

Consideration of Climate Change Issues Under CEQA: The *Golden Door* Decision

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In *Golden Door Properties, LLC v. County of San Diego*, 50 Cal. App. 5th 467 (2020), the Fourth District Court of Appeal issued the first published decision considering a mitigation measure allowing use of purchased offset credits to mitigate significant GHG emissions. The court found the measure invalid under CEQA in part because it did not contain safeguards for ensuring offset credits are effective and enforceable similar to those governing offset credits issued by the California Air Resources Board under the AB 32 cap-and-trade program. The court found the mitigation measure deficient because it did not require protocols for ensuring offset credits represent actual emission reductions that would achieve the goals of AB 32; failed to ensure that GHG emissions reductions be “additional” as that term is defined under the cap-and-trade program; and did not mandate that offsets originating outside California have enforcement mechanisms at least as strict as California’s program. The court also found the mitigation measure violated CEQA because it would allow the County planning director to decide whether use of a specific offset credit program would be appropriate, without any objective criteria for making that determination. The court therefore concluded that the measure lacked the type of performance standards that are required under CEQA to ensure that mitigation will be effective.

Background: The standards for assessing the significance of GHG emissions.

Court decisions issued over the last several years involving CEQA review of GHG emissions have been concerned with the methodologies public agencies may use to determine the significance of a project’s greenhouse gas emissions. These decisions, coupled with revisions to the CEQA Guidelines, confirm that:

- Impacts from GHG emissions are cumulative impacts. A project’s incremental GHG emissions are assessed to determine whether they represent a cumulatively considerable contribution to a global effect. Guidelines § 15064.4(b); *Center for Biological Diversity v. Cal. Dept. of Fish & Wildlife*, 62 Cal. 4th 2014 (2015).
- When evaluating GHG impacts, a CEQA lead agency has discretion to quantify a project’s emissions, conduct a qualitative analysis, or rely on performance-based standards. Guidelines § 15064.4(a).
- The State of California has adopted or issued GHG reduction goals and plans for 2020, 2030, 2045 and 2050. A CEQA document should include a discussion of each goal and plan that is relevant to the project and the document should reflect evolving knowledge and relevant state regulations. Guidelines § 15064.4(b); *Cleveland Nat’l Forest Found. v San Diego Ass’n of Gov’ts*, 3 Cal. 5th 497 (2017).

- According to CEQA Guidelines section 15064.4(b), the analysis should consider:

Whether the project may increase or reduce greenhouse gas emissions compared to the existing environmental setting.

Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project.

The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. (See *Mission Bay Alliance v Office of Community Inv. & Infrastructure* 6 Cal. App. 5th 160 (2016) for an example of a determination of significance based upon consistency with the locally adopted Climate Action Plan. See *Association of Irrigated Residents v Kern County Bd. of Supervisors* 17 Cal. App. 5th 708, 741 (2017) for an example of an EIR that found that a project's GHG emissions would be less than significant based on compliance with the State's cap-and-trade program.)

- An increase in emissions compared to existing conditions is not necessarily significant. Agencies can use efficiency metrics (such as an emissions level per capita or per service population) to evaluate the significance of GHG emissions *if* there is evidence in the record to support use of the metric for the type of project that is being evaluated, in the location the project is proposed to be constructed. See *Center for Biological Diversity v. Cal. Dept. of Fish & Wildlife*, 62 Cal. 4th 2014 (2015); *Golden Door Properties v. County of San Diego*, 27 Cal. App. 5th 892 (2018).

By contrast, relatively few judicial decisions have focused on the sufficiency of measures to *mitigate* significant impacts associated with GHG emissions. *Golden Door* is the first published decision to consider the adequacy of a measure that allows use of purchased offset credits as mitigation.

Overview of the County's GHG mitigation strategy. The court's decision in *Golden Door* addresses actions taken by the County of San Diego to certify a supplemental EIR, adopt a climate action plan, and approve generally applicable guidelines for determining the significance of climate change impacts. The key issue in the case was whether a greenhouse gas mitigation measure included in the EIR, measure GHG-1, complied with CEQA. The measure was designed to address GHG impacts from proposed general plan amendments that had not been included in the climate action plan's emissions inventory.

Under GHG-1, applicants for projects requiring a general plan amendment were required to achieve one of two targets: no net increase in GHG emissions as compared to the GHG emissions expected from development under the County's 2011 general plan update; or net zero GHG emissions. In either case, measure GHG-1 required applicants first to reduce GHG emissions by complying with all feasible onsite measures specified in the Climate Action Plan. Applicants could then mitigate any remaining emissions through offsite mitigation actions, including purchase of carbon offset credits.

The measure allowed project applicants to identify proposed offset credits to be provided as mitigation after project approval, and gave the County planning director discretion to determine whether the proposed credits would adequately offset the project's emissions. Guidelines section 15126.4 generally allows the specific details of a mitigation measure to be developed after a project is approved when it is impractical or infeasible to include those details during environmental review for the project, provided the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the types of potential actions that can feasibly achieve the performance standard and that will be considered, analyzed and potentially incorporated in the mitigation measure.

The court's determination mitigation measure GHG-1 was invalid. Neither the court nor the parties disputed that offset credits can mitigate the impacts of a project's GHG emissions; rather the key question before the court was whether the mitigation measure included specific safeguards sufficient to ensure the effectiveness of offset credits that the County might approve for a project. The court compared the provisions of GHG-1 to the requirements of California's cap and trade program, which are designed to ensure that offset credits result in real, quantifiable, additional, verifiable, permanent and enforceable emissions reductions. The County incorporated some of the standards from the cap and trade program into the mitigation measure, and therefore argued that the measure contained these same assurances. However, while GHG-1 required that offset credits be purchased from California Air Resources Board-approved registries, it did not require use of CARB-approved offset protocols for accounting for credits which are designed to ensure they are an accurate and reliable representation of actual emissions reductions.. According to the court, some CARB-approved voluntary registries use protocols that are not AB 32-compliant and are not the equivalent of offsets under the cap and trade program.

The court also concluded that offsets used to satisfy GHG-1 might not be additional. The measure did not incorporate or reference the provision of the Health & Safety Code that requires that offsets used to satisfy cap and trade requirements be *additional* to any greenhouse gas emission reduction that would occur under business-as-usual operations and reductions required by law. The court reasoned that additionality was key to achieving state goals for GHG reductions.

In addition, the court found that offsets generated outside California may not be genuine or verifiable. For CARB to approve out-of-state offsets, the Governor must make findings that the offsets are genuine, verifiable and enforceable under a law at least as strict as California's. By contrast, GHG-1 did not require any assurance that the offsets would be generated under laws at least as strict as California's. Further, the court concluded that nothing in GHG-1 would preclude a project from obtaining up to 100 percent of its GHG emission reductions through international offset credits. The court found this troubling based upon literature indicating that in some developing countries, records and testing technology may be inadequate or even fraudulent, making verification of offsets impossible.

Finally, the court ruled that GHG-1 was fatally deficient because it did not specify an

objective performance standard, but rather left it to the planning director's unhampered discretion to determine whether particular offsets would be sufficient to achieve the measure's mitigation goals -- no net increase in emissions in comparison with projections for the general plan update, or net zero GHG emissions. The court equated GHG-1 to the measure found invalid in *Communities for a Better Environment v. City of Richmond*, 184 Cal. App. 4th 70 (2010). There, the city set a "no net increase" performance standard for GHG emissions associated with a refinery modernization project; the court found, however, that the record lacked evidence showing that feasible mitigation measures would actually be available to achieve that standard, and that the only measure of success would be a subjective finding by the city council. Here too, the court found that achieving the mitigation measure's generalized goals depended upon implementing unspecified and undefined offset protocols, to the subjective satisfaction of the planning director.

Other legal issues relating to GHG emissions. In the balance of the opinion, the court identified several other legal problems with the Climate Action Plan and the Supplemental EIR for that plan.

The court ordered that the County's approval of the Climate Action Plan be set aside because the plan excluded forecasts of emissions from the pending general plan amendments; emissions relating to those projects could not be assumed to be net zero given the invalidity of GHG-1. The court also found that the EIR did not adequately disclose cumulative impacts associated with the pending amendments, again because it could not be assumed those amendments would result in net zero GHG emissions, and because they could result in other cumulative impacts.

The court rejected the County's finding that its Climate Action Plan was consistent with the Regional Transportation Plan's Sustainable Communities Strategy. The SCS relies upon policies designed to reduce vehicle miles traveled within the County; however, GHG-1 could be used to enable general plan amendments that would instead *increase* VMT by allowing applicants to purchase out-of-County credits to offset the resulting GHG emissions.

Last, the court found the Supplemental EIR did not evaluate a reasonable range of alternatives because it did not include a smart growth land use alternative that would reduce VMT as a means of controlling GHG emissions.