12670 High Bluff Drive
San Diego, California 92130
Tel: +1.858.523.5400 Fax: +1.858.523.5450
www.lw.com

LATHAM & WATKINS LLP

March 30, 2018

VIA EMAIL AND FEDEX

Ashley Smith
Planning and Development Services Department
County of San Diego
5510 Overland Avenue, Suite 310
San Diego, CA 92123
Email: Ashley.Smith2@sdcounty.ca.gov

Re: Requirement to Fully Evaluate Water Conservation Feasibility and Impacts in Newland Sierra EIR

Dear Ms. Smith:

I am writing on behalf of my client, Golden Door Properties, LLC ("Golden Door"), regarding the Court of Appeal's recent decision in Golden Door Properties, LLC v. Vallecitos Water District. The appellate court's written opinion,[1] as well as the statements of the court at the hearing for this case,[2] highlighted the critical role of the County of San Diego in fully and faithfully analyzing both the feasibility and potential impacts of the significant water conservation measures (approx. 36% cutback for all existing water customers) that the Vallecitos Water District has stated will be required in order to ensure that there is enough water for the Newland Sierra project.

In sum, the Court of Appeal's opinion highlighted critical deficiencies in the draft environmental impact report ("EIR") for the Newland Sierra project. The County's duty as lead agency under the California Environmental Quality Act is to correct these deficiencies—including a request to the District to modify, correct, or supplement its WSA and receipt of a revised water supply assessment ("WSA")—and recirculate the draft EIR along with the revised WSA for further public review and comment.

As we have explained in our prior correspondence,[3] the County's role as lead agency in the CEQA EIR process is indeed "to independently review the [WSA] document and ensure that

[1] A copy of the Court of Appeal's written opinion is attached hereto as Enclosure 1.

[2] An unofficial transcript of the argument and hearing before the Court of Appeal in San Diego on March 16, 2018, is attached hereto as Enclosure 2.

[3] *See, e.g.*, Letter from Latham & Watkins on behalf of The Golden Door, dated August 14, 2017, at pp. 79-105; Letter from Latham & Watkins on behalf of The Golden Door, dated May 15, 2017, *RE: The*

the WSA is not built on unspecified and deferred 'mitigation' to substantiate the essential 36% water usage reduction." The Court of Appeal affirmed this principle in its written opinion, stating that the County's "function" under the CEQA process is to "to review the information in the WSA and to evaluate ***any*** objections and challenges to the accuracy of the information and analysis." (Encl. 1 [Slip opinion at p. 23 (emphasis added)].)[4] The Court of Appeal also explained that "if the County does not properly perform its statutory obligations, Golden Door will have the right to seek a judicial remedy in the CEQA process." (*Ibid.*) In other words, the County may not simply defer to the District's conclusions in its WSA without independently evaluating those conclusions, including on issues regarding the District's authority to implement drastic, permanent/long-term conservation mandates on existing customers throughout the District.

Unfortunately, the draft EIR for the Newland Sierra project does not undertake this analysis, stating only that previous efforts to conserve water to a level of a "25.6 percent reduction in water use demonstrates that Vallecitos' customers can respond to calls for water conservation …."[5] The draft EIR does not otherwise discuss whether this conservation level (either a 25.6% reduction or the 36% reduction that will be required as indicated by the District's WSA) is actually "feasible," nor does it disclose the potential impacts of such a drastic cutback on existing customers or on the environment. Additionally, the draft EIR fails to point to any official decision by the District to adopt or implement those cutbacks, such as the adoption of a new District ordinance regarding water usage, including any amendment to the District's Urban Water Management Plan ("UWMP") that would be required in order make such a decision and any other official action required by District Ordinance No. 198.

"Feasible" is defined clearly by CEQA: "'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account ***economic***, ***environmental***, ***legal***, ***social***, and technological factors." (14 Cal. Code Regs., section 15364 [emphasis added].) But, as noted, the Newland Sierra draft EIR does not actually evaluate whether the 36% cutback required to accommodate the project is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account ***economic***, ***environmental***, ***legal***, ***social***, and technological factors." The draft EIR just assumes, based on unique circumstances of the past, that a level of 25.6% reduction can be achieved. The draft EIR does not evaluate whether a greater 36% cutback could be achieved, particularly given the legal obstacles we have identified in our previous correspondence. These "legal factors" include the fact that the governing UWMP does not provide that the District's supply deficit will be achieved solely through "Conservation Required" on existing customers. The County has not disclosed or analyzed the fact that a formal amendment to the UWMP under the Water Code

---

County's Responsibility Regarding Analysis of the Vallecitos Water District's Water Supply Assessment for the Newland Sierra Project.

[4] *See also* p. 3, explaining that the decision "does not preclude Golden Door from challenging the WSA in the CEQA proceedings and/or challenging any later-approved Water Verification under applicable statutory procedures."; p. 24, explaining that "The lead agency ***must*** evaluate the comments and include written responses to the comments in the final EIR." (emphasis added).

[5] Newland Sierra Draft EIR, Chapter 2.14, at p. 2.14-39.

must be undertaken and approved by the District before the project may proceed. Similarly, another "legal factor" affecting the feasibility of District-wide, permanent/long-term conservation mandates includes the fact that District Ordinance No. 198 generally prohibits new potable water connections under Drought Response Level 3, which is the level that the District would need to enact in order to achieve a District-wide 36% conservation mandate.

Notably, the Court of Appeal also highlighted the requirement in Water Code section 10911 that requires the District to "set[] forth the measures that are being undertaken to acquire and develop those water supplies." Simply stating without any detail or analysis that "Conservation Required" will make up for the entirety of the 25% to 36% supply deficits in future years does not comply with Section 10911, particularly given the legal obstacles that we have noted for enacting such drastic permanent water conservation mandates.

As the Court of Appeal aptly noted in its written opinion, "Thus, even assuming the WSA concludes that water supply deficits can be remedied solely by conservation measures, this does not necessarily mean the District *has the authority to implement those measures*." (Enclosure 1 [Slip opn. at p. 21 (emphasis in original)].) The Court of Appeal underscored this point again in its opinion, writing "If Golden Door shows during the CEQA process that the current Water Management Plan would preclude the District from requiring the level of conservation set forth in the WSA, the disclosure of this fact would be potentially relevant in determining whether the water supply would be sufficient for the project demands." (*Ibid.*)

Though the draft EIR notes that District Ordinance 198 and the UWMP exist, it does not provide any substantive disclosure or discussion regarding the impact of these legal requirements and limitations on the feasibility of this level of conservation mandates (36% reduction across all existing customers).

Finally, it is important to note that the Court of Appeal expressed similar concerns to those expressed by the Golden Door regarding the District's WSA:

- Justice O'Rourke: "It doesn't sound like very good water management from what you are portraying to build a subdivision and users that you can't support. South Africa now has a couple of cities undergoing similar problems with this very moment of running out of water." (Enclosure 2 [March 16 hearing transcript, at p. 7].)

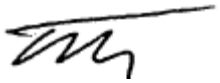
- Justice Haller: "I think all of us have great concern over your concern about the water." (*Id.* at p. 8.)

As the Court of Appeal explained, "When a WSA 'is found to be incomplete or to contain inaccurate information or faulty analysis, the lead agency should request the water supplier to modify, correct or supplement the WSA.'" (Enclosure 1 [Slip opn. at p. 22].) Consistent with this explanation of the law, the Golden Door requests that the County direct the District to modify, correct, or supplement the WSA to provide an honest and complete analysis of water supply in the District under sections 10910 and 10911 of the Water Code. A revised WSA should include, among other things, detail regarding the water conservation mandates

contemplated by the District to accommodate its water supplies to make way for the project, i.e., "the measures that are being undertaken to acquire and develop [the District's] water supplies."

Thank you for your consideration, and we look forward to seeing how the County addresses these important concerns.

Best regards,



Taiga Takahashi
of LATHAM & WATKINS LLP

cc: County Board of Supervisors
County Planning Commission
Mark Wardlaw
Mark Slovick
Darin Neufeld
Claudia Silva, Esq.
William Witt, Esq.
Dan Silver, Endangered Habitats League
Twin Oaks Valley Community Planning Group
Kathy Van Ness
Stephanie Saathoff, Clay Co.
Denise Price, Clay Co.
Andrew Yancey, Esq.
Christopher Garrett, Esq.

ENCLOSURE 1

ENCLOSURE 1

Filed 3/26/18

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GOLDEN DOOR PROPERTIES, LLC, Plaintiff and Appellant, v. VALLECITOS WATER DISTRICT, Defendant and Respondent; COUNTY OF SAN DIEGO et al., Real Parties in Interest and Respondents.	D072280 (Super. Ct. No. 37-2016-00037559-CU-WM-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald Frazier, Judge. Affirmed.

Latham & Watkins, Christopher W. Garrett and Taiga Takahashi for Plaintiff and Appellant.

Law Offices of Scott & Jackson and Jeffrey G. Scott for Defendant and Respondent.

Thomas E. Montgomery, County Counsel, and Claudia G. Silva, Assistant County Counsel, for Real Party in Interest and Respondent the County of San Diego.

Gatzke Dillon & Ballance, Mark J. Dillon, Michael P. Masterson and David Hubbard for Real Party in Interest and Respondent Newland Sierra, LLC.

Newland Sierra, LLC seeks to build a large residential development in an unincorporated rural area of northeastern San Diego County (County). An adjacent property owner, Golden Door Properties, LLC (Golden Door), filed a lawsuit against the public water supplier for the proposed project (Vallecitos Water District (District)), and named Newland Sierra and the County as real parties in interest. In the amended complaint, Golden Door challenged two statutory assessments in which the District concluded there is sufficient water supply for the project. The court sustained a demurrer without leave to amend on grounds of lack of finality, failure to exhaust remedies, and mootness. We affirm.

OVERVIEW

As part of its lead agency review under the California Environmental Quality Act (CEQA), the County requested the District to prepare two statutory documents known as a Water Supply Assessment (WSA) and a Water Verification to analyze water availability for the project. (See Wat. Code, § 10910; Gov. Code, § 66473.7.)[1] The

1 All unspecified statutory references are to the Water Code.

District prepared the WSA and Water Verification in a single combined document. After a public hearing, the District's board approved the report and transmitted it to the County.

Before the County analyzed the District's report and incorporated it into its environmental impact report (EIR), Golden Door filed a writ of mandate petition and complaint, requesting the superior court to declare the Water Verification invalid because it contained flawed analysis, was inconsistent with the District's general water planning document, and violated applicable statutes.

In response, the District rescinded its Water Verification and reissued the report solely as a WSA. Golden Door then amended its complaint to include this fact. In its amended complaint, Golden Door asserted similar challenges to the WSA and also requested that the court address its challenges to the Water Verification (despite that it no longer existed) as an exception to the mootness doctrine.

Defendants successfully demurred to the amended complaint, and Golden Door contends the court erred on numerous grounds. We reject these contentions. Golden Door's challenges to the WSA are barred because governing law precludes claims against a public water supplier for an alleged inadequate WSA while the CEQA process is ongoing. (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1477-1491 (*California Water*)). Golden Door's challenges to the rescinded Water Verification are moot and there are no valid exceptions to the mootness doctrine under the circumstances of the case. This affirmance does not preclude Golden Door from challenging the WSA in the CEQA proceedings and/or challenging any later-approved Water Verification under applicable statutory procedures.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts based on the properly pleaded allegations, inferences from the factual allegations, information in materials attached to the complaint, and matters properly subject to judicial notice. (See *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.)

In January 2015, Newland Sierra submitted an application to the County (the lead agency under CEQA) for its proposed development. The proposal includes a planned community with 2,135 homes, 81,000 square feet of commercial development, a school, vineyards, open space conservation areas, parks, and equestrian facilities.

The next month, the County issued a notice of preparation of the project's EIR. The County then requested the District (the water supplier for the project area) to prepare a WSA and a Water Verification for the proposed project. Under applicable statutes, the purpose of these documents is to evaluate whether total water supplies during a specified period will meet the projected water demand of a proposed project. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 433 (*Vineyard*).) Although the documents have a similar objective, the function of each document and the rules governing challenges to each document differ.

The WSA is primarily an informational report for CEQA purposes. Governing law requires CEQA lead agencies to request the potential water supplier to prepare a WSA. (See §§ 10910-10911; Gov. Code, § 66473.7.) After receiving the WSA, the lead agency must consider the analysis as part of the basis for disclosing whether sufficient water supplies exist for the project. (*Vineyard*, *supra*, 40 Cal.4th at pp. 428-435.)

Objections to the conclusions or analysis contained in a WSA are generally limited to challenges brought in the EIR process or as part of a Water Verification proceeding. (*California Water*, *supra*, 161 Cal.App.4th at pp. 1477-1491.)

Unlike the WSA, a Water Verification can be prepared by the water supplier at any time during the approval process and is not necessarily part of the EIR analysis. (See *Vineyard*, *supra*, 40 Cal.4th at p. 433.) The agency may prepare the Water Verification as a stand-alone document or as part of a WSA report. A Water Verification is a precondition to the project's final subdivision map approval, and is required to provide "firm assurances" of adequate water supply. (*Vineyard*, *supra*, 40 Cal.4th at p. 434.) A Water Verification thus serves as a fail-safe mechanism: a subdivision generally cannot be approved until and unless the local water agency determines there is sufficient water to supply the project. The water supplier can rely on a WSA in preparing the Water Verification. (Gov. Code, § 66473.7, subd. (c)(2).) A local agency or any other interested party has 90 days from the issuance of the Water Verification to bring a writ of mandate petition challenging the report. (Gov. Code, §§ 66499.37, 66473.7, subds. (b)(2), (o).)

On October 5, 2016, after a public hearing, the District adopted the combined WSA and a Water Verification report (Combined Report) that concluded there was sufficient water supply for the Newland Sierra project. Three weeks later, Golden Door filed a superior court action against the District, challenging the District's approval of the Combined Report, and seeking to prohibit the County from using or relying on the report

in its CEQA analysis. Golden Door named the County and Newland Sierra as real parties in interest.

In the lawsuit, Golden Door alleged the conclusions in the Combined Report were flawed in numerous ways. Of relevance here, Golden Door asserted that the conclusions were predicated on water conservation measures that would substantially reduce water availability for existing users. It maintained that this compelled conservation was inconsistent with: (1) the District's Urban Water Management Plan (Water Management Plan), a planning document that must be prepared every five years to evaluate the region's water supply and demand over a 20-year period (§§ 10620, 10621); and (2) certain "water duty factors" adopted in September 2016.

Golden Door claimed the Water Management Plan projects a 20-year *water supply deficit* under all scenarios—showing a deficit in 2020, 2025, 2030, and 2035 in normal, dry, and multiple dry year scenarios. Golden Door alleged that "[i]n an attempt to mask this fatal flaw," the Combined Report relies on a " 'Conservation Required' " figure that creates "a new rationing requirement" that allegedly "makes up as much as 36 percent of the District's demand." Golden Door maintained that this new conservation requirement will apply "perpetually on a District wide-basis" in contradiction to the Water Management Plan, and therefore it constituted a de facto amendment to the Water Management Plan and water duty factors, without providing the statutorily-required notice and comment periods. (See §§ 10621, 10642, 10608.26.) Golden Door further alleged that the conservation measures identified in the Combined Report violate District

Ordinance No. 198, which sets forth the District's drought management plan, including a process for instituting drought response levels.

In response to the complaint, Newland Sierra requested (with the County's support) that the District rescind its action approving the Combined Report, and instead issue the report solely as a WSA (and defer the adoption of a Water Verification until a later stage of the project). On November 16, 2016, the District's board agreed with this proposal and adopted the WSA as a single report (without the Water Verification). The resolution vacating the Combined Report stated that "the Board of Directions of the District deems it would serve the best interests of the District and the public served to avoid costly litigation by rescinding the action approving the [Combined Report]."

The newly approved WSA report contained conclusions and analysis essentially identical to the Combined Report. The WSA concludes that "with development of the resources identified, there will be sufficient water supplies over a 20-year planning horizon to meet the projected demand of the proposed Project and the existing and other planned development projects within the District's service area." The WSA states that "Conservation is an important component of the District's water supply plan to meet future demands, fulfilling as much as . . . approximately 36% of the demand requirements . . . to meet 2020 demands under multi-dry year conditions, but lessening over time to . . . approximately 26% of the demand requirements . . . in 2025 through 2035."

Golden Door then filed an amended writ of mandate petition and complaint. The first six causes of action seek declaratory relief challenging the conclusions of the rescinded Water Verification. The seventh through thirteenth causes of action challenge

the legal adequacy and validity of the WSA. The allegations identified the same alleged deficiencies as were identified in the initial petition/complaint. On its challenge to the (rescinded) Water Verification, Golden Door added that the matter was not moot because (1) "the District's ability to verify a water supply for the [Project] is a matter of continuing public interest and the need for the [Water Verification] is highly likely to recur" despite that the actual "verification may not occur for several years"; (2) property owners and voters in a potential County referendum concerning the proposed project need to have a current understanding as to "whether the District could legally verify the Newland Project's water supply"; and (3) "[b]ecause the District re-approved the same water availability analysis in both the [Combined Report] and [the reissued WSA], it is highly likely that the District would re-approve the existing analysis for a [Water Verification] on a later date . . . ."

Newland Sierra filed a demurrer, asserting: (1) the first through fifth causes of action challenging the Water Verification are moot and not ripe because the District rescinded the Water Verification on November 16, 2016, and Golden Door's allegations do not establish grounds for an exception to the mootness doctrine; (2) the seventh through thirteenth causes of action challenging the WSA are unmeritorious because the District's act of approving the WSA is not a "final act" for purposes of mandamus review

and/or Golden Door failed to exhaust its administrative remedies provided in the CEQA statutory scheme, relying on *California Water*, *supra*, 161 Cal.App.4th 1464.[2]

The County and the District also filed demurrers, and both joined in Newland Sierra's supporting memorandum of points and authorities.

In its tentative ruling, the court found in defendants' favor based on its conclusion that Golden Door's challenge to the Water Verification was moot, and the challenges to the WSA were premature, citing *California Water*. At the hearing on the motion, Golden Door's counsel focused on the WSA challenge, and stated he agreed *California Water* "stands for the general proposition that challenges to [WSA's] can only be brought after there's an approved environmental impact report . . . . Therefore . . . we were pleading uphill when we filed this case . . . ." But counsel argued this is an "appropriate case" to make an exception because Golden Door's challenges concern the inconsistency between the WSA and the Water Management Plan (and Ordinance 198), and the County will not consider those issues in the CEQA process because they concern procedural matters and constitute de facto amendments of the District's governing rules. In support, Golden Door's counsel discussed the County's "silence" in the demurrer proceedings:

> "[T]he County has been strangely silent in these proceedings. . . . [¶] . . . Instead of filing a pleading saying, 'Yes, every claim that's been raised in this petition and complaint, every one of those claims will be adjudicated by the County. Don't worry. We're the agency that has this administrative remedy. It is an available administrative remedy. It's timely, and we will look at all these issues.' Instead, we

---

2 Newland Sierra also challenged the sixth cause of action on separate grounds, but because Golden Door concedes the demurrer was proper on this cause of action, we need not discuss these grounds.

> just have a simple joinder and silence from the County about whether we're going to see that. [¶] . . . [¶]
>
> "So without a commitment by the County to provide that type of review of all those issues rather than just a weighing of, on the face of [the WSA], does it say [there is sufficient] water . . . . [I]n these unique circumstances[,] . . . we don't think we have an available administrative remedy.
>
> "And in part, what I'm concerned about is the developer, [which has] filed the only [memorandum of points and authorities] here, will say, 'You have a great remedy,' and then when the County issues [the EIR] and we say, 'Wait a minute, there're all these problems with the WSA,' they'll say, 'Too bad. It's not our purview. We're just a CEQA agency. We just weigh it as a piece of evidence.' "

Newland Sierra's counsel countered that the case fell squarely within the *California Water* decision, and Golden Door would have the opportunity to raise all of the challenges raised in its current complaint in the CEQA action:

> "Every one of those arguments needs to be presented to the County as a basis for invalidating the EIR's water supply section, and the County will then have the full record before it and it will make the call. It will make the judgment call. . . . [¶] So everything you heard today . . . is the outline, the transcript, the script for what needs to be presented to the County . . . once the draft EIR is released, and it's not even out yet. So we've got to get the EIR out. It's got to be vetted publicly. It's got to go through hearing processes. Counsel's going to . . . have remedies. They just have to be patient."

The court then asked, "You're saying they do have the administrative remedy?" Newland Sierra's counsel responded:

> "They do have an administrative remedy . . . . [¶] . . . [¶] And counsel can use every one of those arguments to try to convince the County . . . to deny this project. . . . And if they're successful, the project could be denied and at which time litigating over advisory water supply documents on a project that was never approved would be just a colossal waste of everyone's time, energy, money, and resources, including this Court's. [¶] . . . [¶] . . . [I]f the water situation is so dire with so many deficiencies and shortfalls and

> deficits, then the County—under the WSA law [as interpreted in *California Water*], . . . is free to accept/reject that WSA. They're free to request additional information. It's a process, and we have to allow the process, and counsel at bottom has to wait. They have remedies."

After Newland Sierra's counsel completed this argument, assistant County counsel Claudia Silva made a brief comment: "Good afternoon, your Honor. I just wanted to address very quickly the County's silence. Until there's a certified [EIR] or at least a draft EIR that's gone out . . . [,] [¶]. . . [¶] . . . the role of the County is in that EIR process, and that's the scope of our role, not to sit as a super legislature over the [D]istrict on this particular WSA process."

Golden Door's counsel responded:

> "What Ms. Silva said I think proves my point, which is . . . that the County can accept or reject the information in the document. None of them say that the County will review whether or not it conflicts with the [D]istrict's . . . Water Management Plan. None of them say that the County will determine whether or not it conflicts with a prior ordinance which the [D]istrict adopted which said 'No new water hookups if you're cutting existing users back over 30 percent.' . . .
>
> "And so simply we have a situation where—and the law is simply that [the WSA] just floats around as an informational document. The [D]istrict won't even be a party to the CEQA proceedings. . . . [S]ince [the County] [doesn't] sit as a super legislature or a super judiciary . . . where they adjudicate the validity of the WSA, we'll never get that determination and we'll never get to the 36 percent cutback that's embodied in their set aside."

After taking the matter under submission, the court issued a final judgment adhering to its tentative ruling and sustained the demurrer without leave to amend. The court found the challenges to the Water Verification are moot because the Water Verification was "rescinded" and the court was "not persuaded" the asserted exceptions to

the mootness doctrine applied. The court further found the principles set forth in *California Water* barred Golden Door's challenges to the WSA.

DISCUSSION

I. *Review Standard*

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the 'reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded.' [Citation.] It 'is error for a trial court to sustain a demurrer [if] the plaintiff has stated a cause of action under any possible legal theory.' " (*Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 389.)

We apply a de novo review, and are not bound by the trial court's construction of the complaint. (*Soto, supra,* 4 Cal.App.5th at p. 389.) We accept as true the well-pleaded material facts, as well as the reasonable inferences that may be drawn from these facts. (*Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111.) "Whether the plaintiff will be able to prove these allegations is not relevant; our focus is on the legal sufficiency of the complaint." (*Los Altos Golf and Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 203, italics omitted.)

II. *Challenges to WSA*

A. *Applicable Law*

In the CEQA process, the lead agency must request a WSA from the water supplier before approving a specified project (including the Newland Sierra project). (§ 10910, subds. (b), (c)(1).) The WSA must evaluate whether the total water supplies

during a 20-year period will meet the projected water demand of the proposed project. (§ 10910, subd. (c)(4).) The water supplier may incorporate into the WSA information from the water system's most recent Water Management Plan, if the plan contained an evaluation of the potential project demand. (§ 10910, subd. (c)(2).) But if the plan did not include this information, the WSA for the project "shall include a discussion" as to "whether the public water system's total projected water supplies available during normal, single dry, and multiple dry water years during a 20-year projection will meet the projected water demand associated with the proposed project, in addition to the public water system's existing and planned future uses . . . ." (§ 10910, subd. (c)(3).)

The WSA shall also identify any existing water supply entitlements, water rights, or water service contracts relevant to the identified water supply for the proposed project, and describe the quantities of water received in prior years by the public water system under the existing water supply entitlements, water rights, or water service contracts. (§ 10910, subd. (d)(1).) "If, as a result of its assessment, the public water system concludes that its water supplies are, or will be, insufficient, the public water system shall provide to the city or county its plans for acquiring additional water supplies, setting forth the measures that are being undertaken to acquire and develop those water supplies." (§ 10911, subd. (a).)

The statutes specify the timeframe for preparing and submitting a WSA. Specifically, the "governing body" of each public water system is required to "approve" the WSA at a regular or special meeting and must submit the WSA to the lead agency not later than 90 days from the date on which the request was received. (§ 10910, subd.

(g)(1).) If the water supplier fails to submit the WSA, the lead agency may seek a writ of mandamus to compel the water supplier to comply. (§ 10910, subd. (g)(3).) After the water supplier provides the WSA to the lead agency, the lead agency must include the WSA in any CEQA environmental documents prepared for the project, and may include an evaluation of the information contained in the WSA. (§ 10911, subds. (b), (c).) Based on its evaluation, the lead agency "shall determine, based on the entire record, whether projected water supplies will be sufficient to satisfy the demands of the project, in addition to existing and planned future uses. If the [lead agency] determines that water supplies will not be sufficient, [it] shall include that determination in its findings for the project." (§ 10911, subd. (c).)

B. California Water

Ten years ago, the *California Water* court extensively reviewed this statutory scheme in addressing an environmental organization's (C-WIN) challenge to a water district's WSA in factual circumstances very similar to those found here. (*California Water*, *supra*, 161 Cal.App.4th at pp. 1478-1481.) There, a water agency prepared a WSA at the request of the CEQA lead agency (the City) that was conducting a CEQA evaluation of a proposed industrial/business park development. (*Id.* at p. 1473.) Before the City had an opportunity to review and evaluate the WSA and incorporate it into the EIR, C-WIN filed a writ of mandate petition and complaint in the superior court, alleging the WSA was legally deficient and misleading in various respects. (*Id.* at p. 1474.) As here, the challenger named the water district, the lead agency, and the project developer as defendants or real parties in interest. (*Id.* at p. 1474 & fn. 7.)

These defendants moved for judgment on the pleadings, raising several arguments, including: (1) under the applicable statutes the WSA was a "technical informational document and not a final act or determination" subject to judicial review; and (2) the challenger (C-WIN) failed to exhaust its administrative remedies and was required to first raise objections with the lead agency in the EIR proceedings. (*California Water*, *supra*, 161 Cal.App.4th at pp. 1474-1475.) The trial court agreed, and granted the motion for judgment on the pleadings without reaching the merits of C-WIN's challenges. (*Id.* at p. 1475.) The Court of Appeal affirmed on both alternative grounds. (*Id.* at pp. 1482-1491.)

Regarding the first (finality) ground, the court explained that a public agency's determination is not subject to judicial challenge until it is final in the sense that the agency " 'possesses "no further power to reconsider or rehear the claim," ' " and that whether an administrative determination is final depends on the governing statutes. (*California Water*, *supra*, 161 Cal.App.4th at pp. 1485-1486.) After reviewing the WSA statutes, the court concluded the Legislature did not intend the WSA to be final for purposes of the mandamus remedy because its primary purpose in the EIR process is an informational tool, and not a final action for purposes of ensuring or requiring water supply. (*Ibid*.)

The court explained: "[T]he code is . . . clear that nothing in the WSA itself or the statutes governing its preparation actually imposes any duty upon the water supplier to provide water services to the project. (See . . . § 10914.) Thus, . . . the WSA is . . . a technical, informational advisory opinion of the water provider. Though the WSA is

required by statute to include an assessment of certain statutorily identified water supply issues and is required to be included in the EIR, the WSA's role in the EIR process is akin to that of other informational opinions provided by other entities concerning potential environmental impacts—such as traffic, population density or air quality. The fact that the duties of the water provider in preparing the WSA and responsibility of the lead agency in requesting the WSA are committed to statute does not change the fundamental nature of the WSA itself as an advisory and informational document." (*California Water*, *supra*, 161 Cal.App.4th at p. 1486.)

The court also supported its conclusion by discussing legislative history showing that the WSA requirement "was motivated by a concern that certain counties and cities were either ignoring or inadequately considering water supply issues prior to approving new developments. While the Legislature wanted to ensure that lead agencies thoroughly considered water supply issues and wanted to add transparency to the entire process, the Legislature committed the final determination on water supply issues to the lead agency, *not the water providers*. Indeed an earlier iteration of the WSA law that gave the water providers ultimate determination of whether insufficient water supplies constituted 'significant environmental effects under CEQA' was rejected because opponents viewed it as shifting land use decisionmaking authority from the cities and counties to water suppliers." (*California Water*, *supra*, 161 Cal.App.4th at p. 1486.)

The court additionally considered the related Water Verification statutes: "[O]n the same day the Legislature enacted [the WSA law], it also enacted [the law] which provides nonagency third parties with an opportunity to seek judicial intervention [to

challenge a Water Verification] under Government Code section 66473.7 to compel a water system to comply with the [W]ater [V]erification law. That the Legislature omitted the right to third party judicial intervention from [the WSA statutes] is instructive as to how the WSA should be viewed in the larger context of the EIR process. The WSA is but an interlocutory and preliminary step in the EIR process, and in general, interim determinations are not subject to mandamus review." (*California Water*, *supra*, 161 Cal.App.4th at p. 1486.)

The court also emphasized the lead agency's review powers after the water agency's "final" approval of its WSA: "Once the WSA is approved by the water provider's governing board the WSA is submitted to the lead agency. The lead agency may then evaluate the information included in the WSA. [(§ 10911, subd. (c).)] [This] power to 'evaluate' the WSA necessarily invests the lead agency with the authority to consider, assess and examine the quality of the information in the WSA and endows the lead agency with the right to pass judgment upon the WSA. *While the lead agency must include the WSA in the EIR, the lead agency is not required to accept the WSA's conclusions. The lead agency may in evaluating the WSA accept or disagree with the water provider's analysis or may request additional information from the water provider. In any event, the lead agency is required by statute to make the ultimate determination, based on the entire record, whether water supplies are sufficient*. [(§ 10911, subd. (c).)] The lead agency may make a finding that adequate water supplies exist (or do not exist) to meet the project's anticipated demand, even if that finding is inconsistent with the

conclusions in the [WSA]." (*California Water*, *supra*, 161 Cal.App.4th at p. 1487, italics added, fn. omitted.)

The *California Water* court thus concluded: "[B]ecause the adoption of a WSA does not create a right or entitlement to water service or impose, expand, or limit any duty concerning the obligation of a public water system to provide certain service and because the lead agency has a separate (from the water provider's WSA) and independent obligation to assess the sufficiency of water supplies for the proposed project, . . . the WSA is not a final agency decision, determination or action as that term is used in the context of mandamus relief. Under the WSA law framework, the 'final' decision for the purposes of writ review occurs only after the lead agency acts—completes its obligations under the WSA and CEQA." (*California Water, supra*, 161 Cal.App.4th at pp. 1487-1488.)

The *California Water* court also found C-WIN was barred from judicially challenging the WSA by the separate (but functionally similar) administrative exhaustion doctrine, explaining the "exhaustion requirement[] . . . avoid[s] . . . premature interruption of administrative processes, allowing an agency to develop the necessary factual background of the case, letting the agency apply its expertise and exercise its statutory discretion, and administrative efficiency and judicial economy." (*California Water*, *supra*, 161 Cal.App.4th at pp. 1489-1490.) C-WIN argued this doctrine was inapplicable because it could not obtain relief in the CEQA process as the " 'City had no authority to disapprove, modify or set-aside the WSA' . . . ." (*Id*. at p. 1490.) The *California Water* court disagreed, reiterating that a lead agency has the statutory authority

"to evaluate the WSA and the concomitant duty to make the final determination on the sufficiency of water supplies," and is empowered "to approve or disapprove the WSA or to request the Water District to revise, modify, amend or supplement the WSA." (*Ibid.*) The court emphasized "the adequacy of the WSA will [be subject to] judicial review" in the CEQA process, noting that a prior EIR for the same project had been successfully challenged based on a deficient water analysis. (*Id.* at p. 1491.)

The court further noted that to the extent C-WIN was arguing the lead agency had no authority to review its challenges to the WSA, this argument should be made first to the administrative agency: " '[I]t lies within the power of the administrative agency to determine in the first instance and before judicial relief may be obtained whether a given controversy falls within its granted jurisdiction.' " (*California Water*, *supra*, 161 Cal.App.4th at p. 1491.) The court also observed that requiring exhaustion of administrative remedies "conserves the parties' and the court's resources and avoids the possibility of multiple and simultaneous litigation as well as inconsistent rulings concerning the same project. In addition, . . . a direct challenge to a WSA in the middle of the EIR review proceedings could delay the review process and could preclude the lead agency from completing and certifying the EIR within the timeframes required under CEQA." (*Ibid.*)

C. California Water *Bars Golden Door's WSA Challenges*

As a sister Court of Appeal, we are not bound by *California Water*. (*Mega Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529.) But we choose to follow its holding because we find its analysis persuasive. On our own independent

review of the applicable statutes, we agree with the court's reasoning and conclusion. For purposes of mandamus review, a WSA is not final when it is approved by the water supplier and the administrative exhaustion doctrine generally requires the applicant to first challenge the WSA through the CEQA process.

Golden Door does not identify grounds to show *California Water* improperly interpreted the governing statutes, and instead argues its holding should not bar this action because Golden Door will not have an available remedy in the CEQA process under the unique circumstances of this case. We find these arguments unavailing.

First, Golden Door contends the WSA constitutes a "de facto amendment" of the Water Management Plan, to which the CEQA process is inapplicable, and thus Golden Door cannot obtain relief in the CEQA process. It asserts that the WSA declares future year supply deficits will be "resolved solely through" conservation measures and there is no support in the existing Water Management Plan to permit water supply problems to be addressed in this fashion. Golden Door thus argues the WSA has effectively amended the Water Management Plan for all future projects. Golden Door likewise emphasizes its allegations that the WSA is inconsistent with District Ordinance 198, which requires specific findings before instituting drought procedures, and argues that the WSA constitutes an improper amendment of this ordinance. Golden Door thus contends that if it is not permitted to challenge the WSA at this time (outside the EIR process), the public will be at risk of "being force-fed" Water Management Plan amendments and District Ordinance 198 determinations in the future, and the WSA determinations will become "baked into" the District's water analysis process.

These arguments reflect a misunderstanding of the WSA's function in the environmental review process. Even assuming the WSA is inconsistent with the Water Management Plan or a District ordinance, this does not mean that it *changes* these documents. As discussed in *California Water*, the WSA does not create a right or entitlement to water service, and is solely an informational report. (*California Water*, *supra*, 161 Cal.App.4th at pp. 1486, 1487-1488; § 10914.) Thus, even assuming the WSA concludes that water supply deficits can be remedied solely by conservation measures, this does not necessarily mean the District *has the authority to implement those measures.*

Golden Door characterizes the claimed inconsistencies between the WSA and the Water Management Plan as procedural defects, but this does not take Golden Door's challenge outside the normal CEQA process for challenging a WSA. If Golden Door shows during the CEQA process that the current Water Management Plan would preclude the District from requiring the level of conservation set forth in the WSA, the disclosure of this fact would be potentially relevant in determining whether the water supply would be sufficient for the project demands. (See, e.g., *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 274-275, 282-286 [rejecting a WSA in an EIR because it did not explain a substantial discrepancy between the estimated water demand for a project and the available water supply].) Moreover, as the *California Water* court observed, whether the lead agency has the authority to consider certain challenges to a WSA should be considered in the first instance by the administrative agency (here the

County), and not by the courts. (*California Water*, *supra*, 161 Cal.App.4th at pp. 1490-1491.)

Golden Door next argues this case is distinguishable from *California Water* because it has alleged facts showing it would be futile to challenge the WSA in the CEQA process. In support, Golden Door relies on its allegation that: " 'County staff have stated that they intend to rely upon the [WSA] as approved by the District and that they will not reexamine the facts or analysis used by the District in approving the [WSA].' " Even assuming this allegation is true, it would not preclude Golden Door from challenging the County's acceptance of an allegedly flawed WSA report. When a WSA "is found to be incomplete or to contain inaccurate information or faulty analysis, the lead agency should request the water supplier to modify, correct or supplement the WSA." (*California Water supra,* 161 Cal.App.4th at p. 1487, fn. 21.) If, as Golden Door suggests, the County will not perform this statutory obligation to review the accuracy of the information provided in the informational documents (particularly when such information has been challenged in the EIR process), an objector can challenge the EIR through the statutory procedures. Thus, the claim that the County will not perform its duties is premature and, as in *California Water*, it is not subject to attack through a direct challenge to the WSA.

Golden Door additionally relies on the brief remark made by the assistant County counsel during the hearing on the demurrer: "I just wanted to address very quickly the County's silence. Until there's a certified [EIR], or at least a draft EIR that's gone out[,]

. . . [¶] . . . [¶] . . . the role of the County is in that EIR process, and that's the scope of our role, not to sit as a super legislature over the [D]istrict on this particular WSA process."

Golden Door argues this statement confirms the County has no intention of evaluating the correctness of the WSA's conclusions. Golden Door's characterization of County counsel's remarks is not reasonable. Viewed in context, County counsel was responding to Golden Door's counsel's argument that he was concerned his client would not have the opportunity to raise challenges to the WSA in the CEQA process because the County merely joined in Newland Sierra's arguments and never affirmatively stated that it would " 'look at all these issues.' " Reasonably understood, County counsel's response to this concern was to emphasize the *timing* of its participation in the environmental evaluation process. County counsel correctly described that the local agency does not become involved in the water supplier's analysis *until* the EIR evaluation, explaining, "that's the scope of our role, not to sit as a super legislature over the district *on this particular WSA process*." (Italics added.) This statement does not suggest the County will not perform its function to review the information in the WSA and to evaluate any objections and challenges to the accuracy of the information and analysis. In any event, as discussed above, if the County does not properly perform its statutory obligations, Golden Door will have the right to seek a judicial remedy in the CEQA process.

Golden Door's reliance on *Action Apartment Ass'n v. Santa Monica Rent Control Bd.* (2001) 94 Cal.App.4th 587 is misplaced. In that case, the court held the administrative remedies were inadequate as applied to a landlord seeking relief from a

law regarding the payment of interest earned on security deposits. Although we agree with *Action Apartment* that the existence of an administrative remedy does not bar a judicial action *if* the administrative remedy would be inadequate, Golden Door has not shown the remedy is inadequate given the statutory scheme governing WSA's and EIR's.

Golden Door requests that we take judicial notice of portions of the draft EIR for the project, and argues that these portions confirm the County will not effectively analyze or understand flaws in the WSA, including the District's improper reliance on conservation measures to satisfy new water demands arising from the project. We decline to take judicial notice of this document. The draft EIR was circulated for public comment in June 2017, one month after the trial court judgment in the case. It is a fundamental appellate principle that an appellate court reviews the judgment based on the record at the time the court made its challenged rulings. (See *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.)

Moreover, the draft EIR would not change the result in this case because it does not support Golden Door's assertion that it does not have an adequate remedy in the EIR process. A draft EIR is not a final document. The public (including Golden Door) will have the opportunity to review and comment on the information contained in the draft EIR, including identifying omissions or flaws in the analysis and/or asserting that the document does not sufficiently or accurately identify possible environmental impacts. (Cal. Code Regs., tit. 14, §§ 15200, 15204, subd. (a).) The lead agency must evaluate the comments and include written responses to the comments in the final EIR. (Cal. Code Regs., tit. 14, § 15088, subd. (a).) If a party believes the responses do not sufficiently

address its concerns, it may seek judicial review. Given this process, the allegation that a *draft* EIR does not discuss or resolve Golden Door's concerns with the WSA does not mean Golden Door does not have an adequate remedy in the CEQA process. The existence of the draft EIR underscores the propriety of the *California Water* decision.

III. *Challenges to Verification*

Golden Door also challenges the court's ruling sustaining the demurrer on the first through fifth causes of action that challenge the Water Verification.

The first five causes of action seek declaratory relief determining that the Water Verification (contained in the rescinded Combined Report) violates applicable law because it fails to provide "firm assurances" of sufficient water supplies for the project, fails to adequately analyze potential groundwater impacts, and fails to ensure priority of water to low income households.

A necessary predicate for declaratory relief is the existence of an actual, present controversy between the parties. (*Linda Vista Village San Diego Homeowners Association, Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 181; *Otay Land Co. v. Royal Indem. Co.* (2008) 169 Cal.App.4th 556, 562-563.) "For a probable future controversy to constitute an 'actual controversy,' however, the probable controversy must be ripe." (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885 (*Environmental Defense*).) "A 'controversy is "ripe" when it has reached . . . the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.' " (*Ibid.*) Whether an "actual controversy" exists is a

question of law. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582.)

There is no present controversy concerning the Water Verification because the District rescinded its approval of this document. Therefore the matter is moot. (See *National Ass'n of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 743, 746-748 [case challenging agency's orders moot after marketing order was rescinded].) Seeking to avoid this bar, Golden Door contends the dispute is highly "likely to recur" because it is reasonable to conclude the District will issue the same or similar Water Verification later in the approval process. Golden Door relies on the fact that the District reissued the identical Combined Report, except that it called the document a "WSA."

An appellate court retains discretion to decide a moot issue under various circumstances, including if the case presents an important issue of public interest that is likely to recur. (See *Californians for Alternatives to Toxics v. California Dept. of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069; *County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1006.) This exception is inapplicable here.

First, it is speculative to conclude the issue will recur, i.e., that District will issue the same Water Verification. As discussed, the WSA will undergo scrutiny in the EIR administrative process (by the lead agency, other agencies, and the public, including potential judicial challenges). It is certainly possible that during this process the analysis of water supplies will change, triggering needed modifications to the Water Verification. Further, the Water Verification need not be issued until the final subdivision map phase (Gov. Code, § 66473.7), which—as Golden Door concedes in its amended complaint—

"may not occur for several years." At that time, there may be different District board members, a different Water Management Plan, and different facts surrounding water supply and demand issues in the relevant geographic areas. Although Golden Door alleged that the District is likely to adopt the same Water Verification, this claim is speculative in light of the record before us. In reviewing a ruling on a demurer, we disregard "conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts." (*Shea Homes Ltd. Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254.)

This case is distinguishable from our recent decision in *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 17 Cal.App.5th 413. In *Cleveland National,* this court considered a case remanded from the California Supreme Court after the high court held a portion of an EIR was inadequate. (*Id.* at pp. 421-422.) The issue for our consideration was whether the entire case should be remanded to the trial court, or whether we should rule on the contentions relating to the portions of the EIR that the California Supreme Court did not address. (*Id.* at pp. 422-424.) The public entity argued the issues were moot because the existing EIR would need modifications. (*Id.* at p. 423.) But the majority of this court rejected this claim, noting there was no evidence in the record that the EIR had been decertified and could no longer be relied upon. (*Id.* at pp. 423-424.)

Here, by contrast, the evidence is undisputed that the Water Verification no longer exists and cannot be relied upon for a project approval, and there is no evidentiary basis

for concluding a new Water Verification would be the same or similar to the former Water Verification. Thus, any opinion would be advisory.

Golden Door relies on a line of cases recognizing that declaratory relief may be appropriate if the facts show a public entity will continue to engage in the challenged practice in the future. (See, e.g., *Environmental Defense*, *supra*, 158 Cal.App.4th at pp. 886-887; *California Alliance for Utility etc. Education v. City of San Diego* (1997) 56 Cal.App.4th 1024, 1029-1030.) Those cases are distinguishable because they contain facts showing (or supporting a reasonable inference) that the challenged actions will continue. For example, in *Environmental Defense*, the public entity "made it clear" it would continue engaging in the same challenged zoning practice "in the future." (158 Cal.App.4th at p. 886.) In this case, there are no factual allegations from which we can draw a reasonable inference that the District would reissue the *same* Water Verification in the future.

Golden Door notes that the District has an alleged practice of issuing a WSA and Water Verification as a single document, and argues we should infer from this fact that the new Water Verification will be the same as the existing WSA. This inference is not reasonable. It may be reasonable to infer that when the two statutorily-required documents are issued at the same time, they will have the same or similar analyses and conclusions. But when, as here, the WSA and Water Verification will likely be issued years apart, this logic of the inference falls away.

Further, contrary to Golden Door's assertions, the fact that the District vacated the Water Verification to avoid the current litigation does not mean the issue is ripe. The

Legislature provided public water agencies the discretion to wait until the final subdivision map process to approve a Water Verification. (Gov. Code, § 66473.7; see *Vineyard*, *supra*, 40 Cal.4th at p. 433.) Although an agency has the authority to issue the Verification earlier and to combine it with the WSA, the agency can reasonably decide that by doing so and triggering an immediate challenge, the agency would be subjecting the public to unnecessary litigation costs before there is any certainty that the project will be approved and will move forward. This decision does not show any form of bad faith or suggest the issue is not moot.

Additionally, the question of the propriety of any approved Water Verification will not evade review, an important factor in finding an exception to the mootness doctrine. (See *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497, 511; *In re Conservatorship of Person of John L.* (2010) 48 Cal.4th 131, 142, fn. 2.) If the County certifies the EIR and approves the project, the project cannot move forward (i.e. no final subdivision map can be approved) *until* the District approves a new Water Verification showing its ability to provide a "sufficient water supply that will meet the projected demand associated with the proposed [development]." (Gov. Code, § 66473.7, subd. (c); *Vineyard*, *supra*, 40 Cal.4th at p. 453.) The statutes provide that once the water supplier approves the Water Verification, a third party objector (such as Golden Door) may bring a judicial challenge to the report's analysis and/or conclusions. (Gov. Code, §§ 66473.7, subd. (o), 66499.37.)

Finally, we find unhelpful Golden Door's focus on the fact that water supply and demand issues are matters of strong public interest. We agree with this fact, but the

specific question before us here concerns the adequacy of a Water Verification to ensure a project has sufficient water supply in a situation when the Water Verification has not yet been issued. There is no public interest in issuing an advisory opinion on this matter, particularly because it would bypass the specific statutory scheme governing challenges to a Water Verification and would potentially overlap with the County's consideration of the same issues with respect to the WSA. There is no public interest in permitting premature judicial intervention. The project cannot go forward without a certified EIR and a Water Verification. In its appellate brief, Newland Sierra acknowledges that Golden Door "retains the right to challenge the EIR, the WSA prepared for the EIR, and the Water Verification" at the appropriate times. The County and the District expressly joined in this brief, which necessarily includes this acknowledgment.

DISPOSITION

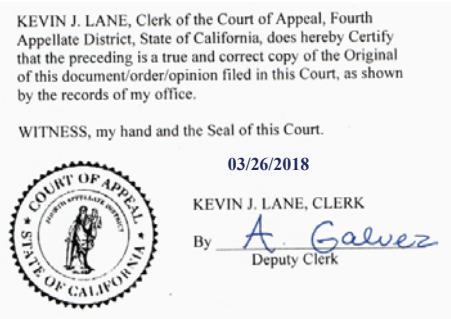
Judgment affirmed. Appellant to bear respondents' costs on appeal.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.


KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

03/26/2018

KEVIN J. LANE, CLERK

By A. Galvez Deputy Clerk

Unofficial Transcript
Golden Door Properties v. Vallecitos Water District
March 16, 2018

Speaker	Dialogue
Justice Nares	(Beginning of audio recording) … Justice Haller and to my left is Justice O'Rourke. This panel will hear Golden Door Properties versus Vallecitos Water District and Newland Sierra. Come forward please. I think Justice McConnell already told you about the time limits, etc. That's number 40. You can state your name as you make your presentation.
Mr. Garrett	Ready for me to be at the podium?
Justice Nares	Yes. Oh, we need more chairs.
Mr. Scott	No, no, no, that's okay. We can sit over here. We just wanted to make our appearances.
Justice Nares	Are you sure, because –
Mr. Scott	Yes.
Justice Nares	Very well. Once we start hearing from the other side, you can make your appearances at that time. Thank you. Counsel?
Mr. Garrett	Good afternoon your honor, my name is Chris Garrett, Latham and Watkins, and I'm representing the Golden Door, the appellant today. We obviously have the burden here, and I wanted – I do think in this situation, we're dealing with the facts as pleaded in our First Amended Complaint, and I do think it's very important to talk about those facts as we pled them. The growth and infrastructure for growth is vitally important for California's today. It's vitally important to us as an agricultural and hospitality operation. We have 35,000 to 40,000 trees. We just purchased 10,000 new avocado citrus trees to be planted. We use some water from Vallecitos. We also use water from groundwater. What's happening with water and water infrastructure is extremely important. And it's extremely important to us as a member of the community that there be the infrastructure and the water supplies in place for growth – thus, our interest in this case. California has a very clear and specified way to make sure that we have enough water and water infrastructure for our projects. That consists of everything we cited in our brief. I'm not going to go through that in detail

ENCLOSURE 2

ENCLOSURE 2

Speaker	Dialogue
	but obviously, the Urban Water Management Plans, which are the cookbooks for making sure that there's enough water there before houses are built, plans are made, things are committed, and there are the two stages: the water supply assessment and the water supply verification. We are one of 70,000 water users who depend on Vallecitos for water. As alleged in our First Amended Complaint, the District first adopted –
Justice Haller	You know, it might be a little more helpful to get to what really are the issues, and the issue is I think whether or not, the decision is final for purposes of you being able to act upon it, whether you exhausted your administrative remedies. We're very familiar with what's in your complaint. I just think that might be a better use of your time.
Mr. Garrett	Right. Thank you very much. The decision that the District took – there were two of them – in October and November of 2016. The first decision was embodied in a document labeled Water Supply Verification. The second decision, the decision was made again in the document labeled Water Supply Assessment. In our view, this is a very extraordinary document. It could have been called a resolution. It could have been called a district ordinance. It could have been called a banana. And our point, this was not the run of mill water supply assessment that was ultimately adopted in November. This water supply assessment had something in it which no other water supply assessment which has ever been reviewed by a court had in it, and that is a District commitment to a – the "Conservation Required" number for all of the Vallecitos customers. All 70,000 of them. What the District did in order to balance the books and to show that there was enough water to allow for new connections was to say we are 35% short in 2020 for our users in a normal water year. So, how do we balance those books? And this is shown in appellant's appendix 517 which includes the table from the Water Supply Assessment. Those books in 2020 where the supply was 21,000 acre-feet, the demand total which they estimated in the latest water – Urban Water Management Plan was 32,000 and then there – that's a difference of 11,447 acre-feet for the total demand in the District, a deficit was shown in the Urban Water Management Plan. So, how did they balance the books and come up with enough water to serve new development? They added a factor which they called

Speaker	Dialogue
	"Conservation Required," which basically the decision that we're going to force existing users to cut back from the demands that we've already estimated they would normally have.
Justice Haller	Again, we are aware of that. The question I'm try to get you to is, is the Water Supply Assessment a final – is final for legal purposes?
Mr. Garrett	Right.
Justice Haller	It's now a part of EIR, and there's full opportunity within that process for it to be – it is an informational document. I know you are very unhappy with it. Water is very important. This project can never be completed unless, at the end of the day, the EIR gets through and is not challenged and, number 2, that there is – that the subdivision map is approved and one of the approvals has to be sufficient water. And I know you don't think that this WSA is valid and I understand what you are saying. But what we are trying to get to is, is this the right time or the right forum to be challenging it.
Mr. Garrett	Let me give you the shortest most precise answer I can. This WSA included the "Conservation Required" number. That was a final decision. As shown in the County's environmental impact report, that was treated as a final decision – a commitment by the District to reduce the 70,000 existing users' water usage from what was shown in Urban Water Management Plan by 35 percent. There will be no review of that decision in the County's EIR. That's the water supply assessment which is normally –
Justice Haller	That it becomes part of the EIR that it cannot be challenged like any other informational document within the EIR?
Mr. Garrett	Well I think the answer is –
Justice Haller	Or is that –
Mr. Garrett	Maybe no. Maybe no and we are very concerned because –
Justice Haller	Well, one of the things that has to be looked at in a EIR is the supply of water. Is it not?
Mr. Garrett	Yes, that's right.

Speaker	Dialogue
Justice Haller	And if – the public, you, neighbors, any number of people have the right to say: This simply is not supported; it's not reliable.
Mr. Garrett	Right. And the EIR which we would request the Court take judicial notice of from the County says –
Justice Haller	Now it's just a draft EIR, correct?
Mr. Garrett	That's right, the draft –
Justice Haller	And the draft EIR had not been adopted at the time of the hearing?
Mr. Garrett	Right.
Justice Haller	Okay.
Mr. Garrett	Your honor, and I think what we want to say is it's indicative of why our administrative remedy in this case is not adequate because that commitment to the "Conservation Required" is not going to be reviewed by the County in the EIR CEQA process.
Justice Haller	Well, it's not a matter of them reviewing it. It's a matter of they have to put it out for public comment.
Mr. Garrett	Right.
Justice Haller	And then it is subject to criticism from the public is it not?
Mr. Garrett	That's right.
Justice Haller	Alright, and if they don't follow that process, that's a basis to challenge the EIR is it not?
Mr. Garrett	If the information is lacking – for example, in this court in the Save Wild Santee, found the information lacking, then you're right. There is a remedy at that point to say, County, you made the wrong call, the information doesn't support the conclusion that there is enough water there – the factual information. That whole statutory scheme is based on the concept that the water supply assessment is information, not decision-making by the District. It doesn't embody – in this case, the water assessment embodies a decision.

Speaker	Dialogue
Justice O'Rourke	What we are trying to ask you is what would preclude you from raising this point later?
Mr. Garrett	Your honor, I think what would happen and what has happened so far in the draft, which may happen when the County if they approve the project and certify the final, is they assume the 35 percent "Conservation Required" in 2020 from all 70,000 users is a given – is a touchstone which they, the County, can't review.
Justice O'Rourke	It's not – that doesn't answer the question. What precludes you from raising these issues later?
Mr. Garrett	Well the standard – in a CEQA case, you weigh the information, and the question is, was the County's decision supported by substantial evidence.
Justice O'Rourke	Can't you say the information provided by the water district is spurious and not credible and below the proven needs of the users? Can't you say that later? Our concern is this – that you're seeking a premature decision or should be say the advisory opinion from this court.
Mr. Garrett	Yes.
Justice O'Rourke	That's where we are getting at.
Justice Nares	That's really the heart of our concern.
Mr. Garrett	Yes. Understood. And in most cases, the water supply assessment is just information but what I'm saying here is that the County – there is a decision buried in here which the County is not reviewing.
Justice O'Rourke	But if the County won't let you raise the point, you come here on a writ, can't you?
Mr. Garrett	Yes.
Justice Haller	Or you can come here and (inaudible) about what they did based on that.
Mr. Garrett	And we will attempt to raise as much as we can.
Justice Haller	And you can challenge the EIR on that basis as well, can you not?
Mr. Garrett	Well, we can challenge the EIR, and what I would like to example is that it's not clear what we will have same ability to challenge this decision

Speaker	Dialogue
	that's embedded in this WSA in the CEQA process or in the Water Supply Verification process.
Justice Haller	We have 90 days after that is adopted. Do you know?
Mr. Garrett	We can file the actions. We can file the lawsuits. But it's – what the issue is, is whether the County's decision that there was enough water for the project, is it supported by substantial evidence. So in that situation, the court is looking to see if there is evidence there. They are not weighing the evidence. The County doesn't sit – as counsel for the County said in the trial court hearing, it doesn't sit as a super legislature. So the County is not reviewing and saying, was that a wise decision by the District to order that 35% cut back.
Justice Haller	But –
Justice O'Rourke	But if you want an advisory opinion from us that it's not enough water, so that when you want to challenge everything down the road, you can point to our decision. It's a judicial determination of your point.
Mr. Garrett	Well, let me put it this –
Justice O'Rourke	I'm not sure we are equipped to give you that at this juncture, or at any juncture.
Mr. Garrett	We're not – I'm not asking for a judicial decision that there is not enough water. What I'm asking for is the judicial decision that our first amended complaint stated a cause of action that embedded in the WSA was a decision by the District which was an invalid decision to order –
Justice O'Rourke	It amounts to the same thing though doesn't it?
Mr. Garrett	No, I don't – with all due respect your honor –
Justice O'Rourke	But you've got it nicely packaged and tight in the (inaudible) but that's basically what you are asking for counsel.
Mr. Garrett	Well, I have searched and I have never found in a CEQA case, a situation where a lead agency like the County looks at a decision that one of the advisory decisions had made and says that is an incorrect legal decision; we the County sitting as the super legislature rule that that ordered 35% cutback which makes the books balanced that that was an invalid

Speaker	Dialogue
	cutback because it conflicted with the District's Urban Water Management Plan.
Justice O'Rourke	It doesn't sound like very good water management from what you are portraying to build a subdivision and users that you can't support. South Africa now has a couple of cities undergoing similar problems with this very moment of running out of water.
Mr. Garrett	And your honor, we do have a process in place and ordinarily, the process works. What happened here was embedded in the decision-making. First, it was a water supply verification. I mean, literally, the same words and we could challenge and the statute very clearly said we can sue can challenge that water supply verification and we did. That was how this case started. No one disagreed when we first filed our lawsuit against exactly those same words that we had a cause of action and that we were entitled to bring it because the Legislature specifically said there was a 90-day statute of limitations for the water supply verification. The label was changed. They changed it to water supply assessment. If they changed it to district resolution or district ordinance, I believe you would agree that we have a cause of action to say that ordinance is invalid because it conflicts with the Urban Water Management Plan.
Justice Haller	So, you are saying that we should look below the surface so to speak and call it for what it is?
Mr. Garrett	I think in this situation when you are looking at a demurrer and we pled it with a great deal of specificity, we pled –
Justice O'Rourke	Can you allege that they are involved in a deceptive scheme by changing the labeling? What if you alleged it was –
Mr. Garrett	The only – what we alleged was that it word for word the same. They changed the label. And the only explanation given in the preceding was that they wanted to avoid costly litigation.
Justice Haller	Wait – what they did was they invalidated the WSV. It's not as if they changed labels. They have the right – the WSA can be filed at – the verification plan can be filed either with the EIR at the same time at that or at a later proceeding. They initially filed them together, then when this litigation occurred, they decided we are not going to fight that battle right now. So they

Speaker	Dialogue
	therefore, invalidated that. So what's before us only is the WSA, which will become a part of the EIR.
Mr. Garrett	Your honor, I don't think we disagree. I just do want to say that the facts are that there was a single document. The heading was WSA/WSV. And that's what we sued on. And that – at that time everyone agreed that was a valid lawsuit. After our lawsuit was filed, the exact – this is what we pled – I mean, this is – I'm not making this up from – the exact same document was approved. But the title was changed and one footnote was changed. That's what we pled. That was the demurrer that the –
Justice Haller	I think all of us have great concern over your concern about the water. Your biggest issue here is whether you are just premature as we have been trying to discuss with you.
Mr. Garrett	Right, and let me just – again, I'd rather answer your questions than say anything, but to go back to the question about WSA, I agree – normally, it would be premature. We just have an unusual fact pattern here which was decided on demurrer and I believe –
Justice Nares	Have you seen this fact pattern in any other water case?
Mr. Garrett	No, I haven't.
Justice Haller	So, you don't think the water case out of Los Angeles – really, yours is virtually on point?
Mr. Garrett	No, I don't because in that situation and C-WIN there was no –
Justice Haller	Factual difference.
Mr. Garrett	There was no allegation that the District – it was actually the city in approving the water supply assessment – was changing – was making a decision about that would affect all 70,000 users like requiring them to cut back. And in C-WIN, there was no argument that the water supply assessment conflicted with the Urban Water Management Plan. So, I mean, to us, those are two distinguishing things.
Justice Haller	I think – the time for you to address the WSA is in connection with the EIR –
Mr. Garrett	Right.

Speaker	Dialogue
Justice Haller	And the time to address the W – water verification is at the point in time when final approval is being given and you have complete rights to be able to do that.
Mr. Garrett	I agree with everything you said. I don't disagree with any of that except in the last sentence, the last phrase that you used, the nuances – if you look at the standard of review that is court or the trial court would apply, in looking at the County's decision to certify the EIR, the standard of decision there does not allow the court – first of all, the water district is not a party to that proceeding. So, the court does not have jurisdiction to say that the District acted improperly in making a decision in within that WSA.
Justice O'Rourke	They have the power to say there's not enough water.
Mr. Garrett	Yes they do.
Justice O'Rourke	Based on the record.
Mr. Garrett	Let me give you a counterfactual.
Justice O'Rourke	Done that many times at the court haven't we?
Mr. Garrett	I would submit that if the District had adopted an ordinance that said, we've decided to cut things back. We are going cut thing things back by 35 percent. You know, our books don't balance right now. We are the only District in the state where they don't balance. We have this huge – we're going to change that and we are going to force all the District residents to cut back by that amount. Just assume that happened and assume it was supported by substantial evidence and they had details about how they were going to do that. And then they adopted this WSA, I'd be out of luck. Because at that point, there would be evidence in the record that the District had made a decision that justified that departure from the Urban Water Management Plan. So, for in that situation, I have no cause of action against the County for saying you were wrong when you said there was not enough – there was sufficient water because the County relied upon a District decision that all the users were going to be forced to cut back by 35 percent. So, it's that decision which I don't – I believe under the standard of review under CEQA, it's not clear that we'll be able to raise that issue, that legal issue. And again, the court –

Speaker	Dialogue
Justice Haller	Counsel, you may want to be careful about certain statements you're making today because they may come back to bite you in the CEQA.
Mr. Garrett	May come back to haunt me. Right – well, that's true. But I imagine that the court will rule what the appropriate way is on the law regardless of what I say today. And I'll have to act upon that. And at least I will know that I did not fail to sue when I needed to sue. So I would say that. And again I would say secondly, we have the problem of the – what standard of review for the County to use and in this situation, we have the facts shown in our request for judicial notice where the County did except the District's decision to cut back. I mean, an integral part of their discussion about the water and the draft EIR is – this all makes sense. There will be these cutbacks. The District has said they will cause these cutbacks to take place. And unless, in a challenge that EIR, it is certain that my client can say, that assumption about that District decision is an incorrect decision. You the County should have looked beyond that and weighed whether that was the correct policy decision by the District or the correct legal decision by the District. Then, it's very difficult to say that the County's made a mistake.
Justice Haller	Well we'll see what the public has to say during the public period.
Mr. Garrett	I neglected to save any time for rebuttal.
Justice Nares	You may save time for rebuttal.
Mr. Garrett	Thank you.
Justice Nares	Everybody is going to be heard.
Mr. Garrett	Okay. Thank you.
Mr. Hubbard	Good afternoon. My name is David Hubbard. I will be speaking on the behalf of Newland Sierra. I'm not sure if counsel for the County or the water district intends to make a presentation. I think they are available to answer questions of the panel.
Justice Nares	And who do you represent?
Mr. Hubbard	I represent Newland Sierra.
Justice Nares	Okay.

Speaker	Dialogue
Mr. Hubbard	Real Party in Interest. I'd really just like to make couple of quick points. The trial court properly followed the very clear directions that are provided in the C-WIN case. And in that case, the court held as a matter of law, a WSA is not a decisional document. It's not a final document that represents an action by the water district. It is informational only. The court even likened it to technical report that gets attached to an EIR. And for that reason, the court in C-WIN determined as a matter of law, the time and place to challenge anything associated with the WSA is during the CEQA process: make your comments known to lead agency, exhaust your administrative remedies, and if you are not happy with the result from the CEQA process, then you go and file a petition for writ of mandate in the superior court, and you can challenge the WSA at that point. As to – and that's what the court held, and that's what should happen in this case, and there is no prejudice to anyone here. No argument that Golden Door would like to make, no remedy that they would seek is foreclosed by letting the CEQA process run its course and then giving them the opportunity to sue at that point. But there is another issue that has gotten somewhat lost here. And that is Golden Door has yet another opportunity to challenge the WSA and that's through Government Code 66473.7 subdivision o. And what happens under that provision is that any member of the public that does not agree with the sufficiency of the water verification that the water district must issue before Newland Sierra can turn any dirt on their project at all, any person who is upset, doesn't agree with it, doesn't believe that the grounds on which the water verification was issued are sound, they can within 90 days to challenge it. Both of those remedies remain open for Golden Door. But we are just not there yet. The CEQA process has to complete itself. The County has to decide whether they want to approve this project at all. They may not. And if they decide to deny the project, all this goes away. But if they approve the project, still nothing can happen at Newland Sierra until they get their project specific water verification from the water district. And once that water verification is issued, Golden Door or any other person who wants to challenge it has ninety days to do so. And all of those issues about how the conservation requirements might be imposed or what – who's going to be affected by them, all of those things can be adjusted at that time. Again we're just not there yet. So, the fundamental point is that the demurrer takes nothing away from Golden Door. They lose nothing by it. All it requires is that they await the final decision from the County

Speaker	Dialogue
	and the water district. I'm happy to answer any questions you might have.
Justice Nares	Apparently none. Thank you.
Mr. Hubbard	Thank you.
Justice Nares	Anyone else wish to be heard? Just a second. Okay. Then, you may close.
Mr. Garrett	One thing that counsel just said is that after the EIR is finished, we can challenge the WSA at that time. That's actually not a correct statement. Again, the form of action is we can sue the County and we can say the County made the wrong decision in certifying the EIR and made the wrong decision because its decision wasn't supported by substantial evidence on certain issues, on water for whatever example. We cannot sue to overturn the WSA. There is no remedy for that. It's not provided under CEQA. It's not provided under the Water Code. The water district is not a party. So the WSA is a document that what was adopted in November of 2016 will stand regardless of what happens in CEQA. That's also true under the water supply verification process. And again, as we pled, that document embodies a present decision by the District – a decision at that time in 2016 to cut us all back by 35 percent – "Conservation Required." Again, that's what we pled. And we believe that to be the case. We already here are facing the 35 percent cutback and neither the CEQA remedy nor the WSV remedy will allow us to overturn that decision. We literally have no other forum where the District will be a party. Where we can adjudicate the merits of the decision that is located there. The other thing I wanted to mention is that in the WSV process, the Legislature specifies that the WSA is substantial evidence. So, when we get to the WSV process, if you reject my lawsuit today and the – goes forward and the WSV can happen at any time whether or not the EIR is certified or not certified, the first thing is that the WSA is substantial evidence. Is the court in that situation in reviewing a WSV allowed to pierce that evidence and go behind it and say, we're going to go back several years to 2016 and decide that the WSA was wrongly taken and the conservation decision made in that WSA was wrongly decided by that

Speaker	Dialogue
	District for various legal reasons under the Water Code or the Urban Water Management Plan? Again, I don't believe that the statute makes that clear at that time. We will make that argument if our lawsuit is rejected here but I would submit to the court that we run a substantial risk of not being able to overturn that decision and being faced with a substantial evidence review with the WSA that embodies decisions, and the court is going to say that was a policy decision by the District so we can't disregard that. The other question is what happens –
Justice O'Rourke	You've made your record for a due process argument down the road haven't you –
Mr. Garrett	Well, I would love –
Justice O'Rourke	– for the hearing you are entitled to.
Mr. Garrett	I would love to say that due process applies to every legal challenge to every project but there are times when there are not remedies or you have to choose the right remedy, and if you don't pick the right remedy, you're out of luck. The last thing I wanted to say was that what happens if the project is rejected? What if the County says, no we're not going to approve the project for some other reason. What if the WSV isn't approved? The WSA still stands. It still embodies this cutback by 35%, and what are we to think? The District now decided that all 70,000 of us must cut back, and we don't have the water up to 2035, and this water is being saved, if you will, for new development and the existing users have to cutback. Now that maybe a great policy decision by the District, but I submit its a policy decision that has to be made by the District via an ordinance, a resolution, and if they make that decision, it needs to be consistent with the Urban Water Management Plan. And, so we have no remedy in that situation either. Thank you.
Justice Nares	Thank you very much. Thank you, the matter is submitted.