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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

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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

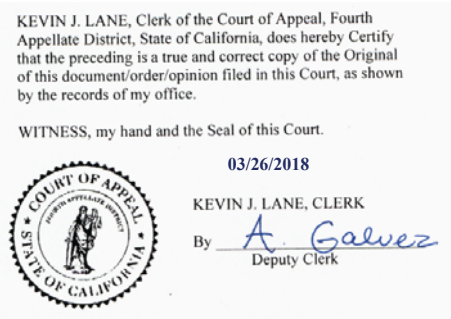
Judgment affirmed. Appellant to bear respondents' costs on appeal.

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

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