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In California the Housing Crisis Yields to Luxury Spas

A recent court of appeal opinion out of San Diego demonstrates how the California Environmental Quality Act ("CEQA") has once again been used to impede housing development—this time to the benefit of a high-end luxury spa.

For CEQA practitioners the case provides two important lessons.

First, it demonstrates how a permitting agency's failure to preserve e-mail communications can lead to calamitous results in litigation. CEQA provides that the administrative record in a CEQA lawsuit "shall include . . . all internal agency communications" and "[a]ll written evidence or correspondence submitted to, or transferred from" the agency related to the project. Preparation of an Environmental Impact Report ("EIR") and other project review activities take years, however, and in practice many agencies have not kept old e-mails or included them in their administrative records. In *Golden Door Properties, LLC v. Superior Court,* project opponents exploited that blind spot with aggressive litigation tactics that have snared the project in what may be intractable litigation.

Second, the case underscores the importance of using care in drafting e-mails or other communications with the permitting agency and protecting such communications to the extent possible with the common interest or joint defense doctrine.

Golden Door Properties, LLC v. Superior Court (2020) 52 Cal. App. 5th 837.

In 2015 the developer—Newland Sierra LLC—began the entitlement process for a mixed-use project of 2,135 residential units and 81,000 square feet of commercial uses in San Diego County, near San Marcos. The project site is close to the Golden Door, a high-end luxury resort and spa on 600 acres.

Golden Door led an aggressive legal campaign to stop the project. In 2016, before the project's draft EIR was even complete, Golden Door filed a lawsuit against the water district to block water supply for the project. Golden Door then served a number of Public Records Act requests to the County seeking the project's technical and environmental reports and "all documents and communications" pertaining to the

project. As a result of the County's 60-day automatic e-mail deletion policy, the County lacked e-mails dating back more than two months. Golden Door then filed a second lawsuit challenging, among other things, the County's destruction of e-mails and alleged failure to comply with the Public Records Act.

In September, 2018, the County certified the project's EIR. Golden Door and numerous environmental groups and individuals filed CEQA lawsuits challenging the EIR.

In litigation Golden Door maintained its aggressive tactics to exploit the County's missing e-mails. It propounded written discovery to the County and the developer. It noticed the deposition of a County representative. And it served document subpoenas on the technical consultants who prepared the EIR and its technical studies.

When the County, developer, and consultants objected to the discovery, Golden Door and other petitioners filed multiple motions to compel the discovery. The superior court denied the motions. Golden Door petitioned the court of appeal to direct the superior court to grant the motions or alternatively enter judgment in its favor. The court of appeal summarily denied the writ petition, but Golden Door petitioned the California Supreme Court for review. The California Supreme Court granted review and transferred the case back to the court of appeal with directions to hear Golden Door's writ petition. This discovery and the ensuing discovery disputes consumed 2019.

In a lengthy opinion the court of appeal addressed several issues. Of particular importance to developers and CEQA practitioners are the following:

1. The lead agency must preserve all internal communications (including e-mails) and all communications with the applicant, consultants, and the public (including e-mails) relating to the project, and include them in the administrative record. If it fails to do so it subjects itself, the developer, and all the technical consultants to time-consuming and costly discovery in litigation and potentially jeopardizes the project. If the permitting agency has policies or systems that delete e-mails in the ordinary course of operations, those policies and systems should be suspended upon project application.

2. The project applicant's written communications with the agency may be included in the administrative record and may be discoverable in litigation unless protected by the common interest doctrine. Although CEQA requires all communications relating to a project to be included in the administrative record, CEQA does not abrogate the attorney-client privilege, attorney work product doctrine, or the common interest (aka joint defense) doctrine.

In general, the common interest doctrine allows parties who possess common legal interests to share privileged attorney-client communications and attorney work product without waiving the privilege. The courts of appeal are divided as to whether and when the common interest doctrine protects communications between project applicants and permitting agencies.

Under the view adopted by the court in *Golden Door*, communications occurring prior to the County's approval of the EIR are generally not covered by the common interest privilege because the agency and applicant have diverging interests. The agency's interest, so the argument goes, is to neutrally and objectively make an unbiased evaluation of the project's environmental impacts, while the applicant's interest is in having the agency produce a favorable EIR in compliance with CEQA. The court does not explain its concept of a "favorable EIR," which is difficult to comprehend considering that EIRs and projects may be, and most often are, approved despite the EIR's identification of unmitigated significant environmental impacts. The other view, adopted in *California Oak Foundation v. County of Tehama*, recognizes the agency's and applicant's common interest in preparing a CEQA-compliant EIR.

Under either view communications occurring after approval of the EIR may be protected by the common interest doctrine. This is of little consequence, however, because the administrative record is generally limited to materials in front of the agency at the time of approval and therefore excludes communications or other documents arising after the project is approved.

Because Golden Door filed a lawsuit prior to the EIR's approval, and because the County and developer entered into a joint defense agreement in connection with the lawsuit, the court held that the common interest doctrine applied to protect any

communications between the County and developer involving their joint defense of the lawsuit.

Ultimately, the court of appeal granted a writ of mandate directing the superior court to vacate its orders denying Golden Door's motions to compel and reconsider the motions to compel in light of the court's opinion. Thus, five years after the developer applied for entitlements and two years into the litigation the parties are still a long way from even completing the administrative record.

The fate of this project is uncertain. In March, 2020, while this appeal was pending, the County's voters disapproved the project's General Plan Amendment by referendum, prompting the developer to withdraw its project approvals. The court of appeal considered whether to dismiss the appeal as moot but elected not to do so.

Golden Door, the County, and the developer have each petitioned the California Supreme Court to review the court of appeal's decision. (Cal. Supreme Court Case No. S264324). The Supreme Court has until December 7, 2020 to grant review.

The irony underlying this decision is that an agency's internal e-mails and communications with the developer and technical consultants should rarely, if ever, be relevant in a CEQA lawsuit. Thus, the Legislature's choice to require such documents in administrative records needlessly injects excessive cost and delay into the process. This may be an issue that CEQA reformers will want to consider.

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