APPENDIX U

Greenhouse Gas Memorandum - San Diego County Climate Action Plan Litigation

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LAWYERS

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By Email

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Re: North River Farms Planned Development Plan Project and the Trial Court Decision in the San Diego County Climate Action Plan (CAP) Litigation

The purpose of this letter is to clarify and affirm that the San Diego Superior Court decision in *Sierra Club v. County of San Diego* (Case No. 37-2018-00014081-CU-TT-CTL), consolidated with *Golden Door Properties v. County of San Diego* (Case No. 37-2018-00013324-CU-TT-CTL) (jointly, County CAP Action), does not impose any restriction on the North River Farms Planned Development Project (project) or its use of carbon offsets to achieve net zero greenhouse gas emissions (GHGs). This letter addresses the sufficiency of GHG mitigation proposed for the North River Farms project, as well as the limited scope and applicability of the trial court decision in the County CAP Action.[1]

I. County CAP Action Background

In February 2018, the County of San Diego (County) Board of Supervisors adopted a Climate Action Plan (CAP). At that time, the County Board also amended its General Plan Goal COS-20 and Policy COS-20.1. In certifying the County's Environmental Impact Report (EIR) for the CAP in February 2018, the Board adopted mitigation measure M-GHG-1, establishing a protocol through which General Plan Amendment projects could meet a portion of their GHG reduction obligation by purchasing carbon offsets, including offsets that are generated by GHG reduction activities located outside of the County. M-GHG-1 also established geographic priorities for GHG reduction features and reduction projects and programs, including: (1) on-site project design features to reduce GHG emissions; (2) off-site reductions within unincorporated areas of the County; (3) off-site reductions within the County; (4) off-site reductions within the State of California; (5) off-site reductions within the United States; and (6) off-site reductions internationally.

In March 2018, several petitioners filed a lawsuit against the County, alleging that the CAP and, in particular, M-GHG-1 was inconsistent with General Plan Goal COS-20 and Policy COS-20.1. Specifically, petitioners argued that Goal COS-20 and Policy COS-20.1 require that all GHG

[1] This letter has been prepared jointly, with the below legal analysis provided by Gatzke Dillon & Ballance LLP, and factual GHG representations affirmed by Dudek.

reductions take place within the County's geographical boundary, and that M-GHG-1 impermissibly allows GPA projects to reduce their GHG emissions through out-of-County offsets. During the litigation, the Office of County Counsel contended the Board never intended to preclude the use of out-of-County offsets and that the County's long-standing practice has been to allow projects to use out-of-County offsets to mitigate their GHG emissions.

On December 24, 2018, the San Diego Superior Court, Judge Taylor presiding, issued a ruling (ruling) against the County on this point. The trial court found that the use of offsets originating outside San Diego County was inconsistent with the County's General Plan Goal COS-20 and Policy COS-20.1, which provided for the "[r]eduction of community-wide (i.e., unincorporated County) and County operations greenhouse gas emissions." (Minute Order[2], p. 12.) According to the trail court, County General Plan Goal COS-20 and Policy COS-20.1 were "fundamental, mandatory, and clear" policies requiring only in-County GHG emissions reductions and barring the use of out-of-County offsets. (*Id.*) The Court issued a writ ordering the approval of the CAP and its EIR to be set aside, and enjoining reliance on the County CAP's mitigation measure M-GHG-1.

II. The County CAP Ruling does not apply Outside the County's Jurisdiction to Require Local Reduction of GHG Emissions or Prohibit use of GHG Emission Offsets

It has been suggested the County CAP Action (and ruling) limits the use of offsets within the City of Oceanside or require only local reduction of GHG emissions. This is incorrect for several reasons.

First, the trial court's ruling in the County CAP Action is not binding on the City or North River Farms project. An opinion by a trial court possesses no precedential value. (*Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 831; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 763, pp. 730-731; *Neary v. Regents of the University of California* (1992) 3 Cal.4th 273, 282 [superseded by statute on other grounds].) It binds only the parties to the specific case and only concerning the specific issues adjudicated. (*Id.*) Thus, the ruling applies only to the County, and *not* the City of Oceanside.

Second, as the trial court's ruling itself makes clear, the County CAP Action addressed specific issues related to consistency with the County's General Plan and CAP. The Court determined that the language of *County's General Plan Goal COS-20 and Policy COS-20.1*

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[2] See, *Sierra Club v. County of San Diego*, Case No. 37-2018-00014081-CU-TT-CTL, Minute Order dated December 24, 2018;

All documents referenced herein, and which were not previously included in the Final EIR for the Project, are hereby provided in Appendix U.

mandated in-County GHG reductions and prohibited the use of out-of-County offsets. (Minute Order, p. 12.) The ruling was based on the Court's interpretation that specific language within the County's General Plan required reductions be achieved locally at the location emitted.

Third, Oceanside's General Plan has no language, goal, or policy comparable to that found in the County's General Plan. The City also does not have an adopted CAP. Accordingly, the ruling in the County CAP Action does not apply to the City or North River Farms project.

III. Neither the Science of Global Climate Change nor any Applicable Law Requires Greenhouse Gas Emissions be Reduced at the Location Emitted

Further, there is no scientific or legal basis for restricting the reduction of GHG emissions to the location where they are emitted.[3] Climate change is a global phenomenon. (See, North River Farms EIR, Section 4.8.1.) Unlike the air pollutant emissions, GHGs emissions do not have a localized impact on air quality conditions, but rather disperse into the earth's atmosphere and increase the amount of heat retained. While greenhouse gas *emissions* are local, their climate change impacts are not. In fact, climate change impacts are so globally-dispersed that it is nearly impossible to calculate the *local* climate effects of *local* greenhouse gas emissions.

Scientists are not the only ones who understand the *global* – as opposed to *local* – character of climate change. The California Supreme Court understands climate change is a *global* as opposed to *local* issue as well:

> [B]ecause of the global scale of climate change, any one project's contribution is unlikely to be significant by itself … [T]he global scope of climate change and the fact that carbon dioxide and other [GHG], once released into the atmosphere, are not contained in the local area of their emission means that the impacts to be evaluated are also global rather than local. For many air pollutants, the significance of their environmental impact may depend greatly on *where* they are emitted; for [GHG], it does not.

(*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 219-220; emphasis in original.)

The significance of GHG impacts also does *not* depend on where the GHG is emitted. Thus, it logically follows that *mitigation* for such impacts does not depend on – and need not take place – where the GHG is emitted.

The key, then, is to address climate change and GHGs on a *global level*, and to accept the scientific fact that one metric ton of GHG emitted in anywhere in the world has the same impact

[3] For additional discussion, please refer to the North River Farms Final EIR, Topical Response GHG-3, addressing the City's discretion to formulate appropriate mitigation for GHG emissions.

on global climate change as one metric ton of GHG emitted in Oceanside, California. Likewise, the *elimination* of one ton of GHG in anywhere in the world produces the same mitigation benefit *locally* as the elimination of one ton of GHG in Oceanside.

Because of the global nature of GHG emissions and their effect on the earth's climate, there is no legal requirement that GHG emission reductions be achieved locally. And CEQA itself supports this fact. Specifically, CEQA does not impose geographic limits on GHG mitigation options. Section 15126.4(c)(3) of the CEQA Guidelines provides that "[o]ff-site measures, including offsets that are not otherwise required," can be used to mitigate a project's GHG emissions. In promulgating the CEQA Guidelines for GHG mitigation, the California Natural Resources Agency (CNRA) and the Governor's Office of Planning and Research (OPR) addressed the legitimacy of offsets as follows:[4]

> The Initial Statement of Reasons...cites several sources discussing examples of offsets being used in a CEQA context. Further, the CARB Scoping Plan describes offsets as way to provide regulated entities a source of low-cost emission reductions, and … encourage the spread of clean, efficient technology within and outside California. The Natural Resources Agency finds that the offset concept is consistent with the existing CEQA Guidelines' definition of "mitigation," which includes "[r]ectifying the impact by repairing, rehabilitating, or restoring the impacted environment" and "[c]ompensating for the impact by replacing or providing substitute resources or environments."

Notably, the language endorsing the use of carbon offsets remains unchanged by the December 28, 2018 *Updates to the CEQA Guidelines* adopted by the Office of Planning and Research (OPR) and finally approved by the Office of Administrative Law.[5] Carbon offsets, where compliant with established protocols to ensure their environmental integrity, are thus broadly endorsed by the State as CEQA mitigation for GHG emissions and are not bound by geographic locale.[6]

Moreover, use of offsets protocols have been upheld by the courts. For example, in *Our Children's Earth Foundation v. CARB* (2015) 234 Cal.App.4th 870, 880, the Court of Appeal recognized the validity of carbon offsets, stating:

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[4] North River Farms Final EIR Appendix T6, p. 47-48, 89 [California Natural Resources Agency, Final Statement of Reasons for Regulatory Action, Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97 (December 2009)];
CEQA Guidelines section 15126.4(c)(3).

[5] Available at http://resources.ca.gov/ceqa/docs/2018_CEQA_FINAL_TEXT_122818.pdf.

[6] *See*, North River Farms Final EIR, Topical Response GHG-3, explaining that CARB and the Governor of California have repeatedly approved the use of offsets to reduce GHG emissions.

> [P]rotocols developed by the Climate Action Reserve (Reserve) employ a standards-based approach for ensuring additionality. The Reserve is a national nonprofit organization that (1) develops standards for evaluating, verifying and monitoring GHG emission inventories and reduction projects in North America; (2) issues offset credits for those projects; and (3) tracks offset credits over time "in a transparent, publicly-accessible system." A primary goal of the Reserve is to establish conservative GHG accounting which will ensure that GHG emission reductions are "real, permanent, additional, verifiable, and enforceable by contract." In formulating its standards-based protocols, the Reserve identifies types of emission reduction projects that are both subject to quantification and appropriate for assessment pursuant to performance-based additionality tests.

In *Our Children's Earth Foundation*, CARB's protocols, which it took almost verbatim from Climate Action Reserve's protocols, were challenged as violating AB 32 because they were alleged to not accurately ensure additionality as required by the act. The court sided with CARB, finding that CARB's protocols based on Climate Action Reserve's protocols are a "workable method of ensuring additionality with respect to offset credits." (*Our Children's Earth Foundation* at p. 889.) CARB has since expanded its program to accept carbon offsets issued under American Carbon Registry and Verified Carbon Standard methodologies.[7]

Comments have been received by the City stating that the purchase of offsets should be limited to those projects within the City of Oceanside and County of San Diego. However, as discussed above, such a limitation does not comport to the global nature of climate change. Further, as explained in the *Evaluation of Greenhouse Gas Emissions Offset Availability within San Diego County*, December 2018, incorporated at Appendix U3 provided with this letter, the current estimated offset demand is far greater than the available supply of offsets within the County (including incorporated areas). Offsets that originate outside of the County are therefore necessary to meet the demand and thereby reduce GHG emissions. Requiring the project to purchase offsets from entirely within the City or County is considered infeasible due to the unavailability of such offsets.

While nothing in the global nature of climate change, CEQA, or the City's General Plan requires any geographic priority structure for the reduction of GHG emissions, in recognition of the air quality and other co-benefits of GHG emissions-reduction strategies in the project vicinity, the project utilizes a combination of on-site and off-site GHG reduction strategies (see, e.g., Mitigation Measures MM-GHG-1 through MM-GHG-3) to reduce GHG emissions. Mitigation Measures MM-GHG-2 and MM-GHG-3 also include a geographic priority structure for the

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[7] *See, e.g.*, Please refer to Topical Response GHG-3 of the North River Farms Project Final EIR for additional discussion;

See also, CARB Compliance Offset Program, https://www.arb.ca.gov/cc/capandtrade/offsets/offsets.htm.

purchase of offsets, which prioritizes local offsets over those purchased further afield.[8] Further, as discussed below, all offsets obtained for the project will be binding, enforceable, and subject to clear standards.

IV. The Process by which GHG Emissions Offsets for the North River Farms Project will be Purchased and Approved Ensures Mitigation is Binding, Enforceable and Subject to Clear Standards

The comment has been made that project mitigation delegates too much authority to the Development Services Director, with too few standards and criteria to determine sufficiency and enforceability. As discussed below, mitigation measures MM-GHG-2 and MM-GHG-3 establish clear performance standards and are fully enforceable by the Development Services Director.

Mitigation Measures MM-GHG-2 and MM-GHG-3 require the project to purchase and retire carbon offsets "in a quantity sufficient to offset approximately 100% of the proposed project-generated GHG emissions" from both construction (including vegetation removal emissions) and operations (for a 30-year period). Both mitigation measures define "carbon offset" to mean:

> … an instrument issued by any of the following: (i) the Climate Action Reserve, the American Carbon Registry, and the Verra (formerly, Verified Carbon Standard), (ii) any registry approved by the California Air Resources Board to act as a registry under the State's cap-and-trade program, or (iii)…any other reputable registry or entity that issues carbon offsets. Prior to use of option (iii), it shall be demonstrated that the other reputable registry or entity follows accounting, quantification and monitoring protocols, as well as eligibility and procedural performance standards, that are comparable to those used by the registries identified in option (i)….[9]
>
> …any carbon offset used to reduce the proposed project's GHG emissions shall be a carbon offset that represents the past reduction or sequestration of one metric ton of carbon dioxide equivalent that is "not otherwise required."

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[8] To the extent the ruling in the County CAP Action addressed the geographic priority structure of mitigation, the factual circumstances are distinguishable. According to the trail court, the County was required to mitigate GHG emissions within the region to comply with the mandatory language of its CAP. On the other hand, here, no law requires prioritization of offsets. The City decision to require local prioritization is a policy choice, not a legal requirement pursuant to federal, state, or local law.

[9] CARB accepts carbon offsets issued under the Climate Action Reserve, American Carbon Registry and Verra methodologies. (See, e.g., CARB Compliance Offset Program, https://www.arb.ca.gov/cc/capandtrade/offsets/offsets.htm.)

Carbon offsets required by MM-GHG-2 and MM-GHG-3 will achieve high environmental integrity standards, will be purchased prior to project generation of GHG emissions, and will be documented in a form that can be tracked and monitored by the City.

a. Environmental Integrity of Offsets

As discussed in Topical Response GHG-3, the offset registries have developed a broad consensus around the standards that are necessary to ensure that offsets are environmentally sound, namely that offsets be real, permanent, quantifiable, verifiable, enforceable, and additional. The terms are defined as follows:

> *"Real":* offsets may only be issued for emissions reductions that are a result of complete emissions accounting.
>
> *"Permanent":* the emissions reductions must be permanent and not be reversed. For example, in the context of forestry, offset project developers must demonstrate that the carbon sequestered in the trees of the forest will not be released to the atmosphere after the fact; i.e., that the trees will not be cut down.
>
> *"Quantifiable":* the emissions reductions from an activity must be rigorously quantified, and offsets may only be issued in an amount that corresponds to emissions that have been quantified. Project developers must ensure the accuracy of their emissions accounting by adhering to standardized quantification methodologies called "protocols," which are discussed further below.
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> *"Validated":* to receive offset credits, emission reductions must be well documented and transparent enough to be capable of objective review by a neutral, third party verifier.
>
> *"Enforceable":* in order to be eligible to generate offsets from reputable programs, the implementation of the activity must represent the legally binding commitment of the offset project developer. Once the developer undertakes the activity, the developer is under a legal obligation to carry it out.
>
> *"Additional":* the GHG emissions reductions generated by an activity must be "additional," meaning that they are only eligible to generate offsets if they would not have occurred without the offset activity. Project developers must ensure additionality by adhering to the applicable protocol, as discussed further below.

The climate registry offset programs have adopted slightly different versions of these standards to ensure the environmental benefit of activities that generate carbon offsets.[10]

The climate registries have undertaken the responsibility of certifying that emissions reductions have occurred in adequate quantity and quality to issue carbon offsets. Developers of offsets can demonstrate the environmental integrity of an offset project by complying with a climate registry's standards-based "protocol." A "protocol" is a method of measuring emission reductions. A standards-based protocol accomplishes that fundamental goal by establishing the baseline scenario for a given activity and then providing the project developer a specific, defined methodology to quantify and verify emissions reductions that occur over and above that baseline scenario or what is otherwise required by law or mandate.

Carbon offset registries measure compliance with approved protocols using rigorous, standardized review processes. As a general rule, when approving a GHG reduction project, the climate registry would require that the offset project meet the following steps to receive offsets:

> *Listing or Registration:* Apply to list or register the proposed GHG emission reduction project with the climate registry. The climate registry will review the application and accept it only if it complies with the applicable climate registry requirements.
>
> *Independent, Qualified Third-Party Confirmation of Reduction or Sequestration:* Once a GHG emission reduction project has begun, the climate registry will require the offset project developer to retain an independent, qualified, third-party to verify the reduction or sequestration achieved by the project. Each climate registry has adopted stringent requirements applicable to the accreditation of third parties and only such third parties are qualified to verify and audit the activities under the applicable registry rules. This process typically takes place on an annual basis. Activities undertaken in a given 12-month period are typically verified during the following 6-12 months. Most climate registry rules and protocols require "boots on the ground" audits, although in certain instances desktop reviews may be sufficient.

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[10] See, American Carbon Registry, "The American Carbon Registry Standard" (July 2018), available at https://americancarbonregistry.org/carbon-accounting/standards-methodologies/american-carbon-registry-standard/acr-standard-v5-1-july-2018.pdf;

Climate Action Reserve, "Program Manual" (Sept. 1, 2015), available at http://www.climateactionreserve.org/wp-content/uploads/2015/08/Climate_Action_Reserve_Program_Manual_090115.pdf;

VCS, "VCS Program Guide" (June 21, 2017), available at http://verra.org/wp-content/uploads/2018/03/VCS_Program_Guide_v3.7.pdf;

See also Health & Safety Code Section 38562(d)(1)-(2).

> *Registry Approval and Issuance:* The final step under most climate registry rules and protocols involve the issuance of the offsets. Registry rules and protocols require the project developer to apply for issuance and to provide the verification report prepared by the independent, qualified third-party. The registry will typically review a verification report and, to the extent that the registry finds that the report complies with the applicable registry requirements, the registry will issue the offsets to the account of the project developer.
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> *Carbon Offset Retirement:* Each registry has adopted rules and procedures governing the retirement or cancellation of offsets. Typically these rules or procedures involve the transfer of the offset serial numbers from a registry account and ensure that once a carbon offset credit has been retired, the retirement is permanent and the carbon offset cannot be further used in any manner.

These protocols and processes ensure that offsets issued by offset registries satisfy the environmental integrity criteria described above, as multiple jurisdictions implementing such programs have recognized.[11] In addition, "[C]ARB recognizes the rigor of the voluntary accounting procedures CAR adopted to establish that GHG emissions are real, additional, and permanent."[12]

b. Sufficient Offsets will be Purchased *before* GHGs are Emitted from the Project and Will be Documented in a Form that can be Tracked and Monitored by the City

Temporally, the North River Farms project's estimated GHG emissions will be offset *before* GHGs are generated or released as a result of the project. MM-GHG-3 requires that offsets sufficient to offset 100% of these construction and vegetation removal emissions be purchased and retired *prior to* the City's issuance of the Project grading permit. Offsets must be additional (i.e., "not otherwise required") and "represent the past reduction or sequestration of one metric ton of carbon dioxide…." (MM-GHG-3.) Thus, the City is able to ensure that a sufficient quantity of carbon offsets are purchased to fully mitigate the project's construction emissions *before* commencement of any actual grading.

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[11] The Climate Action Reserve, for example, has adopted protocols for various types of GHG-reducing projects intended to generate carbon offsets for purchase. See http://www.climateactionreserve.org/how/protocols/ [identifying 18 protocols for different project types that must be complied with, as verified by an independent third party, prior to being registered and issued offset credits]. It also has a comprehensive verification process in place, which it describes as playing "a vital role in upholding the integrity and quality of the data reported to both mandatory and voluntary [GHG] programs across the world." See http://www.climateactionreserve.org/how/verification/.

[12] CARB, "Proposed Regulation to Implement the California Cap-and-Trade Program, Part I, Volume I: Initial Statement of Reasons" (October 28, 2010) at II-48.

Likewise, MM-GHG-2 requires that the operational emissions associated with the project be fully be offset *prior to* the City's issuance of the first building permit. Offsets would be purchased *prior to* issuance of the first building permit to reduce or sequester all 30 years of projected emissions *in advance* of the Project operations. Thus, for example, a residential building permit issued in 2025 would require the project applicant to *immediately* offset all operational GHG emissions estimated to arise from that residence between 2025 and 2054.

The City, as the lead agency, has determined that a 30-year project life is the appropriate methodology for delineating the extent of the project's GHG emissions inventory for purposes of MM-GHG-2's applicable mitigation period. The 30-year project life presents the reasonable limits of scientific and evidentiary data for the project, given current modeling tools, the changing regulatory structure, the level of unknowns beyond 2050 with respect to regulatory programs mandating further reductions in GHG emissions, and other available information.[13]

In using the 30-year project life, the City recognizes that the residential and non-residential development facilitated by the project could continue to exist for more than 30 years. Nonetheless, during and after the 30-year project life period, the project would be subject to a range of existing and future regulatory standards and policies applicable to the built environment. California is expected to implement numerous additional policies, regulations and programs to reduce statewide emissions to achieve the GHG reduction goals of SB 32 and EO S-3-05. The City has exercised its discretion to determine that a 30-year project life is reasonable and supported by the substantial evidence.

MM-GHG-2 requires tabulation of the number and location of offsets purchased to fully reduce the project's GHG emissions for the life of the project. The requirements in MM-GHG-2 and MM-GHG-3 that proof be made to the satisfaction of the Development Services Director that a sufficient quantity of reductions have been purchased would ensure timely mitigation; and it is fully enforceable by the City.

Additionally, the carbon offsets would be monitored and verified by a third party auditor. Each offset project has unique serial numbers. When offsets are purchased, those serial numbers are retired so that the offsets can no longer be purchased. The CARB-approved registries have software that creates a transparent record and accounting of carbon offsets, which will be available to the City.[14]

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[13] Refer to Final EIR at Response to Comment O4-21 for additional explanation and support for reasonableness of 30-year project life.

[14] For further discussion regarding the environmental integrity of carbon offsets and strict protocols used by climate registries to certify that emissions reductions have occurred, please refer to Topical Response GHG-3. These environmental integrity criteria utilized by reputable registries are recognized as sufficient to ensure the environmental benefit of activities that generate carbon offsets. See, See Climate Action Reserve, *Program Manual* (September 1, 2015), available at http://www.climateactionreserve.org/how/program/program-manual/.

The concept of development projects purchasing compensatory mitigation credits in the future is not new. For example, purchasing off-site mitigation credits from "mitigation banks" or "programs" for biological or agricultural impacts has been used for quite some time and upheld by the courts when there is a commitment to the mitigation and performance standards are set forth. The use of carbon offset credits are likewise well-established as appropriate mitigation for project-level GHG emissions. Here, GHG mitigation provides performance standards demonstrating a full commitment to real, verifiable compensatory mitigation.

Nevertheless, to provide further mitigation assurances, MM-GHG-2 and MM-GHG-3 have been revised as follows:

MM-GHG-2 As to operational greenhouse gas (GHG) emissions, prior to the City of Oceanside's (City's) issuance of the first building permits ~~for each implementing Site Plan ("D" Designator)~~, the applicant or its designee shall purchase and retire carbon offsets in a quantity sufficient to offset 100% of the proposed project–generated GHG emissions in order to achieve carbon neutrality (i.e., a net zero emissions level), for a 30-year period, consistent with the performance standards and requirements set forth below.

First, "carbon offset" shall mean an instrument issued by any of the following: (i) the Climate Action Reserve, the American Carbon Registry, and the Verra (formerly, Verified Carbon Standard); (ii) any registry approved by the California Air Resources Board (CARB) to act as a registry under the state's cap-and-trade program; or (iii) ~~if no registry is in existence as identified in options (i) and (ii), above, then~~ any other reputable registry or entity that issues carbon offsets. Prior to use of option (iii), it shall be demonstrated that the other reputable registry or entity follows accounting, quantification and monitoring protocols, as well as eligibility and procedural performance standards, that are comparable to those used by the registries identified in option (i). For additional information about the protocols and standards referenced in this paragraph, please see the State-approved "Newhall Ranch Greenhouse Gas Reduction Plan," which is included in **Appendix H1** of the EIR. Section IX of the "Newhall Ranch Greenhouse Gas Reduction Plan" outlines the protocols and standards that must be followed in order for a registry and the offsets it issues to qualify under this measure.

Second, consistent with CEQA Guidelines Section 15126.4(c), any carbon offset used to reduce the proposed project's GHG emissions shall be a carbon offset that represents the past reduction or sequestration of one metric ton of carbon dioxide equivalent that is "not otherwise required."

Third, "Applicant" shall mean the NRF Project Owner LLC or its designee.

Fourth, regarding operational emissions, prior to the City's issuance of the first building permits ~~for each implementing Site Plan ("D" Designator)~~, the applicant shall provide evidence to the satisfaction of the Development Services Director that the applicant has purchased and retired carbon offsets in a quantity sufficient to offset 100% of the proposed project's GHG emissions for a 30-year period. The "project life" is 30 years. This methodology is consistent with the 30-year project life time frame used by the South Coast Air Quality Management District's GHG guidance), as well as the methodological parameters used by the California Air Resources Board when reviewing AB 900 projects. The emissions reduction obligation associated the building permit shall be calculated by reference to the certified EIR's Greenhouse Gas Emissions Technical Report (Appendix H), which determined total operational emissions as equaling 10,288 metric tons of carbon dioxide equivalent (MT CO_2e) annually, which equates to 308,640 MT CO_2e (10,288 MT CO_2e × 30 years). In making such a determination, the Development Services Director shall require the Project applicant or its designee to provide an attestation or similar documentation from the selected registry(ies) that a sufficient quantity of carbon offsets meeting the standards set forth in this measure have been purchased and retired, thereby demonstrating that the necessary emission reductions are realized.

Fifth, the purchased carbon offsets used to reduce operational GHG emissions shall achieve real, permanent, quantifiable, verifiable, and enforceable reductions.

Sixth, the amount of carbon offsets required ~~for each implementing Site Plan~~ shall be based on the ~~GHG emissions with the implementing Site Plan and shall include~~ operational GHG emissions as identified in the approved GHG emissions report.

Seventh, the applicant shall include a tabulation that identifies the overall carbon offsets required to mitigate the entire proposed project's GHG emissions, ~~and shall identify~~ the amount of carbon offsets purchased, and the locational attributes of the carbon offsets in order to allow Development Services Director to track and monitor the implementation of the geographic priority provision. ~~to date the remaining carbon offsets required to reduce the proposed project's emissions. Such tabulation and tracking shall be to the satisfaction of the Development Services Director.~~

Eighth, all carbon offsets required to reduce the proposed project's operational emissions shall be associated with reduction activities that are geographically prioritized according to the following locational attributes ~~the project applicant or its designee shall demonstrate, to the satisfaction of the Development Services Director, the following geographic priorities for GHG reduction features, and GHG reduction projects and programs~~: (1) project design features/on-site reduction

measures, (2) off site within the City, (3) off site within the County of San Diego, (4) off site within the state of California, and (5) off site within the United States, and (6) off site internationally. As listed, geographic priorities would focus first on local reduction ~~features~~ options (including projects and programs that would reduce GHG emissions) to ensure that reduction efforts achieved locally would provide cross-over, co-benefits related to other environmental resource areas, even though the co-benefits are not needed to mitigate impacts to these other environmental resource areas. ~~air quality criteria pollutant reductions within the San Diego Air Basin and to aid in San Diego County jurisdictions' efforts to meet their GHG reduction goals.~~ The applicant or its designee shall first pursue carbon offsets ~~projects and programs~~ locally within the City consistent with this geographic priority strategy~~, to the extent such offset projects and programs are financially competitive in the global offset market~~.

The project applicant or its designee shall submit proof to the City that offsets are unavailable in a higher priority category before seeking offsets from the next lower priority category. The Development Services Director shall issue a written determination that offsets are unavailable in a higher priority geographic category before allowing the Project applicant or its designee to use offsets from the next lower priority category. In considering whether offsets are unavailable, the Development Services Director shall consider the feasibility factors as defined in CEQA Guidelines Section 15364 and information available at the time the first building permit request is submitted, including but not limited to:

- The availability of in-State emission reduction opportunities;
- The geographic attributes of carbon offsets that are listed for purchase and retirement;
- The temporal attributes of carbon offsets that are listed for purchase and retirement;
- The pricing attributes of carbon offsets that are listed for purchase and retirement; and/or,
- Any other information deemed relevant to the evaluation, such as periodicals and reports addressing the availability of carbon offsets.

MM-GHG-3 As to construction greenhouse gas (GHG) emissions, prior to the City's issuance of the grading permit, the proposed project applicant shall purchase and retire carbon offsets in a quantity sufficient to offset 100% of the proposed project's construction

emissions (including sequestration loss from vegetation removal) associated with each such grading permit, consistent with the performance standards and requirements set forth below.

First, "carbon offset" shall mean an instrument issued by any of the following: (i) the Climate Action Reserve, the American Carbon Registry, and the Verra (formerly, Verified Carbon Standard); (ii) any registry approved by the California Air Resources Board (CARB) to act as a registry under the state's cap-and-trade program; or (iii) ~~if no registry is in existence as identified in options (i) and (ii), above,~~ then any other reputable registry or entity that issues carbon offsets. Prior to use of option (iii), it shall be demonstrated that the other reputable registry or entity follows accounting, quantification and monitoring protocols, as well as eligibility and procedural performance standards, that are comparable to those used by the registries identified in option (i). For additional information about the protocols and standards referenced in this paragraph, please see the State-approved "Newhall Ranch Greenhouse Gas Reduction Plan," which is included in **Appendix H1** of the EIR. Section IX of the "Newhall Ranch Greenhouse Gas Reduction Plan" outlines the protocols and standards that must be followed in order for a registry and the offsets it issues to qualify under this measure.

Second, consistent with CEQA Guidelines Section 15126.4(c), any carbon offset used to reduce the proposed project's GHG emissions shall be a carbon offset that represents the past reduction or sequestration of one metric ton of carbon dioxide equivalent that is "not otherwise required."

Third, "Project applicant" shall mean NRF Project Owner LLC or its designee.

Fourth, as to construction GHG emissions, prior to the City's issuance of the Proposed Project's grading permit, the proposed project applicant shall provide evidence to the satisfaction of the Development Services Director that the proposed project applicant has purchased and retired carbon offsets in a quantity sufficient to offset 100% of the construction GHG emissions generated by the proposed project, as associated with the grading permit, which total 4,951 MT CO2e.

Fifth, the purchased carbon offsets used to reduce construction GHG emissions shall achieve real, permanent, quantifiable, verifiable, and enforceable reductions.

Sixth, all carbon offsets required to reduce the proposed project's operational emissions shall be associated with reduction activities that are geographically prioritized according to the following locational attributes ~~the project applicant or its designee shall demonstrate, to the satisfaction of the Development Services Director, the following geographic priorities for GHG reduction features, and GHG~~

~~reduction projects and programs~~: (1) project design features/on-site reduction measures, (2) off site within the City, (3) off site within the County of San Diego, (4) off site within the state of California, and (5) off site within the United States, and (6) off site internationally. As listed, geographic priorities would focus first on local reduction ~~features~~ options (including projects and programs that would reduce GHG emissions) to ensure that reduction efforts achieved locally would provide cross-over, co-benefits related to other environmental resource areas, even though the co-benefits are not needed to mitigate impacts to these other environmental resource areas. ~~air quality criteria pollutant reductions within the San Diego Air Basin and to aid in San Diego County jurisdictions' efforts to meet their GHG reduction goals.~~ The applicant or its designee shall first pursue carbon offsets ~~projects and programs~~ locally within the City consistent with this geographic priority strategy~~, to the extent such offset projects and programs are financially competitive in the global offset market~~.

The project applicant or its designee shall submit proof to the City that offsets are unavailable in a higher priority category before seeking offsets from the next lower priority category. The Development Services Director shall issue a written determination that offsets are unavailable in a higher priority geographic category before allowing the Project applicant or its designee to use offsets from the next lower priority category. In considering whether offsets are unavailable, the Development Services Director shall consider the feasibility factors as defined in CEQA Guidelines Section 15364 and information available at the time the grading permit request is submitted, including but not limited to:

- The availability of in-State emission reduction opportunities;
- The geographic attributes of carbon offsets that are listed for purchase and retirement;
- The temporal attributes of carbon offsets that are listed for purchase and retirement;
- The pricing attributes of carbon offsets that are listed for purchase and retirement; and/or,
- Any other information deemed relevant to the evaluation, such as periodicals and reports addressing the availability of carbon offsets.

The mitigation measures thus demonstrate a binding commitment to mitigate GHG emissions subject to detailed performance criteria.

V. Other issues in County CAP Action Ruling

a. County CAP Inconsistency with SANDAG's RTP/SCS

In the County CAP Action, the Court also determined the County's Supplemental EIR failed to adequately analyze the impact of the County CAP on the Regional Transportation Plan/Sustainable Communities Strategy (RTP/SCS) prepared by SANDAG and smart growth policies. In particular, the Court expressed concerns that later-approved "reasonably foreseeable future GPAs" may impact regional plans and were not addressed in the programmatic CAP EIR. Again, this portion of the ruling has no applicability on the North River Farms Project or its EIR.

As discussed above, the ruling in the County CAP Action is not binding on the City. The ruling also addressed issues unique to the scope of the County's environmental analysis. Notably, the Court's concern related to the impact of *subsequent* GPAs approved pursuant to the CAP, as the CAP establishes long-term planning requirements in the County. Such programmatic, plan-level concerns are not relevant here where analysis is of a single project.

Further, unlike the County CAP Action, the North River Farms project EIR *does analyze* project consistency with SANDAG's *San Diego Forward: The Regional Plan* (2015) (which combines and updates the Regional Comprehensive Plan and RTP/SCS), and other regional plans, in EIR Section 4.11.4. This includes a detailed discussion of consistency with smart growth principles. As explained in the EIR, the project would include numerous elements consistent with the RTP/SCS and smart growth principles such as being located adjacent to urbanized areas; providing a variety of housing choices in proximity to employment centers; providing a variety of travel choices through interconnected sidewalks and trails; and including a central Village Core with mixed uses. The North River Farms EIR accordingly determined the project is consistent with such regional policies.

The project's GHG mitigation commitment to net zero emissions further ensures the project will be consistent with the GHG reductions sought by the Regional Plan. The Regional Plan seeks to achieve *GHG emissions* reduction targets; there are no targets for VMT reductions.[15] In fact, large future GHG emissions reductions can and are anticipated in the Regional Plan to be achieved without proportionate reductions in VMT. The project's commitment to net zero GHG emissions ensures the project would result in no net increase in GHG emissions from the baseline and future conditions evaluated in the Regional Plan.

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[15] See, Final EIR Appendix K-1, Responses to Comments on the Draft EIR, San Diego Forward: the Regional Plan (September 29, 2015), available at http://www.sdforward.com/pdfs/EIR_final/Appendix%20K%20Responses%20to%20Comments.pdf. [Master Response 4].

In terms of regional transportation, it is notable that one adverse environmental consequence of the regional and local housing shortage is the documented inter-regional commute patterns of San Diego County employees that reside in Riverside County.[16] It is estimated that, as of 2015, more than 58,000 workers commuted *from* Riverside County to the County of San Diego for employment.[17] This includes approximately 11,477 commuting from Riverside County to coastal North County areas, including the City of Oceanside.[18] Assuming those workers commute to the County five days per week from Temecula (the city in Riverside County most proximate to the San Diego County line), Riverside County commuters result in a significant excess of vehicle miles traveled, metric tons of carbon dioxide equivalents and hours of travel time. Therefore, development of housing in closer proximity to North County employment centers in and adjacent to the City will have an additional beneficial impact on regional VMT and transportation.

b. County CAP Inadequate Evaluation of Project Alternatives

The trial court also found that the County's program level EIR failed to adequately evaluate project alternatives where the petitioners had "asked for an alternative land use plan to reduce VMT." As above, this portion of the ruling addresses issues unique to the scope and adequacy of County's environmental analysis. It is neither binding on, nor applicable to, the City or North River Farms project.

The North River Farms project EIR evaluated a reasonable range of feasible project alternatives in Chapter 7, Alternatives. Six alternatives to the project were considered and identified for their ability to "avoid or substantially lessen any of the significant effects of the project." (Guidelines, § 15126.6, subd. (a).) Evaluation of an alternative plan to reduce VMT does not meet the requirement for discussion of alternatives here as it would not lessen any of the significant effects of the project. The North River Farms EIR found the project would have a less than significant impact in terms of Land Use and Planning, including the finding that the project is consistent with SANDAG regional policies. The CEQA Guidelines do not require the use of a VMT metric to analyze transportation impacts until July 1, 2020; thus, project transportation impacts were not analyzed pursuant to this metric for purposes of making a significance determination. (Guidelines § 15064.3.)

Further, the project incorporates numerous transportation demand management and project design features (including alternative transportation, transit, and mixed use features) that would

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[16] See, e.g., ABC 10 News, San Diego, "Making it in San Diego: SD police officers can't afford housing, commuting from Riverside County" (January 22, 2019), available at https://www.10news.com/news/making-it-in-san-diego/making-it-in-san-diego-sd-police-officers-cant-afford-housing-commuting-from-riverside-county.

[17] U.S. Census Bureau, OnTheMap Application and LEHD Origin-Destination Employment Statistics (2015).

[18] See, Market Analysis for Newland Sierra Project Final EIR, dated April 27, 2018, at page 20, available at https://www.sandiegocounty.gov/content/dam/sdc/pds/ProjectPlanning/NS/NSFEIR/NSapp/Market%20Analysis.pdf

result in substantially reduced VMT compared to existing City and regional averages. The project would also reduce all impacts except from growth inducement and certain traffic impacts to less than significant levels through mitigation. Accordingly, the project takes into account VMT and, in addition to mitigating significant project impacts, incorporates features to achieve VMT reductions.

VI. Conclusion

For the reasons detailed above and in the EIR for the North River Farms project, the trial court's ruling on the County's CAP Action does not impose any restriction on the project or its use of carbon offsets as part of a portfolio of mitigation measures used to achieve net zero greenhouse gas emissions (GHGs).

Sincerely,

Mark J. Dillon
of
Gatzke Dillon & Balance LLP

Brian Grover
of
Dudek

cc: John Mullen, City Attorney