Golden Gate University Environmental Law Journal

Volume 12 | Issue 1 Article 6

July 2020

VERTICAL CONSISTENCY IN THE CLIMATE CHANGE CONTEXT

Susan M. Bradford
Golden Gate University School of Law

VERTICAL CONSISTENCY IN THE CLIMATE CHANGE CONTEXT

SUSANN M. BRADFORD, ED. D.[1]

I. INTRODUCTION

Climate change is a critical issue for communities throughout California, our nation, and the world. While specific impacts vary regionally and locally, many cities and counties are beginning to feel the heat from one or more effects of global warming. From increasing urban heat and wildfire risk, to sea-level rise and extreme flooding, the growing evidence of climate change is galvanizing broad demand for political action and practical solutions. While action and initiative is needed at many levels, local governments have an important part to play by virtue of their central role in land-use planning, which is essential to effecting climate mitigation and adaptation at the local level.[2] For advocates seeking to advance local solutions, legal tools and strategies continue to evolve in response to new statewide mandates and legal precedents.

In a recent case in San Diego County Superior Court, petitioners made the novel argument that the county's climate action plan ("CAP") should be set aside because it was inconsistent with the county's general plan.[3] The Superior Court agreed, extending the principle of vertical consistency with general plans to encompass a local climate action plan for the first time.[4] While this case is now on appeal and it remains to be seen whether the appellate court will affirm the lower court's ruling, the

[1] Susann Bradford, Ed. D., is a third-year Honors Lawyering Program student with Environmental Law and Public Interest Law Distinctions at Golden Gate University School of Law, graduating in May of 2021.

[2] STATEWIDE ENERGY EFFICIENCY COLLABORATIVE ("SEEC"). STATE OF LOCAL CLIMATE ACTION: CALIFORNIA 2016, 4 (2016), https://californiaseec.org/wp-content/uploads/2016/10/State-of-Local-Climate-Action-California-2016_Print.pdf.

[3] Minute Order, *4. *Golden Door Properties LLC v. Cty. of San Diego*. Case No. 37-2018-00013324-CU-TT-CTL (Cal. Super. San Diego, December 24, 2018). This case was consolidated with *Sierra Club v. County of San Diego*, Case No. 37-2018-00014081 and prior case, *Sierra Club v. County of San Diego*, Case No. 2012-101054 [hereinafter Minute Order, *Golden Door II*].

[4] *Id*. at *12-13.

use of general plan consistency in the climate change context invites further consideration of how this might be applied in future climate litigation.

As communities respond to changing climate conditions and climate-related mandates, several factors suggest that general plans are likely to incorporate more climate-related policies and goals. If so, vertical consistency could be emerging as an increasingly important legal tool for advancing climate mitigation and adaptation. This is because city and county general plans provide a template for community growth and development, which may place enforceable restrictions on local land use, including the development of private property.[5] Such plans are by definition forward-looking documents that enable a community to anticipate and avert potential conflicts and unintended consequences by setting clear goals and priorities to guide future projects[6] — including development projects that could increase or decrease the community's carbon footprint or preparedness for coping with changing conditions.[7] Thus for communities undertaking to adapt to the reality of climate change, local general plans may provide a key instrument for defining achievable shared long-term goals for reducing greenhouse gas ("GHG") emissions and advancing climate smart development.

The enforceability of general plans is tied to the idea of *vertical consistency*, which describes a state of alignment between general plan provisions and other local land use measures,[8] such as zoning designations, special area plans, transportation plans, proposed development projects — and now climate action plans. In California, vertical consistency is mandated by state law to assure that local zoning and new development projects mirror the goals and objectives set forth by the community in properly approved general plans.[9] This allows the general plan to function as a "constitution" for local land use and development within its jurisdictional boundaries.[10] Thus, when a local general plan contains clear, mandatory goals for advancing climate mitigation or ad-

---

[5] "[T]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 570-71 (1990) (citing *Resource Def. Fund v. Cty. of Santa Cruz*, 133 Cal. App. 3d 800, 806 (1982)).

[6] D. Dwight Worden, Cal. Env. Law § 62.02 (2010).

[7] *See* California Air Resources Board ("CARB"), California's 2017 Climate Change Scoping Plan ("2017 Scoping Plan"), at 99-100 (November 2017), https://ww3.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf.

[8] Worden, *supra* note 6, § 62.06.

[9] *See* Cal. Gov't Code § 65359.

[10] *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 782 (1965); 58 Ops. Cal. Atty. Gen 21 (1975).

aptation, this provides an enforceable standard for future development proposals.

Although vertical consistency has not been a prominent issue in climate advocacy to date, this could change as California's evolving response to climate change continues to place new requirements on local communities. Many local governments have voluntarily developed CAPs and other strategies to reduce GHG emissions to meet statewide goals, while others have adopted such measures as the result of litigation.[11] After the California Environmental Quality Act ("CEQA") was amended in 2010, general plan approval began to require analysis of community-wide GHG emissions to establish baselines, targets, and mitigation policies to meet statewide goals.[12] As a result of these factors, more local governments have added climate mitigation measures to their general plans to comply with CEQA and align with statewide GHG emission goals.[13]

This paper explores the role of general plan consistency in the context of climate change. As California's statewide response to global warming continues to evolve, new statutory and regulatory requirements are changing the scope of local land use planning, both directly and indirectly. The San Diego case provides one example of how this changing legal framework has led to new kinds of land use conflicts over competing strategies for climate mitigation. The growing imperative for local governments to rethink land uses in response to climate change could signal a larger role for general plan consistency as a lever for enforcing compliance.

II. A Tale of Two Plans

The dispute in San Diego involves inconsistencies between policies within the county's general plan and policies within its climate action plan.[14] Which policy prevails will have a direct bearing on how the county responds to new development proposals within the unincorporated sections of the county, including proposals for new housing subdivisions or new commercial centers outside of established residential areas and transportation corridors. Notably, neither of the county's poli-

[11] SEEC, State of Local Climate Action: California 2016, *supra* note 2, at 7; *See also Sierra Club v. Cty. of Tehama*, No. C066996, 2012 WL 5987582, at *26-27 (Cal. Ct. App. Nov. 30, 2012) (unpublished).

[12] *Id*. *See also* SB 97, 2007 Cal. Stat. 185.

[13] Governor's Office of Planning and Research ("OPR"), California Jurisdictions Addressing Climate Change (June 17, 2014), https://www.ca-ilg.org/sites/main/files/file-attachments/california_jurisdictions_addressing_climate_change_pdf_0.pdf.

[14] Minute Order, *Golden Door II*, *supra* note 3, at *12-13.

cies existed until California enacted new statewide mandates requiring analysis of GHG emissions during environmental review of general plans and development projects.[15] Accordingly, some background on California's response to climate change is necessary to understand how this relates to general plans and climate action plans. As a preliminary matter, however, it will be helpful to first note some key distinctions between these two types of plans.

A. Local Land Use and Climate Action Plans

Cities and counties have a critical role in formulating and implementing local responses to climate change. Local land use planning affects everything from housing and transportation to commercial development, resource conservation, waste management, and recreation.[16] As California's communities respond to climate change, traditional land use planning has expanded to include targets and strategies for reducing GHG emissions and strategies for adapting to changing conditions.[17] The plans and decisions made by California's 482 cities and 58 counties in coming years will have a major impact on whether communities succeed in reducing GHG emissions and achieving climate resilience.[18]

Municipal responses to climate change began in the 1990s with pilot projects to develop and promote CAPs.[19] Even before California enacted the Global Warming Solutions Act of 2006, dozens of cities were already leading the way to inventory and reduce GHG emissions.[20] By 2014, over 200 of California's local governments had either adopted CAPs or were in the process of developing one, while 168 jurisdictions had either adopted or were developing GHG reduction policies or implementation measures within their general plans.[21] Many of these jurisdictions, including the County of San Diego, had adopted or were developing climate mitigation measures using both types of plans.[22]

---

[15] Minute Order, at *6. *Sierra Club v. Cty. of San Diego*, Case No. 37-2012-00101054-CU-TT-CTL (Cal. Super. San Diego, April 19, 2013) [hereinafter "Minute Order, *Sierra Club (2013)"*].

[16] "Land use decisions affect GHG emissions associated with transportation, water use, wastewater treatment, waste generation and treatment, energy consumption, and conversion of natural and working lands." CARB, 2017 Scoping Plan, *supra* note 7, at 100.

[17] OPR, General Plan Guidelines: 2017 Update, 222 (2017), http://opr.ca.gov/planning/general-plan/guidelines.html.

[18] SEEC, State of Local Climate Action: California 2016, *supra* note 2, at 5.

[19] *Id*. at 15.

[20] *Id*. at 17.

[21] OPR, California Jurisdictions Addressing Climate Change, *supra* note 13, at 1-11.

[22] *Id*.

This raises a question as to why a city or county would choose one approach over the other or pursue both. In fact, the differences between CAPs and general plans are substantial. CAPs were invented in the 1990's for the specific purpose of reducing GHG emissions, while general plans emerged as the cornerstone of comprehensive land use planning in the 1970s. While both can be useful vehicles for advancing a community's climate mitigation goals, understanding the differences between them is necessary to appreciate the relative utility of each.

B. Local Land Use Planning

The authority of local governments to restrict land uses in order to advance public interests was established nearly a century ago in the seminal case, *Village of Euclid, Ohio v. Ambler Realty Company ("Euclid")*.[23] The Supreme Court affirmed that municipal zoning ordinances may limit private land uses where this is reasonable and substantially related to advancing "the public health, safety, morals or general welfare."[24] The *Euclid* court also noted that what constitutes reasonable regulation necessarily varies with changing societal needs and conditions, and must also consider the specific local needs and conditions.[25] This remains relevant today, as changing conditions underscore the clear public interest of reducing GHG emissions, but decisions about how to accomplish this require consideration of unique local needs and conditions.

While local planning laws and societal conditions have both changed considerably in the century since *Euclid* first envisioned its future as a residential suburb with separate zones for dwelling, shopping, and working, the basic principle that local governments are the proper locus for land use planning remains intact.[26] In response to growing populations and increasing conflicts over land use, reliance on simple zoning ordinances gradually gave way to more long-term planning and the general plan eventually emerged as the cornerstone of local land use planning.[27]

In California, each city and county is required to adopt "a comprehensive, long-term general plan" to guide the development of physical land uses within its jurisdiction.[28] Since 1974, state law has required

[23] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

[24] *Id*.

[25] *Id*. at 387-88.

[26] More recently, for example, in *Constr. Indus. Ass'n of Sonoma Cty. v. City of Petaluma*, 522 F.2d 897, 909-10 (9th Cir. 1975), the court found that a city plan restricting residential growth and promoting infill was a reasonable measure advancing a legitimate interest in the public welfare.

[27] Worden, *supra* note 6, § 62.02.

[28] Cal. Gov't Code § 65300.

local zoning ordinances and subdivision maps to be consistent with local general plans.[29] As stated in the Government Code, "any specific plan or other plan of the city or county that is applicable to the same areas or matters affected by a general plan amendment shall be reviewed and amended as necessary to make the specific or other plan consistent with the general plan."[30] This vertical consistency requirement was later extended to include other local plans and interpreted by California courts to encompass local public works projects.[31]

Under California law, general plans are also required to address several mandatory elements, including land use, circulation, housing, conservation, open space, noise, and safety.[32] Jurisdictions with disadvantaged communities will also be required to add an environmental justice element, pursuant to recent legislation.[33] Thus, in addition to setting goals for growth and development, a general plan must consider how land uses interact with one another and relate to broader public interests as well as the needs and interests of the local community. A general plan must also be *horizontally* consistent, or internally consistent, in the sense that housing objectives, for example, cannot be at odds with conservation objectives, and so on.[34] General plans should also be updated periodically to reassess community needs and goals in light of changing conditions,[35] and to maintain legal sufficiency for project approval.[36] Except for the housing element and some specific provisions within the public safety element, however, general plan updates are not strictly mandated.[37]

Adopting a general plan is a legislative act of the local government.[38] As such, approval of general plans also requires a public process with substantial opportunities for public involvement and public hearings.[39] This promotes a democratic process that protects the rights of

---

[29] Cal. Gov't Code § 65860; Worden, Cal. Env. Law §§ 62.02, 62.06.

[30] Cal. Gov't Code § 65359.

[31] WORDEN, *supra* note 6, § 62.02, citing *Friends of B Street v. City of Hayward*, 106 Cal. App 3d 988. 997 (1980). *See also Orange Citizens for Parks & Recreation*, 2 Cal. 5th 141, 153 (2016), stating, "the requirement of consistency . . . infuse[s] the concept of planned growth with the force of law" (citing *deBottari v. City Council*, 171 Cal.App.3d 1204, 1211 (1985)).

[32] OPR, GENERAL PLAN GUIDELINES, *supra* note 17, at 39; *See also* Cal. Govt. Code § 65302.

[33] SB 1000, 2016 Cal. Stat. 587 (effective January 1, 2018). *See also* Gov't Code § 65302(h) requiring cities and counties with disadvantaged communities to adopt this element "upon the adoption or next revision of two or more elements concurrently on or after January 1, 2018."

[34] WORDEN, *supra* note 6, § 62.06.

[35] Cal. Gov't Code § 65040.5.

[36] Douglas P. Carstens, *General Plans: Are These Mandatory Laws and Interesting Guidelines Ready for Their Close-Up?*, 2011 CAL. ENVTL. REPORTER 572, 574-75 (2011).

[37] Cal. Gov't Code §§ 65302(g) and 65588(e).

[38] Cal. Gov't Code § 65301.5.

[39] WORDEN, *supra* note 6, § 62.09.

people to participate in planning decisions that may affect them for years to come. Proposed plans must be circulated to the general public as well as public agencies, tribes, and other stakeholders to assure adequate opportunities for public comment.[40] Public hearings are required both at the draft stage and again before final adoption by a city council or board of commissioners.[41]

While cities with independently enacted charters ("charter cities") are exempted from many of these state law requirements, they must still enact general plans addressing all of the mandatory elements.[42] Charter cities are also required to comply with most horizontal and vertical consistency requirements.[43] Other requirements, however, may vary from one charter city to the next, as based on local charters.

C. Comprehensive Approach to Low-Carbon Land Use

From a climate mitigation standpoint, several features of general plans make them an important focal point for comprehensive planning to reduce local GHG emissions. The mandatory elements framework, for example, could allow climate goals to be considered in relation to a full range of community needs and interests. In addition, the requirement for internal consistency provides an incentive for identifying potential conflicts between climate and other land use goals early in the process, when public input can be sought to inform priorities and generate additional options. Climate related goals and policies that are fully integrated into a general plan may also have the advantage of becoming enforceable through vertical consistency.

Opportunities for public involvement are also important in the climate change context. Because reducing GHG emissions and adapting to changing risks may require people to change behaviors and forego some land uses that were reasonable under past conditions, the opportunity to develop climate solutions in forums that promote broad public access and involvement is critical. Opportunities for public participation can also provide an important source of knowledge and resources for problem solving, and an open public process can promote collaboration and buy-

[40] Cal. Gov't Code § 65351.

[41] Cal. Gov't Code § 65355.

[42] Cal. Gov't Code § 65700(a).

[43] Cal. Gov't Code § 65700(b) provides that §§ 65300.5 (horizontal consistency), 65359 (vertical consistency of other local plans), 65454 (special plans), and 65455 (consistency within special plans) apply to charter cities. In addition, § 65860(d) provides that vertical consistency between zoning ordinances and general plans extends to charter cities.

in.[44] The local nature of general plans also makes them well suited for accommodating unique features of place, such as cultural values, geographic features, ecology, and local history.[45] Public involvement creates an opportunity to tailor community strategies for reducing GHG emissions in ways that preserve important local values.

While there is no direct mandate requiring communities to add a climate change element to general plans, amendments to CEQA require analysis of GHG emissions in conjunction with the environmental review and approval of general plan updates and amendments.[46] This has led some local governments, including San Diego County, to adopt GHG mitigation policies into their general plans in order to comply with CEQA. Under CEQA Guidelines § 15183.5, communities that incorporate a sufficient GHG analysis into general plans may thereby qualify for streamlined GHG analysis of subsequent projects.[47] This provides an additional incentive for communities to address GHG emissions more fully within their general plans.

D. Climate Action Plans

In contrast to comprehensive general plans, climate action plans are narrowly focused on the singular purpose of GHG reduction, but this also relates to a wide range of community land uses. A CAP is the community's roadmap for achieving GHG emissions reductions.[48]

The development of CAPs has enabled many local governments to make substantial reductions in GHG emissions.[49] While multiple models have been developed to aid cities in conducting GHG emissions inventories and identifying strategies for achieving reductions, the basic idea is fairly straightforward.[50] CAPs are typically generated by following a five-step planning framework that consists of (1) calculating baseline GHG emissions, (2) setting goals, (3) selecting strategies for reducing

---

[44] Public access to land use planning decisions is generally held to be in the public interest. Case studies also illustrate practical benefits for problem solving. *See e.g.*, James E. Crowfoot & Julia M. Wondolleck, Environmental Disputes: Community Involvement in Conflict Resolution (Island Press) (1992).

[45] As the *Euclid* court noted, local land use should consider local needs and conditions. *Village of Euclid*, 272 U.S. at 387-88.

[46] SB 97 of 2007 mandated GHG emissions analysis as part of CEQA review. 2007 Cal. Stat 185.

[47] OPR, General Plan Guidelines, *supra* note 17, at 225.

[48] SEEC, State of Local Climate Action: California 2016, *supra* note 2, at 23; *see also* Institute for Local Government, "Climate Action" (2015), https://www.ca-ilg.org/climate-action-plans.

[49] SEEC, State of Local Climate Action: California 2016, *supra* note 2, at 17-18.

[50] OPR, General Plan Guidelines, *supra* note 17, at 223.

GHG emissions, (4) implementing strategies, and (5) monitoring and evaluating results.[51] Then a report can be generated and the cycle starts over again.

While simple enough in concept, calculating an accurate baseline of community-wide GHG-emissions is a formidable task requiring a comprehensive inventory and quantification of GHG emission sources throughout the community.[52] Fortunately, in the years since the first pilot studies began in the 1990s, several organizations have developed tools and resources to aid cities and counties in this process.[53] For example, the Statewide Energy Efficiency Collaborative ("SEEC") has partnered with state agencies to provide free access to the ClearPath California Tool, which utilizes widely accepted protocols for community scale GHG inventories.[54] Similarly, increasingly sophisticated tools and resources are available to aid local governments in estimating the probable reductions in GHG emissions to be achieved by implementing various strategies.[55] These resources make the difficulty of formulating a CAP surmountable.

Accordingly, CAPs provide a useful framework for communities looking to reduce their GHG emissions. While CAPs are not mandatory, several state agencies now encourage their use.[56] Like general plans, CAPs that comply with CEQA Guidelines § 15183.5 also may qualify for streamlined GHG analysis of subsequent projects that are consistent with the analysis and mitigation strategies set forth in the CAP.[57] This provides an additional incentive for adopting CAPs by reducing the burden of GHG emissions analysis required for project-level proposals. However, in order for a CAP to qualify for this benefit, a plan-level Environmental Impact Report ("EIR") is necessary.[58]

In light of these features, some potential advantages of utilizing CAPs to achieve climate mitigation goals at the local level include (1) a clear focus on GHG mitigation, (2) examples that demonstrate effectiveness, (3) availability of technical resources, and (4) the opportunity to qualify for CEQA streamlining. On the downside, the narrow focus on

---

[51] SEEC, STATE OF LOCAL CLIMATE ACTION: CALIFORNIA 2016, *supra* note 2, at 16.

[52] *See Climate Action Resource Guide*, https://coolcalifornia.arb.ca.gov/local-government/toolkit.

[53] *See* ICLEI USA: Local Governments for Sustainability, https://icleiusa.org/ghg-protocols/.

[54] OPR, GENERAL PLAN GUIDELINES, *supra* note 17, at 223; *see also* SEEC, ClearPath California, https://californiaseec.org/seec-clearpath/.

[55] *See* CoolCalifornia.org, *Local Government*, https://coolcalifornia.arb.ca.gov/local-government.

[56] Agencies endorsing CAPs include CARB, OPR, and the Natural Resources Agency ("CNRA").

[57] *See* OPR, GENERAL PLAN GUIDELINES, *supra* note 17, at 226-32.

[58] *Id*.

GHG mitigation may require an extra effort to assure consistency between CAPs and other local plans, and CEQA equivalent environmental review is necessary for a plan to qualify for tiering and streamlining.[59]

A community may thus address climate mitigation goals within its general plan or by developing a CAP. Whether to use one or the other, or both, is likely to be informed by a variety of circumstances, including whether broader reasons exist to warrant a general plan update. Communities' reasons for reducing GHG emissions also vary. While some local governments led the way by piloting CAPs and reducing GHG emissions voluntarily, others have done so only as a result of state mandates.

III. California's Evolving Climate Change Response

In order to contextualize how land use planning fits into California's evolving legal framework for responding to climate change, a brief overview of some key statutes will be helpful. Some measures have a more direct influence on local land use planning than others, so those will be the principal focus for the present inquiry. Four, in particular, merit special consideration in this context; (1) Assembly Bill ("AB") 32 of 2006 initiated statewide planning for climate mitigation,[60] (2) Senate Bill ("SB") 97 of 2007 amended CEQA to require analysis of GHG emissions,[61] (3) SB 375 of 2008 created a regional planning framework,[62] and (4) Executive Order No. S-13-08 of 2008 initiated statewide planning for climate adaptation.[63] Some additional climate legislation affecting general plan elements will also be considered in this context.[64]

A. Climate Mitigation Stategy

In 2005, climate mitigation became "an official policy of the State of California," when Executive Order No. S-3-05 ("EO S-3-05") established a statewide goal to reduce GHG emissions to 80% below 1990 levels by 2050.[65] Soon after, the legislature enacted the landmark AB 32 of 2006, The California Global Warming Solutions Act, setting in motion

[59] CEQA Guidelines § 15183.5(b)(1)(F).

[60] AB 32: The California Global Warming Solutions Act of 2006, 2006 Cal. Stat. 488.

[61] SB 97: An act to add Section 21083.05 to, and to add and repeal Section 21097 of, the Public Resources Code, relating to the California Environmental Quality Act. 2007, Cal. Stat. 185.

[62] SB 375, 2008 Cal. Stat. 728.

[63] Governor of the State of California, Executive Order S-13-08 (November 14, 2008), https://wayback.archive-it.org/5763/20090411141553/; http://gov.ca.gov/index.php?/executive-order/11036/.

[64] SB 379, 2015 Cal. Stat. 608, amended the general plan safety element.

[65] *Sierra Club v. Cty. of San Diego*, 231 Cal. App. 4th 1152, 1157 (2014) (quoting Attorney General).

a comprehensive statewide effort to meet this ambitious goal.[66] More legislation followed and today the state continues to update and refine its climate framework.

AB 32 directed the State Air Resources Board ("CARB") to launch a massive Scoping Plan to develop a statewide strategy for reducing GHG emissions to 1990 levels by 2020.[67] CARB's initial effort culminated in the *2008 Climate Change Scoping Plan* ("2008 Scoping Plan"), which provided a roadmap for additional statutes and regulations to address distinct types of GHG sources, development sectors, and industries.[68] This informed a wave of legislation creating targets and programs to advance renewable energy, low-carbon fuels, energy efficient vehicle standards, green building standards, and more.[69] The 2008 Scoping Plan also recognized the contribution of local CAPs and the importance of local land use and development decisions in achieving statewide goals, noting that "(m)any of the proposed measures to reduce greenhouse gas emissions rely on local government actions."[70] In particular, it noted, local land use decisions "will have large impacts on the greenhouse gas emissions that will result from the transportation, housing, industry, forestry, water, agriculture, electricity, and natural gas sectors."[71] CARB encouraged local governments to track GHG emissions and set local GHG reduction goals in alignment with statewide goals. It also committed to developing additional tools and resources to assist local governments in these undertakings.[72]

AB 32 also authorized CARB to develop a phased "cap-and-trade" program to help qualified entities achieve compliance with GHG reduction targets through the purchase of offset credits from approved programs.[73] This program requires that any GHG reductions obtained by purchasing offsets must be "real, permanent, quantifiable, verifiable, and enforceable" by CARB, and "in addition to" any direct GHG reductions.[74] Notably, the scope of this provision is disputed in the San Diego

---

[66] AB 32, 2006 Cal. Stat. 488.

[67] CARB, *Facts About California's Climate Plan* (September 25, 2010), https://ww3.arb.ca.gov/cc/cleanenergy/clean_fs2.htm.

[68] CARB, Climate Change Scoping Plan: A framework for change ("2008 Scoping Plan") (December 2008), https://ww3.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf.

[69] *See generally* CARB, 2017 Scoping Plan, *supra* note 7.

[70] CARB, 2008 Scoping Plan, *supra* note 68, at 26-27.

[71] *Id*.

[72] *Id*.

[73] CARB, Process for the Review and Approval of Compliance Offset Protocols in Support of the Cap-and-Trade Regulation (May 2013), https://ww3.arb.ca.gov/cc/capandtrade/compliance-offset-protocol-process.pdf.

[74] Cal. Health and Safety Code § 38562(d)(1) and (2).

case, where the County contends that these conditions do not apply to offsets used to mitigate GHG emissions under CEQA.[75]

The enactment of AB 32 also triggered litigation to enforce the state's new official policy. In April 2007, the Attorney General sued the County of San Bernardino alleging CEQA violations for "failing to analyze the impact of the county's general plan on climate change."[76] This action put cities and counties on notice that the state was serious about requiring local governments to reduce GHG emissions.[77] While the case eventually settled out of court, San Bernardino agreed to create a GHG emissions reduction plan, which became a model for other local governments to follow when updating general plans.[78]

B. CEQA Review of GHG Emissions

In 2007, the legislature passed another major climate statute, SB 97, amending the Public Resource Code to require all CEQA environmental review documents to analyze potential impacts on GHG emissions.[79] SB 97 directed the Governor's Office of Planning and Research ("OPR") and the Natural Resource Agency ("CNRA") to develop and promulgate new CEQA Guidelines to address GHG emissions analysis.[80] This caused another ripple in the force, as lead agencies and local governments across the state had to begin examining GHG emissions in every CEQA review document. This required significant new work to determine baseline emission levels and appropriate thresholds of significance, and to estimate the probable GHG emissions of proposed projects.[81]

---

[75] County of San Diego's Opening Brief, *15-16, *Sierra Club v. Cty. of San Diego*, Case No. D075478, 2019 WL 3457739 (Cal. App. 4th, July 25, 2019) [hereinafter CSD, Opening Brief in 2019 Appeal].

[76] *Sierra Club v. Cty. of Tehama*, *26, Case No. C066996, 2012 WL 5987582 (Cal. Ct. App. Nov. 30, 2012). *See also* Petition for Writ of Mandate, at ¶ 31, *California v. San Bernardino Cty.*, No. 07-00329 (Cal. Super Ct. April 13, 2007), https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/SanBernardino_complaint.pdf.

[77] State of California Department of Justice, *Brown Announces Landmark Global Warming Settlement* (August 21, 2007), available at https://oag.ca.gov/news/press-releases/brown-announces-landmark-global-warming-settlement.

[78] *Id.*; *See also Cty. of Tehama*, *27, Case No. C066996, 2012 WL 5987582 (Cal. Ct. App. Nov. 30, 2012).

[79] SB 97 of 2007, Cal. Stat. 185.

[80] CNRA, "California Environmental Quality Act ("CEQA"): Supplemental Documents," https://resources.ca.gov/About-Us/Legal/CEQA-Supplemental-Documents.

[81] CNRA, 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), https://resources.ca.gov/CNRALegacyFiles/ceqa/docs/Final_Statement_of_Reasons.pdf. *See also*, § 8:17 Determination regarding significance of project's environmental effect, Cal. Civ. Prac. Environmental Litigation § 8:17.

As might be expected, a wave of CEQA litigation followed, as some parties challenged the new regulations and others sought to use them to challenge project approvals or to advance stronger GHG mitigation measures.[82] This in turn has generated a growing body of common law decisions interpreting the statutory and regulatory requirements. Litigated issues include how to establish GHG emission baselines, how to determine thresholds of significance, and how to estimate GHG emissions from projects and plans, as well as many procedural aspects of CEQA.[83]

C. Regional Planning for Sustainable Development

California's next major climate statute was SB 375, the Sustainable Communities and Climate Protection Act of 2008.[84] This modified the state's regional transportation planning framework to integrate regional transportation plans with statewide climate mitigation targets and local housing needs.[85] SB 375 directed the state's eighteen Regional Transportation Agencies ("RTAs") and metropolitan planning organizations ("MPOs") to develop "sustainable community strategies" ("SCSs") aimed at achieving regional GHG emissions reductions targets.[86] SCS plans are required to align with Regional Housing Needs Assessments ("RHNA") in order to facilitate integrated housing and transportation planning that prioritizes housing developments that advance GHG reduction goals.[87] By encouraging urban infill and developments located near public transit systems, cities can address housing needs in a way that minimizes any increased driving, or vehicle miles travelled ("VMT"), a major source of GHG emissions.[88] SB 375 also mandated streamlined CEQA review for housing and transportation projects found to be consistent with an SCS.[89] Later statutes expanded CEQA streamlining for

[82] For overview of precedential cases, *see Final Statement of Reasons for Regulatory Action Amendments to the State CEQA Guidelines*, at 17-21, OAL Notice File No. Z-2018-0116-12 (November 2018), https://resources.ca.gov/CNRALegacyFiles/ceqa/docs/2018_CEQA_Final_Statement_of%20Reasons_111218.pdf.

[83] *See e.g., Friends of Oroville v. City of Oroville*, 219 Cal. App. 4th 832, 841-42 (2013), examining whether statewide threshold of significance standards applied to specific projects; *see also*, *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 62 Cal. 4th 204, 227 (2015), clarifying methods for evaluating project-level GHG emissions reductions.

[84] SB 375, 2008 Cal. Stat. 728. The popular title, "Sustainable Communities and Climate Protection Act," was added by SB 575 of 2009 (Cal. Stats. 2009, Ch. 354).

[85] Cal. Gov't Code § 65080 (b)(2). *See also* Sarah Mawhorter, et al., California's SB 375 and the Pursuit of Sustainable and Affordable Development, 5, Terner Center, Univ. of Cal. (July 2018).

[86] Cal. Gov't Code § 65080 (b)(2). Regional targets must be approved by CARB.

[87] Mawhorter, et al., *supra* note 85, at 5, 7-9.

[88] CARB, 2008 Scoping Plan, *supra* note 63, at 47-51.

[89] SB 375, Sec. 14, 2008 Cal. Stat. 728. *See also* Mawhorter, et al., *supra* note 85, at 5.

qualified urban infill projects and mixed-use developments.[90] This includes SB 226 of 2011, which introduced the provision allowing general plans or CAPs to facilitate streamlined GHG emissions analysis for subsequent consistent projects.[91]

Notably, an SCS is not a land use plan and regional planning organizations have no direct authority to implement development projects that align with regional goals.[92] Local governments retain primary responsibility for land use planning and SB 375 states plainly that "nothing in a sustainable communities strategy shall be interpreted as superseding the exercise of the land use authority of cities and counties within the region."[93] Similarly, local general plans are not required to be consistent with the regional SCS, although CEQA documents are required to discuss any inconsistencies between proposed projects and regional plans.[94]

The regional planning framework provides an additional layer of regional coordination and technical support to assist local governments in identifying and evaluating feasible options for sustainable, low-carbon growth and development.[95] However, local governments may fail to take advantage of these resources. Critics have pointed to the limited impact of the program on meeting housing needs, noting the slow pace of planning cycles, lack of accountability measures, and technical hurdles that outweigh modest incentives.[96] On the other hand, increasing regional collaboration and support is still likely to assist communities in achieving long-term goals, and additional refinements to these programs may improve housing outcomes.

D. Climate Adaptation Strategy

In 2008, Executive Order No. EO S-13-08 directed CNRA to produce a statewide climate adaptation strategy.[97] It also directed state agencies to identify and address impacts of sea-level rise.[98] This initiated another statewide planning effort to identify climate change related

[90] SB 226, 2011 Cal. Stat. 469, adding Cal. Pub. Res. Code § 21094.5; SB 743, 2013 Cal. Stat. 386, added Cal. Pub. Res. Code § 21099.

[91] Cal. Pub. Res. Code § 21094.5.

[92] Cal. Gov't Code § 65080 (b)(2)(K).

[93] *Id*.

[94] *Id*. In addition, for CEQA requirements, *see* Cal. Code Regs. tit. 14, § 15125 (d).

[95] CARB, 2008 Scoping Plan, *supra* note 68, at 47-51; Mawhorter, et al., *supra* note 85, at 12-20.

[96] Mawhorter, et al., *supra* note 85, at 22-24.

[97] CNRA, Safeguarding California Plan: 2018 Update, at 16 (January 2018), https://resources.ca.gov/ CNRALegacyFiles/docs/climate/safeguarding/update2018/safeguarding-california-plan-2018-update.pdf.

[98] *Id.*

threats to California's communities, infrastructure, and economy, and to develop strategies for addressing these.[99] CNRA's initial efforts produced the *2009 California Climate Adaptation Strategy*, outlining preliminary strategies for addressing threats to public health, biodiversity and habitat, oceans and coastal resources, water supply, agriculture, forestry, and transportation and energy.[100]

The 2009 strategy identified the integration of local land use planning and climate adaptation planning as a key strategy for achieving statewide goals, and called for the "long-term vision and development goals of general plans [to] address climate change as soon as possible."[101] In particular, it recommended integrating climate adaptation goals into regional sustainable community strategies to assure that long-term development plans would consider climate risks.[102] It also encouraged cities and counties to conduct vulnerability assessments to identify high risk areas and infrastructure, including public lands and water resources, in order to prioritize the most critical needs.[103] The plan suggested that general plan amendments could be an important tool for integrating climate adaptation needs into future land use decisions.[104]

CNRA updates in 2014 and 2018 have continued to develop and refine statewide climate adaptation goals.[105] The most recent edition, the *2018 Safeguarding California Plan*, addresses eleven policy areas, including "Land Use and Community Development," and continues to emphasize the important role of local land use planning in advancing climate adaptation goals.[106] This document also notes that amending the mandatory elements framework of general plans is one way to incorporate climate adaptation goals into land use planning.[107] For example, SB 1241 of 2012 requires communities in high risk wildfire zones and state response areas to add fire hazard information and fire response plans to the safety element upon the next update of the housing element.[108]

---

[99] CNRA, 2009 California Climate Adaptation Strategy, at 11-12 (2009), https://resources.ca.gov/ CNRALegacyFiles/ docs/climate/Statewide_Adaptation_Strategy.pdf.

[100] *Id*. at 29.

[101] *Id*. at 24-25.

[102] *Id*. at 24.

[103] *Id*.

[104] *Id*. at 25.

[105] CNRA, Building Climate Resilience (2020), https://resources.ca.gov/Initiatives/Building-Climate-Resilience.

[106] CNRA, Safeguarding California Plan: 2018 Update, *supra* note 97, at 21-23.

[107] *Id*. at 82-83. See recommendation L-3: "Coordinate state laws, regulations, guidelines and policies to promote climate resilience and hazard avoidance and mitigation through local, regional and state planning."

[108] SB 1241, 2012 Cal. Stat. 311; see Cal. Gov't Code § 65302(g)(3).

More recently, SB 379 of 2015 amended the safety element to require general plans to include vulnerability assessments and identify climate risks associated with potential development sites, while SB 1000 of 2016 added a new environmental justice element.[109] CNRA's 2018 plan also proposes making additional changes to the housing element to integrate analysis of climate hazards and mitigation strategies into growth and development plans.[110] These recent and proposed amendments indicate that general plans are likely to incorporate more climate adaptation goals in coming years, which may increase the relevance of vertical consistency as an enforcement lever.

In sum, California's evolving response to climate change includes several elements that impact local land use decisions, and thus could make general plans more important in achieving climate mitigation and climate adaptation goals. Continuing pressure to comply with statewide GHG targets and adopt mitigation measures to achieve CEQA compliance, as well as local initiative, are leading more communities to incorporate climate mitigation policies into general plans. At the same time, new amendments to the mandatory elements of general plans requiring identification of climate related risks to local populations and infrastructure will likely lead more city and counties to incorporate strategies and policies for responding to climate adaptation into general plans. General plans are thus likely to become more instrumental in community responses to climate change, which in turn could make vertical consistency more important as a legal tool for enforcement and accountability.

On a side note, recent updates to statewide planning and guidance documents have made this framework somewhat easier to navigate. CARB's *2017 Climate Change Scoping Plan* updated the state's climate mitigation strategy, while CNRA's *2018 Safeguarding California Plan* updated the state's climate adaptation strategy.[111] CNRA also issued the *2018 CEQA Guidelines*, providing the first comprehensive update since the 1990s.[112] In addition, OPR released *General Plan Guidelines: 2017 Update*, integrating cumulative changes for the first time since 2003.[113]

---

[109] SB 379, 2015 Cal. Stat. 608; SB 1000, 2016 Cal. Stat. 587. *See also* CNRA, SAFEGUARDING CALIFORNIA PLAN: 2018 UPDATE, *supra* note 97, at 82, Recommendation L-3.1.

[110] CNRA, SAFEGUARDING CALIFORNIA PLAN: 2018 UPDATE, *supra* note 97, at 83.

[111] The Climate Change Scoping Plan and The Safeguarding California Plan are both updated triennially. For more information see CARB, AB 32 SCOPING PLAN (January 8, 2018), https://ww3.arb.ca.gov/cc/scopingplan/ scopingplan.htm; CNRA, BUILDING CLIMATE RESILIENCE (2020), https://resources.ca.gov/Initiatives/Building-Climate-Resilience.

[112] CNRA, FINAL STATEMENT OF REASONS FOR REGULATORY ACTION: AMENDMENTS TO THE STATE CEQA GUIDELINES, 2, OAL Notice File No. Z-2018-0116-12 (November 2018), https://resources.ca.gov/About-Us/Legal/CEQA-Supplemental-Documents.

[113] OPR, GENERAL PLAN GUIDELINES, *supra* note 17.

IV. San Diego County's Conflicted Plans for Climate Mitigation

The recent case in San Diego County Superior Court illustrates how California's climate mandates have intersected with land use planning to make vertical consistency relevant to climate mitigation advocacy.[114] As mentioned earlier, the central dispute in this case involves inconsistencies between the climate mitigation policies adopted in San Diego County's general plan and those adopted later in the County's CAP.[115] While the general plan required the County to prepare a CAP to identify strategies for *local* reductions in GHG emissions to meet the statewide goals set forth in AB 32, the CAP actually produced by the county took a different direction. Neither an initial version released in 2012 nor a more recent version released in 2018 has provided the County with a roadmap for reducing its local GHG emissions to the extent required by its general plan.[116] Because the CAP is thus inconsistent with the general plan, the issue of vertical consistency may prove to be an effective argument for holding this local government accountable to its own climate mitigation goals.

To better assess the utility of this argument, a closer look at the case, including its core issues and how the conflict emerged, will be helpful. As noted previously, neither the general plan's climate policies nor the CAP existed prior to the statewide climate mandates outlined above.[117] As discussed below, the County's decision to adopt climate mitigation measures appears to have been strongly influenced by the state's evolving legal framework. Although local governments have substantial authority over local land use decisions, that does not prevent the state from restricting that authority. As the *Euclid* court observed, a local government's authority derives from police powers granted to it by the state.[118] What the state giveth, the state may limit. Environmental laws, for example, may limit local governmental authority by restricting some land uses or by imposing procedural requirements to minimize potential harm to the environment. In this case, the County of San Diego's general plan was limited by the legislature's climate mandates.

---

[114] *Golden Door Properties LLC v. Cty. of San Diego* ("*Golden Door II*"), Case No. 37-2018-00013324-CU-TT-CTL (Cal. Super. San Diego, December 24, 2018).

[115] Minute Order, *Golden Door II*, *supra* note 3, at 4.

[116] *Id*.

[117] Minute Order, *Sierra Club (2013)*, *supra* note 15, at *6.

[118] *Village of Euclid*, 272 U.S. at 395.

A. A Brief History of the San Diego Cap Case

The story of the San Diego CAP dispute begins with the County's approval of a comprehensive update to its general plan in 2011.[119] This was the first comprehensive update since 1978, and thus also the first major update since AB 32 had mandated ambitious new climate mitigation goals.[120] By 2011, SB 97 had also gone into effect, which meant that the County's EIR for the general plan update was required to evaluate the plan's potential impacts on countywide GHG emissions.

The general plan EIR ("PEIR") found that the plan's adverse impacts on climate change were potentially significant and that its cumulative impacts were likely to be significant unless they could be mitigated.[121] After further analysis, the EIR identified a combination of ten policies and nineteen mitigation measures that would enable the County to bring the general plan's GHG emissions impact into compliance with AB 32.[122] Instead of finding that compliance would be infeasible, the County approved the EIR and the 2011 General Plan Update ("GPU"), incorporating all twenty-nine of the recommended policies and mitigation measures.[123]

Central among the GPU's adopted mitigation measures was a directive to prepare a CAP that would facilitate a better analysis of the County's baseline GHG emissions and develop strategies for achieving compliance with AB 32. More precisely, mitigation measure CC-1.2 required as follows:

> Prepare a County Climate Change Action Plan with an update[d] baseline inventory of greenhouse gas emissions from all sources, more detailed greenhouse gas emissions reduction targets and deadlines; and a comprehensive and enforceable GHG emissions reduction measures that will achieve a 17% reduction in emissions from County operations from 2006 by 2020 and a 9% reduction in community emissions between 2006 and 2020.[124]

---

[119] *Sierra Club v. Cty. of San Diego*, 231 Cal. App. 4th 1152, 1156 (2014).

[120] County of San Diego, County of San Diego General Plan, 1-2, (August 2011; as amended through January 29, 2020), https://www.sandiegocounty.gov/content/sdc/pds/generalplan.html.

[121] County of San Diego, San Diego County General Plan Update: Final Environmental Impact Report, at 2.17-1 (August 2011), https://www.sandiegocounty.gov/content/sdc/pds/gpupdate/environmental.html. [hereinafter "General Plan PEIR"].

[122] *Id*. at 2.17-28 – 2.17-33.

[123] Minute Order, *Sierra Club (2013)*, *supra* note 15, at *6.

[124] *Id. See also* General Plan PEIR, *supra* note 121, at 2.17-30.

Notably, this language is clear and unambiguous in stating a precise GHG emissions reduction goal for "community emissions" and in requiring the plan to include "targets and deadlines" and "comprehensive and enforceable" measures to achieve these. In addition, mitigation measures CC-1.7 and CC-1.8 required the county to use the CAP to revise its Guidelines for Determining Significance and to formulate a threshold of significance for GHG emissions to facilitate CEQA review of future projects.[125] When the County approved and adopted the general plan and the PEIR, these mitigation measures became enforceable under CEQA as "necessary actions to mitigate environmental impacts" and also as part of the general plan.[126]

A year later, in 2012, the county approved its first Climate Change Action Plan ("2012 CAP").[127] While the 2012 CAP purported to meet the requirements of mitigation measure CC-1.2 and to facilitate streamlined CEQA review for future development projects, in fact it did neither.[128] Instead of developing comprehensive and enforceable strategies to reduce GHG emissions to the levels specified in the PEIR and consistent with AB 32, the CAP framed these GHG emissions reduction goals as *recommendations* and concluded that local GHG emissions might actually increase under the plan, and probably would after 2020.[129] The 2012 CAP also failed to identify targets and deadlines and was not accompanied by a plan-level EIR as required to facilitate tiering of future projects.[130] Legal challenges ensued.

B. Legal History

The current case is actually the third round of litigation in a series of lawsuits that began when the 2012 CAP was successfully challenged by the Sierra Club alleging multiple CEQA violations.[131] A second case commenced in 2016 after the County approved an updated Guidelines for Determining Significance document without having consulted a valid CAP or conducting adequate CEQA review.[132] The third case was filed in 2018 after the County issued an updated CAP that again failed to meet

---

[125] General Plan PEIR, *supra* note 121, at 2.17-30 – 2.17-31.

[126] Cal. Pub. Res. Code § 21081.6 (b) provides that a "public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures."

[127] Minute Order, *Sierra Club (2013)*, *supra* note 15, at *6.

[128] *Sierra Club*, 231 Cal. App. 4th at 1160-61.

[129] *Id*.

[130] *Id.* at 1172.

[131] Minute Order, *Sierra Club (2013)*, *supra* note 15, at *1-2.

[132] *Golden Door Properties v. Cty. of San Diego ("Golden Door I")*, 27 Cal. App. 5th 892, 896 (2018).

the requirements set forth in the 2011 GPU PEIR and general plan.[133] Notably, this last case is unique in raising the issue of general plan consistency as a distinct claim independent of and in addition to several alleged CEQA violations.[134]

Although the 2012 case did not bring forward a specific legal claim based on vertical inconsistency between the CAP and the general plan, this was still a key factor in the case as an element of the alleged CEQA violations. Petitioner Sierra Club argued that the County violated CEQA because the CAP (1) failed to comply with the mitigation measures set forth in the general plan PEIR, (2) failed to satisfy the requirements for adopting thresholds of significance, and (3) required a supplemental EIR ("SEIR").[135] The court diffused this down to two central questions: "whether the CAP was properly approved, and whether it meets the requirements of Mitigation Measure CC-1.2."[136]

On the first issue, the Superior Court agreed with petitioners that the County should have completed an SEIR for the CAP. This reflected the courts findings that (1) the County had presented no substantial evidence that the CAP was within the scope of the general plan PEIR, (2) since the CAP did not even exist at the time of the previous PEIR it was not considered in that review, and (3) the CAP required a plan-level environmental review to assess whether it complied with AB 32 before it could be used to establish tiering or guidance for future projects.[137]

On the second issue, the court also agreed with petitioners, finding that the CAP failed to comply with mitigation measure CC-1.2.[138] The CAP not only failed to meet the general plan's GHG emission reduction targets, but described these as mere *recommendations* that would *not* ensure GHG reductions.[139] The 2012 CAP also failed to identify detailed deadlines or enforcement mechanisms as required by CC-1.2.[140] In other words, the court concluded that the CAP had violated CEQA because it was inconsistent with general plan mitigation measure CC-1.2.[141]

After the county lost at trial, the 2012 CAP was set aside, but the County appealed.[142] In 2014, California's Fourth District Court of Appeal affirmed the trial court's findings and conclusions. The CAP not

---

[133] Minute Order, *Golden Door II*, *supra* note 3, at *3.
[134] *Id*. at *4.
[135] *Id*.
[136] *Id*. at *5-6.
[137] *Id*. at *7.
[138] *Id*.
[139] *Id*. at *7-8.
[140] *Id*.
[141] *Id*. at *8.
[142] *Sierra Club*, 231 Cal. App. 4th at 1157.

only failed to include detailed targets, deadlines, and enforceable GHG reduction measures as required by Mitigation Measure CC-1.2, it also failed to meet statewide GHG emissions targets as required by AB 32 and EO S-3-05.[143] In addition, the Court of Appeal found that the County had erred in assuming that the "CAP and Threshold project" was within the scope of the general plan PEIR,[144] and confirmed that a plan-level EIR would be necessary for the CAP and Threshold project to qualify as a basis for GHG impact analysis of future development projects.[145] The County's decision not to consider mitigation measures beyond 2030 and its rejection of feasible mitigation measures proposed by the Sierra Club also lacked basis in substantial evidence.[146]

After this appellate decision, the case was returned to the Superior Court, which issued a Supplemental Writ updating the conditions for the combined CAP and Threshold project.[147] The appellate decision was subsequently published and in March 2015, the California Supreme Court denied the County's petition for review.[148]

The second lawsuit in the series emerged the following year after the County issued a "2016 Climate Change Analysis Guidance" document that failed to follow the conditions set forth in the 2015 Writ.[149] As noted above, the Court of Appeals in 2014 had determined that the CAP and Threshold project required a plan-level EIR. In addition, Mitigation Measure CC-1.8 from the general plan PEIR had directed the County to "[r]evise County Guidelines for Determining Significance based on the Climate Change Action Plan."[150]

The 2016 Guidance document was accompanied by neither a plan-level EIR nor a new CAP.[151] While the County maintained that the new document was not a threshold of significance determination, it did contain a section entitled "Significance Determination" in which the narrative explained that "[t]he County Efficiency Metric is the recognized and recommended method by which a project may make impact significance determinations."[152] The document also identified a numeric value, 4.9 metric tons of carbon dioxide equivalents ("$MTCO_2e$") per service popu-

[143] *Id*. at 1167-68, 1169-70.

[144] *Id*. at 1170-71.

[145] *Id*. at 1172-73, citing Pub. Resources Code, § 21081.6(b).

[146] *Id*. at 1175-76.

[147] *Golden Door I*, 27 Cal. App. 5th at 897.

[148] Docket, *Sierra Club v. County of San Diego*, Case Number D064243 (Cal. App. 4th).

[149] *Golden Door I*, 27 Cal. App. 5th at 897-98.

[150] GENERAL PLAN PEIR, *supra* note 121, at 2.17-31.

[151] *Golden Door I*, 27 Cal. App. 5th at 897.

[152] *Id*. at 894, 898.

lation per year, as the County Efficiency Metric for 2020.[153] Again, litigation ensued.

This time two petitioners challenged the County's approval of the guidance document in separate lawsuits. Sierra Club filed an amended petition alleging the approval had violated the 2015 Writ and CEQA,[154] and sought to enjoin the County from approving large new developments in rural areas of the county until it issued a lawful CAP.[155] The second petitioner, Golden Door Properties ("Golden Door"), filed for injunctive and declaratory relief, alleging the County had violated CEQA by attempting to establish a threshold of significance that circumvented proper environmental review.[156] Golden Door, a private destination resort in the northern part of the county, had also been opposing a large new residential development that threatened to impact the rural area near its property.[157]

The cases were heard together and the trial court agreed with petitioners that the guidance document did contain a threshold of significance as defined by CEQA, which violated Mitigation Measures CC-1.2 and CC-1.8, and was not based on substantial evidence.[158] The court also found that the document violated the terms of the 2015 Writ and constituted piecemeal environmental review.[159] The County was again unsuccessful on appeal and the 2016 Guidance document was set aside.[160] Here, the appellate court re-affirmed its previous determination that the CAP and threshold should be treated as a single project for the purpose of environmental review.[161] The Court of Appeal also noted that its finding did not prevent the County from processing development projects on unincorporated county lands or otherwise prevent developers from conducting environmental reviews of GHG emissions, but simply prohibited such activities from relying on an invalid threshold of significance determination.[162]

---

[153] *Id*. at 898.

[154] Respondent's Brief (Sierra Club), *8, *Golden Door I*, 27 Cal. App. 5th 892.

[155] Id. at *15-16.

[156] *Golden Door I*, 27 Cal. App. 5th at 897.

[157] Christopher W. Garrett, Golden Door's Comments Regarding the Climate Action Plan Notice of Preparation (November 21, 2016), in COUNTY OF SAN DIEGO, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT REPORT (August 2017), Appendix A: Notice of Preparation Comments and Summary Matrix, 74, https://www.sandiegocounty.gov/content/dam/sdc/pds/advance/cap/publicreviewdocuments/DraftSEIRdocuments/Apdx%20A%20NOP%20%26%20Comments.pdf.

[158] *Golden Door I*, 27 Cal. App. 5th at 897.

[159] *Id*.

[160] *Id.* at 894-95.

[161] *Id*. at 906.

[162] *Id*.

The third and current case in this prolonged dispute commenced in 2018 after the County issued and approved the long-awaited revised CAP and SEIR.[163] Both Sierra Club and Golden Door participated in the public review process and commented on the Draft EIR ("DEIR"), and both challenged the 2018 CAP in separate actions, which were then consolidated with the still lingering writ from Sierra Club's 2012 case.[164] Notably, this last case is unique in raising the issue of general plan consistency as a distinct claim independent of and in addition to multiple alleged CEQA violations.

C. THE 2018 CAP

Like its predecessor, the 2018 CAP concluded that the level of GHG emissions resulting from the 2011 GPU will exceed the reduction targets set forth in mitigation measure CC-1.2.[165] While the CAP purports to be on track to meet its stated 2020 target, it projects that the county will fail to meet its 2030 target by nearly 900,000 $MTCO_2e$.[166] That is, rather than meeting its stated target of reducing GHG emissions to 40% below 2014 levels by 2030, the County expects to reduce emissions by only 12% below 2014 levels in this time frame.[167] The CAP's outlook for emissions after 2030 is even worse, with GHG emissions expected to climb back to a level just 7% below 2014 levels by 2050.[168] Notably, the CAP also declined to examine GHG reduction strategies for the period beyond 2030 because this would be too speculative.[169]

In addition, the CAP acknowledged that new development projects adopted by general plan amendments ("GPAs") between 2011 and 2017 had already increased the overall GHG emissions likely to result from the general plan and anticipated that additional GPAs would have a similar effect, making it even more difficult to achieve future targets.[170] Moreover, the CAP adopted a target for 2020 that was only 2% below the 2014 baseline, a much smaller reduction than the goal of 9% below

---

[163] Minute Order, *Golden Door II*, *supra* note 3, at *3.

[164] *Id*.

[165] County of San Diego, CLIMATE ACTION PLAN, 2-10 – 2-14 (February 2018), https://www.sandiegocounty.gov/content/dam/sdc/pds/advance/cap/publicreviewdocuments/PostBOSDocs/San%20Diego%20County%20Final%20CAP.pdf.

[166] *Id*. at 2-12. Figure 2.3 indicates the 2014 baseline at 3,211,595 $MTCO_2e$ with the 2030 target at 1,926,903 $MTCO_2e$, but projects actual emissions for 2030 will be 2,824,049 $MTCO_2e$.

[167] *Id*.

[168] *Id*.

[169] *Id*. at 2-10.

[170] *Id*. at 2-14.

2006 levels that was set forth in the 2011 GPU.[171] Even with these modified targets, however, the CAP forecasted substantial shortfalls, or "emissions gaps," in meeting its proposed 2030 and 2050 targets.[172]

The CAP's proposed solution for not meeting the County's GHG emission reduction targets was Mitigation Measure GHG-1 ("M-GHG-1"), a carbon offset purchase program.[173] According to the CAP,

> [w]ith the incorporation of Mitigation Measure GHG-1 . . . all future GPAs that propose increased density/intensity above what is allowed in the General Plan will comply with the CAP and; therefore, will not interfere with the County's 2020 and 2030 GHG reduction targets or 2050 goal. General Plan Amendments would, therefore, comply with the threshold of significance, which is consistency with the CAP.[174]

Like magic, GHG emissions would no longer be a problem. M-GHG-1 provided that "[o]ff-site mitigation, including purchase of carbon offset credits, would be allowed after all feasible on-site design features and mitigation measures have been incorporated," and placed no limits on the amount or percentage of a project's GHG emissions that could be "reduced" by offsets.[175] In contrast, CARB's statewide carbon offset program limits reliance on offsets to 8% of a project's total annual emissions.[176]

M-GHG-1 also identified "geographic priorities" to favor onsite GHG reductions over offsets and local offset projects over more distant ones — but if local offset credits are not feasible or available, it allowed offsets to be purchased for projects anywhere in the world.[177] An applicant need only satisfy the County's Director of the Planning and Development Service ("PDS") that all feasible design changes had been made and any offsets to be purchased would comply with M-GHG-1.[178] Thus, so long as a sufficient quantity of offsets is purchased and approved by the planning director, virtually any project could be deemed compliant

---

[171] *Id*. at 2-10 – 2-11. Here the CAP maintains that the overall decrease in statewide emissions between 2005 and 2014 reduces the per capita contribution needed at the county level.

[172] *Id*. at 2-12, 2-14.

[173] *Id*. at 2-14.

[174] *Id*.

[175] County of San Diego, Final Supplemental Environmental Impact Report: Supplement to the 2011 General Plan Update Program Environmental Impact Report for the Climate Action Plan, General Plan Amendment, GHG Threshold, and Guidelines for Determining Significance for Climate Change, 2.7 at 38-40 (January 2018), (SCH # 2016101055) [hereinafter Climate Action Plan SEIR].

[176] CARB, Process for the Review and Approval of Compliance Offset Protocols, *supra* note 73, at 8.3, 10. This percentage will decrease in 2021.

[177] Climate Action Plan SEIR, *supra* note 175, 7-4 – 7-6.

[178] *Id*.

with the CAP, even if it actually produced a substantial increase in countywide GHG emissions.[179]

The 2018 CAP's approach of relying on offsets to achieve climate mitigation was thus substantially different than the one set forth in the 2011 GPU. Where the general plan mitigation measure CC-1.2 required "a 9% reduction in *community* emissions,"[180] the CAP allowed offset purchases to substitute for actual reductions.[181] While *local* offset credits might allow communitywide emissions reductions to stay on track to meet targets, and could benefit the community in other concrete ways, such as reducing pollution or expanding greenways and open space, the CAP's policy did not ensure local GHG reductions.

The chance of obtaining offset credits for projects within the county was very slim; as only one eligible project existed at the time, making few if any local offsets available.[182] Most offset purchases would thus provide little if any direct benefit to the residents of the county — other than the disputed benefit of facilitating approval of development projects that would otherwise fail to comply with AB 32 targets for reducing local GHG emissions. Under the CAP's approach, the County could approve development projects in the unincorporated county that would expand urban sprawl and perpetuate unsustainable transportation and land use patterns without regard for reducing countywide GHG emissions, so long as the applicants could purchase enough offset credits.

The general plan, however, included no allowance for using offsets to substitute for actual compliance. Mitigation measure CC-1.2 set a clear target for reducing *community* GHG emissions. By the time the CAP was issued, the general plan also contained updated goal and policy language, including Goal COS-20:

> 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. California Global Warming Solutions Act of 2006: emissions limit).[183]

---

[179] In fact, the County used M-GHG-1 to approve a development project that was expected to increase local GHG emissions by more than 43,000 MTCO2e/yr. for the next thirty years; *see* COUNTY OF SAN DIEGO, NEWLAND SIERRA PROJECT PLANNING COMMISSION STAFF REPORT, Attachment G: Findings Regarding Significant Effects Pursuant to State CEQA Guidelines Sections 15090, 15091 and 15093, 74-83 (June 28, 2018), https://www.sandiegocounty.gov/content/dam/sdc/pds/ProjectPlanning/NS/NSFEIR/NSapp/Full%20Version%20Staff%20Report%20(Optimized).pdf.

[180] GENERAL PLAN PEIR, *supra* note 121, at 2.17-30 (emphasis added).

[181] CLIMATE ACTION PLAN SEIR, *supra* note 175, at 7-4 – 7-6.

[182] Minute Order, *Golden Door II*, *supra* note 3, at *13.

[183] COUNTY OF SAN DIEGO GENERAL PLAN, *supra* note 120, at 5-38 (emphasis added).

and Policy COS-20.1:

> Climate Change 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.[184]

The general plan's emphasis on "community" and "community-wide" reduction of GHG emissions is thus quite clear. Nowhere does the general plan contemplate the idea of allowing carbon offsets to replace some portion of community-wide GHG reductions. By allowing out-of-county offsets to substitute for in-county GHG reductions, the 2018 CAP would allow in-county emissions to exceed the general plan's stated goals. This would effectively undermine the County's commitment to meet the statewide GHG reduction goals as set forth in general plan mitigation measure CC-1.2 and Goal COS-20.

The Supreme Court of California has made clear that "[t]he propriety of virtually any local decisions affecting land use and development depends upon consistency with the applicable general plan and its elements."[185] It is also well established that "[a]n action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment."[186] Accordingly, insofar as M-GHG-1 would obstruct the attainment of the general plan's objectives and policies, the 2018 CAP would appear to be inconsistent with the general plan.

D. 2018 CAP Litigation

The issue of general plan consistency was finally raised directly in the third round of the case. Petitioners Sierra Club and Golden Door again brought independent claims alleging that the 2018 CAP was inconsistent with the County's general plan.[187] Both also alleged that the County had violated CEQA by failing to provide adequate review of mitigation measure M-GHG-1.[188]

---

[184] *Id*. at 5-39 (emphasis added).

[185] *Orange Citizens for Parks & Recreation v. Superior Court*, 2 Cal. 5th 141, 153 (2016), citing *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 570 (1990); *see* Cal. Gov't. Code §§ 65359 (requiring specific plans to be consistent with the general plan), 65860 (same with respect to zoning ordinances), 65867.5(b) (same with respect to development agreements).

[186] *Id*., citing OPR, General Plan Guidelines (2003), p. 164; See also OPR, General Plan Guidelines, *supra* note 17, at 255, citing 58 Ops. Cal. Atty. Gen. 21, 25 (1975).

[187] Minute Order, *Golden Door II*, *supra* note 3, at *4.

[188] *Id*.

With respect to general plan consistency, the Superior Court explained that the burden is on petitioners "to show why, based on all of the evidence in the record," the local government's determination of consistency was unreasonable.[189] The court also noted that "[a] project fails for general plan inconsistency if it conflicts with a general plan policy that is fundamental, mandatory and clear."[190] Although a local government is entitled to considerable deference in making a consistency finding,[191] a court may disagree if it determines that a reasonable person would not reach the same conclusion based on the evidence.[192] Here, the County maintains that the terms "local" and "community-wide" GHG reductions, as used in the context of the general plan policies and mitigation measures, meant only that the emissions *sources* were within the county's jurisdictional control, but not that the emissions *reductions* in GHG had to take place within the county.[193] However, Petitioners/Respondents argue to the contrary that there is no substantial evidence in the record to support this claimed usage, even within the CAP itself,[194] and that the reasonable person standard applied in this context must look to the ordinary meaning of the general plan's terms.[195]

After considering the arguments, the Superior Court found that the County had "incorporated a fundamental, mandatory, and clear policy into both the 2011 and 2018 iterations of the general plan: that GHG emission reductions be local."[196] Although the 2011 version of policy COS-20 used the terms "local GHG emissions" and the 2018 version used the terms "community-wide (i.e. unincorporated County) and County operations greenhouse gas emissions," both formulations expressly required the GHG reductions to be "in-County."[197] The CAP, on the other hand, which "expressly incorporated" M-GHG-1, "would freely allow the use of offsets purchased anywhere on the planet, with no limit on geographic scope or duration" and "[n]o standards or criteria . . . for achieving the 'satisfaction' of the planning director."[198]

---

[189] *Id*. at *8, citing *San Diego Citizenry Group v. Cty. of San Diego*, 219 Cal. App. 4th 1, 26 (2013).

[190] *Id*. at *12, citing *Spring Valley Lake Ass'n v. City of Victorville*, 248 Cal. App. 4th 91, 100 (2016).

[191] CSD, Opening Brief in 2019 Appeal, *supra* note 75, *24-25.

[192] OPR, GENERAL PLAN GUIDELINES, *supra* note 17, at 255.

[193] CSD, Opening Brief in 2019 Appeal, *supra* note 75, at *31-32, citing *No Oil, Inc. v. City of Los Angeles*, 196 Cal. App. 3d 223 (1987).

[194] Respondent's Brief (Golden Door), *38, *Sierra Club v. Cty. of San Diego*, Case No. D075478, 2019 WL 4795704 (Cal. App. 4th, September 23, 2019) [hereinafter Respondent's Brief (Golden Door) in 2019 Appeal].

[195] *Id*. at 31, citing *People v. Robinson*, 47 Cal.4th 1104, 1138 (2010).

[196] Minute Order, *Golden Door II*, *supra* note 3, at *12.

[197] *Id*.

[198] *Id*. at *12-13.

The court concluded that the CAP's policy of allowing out-of-county offsets for in-County projects was inconsistent with an express policy of the General Plan.[199] The County had not only "violated its General Plan and the Planning and Zoning Law," but had also violated the public participation mandate of CEQA by granting an unelected local official "unfettered discretion" to waive compliance with a duly approved general plan policy.[200] The CAP's geographic priorities were neither binding nor enforceable, and there was no substantial evidence on record to indicate that the general plan's commitment to in-county GHG reductions meant anything other than what it plainly stated.[201] The Superior Court of San Diego thus agreed with petitioners' argument that the County's 2018 CAP should be set aside because it was inconsistent with the 2011 general plan.[202]

With respect to the several CEQA claims raised, the trial court again ruled in favor of petitioners. This included eight distinct violations; (1) the County failed to show that the offsets would be "enforceable, verifiable, and of sufficient duration" as required by AB 32, (2) the SEIR failed to adequately analyze the impact of the 2018 CAP on the Regional SCS, (3) the SEIR failed to adequately analyze M-GHG-1 impacts, (4) the SEIR failed to analyze cumulative GHG impacts, (5) the County improperly delegated and deferred feasibility findings to the Planning Director, (6) the SEIR failed to address impacts to energy and environmental justice, (7) the SEIR failed to evaluate smart growth mitigation or alternatives to GPAs, and (8) the County failed to adequately respond to comments.[203] Based on these findings together with general plan inconsistency, the court ordered the 2018 CAP set aside and issued a permanent injunction prohibiting the County's use of M-GHG-1 to mitigate GHG emissions impacts.[204] In the interest of due process, the court explained, the injunction did not prohibit the County from continuing to approve development projects or even from applying other mitigation measures that might have similar features to M-GHG-1.[205]

The CAP case is now under appeal with a hearing scheduled for May 2020. The County is challenging the Superior Court ruling on all points, including the court's determination that the CAP violated the general plan.[206] According to the County, the court failed to grant proper

[199] *Id*. at *13.
[200] *Id*.
[201] *Id*.
[202] *Id*. at *12.
[203] *Id*. at *13-15.
[204] *Id*. at *16-17.
[205] *Id*. at *17.
[206] CSD, Opening Brief in 2019 Appeal, *supra* note 75, at *12.

deference to the County's consistency finding and M-GHG-1 is an "eminently reasonable" interpretation of the general plan's "broad policy statements."[207] The County further argues that because CARB's statewide cap-and-trade program allows the purchase of out-of-state and out-of-county offsets, then mitigation measure M-GHG-1 should be allowed to as well.[208] Petitioners/Respondents, meanwhile, point to the general plan's specific policy language addressing in-County GHG reductions and itemize the many substantial differences between CARB's statewide offset program and the County's formulation under M-GHG-1."[209]

While it remains to be seen which party will prevail on appeal, the issue of general plan consistency has for the time being emerged as an important consideration for climate-related land use planning.

V. Broader Implications of the San Diego Litigation

The San Diego County CAP case illustrates an application of vertical consistency in the climate change context as well as the importance of local land use decisions in achieving climate mitigation goals. Even as petitioners undertook to stay or enjoin the County from utilizing measure M-GHG-1 during the legal proceedings, the County quickly used the measure to approve a major new subdivision in a rural area of the county. In this instance, offset credits were allowed to substitute for 82% of the project's expected GHG impact, effectively increasing the county's local GHG emissions by more than 43,000 $MTCO_2e$/yr. for the next thirty years.[210] While this project was subsequently challenged and ultimately rejected by voter referendum in March 2020, this further underscores the importance of this litigation.[211] Land use choices made now will impact GHG emissions for decades to come and greatly influence the ability of communities to achieve climate mitigation and adaptation.

---

[207] *Id*., at *12, *30, *34-35.

[208] *Id*., at *32-34.

[209] Respondent's Brief (Golden Door) in 2019 Appeal, *supra* note 194, at *35, *58-59; Respondents' Opposition Brief (Sierra Club), *30-31, *47-50, *County of San Diego v. Sierra Club, et al.,* Case No. D075478, 2019 WL 4795705 (Cal. App. 4 Dist., September 24, 2019).

[210] County of San Diego, Newland Sierra Project Planning Commission Staff Report, Attachment G: Findings Regarding Significant Effects Pursuant to State CEQA Guidelines Sections 15090, 15091 and 15093, 74-83 (June 28, 2018). This project, expected to generate 52,986 MTCO2e/yr. for thirty years, was approved by County Commissioners but then blocked by petition and rejected by voter referendum in March 2020.

[211] J. Harry Jones, "*In the Aftermath of Measures A & B, What's Next?*" San Diego Union-Tribune (March 29, 2020, 5 am), https://www.sandiegouniontribune.com/business/growth-development/story/2020-03-29/in-the-aftermath-of-measures-a-b-what-next.

The broader implications of this case will of course depend to a great extent on the specific content of the appellate court's forthcoming ruling. However, the dispute to date already provides an example of how general plans and vertical consistency can be important to legal advocacy in the climate change context. This section explores several aspects of the San Diego case in relation to California's evolving response to climate change in order to consider how this might inform the relevance of vertical consistency as a legal strategy for advancing climate mitigation and climate adaptation at the local level.

A. Extending General Plan Consistency to CAPS

As noted in Part II, climate provisions in general plans have the potential advantage of enforceability.[212] While the issue of vertical consistency between CAPs and general plans has not been previously established, the extension of this principle would seem to fit well with the existing legal structure and principle of general plans as constitution for future development.

Provisions of the Government Code already require zoning designations, maps, projects, and special plans to be consistent with general plans.[213] Section 65359, in particular, broadly provides that "[a]ny specific plan *or other plan* of the city or county that is applicable to the same areas or matters affected by a general plan amendment shall be reviewed and amended as necessary to make the specific or other plan consistent with the general plan."[214] While CAPs are not land use plans per se, they do appear to fit well within the broad category of *other plans applicable to the same areas or matters affected by a general plan*. Insofar as a CAP provides strategies to guide local development priorities, it clearly impacts areas and matters addressed by a general plan. Caselaw also agrees that "virtually all local decisions affecting land use and development must be consistent with the general plan."[215] Accordingly, it is no great leap for a court to clarify that vertical consistency similarly applies to CAPs. If the appellate court affirms the superior court's extension, however, this could establish a useful precedent.

One foreseeable implication of a published ruling on this issue would be to make general plan consistency more prominent as a poten-

---

[212] *See supra* note 31.

[213] *See* Cal. Gov't. Code §§ 65454 (addressing special plans), 65860 (addressing zoning designations), 65867.5(b) (addressing development agreements).

[214] Cal. Gov't Code § 65359 (emphasis added).

[215] *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles*, 83 Cal. App. 4th 1252, 1260 (2000), citing *Citizens of Goleta Valley*, 52 Cal. 3d at 571.

tially availing legal strategy in the climate context. In disputes similar to that in the San Diego case, where a CAP would undercut strong climate mitigation policies set forth in a general plan, a clear precedent could support efforts to hold local officials accountable to the duly enacted general plan. On the other hand, in situations where a CAP set forth stronger GHG reduction strategies than a general plan, this could cut the other way. An appellate finding that CAPs must be consistent with general plans could invite closer analysis of this issue on all sides of future conflicts involving CAPs and general plans.

The enforceability of general plan consistency also has some important limitations. As noted by the Superior Court in its 2018 ruling, courts have placed the burden on petitioners to show why a city's or county's consistency determination is unreasonable.[216] The County's argument that it is entitled to great deference in such determinations is not without merit.[217] Courts review general plan consistency under the arbitrary and capricious standard, and "defer to an agency's factual finding of consistency unless no reasonable person could have reached the same conclusion on the evidence before it."[218] This deference reflects the separation of powers between the judicial and legislative branches of government, which counsels judicial restraint in interpreting the legislative enactments of municipal and county governments.[219] Therefore, so long as a local government provides a reasonable basis for a consistency finding, and the finding does not contradict the evidence on record, it is likely to be upheld.

Another key factor in the enforceability of general plan provisions is the specificity and clarity of the language with which these are articulated. As the trial court observed, "[a] project fails for general plan inconsistency if it conflicts with a general plan policy that is *fundamental, mandatory and clear*."[220] Similarly, a 2011 review of court decisions addressing claims of general plan inconsistency found that courts were more likely to enforce the implementation of general plan policies where these are "fundamental, specific, and mandatory."[221] Conversely,

---

[216] Minute Order, *Golden Door II*, *supra* note 3, at *8.

[217] *Id*.

[218] *Endangered Habitats League, Inc. v. Cty. of Orange*, 131 Cal. App. 4th 777, 782 (2005); *see also*, *San Francisco Tomorrow v. City & Cty. of San Francisco*, 229 Cal. App. 4th 498, 514, (2014).

[219] Carstens, *supra* note 36, at 576. *See also*, *San Francisco Tomorrow*, 229 Cal. App. 4th at 515.

[220] Minute Order, *Golden Door II*, *supra* note 3, at *12 (emphasis added).

[221] Carstens, *supra* note 36, at 575.

"[w]here policies are vague or permissive, courts have tended to defer to the adopting agency's interpretation of the plan.[222]

The present case appears to correlate well with this distinction, affirming that the clear and mandatory language of the GPU's mitigation measures allowed the court to make a determinative finding that GHG emissions reductions were required to be local. However, general plan policies are often held to be broad general principles rather than mandatory requirements.[223] Had the policy language been expressed in a more hortatory voice, like the 2012 CAP's treatment of GHG reduction strategies as mere recommendations and guidelines, the outcome of the case could have been quite different.[224] Here, the fact that CEQA required the 2011 GPU PEIR mitigation measures to be enforceable also may have influenced the clarity of the policy language as well as the court's determination that the policies were mandatory.[225]

These considerations underscore the value of advocating for clear and mandatory climate policies to be incorporated directly into general plans. Including policies in general plans rather than relying on CAPs opens the door to enforcement through vertical consistency, because it is the general plan policies that other local plans must conform to. However, whether these policies originate as mitigation measures under CEQA or voluntary measures advanced by local leaders, clear mandatory language and policy headings are likely to aid enforceability.

B. Statewide Climate Mandates and Local General Plans

Significantly, the San Diego conflict arose after the general plan adopted mitigation measures to comply with statewide climate mandates, AB 32 and SB 97. It is unclear whether the county would have adopted mitigation measure CC-1.2 had it not been for the statutory mandates adding climate change analysis to CEQA review.[226] This illustrates the influence of statewide climate initiatives on local land use planning and the tension between these two levels of decision-making. In this case, the statewide mandates effectively forced the County to modify its general plan by adopting CC-1.2.[227] This not only caused climate mitigation goals to be incorporated into the general plan, but required those goals to conform with AB 32, and set the CAP project into motion.[228] The influ-

[222] *Id*.
[223] *San Francisco Tomorrow*, 229 Cal. App. 4th at 517.
[224] Minute Order, *Sierra Club (2013)*, *supra* note 15, at *7.
[225] Cal. Pub. Res. Code § 21081.6 (b).
[226] *Id*.
[227] *Sierra Club v. Cty. of San Diego*, 231 Cal. App. 4th at 1158-59.
[228] *Id*.

ence of state government on local land use planning was substantial in this instance and narrowed the scope of the county's discretion to chart its own plan for growth and development.

While the state policies succeeded in getting the county to adopt climate mitigation measures, however, a costly multi-year dispute ensued. Whether such tradeoffs are acceptable or avoidable raises difficult questions. Given the urgency of climate mitigation, forcing local agencies to take action may be necessary in some situations. Local land use plans can influence GHG emissions for decades to come by locking in housing and transportation patterns and infrastructure needs that set the stage for a high-emissions future or a low-emissions future. Where local governments lack the political will to act voluntarily, litigation offers an important lever to advance the broader public interest in reducing GHG emissions.

On the other hand, taking an adversarial approach can foreclose opportunities for collaboration and exacerbate already poor buy-in. Where local inaction reflects a lack of technical staff and financial resources, the more collaborative approach facilitated by SB 375 may be more productive.[229] Regional planning organizations can help local governments overcome hurdles to developing and funding feasible strategies for reducing GHG emissions.[230] This illustrates another way that the statewide mandates can influence local land use decisions.

Importantly, local governments can also be a driver of state policy. For example, the state's ambitious goals for comprehensive planning to address climate mitigation might not have been feasible had it not been for the development of CAP's by pioneering cities and organizations.[231] Without this framework and preliminary work to develop methods for calculating GHG emissions, requiring this through CEQA review would have placed an oppressive and possibly unrealistic burden on local governments.[232] Thus, while state forcing is one side of the coin, local advocacy and leadership can also influence state policy and actions. Promoting a dynamic exchange of ideas between these levels of government is probably the best approach to advancing statewide policy that integrates state and local interests.

---

[229] MAWHORTER, ET AL., *supra* note 85, at 7-9.
[230] *Id*.
[231] SEEC, STATE OF LOCAL CLIMATE ACTION: CALIFORNIA 2016, *supra* note 2, at 15-17.
[232] CARB, 2008 SCOPING PLAN, *supra* note 68, at 26-27.

C. Local Land Use Plans and Regional Sustainable Community Strategies

The San Diego County CAP case also invites some observations about the relationship between local land use planning and the state's regional planning framework. As noted in Part III, SB 375 seeks to integrate housing and transportation planning at the regional level to encourage housing developments that align with regional GHG reduction goals.[233] This requires MPOs to develop regional partnerships with local governments and other stakeholders to develop SCSs that identify priority areas for future development of housing and regional transportation systems.[234] The outcome of the appeal in this case could have significant impacts on the regional SCS by determining which of the County's policies will guide future development decisions in a large part of the region. That is, while the general plan's policies and mitigation measure CC-1.2 would require the county to reduce in-County GHG emissions to an extent similar to the SCS goals,[235] the CAP's mitigation measure M-GHG-1 would potentially allow unlimited approvals of subdivisions that drive up in-County emissions and conflict with efforts to meet regional GHG reduction goals.

This points to a difficulty faced by many communities in California, which is how to address housing needs and GHG reductions at the same time. While SB 375 attempts to link these objectives by providing guidance and incentives for advancing housing developments that minimize transportation-related GHG emissions,[236] the County in this case does not appear to have taken advantage of these programs or even consulted the SCS. Notably, the Superior Court found that the County, in its SEIR for the 2018 CAP, failed to examine inconsistencies between M-GHG-1 and the regional SCS as required by CEQA,[237] and also failed to consider "smart-growth" alternatives to M-GHG-1 as requested by petitioners and supported by caselaw.[238]

While the County notes the "need to balance climate action with the major housing crisis in San Diego,"[239] it appears to frame this as an either-or proposition requiring offsets. In its Opening Brief on Appeal,

---

[233] Cal Gov't Code § 65080.

[234] *Id*.; *See also* CARB, 2008 Scoping Plan, *supra* note 68, at 48-49.

[235] Both CC-1.2 and the SCS are aligned to statewide targets.

[236] CARB, 2008 Scoping Plan, *supra* note 68, at 48-51.

[237] Minute Order, *Golden Door II*, *supra* note 3, at *13-14, citing CEQA Guidelines § 15125(d).

[238] *Id*. at *15, citing *Cleveland Nat'l Forest Found. v. SANDAG*, 17 Cal. App. 5th 413, 433-34 (2017).

[239] CSD, Opening Brief in 2019 Appeal, *supra* note 75, at *33 (internal quotation omitted).

the County argues that the general plan's policies are intended to be broad and flexible to allow such balancing, and concludes that "[t]he County thus had discretion to weigh the GHG emission reduction measures included in the CAP and as SEIR mitigation measures against its goals to construct sufficient housing to meet the needs of all of its residents, which is what it did."[240] While the Court of Appeals will soon weigh in on whether the general plan policies are in fact broad and flexible or fundamental, mandatory, and clear, the County's framing of this issue suggests that it perceives reducing GHG emissions and approving housing developments as conflicting duties. Rather than collaborating with regional partners to explore smart growth alternatives, the County adopted M-GHG-1 as a means to approve housing developments notwithstanding potentially significant local GHG-emissions.

While there is no requirement that general plans be consistent with an SCS, public comments on the 2018 CAP's DEIR raised concerns that M-GHG-1 would impair efforts to achieve the sustainable development goals of the regional SCS.[241] Here, the County took the position that the regional plan should be adjusted to align with the general plan, while Petitioners argued that the County's EIR failed to identify inconsistencies between the CAP and the SCS.[242] Although it's true that the regional MPO is supposed to *consider* general plans when it formulates the SCS, there is no requirement that the SCS must strictly conform to general plans or be modified if they do not.[243]

As a practical matter, it seems unreasonable to require an MPO to limit an SCS to only identifying options that are consistent with every local general plan in the region. Too strict a policy could prevent the identification of regional development opportunities that local governments may not have considered or perceived as within their scope of authority when a general plan was formulated. At the same time, it is not unthinkable that provisions in a regional SCS could lead a community to reconsider its options and even amend its general plan to take advantage of emerging opportunities for regional collaboration. For smaller communities or low-income communities, in particular, regional agencies may offer important technical support and other resources for developing local climate mitigation and adaptation strategies that might otherwise be out of reach and leave communities at risk.[244]

---

[240] *Id*. at *35.

[241] Minute Order, *Golden Door II*, *supra* note 3, at *11, *13-14.

[242] Respondents' Opposition Brief (*Sierra Club*) in 2019 appeal, *supra* note 209, at *62-70.

[243] CEQA Guidelines § 15125(d).

[244] MAWHORTER, ET AL., *supra* note 85, at 22-24.

Moreover, while SB 375 makes clear that nothing in an SCS compels a local government to follow it, this doesn't diminish the value of the SCS as an informational and strategic document.[245] State law requiring general plan EIRs to examine and discuss inconsistencies with an SCS ensures that local governments will at least *consider* the SCS and identify reasons for not aligning to the regional strategy for reducing GHG emissions. This advances information sharing, which may help regional agencies identify obstacles and modify plans to better address local needs and emerging issues. It may also encourage local authorities to review their reasons for diverging from the regional guidance and to reconsider whether lower GHG alternatives were adequately evaluated. In general, promoting regional coordination and collaboration can open the way to new opportunities for joint problem solving to advance local and regional goals. This is likely to be a valuable asset as climate change continues to pose new challenges and threats for decades to come.

D. Application to Climate Adaptation Policies

While the San Diego case is primarily concerned with climate mitigation policies, the use of vertical consistency to enforce general plan provisions may extend to climate adaptation as well. As noted in Part III, legislation amending the mandatory elements framework of general plans added the requirement that local governments begin addressing climate-related risks and vulnerabilities within the safety element. In particular, all general plans must be amended "to address climate adaptation and resiliency strategies applicable to the city or county" within the safety element by 2022.[246] Communities located in state-designated "fire hazard security zones" must also add fire hazard information and fire response plans to their safety elements upon the next update of the housing element.[247] In addition, CNRA's 2018 update to the *Safeguarding California Plan* contemplates a future amendment to the housing element that would integrate analysis of climate hazards and mitigation strategies into community growth and development plans.[248] Based on these new and proposed requirements, it appears that general plans are likely to incorporate more climate adaptation and resilience policies in years to come, which stands to further increase the relevance of vertical consistency as a legal tool for advancing climate resilience.

---

[245] Cal. Gov't Code § 65080(b)(2)(K).

[246] SB 379, 2015 Cal. Stat. 608, amending Cal. Gov't Code § 65302(g)(4).

[247] SB 1241, 2012 Cal. Stat. 587; amending Cal. Gov't Code § 65302(g)(3).

[248] CNRA, Safeguarding California Plan: 2018 Update, *supra* note 97, at 83.

Like the GHG emissions policies in the San Diego case, the enforceability of general plan policies advancing climate adaptation goals may similarly depend on whether the policies are formulated to be "fundamental, mandatory and clear."[249] The regional and even statewide nature of risks like sea level rise, wildfire risk, and drought also points to the importance of increased coordination across local, state, and regional levels of government. As more effects of climate change are felt, information and resource sharing will be increasingly helpful for developing strategies to protect vulnerable communities. At the same time, local land use choices will continue to play a pivotal role as communities choose how and where to grow and develop in the face of new threats and changing conditions.

VI. Conclusion

This paper has explored the use of vertical consistency as a legal advocacy tool in the climate change context. Although vertical consistency has not been a prominent issue in climate advocacy in the past, the San Diego County Cap case illustrates how this principle can be used to hold local officials accountable to the climate policies enacted in their general plans. It also speaks to the importance of local land use planning and the role of general plans in achieving GHG emissions reductions. While the impact of any one development project, or even one community, may seem negligible when compared to the magnitude of the climate, there is no doubt that the incremental GHG emissions resulting from local land use decisions will contribute measurably to the overall levels of GHG in the atmosphere.[250] Land use choices made now will impact GHG emissions for decades to come and greatly influence the ability of communities, regions, and states to achieve climate mitigation and adaptation goals in the future.

As California's response to climate change continues to evolve, several factors suggest that local land use planning, and general plans in particular, will become more prominent in the effort to achieve climate mitigation and climate adaptation goals. First, statewide mandates initiated under AB 32 and SB 97 have required many communities to adopt climate mitigation policies into their general plans in order to comply with CEQA. Second, regional planning and CEQA streamlining enacted by SB 375 and other statutes have led many communities to adopt plan-level policies for meeting GHG reduction targets. Third, additional leg-

[249] Minute Order, *Golden Door II*, *supra* note 3, at *12.

[250] *See*, *e.g.*, the Court's discussion of causation in *Massachusetts v. E.P.A.*, 549 U.S. 497, 523-24 (2007).

islation amending the mandatory elements of general plans now requires communities to add climate adaptation and resilience strategies to their general plans as well. Given the increasing urgency of responding to climate change and the growing recognition that local land use planning has a pivotal role in envisioning and implementing climate solutions at the local level, this trend is likely to continue. General plans are thus likely to become more instrumental in community responses to climate change, which in turn could make vertical consistency more relevant as a lever for enforcement and accountability.

The San Diego case also illustrates that communities are often divided over how to achieve climate mitigation and adaptation. Importantly, litigation is just one tool and collaborative strategies that can help community members negotiate their differences are also essential to achieving the state's bold vision of climate change solutions. However, as the trial court observed in 2012, this case is taking place "in a setting in which hundreds of thousands of people in [the County] live in low-lying areas near the coast, and are thus susceptible to rising sea levels associated with global climate change," which means "enforceable mitigation measures are necessary now."[251] This points to a need for general plans to adopt fundamental, clear and mandatory policies to guide local growth and development towards a low-carbon and climate-resilient future.

As this paper goes to publication, the Court of Appeals is yet to issue its decision on the County's appeal. If the County prevails, this could lead to higher local GHG emissions and encourage other cities and counties to adopt measures like M-GHG-1. Alternatively, if the Court of Appeals affirms that the 2011 general plan's commitment to reducing GHG emissions is enforceable, this could encourage the County to finally begin implementing projects that are vertically consistent with its general plan. Hopefully, the appellate decision will be one that strengthens the larger collective effort to reduce GHG emissions and adapt to changing conditions in order to provide for the well-being of communities and our common future.

[251] Minute Order, *Sierra Club (2013)*, *supra* note 15, at 7.