S212800
IN THE SUPREME COURT OF CALIFORNIA

ORANGE CITIZENS FOR PARKS AND RECREATION, et al.,
Petitioners,
v.
SUPERIOR COURT OF ORANGE COUNTY
Respondent;

MILAN REI IV LLC, et al.,
Real Parties in Interest.

AND CONSOLIDATED CASE

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three
Case Nos. G047013 and G047219

Appeal from the Orange County Superior Court
Case No. 30-2011-00494437
The Honorable Robert J. Moss, Judge Presiding

PETITIONERS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

The central question in this case is whether a residential subdivision proposed by Real Party Milan is consistent with the City of Orange's 2010 General Plan.

Any member of the public examining the City's General Plan would find that its Land Use Policy Map sets forth the land uses permitted on all properties throughout the City. On this map, Milan's Property is designated solely "Open Space."

The General Plan also references a document called the "Orange Park Acres Plan," which it identifies as a "specific" or "neighborhood" plan that "must be consistent with" the General Plan. A member of the public who obtained a copy of this OPA Plan would likewise find that it designates Milan's Property solely for open space uses.

Based on these investigations, the only reasonable conclusion would be that the General Plan (as well as the OPA Plan) prohibits residential development on Milan's Property. Milan and the City initially came to this exact same conclusion. That is why in 2007 Milan requested—and in 2011 the Orange City Council approved—a General Plan Amendment ("GPA"), changing the designations for Milan's Property from Open Space to residential. The GPA, however, was rejected by the voters in November 2012.

Having lost at the ballot box, Milan and the City (collectively, "Real Parties") now attempt to evade the effect of the voters' Referendum based on a remarkable legal theory. This theory is centered on a 1973 Planning Commission resolution that Milan's lawyers unearthed late in the planning process, which recommended amending the OPA Plan to designate a portion of the Property for residential use. After its adoption, this recommended residential designation was promptly forgotten, was never implemented, and was, in any case, entirely superseded by the City's adoption of new general plans in 1989 and 2010. Nevertheless, Real Parties now insist that this obsolete 1973 residential designation is the controlling "general plan" designation for the Property today.

Although their theory defies common sense and directly contradicts decades of black-letter law, Real Parties claim it is entitled to "great weight" and "considerable deference." Likewise, Real Parties repeatedly invoke, and ask this Court to defer to, the City Council's alleged findings that the Project did not need the General Plan Amendment to be consistent with the General Plan.

The City Council, however, never made any such findings. Rather, the City repeatedly acknowledged that the Project was *inconsistent* with the existing Open Space designation in the 2010 General Plan, as well as with the open space designations in the OPA Plan. Accordingly, only after adopting the General Plan Amendment did the City Council approve

the Development Agreement and Zone Change for Milan's Project, finding that these approvals were consistent with the 2010 General Plan "*as amended by*" the GPA to allow residential use on the Property.

What Milan and the City truly seek from this Court is not deference to the City Council's legislative findings (which recognize that the Project's approval was wholly contingent on the GPA), but rather deference to the City's litigation theory (which posits that the GPA was meaningless). While the validity of this litigation theory is a legal question that this Court reviews *de novo*, Real Parties' theory cannot be upheld under any standard of review. Every element of Real Parties' litigation theory conflicts not only with fundamental principles of planning law, but also with Real Parties' previous positions and with the undisputed facts of this case.

In fact, the true story of what actually transpired in this case is almost unrecognizable in Real Parties' briefs, which attempt to re-write the land use history of the Property, ignore the plain text of the City's General Plans, and fundamentally distort the nature and effect of the General Plan Amendment adopted by the City Council.

For example, while Real Parties now argue that the General Plan Amendment is irrelevant, prior to its adoption, both the City and Milan repeatedly recognized that the GPA was critical for Project approval. Indeed, as Milan emphasized to the City Council at the public hearing on

the GPA, "the one point we agree with" Orange Citizens on is that *"you need to do a General Plan amendment."* AR-13:5434.

While Real Parties now argue that the Project can proceed even though it is "not entirely consistent with the City-wide land use policy map," the General Plan itself expressly mandates that City land use decisions *must be* "consistent" with "the land uses shown on the Land Use Policy Map." Exhibit A to Opening Brief on the Merits ("Exhibit A") at 9.

While Real Parties now argue that the 2010 Open Space designation for Milan's Property was a "clerical error," the record establishes that the City Council affirmatively retained this long-standing designation in adopting the 2010 General Plan.

While Real Parties now argue that the "OPA Plan from time of adoption . . . has been considered as the land use element of the General Plan" (City Answer at 27), this claim is demonstrably false. It is directly contradicted by, among other things, the plain text of the City's 1989 and 2010 General Plans, the certified environmental impact reports ("EIRs") for each of these documents, numerous City Council resolutions, and Milan's own development application. These documents, and the record as a whole, demonstrate that the City and the public have long treated the OPA Plan *not* as "part of" the general plan, but rather as a subordinate plan that must be consistent with general plan policies.

Finally, while Real Parties now argue that the Property is controlled by the long-forgotten 1973 residential designation, every single reference to the Property in the administrative record, from immediately after the adoption of the OPA Plan in 1973 until Milan developed its new theory in 2009, states that the Property is designated as Open Space in both the City's General Plan and the OPA Plan.

The critical facts in this case are an undisputable matter of record. It is undisputed that the comprehensive 2010 General Plan designates the Property exclusively as Open Space. It is undisputed that Milan's proposed subdivision is inconsistent with this designation. And it is undisputed that the GPA—adopted for the express purpose of making Milan's Project consistent with the General Plan—was rejected by the voters and never took effect.

As an inescapable matter of fact, law, and logic, the Property's Open Space designation in the 2010 General Plan thus remains in effect and precludes Milan's Project. Real Parties' briefs consist of little more than an elaborate series of smokescreens to obscure the consequences of this inevitable conclusion and defeat the will of the voters.

ARGUMENT

I. THE PRIMARY ISSUES BEFORE THIS COURT ARE QUESTIONS OF LAW BASED ON UNDISPUTED FACTS.

A. Determining What Constitutes the "Applicable" General Plan Under State Law Is a Question of Law.

To decide whether Milan's Project is consistent with the City's General Plan, this Court must first determine, under State law, what that "General Plan" *is*. On March 9, 2010, the City Council adopted Resolution No. 10436, approving a Citywide "Comprehensive General Plan Update" ("2010 General Plan"). AR-14:6277-81. Orange Citizens submits that this formally-adopted document, which was also placed on the City's website and distributed to the public as the City's General Plan, in fact constitutes the City's "General Plan" under State law. *See* Gov. Code § 65300.[1] Real Parties, however, claim that the City's General Plan is an entirely different document, one that was never made available to the public, and that somehow incorporates both the OPA Plan and the provisions of the 1973 Planning Commission resolution.

The meaning of the State Planning and Zoning Law, including the question of what constitutes the general plan "applicable" to a development project, presents a "question of law requiring an

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[1] All undesignated statutory references are to the Government Code.

independent determination by the reviewing court." *Harroman Co. v. Town of Tiburon,* 235 Cal.App.3d 388, 392, 395 (1991).

Milan insists that *Harroman* is inapposite because "[t]his Court is not being asked to interpret the Government Code." Milan Answer at 26. However, it is the Government Code that requires the City to adopt a "comprehensive, long-term general plan" and make it available to the public. §§ 65300, 65357. The Government Code also requires development agreements to be consistent with the applicable "general plan." § 65867.5. Likewise, with regard to zoning, the Government Code provides:

> A zoning ordinance shall be consistent with a city or county general plan only if both of the following conditions are met:
>
> (1) The city or county has *officially adopted* such a plan.
>
> (2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.

§ 65860(a) (emphasis added); *accord* § 65855 (zoning must be consistent with "*applicable* general and specific plans") (emphasis added).

Thus, this Court must determine what, under State law, constitutes the "applicable" and "officially adopted" general plan to which Milan's Zone Change and Development Agreement must conform. This is nearly identical to the question presented in *Harroman,* 235 Cal.App.3d at

395, which was whether the term "applicable general plan," in section 65589.5, meant the general plan existing at the time the developer filed its application, or a proposed "draft" prepared pursuant to section 65361. The court concluded that this was a "question of law." *Id.* at 392; *see also City of Coachella v. Riverside County Airport Land Use Comm'n,* 210 Cal.App.3d 1277, 1289-91 (1989) (determining, as a "matter[] of law," whether an adopted airport plan constituted the "comprehensive land use plan" to which surrounding local governments must conform).

Likewise, in *Lesher Communications, Inc. v. City of Walnut Creek,* 52 Cal.3d 531, 541-43 (1990), this Court determined whether an initiative should be considered part of the city's general plan as a question of law, which the Court resolved based on the initiative's plain meaning and the materials presented to the public.

Contrary to the City's claim (City Answer at 2), Orange Citizens' assertion that the City "abused its discretion" in approving the Zone Change and Development Agreement does not suggest otherwise. It is well established that, under the arbitrary and capricious standard governing review of quasi-legislative actions, courts must "exercise independent judgment" in determining whether an agency action is "consistent with applicable law." *Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n,* 21 Cal.4th 352, 361 (1999); *see also Citizens for East Shore Parks v. California State Lands Comm'n,* 202

Cal.App.4th 549, 572 (2011) (courts apply *de novo* review "'when the case involves resolution of questions of law where the facts are undisputed'") (citation omitted).

Because determining what constitutes the "general plan" applicable to Milan's Project is a question of law, this Court owes no deference to the erroneous legal conclusions of City officials or the courts below.

B. The City Council's Consistency Findings Do not Support Real Parties' Theory Because They Address the Project's Consistency with the General Plan *as Amended* by the General Plan Amendment.

In examining the other main issue before this Court—whether Milan's Project is consistent with the City's "applicable" General Plan—it is critical to keep in mind that the City Council, in adopting its consistency findings, *assumed* that the GPA was in place. Due to the Referendum, however, that GPA never took effect. Thus, the Court here is making an entirely different determination than the City Council did in approving Milan's Project in 2011. The Council determined only that the Project was consistent with the 2010 General Plan *as amended* to designate Milan's Property for residential use. This Court, by contrast, must determine whether the Project is consistent with the *pre-existing* General Plan, which unambiguously designates the Property "Open Space."

1. The City Council's Consistency Determinations Were Contingent on Its Adoption of the General Plan Amendment.

In approving Milan's Development Agreement and Zone Change, the City Council did not find that the Project approvals were consistent with the existing General Plan, but only that these approvals were consistent with the "General Plan, *as amended by [the] General Plan Amendment.*" AR-4:1834 § III(A) (resolution approving Development Agreement) (emphasis added); AR-4:1828 § II (identical finding regarding Zone Change).

Ironically, Real Parties cite to the Council's resolution *amending* the General Plan to allow residential use on Milan's Property as evidence of the Project's alleged consistency with the General Plan *without* the amendment. *See, e.g.,* City Answer at 9 n.3, 16, 47. Not surprisingly, however, the GPA Resolution fails to support Real Parties' position. Rather, the GPA Resolution provides "*[u]pon approval of the proposed amendments to the General Plan*, the project is consistent with the goals and policies of the City's [2010] General Plan." AR-4:1950 (emphasis added) (also stating that Milan's Project is consistent with the "General plan, as texturally [sic] amended" by the proposed GPA). Moreover, because the GPA Resolution was rejected by the voters, it is legally void. *Midway Orchards v. County of Butte,* 220 Cal.App.3d 765, 781-83 (1990).

Real Parties studiously ignore the fact that the relevant consistency findings for the Zone Change and Development Agreement were expressly contingent on the GPA's adoption. Instead, the City cites over and over to "56 pages" in the Project's EIR, alleging that the asserted "findings" on these pages demonstrate that the Project is consistent with the pre-GPA General Plan. City Answer at 4-5, 37, 46, 48, 51.

In fact, the EIR provides just the opposite. It states that the Property's "General Plan" designation is "Open Space" and concludes that "*the proposed project is inconsistent with the existing City General Plan land use designation for the project site.*" AR-6:2182, 2388 (emphasis added). The EIR further acknowledges, under the heading "General Plan Consistency," that its consistency determinations are "contingent on" the adoption of the GPA:

> The Draft EIR . . . concludes that, ***contingent on passage of the proposed General Plan Amendment*** the proposed project would be both consistent [with] and in many cases furthers the City's policies. . . . ***With the approval of the General Plan Amendment*** all General Plan goals and policies would be met by the proposed project.

AR-7:2620 (emphasis added); *see also* AR-7:3240 (EIR stating that "the proposed project is consistent with the General Plan Update, *provided that the General Plan Amendment sought by the applicant is approved*") (emphasis added).

By contrast, the "56 pages" of EIR text repeatedly cited (and erroneously described as "findings") by the City do not even purport to address the Project's consistency with the General Plan *land use designation* for the Property. Instead, they merely discuss the 2010 General Plan policies applicable to new development citywide.[2]

Continuing its attempt to fabricate relevant consistency findings, Milan also cites extensively to the City's resolution certifying the Project EIR. Milan Answer at 13-14. The cited recitals, however, do not find, or even imply, that the Project is consistent with the General Plan in the absence of the GPA. To the contrary, they conclude:

> ***In approving [the GPA],*** it is the intent of the City Council . . . ***to honor the intent*** of the original adoption of the OPA, remove any uncertainty pertaining to the permitted uses of the Property, and allow uses on the Property which the City Council believes to be appropriate. . . .
>
> ***Changing the zoning of the Project Site*** from [open space to residential] ***is consistent with*** the 1973 OPA Plan Land Use designations and ***the land use designations adopted by the City Council's approval of [the GPA]. Therefore,*** the [residential] zoning is consistent with the City's General Plan.

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[2] *See, e.g.,* AR-7:2670 (finding Project consistent with policy requiring that "new development [be] compatible with the style and design of established structures").

AR-4:1895 (emphasis added). In other words, the City Council found: (1) the General Plan *amendments* would make the General Plan consistent with what it believed the City Council intended to do in 1973; and (2) the residential zoning would "therefore" be consistent with "the land use designations adopted by the [GPA]."

In fact, the only "determination" cited by Real Parties that addresses whether the Project was "consistent with its existing general plan (without the general plan agreement)" is the City Attorney's "opinion"—issued two months *after* the GPA's adoption—that the GPA's repeal would "not necessarily preclude [Milan's Project] from going forward." PA-I:7:APP283-84; Milan Answer at 16, 27. However, the City Attorney's opinion is not a "finding," and it is not entitled to any deference whatsoever. *See, e.g., Floresta, Inc. v. City of San Leandro,* 190 Cal.App.2d 599, 610 (1961) (City Attorney's opinion "cannot change the plain meaning of the ordinance"). Milan cites no authority for the remarkable proposition that this Court should defer to the hedged opinion of a city attorney that a general plan amendment *might* be unnecessary for project approval, despite the fact that his city council earlier came to the exact opposite conclusion.

2. Where, as Here, There Are no Relevant Consistency Findings, the Courts Have Uniformly Determined Consistency Based on the General Plan's Plain Language.

Because the City Council never found that the Project was consistent with the existing (pre-GPA) General Plan, there are no "consistency findings" to which this Court can defer. Thus, the cases cited by Real Parties—all of which address the appropriate standard of review in a challenge to a city council or board of supervisor's express determination that a project is consistent with its general plan—are inapposite. *See, e.g., No Oil, Inc. v. City of Los Angeles,* 196 Cal.App.3d 223, 244-45 (1987).

By contrast, where an inconsistency between a project and the applicable general plan is alleged to result from an initiative or referendum—and, thus, as here, no relevant consistency findings exist—the courts have uniformly determined whether the project and the applicable designations are inconsistent on their face. *E.g., Midway Orchards,* 220 Cal.App.3d at 770-71, 783 (agricultural and residential designations facially inconsistent); *City of Irvine v. Irvine Citizens Against Overdevelopment,* 25 Cal.App.4th 868, 879 (1994) (residential and "reserve" designations facially inconsistent); *see also Merritt v. City of Pleasanton,* 89 Cal.App.4th 1032, 1034, 1036-38 (2001) (determining that a referendum did not create an inconsistency with the city's general plan simply by examining the language of the relevant documents); *Chandis*

Securities Co. v. City of Dana Point, 52 Cal.App.4th 475, 484-85 (1996) (referendum on its face not inconsistent with general plan).

C. Milan's Project Approvals Cannot Be Upheld Under Any Standard of Review.

Even if the Council had found that the Project was consistent with the existing General Plan, such a finding could not withstand judicial scrutiny. A city council's interpretation of its general plan is entitled to deference only where the languge contains "ambiguity" (*No Oil,* 196 Cal.App.3d at 244-45) or requires the agency to "weigh and balance" competing plan policies (*Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors,* 87 Cal.App.4th 99, 142 (2001)).

By contrast, as this Court has explained, neither a city nor a court can interpret its general plan in a manner contrary to its plain language. *Lesher*, 52 Cal.3d at 543. Moreover, "'deference is not abdication.'" *California Native Plant Soc. v. City of Rancho Cordova,* 172 Cal.App.4th 603, 642 (2009) ("*CNPS*") (citation omitted). In *CNPS,* for instance, the court determined that the city's interpretation of the word "coordination" was "unreasonable" and that "deference to the City's interpretation of its general plan" was therefore "unwarranted." *Id.* Likewise, in *Endangered Habitats League, Inc. v. Orange County,* 131 Cal.App.4th 777, 789 (2005), the court held that an agency "cannot articulate a policy in its general plan and then approve a conflicting

project." *See also id.* at 783; *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County,* 62 Cal.App.4th 1332, 1336, 1341-42 (1998) ("*FUTURE*") (setting aside county consistency finding where the project clearly conflicted with a "fundamental, mandatory and specific land use policy").

Thus, where, as here, a project is inconsistent with a specific and unambiguous general plan policy or designation, the courts have not hesitated to overturn its approval, even where the agency adopted relevant consistency findings.

D. The City's Litigation Position Is not Entitled to Deference.

In reality, Real Parties' argument that the Project can go forward despite the Referendum is based not on the City Council's 2011 findings, but on the City's current litigation theory. Thus, contrary to Milan's assertions, the no "reasonable or rational basis" standard of review applicable to "quasi-legislative decisions" (*see American Coatings Assn., Inc. v. South Coast Air Quality Dist.,* 54 Cal.4th 446 (2012)), does not apply here. Indeed, this Court has expressly disapproved cases applying this standard to agency "litigating positions," emphasizing that while such positions may be entitled to some weight, "'the ultimate resolution of such legal questions rests with the courts.'" *Culligan Water Conditioning v. State Bd. of Equalization,* 17 Cal.3d 86, 93, 93 n.4 (1976) (citations omitted); *accord American Coatings,* 54 Cal.4th at 462 (holding that "the

proper interpretation" of a legislative enactment "is ultimately the court's responsibility"); *County of Sutter v. Board of Admin.,* 215 Cal.App.3d 1288, 1295 (1989) (agency "litigation position" based on "the legal reasoning of staff counsel" not entitled to deference).

Moreover, while courts will sometimes defer to an agency interpretation where the agency "'has consistently maintained the interpretation in question,'" a "'vacillating position . . . is entitled to no deference'" whatsoever. *Yamaha Corp. of America v. State Bd. of Equalization,* 19 Cal.4th 1, 13 (1998) (citations omitted); *see id.*at 14 (The "weight" afforded agency interpretations of their laws "turns on a legally informed, commonsense assessment of their contextual merit."). These same "rules of statutory construction apply equally to the construction of" local legislation such as general plans. *Russ Bldg. Partnership v. City and County of San Francisco,* 44 Cal.3d 839, 847 n.8 (1988); *see also Lesher,* 52 Cal.3d at 540, 544.

As detailed below, the City's current litigation position has not been "consistently maintained." To the contrary, every element of this litigation theory conflicts with the City's previous positions, as well as with the undisputed record facts and controlling case law.

II. THE GENERAL PLAN AMENDMENT CHANGED THE PROPERTY'S GENERAL PLAN DESIGNATION AND WAS CRITICAL FOR PROJECT APPROVAL.

Real Parties make such a concerted effort to obscure what the GPA actually accomplished that their briefs have an *Alice-in-Wonderland* quality. Thus, Milan claims that the "'City *did not amend* the land use designation of the Property by means of the General Plan Amendment.'" Milan Answer at 39 (quoting Opinion at 31). Likewise, the City contends that the GPA merely "directed" that the staff "perform its ministerial function" by updating the Map "to reflect" the "existing [ ] designation." City Answer at 8-9 (emphasis in original). In short, Real Parties ask this Court to hold that the City adopted a "General Plan Amendment" that was not only "unnecessary" (Milan Answer at 54), but did not even amend the General Plan. The record does not support this narrative.

A. Even after Milan Introduced Its Novel Theory, the City and Milan Recognized that the Open Space Designation in the Land Use Policy Map Precluded Approval of Milan's Project.

The GPA, of course, *did* change the General Plan by amending the Land Use Policy Map (or "2010 Map") for the Property. AR-4:1952 (showing new land use designation for the Property as "Other Open Space & Low Density"); *see also* AR-1:0004, 0006 (attachments to 5/10/11 City Council Staff Report showing existing and proposed General Plan Maps); Opinion at 21. Even the City Attorney's "Impartial Analysis" in the

ballot pamphlet makes clear that the GPA revised the "General Plan land use map, which shows solely an 'Open Space' land use designation on the [Property]," to allow residential use. Appellants' Supplemental RJN ("SRJN") 006 (filed 01/30/13).

Moreover, in the years leading up to its adoption, the City repeatedly concluded that the GPA *was necessary* to ensure the legally mandated consistency between the Project and the General Plan. This was, of course, taken for granted in all City planning documents from 2007 to 2009. *See, e.g.,* Opening Brief at 7-8. In late 2009, however, Milan proposed its erroneous legal theory that the 1973 designation was a valid part of the general plan. Milan's theory was thereafter endorsed by the City Attorney and presented to City staff and officials as a legal *fait accompli.*[3] City staff nevertheless still recognized that General Plan and OPA Plan amendments were needed to "[e]nable the project to be consistent with" these plans. AR-2:502-03; *see* 7:2650 (City Attorney opining that "the noted inconsistencies between the Ridgeline project and the Plan still need to be resolved").

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[3] *See* Opening Brief at 14; AR-2:504 (staff report noting "the City Attorney clarified the following based upon additional research regarding the OPA Plan"); AR-12:5110, 5123, 5302, 5315; AR-13:5405 (presenting theory to Planning Commission and City Council).

To ensure this consistency, the Open Space designation in the 2010 Map needed to be changed. Thus, on May 3, 2010, the City's Senior Planner informed the Planning Commission that a "General Plan Amendment [] to change the existing land use map designation is proposed to go from open space, as it now exists, to estate low-density residential." AR-12:5109. In recommending approval of the GPA, the Planning Commission likewise found that "amendments to the City's General Plan and the [OPA] Plan *are required in order to make the uses specified within the Development Agreement compatible with the land use designations*." AR-1:33 (emphasis added); AR-1:155 (Planning Commission finding that the Project is "inconsistent with the existing City General Plan land use designation").

While Real Parties repeatedly accuse Orange Citizens of significantly misrepresenting the record, the only accusation accompanied by an actual record citation is their disagreement with Orange Citizens' statement that the City Council approved, at Milan's request, a GPA changing the Property's designation from Open Space to "residential." City Answer at 9. It is true that the Planning Commission, having been informed by the City Attorney that the Property's "real" designation pursuant to the 1973 resolution was "Other Open Space and Low Density," recommended that *this* residential designation (rather than the "Estate"

residential designation originally requested by Milan) be adopted. AR-1:29; *see* Opening Brief at 8, 10.

Orange Citizens submits that this was not a misrepresentation at all, let alone a "significant" one. The relevant and undisputed fact is that the GPA removed the Open Space designation in the 2010 General Plan Land Use Map and replaced it with a designation that permitted residential use, which is exactly what Milan requested.

B. The General Plan Amendment and Approving Resolution Obscure Its Actual Effect.

While the GPA that was presented to, and approved by, the City Council indisputably changed the Property's Open Space designation in the 2010 Map, there is no mention of this significant change in the text of the City resolution adopting the GPA. *See* AR-4:1948-50 ("GPA Resolution"). Instead, this change appears only in an untitled and difficult to read map attached as Exhibit A to the Resolution. *See* AR-4:1952 (Attachment A to GPA Resolution).

There is something deeply troubling about the stark contrast between the 2010 General Plan, which emphasizes the centrality of its Land Use Policy Map, and the text of the GPA Resolution, which ignores the existing Map altogether. Even the most careful reader would have no idea that the GPA is *removing* the 2010 Map's exclusive Open Space designation for the Property and *replacing* it with a designation allowing

residential development. *See* AR-4:1948-52 (GPA Resolution). The City's obfuscation of this critical change is all the more striking when compared to the standard practice of the City—and most other jurisdictions—to illustrate changes to a property's land use designation by attaching maps that clearly depict the existing and proposed designation. *See, e.g.,* AR-6:2179-81 (EIR for Milan's Project showing existing Open Space and proposed residential designations); AR-14:6032, 6034, 6037-38 (2003 Council resolution showing existing and proposed designations for the nearby Fieldstone property).

The GPA Resolution is equally misleading with respect to the land use designations in the OPA Plan map. Its recitals assert that the GPA is merely "clarify[ing]" the allegedly "unchanged terms of the existing OPA Plan." AR-4:1948. In fact, the GPA *replaced* the OPA Plan map's existing open space designations (in place for almost 40 years) with a residential designation, and it eliminated text requiring the permanent protection of the Property's golf course. *See* AR:1:04-09 (staff report attachments); 4:1952-54, 1960, 1963.

The GPA Resolution is thus "a masterpiece of hiding something in plain sight." *See Wilson v. City of Laguna Beach,* 6 Cal.App.4th 543, 557 (1992) (criticizing city planning document which "employed language so couched and tentative" that it would mislead "an

ordinary reader"). It almost reads as if the City were trying to amend its general plan *without admitting* that it was amending its General Plan.

Why would the City draft and adopt a resolution that obscures the GPA's most important objective?

The answer is clear from the record. Although Milan had always recognized the need for a general plan amendment, it also feared that the City's approval of the GPA would be subject to a referendum that could stop the Project.[4] Thus, Milan and the City faced a conundrum: they wanted to eliminate the legally inconsistent Open Space designation in the 2010 General Plan, while retaining the ability to argue—in the event a referendum was successful—that the GPA was unnecessary and accomplished nothing at all.

1. The CEQA Process Reflects the City's Equivocation Between Recognizing the Primacy of the 2010 Land Use Policy Map and Accomodating Milan's Theory.

The documents prepared by the City under the California Environmental Quality Act ("CEQA") demonstrate the City's equivocation

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[4] Milan had long worried that its controversial Project would be rejected by the voters, just like the nearby Fieldstone Project was in 2003. *See* PA-II:11:APP391. Indeed, Milan initially proposed to condition its financing of the Project's most valued public amenities on the public not exercising its constitutional referendum rights (regardless of the outcome of the referendum). AR- 2:513-14; 7:2617-18. This provision was ultimately withdrawn after a public outcry. *See* AR-8:3367-68.

in the face of this conundrum. An agency's EIR is supposed to be a "document of accountability." *Laurel Heights Improvement Ass'n. v. Regents of University of California*, 47 Cal.3d 376, 392 (1988). Far from making the City "accountable" for its actions, the City's CEQA documents here present a series of conflicting statements that increasingly obscure the very nature of the proposed GPA.

The initial CEQA documentation Milan submitted with its development application in 2007 expressly states that Milan is requesting amendments to the Open Space designations in both the General Plan and the "Orange Park Acres Specific Plan" to permit residential use. AR-6:2177-82; 14:6068. The Draft EIR—and every other planning document prepared through 2009—likewise informed the public that the existing General Plan designation was "Open Space," that the OPA "Specific Plan" designations were "Golf Course and Local Parks," and that a GPA (and specific plan amendment) were needed to change these designations. *See* Opening Brief at 8, 35.

By the time the Final EIR ("FEIR") for the Project was released in April 2010, however, the City Attorney had embraced Milan's flawed theory. *See* Opening Brief at 36. The FEIR thus included an opaque attempt to clear up the "misconceptions" about the status of the OPA Plan by suggesting that the 1973 residential designation remained in place. AR-7:2618-21. The FEIR, however, still recognized the need for a

GPA, expressly stating that "the proposed project GPA would amend the General Plan Land Use Element Map to show . . . Residential over the project site." AR-7:2621.

After the Planning Commission hearing, the City apparently decided that even this straight-forward statement was objectionable. The statement was therefore struck out in a second "Final" EIR ("FEIR Report"), prepared in February 2011. AR-8:3369. This FEIR Report states, in language nearly identical to that in Real Parties' briefs, that a GPA is "no longer proposed;" rather, the Property would "retain" its designation as "Other Open Space and Low Density," which would be "reflected" on the General Plan and OPA Plan maps. AR-8:3358, 3369.

The FEIR Report was clearly an attempt to test-run a new approach to the City's conundrum: simply declaring that a change in the 2010 Map—the central feature of the General Plan Land Use Element—would somehow *not* constitute a General Plan amendment. This, of course, is the theory that Real Parties now promote in their briefs. Yet, the FEIR Report did not modify, and thus left in place, numerous *conflicting* statements in the EIR making clear that the "General Plan designation of the project site on the City's Land Use Element map *is* Open Space" and that therefore "a General Plan amendment *continues to be necessary to provide consistency.*" AR-7:2621 (emphasis added); *see supra,* Part I.B.1; 6:2182, 2388.

The central purpose of an EIR is "'to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered'" the implications of its actions. *Laurel Heights,* 47 Cal.3d at 392 (citation omitted). Here, the citizens of Orange had good reason to be apprehensive. The City's EIR is not just confusing and contradictory. It also reflects a calculated manipulation of the CEQA process that Real Parties now use in their attempt to defeat the public's right of referendum.

2. Both the City and Milan Recognized the Necessity for the General Plan Amendment at the Time of Its Adoption.

The City's equivocations, however, do not end with the FEIR Report. After its release, Orange Citizens submitted a detailed letter explaining that, as a matter of law, the Property was clearly governed by the 2010 Open Space designation, not the obsolete 1973 designation, and that therefore the Project could not legally be approved without a General Plan Amendment. AR-4:1364-70.

At this point, the City and Milan switched gears yet again. The City Attorney now reconfirmed the need for a GPA. AR-4:1450 (5/10/11 memo stating that "amendments to the General Plan are being proposed" to remove potential "internal inconsistencies"); *accord* AR-13:5641-42 (statement to City Council that "the intent of the" GPA is to "clean up those inconsistencies"). City staff concurred. *See* AR-3:1094-95 (May 2011 Staff Report noting that the 1973 designation is "inconsistent

with" both the "City's General Plan Land Use Map designation of the project site as 'Open Space'" and the OPA Plan map designation of "Golf" and "Local Parks"). And Milan's representative testified to the City Council that "the one point we agree with" Orange Citizens on is that *"you need to do a General Plan amendment."* AR-13:5434, lines 24-25 (emphasis added); Opening Brief at 14-15.

In the end, the City complied with Milan's request to make its Project legally "approvable" (AR-4:1429) by adopting the requested GPA changing the Open Space designations for the Property. But the GPA Resolution attempted to obscure the GPA's actual effect by claiming it merely "clarif[ied] the original and unchanged terms of the existing OPA Plan." AR-4:1948.

Once the Referendum was filed, Milan and the City Attorney *again* reversed course, arguing that the GPA was never necessary in the first place. *See* AR-9:3982 (Milan proposing, as "an elegant solution" to the Referendum problem, that the City "re-evaluate the requirement for" the GPA that the City Council had approved two months earlier); PA-I:7:APP284. Real Parties' circumlocutions, however, cannot alter either the law or the record, which definitively establish that the GPA was an essential legal prerequisite to Project approval.

III. THE PROJECT IS INCONSISTENT WITH THE GENERAL PLAN OPEN SPACE DESIGNATION.

A. The Exclusive and Controlling Land Use Designation for the Property Is the Open Space Designation in the 2010 Land Use Policy Map.

It is undisputed that the City's 2010 General Plan designates the Property exclusively for "Open Space" in the Land Use Policy Map (or "2010 Map"). City Answer at 25; *see also* Opening Brief at 26-29.

Invoking *Lesher,* Milan attempts to downplay the importance of the 2010 Map by characterizing it as a "secondary planning document." Milan Answer at 49. *Lesher,* however, in no way supports this characterization. Rather, it holds that a *zoning ordinance* cannot supersede a general plan because, by statute, it sits below the general plan in the planning hierarchy. 52 Cal.3d at 541.

The 2010 Map is certainly not a "secondary planning document." Rather, it lies at the heart of the 2010 General Plan, which defines this map as an "important feature of [the Land Use] Element," establishing "the location, density, and intensity of development *for all land uses citywide.*" Exhibit A at 4, 7 (emphasis added); *see* AR-10:4075 (Map in context of entire General Plan); Governor's Office of Planning and Research, *General Plan Guidelines* at 13-14 (2003) ("The general plan's

text and its accompanying diagrams are integral parts of the plan.").[5] Indeed, the 2010 Map is the *only place* in the General Plan where permitted levels of development are set forth, for Milan's Property and for all other properties in the City. The 2010 Map is thus *the* critical document for determining permitted land uses City-wide.

Accordingly, for Milan's development to be consistent with the General Plan's "policies, general land uses, and programs," as required by law, it must, by definition, be consistent with the 2010 Map. *See* Exhibit A at 9 ("Program I-2" requiring that "City land use decisions [be] consistent with . . . the Land Use Policy Map"); *id.* at 2 (defining General Plan "policies" as including its "maps"); § 65860(a). Milan's attempt to equate the 2010 Map to a zoning ordinance—a subordinate land use regulation—is therefore completely baseless.

Indeed, Real Parties' insistence that this Court ignore the 2010 Map merely highlights the absurdity of their position. They claim that the 2010 Map, which was manifestly adopted as a critical element of the General Plan and to which that plan *expressly* requires conformity, *is not even part of the 2010 General Plan.* Milan Answer at 48-49. Yet, at

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[5] This document, which is adopted by the Governor's Office of Planning and Research, is available online at the location cited on page 25 of the Opening Brief.

the same time, they maintain that that the 2010 General Plan *does* incorporate a 1973 amendment to a map in a subordinate planning document that was never implemented, was forgotten for nearly 40 years, and is not mentioned anywhere in the 2010 General Plan.

B. The General Plan Open Space Designation for Milan's Property Was Not a "Clerical Error."

In furtherance of their revisionist history of this case, Real Parties also repeatedly insist that the General Plan Open Space designation adopted for Milan's Property was a "clerical" or "ministerial" error and that there is no record evidence the City Council "intended" to adopt it. *See, e.g.*, Milan Answer at 43-44. In fact, the record conclusively shows that the City Council deliberately retained this Open Space designation in adopting the 2010 General Plan.

1. The Record Shows that the City Council Was Fully Aware of the Existing Open Space Designation for Milan's Property and Affirmatively Retained It in Adopting the 2010 General Plan.

In the months leading up to the City Council's adoption of the General Plan in March 2010, City staff and officials repeatedly acknowledged the Property's existing Open Space designation and made clear that the City intended to consider any change to this designation *only* as part of Milan's pending GPA application. For example, in November 2009, the Draft EIR circulated to the public for Milan's Project noted that the Project was controversial due to the proposed GPA, which would

change the "existing General Plan Recreational Open Space land use designation to Estate Density Residential." AR-6:2144. It also informed the public that, by contrast, the "General Plan update does *not* propose changing the land use designation on the project site." AR-6:2404 (emphasis added).

In April 2010, a month after adopting the 2010 General Plan, the City released the Final EIR for Milan's Project, which again confirmed that "the City's General Plan update does *not* incorporate or include private development applications such as [Milan's] proposed project." AR-7:3189 (emphasis added). The City emphasized, however, that Milan's "project application includes a General Plan Amendment that will result in consistency with the General Plan and Orange Park Acres Plan." *Id.*; Opening Brief at 51-52.

Thus, notwithstanding Real Parties' failure even to mention these EIR provisions, the City Council was clearly aware of the existing Open Space designation for Milan's Property and elected to retain it in adopting the 2010 General Plan. Real Parties' assertion that this is a case where the staff inadvertently "fail[ed] to make the changes set forth in the enacting legislation" in 1973 (Milan Answer at 44; *accord* City Answer at 3) is a red herring. The relevant "enacting legislation" was not the City's adoption of the OPA Plan in 1973, but its adoption of the 2010 General Plan in March 2010. This legislation included, at its core, the Land Use

Policy Map, which clearly designated the Property as Open Space. To hold that the City Council in 2010 actually intended to designate Milan's Property as "Open Space *and Residential*" would require this Court to ignore the plain language of the governing legislation, as well as the Project history set forth above.

Moreover, it is well established that this Court cannot "rewrite" the 2010 General Plan to "conform to an assumed intent" that was not expressed in the plan itself. *Lesher,* 52 Cal.3d at 543. Rather, the City Council is "'presumed to have meant what it said'" in adopting the 2010 General Plan, and its "'plain meaning . . . governs.'" *Stephens v. County of Tulare,* 38 Cal.4th 793, 802 (2006) (citation omitted); *see also California Fed. Sav. & Loan Ass'n v. City of Los Angeles,* 11 Cal.4th 342, 349 (1995) ("'[T]he office of the judge is . . . not to insert what has been omitted or omit what has been inserted.'") (citation omitted). Milan's claim that the 2010 Map "is merely incomplete" because it "lists only one of the two permissible land use designations" (Milan Answer at 52) violates these fundamental principles of statutory construction.

Indeed, Milan's real complaint is not that the *staff* somehow erred in implementing the 2010 General Plan adopted by the City Council. Rather, it is that the City Council, in adopting the 2010 General Plan, failed to come to the same decision regarding the Property as the City Council did in 1973. In interpreting a legislative enactment, however, "the will of the

Legislature" is understood to be expressed in "the most recent[]" enactment. *Professional Engineers in California Gov't v. Kempton,* 40 Cal.4th 1016, 1038 (2007) (citation and internal quotations omitted). Real Parties provide no possible justification for their unprecedented request that this Court graft onto the City Council adopting the 2010 General Plan the intent of the City Council 37 years before.

2. This Court Owes No Deference to the City Council's Post-Hoc "Interpretations" of the 2010 General Plan.

In addition to asking the Court to look to the intent of the 1973 City Council in interpreting the 2010 General Plan, Real Parties also ask this Court to defer to the interpretations set forth in the City Council resolutions approving Milan's Project a year later. Specifically, Real Parties assert that these resolutions support Milan's theory because they state that the OPA Plan is "part of" the General Plan or that the GPA merely "affirms" and "clarif[ies]" the Property's existing designation. *See* AR-4:1948; 1828; Milan Answer at 13-15.

Even if the Council's 2011 resolutions had not been voided by the Referendum, however, they could not change the plain language of the 2010 General Plan. While a legislative body has broad authority to *amend* its enactments, it has much more limited authority to "interpret" them after the fact. *McClung v. Employment Development Dept.,* 34

Cal.4th 467, 473 (2004). Rather, declaring the meaning of a previously adopted enactment "is a judicial task." *Id.* Thus:

> [A legislative body] has no legislative authority simply to say what it *did* mean. A declaration that a statutory amendment merely clarified the law "cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms."

Id. (citations omitted).

Here, the City Council's 2011 recitals flatly contradict the 2010 General Plan's unambiguous provisions, which establish that the OPA Plan is *not* part of the General Plan today and that the Property's land use designation is Open Space. Accordingly, this Court should reject Real Parties' contention that the unmistakable change in the City's General Plan proposed by the Council's 2011 recitals is nothing more than a "clarification."

3. Milan's Complaints about the 2010 General Plan Are Time-Barred.

In the end, Milan's claims in this litigation are nothing more than a belated challenge to the 2010 General Plan. If Milan truly believed that the Open Space designation for its Property in the 2010 General Plan was somehow "erroneous," it should have timely challenged the Plan's adoption. *See* § 65009(a)(3), (c)(1) (establishing 90-day limitations period

for challenging general plan amendments "to provide certainty for property owners and local governments"). Because Milan failed to do so, its objections are now time-barred.

Milan's complaint that adoption of the 2010 General Plan somehow violated applicable notice requirements is likewise time-barred. *Id.* It is also frivolous. In adopting the 2010 General Plan, the City took great pains to ensure adequate public notice. The legal notice of intent to adopt the "Comprehensive General Plan Update," for example, makes clear that it "represents a complete updating of the City's 1989 General Plan" and applies to property "citywide." AR-14:6170; Opening Brief at 40-41. There were at least eight public hearings on the update, and members of the public could review the draft plan online. AR-14:6277, 6494.

Moreover, Milan was fully on notice that the General Plan designated its Property solely as Open Space, as evidenced by its submittal of an application *to change* that designation to residential (AR-9:4000-01) and its insistence to the Council that "you need to do a General Plan amendment" to designate its Property for residential use. AR-13:5434.

4. The Open Space Designation in the 1989 General Plan Likewise Reflected the City Council's Intent to Limit the Property Exclusively to Open Space Uses.

The 1989 General Plan, like the 2010 General Plan, exclusively designated Milan's Property for Open Space in its land use map and underscored the critical role of this map, describing it as the plan's

"single most important feature." AR-11:4634; *see also* AR-11:4649 ("The goals and policies and the land use map . . . serve as the framework for the remaining General Plan Elements."). While conceding that this map "showed a single designation of Open Space on the Project property" (City Answer at 23), Real Parties insist that this, too, was a clerical error. Again, however, neither the City nor Milan provides a shred of evidence to overcome the presumption that the City Council in 1989 "meant what it said" in adopting this unambiguous designation. *See Stephens,* 38 Cal.4th at 802. In fact, the record shows that the City Council at that time clearly intended to limit the Property to recreational uses and to require a general plan *amendment* for any other uses.

In 1985, when the golf course was annexed to the City, the entire Property became for the first time subject to City jurisdiction. AR-9:3798-99. Both Milan and the City misleadingly claim that a 1985 staff report recognized the "open space and residential dual land use designation for the Property," which they identify as "R-O" and "R-1-40." Milan Answer at 7, 57 (citing AR-9:3892); *accord* City Answer at 22. As Real Parties well know, however, R-0 and R-1-40 are *zoning*—not general plan—classifications. *See* AR-9:3893.

Real Parties wholly ignore the portion of the 1985 staff report that *does* address the Property's General Plan designation. This section confirms the City's understanding that *both* "the Land Use Element of the

General Plan and the Orange Park Acres Plan designate[] the [Property] area for Open Space and Recreation uses." AR-9:3893. The report continues:

> Conflict to General Plan?
>
> The property is within the City of Orange sphere of influence and ***is designated as recreation/open space.*** Their prezone to R-O would support the General Plan.

AR-9:3894 (emphasis added). Notably absent from the staff report is any assertion of a dual "open space and *residential*" General Plan designation for the Property.

The Property owner's 1985 annexation application likewise identified the "General Plan Land Use designation for the site" as "Recreation/Open Space." AR-9:3818. Consistent with the submissions of the Property owner and the recommendations of its staff, the City Council itself expressly found that "a General Plan Amendment . . . would be required" to allow development (other than recreation) on the Property. AR-9:3880 (Resolution No. 6465 (10/8/1985)).

The designation of the Property as "Open Space" in the 1989 General Plan is thus entirely consistent with the City Council's stated intent, in annexing the Property in 1985, to limit the Property exclusively to recreational uses. Once again, Real Parties fail to address any of the relevant record evidence on this point.

C. The 2010 General Plan Superseded any Conflicting 1973 General Plan Policies.

With their exhaustive focus on the City's planning actions in the 1970's, Real Parties' briefs read as if they were in a time warp. Milan asserts, for example, that the "1973 resolution properly and conclusively authorized residential development on the Property." Milan Answer at 39. Even assuming, *arguendo*, that the 1973 resolution "properly" authorized residential development, it did not—and legally could not—do so "conclusively." Rather, the City Council retained the power to designate the Property exclusively for Open Space use, and it unambiguously did so in both the 1989 and 2010 General Plans. As this Court has held, "[o]nly the general plan in effect at the time [a land use approval] is adopted is relevant in determining inconsistency." *Lesher*, 52 Cal.3d at 545. Thus, Milan's Property is not governed by the City's general plan policies from 1973 (when the Property was largely outside City jurisdiction). To the contrary, the 2010 General Plan is the constitution for land use development throughout the City today, and it supersedes any previous general plan policies. *See Harroman,* 235 Cal.App.3d at 396.

Real Parties make no attempt to distinguish the long line of cases establishing this principle. *See* Opening Brief at 37-42. Rather, again invoking *Lesher,* Milan argues that the 1973 designation could not have been amended "by implication." Milan Answer at 44. *Lesher,* however, in

no way suggests that a comprehensive *general plan* revision cannot supersede or replace a previously adopted general plan policy. It simply holds that a *zoning ordinance* cannot result in a "pro tanto repeal or implied amendment of the general plan." 52 Cal.3d at 541. Here, the City's prior general plan policies were not amended via a zoning ordinance or "by implication;" they were *expressly* replaced through the City's adoption of a comprehensive new general plan in 1989, and again in 2010.

Real Parties' efforts to downplay the scope of the 2010 General Plan revisions are likewise baseless. Milan claims, for example, that in 2010 the City adopted a "General Plan for 8 focused areas." *See* Milan Answer at 59. In fact, however, as the City repeatedly announced, the 2010 General Plan was a "Comprehensive General Plan update" that "*cover[s] all of Orange*" and "provides a blueprint for development *throughout the community*." AR-14:6495 (emphases added); Opening Brief at 39-42. Even a cursory comparison shows that the 1989 and 2010 General Plans are entirely different. *Compare* 2010 General Plan (AR-10:4010-4614) *with* 1989 General Plan (AR-11:4615-4898). While the 2010 General Plan does identify eight focus areas "where *future* land use change may occur" (AR-10:4079 (emphasis added)), it clearly contains the *current* governing policies for the entire City. AR-10:4028-30; AR-7:3181 (EIR for Milan's Project describing 1989 General Plan as "inoperative" after adoption of the 2010 General Plan).

D. Recognizing the Primacy of the Property's Open Space Designation in the 2010 General Plan Is Necessary to Effectuate the Will of the Voters.

Even if there were any doubt about the controlling authority of the Open Space designation in the 2010 General Plan—which there is not—the power of referendum must be liberally construed. As this Court has recognized, voter action is the "most direct form" of community input on a general plan. *DeVita v. County of Napa,* 9 Cal.4th 763, 786 (1995). To ascertain the intent of the voters, the Court examines "the explanatory material in the ballot pamphlet." *Lesher,* 52 Cal.3d at 541-42; *accord Rossi v. Brown,* 9 Cal.4th 688, 700 n.7 (1995).

Here, the argument against measure FF (submitted by Orange Citizens) explains:

> Vote No on the City Council's decision to replace the long-time "Open Space" label on the General Plan land use map for the Ridgeline property with a designation that allows for expensive residential "estates."

SRJN006. The City Attorney's official "Impartial Analysis" likewise underscored that the GPA would "revise[]" the "Open Space" designation in the "General Plan land use map." *Id.* By voting "No" on Measure FF and the GPA, the voters necessarily intended to retain the existing Open Space designation as the controlling General Plan designation. This Court should give effect to that intent. Indeed, while Real Parties repeatedly cite the legislative recitals in the GPA Resolution to support their litigation

theory, it is the *voters'* intent in rejecting and invalidating these theories—not the Council's intent in adopting them—that is significant and dispositive. *See Rossi,* 9 Cal.4th at 704 (holding that the voters have the "'final legislative word'") (citation omitted).

To hold otherwise would allow the Council to completely eliminate the right of referendum in this matter. In order to preserve the existing status of the Property, the community could not have challenged the adoption of the 2010 General Plan, as it plainly designates the Property solely for Open Space. It was only when this designation was *amended* in 2011, through the GPA, that City voters had the opportunity to be heard. They responded promptly by challenging (and ultimately rejecting) the GPA. Thus, their clear intent to preserve the status quo is dispositive.

E. The City's Approvals of the Zone Change and Development Agreement Are Void *Ab Initio.*

Because the Open Space designation in the 2010 Map is the controlling General Plan designation for Milan's Property and precludes Milan's proposed subdivision, Milan's Zone Change and Development Agreement are "invalid *ab initio.*" *Lesher,* 52 Cal.3d at 544-45 (striking down zoning ordinance as inconsistent with controlling general plan); *Midway Orchards,* 220 Cal.App.3d at 770-71 (striking down development agreement as inconsistent with general plan following referendum); Opening Brief at 26-31. Tellingly, Real Parties simply ignore this holding

of *Lesher* and fail even to mention—let alone attempt to distinguish—the controlling holding in *Midway Orchards*.

Rather, relying heavily on *No Oil,* the City argues that Orange Citizens has failed to meet its burden of showing "that the City Council's interpretation of its General Plan was clearly erroneous and [its] findings of consistency were arbitrary and capricious." City Answer at 33. *No Oil,* however, is wholly inapposite. First, that case upheld the council's "specific finding" that oil drilling was consistent with the general plan. *No Oil,* 196 Cal.App.3d at 243, 248. Here, by contrast, the City Council never found that the Project was consistent with its General Plan, but rather recognized the *necessity* for a General Plan Amendment to change the existing Open Space designation to allow residential use. *See supra,* Part I.B.1.

Second, *No Oil* found that the city council's consistency finding was fully supported by the maps and text of the general plan, which designated the area for "open space" in the controlling general plan map and defined "open space" to *include* "managed production of natural resources." 196 Cal.App.3d at 244-45. Thus, there was a reasonable basis for concluding that oil drilling was encompassed within that general plan's definition of permitted open space uses. *Id.* at 248. Here, by contrast, the 2010 General Plan's designation of "Open Space" expressly *precludes*

residential development. Exhibit A at 5 (describing the uses allowed in Open Space designations).

The City, in fact, concedes that the Project is not "consistent with the City-wide land use policy map." City Answer at 51. It nevertheless suggests that this inconsistency is somehow outweighed by the Project's alleged conformance with other policies in the City's General Plan. *Id.* The "56 pages" of the EIR cited by the City, however, merely address broad general policies applicable to new development that is *otherwise* authorized by the General Plan. *See, e.g.,* AR-7:2670; *supra,* Part I.B.I. The Property's Open Space designation, by contrast, is a "fundamental, mandatory and specific land use policy" (*see FUTURE,* 62 Cal.App.4th at 1336, 1341-42), which provides that the Property "should not be developed" at all. *See* Exhibit A at 5. Accordingly, Milan's Project approvals are invalid as a matter of law. *See FUTURE,* 62 Cal.App.4th at 1336, 1341-42; *Endangered Habitats League,* 131 Cal.App.4th at 790 (project approval invalid where general plan "articulate[s] a specific and mandatory policy, and it has not been met"); *Napa Citizens for Honest Gov't v. County of Napa,* 91 Cal.App.4th 342, 379 (2001) (project is inconsistent with the general plan where there is an "outright conflict" or it will "frustrate the General Plan's goals and policies").

Because the arguments above are dispositive, this brief could end here. Nevertheless, to set the record straight, Orange Citizens explains

below why each component of Real Parties' theory is directly contradicted by the record or well-established case law.

IV. THE OPA PLAN IS NOT PART OF THE 2010 GENERAL PLAN.

Real Parties repeatedly insist that the OPA Plan is part of the City's General Plan today. As set forth in Part V below, their claims fail regardless of the status of the OPA Plan. However, the OPA Plan cannot be construed as "part of" the City's General Plan today for the simple reason that the 2010 General Plan says it is not.

A. The 2010 General Plan Designates the OPA Plan as a Subordinate Specific or Neighborhood Plan.

The City's 2010 General Plan—its "constitution" for development—clearly establishes its own place "atop the hierarchy" of the City's land use plans. Exhibit A at 2. It consistently (and exclusively) defines the OPA Plan as a subordinate "specific" or "neighborhood" plan that must "be consistent with" General Plan policies. *Id.* at 6; *see also id.* at 2, 3, 10. And it mandates that all City land use decisions *must* be "consistent with . . . the land uses shown on the [2010] Land Use Policy Map." *Id.* at 9; *see also id.* at 2 (defining the 2010 General Plan as consisting *only* of the eleven specified general plan elements); AR-14:6205 (General Plan EIR stating same).

Thus, the 2010 General Plan makes clear that it is the OPA Plan which must conform to the General Plan, and not the other way

around. Indeed, "[n]o reasonable person . . . could conclude otherwise." *FUTURE,* 62 Cal.App.4th at 1341-42; *see* Opening Brief at 27-29.

Real Parties studiously avoid any mention of the 2010 General Plan's controlling language regarding the OPA Plan. Instead, they attempt to sow uncertainty where none exists. Milan claims, for example, that the General Plan contains "contradictory references" to the OPA Plan and that the "OPA Plan is not listed in the section that discusses adopted, subordinate plans." Milan Answer at 9. Yet Milan does not cite to a single page of the General Plan that supports these claims.

Likewise, Milan declares that the 2010 General Plan "'expressly adopts the OPA Plan as a land use element.'" Milan Answer at 37. Given that this is really Milan's core argument, one might (again) expect a record citation to support it. The quoted language, however, is not to the 2010 General Plan—or to any other City document—but to a trial court conclusion which is itself entirely unsupported.[6]

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[6] *See* PA-3:19:APP3:706. Milan's other citations also fail to support this claim. *See* AR-10:4028 (General Plan with no mention of OPA Plan), 4039-4047 (General Plan identifying OPA Plan as a neighborhood or specific plan). The remaining references are to the 1989 General Plan (AR-11:4634-37, 4619) or to resolutions adopted decades before the 2010 General Plan (AR-9:3784-85, 3774; AR-11:4899-905).

In short, Real Parties fail to identify a *single* reference in the 2010 General Plan's six-year planning process that even remotely suggests the 2010 General Plan was intended to incorporate the OPA Plan.

The record, in fact, shows precisely the opposite. During the public review of the General Plan, the City repeatedly informed the public that the OPA Plan was an outdated "specific plan." Thus, the EIR for the 2010 General Plan—which the City Council certified under CEQA as reflecting its "independent judgment"[7]—responded to comments calling for the update of the OPA "Specific Plan" by stating:

> The City agrees that a number of the specific plans currently in place warrant review and update to reflect the changing characteristics of the City in recent decades. [The General Plan] ***call[s] for implementation and update of existing specific plans, including the Orange Park Acres Specific Plan.*** It is expected that specific plan updates will incorporate current planning . . . .

AR-14:6262 (emphasis added).

Likewise, in response to public comments requesting that the boundaries of the OPA Plan be better defined, the City's EIR for the 2010 General Plan states:

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[7] *See* 14 Cal. Code Regs. § 15090(a)(1)-(3); Pub. Res. Code § 21151(a); AR 14-6277.

> The boundaries of the Orange Park Acres Specific Plan are most appropriately delineated in the specific plan document itself . . . . ***At the time the City updates the specific plan as provided for in Program I-3 of the proposed General Plan Implementation Plan*** . . . , the land area covered in the specific plan will be more clearly represented in the specific plan graphics, and added to the Zoning Map.

AR-14:6262 (emphasis added). For Real Parties now to claim that the City Council certifying these statements pursuant to CEQA nonetheless considered the OPA Plan to be, not a specific plan, but a part of the comprehensive 2010 General Plan, strains the bounds of zealous advocacy.

Indeed, when Milan and the City Attorney introduced their novel theory that the "OPA Specific Plan" was actually the controlling "general plan," this pronouncement came as news to the City staff and officials who had just prepared and adopted the 2010 General Plan. *See, e.g.,* AR-12:5362 (lines 14-17) (Planning Commissioner stating that "There is considerable doubt in my mind as to whether the community fully understands the significance of the fact of what it considers its Specific Plan is, indeed not the case at all.").[8] Given that the OPA Plan was drafted

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[8] *Accord* AR-2:504 (City Staff report noting that, after City Attorney "clarified" the OPA Plan's status, "it is now apparent that the OPA Plan is not a Specific Plan"); AR-12:5123 (lines 6-10) (Planning Manager statement to Planning Commission that "It has been determined that what's

as a specific plan, is titled a "specific plan," and refers to itself this way throughout the text, it is hardly surprising that the OPA Plan was universally understood to be a specific plan at the time of the 2010 General Plan's adoption.

Even a cursory review of the OPA Plan also underscores why it was never considered part of the 2010 comprehensive General Plan "update." The OPA Plan has not been substantially revised since 1973. Its maps are largely hand-drawn and, in some cases, hand-written, and its assessments of area conditions and resources are woefully outdated. *See, e.g.*, AR-11:4916, 4925, 4955, 5020, 5040. For example, the OPA Plan provides air quality data from 1972 and notes that "higher quality imported water . . . will be available in 1976." AR-11:4943, 4948. It lists the population of the City of Orange as 83,900, while the figure in the 2010 General Plan is 138,640. AR-11:4967, 10:4181. Thus, incorporating the outdated 1973 OPA Plan into the 2010 General Plan would make the entire General Plan internally inconsistent. *See, e.g., DeVita,* 9 Cal.4th at 792 (describing each jurisdiction's duty to keep its general plan "current"); *General Plan Guidelines* at 14 ("A general plan based upon outdated

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been formerly known as the OPA Specific Plan . . . it's really within the General Plan.").

information and projections is not a sound basis for day-to-day decisionmaking and may be legally inadequate.").

B. The City's 2010 General Plan Is Only One Document.

The City insists that a general plan *may* consist of more than one document. That is certainly true. However, the City's 2010 General Plan, on its face, does not. Exhibit A at 1-3; AR-10:4044-50 (distinguishing between the "General Plan's" contents and other subordinate "Related Plans and Policies," including the OPA Plan). While the 2010 General Plan *identifies* the OPA Plan as one of several subordinate City plans, it never *incorporates* the OPA Plan (or any of these other plans) as "part of" the General Plan. *Compare Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,* 40 Cal.4th 412, 443 (2007) (mere reference to an earlier document does *not* incorporate it by reference), *with Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles,* 177 Cal.App.3d 300, 310-11 (1986) (giving effect to general plan text that expressly incorporated earlier plans as "component parts" of general plan). The City's cases do not remotely suggest otherwise.[9]

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[9] In the cases cited by the City (City Answer at 12-13, 44), the status of the referenced plans is not even at issue. *See Vineyard Area Citizens,* 40 Cal.4th at 422 (addressing adequacy of an EIR for a "community plan"); *Gonzalez v. County of Tulare,* 65 Cal.App.4th 777, 780-81 (1998) (addressing limitations period for claim based on a "community plan"); *No*

Contrary to the City's claims, Orange Citizens never argued that the existence of multiple plans necessarily breeds "confusion." City Answer at 14. Rather, Orange Citizens argued that accepting Real Parties' litigation theory would do so, as the facts of this case amply demonstrate. *See* Opening Brief 47-49; *Kings County Farm Bureau v. City of Hanford,* 221 Cal.App.3d 692, 744 (1990) (a general plan "'must be reasonably consistent and integrated on its face,'" because otherwise "'those subject to the plan cannot tell what it says should happen or not happen'") (citations omitted).

C. Prior to Adopting the 2010 General Plan, the City Treated the OPA Plan as a Subordinate Plan for Decades.

Because this case turns on the plain text of the 2010 General Plan, the City's earlier plans and resolutions are legally irrelevant. Even assuming these documents were relevant, however, they do not support Real Parties' theory that the OPA Plan has always been considered "part of" the General Plan. While Real Parties selectively quote isolated Council resolutions to support their litigation theory, they largely ignore numerous other plans and resolutions formally adopted by the City Council that directly contradict it. These include the 1989 General Plan, the EIR for this plan, and

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Oil, 196 Cal.App.3d at 242 (status of "district plan" as element of general plan not at issue).

every relevant City Council resolution adopted between 2000 and Project approval, all of which recognize the OPA Plan as a subordinate plan. Moreover, none of these earlier plans or resolutions reference Milan's Property as designated for any use other than Open Space.

1. The 1989 General Plan Does Not Incorporate the OPA Plan.

As it does with the 2010 General Plan, Milan repeatedly attempts to conflate the 1989 General Plan's mere reference to the OPA Plan as the equivalent of incorporating it. *See, e.g.,* Milan Answer at 57, 8. In fact, however, the 1989 General Plan in no way incorporates the OPA Plan as "part of" the General Plan. Rather, the 1989 General Plan explicitly defines its own contents as follows:

> The Orange General Plan is divided into seven elements[:] . . . . The six required elements [and] . . . a Historic Preservation Element as an optional element. This element is bound under separate cover and is incorporated in this document by reference. . . .
>
> The General Plan *as a whole* consists of three sections – the General Plan policy document, the General Plan Technical Reports and the General Plan Environmental Impact Report . . . .

AR-11:4625 (emphasis added). Thus, the documents comprising the 1989 General Plan are all either expressly incorporated by reference or specifically enumerated. In contrast, the OPA Plan and other City planning documents, such as its zoning ordinances, are listed under the heading

"Related Plans and Programs." AR-11:4634-37 (listing the Orange Park Acres "Area Plan" at 4635).

The EIR certified by the City Council for the 1989 General Plan likewise clearly distinguishes between the General Plan itself and other subordinate planning documents. It declares that State law "establishes a hierarchy of plans which places the general plan at the top of these plans," states that "[a]ll other plans must be consistent with the General Plan," and identifies such "other plans" as City redevelopment, recreation, and transportation plans, zoning, design guidelines, and "Specific and Area plans" (including the "Orange Park Acres Area Plan"). AR-14:5949; *see also* AR-14:5946 ("Following adoption of the General Plan, all other existing land use plans . . . will be reviewed for consistency with the General Plan.").

Thus, the OPA Plan is no more "part of" the 1989 General Plan than the City's zoning ordinances are. Rather, both are identified as planning tools "*outside of the General Plan* which may be used to achieve specific General Plan goals." AR-11:4625 (emphasis added). To uphold Real Parties' arguments, this Court would have to construe the words "outside of the General Plan" to mean just the opposite.

2. The City Council Has Consistently Identified the OPA Plan as a Specific Plan Since at Least 2000.

The City, while at least acknowledging that "the 1989 General Plan did not specifically 'incorporate' the OPA Plan," nonetheless claims that "the City Council, the community and developers continued to consider it as a General Plan." City Answer at 35.

The City Council's early resolutions do reflect some confusion about the status of the OPA Plan. For example, a few months prior to adopting the 1989 General Plan, the City Council adopted a resolution (for an unrelated project) stating that, "due to . . . the manner in which it was adopted," the OPA Plan had "the authority of a General Plan," rather than a specific plan. AR-9:3903. The City Council then promptly forgot it had made such a statement (as it did in 1973) and, in adopting the 1989 General Plan, specifically identified the OPA Plan as a subordinate plan "*outside* of" the General Plan. AR-11:4625. Adding to the confusion, the City Council subsequently adopted two resolutions that referred in passing to the OPA Plan as "part of" the 1989 General Plan. *See* AR-9:3909 (1990); AR-9:3923 (1998). However, just as the City's 2011 recitals could not amend the plain language of the 2010 General Plan (*see supra,* Part III.B.2), these 1990 and 1998 recitals did not amend the plain language of the 1989 General Plan.

Moreover, despite this early confusion, the City Council eventually recognized its error. Thus, from 2000 until the replacement of the 1989 General Plan in 2010, the Council's resolutions and recitals consistently identify the OPA Plan *not* as part of the "general plan," but as a "specific plan." For example, in 2000, the City Council denied a project application, noting that it "is located in Orange Park Acres, which is a unique and very important rural land area . . . with special needs that are protected by the Orange Park Acres Specific Plan." AR 9:3930.

Similarly, in approving a 2003 subdivision for the Fieldstone project, the City Council noted that the "General Plan" designations for the property were residential, open space, and "Resource Area," and adopted a General Plan amendment to amend them. AR-14:6032-34, 6002. It also found that the subject property was designated "greenbelt" in the "Orange Park Acres Specific Plan." AR-14:6003. The City Council never identified the OPA Specific Plan as "part of" the General Plan. Instead, it resolved the inconsistency between this greenbelt designation and the proposed subdivision by *removing* the site "from the Orange Park Acres *Specific* Plan." AR-14:6002-03, 6034; *see also* AR-9:3938-39 (2008 City Council resolution amending "the Open Space Element of the General Plan" to reflect a dedication of trail systems and also concluding that the project "supports the Orange Park Acres *Specific* Plan"); AR-9:3945 (2008 Council resolution analyzing policies in the "Orange Park Acres *Specific* Plan" to

determine whether project would conform to "applicable . . . *specific* plan requirements") (all emphases added).

Finally, in 2010, the City Council adopted the 2010 General Plan and its accompanying EIR, which repeatedly refer to the OPA Plan as a subordinate "specific" or "neighborhood" plan.

3. The City Attempted to Correct Its Inconsistent Treatment of the OPA Plan in Its 2006 Resolution Requiring "Specific Plan Amendments" to the OPA "Specific Plan."

The City makes much of the fact that it sometimes approved amendments to both the "Orange Park Acres Specific Plan" and the 1989 General Plan in a single resolution entitled a "General Plan Amendment." City Answer at 24-26 (citing, e.g., AR-14:6032).[10] In 2006, however, the City Council took action to prevent such errors in the future by adopting

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[10] Of the "five" resolutions cited by the City that are so entitled (City Answer at 25-26), two were adopted in 1977 and 1989, prior to the 1989 General Plan, and thus have no bearing on this case. The last is the 2011 GPA Resolution currently in dispute. Milan similarly plays fast and loose with the content of the City's prior resolutions in its exhibit purporting to set forth a relevant "Table of City Resolutions Regarding the Property." This table, which does not exist anywhere in the record, violates the plain text of Rule 8.520(h), which limits attachments to "copies of relevant local, state, or federal regulations or rules . . . or other similar citable materials." Exhibit 1 is not a citable rule or regulation, but a misleading piece of advocacy disguised as a "summary" of historic city resolutions. To give just one telling example, Milan fails to mention, in its purported analysis of how the adoption of the 1989 and 2010 General Plans "effect[ed] [sic] the Ridgeline Property General Plan Designation" (Milan Answer at 58-59), that both plans designated the Property exclusively as Open Space.

Resolution No. 10081. This resolution requires developers within "the Orange Park Acres Specific Plan" to notify a review committee of any proposed "specific plan" and "general plan amendments." SRJN007-09. The City's official "Land Use Project Application Information Packet," citing this resolution, likewise provides that "Specific Plan Amendment[s]" within Orange Park Acres are subject to special review. SRJN014.

In conformance with this City Council directive, Milan's 2007 application requested a "Specific Plan Amendment" to change the Property's designations in the OPA "Specific Plan" from "Golf" and "Local Parks" to residential. AR-6:2177-82; AR-14:6068. (The City's assertion that "Milan's Project application" sought a "change in the OPA Plan *general* plan land use designation" (City Answer at 16 (emphasis added)), is directly belied by the actual language of Milan's application.) The City then processed Milan's request as routine for the next three years. *See* Opening Brief at 7-8.

Thus, the City's current litigation theory emphatically does not, as City claims, give "meaning to every word, phrase, and sentence of past City Councils" on the status of the OPA Plan. City Answer at 45. Rather, the City's theory ignores the Council's most recent and relevant pronouncements, as well as the plain text of the General Plan adopted by the Council in 2010. Accordingly, the City's position is entitled to no deference. *See Yamaha*, 19 Cal.4th at 13; *Wilson,* 6 Cal.App.4th at 552 ("We do not

think the city should now be allowed to take a position diametrically opposed to the one which prompted this litigation in the first place.").

More importantly, while the City was occasionally inconsistent in how it referred to the OPA Plan, it was never inconsistent with respect to the land use designation for Milan's Property. From immediately after the adoption of the OPA Plan resolutions in 1973 until late 2009, every single reference to the Property in the record, including the City Council's 1985 resolution annexing the Property, states that the Property is designated as Open Space in the City's General Plan and in the OPA Plan. In contrast, not a single document or City Council resolution during this 37-year period refers to the Property as being designated for residential development in any City plan.

D. The OPA Plan Must Be Consistent with the General Plan.

The City repeatedly faults Orange Citizens for allegedly claiming that the OPA Plan is meaningless or "completely 'inoperative.'" City Answer at 7-8, 10, 36.

This argument is another straw man. Orange Citizens has never claimed that the OPA Plan as a whole is invalid. Rather, Orange Citizens has consistently maintained that the courts—and the City—must treat the OPA Plan as the subordinate planning document that the 2010 General Plan declares it to be.

Moreover, the City's suggestion that Orange Citizens has waffled on this issue is groundless. As the City correctly notes, Orange Citizens' "pre-litigation" position recognized both the importance of the OPA "Specific Plan" and the fact that it was significantly outdated. City Answer at 7-8, 11, 37. This position is identical not only to Orange Citizens' current litigation position, but also to the *City's* pre-litigation position in adopting the 2010 General Plan.[11]

Because the OPA Plan is a subordinate planning document, however, Orange Citizens has also consistently maintained that any OPA Plan policies or designations inconsistent with the 2010 General Plan are superseded and inoperative as a matter of law. AR-4:1364-70; *see* § 65359; *Lesher,* 52 Cal.3d at 544-45; *Napa Citizens for Honest Government,* 91 Cal.App.4th at 389 ("If the Updated Specific Plan is inconsistent with the General Plan, the Updated Specific Plan is invalid."); *Chandis,* 52 Cal.App.4th at 484 (finding that "consistency is necessary between a general plan and a specific plan").

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[11] *See* AR-14:6262. Equally unfounded is the City's allegation that Orange Citizens' legal arguments have "grown almost exponentially as this case wound its way through the courts." City Answer at 5. *See, e.g.,* PA-II:9:APP313, 14:APP433 (Orange Citizens' trial court briefs).

The City asserts that because the OPA Plan was not originally adopted as a specific plan, if it is not part of the General Plan, then it must be a nullity. State planning law, however, certainly allows cities to implement local plans other than specific plans. *See* § 65359 (holding that "[a]ny specific plan or other plan of the city . . . shall be . . . consistent with the general plan"). The 2010 General Plan itself refers to "neighborhood plans," which have no specific statutory authority, as useful planning "tools." AR-10:4074 (recognizing that such plans "must be consistent with" the General Plan).

However, the only determination before this Court is whether the OPA Plan is subordinate to the 2010 General Plan (in which case the Open Space designation in the 2010 Map clearly controls), or somehow "part of" the General Plan (which would render the General Plan internally inconsistent and invalidate the Project approvals as a matter of law (*see infra* Part V)). Either way, aside from determining whether the OPA Plan is "part of" the General Plan, the precise status of the OPA Plan today is not a question this Court needs to resolve. *See City of Poway v. City of San Diego,* 229 Cal.App.3d 847, 852 n.2 (1991) (resolving the unclear status of a plan in similar circumstances by treating it as "a type of specific plan").

Plus, the City has always had the authority to update and re-adopt the OPA Plan as the "Specific Plan" that it was generally understood to be. The City stated its intent to do precisely this when it adopted the

2010 General Plan in March 2010. *See* AR-14:6262 (acknowledging that the 2010 General Plan calls for "implementation and update of existing specific plans, including the Orange Park Acres Specific Plan"). Alternatively, the City could adopt a General Plan amendment changing the General Plan's language to expressly incorporate an updated OPA Plan and eliminate references to the OPA Plan as a subordinate planning document. This is, in fact, exactly what Milan urged it to do in May 2011. *See* AR-4:1429.

Having failed to follow either course, however, the City cannot now use any uncertainty about the nature of the OPA Plan to distort the very definition of the 2010 General Plan. It is not the General Plan that must conform to the OPA Plan, but the OPA Plan that "must be brought into conformity with the general plan." *Lesher,* 52 Cal.3d at 541 ("The tail does not wag the dog.").

V. THE 1973 RESIDENTIAL DESIGNATION IS NOT CONTROLLING TODAY.

Even assuming that the OPA Plan were somehow "part of" the 2010 General Plan, Milan's Project still could not go forward, for three independent reasons. First, the alleged "residential" designation in the OPA Plan covers only a portion of the Property. Second, it was never implemented. Third, it is blatantly inconsistent with the current General Plan Open Space designation in the 2010 General Plan Map.

A. The 1973 Residential Designation Covers Only a Portion of the Property.

Real Parties' arguments are premised on a demonstrably erroneous factual assertion: their repeated claim that the 1973 residential designation covers the entire "Project site." *See, e.g.,* Milan Answer at 41 (alleging that "the 1973 resolution designat[ed] the *Ridgeline Property* as 'Other Open Space and Low Density (1 acre)'") (emphasis added).

In fact, the 1973 residential designation applied only to the *portion* of the Property designated "Golf Course" in the OPA Plan. AR-9:3677 (1973 resolution); *see* Opening Brief at 37. The City Council's 2011 resolution adopting the GPA confirms this fact, acknowledging that the "OPA Plan designates the *golf course portion* of the Ridgeline project property" as residential. AR-4:1949 (emphasis added). The Golf Course, however, covers only 34 acres on the western portion of the Property, about two-thirds of the total 51 acres. *See* AR-6:2181 (EIR depiction of OPA Plan).[12]

Thus, the remaining 17 acres of the Project site—which lie outside the "Golf Course" and are designated for "Local Parks" in the OPA

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[12] *Accord* AR-11:5037 (OPA Plan Map designating "Golf Course" ("8") on western portion of Property); 5033 (OPA Plan stating that it "advocates the permanent retention of the 34 acre golf course within Orange Park Acres."); 5036 (OPA Plan identifying the "Golf Course" as constituting 34 acres).

Plan—were entirely unaffected by the 1973 resolution. AR-6:2181 (EIR showing "Golf Course" and "Local Parks" designations); 11:5037 (OPA Map showing same). These 17 acres contain at least a third of the proposed lots for Milan's subdivision. *See* AR:1:434 (subdivision map showing 13 of Milan's proposed 39 lots lie on the "Local Parks" portion of the Property).

Real Parties do not dispute that Milan's proposed subdivision is inconsistent with the "Local Parks" designation. Rather, their briefs simply gloss over this inconvenient fact and repeatedly conflate the 34-acre Golf Course with the entirety of the 51-acre Project site. In similar manner, while the City Attorney in a 2009 letter to Milan and Orange Citizens acknowledged that the "Golf Course" designation covered only a portion of the Property (*see* AR-7:2646 (noting that the 1973 resolution affected "the golf course portion of the Ridgeline project property")), he later misinformed the Council that this designation applied to the entire Property. *See* AR-9:3975 (2011 memo informing the City Council that, under Milan's theory, "the Property" was designated for residential use).

The GPA, of course, would have changed both the Golf Course *and* the Local Parks designations in the OPA Plan to allow residential use. Because the Referendum prevented the GPA from taking effect, however, Milan's proposed subdivision remains inconsistent with

the OPA Plan's "Local Parks" designation. Thus, Milan's Project cannot go forward even under Real Parties' theory of the case.

B. The Partial 1973 Residential Designation Was Never Implemented.

Even with respect to the "Golf Course" portion of the Property, the 1973 amendment was never implemented. Rather, the OPA Plan that has been available and distributed to the public for 40 years designates the *entire Property* exclusively for open space uses. *See* AR-11:5037 (OPA Plan); AR-6:2181-82, 2418 (EIR for Milan's Project explaining same); Opening Brief at 34-37. Although Real Parties try to duck this reality, they do not—and cannot—dispute it. Indeed, no residential designation for the Property has *ever* appeared on the face of *any* City plan.

The 1973 designation, therefore, has no legal validity today. *Poway* is directly on point and establishes that where, as here, a general plan amendment is never implemented, never appears on the face of the publicly available version of the general plan, and conflicts with the current general plan, it is legally invalid. *See* Opening Brief at 31-34.

Real Parties' efforts to distinguish *Poway* distort both the facts of that case and the record before this Court. Nothing in *Poway* remotely supports Milan's claim that the road-closure amendment was ineffective because "it was not adopted in a public process" or was "adopted behind

closed doors." Milan Answer at 45-46. To the contrary, *Poway* based its holding on the fact that the amendment was not "available to the public" *after its adoption*. 229 Cal.App.3d at 863.

Milan also claims that while the amendment in *Poway* was "not made available to the public," the "opposite happened here." Milan Answer at 45. However, the City has expressly conceded that the Planning Commission's recommended residential designation for Milan's Property was entirely "forgotten" from immediately after its adoption in 1973 until it was unearthed by Milan in late 2009. Opening Brief at 34-35.

Moreover, it is undisputed that the OPA Plan itself was *never* amended to reflect a residential designation for the Property. While Real Parties note that City Council Resolution No. 3915 was attached to the front of the OPA Plan, this resolution merely states that the OPA Plan is approved "as amended" by the Planning Commission. AR-9:3688-89. Members of the public looking at the resolution would have no information about the nature of these amendments and no reason to suspect that they were not incorporated into the plan on file with the City decades later.

Milan also cites to pages of the Administrative Record showing a copy of the 1973 Planning Commission resolution sandwiched between Resolution No. 3915 and the OPA Plan title page. Milan Answer at 46. It is true that the City Attorney, in preparing the Administrative Record for this litigation in 2012, conveniently inserted a copy of the Planning

Commission resolution either immediately in front of, or between, the two "covers" of the OPA Plan. AR-11:4899-4904; AR-3:1141-47. However, that is the first time these documents were ever presented together. No member of the *public* ever saw such a format. As Milan itself emphasized to the City Council, "the 'over-the-counter' copy of the OPA Plan, as well as the copy available on the City's website" included only the City Council resolution, and did "not include the Planning Commission's recommended changes to the text." AR-4:1429; *see also* AR-4:1867 (Development Agreement acknowledging same).

Real Parties next suggest that *Poway* is inapplicable because section 65357, which requires cities to promptly provide general plan amendments to the public, was not adopted until 1984 and thus did not apply to the City's adoption of the 1973 resolution. *Poway,* however, recognizes that State law has always required general plans to be publicly accessible and that section 65357 did not impose any new obligations. 229 Cal.App.3d at 862 n.11. Moreover, the 1973 designation was certainly not "available" to members of the public reviewing the new General Plan in 2010, which never mentions, much less "incorporates," the 1973 resolution. Opening Brief at 40-47.

Milan also claims that the reason the residential designation was not discovered until 2009 was that "no one was attempting to develop the Property." Milan Answer at 47. However, the Property's land use

designation was carefully scrutinized during its 1985 annexation to the City. At that time, the Property owner, City staff, and the City Council all concluded that the General Plan designated the Property exclusively as Open Space. *Supra,* Part III.B.4. Moreover, neither Milan's due diligence prior to purchasing the Property in 2006—on the basis of which Milan allegedly "determined that the area would be excellent for single-family [ ] homes" (Milan Answer at 10)—nor the year-long investigation it undertook prior to submitting its development application in 2007, unearthed any of these supposedly "available" documents. Indeed, in submitting its 2007 development application, Milan expressly "certif[ied]" under law that both the General Plan and the OPA Plan designated its Property solely for open space uses. AR-14:6068 (Milan's "Initial Study" under CEQA); 9:4007 (Milan's application attaching Initial Study); Opening Brief at 34-35. Milan's new theory was not based on the General Plan "available to the public," but on a "notebook of resolutions" subsequently unearthed by its lawyers. Opening Brief at 36.

Finally, Milan's claim that the 1973 resolutions were "discussed in connection with the Ridgeline Project" after 2009 (Milan Answer 47) is irrelevant, as the City Council subsequently affirmed the Open Space designation in adopting the 2010 General Plan in March 2010.

In short, it is not enough for a general plan amendment to simply be "available" in the sense of being in a file somewhere in the City's

archives. *See* City Answer at 42. The road closure resolution at issue in *Poway* was necessarily on file *somewhere,* as the city ultimately produced it for the litigation. *See* 229 Cal.App.3d at 855-56. The court, however, properly held that the public version of the general plan controls and the public is not required to ferret out obsolete information buried deep in a city's archives.

C. The 1973 Designation Is Irreconcilable with the Open Space Designation in the 2010 General Plan.

Even assuming, *arguendo,* that the 1973 residential designation were somehow a valid, current general plan designation for the entire Project site—which it clearly is not—Real Parties' arguments would still fail. State law requires that a general plan "must be reasonably consistent and *integrated on its face.*" *Kings County,* 221 Cal.App.3d at 744 (emphasis added) (citations omitted); § 65300.5. The furthest Real Parties' flawed theory can take them is to a conclusion that the current General Plan has *conflicting* policies directly applicable to Milan's Property: the Open Space designation in the 2010 General Plan Land Use Map, which forbids residential development, and the alleged 1973 residential designation, which purports to permit such development.

It is hard to image a more blatant internal inconsistency. Indeed, as Milan itself asserted in its Cross-Complaint, these designations

are so fatally in conflict that "a reasonable person could *not* conclude that the General Plan, without the GPA, is internally consistent or correlative."[13]

Sierra Club v. County of Kern, 126 Cal.App.3d 698 (1981), is directly on point and definitively establishes that, under Real Parties' theory, the City's "General Plan" is internally inconsistent and Milan's development approvals are void. *See id.* at 703-04 (general plan is internally inconsistent where residential designation in land use map conflicts with designation in open space map); Opening Brief at 56-60.

Sierra Club also expressly holds that a local government cannot resolve an internal inconsistency in its general plan by arguing that one designation "take[s] precedence" over another. 126 Cal.App.3d at 703, 708. Real Parties' argument that the 1973 residential designation somehow trumps the Open Space designations in the 2010 General Plan (and on the face of the OPA Plan) directly conflicts with this holding. It also directly conflicts with the 2010 General Plan's express statement that the OPA Plan "must be consistent with" the General Plan itself. Exhibit A at 6.

Real Parties' heavy reliance on *Las Virgenes* is wholly misplaced. Contrary to their claims, *Las Virgenes* in no way suggests that a

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[13] PA-I:4:APP077, ¶ 100 (emphasis added). Milan made this claim as part of its since-abandoned attempt to invalidate the Referendum.

general plan's maps can be ignored. Rather, it confirms that, in interpreting a general plan, a court must look to that document's plain language.

Thus, the *Las Virgenes* court cited again and again to specific pages in the general plan which "stat[ed] repeatedly that [its] policy maps are *general* in character and are *not* to be interpreted literally." 177 Cal.App.3d at 310 (emphasis added). The Los Angeles County general plan in that case also expressly provided that "specific residential density ranges" for the subject property were set forth in an "area plan" map, which was a "component part[]" of the general plan. *Id.* at 310-11. Moreover, the court concluded that the proposed project was consistent with *both* the area plan and the general plan; the general plan map showed a lower permitted density, but its policies expressly permitted an increase in density in specified circumstances. *Id.* at 311-12.

Here, the facts, and the relevant general plan language, could not be more different. Whereas the general plan at issue in *Las Virgenes* stated that the county-wide map was *not* to be interpreted literally, the City's 2010 General Plan here mandates that all City land use decisions must be "consistent with . . . the land uses shown on the Land Use Policy Map." *Id.* at 9. Likewise, whereas the general plan in *Las Virgenes* expressly included the area plans as "component parts," the City's 2010 General Plan here expressly provides that the OPA Plan is a specific or neighborhood plan that must "conform to" and "be consistent with"

General Plan policies. Exhibit A at 2, 6. Moreover, unlike in *Las Virgenes,* the 1973 residential designation here is facially inconsistent and irreconcilable with the Open Space designation in the 2010 Map.

Real Parties essentially ask this Court to superimpose on the City's 2010 General Plan the policy language from the Los Angeles County General Plan that was construed in *Las Virgenes*. Such an approach, however, would require this Court to ignore the General Plan's plain language and this Court's mandate that the "meaning apparent on [its] face" controls. *Lesher,* 52 Cal.3d at 543.

Garat v. City of Riverside, 2 Cal.App.4th 259 (1991), disapproved on other grounds by *Morehart v. County of Santa Barbara,* 7 Cal.4th 725 (1994), is likewise inapposite. There, petitioner argued that a city's general plan was internally inconsistent because it contained conflicting *flood plain* maps. *Id.* at 299. The court observed that the alleged inconsistency was irrelevant because there was no "connection between the inconsistent elements and the property in question." *Id.* Moreover, the differing flood plain maps were not necessarily inconsistent because "the degree and risk of flooding may differ depending upon the planned uses to which the land may be put." *Id.* at 300. The court contrasted this situation to one where "misinformation may make it impossible for the public entity to set up and implement policies in a consistent manner." *Id.*

Here, unlike in *Garat*, the alleged inconsistency directly affects the subject Property. Moreover, the "inconsistencies" between the City's 2010 Map and the 1973 designation would indisputably make it impossible for the City to implement its plans "in a consistent manner."

Milan also argues that a general plan can be internally inconsistent only if "two of the *required elements* mandate different conduct." Milan Answer at 51. This argument does not even serve Milan, given that the 1973 designation conflicts with the maps in both the Land Use *and* the Open Space elements of the 2010 General Plan. *See* Exhibit A at 7-8. In any case, the argument is clearly wrong. *All* general plan policies must be "integrated" and "consistent." § 65300.5; Exhibit A at 2 (2010 General Plan "policies" include its "written statements, tables, *diagrams, and maps*") (emphasis added).

Milan's claim that a general plan's map "cannot create an inconsistency" with written policies (Milan Answer at 52) is also incorrect. In fact, the *General Plan Guidelines* identify this precise situation as a textbook example of an internal inconsistency:

> The general plan's text and its accompanying diagrams are integral parts of the plan. They must be in agreement. For example, if a general plan's land use element diagram designates low-density residential development in an area where the text describes the presence of prime agricultural land and further contains written policies to preserve agricultural land or open space, a conflict exists.

General Plan Guidelines at 13; *id.* at 12 (holding that "no policy conflicts can exist, either textual or diagrammatic, between the components of [a] . . . general plan"); *see also* PA-I:4:APP077, ¶ 100 (Milan's complaint alleging that this very inconsistency rendered the General Plan invalid).

The *Guidelines* further point out the dangers of an internally inconsistent plan:

> Without consistency . . . , the general plan cannot effectively serve as a clear guide to future development. Decision-makers will face conflicting directives; citizens will be confused about the policies and standards the community has selected; findings of consistency of subordinate land use decisions such as rezonings and subdivisions will be difficult to make; and land owners, business, and industry will be unable to rely on the general plan's stated priorities and standards for their own individual decision-making. Beyond this, inconsistencies in the general plan can expose the jurisdiction to expensive and lengthy litigation.

General Plan Guidelines at 13. Not surprisingly, after the City Attorney embraced Milan's erroneous theory, this entire "parade of horribles" came to pass in the City of Orange.

In the end, Real Parties' theory, in addition to being wrong in every aspect, simply does not go far enough. Rather than saving Milan's Project, the theory leads ineluctably to the conclusion that the City's alleged "general plan" is internally inconsistent with regard to Milan's Property. Thus, even under Real Parties' theory, Milan's Development

Agreement and Zone Change are void *ab initio* because, under *Sierra Club,* they cannot be consistent with an internally inconsistent general plan.

VI. THE CITY DOES NOT HAVE THE AUTHORITY TO "INTERPRET" ITS GENERAL PLAN IN A MANNER THAT CONTRADICTS THE PLAN'S PLAIN LANGUAGE.

Although Real Parties and Orange Citizens present the Court with dramatically different narratives of what transpired in this case, they agree on two key points.

First, they agree that while a city council has the legislative power to change its general plan, it can do so only through a validly-adopted general plan amendment. Here, the Orange City Council's attempt to do just that, via the GPA, was rejected by the voters.

Second, they agree that the "chief accomplishment" of the Referendum "was to keep the [Property's] Open Space designation on the City-wide General Plan land use map." City Answer at 9. Given the General Plan's mandate that all development be consistent with the 2010 Map, the City's admission is dispositive. Milan's Project is blatantly inconsistent with this Open Space designation and cannot go forward.

Having failed to get their General Plan Amendment past the voters, Real Parties now argue that this Court must defer to the City's litigation position and give effect to the City Council's "clarifying" recitals in various resolutions approving Milan's Project in 2011. In other words, they argue, the City can construe its General Plan as it pleases. *See, e.g.,*

Milan Answer at 36 (insisting that the Legislature gave each local government "ultimate authority to construe and give effect to its own general plan"). If this were true, however, the statutory requirements for general plan consistenty would be meaningless. A city could ignore the plain language of its own policies and simply interpret "open space" to mean "residential," or "residential" to mean "industrial."

In reality, rather than granting local governments such unfettered discretion, the Legislature has made land use approvals subject to judicial review and oversight. *See* §65009(c)(1). Pursuant to this review, the courts do defer to local governments where, for example, the applicable general plan contains ambiguous language. However, "'deference is not abdication.'" *CNPS,* 172 Cal.App.4th at 642 (citation omitted). Thus, the courts must give effect to the plain text of a city's general plan even if a city argues otherwise. *Lesher,* 52 Cal.3d at 543.

The Fourth District here failed to follow this admonition. Instead, it rewrote the 2010 General Plan to eliminate the Open Space designation for Milan's Property. In so doing, the Fourth District undertook precisely the type of retroactive general plan amendment by "judicial fiat" that this Court condemned in *Lesher. Id.* at 541.

CONCLUSION

This Court should reverse.

DATED: March 26, 2014 SHUTE, MIHALY & WEINBERGER LLP

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CERTIFICATE OF WORD COUNT

In accordance with California Rules of Court Rules 8.204(c)(1) and 8.490(b)(6), I certify that all text in the attached **Petitioners' Reply Brief on the Merits** is proportionally spaced and, not counting the verification or other exclusions referenced in Rule 8.486(a)(6), contains 16,729 words.

DATED: March 26, 2014 SHUTE, MIHALY & WEINBERGER LLP

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PROOF OF SERVICE

Orange Citizens for Parks and Recreation, et al. v. Superior Court of Orange County
Case No. California Supreme Court Case No. S212800

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On March 26, 2014, I served true copies of the following document(s) described as:

PETITIONERS' REPLY BRIEF ON THE MERITS

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 26, 2014, at San Francisco, California.

David Weibel

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