1100 K Street
Suite 101
Sacramento
California
95814

Telephone
916.327.7500

Facsimile
916.441.5507

October 13, 2020

Via TrueFiling Electronic Filing and Service

The Honorable Tani Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-3600

Re: ***Golden Door Properties, LLC v. Superior Court (San Diego County)***
California Supreme Court No. S264324
Fourth Appellate District Case Nos. D076605, D076924, D076993
Superior Court Case No. 37-2018-00030460-CU-TT-CTL (San Diego County Superior Court)

To the Honorable Chief Justice Cantil-Sakauye and Associate Justices:

Amici Curiae California State Association of Counties ("CSAC"), League of California Cities ("League") and California Special Districts Association ("CSDA") respectfully submit this letter under California Rules of Court, rule 8.500(g) in support of the Petition for Review filed by the County of San Diego in the above-named case.

In this case, the Court of Appeal reversed a trial court order concluding that the County properly applied its email retention policy to records related to a land use project that was eventually the subject of a CEQA challenge. The Court of Appeal concluded, instead, that CEQA requires a lead agency to retain not only documents that were before the decisionmakers who applied CEQA's provisions to a project, but all documents that pertain to the project, including drafts and all emails of any relevance to the project. The breadth of this ruling – the first of its kind in a Court of Appeal – warrants this Court's attention.

Amici join San Diego County in requesting review to clarify the distinction between documents that must be retained as part of a CEQA administrative record and those that may be subject to a local document retention policy, and to provide some meaningful standard on how to differentiate between the two. If the Opinion is allowed to stand, parties in CEQA litigation, as well as the courts, will be saddled with unwieldy administrative records that do little to meet the purpose of the record in the first place: to allow a court to determine whether the agency's decision is supported by substantial evidence based on evidence that was before the agency at the time the decision was made.

Interest of Amici Curiae

CSAC is a non-profit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has

determined that this case is a matter affecting all counties in that this Court's decision will impact important issues of governance statewide.

The League is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSDA is a California non-profit corporation consisting of over 900 special district members throughout California that was formed in 1969 to promote good governance and improved core local services through professional development, advocacy, and other services for all types of independent special districts. These special districts provide a wide variety of public services to urban, suburban and rural communities, including water supply, treatment and distribution, sewage collection and treatment, fire suppression and emergency medical services, recreation and parks, security and police protection, solid waste collection, transfer, recycling and disposal, library, cemetery, mosquito and vector control, road construction and maintenance, pest control and animal control services, and harbor and port services. CSDA is advised by its Legal Advisory Working Group, comprised of attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies those cases that are of statewide or nationwide significance. CSDA has identified this case as having statewide significance for special districts.

Collectively, amici's members serve as lead agency for hundreds of projects annually. When litigation is filed to challenge those projects, amici's members are often responsible for assembling the documents that will become the administrative record in the case. Thus, the primary issue raised in this case – the interplay between CEQA's administrative record requirements and the ability of local agencies to adopt and follow their own record retention policies – is significant to amici's members.

Reasons Review Should Be Granted

A. Lead agencies need clarity from this Court on which documents must be retained for possible inclusion in an administrative record, and which can be destroyed pursuant to a lawfully-adopted document retention policy.

The Opinion below creates uncertainty about which documents must be retained under Public Resources Code section 21167.6, which should be resolved by this Court. Though the Opinion notes that "nothing in section 21167.6 or this Opinion requires retention of emails of no relevance to the Project or the agency's CEQA compliance," it provides no discernable standard to determine such relevance. (*Golden Door Properties, LLC v. Superior Court* (2020) 53 Cal.App.5th 733, 779.) There is no guidance of what types of messages "provide insight" into the project and must therefore be retained. For example, the Opinion states that the email equivalent to a calendaring fax need not be retained. But what about if that calendaring email notes that the need for the meeting is to discuss concerns about a

project study? Does that "provide insight" or contain enough relevance to the project to fall within the Opinion's retention requirement? This vague standard will certainly lead to increased litigation over administrative records, leaving the courts with the task of trying to decipher whether potentially hundreds of thousands of emails have any relevance to a project.

A similar lack of clarity exists as to staff notes and preliminary draft documents. It is undisputed that CEQA cases are generally limited to the evidence actually before the agency when it made the decision being challenged. (*Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559.) Yet, the Opinion requires that draft documents or notes that are attached to emails, which never appear before the decisionmaking body, must be retained and included in the administrative record under Public Resources Code section 21167.6.

Further, this interpretation means that administrative records created under the traditional method (i.e., upon commencement of litigation under section 21167.6) will include far more documents than those created under the alternative recently established by the Legislature (i.e., creating the administrative record concurrently with the project under section 21167.6.2). When the administrative record is concurrently prepared under the new process, the obligation to start creating the record begins "with the date of the release of the draft environmental document for the project." (Pub. Resources Code, § 21667.6.2, subd. (a)(1)(B).) Thus, even when the record is created as the project is moving through the lead agency's process, the Legislature does not intend to require the record to contain documents developed prior to the draft EIR release date. This is inconsistent with the Opinion's holding that the County is required by CEQA to maintain all of its emails and drafts involving the project and include them in the administrative record. This inconsistency must be resolved.

B. This Court should grant review to reconcile the Opinion's broad retention requirement with the purpose of the CEQA administrative record.

The Opinion is premised on the belief that CEQA's administrative record provisions are inconsistent with local document retention policies. However, the plain language of section 21167.6 does not include any requirement that the specified documents be retained during the course of a project's consideration or after its approval.

The Opinion finds that the "notwithstanding any other law" language in the opening line of section 21167.6 means that retention schedules are preempted by the statute. But that language simply has no bearing here. Lead agencies are not directed in Section 21167.6 to retain any particular records, and thus are free to follow their lawfully-adopted retention policies without running afoul of section 21167.6. If litigation eventually occurs, the record will include, at a minimum, the documents listed in Section 21167.6, subdivision (e) that the agency elected to retain or was required by some other statute to retain. Since there is no conflict, section 21167.6 and local record retention policies can be read harmoniously.

The broad view taken by the court below as to what must be retained and included in the administrative record is also inconsistent with the purpose of an administrative record in CEQA's statutory scheme. The CEQA administrative record's purpose is discrete: to allow a

court to determine whether the record demonstrates any legal error and whether it contains substantial evidence to support the agency's decision on a project. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.)

Providing a record to the court that fails to show substantial evidence supporting the agency's decision may result in reversal of project approval. Whether or not a document is included in the administrative record, which is only prepared after the project approval and only if litigation is initiated, is a completely separate inquiry from whether the decisionmakers and participating public were informed before the project was approved. In fact, removal of documents from the administrative record "is presumptively prejudicial to project proponents. It is, after all, the project proponents who will be saddled with the task of pointing to things in the record to refute asserted inadequacies in the EIR." (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 13.)

This Court should grant the petition to reconcile the case law on the purpose of the administrative record in judicial review of CEQA compliance, and the breadth of the documents required to be retained by the Court of Appeal below.

C. The statewide importance of allowing public agencies to manage their records in a manner consistent with the purposes of CEQA warrants this Court's review.

This case warrants review because of the statewide importance of the ability to manage document storage and retention at the local level. The volume of local agency email continues to grow, as much of the conversations that would happen in hallways or over the telephone in the past are now accomplished via email. This is even more true today than ever, as many local governments are engaged in remote working due to COVID-19. The volume of email creates tremendous burdens for local agencies. Storage costs alone are certainly one significant issue.

Further, retained emails can be public records subject to disclosure under the Public Records Act. Thus, retaining all of the voluminous email sent and received by a public agency, much of which is insignificant routine communication of minimal public interest (scheduling emails, etc.), creates volumes of records that must be reviewed for potential responsiveness, privileges, exemptions, etc., in response to a Public Records Act request. This concern is not mere hyperbole. This Court has acknowledged that the impact of the number of Public Records Act requests, and the volume of records involved in such requests, can be staggering. (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1189.) The rate and scope of the requests mean it can sometimes take months on a rolling production schedule for the requester to receive all of the documents they request, requiring significant staff time and imposing a significant expense to both the agency and the requester.

Record retention policies create efficiencies by developing a mechanism for determining records that should or must be retained, and removing the others. The Court of Appeal disregards the importance of this process, noting that its Opinion "does not require records to be retained in perpetuity" because of CEQA's statute of limitations periods, after which the records could be destroyed. (*Golden Door Properties, LLC v. Superior Court* (2020) 53 Cal.App.5th 733, 779.) However, a 60-day or 180-day statutory period to initiate

litigation after a project is approved is just a small fraction of the period of time it takes for many projects, particularly those that are larger and more complex (and therefore more likely to be subject to litigation), to be approved. The project that is the subject of this litigation, for example, was first proposed in January 2015 and the CEQA litigation was not commenced until October 2018. Thus, in this example, the Opinion would effectively require the County to retain emails, notes and drafts of *any* relevance[1] to the project for nearly four years. This is precisely what retention statutes are intended to avoid.

In addition, this Court need not look far to see how the conversion of CEQA into a general document retention statute will extend beyond CEQA. Indeed, Petitioner Golden Door asks this Court to do just that, requesting that this Court establish not only that CEQA is a document retention statute, but also that local agencies must retain all documents for a minimum of two years, notwithstanding the Governor's decision to veto such a requirement in AB 1184 just last year. (Golden Door Pet. for Rev., p. 15; Assem. Bill No. 1184 (2019-2020 Reg. Sess.) § 1.)) The Governor considered the additional benefits that the public would derive from a two-year email retention requirement and the costs associated with that requirement, and concluded: "This bill does not strike the appropriate balance between the benefits of greater transparency through the public's access to public records, and the burdens of a dramatic increase in records retention requirements, including associated personnel and data-management costs to taxpayers." (Governor's veto message to Assem. on Assem. Bill No. 1184 (Oct. 13, 2019) Recess J. No 14 (2019-2020 Reg. Sess.) p. 3684.) Similar considerations should move this Court to grant the Petition for Review in this case.

The statewide importance of this issue, which goes to the heart of the ability of local governments to manage the costs associated with electronic records, warrants this Court's review.

Conclusion

For these reasons, Amici respectfully urge this Court to grant the Petition for Review filed in this case.

Sincerely,

/s/

Jennifer B. Henning, SBN 193915
Litigation Counsel
California State Association of Counties

Counsel for Amici CSAC, League and CSDA

[1] As noted above, the Opinion states that only emails with "no" relevance may be omitted from the administrative record.