

**Response to Comment Letter X23**

**Golden Door Properties LLC  
Samantha Seikkula of Latham & Watkins LLP  
December 1, 2017**

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**Letter  
X23**

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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.

X23-1

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.

X23-2

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.

**X23-1** The comment provides introductory information related to the commenting organization, the Golden Door Spa, and reasons for commenting on the project. No environmental issues were raised in this comment; therefore, no response can be provided.

**X23-2** The comment expresses concern regarding information provided by the County at a meeting on October 20, 2017. The comment states that the County expressed that the GHG reduction measures selection process of the CAP was ongoing even as the Draft SEIR had been released, which may result in a CEQA violation. The County disagrees with this assertion. The Draft SEIR which was released for public review on August 25, 2017 appropriately described the elements of the project and evaluated and disclosed the potential environmental impacts associated with implementation of the CAP. As described in “Chapter 1, Project Description, Location, and Environmental Setting,” the project consists of the CAP, a General Plan Amendment and revision to the associated mitigation monitoring and reporting program (collectively referred to as the GPA), a threshold of significance for GHG, and a revised Guidelines for Determining Significance for Climate Change (Guidelines).

It appears the comment is suggesting that the elements and measures in the CAP are still being determined. This is not correct. The County wishes to reiterate that the CAP, as described in Chapter 1 of the Draft SEIR, consists of 11 strategies, 30 GHG reduction measures, and supporting efforts that will be considered by decision makers. Regarding decisions about specific GHG reduction measures in the CAP, the County acknowledges that its decisionmakers will review

and contemplate the full suite of feasible and enforceable reduction measures and actions that are proposed and will ultimately determine what measures are approved as part of the CAP. That policy discretion appropriately lies with the decisionmakers. Nonetheless, the County has put forth a stable and well-defined project description for the Draft SEIR and the CAP and the commenter offers no evidence to dispute this. Further, the CAP has been prepared through a transparent, iterative process that includes considerations of many factors, including public input, feasibility and cost considerations, and stakeholder concerns. The fact that the CAP consists of multiple GHG reduction measures, as required for a qualified GHG reduction plan pursuant to CEQA Guidelines Section 15183.5, does not result in an unstable project description. Even if some measures are removed after public review, the underlying fundamental purpose of the project, which is to reduce County GHG emissions consistent with state legislative requirements through implementation of a CAP, has not changed and will be met. This comment will be included in the administrative record and provided to decision makers.

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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

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X23-3

**X23-3**

The comment expresses concern that studies related to the cost and feasibility of GHG reduction measures have not been released for public review prior to publication of the Draft SEIR. It appears the commenter is referencing statements from County staff indicating that two technical studies for certain GHG reduction measures were in preparation as of the date of that meeting. The studies that the commenter has expressed concerns about were released with the Final CAP and Final SEIR on January 8, 2018 and are included as attachments to the Planning Commission Hearing Report. These studies, the Climate Action Plan Implementation Cost Report and Climate Action Plan Cost-Effectiveness Analysis address the cost effectiveness of proposed measures and do not relate to or change the environmental analysis prepared for these measures, nor do they change the conclusions in the Draft SEIR previously circulated for public review. These studies were not pertinent nor required in preparation of the Draft SEIR. Nonetheless, the County proceeded with preparation of the studies to inform decision makers of the costs and benefits associated with the implementation of the CAP. This comment will be included in the administrative record and provided to decision makers.

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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

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X23-4

**X23-4**

The comment expresses concern that the County is providing a menu of options that may or may not be deployed to reach the GHG reduction targets which could result in mitigation measures that are not "fully enforceable" and would be in violation with CEQA. The County disagrees with this assertion for several reasons. As described in response to comment X23-2 above, the County has put forth a detailed and stable project description for the Draft SEIR and the CAP. The commenter offers no evidence to dispute this. However, the County recognizes that decisionmakers, at the time of CAP adoption, have the ultimate authority in determining what specific GHG reduction measures would be approved with the CAP to achieve the CAP's reduction targets. The CAP provides a comprehensive set of strategies, measures, and supporting efforts that have been determined to feasibly achieve the established targets. The County has provided a good-faith effort in defining the elements of the CAP, but also recognizes that it is a planning document that will guide the process for managing and implementing GHG reduction measures over time. Where updates to the plan are required, the CAP appropriately describes the process and the specific future discretionary and environmental steps that would be required.

Regarding the assertion that the CAP provides a menu of options that the County selects from at its discretion, is not accurate. The 11 strategies and 30 GHG reduction measures proposed in the CAP have been proposed as a combination of actions and activities that together will achieve proposed reduction targets. Therefore, all 11 strategies, and 30 GHG reduction measures would need to be implemented as proposed in the CAP to meet the reduction targets. However, the County recognizes that over time and as technology advances, some measures may be more or less effective in achieving GHG reductions that have been identified in the CAP. The CAP, as a planning-level document, requires future updates that will provide some flexibility in allowing changes in the level of implementation of the GHG reduction measures to ensure that the CAP meets its targets. In these situations, the

County must also follow a process by which it would determine whether new or substantially more severe environmental impacts would occur with these changes consistent with the requirements of CEQA Guidelines Sections 15162-15164. This is an appropriate pathway for considering planning-level changes and is the recommended pathway for supplemental analysis as identified in CEQA.

Regarding the enforceability of reduction measures, each of the 30 GHG reduction measures in the CAP are achievable, measurable, and enforceable. The commenter offers no specific evidence to dispute this.

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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.)

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**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.

X23-5

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

**X23-5**

The comment expresses concern related to the Project Description and asserts that because the GHG reduction measure selection process was iterative, that this caused the public to be deprived of a stable Project Description. The County disagrees with this assertion. Please refer to response to comments X23-2 and X-23-3 above. The case cited by the commenter, *Washoe Meadows Community v. Department of Parks and Recreation*, 17 Cal.App.5th 277 (2017), involved an EIR that included no project description, instead presenting the public and decisionmakers with detailed analysis of five separate and vastly different project alternatives, none of which were identified as a preferred alternative prior to public review of the EIR. The court in that case found the EIR failed to include a stable project description, and instead required commenters "to offer input on a wide range of alternatives that may not be in any way germane to the project ultimately approved." *Id.* at 288. In contrast, the Final SEIR sets forth a clear, stable, and well-defined project description of the CAP's 11 strategies and 30 GHG reduction measures. Minor changes made to the CAP's GHG reduction measures in response to comments received from the public do not change the analysis of the project in the Draft SEIR, nor do they change the conclusion that the measures will meet the CAP's reduction targets. As discussed above, the studies related to the cost and feasibility of the CAP's GHG reduction measures address the cost effectiveness of proposed measures and do not relate to or change the environmental analysis prepared for these measures, nor do they change the conclusions in the Draft SEIR previously circulated for public review. These studies were not pertinent to nor required in preparation of the Draft SEIR, but simply provide the public and decisionmakers with additional information regarding the reduction measures included in the CAP and analyzed in the Draft SEIR.

In addition, the fundamental purpose of the project is to reduce County GHG emissions consistent with state legislative requirements through implementation of a CAP, which includes strategies and measures to reduce community and County local government operations (County operations) GHG

emissions. Even if some measures are changed or removed after public review, the underlying fundamental purpose of the project, which is to reduce County GHG emissions consistent with state legislative requirements through implementation of a CAP, has not changed and will be met. See also Master Response 9 on selection of GHG reduction measures in the CAP. The comment will be included in the administrative record and provided to decision makers.

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

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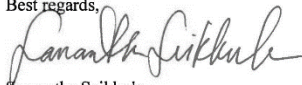
**Adding or Removing Mitigation Measures and Additional Analysis May Require Recirculation.** We are also concerned that the County did not analyze the feasibility of the mitigation measures in advance of publishing the Draft CAP and its EIR. The public should be granted the opportunity to comment on 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].)

X23-6

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.

X23-7

Best regards,



Samantha Seikkula  
of LATHAM & WATKINS LLP

cc: Kathy Van Ness, Golden Door  
Maggie Soffel, County Planning and Development Services  
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Stephanie Saathoff, Clay Co.  
Denise Price, Clay Co.  
Christopher Garrett, Latham & Watkins  
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**X23-6**

The commenter expresses concern that the County did not adequately analyze the feasibility of mitigation measures in the Draft SEIR and suggests that any changes to mitigation measures after the close of the public review process may require recirculation. The commenter appears to confuse the GHG reduction measures included in the Draft CAP with CAP Mitigation Measures developed to reduce impacts from the GHG reduction measures. This topic is thoroughly addressed in Master Response 13. Additionally, each of the CAP's 30 GHG reduction measures are achievable, measurable, and enforceable. The Final CAP does not contain any new GHG reduction measures that have not been adequately evaluated in the Final EIR, nor have any of the Draft SEIR Mitigation Measures been changed since the close of public review. The Recirculation Findings which are provided as an attachment to the Planning Commission Hearing Report thoroughly describe the revisions which have been made to the Draft SEIR and substantiate the County's decision not to recirculate the SEIR.

**X23-7**

The comment provides closing remarks and requests that the comment letter be included in the administrative record. This comment letter is included with the Final SEIR and will be provided to decision makers for consideration prior to adoption of the project.