SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

MINUTE ORDER

DATE: 12/24/2018 TIME: 01:51:00 PM DEPT:

JUDICIAL OFFICER PRESIDING: Timothy Taylor
CLERK: Kelly Breckenridge
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2018-00013324-CU-TT-CTL** CASE INIT.DATE: 03/15/2018
CASE TITLE: **Golden Door Properties LLC vs County of San Diego [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

APPEARANCES

The Court, having taken the above-entitled matter under submission on 12/21/18 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Rulings on Petitions for Writs of Mandate (CEQA)

Sierra Club v. County of San Diego, Case No. 2012-101054

Sierra Club v. County of San Diego, Case No. 2018-14081

Golden Door Properties v. County of San Diego, Case No. 2018-13324

Argued and submitted: December 21, 2018, 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 National Forest Foundation v. SANDAG*, SDSC Case No. 2011-00101593; that case was the ultimately the subject of three appellate opinions: 180 Cal.Rptr.3d 548 (2014); 3 Cal.5th 497 (2017); and 17 Cal.App.5th 413 (2017).

The second was (and still is) *Sierra Club v. County of San Diego*, Case No. 2012-101054. 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); 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.

More than five and a half 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 agreed-upon 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 essentially 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 then-current iteration of the *Sierra Club* 2012 case and the *Golden Door* 2016 case challenged 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.

Following extensive briefing (ROA 169-190) and the publication of a tentative ruling (ROA 191), the court rendered its decision on April 28, 2017. ROA 193. A judgment on the second supplemental petition was thereafter entered. ROA 194. The County appealed (ROA 198-199). On September 28, 2018, the Fourth District Court of Appeal, Div. 1, handed down its learned decision in Consolidated Case Nos. D072406 and D072433, affirming this court in full (27 Cal. App.5th 892). Of this more below; the cases were set for a status conference on December 21, 2018 to spread the mandate of the Court of Appeal.

In early 2018, with the County's appeal pending, the County filed a sixth and seventh return on the supplemental writ. ROA 220, 221. The latter came as the result of the Board of Supervisors certifying the EIR for the 2018 CAP, and was the subject of objections by the Sierra Club. ROA 224. Sierra Club filed a new petition (Case No. 2018-14081) challenging the 2018 CAP. In addition, the Sierra Club filed its third supplemental petition for writ of mandate in the 2012 case. ROA 226, 231.

In a nutshell, the County contends that certification of the EIR for the 2018 CAP, and the related actions, comply with the requirements of the second paragraph of the supplemental writ in the 2012 case, and demonstrate compliance with CEQA as required by the third paragraph of the supplemental writ. The County wanted the court to discharge the supplemental writ and deny the new petition. The Sierra Club contends that the County's 2018 actions violate "CEQA as an informational document, as a substantive document of environmental protection, and as a document of public accountability."

Golden Door, which filed its own case challenging the 2018 CAP (No. 2018-13324), also sought leave to intervene in the 2012 case pursuant to Code of Civil Procedure section 387, subdivisions (a) (permissive intervention) or (b) (mandatory intervention). Following full briefing, the court granted the motion (ROA 276, 285), and the complaint in intervention was filed. ROA 277.

The County filed a motion to discharge the May 4, 2015 Supplemental Writ of Mandate. ROA 271-274. The Sierra Club and Golden Door filed separate opposition. ROA 282-284, 286. The court reviewed the papers, and on July 20, 2018, granted the County's motion in part and denied it in part in light of the then-pending appeal and Code of Civil Procedure section 916. ROA 297.

At the continued CMC, the court ordered the administrative record for the ongoing challenges to the 2018 CAP filed by August 3, 2018, and set a merits hearing for November 30, 2018. ROA 25. Golden Door lodged the proposed administrative record on August 3, 2018. ROA 48. The County challenged the adequacy of the proposed record and sought a substantial delay in the merits hearing (in a motion misleadingly phrased as one merely seeking "clarification"). ROA 50-54. The County contended the proposed record does not "comply with Rule of Court 3.2205 or Public Resources Code § 21167.6." Golden Door filed opposition. ROA 59-63. The County filed reply. ROA 64-66. The court reviewed the papers, published a tentative ruling (ROA 67), and on August 31, 2018, made its ruling. ROA 75. The merits hearing was continued to December 21, 2018 at the County's insistence and over petitioners' objections. ROA 69. Golden Door lodged an electronic copy of the administrative record on a 500 GB portable drive on September 7, 2018. ROA 51. Golden Door also lodged an electronic copy of the administrative record on a flash drive on October 17, 2018. ROA 49. The administrative record is

approximately 70,000 pages.

Petitioners sought a stay or preliminary injunction whereby the County will be precluded, during the pendency of these proceedings, from utilizing Mitigation Measure M-GHG-1 in connection with any pending project approvals requiring a General Plan amendment. ROA 84-91. Golden Door's motion submits the M-GHG-1's utilization violates the General Plan's requirements to reduce GHG emissions within the County and violates CEQA because M-GHG-1 would allow in-process and future General Plan amendment projects to increase GHG emissions within the County, in exchange for the purchase of carbon offset credits applicable to another location in California, the United States, or the world, without considering the requirements of the General Plan, even as amended, or undertaking the appropriate analysis to understand the effect of this program. Sierra Club filed its own, similar motion, also requesting that the County's 2018 Threshold of Significance be stayed or enjoined. ROA 303-304.

On September 14, 2018, the court granted a limited version of the stay/preliminary injunction. ROA 107. A little more than a week later, petitioners appeared *ex parte* asking the court to set an OSC re contempt against the County for its actions in the wake of the September 14 order. ROA 112-115. The court declined to do so, finding that a contempt hearing would delay resolution of the merits of the petitions,* and that the allegedly contemptuous behavior had not even occurred yet. ROA 120. The following day, the County Board of Supervisors voted 4-0 to approve the project (a decision which petitioners claim was premised on a violation of the September 14, 2018 stay/injunction).

Several other cases have since been filed challenging individual development approvals. The parties have disputed whether these cases are "related" to the current cases. See ROA 73. So far as this court is aware, no party has teed these disputes up for resolution (for example, by making a motion to transfer or a motion to consolidate)

Petitioners filed their merits briefing on October 19, 2018. ROA 44, 53. The County filed its answering briefing on December 7, 2018. ROA 81. Petitioners jointly replied on December 14, 2018. ROA 84. The court reviewed the briefing and the certified administrative record. The court published a detailed tentative ruling on December 20 in which it thanked the parties for their thorough and comprehensive presentations.

The answering brief "incorporates by reference" substantial material from the County's answers to the petitions for writ of mandate (ROA 81, opposition brief, p. 7:24-26), evidently in an attempt to evade the agreed-upon and court-ordered page limitations (ROA 47). Petitioners point this out but do not request that the court strike or disregard the unauthorized extra pages (ROA 84, reply brief, p. 8:25-27). The court considered the unauthorized extra pages.

Petitioners both contend the 2018 CAP is inconsistent with the County's General Plan. ROA 44, Sierra Club's opening brief at p. 21*ff*; ROA 53, Golden Door's opening brief at pp. 8-10. And both petitioners contend, with somewhat different analysis, that the County violated CEQA by allowing out of county GHGs offsets without legally sufficient analysis. ROA 44, Sierra Club's opening brief at pp. 8-20; ROA 53, Golden Door's opening brief at pp. 10-18.

In view of the importance of the issues presented, the court set aside the entire afternoon calendar on December 21 for this matter. The parties presented lengthy and thoughtful argument. PowerPoint or similar presentations were encouraged by the court and were used at the oral argument by both sides; paper copies of these outlines were appended to the minutes of the court. The case was then submitted for decision.

2. Applicable Standards.

A. "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 (*Yokely*), italics added. 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, italics added. 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.

The doctrine of "law of the case" deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case. *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491. "Generally, the doctrine of law of the case does not extend to points of law which might have been but were not presented and determined in the prior appeal. [Citation.] As an exception to the general rule, the doctrine is . . . held applicable to questions not expressly decided but implicitly decided because they were essential to the decision on the prior appeal." *Estate of Horman* (1971) 5 Cal.3d 62, 73.

B. The Court's Role in CEQA Cases.

In *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 486 (*Mira Mar Mobile Community*), the court explained that "[i]n a mandate proceeding to review an agency's decision for compliance with CEQA, [courts] review the administrative record *de novo* [citation], focusing on the adequacy and completeness of the EIR and whether it reflects a good faith effort at full disclosure. [Citation.] [The court's] role is to determine whether the challenged EIR is sufficient as an information document, not whether its ultimate conclusions are correct. [Citation.]" An EIR is presumed adequate. Pub. Resources Code § 21167.3(a).

Courts review an agency's action under CEQA for a prejudicial abuse of discretion. Pub. Res. Code § 21168.5. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." *Id.;* see *Mira Mar Mobile Community*, *supra*, 119 Cal.App.4th at 486; *County of San Diego v. Grossmont-Cuyamaca Community College Dist*. (*Grossmont*) (2006) 141 Cal.App.4th 86, 96 (same).

In defining the term "substantial evidence," the CEQA Guidelines state: " 'Substantial evidence' ... means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made ... is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion[,] narrative [or] evidence which is clearly erroneous or inaccurate ... does not constitute substantial evidence." CEQA Guidelines, § 15384(a). "In applying the substantial evidence standard, [courts] resolve all reasonable doubts in favor of the administrative finding and decision. [Citation.]" *Mira Mar Mobile Community*, *supra*, 119 Cal.App.4th at 486; *Grossmont, supra*, 141 Cal.App.4th at 96.

Although the lead agency's factual determinations are subject to the foregoing deferential rules of review, questions of interpretation or application of the requirements of CEQA are matters of law. While

judges may not substitute their judgment for that of the decision makers, they must ensure strict compliance with the procedures and mandates of the statute. *Grossmont, supra*, 141 Cal.App.4th at 96.

C. The Three Steps of CEQA.

CEQA establishes "a three-tiered process to ensure that public agencies inform their decisions with environmental considerations." *Banker's Hill, et al v. City of San Diego* (2006) 139 Cal.App.4th 249, 257 (*Banker's Hill*); *see also* CEQA Guidelines, § 15002(k) (describing three-step process).

First Step in the CEQA Process.

The first step "is jurisdictional, requiring that an agency conduct a preliminary review in order to determine whether CEQA applies to a proposed activity." *Banker's Hill, supra,* 139 Cal.App.4th at 257; *see also* CEQA Guidelines, § 15060. The Guidelines give the agency 30 days to conduct this preliminary review. CEQA Guidelines, § 15060. The agency must first determine if the activity in question amounts to a "project." *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380. "A CEQA ...project falls into one of three categories of activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (§ 21065.)" *Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 907.

As part of the preliminary review, the public agency must also determine the application of any statutory exemptions or categorical exemptions that would exempt the proposed project from further review under CEQA. *See* CEQA Guidelines, § 15282 (listing statutory exemptions); CEQA Guidelines, §§ 15300–15333 (listing 33 classes of categorical exemptions). The categorical exemptions are contained in the CEQA Guidelines and are formulated by the Secretary under authority conferred by CEQA section 21084(a). If, as a result of preliminary review, "the agency finds the project is exempt from CEQA under any of the stated exemptions, no further environmental review is necessary. The agency may prepare and file a notice of exemption, citing the relevant section of the Guidelines and including a brief 'statement of reasons to support the finding.'" *Banker's Hill*, *supra*, 139 Cal.App.4th at 258, citing CEQA Guidelines, §§ 15061(d), 15062(a)(3).

Second Step in the CEQA Process.

If the project does not fall within an exemption, the agency proceeds to the second step of the process and conducts an initial study to determine if the project *may* have a significant effect on the environment. CEQA Guidelines, § 15063. If, based on the initial study, the public agency determines that "there is substantial evidence, in light of the whole record ... that the project may have a significant effect on the environment, an environmental impact report [(EIR)] shall be prepared." Pub. Resources Code § 21080(d). On the other hand, if the initial study demonstrates that the project "would not have a significant effect on the environment," either because "[t]here is no substantial evidence, in light of whole record" to that effect or the revisions to the project would avoid such an effect, the agency makes a "negative declaration," briefly describing the basis for its conclusion. Pub. Resources Code§ 21080(c)(1); *see* CEQA Guidelines, § 15063(b)(2); *Banker's Hill*, *supra*, 139 Cal.App.4th at 259.

The Guidelines and case law further define the standard that an agency uses to determine whether to issue a negative declaration. "[I]f a lead agency is presented with a *fair argument* that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect." CEQA Guidelines, § 15064(f)(1), italics added. This formulation of the standard for determining whether

to issue a negative declaration is often referred to as the "fair argument" standard. *See Laurel Heights Improvement Assn. v. Regents of University of California,* (1993) 6 Cal.4th 1112, 1134-1135. Under the fair argument standard, a project "may" have a significant effect whenever there is a "reasonable possibility" that a significant effect will occur. *No Oil v. City of Los Angeles* (1974) 13 Cal.3d 68, 83-84. Substantial evidence, for purposes of the fair argument standard, includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." § 21080(e)(1). Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts unrelated to physical impacts on the environment. Pub. Resources Code § 21080(e)(2).

If the initial study reveals no substantial evidence that the project may have a significant environmental effect, the agency may adopt a negative declaration. Pub. Resources Code § 21080(c)(2); CEQA Guidelines, § 15070(b); *Grand Terrace for Responsible and Open Government v. City of Grant Terrace* (2008) 160 Cal.App.4th 1323, 1331 (*Grand Terrace*); *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175 (holding common sense is part of the substantial evidence analysis). "Alternatively, if there is no substantial evidence of any net significant environmental effect in light of revisions in the project that would mitigate any potentially significant effects, the agency may adopt [an MND]. [Citation.] [An MND] is one in which '(1) the proposed conditions "avoid the effects or mitigate the effects to a point where *clearly* no significant effect on the environment would occur, *and* (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (§ 21064.5 . . . .)' [Citations.]" *Grand Terrace, supra,* at 1331-1332. The MND allows the project to go forward subject to the mitigating measures. Pub. Resources Code §§ 21064.5, 21080(c); *see Grand Terrace*, *supra,* 160 Cal.App.4th at 1331.

Third Step in the CEQA Process.

If no negative declaration is issued (or if, as here, it was held to be unlawful), the preparation of an EIR is the third and final step in the CEQA process. *Banker's Hill, supra*, 139 Cal.App.4th at 259; Guidelines, §§ 15063(b)(1), 15080; CEQA, §§ 21100, 21151.

D. <u>The Environmental Impact Report</u>.

Central to CEQA is the EIR, which has as its purpose informing the public and government officials of the environmental consequences of decisions before they are made. [Citation.] "An EIR must be prepared on any 'project' a local agency intends to approve or carry out which 'may have a significant effect on the environment.' Pub. Res. Code §§ 21100, 21151; Guidelines, § 15002(f)(1). The term 'project' is broadly defined and includes any activities which have a potential for resulting in a physical change in the environment, directly or ultimately. Pub Res. Code § 21065; Guidelines, §§ 15002(d), 15378(a); [Citation].) The definition encompasses a wide spectrum, ranging from the adoption of a general plan, which is by its nature tentative and subject to change, to activities with a more immediate impact, such as the issuance of a conditional use permit for a site-specific development proposal." *CREED v. City of San Diego* (2005) 134 Cal.App.4th 598, 604 (*CREED*).

"To accommodate this diversity, the Guidelines describe several types of EIR's, which may be tailored to different situations. The most common is the project EIR, which examines the environmental impacts of a specific development project. (Guidelines, § 15161.) A quite different type is the program EIR, which 'may be prepared on a series of actions that can be characterized as one large project and are related either: (1) Geographically, (2) As logical parts in the chain of contemplated actions, (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or (4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways.'" CEQA Guidelines, § 15168(a); *CREED, supra*, 134 Cal.App.4th at 605. As the court held in *CREED*, a program EIR may serve as the EIR for a subsequently proposed project only to the extent it

contemplates and adequately analyzes the potential environmental impacts of the project. *CREED, supra,* 134 Cal.App.4th at 615. The EIR at issue in this case is of the latter variety, a program EIR.

E. Standards of Review.

Under CEQA, an EIR is presumed adequate (Pub. Resources Code, § 21167.3), and the plaintiff in a CEQA action has the burden of proving otherwise. *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 275, internal quotation marks omitted, quoting *Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 836. Courts review an agency's determinations and decisions for abuse of discretion. An agency abuses its discretion when it fails to proceed in a manner required by law or there is not substantial evidence to support its determination or decision. Pub. Resources Code §§ 21168, 21168.5; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-427 (2007) (*Vineyard*). "Judicial review of these two types of error differs significantly: While [courts] determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' [citation], [courts] accord greater deference to the agency's substantive factual conclusions." *Vineyard*, *supra*, 40 Cal.4th at 435.

Consequently, in reviewing an EIR for CEQA compliance, courts adjust "scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." *Vineyard*, *supra*, 40 Cal.4th at 435. For example, where a petitioner claims an agency failed to include required information in its environmental analysis, the court's task is to determine whether the agency failed to proceed in the manner prescribed by CEQA. Conversely, where a petitioner challenges an agency's conclusion that a project's adverse environmental effects are adequately mitigated, courts review the agency's conclusion for substantial evidence. *Vineyard*, *supra*, 40 Cal.4th at 435.

Here, the parties dispute even the proper analytical framework guiding this court's review of the SEIR. The County claims all of petitioners' claims are subject to deferential "abuse of discretion" review. ROA 81, page 11. Petitioners note that the County "conflates three separate standards of review that are applicable in this case," and go on to discuss all three. ROA 84, page 11. The court concludes that petitioners' formulation is the correct one, and in resolving this matter, has attempted to utilize the scrutiny appropriate to several questions presented. So, with respect to general plan consistency, the court has required petitioners "to show why, based on all of the evidence in the record, the determination was unreasonable." *San Diego Citizenry Group v. County of San Diego*, 219 Cal. App. 4th 1, 26 (2013). With regard to analysis of the SEIR, the court has adjusted its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. *Vineyard*, *supra*, 40 Cal.4th at 435.

F. Further Requirements of CEQA.

In addition to the foregoing public process/decision maker information steps, the Legislature in enacting CEQA also intended to "provide certain substantive measures for protection of the environment. [Citations.] In particular, one court noted [Public Resources Code] section 21002 requires public agencies 'to deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen such effects.' [Citation.]" *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602, and *Laurel Heights Improvement Assn. v. Regents of University of Californi*a (1993) 6 Cal.4th 1112, 1123. The Legislature declared its intention in enacting CEQA "that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties. [Citations.] CEQA is to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " *Mountain Lion Foundation v. Fish & Game Com*. (1997) 16 Cal.4th 105, 112.

G. Exhaustion.

The exhaustion of administrative remedies is a jurisdictional prerequisite to seeking judicial relief.

(*Abelleira v. Dist. of Ct. of Appeal* (1941) 17 Cal.2d 280, 292.) The failure to exhaust is a jurisdictional defect. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197.) It is based upon the notion that a public agency must be given an opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review. (*Id.* at p. 1198.) Even claims of constitutional infirmities (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 276) and challenges to the validity of any governing regulation (*Woods v. Super. Ct.* (1981) 28 Cal.3d 668, 680) must be presented in the first instance to the administrative agency. This requirement permits the agency to apply its expertise, resolve factual issues, apply statutorily delegated remedies, and mitigate damages. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 86.) Petitioner has the burden to prove that an issue was exhausted and timely and properly raised in the administrative process. *CREED v. City of San Diego* (2011) 196 Cal.App.4th 515, 527. Proper exhaustion of administrative remedies is a jurisdictional prerequisite to maintain a CEQA challenge. *CREED, supra,* 196 Cal. App.4th at 527. Under the *CREED* case, a generalized, vague reference to environmental concerns will not preserve a challenge against a failure to exhaust claim. *Id*. at 527.

3. Requests for Judicial Notice.

The Sierra Club seeks (ROA 45-46) judicial notice of five items not included in the administrative record: (1) regulations issued by the California Air Resources Board (CARB) to regulate "Cap-and-Trade" (Exhibit 1); (2) a declaration filed on August 22, 2018 (ROA 89) in Case No. 2018-37-13324 (Exhibit 2); and (3) portions of draft EIRs on projects that have not been approved by the County Board of Supervisors (Exhibits 3-5). In response, the County filed evidentiary objections (ROA 79) to Exhibits 2-5 in the Sierra Club's request for judicial notice.

The County seeks (ROA 82) seeks judicial notice of six items not included in the administrative record: (1) regulations issued by CARB in 2012 to regulate "Cap-and-Trade" (Exhibit 1): (2) a 2015 San Diego Superior Court ruling in Case No. 2015-07420 (Exhibit 2); (3) County Code of Administrative Ordinance section 375.19 (Exhibit 3); (4) Board Policy I-63; and (5) the County's answers to Sierra Club's and Golden Door's writ of mandate petitions (Exhibits 5-6). In response, the Sierra Club and Golden Door filed evidentiary objections (ROA 85) to Exhibits 2, 5, and 6 in the County's request for judicial notice.

Courts of appeal review a trial court's ruling on 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.]"

Turning to the other materials: the administrative record may only be augmented where the proponent makes the showing under Code of Civil Procedure section 1094.5(e): (1) that the proposed evidence could not have been produced at the administrative hearing through the exercise of reasonable diligence; or (2) that the proposed evidence was improperly excluded at the administrative hearing. Situations in which such "extra-record" evidence should be admitted by a court are relatively rare. *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 578; *City of Fairfield v. Superior*

Court (1976) 14 Cal.3d 768, 776; *Toyota of Visalia v. New Motor Vehicle Bd*. (1987) 188 Cal.App.3d 872, 881. Determination of the question of whether one of the exceptions (to the general rule of non-admissibility) applies is within the discretion of the trial court, and "will not be disturbed unless it is manifestly abused." *Pomona Valley Med. Ctr. v. Superior Court* (1997) 55 Cal.App.4th 93, 102. Generally speaking, the rule in CEQA cases is: "take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364. Said another way: "If it is not in the administrative record, it does not exist." *See Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 863; Code of Civil Procedure § 1094.5; *Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at 565.
Although the *existence* of a document may be judicially noticeable, the truth of statements contained in the document and its *proper interpretation are not subject to judicial notice* if those matters are reasonably disputable.' " *Unruh-Hazton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364-365; accord, *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 ("When judicial notice is taken of a document . . . the truthfulness and proper interpretation of the document are disputable").

Trial court rulings are not binding precedent. *E.g*., *Schachter v. Citigroup,* Inc. (2005) 126 Cal.App.4th 726, 738. Rulings in other cases are irrelevant absent some additional showing like the elements of claim or issue preclusion. *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 448.

Judicial notice is granted as to the Sierra Club's Exhibit 1 and the County's Exhibits 1, 3, and 4. No objection was received to these Exhibits. Judicial notice is denied as to the Sierra Club's Exhibits 2-5; the County's evidentiary objections are sustained to Exhibits 2-5. The Sierra Club's Exhibits 2-5 are extra record evidence. Judicial notice is denied as to the County's Exhibit 2; the evidentiary objections are sustained to Exhibit 2. Exhibit 2 is irrelevant. It pertains to a solar project and a case that underwent judicial review in 2015, before the County's approval of the 2018 CAP. Judicial notice is granted as to the County's Exhibits 5-6 subject to the limitations on the doctrine stated above; the evidentiary objections to Exhibits 5-6 are overruled. In other words, the court takes judicial notice of the fact that the answers were filed, but does not accept the truth of any of the contentions expressed therein.

Needless to say, the court takes judicial notice of its own previous decisions and those of the Court of Appeal in *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152 (*Sierra Club*), and *Golden Door v. County of San Diego* (2018) 27 Cal.App.5th 892 (*Golden Door*).

4. Discussion and Rulings.

The petitions are granted, and the County is ordered to set aside its February 14, 2018 approval of the 2018 CAP and the Supplemental EIR (SEIR) on which the 2018 CAP is based.

A. The County Persists in Failing to Carry Out its Legal Obligations With Regard to Greenhouse Gas Reduction.
The court knows full well that, when it decides to do so, the County knows how to prepare a lawful and valid EIR. *See San Diego Citizenry Group v. County of San Diego*, *supra*, 219 Cal.App.4th 1 (boutique winery case; this court's judgment finding the County's EIR valid affirmed on appeal); *see also Backcountry Against Dumps v. County of San Diego* (2015) 2015 WL 5451508 (wind turbine case; this court's judgment finding the County's EIR valid affirmed on appeal). In finding that the County did not do so when it approved the 2018 CAP, the court does not write on a clean slate. The County's efforts to comply with the statewide GHG/global warming requirements summarized in part IIA of the Court of

Appeal's September 28, 2018 opinion in Consolidated Case Nos. D072406 and D072433 have given rise to several decisions by the court, and two by the Court of Appeal. Virtually every decision has found the County's efforts wanting; this is particularly true in connection with the County's penchant for proceeding in the absence of substantial evidence and without adequate analysis. Although it does some things well, the 2018 SEIR fails as an informational document and as a document of public accountability in material ways, and the court finds the County has once again failed to proceed according to CEQA.

In *Sierra Club*, the Court of Appeal affirmed this court and held the 2012 CAP failed to comply with the County's general plan update mitigation measure CC-1.2 requiring detailed GHG emissions reduction targets; that the County's adoption of the 2012 CAP was a separate project requiring a separate determination of environmental impact; and that the CAP required a supplemental EIR. 231 Cal.App.4th 1152, 1167-69, 1174-76 (2014). The Court noted the County had failed to consider the use of the CAP and the Thresholds "as a plan-level program," *Ibid*. at 1172, that the Sierra Club had proposed "feasible mitigation measures, that the County "rejected these mitigation measures without substantial evidence for doing so," and that the CAP did "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." *Ibid*. at 1176.

More recently, in *Golden Door*, the Court of Appeal affirmed this court and held the 2016 Guidance Document violated CEQA and that the threshold of significance was not supported by substantial evidence. 27 Cal.App.5th 892, 894-95; 238 Cal.Rptr.3d 559, 561-562 (2018). Justice Huffman, who notably concurred only in the result of Justice Nares' opinion in *Sierra Club*, held that the County had failed "to address adequately the core concern raised by plaintiffs in the court below, which is reliance on statewide data without evidence supporting its relationship to countywide reductions," and that this "fails to meet the substantial evidence standard." 27 Cal.App.5th at 904; 238 Cal.Rptr.3d at 569.

B. <u>Petitioners Complied with the Exhaustion Requirements</u>.

In its opposition brief, the County contends that petitioners failed to exhaust the administrative exhaustion requirements for several claims. ROA 81, opposition brief, p. 12:19-28. The County fails to set forth any law, facts, or analysis in support of its failure to exhaust contentions, other than referencing the County's answers to the Sierra Club's and Golden Door's writ of mandate petitions. In this context, "exhaustion" requires that prior to the close of the public hearing, some member of the public "fairly apprised" the County of the issue. *See* Pub. Resources Code § 21177(a); *see also Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1052. Here, public testimony did not close until about mid-day February 14, 2018. *See* AR 79:28681.

The issue of whether in-process GPAs would affect meeting 2020 GHG reduction targets (ROA 81, opposition brief, p. 15:2-6) was exhausted. *See*, e.g., AR 22:18416, AR 22:28418, and AR 22:18422 (lack of vehicle miles travelled (VMT) analysis creates uncertainty regarding emissions targets), AR 22:18424 (the County may lack ability to meet SB 375 goals), AR 22:18429 (the County must demonstrate it will comply with reductions previously agreed to in the 2011 GPU), AR 22:18433 (the County not on track to meet emissions targets), AR 22:18449 ("no open lands should be annexed or rezoned for greater development until there is an adequate CAP that actually achieves the 2020 emission reduction goals the County agreed to in its 2011 General Plan update"), AR 22:18628 (must better evaluate amendments to meet goals).

The issue of inconsistent geographic areas for analysis (ROA 81, opposition brief, p. 23:27-28) was exhausted. *See*, *e.g.*, AR 16-15349 ("concerned about the CAP's mitigation measure for cumulative GHG impacts caused by General Plan Amendment projects"); AR 22:18424, AR 22: 19604-05; AR 38:24174.

The issue of M-GHG-1 as a separate CEQA project (ROA 81, opposition brief, p. 26:11-14) was exhausted. *See*, *e.g.*, AR 22:19592-93. The case relied upon by the County, *CREED v. City of San*

Diego (2011) 196 Cal.App.4th 515, 527-28, is inapposite. The issues presented by petitioners and other interested persons to the County were not "general, unelaborated objections." The issues raised by petitioners and other interested persons were fairly presented to the County in comment letters with clearly organized headings.

Therefore, the County's exhaustion contentions fail. It is noteworthy that the December 21 argument consumed several hours, yet exhaustion was not raised.

C. The 2018 CAP is Inconsistent with the County's General Plan.

The California Planning and Zoning Law, commencing with Gov. Code section 65000, requires that cities and counties have a General Plan (Gov. Code § 65300), consisting of specified required elements (Gov. Code § 65302), which is intended to be "a constitution for all future developments." *See Concerned Citizens of Calaveras County v. Calaveras Board of Supervisors* (1985) 166 Cal.App.3d 90, 94, 97. The Planning and Zoning Law provides that any land use approval to be consistent with the General Plan. *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570-71. A project fails for general plan inconsistency if it conflicts with a general plan policy that is fundamental, mandatory and clear. *Spring Valley Lake Assn. v. City of Victorville,* 248 Cal. App. 4th 91, 100 (2016).

Here, the County incorporated a fundamental, mandatory and clear policy into both the 2011 and the 2018 iterations of the General Plan: that GHG emission reductions be local. In 2011, the County explicitly used the words "**local** GHG emissions." in COS-20. See AR25:21559; see also AR 33843 (Excerpts tab 34 at 5-38). This did not change in the 2018 amendment. The County's 2018 reiteration stated, again in COS-20, that the CAP should achieve GHG emissions from the "unincorporated County" and from "County operations." *See* AR 16:13165 (italics added; strikeouts and additions omitted):

"GPU Goal COS 20 (Governance and Administration)

Reduction of *community-wide (i.e., unincorporated County) and County operations greenhouse gas emissions* contributing to climate change that meet or exceed requirements of the Global Warming Solutions Act of 2006, as amended by Senate Bill 32 (as amended, Pavley. Global Warming Solutions Act of 2006: emissions limit.)

GPU Policy COS 20.1 (Climate Action Plan)

Prepare, maintain, and implement a Climate Action Plan for the *reduction of community-wide (i.e., unincorporated County) and County operations greenhouse gas emissions* consistent with the California Environmental Quality Act (CEQA) Guidelines Section 15183.5."

Thus, the County's General Plan has consistently, for 7 years, stated that it required in-County GHG reductions. However, M-GHG-1, which is expressly incorporated into the 2018 CAP (*see e.g.*, AR 1340:58761 that states the 2018 CAP expressly incorporates M-GHG-1) allows essentially unlimited increases in GHG within the County. In this respect, applicants proposing projects in the County can meet their GHG mitigation requirements by purchasing offsets from anywhere in the world, in the discretion of the Director of a County department.

See AR 38:22771, AR 38-23054 ("The County will consider to the satisfaction of the Director of Planning & Development Services (PDS) the following geographic priorities for GHG reduction features and GHG reduction projects and programs: 1) project design features onsite reduction measures; 2) off-site within the unincorporated areas of the County of San Diego; 3) off-site within the County of San Diego; 4 off-site within the State of California; 5) off-site within the United States; and 6) off-site internationally".)

The fact that a single Supervisor opined rather ambiguously at a single hearing that COS-20 was not intended to restrict GHG reductions to local operations or actions does not change the court's view. If this had been the intention of all the Supervisors, it would have been a simple matter to include a sentence in COS-20 making this crystal clear.

In essence, the County would freely allow the use of offsets purchased anywhere on the planet, with no limit on geographic scope or duration (and no temporal or cumulative limit), in order for project applicants within the County to meet their GHG mitigation requirements. All that is required is the "satisfaction" of the Planning Director. No standards or criteria are stated for achieving the "satisfaction"

of the Planning Director. As such, the County violated its General Plan and the Planning and Zoning Law by allowing the free use of out-of-county GHG offsets for projects within the County. This standard-free granting of unfettered discretion to an unelected official is antithetical to the public participation foundation of CEQA – particularly when it concerns the signal environmental issue of our times.

To the extent the County contends that M-GHG-1's "geographic priorities for GHG reduction features" requires offsets to result in GHG reductions within the County, this requirement is illusory. The County even conceded this point in the SEIR, explaining that only one project (a reforestation project) within the County is included on the approved registries for offset projects, but offsets from this project are not available. AR 38:23111. The court has no trouble concluding that future project applicants are unlikely to regard the "geographic priorities" as binding on them in any sense. Certainly the County was unable to articulate, during the December 21 hearing, anything binding or enforceable about the "geographic priorities," other than the order of their listing.

The County committed in 2011 and again in 2018 to achieving GHG reductions within the County. The Administrative Record does not support a major deviation from that commitment, particularly when essentially all seven of the intervening years have been marked by the litigation summarized above. The 2018 CAP appears to the court to be an attempt to address GHG reduction with a window-dressing pronouncement of policy suggesting aggressive action, but the devil is in the details. And here, the details allow the bold policy pronouncement to be emasculated by the unfettered access to out of region credit purchases. The people of the County have a right to expect more from their elected officials, and the Planning and Zoning Law, the General Plan, and CEQA all require that they provide more.

D. <u>The County Violated CEQA by Allowing the Purchase of Out-of-County GHG Offsets Without Legally Sufficient Analysis</u>.

Initially, the County fails to show in the Administrative Record that out-of-county offsets will be enforceable, verifiable, and of sufficient duration. The County contends that the SEIR's references to a requirement that carbon credits be purchased from "CARB-approved registries" (*see, e.g.*, AR 16:13892; 16 AR: 15418) suggests that the M-GHG-1 program has CARB approval. However, the M-GHG-1 program is not remotely similar to the CARB program. Under California's Cap-and-Trade program, a registry offset credit must "[r]epresent a GHG emission reduction ... that is real, additional, quantifiable, permanent, verifiable, and enforceable." 17 CCR § 95970. The Cap-and-Trade program has strict monitoring, reporting, and record retention requirements for offset projects. 17 CCR § 95976. The offsets are generally limited to the geographic boundaries of the United States and United States territories. 17 CCR § 95972(c). Offset credits can only be used to meet up to 8% of participants' annual compliance obligations. 17 CCR § 95854. By contrast, the County's proposed program has no limitation on a participant's annual compliance obligations. Also, it does not set time limits on the offsets it authorizes, nor does it limit the geographic scope. Further, the offsets require the "satisfaction" of the Planning Director, but no standards are provided for obtaining this "satisfaction." The County fails to show that out-of-county offsets will be enforceable, verifiable, and of sufficient duration. The County also failed to adequately analyze the infeasibility of requiring offset credits to be limited to within the County, or at least to the Southern California region.

Second, the SEIR failed to adequately analyze the impact of the 2018 CAP on the Regional Transportation Plan/Sustainable Communities Strategy (RTP/SCS) prepared by SANDAG to carry out the mandate of SB 375 that transportation planning and funding should be used to reduce GHG emissions, in part by changing land use patterns to require less driving. *Cleveland National Forest Foundation v. SANDAG* (2017) 3 Cal.5th 497, 506.

CEQA Guidelines, section 15125(d) requires that an "EIR shall discuss any inconsistencies between the proposed project and applicable . . . regional plans. Such regional plans include, but are not limited to . . . regional transportation plans." In this matter, the SEIR does not directly address such inconsistencies with SANDAG's plan. The SEIR replied to comments "express[ing] concern that the proposed GHG

reduction measures within the CAP would not meet the VMT [vehicle miles traveled, i.e., driving] reduction targets established" in the SANDAG RTP/SCS (AR 16:13853) by asserting "it is the responsibility of SANDAG to ensure that the region is demonstrating consistency with SB 375." AR 16:13854. Nonetheless, stating SANDAG's responsibilities under SB 375 does not satisfy the County's duty under CEQA Guidelines section 15125(d), which requires an EIR to examine and discuss any inconsistencies between the 2018 CAP and the SANDAG plan.

Also, the SEIR states the County provided accurate land use planning data to SANDAG for use in preparing the regional plan. AR 16:13854. Nevertheless, while that land use information was accurate at the time it was provided, and while the 2018 CAP itself does not change any land use, the SEIR admits the GHG emissions data used in the 2018 CAP are different from the data the County provided to SANDAG. AR 16:13855. In this respect, the SEIR indicates the 2018 CAP's inventory includes emissions from General Plan Amendments (GPAs) approved after the County provided its land use information to SANDAG, data whose impact on the SANDAG plan has not been evaluated by the County. *Ibid*. However, there is no discussion in the SEIR of the impact that the GHG emissions from the GPAs approved after the County submitted its data to SANDAG, or from reasonably foreseeable future GPAs, may have on the regional plan's VMT or GHG reduction goals. As such, the County's approach does not properly address VMT impacts. In essence, the County failed to adequately analyze the VMT impacts and resulting implications for the San Diego's area SB 375 Planning and Goals.

Third, the SEIR failed to adequate analyze M-GHG-1 impacts. The M-GHG-1 allows applicants to meet their GHG mitigation requirements by purchasing offsets from anywhere in the world. AR 38:22771, AR 38-23054. The M-GHG-1 allows practically unlimited increases in GHG emissions within the County, subject only to the discretion of a single Director. *Ibid*. However, the SEIR failed to adequately analyze M-GHG-1 impacts. It failed to analyze the potential VMT impacts from the known and/or in process GPAs that would necessarily rely on it. And by failing to include information about the potential VMT impacts of known and/or in progress GPAs, the County deprived the public of adequate information regarding, among other things, SANDAG's ability to meet State mandated VMT reduction requirements (SB 375).

Fourth, the SEIR failed to analyze cumulative GHG impacts. In this respect, the County failed to define a geographic scope for analyzing cumulative GHGs, as required by CEQA Guidelines, section 15130(b), which requires agencies to define a consistent geographic scope for their cumulative impacts analyses. Instead, the County used a geographic scope that was inconsistent and alternated between a "Countywide" geographic scope of cumulative GHGs and a "global" geographic scope. *See, e.g*., AR 38-22749 ("cumulative impact analysis . . . was identified as the entire unincorporated County"]; *see also*, *e.g*., AR 38: 22769 ("global climate change is inherently a cumulative issue").) This inconsistency violates CEQA Guidelines section 15130(b).

Fifth, the County improperly delegated and deferred feasibility findings. M-GHG-1 delegates to the Planning Director deferred findings of feasibility for mitigation measures for in-process and future GPAs. *See* AR 38-23054-55. In particular, it delegates to the Planning Directory the determination of "geographic priorities" for the offset program and when an applicant may be exempted from obtaining "local" offsets due to "financial feasibility." *Ibid*. It also delegates to the Planning Director the determination of when non-standard offsets may be used, *i.e*., whether a registry is sufficiently "reputable" to substitute for the expressly defined offset registries. *Ibid*. Additionally, there is no requirement that any offset contract be made directly enforceable by the County of San Diego. Moreover, the language of M-GHG-1 indicates such feasibility determinations would occur after project approval and outside of public review and hearing. *Ibid*.

Essentially, M-GHG-1, a deferred mitigation measure, violates CEQA. It lacks adequate performance standards. It relies on standardless delegation to County staff. *See, e.g*., *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94 (list of potential methods of mitigation for later selection without "specific and mandatory performance standards" is improper deferral]; *see*

also, e.g., *California Clean Energy Commission v. City of San Jose* (2013) 220 Cal.App.4th 1325, 1340 ("delegation to a nonelected nondecisionmaking body, the planning commission," improper under CEQA.) As such, the County improperly delegated and deferred feasibility findings under M-GHG-1.

Sixth, the SEIR failed to address impacts to energy and environmental justice. It failed to analyze potential energy impacts that may result from GPAs and strategies to reduce energy impacts on such project sites. Also, it is undisputed that the County failed to evaluate the reasonably foreseeable impacts on energy usage in allowing increased VMTs in exchange for GHG reduction through offsets. Moreover, the SEIR made no attempt to disclose the increased health damage that could occur to the more vulnerable County residents (children, the ill, and disadvantaged communities), from the project "increasing nonattainment criteria pollutants" (AR 16: 13401), or from not requiring GHG offsets to be obtained in-County. *See* CEQA Guidelines, § 15126.2 (EIR shall identify and analyze all foreseeable significant harm of the project.

Seventh, the SEIR failed to evaluate smart growth mitigation or alternatives for GPAs. "The EIR is the heart of CEQA, and the mitigation and alternatives discussion forms the core of the EIR." *In re Bay-Delta etc*. (2008) 43 Cal.4th 1143, 1162. Case law emphasizes the importance of analyzing a "smart growth" mitigation measure or alternative. *Cleveland National Forest Foundation v. SANDAG* (2017) 3 Cal.5th 497, 506 ("The reductions mandated by Senate Bill 375 may be achieved through a variety of means, including 'smart growth' planning ...."); *Cleveland National Forest Foundation v. SANDAG* (2017) 17 Cal.App.5th 413, 433-34 (error to fail to address smart growth in mitigation and alternatives).

In essence, the petitioners asked for an alternative land use plan to reduce VMT. None of the alternatives in the SEIR addressed VMT or transportation-related emissions. Instead, the SEIR alternative analysis looked at waste and renewable energy. *See*, *e.g*., AR 38:22392-95. Without an alternative aimed at reducing land-use-derived VMT, the analysis in the SEIR lacked "those alternatives necessary to permit a reasoned choice." CEQA Guidelines, § 15126.6(f)

Eighth, the County failed to adequately respond to comments, thereby violating CEQA. "Comments are an integral part of the EIR and should be relied upon by the decisionmakers." *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 735. Responses to comments must be in good faith and rely on factual information; "'[c]onclusory statements unsupported by factual information"' do not satisfy CEQA. *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 475.

For example, Sempra commented that only 13% of CAP GHG reductions would come from a transportation sector that emits 45% of County GHGs and advocated decreasing VMT through the County's comprehensive planning powers. AR 16:15041-42. The County's "response" was that it will explore increasing the use of electric vehicles, which was nonresponsive. AR 16:15040-42. Master Response 9 admits that transportation sector reductions are proportionally low, but does not explain why transportation reductions were not included in the alternatives analysis. AR 38:23098-100. Master Responses 2 and 5 are likewise nonresponsive and rely on data that does not include VMT generated by GPAs under consideration and the ones that are likely to be submitted for County review. AR 38: 23072-75, AR 38: 23084-87. These are not adequate responses under CEQA.

As a second example, the Sierra Club suggested that the County "install a car parking system that gives its employees more choice over how they spend their wage" by unbundling free or subsidized parking from employee benefits. AR 16:15048-49. In response, the County stated the suggestion "would be infeasible" and set forth conclusions and argument. *Ibid*. CEQA requires the County to set forth substantial evidence to support its conclusions and argument that mitigation measures are infeasible. The County has failed to do so.

By way of further example, SANDAG commented on the draft CAP to encourage the CAP to embrace smart growth policies. AR 38-23133. SANDAG asked the County to take into account smart growth policies. *Ibid*. However, the County's responses in the SEIR do not say anything about the impact of M-GHG-1's contribution to increased VMT. AR 38:24144-46, AR 38:24578-79. The SEIR's failure to

address M-GHG-1's contribution to increased VMT is a CEQA impact that was required to be addressed prior to CAP approval. The responses to comments are inadequate.
In light of the foregoing, the petitions for writ of mandate are granted.
The court believes it has resolved the petitions on all material grounds. To the extent any party disagrees, the court declines to address the other contentions of the parties. *See PDK Labs. Inc. v. DEA* (D.C. Cir. 2004) 362 F.3d 786, 799 (Roberts, J., concurring in part and concurring in the judgment) (noting "the cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more"); *Compare Natter v. Palm Desert Rent Review Comm'n.* (1987) 190 Cal.App.3d 994, 1001 (reversal on stated grounds made it unnecessary to resolve other contentions challenging constitutionality); *Young v. Three for One Oil Royalties* (1934) 1 Cal.2d 639, 647-648 (court declined to rule on matters unnecessary to resolving the case before the court, as to do so would be to provide "dictum pure and simple").

E. Remedy.

Let a writ of mandate issue forthwith, directing respondent the County of San Diego to set aside its February 14, 2018 approvals of the CAP and the SEIR [specifically items 1-8 in the County's February 14, 2018 Minute Order (AR 80-28788-89)]. During the December 21 hearing, the County offered a severance argument based on the highlighted portions of Public Resources Code section 21168.9:
(a) If a court finds, as a result of a trial, hearing, or remand from an appellate court, that any determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order that includes one or more of the following:
(1) A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part.
(2) If the court finds that a specific project activity or activities will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project, a mandate that the public agency and any real parties in interest suspend any or all specific project activity or activities, pursuant to the determination, finding, or decision, that could result in an adverse change or alteration to the physical environment, until the public agency has taken any actions that may be necessary to bring the determination, finding, or decision into compliance with this division.
(3) A mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance with this division.
(b) Any order pursuant to subdivision (a) shall include only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division. The order shall be made by the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with this division. **However, the order shall be limited to that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance only if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this division.** The trial court shall retain jurisdiction over the public agency's proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division.
(c) Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way. Except as expressly provided in this section, nothing in this section is intended to limit the equitable powers of the court.

The court finds that M-GHG-1, which allows essentially unlimited increases in GHG within the County by allowing developers to purchase offsets from anywhere in the world, is an essential element (if not the

centerpiece) of the 2018 CAP (*see e.g.*, AR 1340:58761 that states the 2018 CAP expressly incorporates M-GHG-1). The court therefore finds that the offset purchase element to be not severable from other project activities, and declines to adopt the County's severance proposal.

A permanent injunction is also issued essentially in accordance with the preliminary injunction granted on September 14, 2018 (ROA 323 in 2012 case). The injunction does not prohibit all development projects in the County; it affects only those projects reliant on the use of the legally inadequate program set forth in M-GHG-1. While the injunction is in place, the County may consider any project that does not depend on the use of the legally insufficient M-GHG-1 program. The bonds previously imposed to support the preliminary injunction are exonerated.

As they did last September, petitioners asked the court to extend the injunctive relief to reach projects in which the development approvals used mitigation measures they perceive to be "substantially similar" to M-GHG-1. This the court declined (and declines) to do. The first reason is philosophical: the power to grant injunctions is an important and significant one, and if it is to remain so, it is important that injunctions be granted judiciously and carefully. Second, the court has been and remains concerned that any injunction not violate the due process rights of project applicants not before the court.

Petitioners expressed frustration that other tribunals will now have to adjudicate whether the County has, in adopting mitigation measures in individual development projects, essentially used the legally insufficient M-GHG-1 program but called it something else. The court understands this frustration. Certainly it would be more efficient to simply bar the any out of county carbon credit mechanism, regardless of moniker. But efficiency must yield to due process, and the court has complete confidence in the judges to whom the individual cases have been assigned to sort out, with the participation of the affected project proponent, whether the GHG mitigation measure in any individual instance was a wolf in sheep's clothing.

The court has signed peremptory writs of mandate and permanent injunction orders consistent with the foregoing.

To the extent it is not obvious from the foregoing, the County's request to discharge the remaining elements of the May 4, 2015 Supplemental Writ of Mandate in the 2012 *Sierra Club* case is now denied, inasmuch as the court has now determined that the 2018 CAP does not comply with CEQA.

Finally, the County must file a return to comply with the mandate of the Court of Appeal in Case No. 2016-00037402 not later than January 10, 2019. A status conference is hereby set in that case for February 1, 2019 so that the court may monitor the timeliness and adequacy of that return.

IT IS SO ORDERED this 24th day of December, 2018.

_____
Timothy B. Taylor, Judge of the Superior Court

_____

*Concern for delay in the resolution of these matters at the trial court level also informed the court's decision to deny the AG's tardy application for leave to file *amicus* briefing. ROA 62. As the court has observed, it is particularly true in CEQA cases that because the trial courts are not final, it is important that they be prompt.

_____
Judge Timothy Taylor