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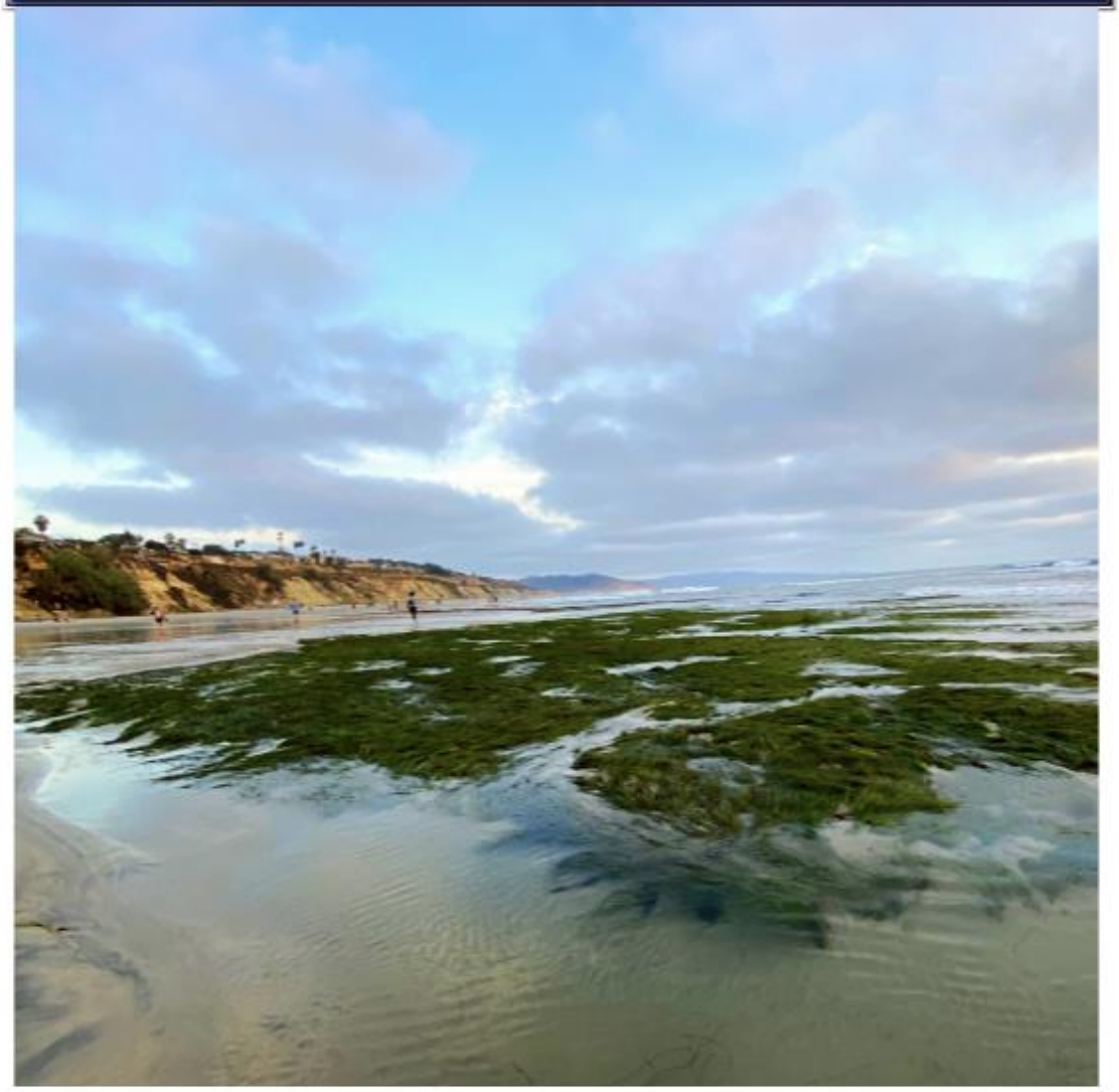

Appellate Court Rules on Preservation of Documents and Discovery
Relating to Administrative Records in CEQA Litigation

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The Fourth District of the Court of Appeal recently issued an important opinion in *Golden Door Properties, LLC v. Superior Court*, which involves a public agency's duties to preserve records under the California Environmental Quality Act ("CEQA") and the Public Records Act ("PRA"), and the extent of discovery available to plaintiffs in CEQA litigation.

Case Background

The underlying case involved San Diego County's consideration of a mixed-use project consisting of 2,135 residential units and 81,000 sq. ft. of commercial space. The opinion, however, involves a series of discovery disputes regarding the contents of the administrative record. During the course of a request for records under the PRA, the County revealed that, pursuant to the County's 60-day email retention policy, the County had destroyed approximately 2.5 years of emails related to the project. Plaintiffs filed a lawsuit under the PRA, then a second lawsuit under CEQA after the County approved the project. Extensive discovery requests followed in both cases, with Plaintiffs requesting documents from the County and the applicant, issuing subpoenas to the consultants who assisted in the preparation of the Environmental Impact Report ("EIR"), taking depositions, and filing motions to compel. A special referee was assigned to resolve the discovery disputes and ultimately denied the majority of Plaintiffs' discovery requests.

Court Rules Agencies Have a Duty to Preserve Administrative Record Documents

On appeal, the Court ruled that the County's 60-day email destruction policy is unlawful as it applied to documents that would constitute the administrative record under CEQA. Public Resources Code ("PRC") section 21167.6 details the documents that "shall" constitute the administrative record and, the Court held, it would defeat the purposes of the statute to allow agencies to delete documents not to the agency's liking under a blanket policy and then claim they should not be in the record because the documents no longer exist. Moreover, the Court held that under Government Code section 26205.1, which governs the County's policies for destroying "nonjudicial records," the County was not authorized to destroy administrative record emails because they were documents in the County's possession that are "required by law to be kept."

Two Exceptions Reduce Public Agencies' Burdens

•First, the Court held that CEQA does not require a public agency to retain "every email and preliminary draft." Elaborating, the Court noted that public agencies are not required to retain the "e-mail equivalent to sticky notes, calendaring faxes, and social hallway conversations—that is, e-mails that do not provide insight into the project or the agency's CEQA compliance with respect to the project."

•Second, the Court pointed to CEQA's short statute of limitations period and reasoned that "the lapse of the applicable limitations period is a relevant consideration" in determining how long a public agency should hold on to administrative record emails. Following this

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opinion, public agencies should carefully evaluate their document retention policies and document management systems, especially with regards to email communications concerning CEQA review of development proposals. Public agencies should be sure that these policies and systems will retain communications required to be a part of the administrative record, while ensuring that non-record emails are timely destroyed to ease the cost and burdens of both document retention and responses to PRA requests and record preparation requests under CEQA.

Court Rules Discovery is Available Under CEQA to Obtain Components of the Administrative Record

The County sought to defend the referee's ruling that "discovery is generally not permitted" in a CEQA action relying on the restrictions placed on parties seeking to introduce evidence outside of the administrative record in Western States Petroleum Assn. (1995) 9 Cal.4th 559. The Court quickly dismissed this position, declaring that the County was incorrect, and that discovery is allowed under CEQA. This was especially true in Golden Door where plaintiffs were not seeking to introduce extra-record evidence, but rather were seeking to find copies of record documents lost due to the County's retention policy.

Again, adequate document retention policies and document management systems are keys to avoiding the additional costs of discovery in litigation under CEQA and the PRA. Designing these policies and systems to easily capture and retain communications that should be included in the administrative record will give public agencies the ability to minimize or defeat expensive discovery by citing to the policies and systems as evidence that discovery is not necessary or warranted to complete an administrative record.

Court Did Not Rule on Application of the Common Interest Doctrine in CEQA Cases

The Court recognized, but declined to weigh in on, a split of authority between the Fifth Appellate District and the Third Appellate District regarding whether the common interest doctrine could apply to preserve privileged communications between a public agency and an applicant prior to project approval. The Fifth Appellate District had ruled that, prior to project approval, the parties' interests were not aligned and, therefore, the common interest doctrine could not apply to pre-approval communications. (*Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889.) The Third District disagreed, holding that the public agency and the applicant had a common interest in producing a legally adequate EIR and, therefore, the common interest doctrine could apply to such communications. (*California Oak Found. v. County of Tehama* (2009) 174 Cal.App.4th 1217.)

In Golden Door, however, the Court sidestepped the issue, noting that the plaintiffs had filed two pre-approval lawsuits, thus creating a common interest between the applicant and the agency in defending against these suits. Due to the ongoing split in authority, public agencies and applicants should be wary of sharing confidential information under the common interest doctrine prior to project approvals.

Court Acknowledges Agencies Face "Difficult Task" Establishing Deliberative Process Privilege

Of final note, the Court rejected the County's evidence supporting its assertion of the deliberative process privilege to more than 1,000 documents withheld during discovery. Despite producing a privilege log, as well as a declaration describing the basis for the County's assertion of the privilege, the Court held that the County's evidence amounted to nothing more than a recitation of the public policy behind the deliberative process privilege. The Court did not question the County's assertion that a free and open exchange of ideas is a necessary component of the administrative process and could form the basis for a privilege. However, the Court held that the claims of privilege must be supported with evidence specific enough to give the requester a meaningful opportunity to contest, the court an

opportunity to determine whether the exemption applies, and to show the consequences of disclosing the information. The Court did acknowledge that public agencies have a "difficult task" of justifying the withholding without compromising the information by revealing too much. The deliberative process privilege serves important purposes and should be protected. However, the Court decision places an increasing evidentiary and cost burden on public agencies to justify the reliance on the privilege.

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