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Third Time Is Not The Charm: Fourth District Affirms Judgment Setting Aside San Diego County's Climate Action Plan And Related Supplemental EIR Approvals Due To CEQA Violations

By Arthur F. Coon on June 29, 2020

In a mammoth 132-page published opinion (with an additional five pages of appendices) filed on June 12, 2020, the Fourth District Court of Appeal (Division One) mostly affirmed the trial court's judgment invalidating San Diego County's approvals of a 2018 Climate Action Plan (CAP), related Guidelines for Determining Significance, and related Supplemental EIR (SEIR). The opinion – which marked "the third time the County's attempt to adopt a viable climate action plan and related CEQA documents" had been before the Court – resolved consolidated appeals in three cases, in which the lead plaintiffs were Golden Door Properties, LLC and the Sierra Club. (*Golden Door Properties, LLC v. County of San Diego* (2020) ___ Cal.App.5th ___.) While the Court of Appeal *reversed* the trial court's findings that the CAP was inconsistent with the County's General Plan (applying the familiar highly deferential standard of review to the County's consistency determination), that several of the County's responses to SEIR comments were inadequate, and that the SEIR's geographical scope of study for cumulative impacts was inconsistent, it otherwise affirmed the trial court's findings of significant CEQA violations affecting the CAP and SEIR.

The 2018 CAP Was Invalid Because It Relied On An Unlawful GHG Mitigation Measure

The primary problem found with the CAP was its reliance on a greenhouse gas (GHG) mitigation measure – M-GHG-1 – that lacked enforceable performance standards and improperly deferred and delegated mitigation. M-GHG-1 allowed certain development projects – specifically, in-process and reasonably foreseeable projects in the unincorporated County requiring General Plan amendments (GPAS) – to mitigate up to 100% of their in-County GHG emissions by purchasing carbon offsets originating anywhere in the world. While in theory such offsets should be able to fully mitigate the *climate change* impacts of local GHG emissions – assuming they are verifiable and real reductions, and setting aside other types of impacts – the "devil is in the details" and the court found M-GHG-1 to have a number of fatal defects which rendered it invalid as a CEQA mitigation measure.

As background to help understand M-GHG-1's proposed operation, the CAP was meant to serve as GHG impact mitigation for all development projects that are completely consistent with the County's 2011 General Plan Update (GPU); for such projects, compliance with the CAP's GHG reduction measures, i.e., consistency with the CAP, was the "threshold of significance" and would be deemed sufficient to mitigate GHG impacts to less than significant. The CAP's baseline GHG emissions inventory, against which future reductions were to be measured, included all GHG emissions from County projects and projects in the unincorporated County as of 2014; it included GPAs, but only those constructed as of 2014. The CAP also set forth "business-as-usual" GHG projections for full buildout of GPU-consistent projects for years 2020, 2030, and 2050, and these projections accounted for GPAs adopted up until the August 2017 release date of the DSEIR, but importantly not for numerous (21 in all) "in-process" GPAs (including GPAs for quite major projects) that were under environmental review but not yet adopted by the County.

To meet CARB's GHG emissions reduction targets for future years for all covered development, compliance with all the CAP's reduction measures (26 in all) would be necessary. For in-process GPAs, consistency with the CAP was to be achieved under M-GHG-1 of the SEIR, which required projects that would increase land use density or intensity above what is allowed under the GPU to mitigate their GHG emissions to zero above the CAP through a number of possible measures. These included on-site design features to reduce VMT and promote transit oriented development and low carbon transportation options, which would also produce local environmental "co-benefits" (such as less air pollution, more open space preservation, walkable communities, etc.). But if compliance with CAP measures and onsite design features were insufficient to achieve no net GHG increase above CAP-allowed levels, M-GHG-1 would allow project applicants to use offsite mitigation, including purchasing offset credits originating from projects located *anywhere in the world*. Under any available mitigation option, the goal is to reduce to zero any GPA project GHG emissions increases over those projected in the CAP.

In mostly affirming the trial court, the Court of Appeal held that M-GHG-1 was not a CEQA-compliant mitigation measure, for numerous reasons. M-GHG-1 invoked a statutory "cap-and-trade" provision and the County defended it in the litigation as being "substantially similar" to allowed cap-and-trade offsets. While off-site measures, including offsets not otherwise required, can be permissible as CEQA mitigation (CEQA Guidelines, § 15126.4(c)(3)), the Court pointed to the "cap-and-trade" statutes and regulations in holding such offsets must be "real, permanent, quantifiable, verifiable, enforceable, and additional to any GHG emission reduction otherwise required by law or regulation, and any other GHG emission reduction that otherwise would occur." (Citing Health & Saf. Code, §§ 38562(d)(1), (2).) M-GHG-1 failed to meet these standards, as further defined through the detailed cap-and-trade regulations, because: (1) it did not require the CARB-approved or other "reputable" registries from which offset purchases would be allowed to follow equally-important CARB-approved offset *protocols* which are AB 32-compliant and adopted through a regulatory process; (2) M-GHG-1 does not even mention the word "protocol" even though CARB-approved protocols "are the heart of cap-and-trade offsets" and are needed to assure reductions are real, permanent, additional, etc.; (3) unlike cap-and-trade, which contains stringent enforceable restrictions to ensure that "linked" jurisdictions' offsets are genuine, verifiable and enforceable under GHG laws at least as strict as California's, M-GHG-1's only limit on mitigating with international offsets is the County Planning Director's unilateral decision that offsets are not feasibly available within the County, California, or the United States, while the County has no enforcement authority outside the state, much less in a foreign country; (4) while cap-and-trade offsets are limited to a maximum of 8% of an entity's compliance obligation, nothing in M-GHG-1 other than the Planning Director's feasibility determination limits a GPA applicant from obtaining up to 100% of its needed GHG emission reductions from offsets, including from developing foreign countries where verifiability and corruption present serious challenges; (5) M-GHG-1 specifically omits from its text reference to the cap-and-trade statutory subdivision containing the critical "*additionality*" requirement for offsets, and contains no comparable requirement that

offset credits be additional to what would have occurred anyway; (6) M-GHG-1 improperly delegates and defers mitigation to future Planning Director determinations regarding (a) what registries are CARB-approved or "reputable" and issue qualified offsets, and (b) whether offsets are "available" or "financially feasible" from geographic sources in or closer to the County, and it lacks objective standards to make or guide these determinations, which are left to the "satisfaction of the Director"; and (7) while containing a generalized goal of no net increase above CAP projections, M-GHG-1 lacks performance standards or objective criteria to ensure the goal is actually met and that required GHG reductions are real, permanent, quantifiable, verifiable, enforceable, and additional. (The Court's opinion contains a lengthy discussion of the CEQA case law on deferred mitigation.)

Because the CAP assumed that in-process and future GPAs would mitigate their GHG emissions above the CAP to zero under M-GHG-1, and because M-GHG-1 was invalid, the CAP's assumption was not supported by substantial evidence and it was therefore also invalid.

Notably, the Court did preface its extensive analysis and discussion of these issues with the caveat that its holding was a narrow one limited to the facts before it, and that - other than its reliance on M-GHG-1 and its GHG inventory's inconsistency with the SEIR - the CAP was CEQA-compliant.

The SEIR's Cumulative Impacts Analysis Violated CEQA By Failing To Address The Impacts Of GPAs Mitigating GHG Emissions Under M-GHG-1 And Failing To Analyze A "Smart-Growth" Alternative, And Its Finding That M-GHG-1 Was Consistent With SANDAG's Regional Transportation Plan (RTP) Was Not Supported By Substantial Evidence

The SEIR failed to adequately analyze the environmental effects of probable future projects, as required by CEQA to avoid a "piecemeal" review approach that fails to disclose cumulative impacts "result[ing] from the incremental impact of the project [under review] when added to other closely related past, present, and reasonably foreseeable probable future projects." (Quoting CEQA Guidelines, § 15355(b).) The Court noted that once an EIR for a future project is initiated, the project is considered to be "probable rather than merely possible" for purposes of cumulative impact analysis. (Citing *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 870.)

While the 21 in-process GPAs are closely related projects currently under environmental review which, if built, would add almost 14,000 dwelling units and 139,485 $MTCO_2e$ in construction-related GHG emissions alone, the SEIR did not analyze these cumulative impacts except by stating M-GHG-1 would reduce in-process GPA GHG emissions to zero above the CAP. The SEIR's complete failure to analyze the cumulative air quality, energy, and VMT impacts (among others) from these projects rendered it an inadequate informational document. Per the Court, if these projects were, as County conceded, probable and foreseeable enough to create cumulatively considerable GHG impacts, they were also probable and foreseeable enough to create *other* types of impacts (e.g., VMG from adding 14,000 new homes to the County's backcountry). Non-speculative analysis of impacts from these projects in some level of detail was thus both possible and required, but was wholly missing from the SEIR despite the fact that these projects were well beyond the initial planning stage and detailed information from numerous relevant EIRs was available to the County.

Further, the SEIR's finding of consistency with SANDAG's RTP – a plan mandated by SB 375 to include a Sustainable Communities Strategy (SCS) to meet CARB's regional GHG emissions reduction goals – lacked substantial evidence support. SANDAG's target was to reduce car and light truck emissions by 7% by 2020, and 13% by 2035, as compared to 2005 baseline levels. To do so, the RTP/SCS set forth strategies of focusing housing and job growth in urbanized areas with existing and planned

transportation/transit infrastructure; preserving habitat, open space, cultural resources, and farmland; establishing a GHG-reducing transportation network; addressing housing needs of all economic segments of the population; and implementation of the plan through incentives and collaboration.

An EIR is required by CEQA to discuss any *inconsistencies* between the proposed project and applicable regional plans, including regional transportation plans, and its determination must be supported by substantial evidence. (CEQA Guidelines, § 15125(d).) Here, the County's finding of consistency with SANDAG's RTP/SCS relied on an assumption that M-GHG-1 would fully mitigate GPA projects' GHG emissions to meet CARB's regional targets, but M-GHG-1 was itself invalid. Additionally, because M-GHG-1 would potentially allow 100% of in-County GHG emissions for GPAs to be mitigated with out-of-County offsets, the measure would not reduce VMTs through *local* land use decisions, and it ignores whether GPAs are located consistent with smart growth policies. These characteristics are inconsistent with SB 375, CARB's 2017 Scoping Plan, and SANDAG's RTP/SCS. Reliance on M-GHG-1 rendered the SEIR inadequate under CEQA's informational standards.

Relatedly, the SEIR also failed to describe a *reasonable range of alternatives* to the project because it omitted discussion of a potentially feasible smart-growth alternative which could reduce project-related VMT and thus substantially lessen significant project impacts while still achieving most of the project's basic objectives. The Court found "closely on point" its decision in *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 17 Cal.App.5th 413 holding that the Program EIR (PEIR) for SANDAG's 2011 RTP/SCS violated CEQA because its alternatives section omitted any alternative that could significantly reduce total VMT. Given the critical role of the state's efforts to reduce VMT as a key component of overall needed GHG reductions, the Court in *Forest Foundation* found the PEIR's omission of an alternative focused primarily on VMT reduction to be "inexplicable." In light of SANDAG's and CARB's recognition that car/light truck emissions account for one-third of all regulated state GHG emissions, and that VMT reductions are necessary and must be part of any GHG strategy, the SEIR's failure to include a VMT reduction-focused alternative here precluded informed public participation and decision making. In this vein, the Court also noted that the County's on-road transportation sector accounted for a whopping 45% of its 2014 GHG emissions inventory, whereas its CAP's minimal VMT reduction measures would reduce that sector's GHG emissions by less than 1 percent; per the Court, this meant that, contrary to the County's arguments, the CAP's VMT reduction was "not tantamount to a smart growth alternative."

Other Issues

The Court included numerous more minor holdings within its magnum opus of an opinion. The Court held the County forfeited its contention that the trial court erred in holding the SEIR erroneously omitted an "environmental justice" analysis – which the Court opined in *dicta* is "reasonably arguable" CEQA may require in some circumstances – by relegating its argument to an opening brief footnote rather than clearly setting it out in a heading. And County similarly forfeited its argument challenging the trial court's ruling that the SEIR lacked adequate energy impact analysis by failing to address that issue in its opening brief. As indicated above, the Court also found material inconsistencies between the SEIR's and the CAP's GHG emissions inventories; specifically, the CAP's inventory stated it excluded GPA emissions where the GPA project was not *constructed* by 2014, whereas the SEIR stated its inventory included additional emissions from GPAs adopted up until March 28, 2017.

The Court also rejected the County's argument that it should grant a remedy *severing* the invalid M-GHG-1 and allowing the CAP to stand, both because the County forfeited that issue by not raising it in its opening brief, and because the typical remedy of voiding the approval was appropriate here since the

CAP's GHG projections were substantively inaccurate and flawed due to their reliance on the invalidated M-GHG-1.

The Court rejected Golden Door's request that the Court appoint a special master to work with the parties to ensure County's expeditious preparation of an adequate CAP and SEIR (as lacking sufficient "exigent circumstances" given the existing injunction against reliance on M-GHG-1); it further rejected the Sierra Club's request for an advisory opinion declaring that *no* out-of-County offsets are permitted under County's Current General Plan, stating that it "remains to be seen how the County will amend the CAP, the SEIR, and M-GHG-1 to comply with this opinion."

Conclusion and Implications

The Court of Appeal's opinion provides detailed analysis and guidance that should assist local lead agencies in their efforts to develop legally valid and CEQA-compliant CAPs. While it exposed in detail the flaws in M-GHG-1 as a GHG emissions reduction measure, it also looked with favor (in dicta) on another unchallenged measure in County's CAP – T-4.1 – which was designed to offset in-County emissions through County's "direct investments in local projects to offset carbon emissions." Such direct investment projects would result from specific actions to reduce, avoid or sequester GHG emissions, and could include urban forest and urban tree planting, or a weatherization project reducing in-County carbon emissions while also reducing residents' heating and cooling costs. The Court noted that – unlike M-GHG-1 – T-4.1 required compliance with specified established protocols approved by CARB, CAPCOA, or the San Diego County Air Pollution Control District that had received public review before adoption, and also required real, permanent, quantifiable, verifiable and enforceable reductions verified by an independent, qualified third party.

Further, in emphasizing the narrowness of its holding, even with respect to the invalidated M-GHG-1, the Court stated: "Our decision is not intended to be, and should not be construed as a blanket prohibition on using carbon offsets – even those originating outside of California – to mitigate GHG emissions under CEQA."

Ultimately, for the County of San Diego, and for all other local and regional agencies throughout the State attempting to prepare legally compliant CAPs, the "silver lining" behind the "Golden Door" is the Court's extensive and detailed analysis pointing the way toward successfully achieving that goal.

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