Golden Door Properties v. County of San Diego
(June 12, 2020) __ Cal.App.5th __

This is the third case litigating the mitigation and climate action plan arising from the County's attempts to adopt a Climate Action Plan (CAP) as required by a mitigation measure in the EIR certified for the County's 2011 General Plan Update. In this case, the County appealed the writ of mandate and injunction that invalidated its 2018 approvals of a CAP, Guidelines for Determining Significance of Climate Change, (to be used as thresholds for later projects), and supplemental EIR. The Court of Appeal upheld the writ and injunction, invalidating the CAP, guidelines, a mitigation measure adopted by the County, and the SEIR. The Court summarized its decision as follows:

> Our primary holdings are: (1) [mitigation measure] M-GHG-1 violates CEQA because it contains unenforceable performance standards and improperly defers and delegates mitigation. (2) The CAP is not inconsistent with the County's General Plan. (3) However, the County abused its discretion in approving the CAP because the CAP's projected additional greenhouse gas emissions from [future] projects requiring a general plan amendment is not supported by substantial evidence. (4) The SEIR violates CEQA because its (a) discussion of cumulative impacts ignores foreseeable impacts from probable future projects; (b) finding of consistency with the Regional Transportation Plan (RTP/SCS) is not supported by substantial evidence; and (c) analysis of alternatives ignores a smart-growth alternative.

The Court noted that its decision here is a narrow one based on a complex case with a history and a large administrative record. The Court explained:

> To be abundantly clear, our holdings are necessarily limited to the facts of this case, and in particular, M-GHG-1. Our decision is not intended to be, and should not be construed as blanket prohibition on using carbon offsets—even those originating outside of California—to mitigate GHG emissions under CEQA.
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> Similarly, our holding regarding the CAP's invalidity is a narrow one. The judgment requiring the County to set aside and vacate its approval of the CAP is affirmed because the CAP's greenhouse gas emission projections assume effective implementation of M-GHG-1, and M-GHG-1 is itself unlawful under CEQA. Except to the extent that (1) the CAP is impacted by its reliance on M-GHG-1; and (2) the CAP's inventory of greenhouse gases is inconsistent with the SEIR (see part IX, post), the CAP is CEQA compliant.

The SEIR created M-GHG-1 to enable a developer of a project not included in the current General Plan (and therefore not reflected in the CAP's emissions assumptions) to establish a means to reduce their project's GHG emissions to net zero by utilizing off-site compensation. The CAP relied upon M-GHG-1 to meet its GHG reduction goals. This was a fatal flaw. The Court stated:

> The CAP's strategies and measures are designed to reduce GHG emissions for build-out under the GPU. The CAP does so by (1) calculating a baseline GHG emissions

> level as of 2014; and (2) estimating future GHG emissions under a business as usual standard; and (3) implementing state mandated GHG reduction targets. If any one of these calculations is erroneous, the CAP fails to accomplish its purpose. In addition to the inconsistency between the CAP and SEIR discussed ante in part IX [of the decision], the problem here is with the CAP's GHG projections. The projections assume that in-process and future GPAs [general plan amendments] will mitigate to zero-above-the-CAP under M-GHG-1. Because M-GHG-1 is invalid, these projections are not accurate. There is no assurance that in-process and future GPAs will in fact mitigate to net zero. Thus, there is no evidence that the CAP's reduction measures will achieve the stated reduction targets, even for projects consistent with the GPU. In sum, it is impossible to surgically excise M-GHG-1 from the CAP to produce a valid stand-alone climate action plan.

Mitigation measure M-GHG-1 was the failed linchpin that brought down both the CAP and its SEIR. The Court found that M-GHG-1 was problematic for a number of reasons.

M-GHG-1 relied on an unenforceable performance standard and therefore was not properly deferred mitigation. The County equated the M-GHG-1 offsets with CARB's offset protocols and registries in terms of enforceability and stability. The offset protocols for CARB's cap and trade program are regulatory and are subject to direct CARB oversight to ensure that the offsets are real and long-term. Out-of-state or foreign offsets require a finding by the Governor before they may be allowed. Foreign offsets don't necessarily meet the California Air Resources Board (CARB) offset standards. However, M-GHG-1 does not offer that level of oversight, nor does it include standard criteria for qualifying offsets such as those used by CARB.

The County argued that the effectiveness of M-GHG-1 was assured because it would rely on the registries for out-of-county offsets. The Court disagreed, explaining that not all registries meet CARB's offset protocols and therefore are not assured to be effective.

The Court further noted:

> There is another significant deficiency in M-GHG-1. Under cap-and-trade, GHG emission reductions must be additional "to any greenhouse gas emission reduction otherwise required by law or regulation, and any other greenhouse gas emission reduction that otherwise would occur." ([Health and Safety Code] § 38562, subd. (d)(2).) "Additionality is an important requirement because if non-additional (i.e., 'business-as-usual') projects are eligible for carbon [offset] . . . then the net amount of greenhouse gas emissions will continue to increase and the environmental integrity of carbon reduction projects will be called into question." (McFarland, supra, 11 Sustainable Dev. L. & Pol'y at p. 15.) For example, CARB will not approve a protocol that "includes technology or GHG abatement practices that are already widely used." Moreover, "[t]o assess if a specific GHG mitigation method may have 'otherwise occurred,' " CARB will determine "if that method is common practice in the geographic area in which the proposed [CARB Protocol] is applicable." Although additionality is "a critical component of any environmental market" it is "often seen as

> expensive [and] onerous. . . ." (Karen Bennett, Additionality: The Next Step for Ecosystem Service Markets (2010) 20 Duke Envt'l. L. & Pol'y F. 417, 419.) Perhaps this explains why M-GHG-1 seemingly goes out of its way to not require additionality. Under M-GHG-1, the Director may approve offsets issued by any "reputable registry or entity that issues carbon offsets consistent with . . . [Health and Safety Code] section 38562[, subdivision] (d)(1)." The County asserts this reference to section 38562 ensures that offset protocols administered under M-GHG-1 will be substantially similar to Assem. Bill No. 32 compliant offsets. However, subdivision (d)(1) of section 38562 does not require that offsets be additional. Additionality is required under the next subdivision [(d)(2)] in section 38562, which provides in part: "Any regulation adopted by [CARB] . . . shall ensure all of the following: [¶] . . . [¶] (2) . . . the reduction is in addition to any greenhouse gas emission reduction otherwise required by law or regulation, and any other greenhouse gas emission reduction that otherwise would occur." (§ 38562, subd. (d)(2).) Although M-GHG-1 cites subdivision (d)(1) of section 38562, it is silent with respect to subdivision (d)(2). And there is nothing else in M-GHG-1's text that requires additionality.

Furthermore, under M-GHG-1, the Planning Director determined whether to approve offset credits. That decision was based on two findings: (1) the registry or issuing entity must be CARB-approved or "reputable" and issue offsets consistent with Health and Safety Code Section 38562(d)(1); and (2) the offsets must not be "available" and/or not "financially feasible" in a location closer to the County as listed in the geographical hierarchy. The Court explained:

> "… MGHG-1 contains no objective standards for determining whether any particular offset project is "available" and "financially feasible" in one location or another. Without any objective and measurable standard for what "feasible" onsite reductions consist of, M-GHG-1 provides no reasonable assurance that any onsite GHG reduction will actually occur."
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> "Especially troubling is that M-GHG-1 contains no objective standards for the Director to apply in determining whether offsets originating in foreign countries are real, permanent, verifiable, enforceable, and additional. As one commentator notes, the ordinary challenges in establishing that a domestic offset protocol meets these standards are magnified in foreign countries."
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> "The CEQA defect in M-GHG-1 is not that it allows one person—the Director—to make discretionary decisions. The problem is M-GHG-1 lacks objective criteria to ensure the Director's exercise of that discretion will result in GHG reduction that is real, permanent, quantifiable, verifiable, enforceable, and additional."

The level of development assumed in the CAP and analyzed in the SEIR did not include 21 general plan amendments that were in progress. The Court found the SEIR's cumulative impact analysis to be inadequate because it failed to address the substantial, reasonably known cumulatively considerable impacts from probable GPAs. The Court found there was sufficient information known about the pending GPAs for the County to include them in the cumulative

analysis. Per the Court: "the 21 in-process GPAs, if constructed, would collectively add nearly 14,000 dwelling units in the unincorporated County. The EIRs for just five of these disclose they will collectively produce 139,485 MTCO2e in construction-related GHG emissions alone."

The Court found that the SEIR did not adequately discuss the project's consistency with the RTP/SCS. The Court asserted, contrary to the decision in *Environmental Council of Sacramento v. County of Sacramento* (2020) 45 Cal.App.5th 1020 (Environmental Council of Sacramento) [CEQA does not require analysis of consistency with a sustainable communities strategy], that interplay between state policies on the reduction of GHG emissions (e.g., AB 32 and SB 375) and the role of the regional RTP/SCS in reducing VMT requires the SEIR to discuss whether future GPAs allowable under M-GHG-1 would be consistent with the RTP/SCS. The Court asserted that "…the fact that the CAP itself is consistent with VMT reductions in the SCS does not support a finding that VMT impacts by in-process and future GPAs will be consistent with the Regional Plan." The Court apparently felt that because vehicles are the major source of GHG emissions the CAP and its SEIR must specifically consider ways to reduce VMT from future projects.

Commenters on the draft SEIR suggested an alternative that would limit GPAs to "smart growth areas near transit and jobs" to be "consistent with the RTP/SCS," reducing vehicle miles travelled (VMT) as a means of limiting GHG emissions. However, the County neither included this suggested alternative in the Final SEIR nor made findings as to why the alternative was infeasible. This violated CEQA. The Court again focused on the importance of reducing VMT in order to reduce GHG emissions, asserting that the County should have included a VMT-reducing alternative simply because VMT reduction is so important.

The Court found that the CAP and its SEIR were not using the same inventory of GHG emissions. The CAP GHG emissions inventory did not include projects constructed after 2014; the SEIR stated that the CAP's inventory included projects approved between 2011 and 2017. This inconsistency invalidated the SEIR.

The County's appeal was flawed, limiting its ability to challenge all parts of the trial court's decision. The trial court had held that the SEIR should have examined the impact of the CAP on environmental justice concerns. The Court of Appeal allowed this holding to stand because the County had failed to properly appeal that issue. The County similarly forfeited its ability to appeal the trial court's finding that the SEIR failed to adequately analyze energy impacts. The Court of Appeal was sympathetic to the idea that environmental justice could be considered under CEQA in some circumstances, but did not decide the issue. We note that despite the Court's sympathy, neither the CEQA statute nor the CEQA Guidelines explicitly require consideration of environmental justice.

Because this case is complex and the decision so long (136 pages), the Court conveniently offered a summary of its holding, reproduced in pertinent part below.

A. The 2018 Climate Action Plan (CAP)

The CAP is not inconsistent with the General Plan. Nevertheless, the judgment requiring the County to set aside and vacate its approval of the CAP is affirmed because the CAP's greenhouse gas emission projections assume effective implementation of M-GHG-1, and M-GHG-1 is itself unlawful under CEQA. Except to the extent that (1) the CAP is impacted by its reliance on M-GHG-1; and (2) the CAP's inventory of greenhouse gases is inconsistent with the SEIR (see holding (C)(4) post), the CAP is CEQA-compliant.

B. M-GHG-1 is Invalid under CEQA

Generally speaking, CEQA permits mitigation measures for GHG emissions to include offsite measures, including purchasing offsets. However, M-GHG-1 violates CEQA because M-GHG-1 does not require that (1) offset protocols meet Assem. Bill No. 32 criteria as established in the California Code of Regulations, title 17, section 95972; (2) greenhouse gas emission reductions achieved are additional within the meaning of Health and Safety Code section 38562, subdivisions (d)(1) and (d)(2) and California Code of Regulations, title 17, section 95802, subdivision (a); and (3) offsets originating outside California have GHG emissions programs equivalent to or stricter than California's program.

Additionally, M-GHG-1 violates CEQA because (1) it would allow a project applicant to offset 100 percent of its GHG emissions through offset projects originating outside of California; and (2) it allows a County official to determine whether any particular offset program is feasible and otherwise appropriate, with no objective criteria to guide the exercise of that discretion. M-GHG-1, therefore, lacks performance standards to ensure the mitigation goal will be achieved. Therefore, the judgment directing the County to set aside and vacate its approval of the CAP and SEIR is affirmed.

C. SEIR Holdings

1. The cumulative impacts analysis violates CEQA
The SEIR's cumulative impacts analysis violates CEQA because it excludes GHG impacts from in-process GPAs.

2. The finding that M-GHG-1 is consistent with the Regional Plan is not supported by substantial evidence
The SEIR's finding that M-GHG-1 is consistent with the Regional Plan is not supported by substantial evidence. Therefore, the County abused its discretion in certifying the SEIR. (Golden Door I, supra, 27 Cal.App.5th at p. 901.)

3. The failure to analyze a smart-growth alternative
The SEIR violates CEQA because it fails to analyze a smart-growth alternative to the Project.

4. Inconsistency with the CAP
The CAP and SEIR are inconsistent with each other. The CAP states that its 2014

inventory of GHG emissions excludes emissions from GPAs that were adopted, but not constructed as of 2014. However, the SEIR states that the same inventory includes GPAs adopted between August 2011 and March 28, 2017.