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Opening the Golden Door: The Fourth District Shines a Light on CEQA Compliant Greenhouse Gas Mitigation

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Photo Not Available

Key Points

- The third *Golden Door* iteration resulted in a common refrain: San Diego County has not yet reached the high bar for greenhouse gas mitigation (GHG) measures under CEQA
- Enforceability is a significant component of a CEQA compliant GHG mitigation measure
- In a nod to the recently approved Newhall Ranch plan, the Court of Appeal outlined the contours of acceptable carbon offset programs, both within and outside California

In *Golden Door Properties, LLC, v. County of San Diego*, filed on June 12, 2020, the Fourth District Court of Appeal affirmed the superior court's order directing San Diego County to set aside its latest attempt at a Climate Action Plan (CAP), Guidelines for Determining Significance of Climate Change, and supplemental environmental impact report (SEIR) addressing both. This case represented the third time San Diego County's CAP has been challenged in the Court of Appeal. Here, the difference is that the Court, by rejecting a specific GHG mitigation measure (M-GHG-1), in effect outlined a roadmap for what is required for such a measure to comply with the California Environmental Quality Act (CEQA). In addition, the Court in dicta suggested that a different GHG reduction measure (T-4.1) "significantly differs from M-GHG-1 in several respects and, perhaps more importantly, in indicating the types of offset protocols that might pass muster, is unchallenged in this litigation."

Following the superior court, the Court of Appeal based the bulk of its decision on M-GHG-1, a GHG mitigation measure in the SEIR. M-GHG-1 allowed General Plan Amendment (GPA) project applicants to mitigate in-county GHG emissions by purchasing carbon offsets originating out-of-county, including internationally. The Court held that M-GHG-1, specifically its mechanism of allowing off-site carbon offsets, violated CEQA by containing unenforceable performance standards and by improperly deferring and delegating mitigation. The Court further found that that the SEIR violated CEQA because (a) its cumulative impacts analysis ignored foreseeable cumulative impacts from probable future GPAs; (b) its finding of consistency with Senate Bill 32 as well as the Regional Transportation Plan is not supported by substantial evidence; and (c) it failed to consider a smart growth,

vehicle miles traveled (VMT) reducing alternative.

Though it may seem that the decision is a blow to off-site carbon offset mitigation, the Court was also quick to note that its Golden Door finding should not be taken as a referendum on the issue: "Our decision is not intended to be, and should not be construed as a blanket prohibition on using carbon offsets—even those originating outside of California—to mitigate GHG emissions under CEQA." In fact, throughout its opinion, the Court provided guidance for localities seeking to design a CEQA compliant off-site carbon offset mitigation program.

The CAP and M-GHG-1

The San Diego County CAP contained 26 measures intended to achieve statewide GHG reduction targets. The CAP utilized future GHG emission projections for development consistent with land uses allowed under the County's General Plan. Consistency with the CAP is set as the threshold of significance for public agencies to determine whether a project will have significant GHG impacts.

The CAP's GHG projections, however, excluded GPA projects under review, but not yet adopted by the County. Instead, the SEIR required GPA projects to achieve CAP consistency using M-GHG-1 to mitigate and offset any GHG emissions above the CAP's projections. M-GHG-1 required all GPA projects to first mitigate GHG emissions through all feasible onsite design features. Once onsite measures were exhausted, GPA projects would have been able to use off-site mitigation, including the purchase of domestic or international carbon offset credits.

Court of Appeal Decision

As noted, the Court's decision focused primarily on M-GHG-1. The Court first objected to M-GHG-1's lack of enforceability: "Mitigating conditions are not mere expressions of hope.' [citation omitted] They must be enforceable through permit conditions, agreements, or other legally-binding instruments."

To further illustrate why M-GHG-1 is not enforceable mitigation, the Court contrasted the requirements of M-GHG-1 with the robust protocols governing California Air Resources Board (CARB) offset credits under California's cap-and-trade program. First, CARB-approved protocols require GHG reduction to exceed any reduction required by law or regulation, as well as what would have otherwise occurred in a conservative business as usual scenario. Second, CARB heavily scrutinizes protocols to ensure compliance with statutes such as AB 32. Third, though M-GHG-1 required offsets to be purchased from a CARB-approved offset registry or to meet the relevant cap and trade statutory requirements, M-GHG-1 failed to require that carbon offsets use CARB-consistent protocols. Perhaps most glaringly, M-GHG-1 failed to require that carbon offset protocols involve carbon reductions beyond what is achievable through existing laws or widely used reduction technology. The Court found this gap particularly concerning since M-GHG-1 contained no mechanism to prevent a GPA project from obtaining 100 percent of its GHG emissions reductions through M-GHG-1 offsets from anywhere in the world, including countries which lack robust monitoring and reporting mechanisms. Fourth, the Court frowned on granting the Director of Planning & Development Services vested approval authority of particular projects' offset credits without providing any objective standards to guide the Director's decision. The Court found this to be an improper deferral of mitigation, as "M-GHG-1 sets a generalized goal—no net increase or net-zero GHG emissions […] achieving that goal depends on implementing unspecified and undefined offset protocols, occurring in unspecified locations (including foreign countries), the specifics of which are deferred to those meeting one person's subjective satisfaction."

The Court also identified the following deficiencies in the project's Program Environmental Impact Report (PEIR):

- The cumulative impacts analysis omitted any discussion of GPA project impacts, instead concluding that compliance with M-GHG-1 addressed the impact of these project's GHG emissions. However, the Court noted that the PEIR fails to note any other potential effects of these projects, including air quality effect, VMTs, and energy use, especially given the potential that all M-GHG-1 mitigation would be occurring outside of the County.
- The PEIR concluded that M-GHG-1 is consistent with Senate Bill 32 and its associated Regional Transportation Plan, but offered no evidence of the same. Instead, the County assumed consistency because the Regional Transportation Plan accounted for the existing General Plan. Such reliance ignored that M-GHG-1 applied to GPA projects, which by definition are not compliant with the existing General Plan.
- The PEIR failed to consider a reasonable range of alternatives. Specifically, the Court noted that none of the four alternatives discussed in the PEIR includes smart-growth alternatives aimed at reducing VMT. Citing AB 32 guidance and the 2017 CARB Scoping Plan, the Court concluded that "[i]n light of this consistently clear mandate to reduce VMT to help achieve target GHG emission reductions, it is reasonable to expect at least one project alternative in the SEIR to have been focused primarily on significantly reducing VMT."

The County asked that its CAP be allowed to stay in place, even if the Court found M-GHG-1 to be inadequate. The Court, however, held that the CAP must be invalidated, as its entire GHG projection is based on the assumption that GPA projects will be mitigated to zero-above-CAP emissions under M-GHG-1.

CEQA Compliance Guidance

Though much of this year's *Golden Door* decision is dedicated to invalidating M-GHG-1, the Court also cited examples of measures and projects that avoid the same pitfalls. To comply with CEQA, it would behoove local governments to review this important guidance as they craft similar off-site carbon offset mitigation programs.
Similarly, project applicants should review the same as they forecast climate change-related policy impacts on their development projects.

While criticizing M-GHG-1 for its handling of offset protocols, the Court also lauded the robust protocols in another San Diego County CAP measure. Measure T-4.1 allowed the County to invest in in-county projects that reduce or eliminate in-county GHG emissions. The County was then allowed to track those reductions as offsets toward CAP targets. A lengthy appendix accompanied the measure, setting forth the direct investment protocols the County could engage in, including stringent rules to ensure that projects are reducing emissions beyond business-as-usual scenarios as well as standards for tracking to confirm that actual reductions are occurring. The Court noted that these protocols are typical of enforceable offset-type mitigation measures.

The Court also discussed the recently approved Newhall Ranch Resource Management and Development Plan, which utilizes a similar off-site carbon offset approach. The Newhall Ranch measure, however, is far stricter than the San Diego County CAP in that it:

- Includes that any offset meet a legal requirement and performance test to confirm that reductions are truly reductions;

- Requires that 80% of off-site reductions occur within the United States,
- Requires that developers continue to seek reasonable opportunities for domestic offsets; and
- Allows for cessation of offset permitting if the granting agency determines that the offset is non-compliant with performance standards.

While discussing M-GHG-1's unlawful mitigation deferral, the Court observed that delegating mitigation approvals to staff does not necessarily violate CEQA. In *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, such a delegation of earthquake mitigation measures was found to be permissible because it was accompanied by standards that staff was to apply in making its decision. The key determination is whether the decision-maker is given objective criteria by which to make a decision.

Conclusions and Implications

This *Golden Door* holding is far from a death knell for off-site carbon offset mitigation measures. In fact, the decision serves to sharpen the contours of CEQA compliant and enforceable policy choices. Localities attempting to take advantage of off-site carbon offsets should endeavor to create requirements that closely scrutinize offset protocols to ensure that actual reductions beyond business-as-usual scenarios are occurring. Likewise, local governments should consider enacting measures with a clear preference for domestically based offsets. Such measures should also allow overseeing agencies to revoke offset permits if permitted offsets fail to meet performance standards. Lastly, measures should include objective criteria to govern the approval of carbon offset use.

For more information about this decision or any other land use issue you are facing, please contact the authors or the Hanson Bridgett Land Use Group. You can also follow @Cal_LandUseLaw on Twitter.

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