to consider whether a ripe controversy existed. (*Id*. at p. 169, 188 Cal.Rptr. 104, 655 P.2d 306.)

Turning to the question of whether the challenge to the Coastal Commission's guidelines was ripe, the court applied a standard used by the federal courts and considered " 'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.' " (*Pacific Legal Foundation*, *supra*, 33 Cal.3d at p. 171, 188 Cal.Rptr. 104, 655 P.2d 306, italics omitted.) It concluded the facial challenge to the guidelines was not ripe: "Although it may be predicted with assurance that some of the plaintiff landowners will eventually wish to make improvements on their property, it is sheer guesswork to conclude that the Commission will abuse its authority by imposing impermissible conditions on any permits required. The guidelines are not mandatory. *They do not require the Commission to impose access conditions in any particular circumstances, but rather adopt a flexible approach: the Commission is to determine the appropriateness of access exactions on a case-by-case basis*." (*Id*. at p. 174, 188 Cal.Rptr. 104, 655 P.2d 306, italics added.)

Unlike the Coastal Commission guidelines at issue in *Pacific Legal Foundation*, the District Guidelines do not call for the Receptor Thresholds to be applied to projects on a case-by-case basis. Instead, they suggest a routine analysis of whether new receptors will be exposed to specific amounts of toxic air contaminants. Given the clarity of the Supreme Court's decision that such an analysis oversteps the bounds of CEQA except in specified circumstances (*Building Association*, *supra*, 62 Cal.4th at p. 392, 196 Cal.Rptr.3d 94, 362 P.3d 792), the issue is fit for judicial determination. The ripeness requirement "should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question." (*Pacific Legal Foundation*, *supra*, 33 Cal.3d at p. 170, 188 Cal.Rptr. 104, 655 P.2d 306.)

C. "Under the law-of-the-case doctrine, the determination by an appellate court of an issue of law is conclusive in subsequent proceedings in the same case. [Citation.] The doctrine applies only if the issue was actually presented to and determined by the appellate court. [Citation.] The doctrine is one of procedure that prevents parties from seeking reconsideration of an issue already decided absent some significant change in circumstances." *People v. Yokely* (2010) 183 Cal.App.4th 1264, 1273. Furthermore, "the law-of-the-case doctrine governs only the principles of law laid down by an appellate court, as applicable to a retrial of fact . . . ." *People v. Boyer* (2006) 38 Cal.4th 412, 442. "[T]he doctrine applies only to an appellate court's decision on a question of law; it does not apply to questions of fact." *People v. Barragan* (2004) 32 Cal.4th 236, 246. The doctrine applies only to rulings by appellate courts and not trial courts. *Yokely*, at p. 1273; *Boyer*, at p. 442; *Barragan*, at p. 246.

D. Since the court decided the first Sierra Club petition in April of 2013, and since the court's May 2015 ruling, the Supreme Court has decided two cases of importance to the current inquiry, particularly as they relate to the standard of review:

In *Center for Biological Diversity v. Calif. Dept. of Fish and Wildlife*, (November 30, 2015) 62 Cal.4th 204, the High Court held that the lead agency did not abuse its discretion in using AB 32 as a significance criterion in analyzing the GHG-related effects of a large, mixed use development. *Id*. at 222-223.

In *Banning Ranch Conservancy v. City of Newport Beach* (March 30, 2017) __ Cal.5th __, 2017 WL 1174436, the Court held that, in "punting" to the Coastal Commission, the City had failed to use its best efforts to investigate and disclose what it had discovered about environmentally sensitive areas in the project site. *Id*. at *11.

E. An injunction is appropriate in a CEQA case where activities will prejudice the implementation of a mitigation measure. *Californians for Alternatives to Toxics v. Department of Food and Agriculture* (2005) 136 Cal.App.4th 1, 21 ("a court can issue an order enjoining activities that could adversely change or alter the environment, if it finds that such activities 'will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project ....' ")

3. Requests for Judicial Notice.

The Sierra Club seeks (ROA 170) judicial notice of two documents: (A) the October 20, 2016 Notice of Preparation of the County of San Diego Climate Action Plan and General Plan Amendment; and (B) a chart, prepared by the County, of the proposed and in-process General Plan Amendment applications within San Diego County.

Golden Door seeks (ROA 25) judicial notice of the County's October 21, 2009 CEQA Guidelines.

The petitioners' requests are made pursuant to Evid. Code section 452(c), official acts of a state political subdivision.

The County seeks judicial notice (ROA 32* and 182) of 20 documents (three in the *Golden Door* case and 17 in the *Sierra Club* case). These requests are made pursuant to Evid. Code sections 452(c), official acts of a state political subdivision, and 452(d), court records.

Courts of appeal review a trial court's ruling granting a request for judicial notice pursuant to the abuse of discretion standard of review. *In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1271.

Evidence Code section 453 provides that a trial court must take judicial notice of any matter specified in Evidence Code section 452, upon a party's proper request.

In *People v. Harbolt* (1997) 61 Cal.App.4th 123, 126-127, the court discussed the limited purposes for which a court may take judicial notice of a court record:

"Evidence Code sections 452 and 453 permit the trial court to 'take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached-in the documents such as orders, statements of decision, and judgments-but cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.' [Citations.]

The County did not oppose either petitioner request, and they are granted. With regard to the County's requests, the court rules as follows:

Ex. 1, April 19, 2013 reporter's transcript: Granted
Ex. 2, April 24, 2013 Judgment: Granted
Ex. 3, April 19, 2013 Minutes: Granted
Ex. 4, April 24, 2013 Writ: Granted
Ex. 5 and Ex. 2, Nov. 7, 2013 Guidelines: Granted
Ex. 6, Supplemental Petition: Granted
Ex. 7, Stipulation and Order (ROA 64): Granted
Ex. 8, May 4, 2015 supplemental writ of mandate: Granted
Ex. 9 and Ex. 3, June 4, 2015 Initial Return: Granted
Ex. 10, January 5, 2016 Second Return: Granted
Ex. 11, June 29, 2016 Third Return: Granted
Ex. 12, Dec. 29 2016 Fourth return: Granted

Ex. 13, Second Supp. Petition: Granted
Ex. 14, opposition to demurrer: Granted
Ex. 15 and Ex. 1, Bay Area June 2010 document: Denied
Ex. 16, 2007 San Bernardino document: Denied
Ex. 17, 2011 San Bernardino document: Denied

With regard to the latter three documents, the denial is based on lack of relevance and the fact that none of the three documents was, so far as the court can dicern, within the administrative record in these matters.

4. Discussion and Rulings.

A. Law of the Case.

The following are the holdings of the Fourth District Court of Appeal, Div. 1, in the 2012 *Sierra Club* case:

"[W]ith respect to the CAP as mitigation for a plan-level document, the County failed to proceed in the manner required by CEQA by proceeding with the CAP and Thresholds project in spite of the express language of Mitigation Measure CC-l.2 requiring that the CAP "include ... more detailed greenhouse gas emissions reduction targets and deadlines" and that the CAP "will achieve comprehensive and enforceable GHG emissions reduction" by 2020. With respect to the CAP as a plan-level document itself, the County failed to proceed in the manner required by law by failing to incorporate mitigation measures into the CAP as required by *Public Resources Code section 21081.6*."

231 Cal.App.4th at 1167 (italics in original).

"Instead of analyzing and making findings regarding the environmental effects of the CAP and Thresholds project, the County made an erroneous assumption that the CAP and Thresholds project was the same project as the general plan update. ... As a result, the County failed to render a "written determination of environmental impact" before approving the CAP and Thresholds project. ...This constitutes a failure to proceed in the manner required by law."

231 Cal.App.4th at 1170-71.

The "trial court did not err in finding a supplemental EIR was required."

231 Cal.App.4th at 1174.

The CAP "does not fulfill the County's commitment under CEQA and Mitigation Measure CC–1.2, to provide detailed deadlines and enforceable measures to ensure GHG emissions will be reduced."

231 Cal.App.4th at 1176.

B. Contentions of the Parties.

The Sierra Club contends the County's 2016 Guidance Document was not properly adopted, creates a threshold of significance, and violates CEQA; that the use of the 2016 Guidance Document violates the decision of the Court of Appeal and this court's supplemental writ of mandate, as well as the County's own previously adopted mitigation measure; that the County proceeded in the absence of substantial evidence; and that the County should be enjoined from processing and approving new, large-scale developments until a lawful CAP and threshold are in place to guide that development and ensure the County can meet its greenhouse gas reduction targets. In the reply brief (p. 5:19-20), the Sierra Club withdraws its request to enjoin the processing of designated projects and states it only seeks to enjoin project approvals until a lawful CAP and threshold are in place.

Golden Door's arguments are similar; it contends the County violated CEQA's procedural requirements in adopting the 2016 Significance Document; that the County violated CEQA by failing to comply with County General Plan EIR Mitigation Measures CC-1.2 and CC-1.8; and that by approving the 2016 Significance Document before the CAP is approved and without environmental review, the County is "piecemealing" and thwarting the County's commitment to comprehensive GHG mitigation. Golden Door also agrees with the Sierra Club argument regarding the absence of substantial evidence as to the County's "Efficiency Metric."

The County contends that the claims of the Sierra Club and Golden Door are not ripe; that the 2016 Guidance Document is merely an advisory document to be used on a project-by-project basis, and not a formally adopted threshold of significance; that the 2016 Guidance Document is based on substantial evidence; that it is in full compliance with the earlier decisions of this court and the 4th DCA, Div. 1; and that petitioners are not entitled to injunctive relief [either to stop all large scale ("greenfields") development (Sierra Club) or to stop the use of the 2016 Guidance Document (Golden Door)].

C. Rulings of the Court.

1. Are the Claims Ripe for Decision?

Yes. It is somewhat ironic that in 2013, the County argued the Sierra Club's claims were time-barred, and now it argues they are not ripe. As the court held in overruling the demurrer, a definite and concrete dispute is raised in the Second Supplemental Petition (SSP). The SSP pleads that the 2016 Guidance Document contains or constitutes a threshold of significance. SSP, paragraphs 1-4, 15, 34-35, 41, 52. The 2016 Guidance Document contains interpretative guidelines for CEQA analysis prepared by the County for use when it acts as the lead agency or responsible agency on projects within its jurisdictional boundaries. AR 10976-10983. This scenario is similar to *Cal*. *BIA*, *supra,* in which the court was not persuaded by the District's argument that the District's guidelines are a nonbinding, advisory document. *Cal. BIA*, *supra*, 2 Cal.App.5th at 1088. If the County's approach was to proceed on a project-by-project basis, as it now claims, it would just do so; it would not need the 2016 Guidance Document. If, instead, the 2016 Guidance Document was intended as an interim set of thresholds of significance for use between now and the time the County finally gets around to complying with the decisions of this court and the Fourth District Court of Appeal, the County cannot be heard to complain that there is no definite and concrete dispute. The County's apparent failure to devote sufficient resources to complying with the decisions of the courts in a timely fashion cannot be held to allow the County to invoke the ripeness doctrine.

2. Is the 2016 Guidance Document a Threshold of Significance under CEQA Guideline 15064.7, or Is It Merely Advisory?

The 2016 Guidance Document is a threshold of significance under CEQA Guideline 15064.7.

CEQA Guideline 15064.7(a) provides, "[a] threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." CEQA Guideline 15064.7(a).

The 2016 Guidance Document meets this threshold of significance definition. It sets forth the "County Efficiency Metric" and recommends the use of the "Efficiency Metric" as a "quantitative GHG analysis." *See* AR 10979. It provides a "measuring stick" for the significance of GHG impacts as to the "Efficiency Metric." It sets 4.9 metric tons of CO2e per person per year as the level above which a project's GHG impacts are found significant and below which the impacts will be found less than significant. *See* AR 10980. It describes the "Efficiency Metric" as a "threshold"." *See* AR 10980. The metric is included in the 2016 Guidance Document in a section entitled "Significance Determination." *See* AR 10979-80.

The fact that the "Efficiency Metric" is recommended, and not mandatory, does not mean that the 2016 Guidance Document is not a threshold of significance. See *Cal*. *BIA*, *supra,* 2 Cal.App.5th at 1088-89 ("District argues writ relief is inappropriate because the District Guidelines are a nonbinding, advisory document and their review is premature given the lack of a specific controversy. We are not persuaded .... The District Guidelines are not interim steps in a larger review process; rather, they are interpretive guidelines for CEQA analyses promulgated by an air district that acts as either the lead agency or a responsible agency on projects within its jurisdictional boundaries.") The same is true here. The 2016 Guidance Document contains interpretative guidelines for CEQA analysis. It was drafted by the County that acts as the responsible agency on projects within its jurisdictional boundaries.

Since the 2016 Guidance Document is a threshold of significance under CEQA, the County is required to comply with the CEQA's mandated procedures for adopting it. That is, CEQA requires that a threshold of significance "be adopted by ordinance, resolution, rule, or regulation, and developed through a public review process and be supported by substantial evidence." *See* CEQA Guidelines 15064.7(b). Thresholds of significance that are "clearly erroneous and unauthorized under CEQA" must be set aside. *Cal. BIA*, *supra*, 2 Cal.App.5th at 1088.

The County failed to comply with the CEQA-required procedures in adopting the 2016 Guidance Document. It did not adopt the 2016 Guidance Document by "ordinance, resolution, rule, or regulation." It did undertake a public review process. Also, the County's rules (ignored by the County) require that the 2016 Guidance Document be subject to public review. *See* Golden Door's RJN, Ex. 5, County's CEQA Guidelines, p. 5 ("Processing Departments shall prepare and maintain administrative guidance for determining the significance of environmental effects. Such guidance, if available, should be utilized in the preparation of Initial Studies and EIRs and updated periodically .... Before any administrative guidance or revisions are approved by the Processing Department, the proposal shall be circulated for public review and comments...") Accordingly, the 2016 Guidance Document is a threshold of significance under CEQA.

Interestingly, the 2016 Guidance Document allows more GHG emissions per year (4.9 metric tons of CO2e per year), as opposed to the County 2013 GHG Significance Document (4.3 metric tons of CO2e per year. AR 10349. However, the lower 4.32 metric tons of CO2e per year threshold was vacated by this court. ROA 92. CEQA was violated because there was no opportunity for public discussion of this determination.

3. Does the 2016 Guidance Document Violate Mitigation Measures CC-1.2 or CC-1.8?

Yes. In order to mitigate the climate change impacts of the 2011 GPU, the County approved mitigation measures requiring it to prepare a CAP (CC-1.2) and to revise its thresholds of significance (CC-1.8). AR 1317-1318 (CC-1.2, CC-1.8). The 2016 Guidance Document violates CC-1.2 and CC-1.8 when the County processes projects using the 2016 Guidance Document in lieu of a threshold of significance based on the CAP. The County got the cart before the horse.

4. Is the 2016 Guidance Document Supported by Substantial Evidence?

No. A threshold of significance must be based on substantial evidence. *See* CEQA Guideline 15064.7(c). The 2016 Guidance Document fails to bridge the analytical gap with substantial evidence, and thus is not supported by substantial evidence.

The 2016 Guidance Document relies on statewide service population and statewide GHG inventory to derive a "per person" limit of GHG emissions. AR 10981. It provides no data specific to San Diego County. It makes no effort to explain why the calculation of the "County Efficiency Metric" based only on statewide data is appropriate for San Diego County. It provides no information on what level of population was assumed for unincorporated San Diego County in the statewide service population number. It does not differentiate between various types of development, such as new, urban, and rural. Thus, it fails to bridge the analytical gap with substantial evidence explaining why calculation of the

"County Efficiency Metric" based on statewide data is proper for San Diego County.

The matter is somewhat similar to *Cal. BIA.* In that case, the Supreme Court held that an EIR's GHG analysis was insufficient given it failed to provide substantial evidence that the statewide GHG reduction levels were a "proper measuring stick" at the project level. *Cal. BIA*, *supra*, 62 Cal.4th at 225-227. The Supreme Court's holding was partly premised on potential differences in new and existing development and differences in assumptions used in statewide models and in local models. *Id*. Here, the "County Efficiency Metric" is somewhat similar to the *Cal. BIA* EIR. It relies on statewide service population and statewide GHG inventory to derive a "per person" limit of GHG emissions. AR 10981. It provides no data specific to San Diego County (which has topography, marine influences, and an industrial mix different from many parts of the state (not to mention an international border no other part of the state has). It makes no effort to explain why the calculation of the "County Efficiency Metric" based only on statewide data is appropriate for San Diego County.

Golden Door does not (and is not required to) discuss the evidence supporting the County's statewide service population and statewide GHG inventory. Golden Door does not challenge the sufficiency of such evidence for statewide purposes.

The court grants Sierra Club's joinder in Golden Door's supporting and reply briefs regarding the lack of substantial evidence for the 2016 Guidance Document. ROA 171, 188.

5. Is the County in Compliance with This Court's Directives as Affirmed by the Court of Appeal?

No. The Court of Appeal in the 2012 *Sierra Club* case found that the CAP and thresholds of significance based on the CAP are a single project that is subject to environmental review. 231 Cal.App.4th at 175 ("As a plan-level document, the CAP and Thresholds project was required to undergo environmental review as a matter of law.") Three years later, the County has not completed a CAP. Also, it has not performed CEQA review for the 2016 Guidance Document. Thus, the 2016 Guidance Document violates the Court of Appeal ruling and is piecemeal environmental review.

6. Are Petitioners Entitled to Injunctive Relief?

Yes, although not the extent sought by the Sierra Club.

The Sierra Club seeks an injunction prohibiting the County from processing and approving new large scale developments on undeveloped land in San Diego County until the County approves a lawful CAP and thresholds regarding GHG impacts. The Sierra Club proposes to enjoin 17 in-process projects listed in the Serra Club's RJN, Ex. B (ROA 170).

The Sierra Club and Golden Door also seek an injunction prohibiting the County from using the 2016 Guidance Document and its "County Efficiency Metric" for CEQA review of GHG impacts for development proposals on undeveloped land in San Diego County.

The Sierra Club's request (injunction prohibiting the County from processing and approving new large scale developments on undeveloped land in San Diego County until the County approves a lawful CAP and thresholds) is denied. An injunction to prohibit the County from undertaking its planning process is too broad, and would embroil the court in County operations the court is not equipped to oversee. Further, there is the possibility that the County will deny some or all of the projects. Moreover, the Sierra Club has withdrawn its request to enjoin the processing of the designated projects. *See* reply brief, p. 5:18 ("The Club no longer seeks to enjoin the *processing* of the designated projects..."; italics in original).

The Sierra Club's request (injunction prohibiting the County from approving new large scale developments) is denied. The parties involved in the projects are not before the court, and thus, do not have the opportunity to address the request. This is a basic due process concern. Also, granting the request would probably prejudice the applicants in the projects. *Save Our Bay, Inc. v. San Diego Unified*

Port District (1996) 42 Cal.App.4th 686, 696 ("the test is whether the person is one whose rights must necessarily be affected by the judgment in the proceeding"). Undoubtedly, some applicants have expended time and financial resources and would be obviously impacted by an injunction prohibiting the approval. In addition, the Sierra Club has an available adequate remedy - filing an individual lawsuit with respect to each project that is approved. In addition, the Sierra Club concedes the injunction request is a "novel situation" and that "it may be unusual for a court to issue the type of injunctive ... relief sought here". *See* opening brief, p. 23:21; *see also* reply brief, p. 11:14-15.

However, the court is very concerned that the County has not acted expeditiously and has allowed approximately 4 years to transpire since the court ordered the preparation of a new CAP and approximately 2 years to transpire since the High Court denied the County's petition for review. As such, the injunction is denied without prejudice for the Sierra Club to renew the request if it appears within the next couple of months that the County is still avoiding its obligation to effectuate a lawful CAP and threshold.

The joint injunction request is granted. The County is prohibited from using the 2016 Guidance Document and its "County Efficiency Metric" for CEQA review of GHG impacts for development proposals on undeveloped land in San Diego County. The injunction does not enjoin planning activities. It only prevents the County from utilizing an improper threshold of significance in the CEQA review of GHG impacts on undeveloped land in San Diego County. It only enjoins an action that is inconsistent with CEQA. *Lincoln Place Tenants Ass'n v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 454-55.

Accordingly, let a writ of mandate issue forthwith, directing respondent the County of San Diego to set aside and vacate the 2016 Guidance Document; and let an injunction issue wherein the 2016 Guidance Document and its "County Efficiency Metric" may not be used to provide the basis for CEQA review of GHG impacts of development proposals on unincorporated County lands. The court declares that the 2016 Guidance Document and its "County Efficiency Metric" are legally inadequate and may not be used to provide the basis for CEQA review of GHG impacts of development proposals on unincorporated County lands.

The court believes it has addressed all of the principal controverted issues of the case, and the court therefore finds it unnecessary to address the other contentions in the second amended/supplemental petition for writ of mandate and petition for writ of mandate. *Compare Natter v. Palm Desert Rent Review Com.* (1987) 190 Cal.App.3d 994, 1001; *Young v. Three for One Oil Royalties* (1934) 1 Cal.2d 639, 647-648. By proceeding in this fashion, the court aims to deliver a prompt decision, bearing in mind that the trial court is most often just a waystation in the life of a CEQA case.

Attorneys' fees, if sought, may be addressed in a future noticed motion.

The court thanks the parties for their high-quality briefs. The court expects to return the lodged AR to the parties at the hearing so that it will be available for appellate proceedings should that be deemed appropriate. Accordingly, the parties should bring an extra briefcase to the hearing.

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*The County's request in the *Golden Door* case is confusing, as it refers initially to "Exhibits A-P" but then only references and attaches Exhibits 1-3.