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

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

(As stated in the Petition for Review)

1. Where a city's current general plan contains an unambiguous land use designation for a piece of property, can this designation be superseded by a conflicting designation adopted 40 years ago in 1973?

2. Where a city, in 1973, adopts a resolution modifying the designation for a piece of property, but where that designation is never implemented, never appears on the face of any publicly-available plan, and conflicts with the designation in the city's subsequently-adopted general plans, is the 1973 designation the controlling land use designation for the property?

3. Where a city council adopts a general plan amendment to resolve internal inconsistencies in its general plan, and the amendment is defeated by referendum, can the court itself resolve the inconsistencies by invalidating portions of the general plan in a manner contrary to the will of the voters?

INTRODUCTION

In *DeVita v. County of Napa,* 9 Cal.4th 763 (1995), this Court reaffirmed the general plan's role as a community's "constitution for future development, located at the top of the hierarchy of local government law regulating land use." *Id.* at 773 (citations and internal quotations omitted).

Reflecting this principle, decades of planning cases uniformly hold that the "'propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.'" *Citizens of Goleta Valley v. County of Santa Barbara,* 52 Cal.3d 553, 570-71 (1990) (citation omitted). And it is black-letter law that, as they do with other legislative enactments, courts interpreting a general plan must look to the "meaning apparent on [its] face." *Lesher Communications, Inc. v. City of Walnut Creek,* 52 Cal.3d 531, 543 (1990).

Petitioners Orange Citizens *et al.* ask this Court to reaffirm these fundamental principles and to uphold a seemingly self-evident proposition: that a city's general plan is the most current document circulated for public review and formally adopted by the city council as the official "General Plan."

The City of Orange's General Plan, on its face, has for decades designated as "Open Space" a 51-acre property purchased by Real Party in Interest Milan REI IV LLC ("Milan") in 2006. The Orange City Council reaffirmed this Open Space designation most recently in 2010, when it adopted a comprehensive new general plan ("2010 General Plan"). Thus, to proceed with its controversial development project, Milan requested, and the City Council in 2011 approved, a General Plan amendment ("GPA"), changing the land use designation of Milan's

property on the General Plan's "Land Use Policy Map" from Open Space to residential.

Shortly thereafter, Orange Citizens submitted a Referendum on the GPA, and, in November 2012, City voters rejected the GPA by a 56% vote. Milan's proposed residential development accordingly remains flatly inconsistent with the Open Space designation in the City's current General Plan. Under bedrock principles of planning law, therefore, Milan's Project cannot go forward.

The Fourth District nevertheless held that Milan's Project conforms to the City's General Plan and can proceed. It did so based on an unprecedented legal theory that Milan devised, and the City Attorney accepted, late in the Project's administrative approval process: that the Property's "real" General Plan designation is a *residential* one buried in a long-forgotten (and never implemented) 1973 City resolution adopted to amend the City's general plan at that time.

Until the Referendum was filed, however, Milan and the City had repeatedly acknowledged that resurrecting the 1973 resolution was not enough to allow development of Milan's Property. The Project, they recognized, was still inconsistent with the Open Space designation on the face of the 2010 General Plan. Thus, the Project could not legally be approved without a General Plan Amendment.

But after the GPA was challenged by the Referendum, Milan and the City reversed course. They now claimed that the GPA adopted by the City Council, at Milan's urging, had never been necessary in the first place. Rather, Milan and the City argued, the long-forgotten 1973 residential designation was the exclusive and *controlling* land use designation for the Property and the plain language of the 2010 General Plan should be ignored.

In upholding these remarkable arguments, the Fourth District undercut the most fundamental tenets of modern planning law. First, the Legislature has directed that general plans must be adopted and amended in an open public process that ensures full "public participation" and government accountability. *DeVita,* 9 Cal.4th at 773-74, 786. Here, the City circulated its 2010 General Plan for public review, formally adopted it, distributed it to the public, and placed it on the City's website as its official "General Plan." To permit the City to turn around later and declare that its "real" general plan contains entirely different land use designations would render this public process meaningless.

Second, to function as an effective land use "constitution," a general plan must be fully integrated and up-to-date. *Id.* at 773, 792. Cities and counties therefore periodically undertake comprehensive general plan revisions to reflect the current vision of their communities. Here, the City adopted comprehensive new general plans in 1989 and 2010 that designate

Milan's Property exclusively for Open Space. As a matter of law, each of these new plans superseded any previous general plan provisions. *Harroman Co. v. Town of Tiburon,* 235 Cal.App.3d 388, 396 (1991). Therefore, even if the City had validly designated the Property as residential in 1973, its designation as Open Space in the 1989 and 2010 General Plans superseded this earlier designation.

Third, general plans must be readily accessible to the public. Thus, in *City of Poway v. City of San Diego,* 229 Cal.App.3d 847, 862-63 (1991), the court held that a general plan amendment was ineffective where it was never implemented, never appeared on the face of the publicly-available version of the general plan, and conflicted with the current general plan that *was* available to the public. Here, the 1973 residential designation cannot control because it never appeared on the face of *any* City plan, was forgotten for decades, and conflicts with the current Open Space designation in the 2010 General Plan.

Fourth, general plans must be internally consistent. *DeVita,* 9 Cal.4th at 773; Gov. Code § 65300.5. Established case law thus holds that where a general plan contains inconsistent designations for a piece of property, no development may be approved for that land until the inconsistency is resolved via proper legislative action. *Sierra Club v. County of Kern,* 126 Cal.App.3d 698, 703-04 (1981); *Concerned Citizens of Calaveras County v. Calaveras County,* 166 Cal.App.3d 90, 104 (1985).

Accordingly, even if the City's 2010 General Plan could somehow be redefined to include the 1973 residential designation (as the Fourth District erroneously concluded), this "General Plan" would contain two irreconcilable designations for the Property: residential and Open Space. By law, such an internal inconsistency would preclude the City from approving *any* development on the Property.

Finally, this case implicates not just planning law, but also the constitutionally enshrined right of referendum. It is "the duty of the courts to jealously guard" this right and ensure that it is not "improperly annulled." *Rossi v. Brown,* 9 Cal.4th 688, 695 (1995) (citations omitted). Here, the voters resoundingly rejected the City Council's attempt to change the Property's General Plan designation from Open Space to residential. Upholding Milan and the City's litigation theory—that the long-buried residential designation is nevertheless the controlling land use designation for the Property—would "improperly annul" the voters' action and render the Referendum meaningless.

Accordingly, this Court should reverse the Fourth District's Opinion upholding Milan's Project approvals. It should reaffirm that the "constitution" for development in cities and counties throughout California is the general plan most recently adopted by the legislative body, which may be amended only via a general plan amendment subject to voter referendum.

STATEMENT OF THE CASE

I. Statement of Facts

A. Milan Requests a General Plan Amendment to Change the Property's Existing Open Space Designation to Residential.

Milan proposes to build the Project on the former site of the Ridgeline Country Club. The Club operated the Property as a golf course since 1968, later adding tennis courts, a swimming pool, and a club house. AR-6:2171.[1] The Property lies in an area of the City known as "Orange Park Acres."

In 2006, Milan purchased the Property. AR-6:2171. A year later, it applied to the City to develop a 39-unit residential subdivision. AR-9:4002-04; 6:2131.

At that time, the Property was designated exclusively for open space uses in the City's General Plan and applicable zoning. *See generally* AR-6:2177-82 (City's summary of Project and applicable laws in Project's Draft Environmental Impact Report ("EIR")). The Property was also designated exclusively for open space uses (i.e., "Golf Course" and "Local Parks") in the City's Orange Park Acres Specific Plan ("OPA Plan"). *Id;* AR-11:4901-03, 5037. Milan's development application

[1] Citations to the 14-volume administrative record ("AR") are by volume:page.

therefore requested a General Plan amendment, a specific plan amendment, and a rezone to permit residential development. AR-6:2177-82.

Among the application materials Milan submitted was an Initial Study prepared pursuant to the California Environmental Quality Act, Public Resources Code section 21000 *et seq.* ("CEQA"). The Initial Study explains that Milan was requesting both (1) a GPA to change the Land Use Map's designation for the Property from "Recreation Open Space" to "Estate Residential," and (2) a "Specific Plan Amendment" to change the "Orange Park Acres Specific Plan Map and text" to allow residential use. AR-14:6068.

All City planning documents for the Project from 2007 through 2009 likewise confirm the Property's General Plan and OPA Plan designations as open space or recreation. For example, the City's Draft EIR, released in September 2009, identifies the General Plan designation as "Open Space," states that the Project is "inconsistent with" this land use designation, and informs the public that a GPA is needed to permit the proposed residential development. AR-6:2388. The Draft EIR also states that, to approve the Project, the City would need to "amend the OPA Specific Plan by changing the land use designations [for the Property] from Golf Course and Local Parks" to residential. AR-6:2426, 2178; *see also* 2:690 (12/10/2009 Planning Commission Staff Report); 2:594 (11/4/2009 Design Review Staff Report).

B. Milan Devises a New Theory that the Property Is Already Designated Residential.

The Project generated considerable controversy, centered primarily on its replacement of a treasured and long-standing open space and recreational area with a private residential subdivision. AR-6:2144; 2:697-702. In late 2009, in an apparent effort to avoid the effects of an anticipated referendum on its Project, Milan developed a theory that the applicable land use designation for the Property was not in fact "Open Space," as had been universally recognized by the public, the City, and Milan. Rather, Milan now claimed that the appropriate designation was low-density residential. AR-7:2646; 9:3980-86; 12:5142. Milan repeatedly urged the City Attorney to find that this designation, which Milan had located in a long-forgotten 1973 City Planning Commission resolution, remained a valid land use designation for the Property. *Id.*

Because the only issue before this Court is the consistency of Milan's Project with the current and controlling 2010 General Plan, the City's planning actions in 1973 are legally irrelevant. Nevertheless, because the Opinion found these actions to be dispositive, Orange Citizens provides the necessary context for these actions below.

1. The City Adopts the 1973 OPA Plan.

Milan's theory revolves around the City's 1973 resolutions adopting the OPA Plan. The OPA Plan, on its face, designates the bulk of

the Property (34 acres) as "Golf Course" and the remainder as "Local Parks." AR-6:2181; 11:5037. This plan is entitled the "Orange Park Acres Specific Plan" and its content repeatedly identifies the plan as a "specific plan." *See, e.g.,* AR-11:4905, 4915, 5010; *accord* AR-9:3690 (EIR for OPA "Specific Plan").

In its review of the proposed OPA Plan in 1973, however, the Planning Commission adopted a resolution recommending that the City Council approve the OPA Plan *not* as a specific plan but instead as "part of" the City's then-existing general plan. AR-9:3676. This resolution also recommended that the "Golf Course" designation (which covers the western portion of the Property) be changed to "Other Open Space and Low Density (1 acre)." AR-9:3677. (The resolution left in place the "Local Parks" designation for the remainder of the Property.) On December 26, 1973, the City Council approved Resolution No. 3915, adopting the OPA Plan "as amended by" the Planning Commission. AR-9:3688-89.

Although Milan's theory posits that the 1973 residential designation controls today, the City never took any action to implement that designation. Thus, it is undisputed that, from 1973 through 2011, neither the text nor the maps of the OPA Plan (or the General Plan) *ever* applied the designation of "Other Open Space and Low Density" to the golf course portion of the Property. AR-4:1895 (¶ 4) (6/14/11 City Council finding confirming this fact); 2:484 (6/4/10 staff memo explaining that 1973

designation "does not exist in OPA Plan hardcopies or on any associated map" and is "not depicted on . . . the General Plan Land Use Map"); 4:1429 (Milan acknowledging same). Instead, all publicly-available versions of the OPA Plan have always designated this portion of the Property solely as "Golf Course" and the remainder of the Property solely as "Local Parks." AR-11:5037 (OPA Plan); 1:483-84 (staff memo).

The Property's land use history also reflects the City's confusion and inconsistent pronouncements about the status of the OPA Plan. Some City documents prior to 1999 refer to the OPA Plan as a "part of" previous general plans; others refer to it as a subordinate "area plan" or "specific plan." *See, e.g.,* AR-9:3907; 11:4635, 4905. However, from at least 2000 through the adoption of the GPA in 2011, City plans and resolutions have consistently described the OPA Plan as a "Specific Plan."[2]

2. The City's 1985 Annexation and Rezone of the Property Recognize Its Open Space Designation.

Milan's theory not only ignores the City's failure to implement the residential designation in 1973, it also overlooks the City Council's action expressly affirming the Open Space designation upon the Property's subsequent annexation to the City.

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[2] The 2010 General Plan, for instance, refers to the OPA Plan exclusively as a "specific" or "neighborhood" plan. Exhibit A at 3, 6 (reproducing relevant excerpts of 2010 General Plan pursuant to Rule of Court 8.520(h)); *see also infra* n. 11 (citing additional resolutions and plans).

In 1985, the golf course was annexed to the City, and thus the entire Property became for the first time subject to City (rather than County) jurisdiction. AR-9:3798-99. In conjunction with the annexation, the City re-zoned the Property "R-O," or "Recreational Open Space," to be "consistent with [the] General Plan" designation of "Open Space and Recreation." AR-9:3880 (Resolution No. 6465), 3893-94 (Planning Commission Staff Report).

In approving this rezone, the City Council specifically found that a general plan amendment for the Property would be required to allow any residential development such as that ultimately proposed by Milan:

> The configuration of the proposed parcels would increase the potential for development to other than recreation oriented uses, *but it is noted that, at a minimum, a General Plan Amendment and Zone Change would be required to allow other uses.*

AR-9:3880 (emphasis added).

3. The City Adopts the 1989 General Plan, Designating the Property as Open Space.

In any case, all of this early history was rendered irrelevant by the City's adoption, in 1989, of its first comprehensive new general plan since the 1970's ("1989 General Plan"). AR-11:4621; 14:5941. The 1989 General Plan provides that the "single most important feature" of its Land Use Element is "the Land Use Policy Map." AR-11:4634. This map—which "indicates the location, density and intensity of development for all

land uses city-wide"—designates the entire Property solely as open space/golf ("OS/Golf"). *Id.*; AR-14:5919. Milan and the City have conceded as much. *E.g.,* City Respondent's Opposition Brief on Appeal (filed 11/30/12), at 26 (conceding "that the 1989 and 2010 City-wide General Plan land use map shows the Property as solely Open Space").

C. The City Adopts the 2010 General Plan, Reaffirming the Property's Open Space Designation.

When Milan unveiled its new theory concerning the Property's alleged residential designation, the City was in the midst of another lengthy and comprehensive update of its General Plan, a process that had begun in 2004. AR-14:6140. In March 2010—months after Milan proposed its new theory—the City Council approved a City-wide "Comprehensive General Plan Update" (i.e., the 2010 General Plan). AR-14:6277-81. This new General Plan designated the entire Property exclusively as "Open Space." Exhibit A at 7-8. The 2010 General Plan also identifies the 1973 OPA Plan as a subordinate "specific plan" or "neighborhood plan" that must be updated to conform to the General Plan. *Id.* at 3, 6, 10.

D. The City Approves the General Plan Amendment, but the Referendum Renders It Inoperative.

Despite the City's confirmation of the Property's Open Space designation in the newly-adopted 2010 General Plan, Milan persuaded the City Attorney to accept its theory that the Property, or at least the "golf

course portion," retained the 1973 residential designation. AR-7:2646-50 (City Attorney letter). Milan's theory was thereafter presented to City staff and officials as a legal *fait accompli. See, e.g.,* AR-12:5346 (staff informing Planning Commission that it "tiered off of the City Attorney's opinion"). City staff reports for Milan's Project were accordingly drafted to incorporate the City Attorney's awkward conclusions that (1) the OPA Plan designated the Property for residential use (even though this designation appears nowhere in the plan), and (2) the OPA Plan was now to be considered "part of" the City's "general plan" (even though the 2010 General Plan says the OPA Plan is a subordinate "specific" or "neighborhood" plan). AR-2:504.

Staff, however, was forced to confront the fundamental problem created by the Milan theory: that the 1973 residential designation directly conflicted with the existing Open Space designations in both the 2010 General Plan and the OPA Plan. Staff thus concluded that General Plan and OPA Plan amendments were needed to "[e]nable the project to be consistent with" these plans. AR-2:502-03 (5/3/2010 Staff Report); *see also* AR-1:484 (6/4/2010 staff memo explaining that City is proposing to "formally amend the OPA Plan and General Plan to ensure consistency with the proposed project").

The City did thereafter briefly float the idea that it could somehow change the 2010 Land Use Map—the central feature of the

General Plan Land Use Element—without calling this change a "General Plan amendment." AR-8:3358, 3369. The City dropped this idea, however, after Orange Citizens argued that such a tactic would be illegal. *See* AR-4:1364-70.

Thus, both Milan and the City ultimately recognized that Milan's Project could not be approved without a General Plan amendment. AR:7:2621 (EIR stating that GPA "continues to be necessary to provide consistency"); 3:1094-95. Indeed, just weeks before the approval, Milan's lawyers submitted a letter to the City, reiterating Milan's request for the GPA so that the Project would be "100% approvable." AR-4:1429; *accord* AR-9:3981. Milan likewise insisted at the City Council's May 10, 2011, public hearing on the Project 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).

On June 14, 2011, the City Council approved Resolution No. 10566, which adopted the GPA for the Project. Among other things, the GPA:

> (1) changed the 2010 General Plan Land Use Policy Map for the Property from "Open Space" to "Other Open Space & Low Density";
>
> (2) changed the OPA Plan Map for the Property from "Golf" and "Local Parks" to "Other Open Space & Low Density"; and

(3) eliminated the text in the OPA Plan requiring the permanent protection of the golf course.

AR:1:04-09; 4:1952-54, 1960, 1963; *see* Slip Opinion ("Opinion") at 21.

Orange Citizens' members promptly exercised their constitutional right of referendum to protest the City's approval. On July 12, 2011, Orange Citizens submitted the Referendum to the City Clerk.[3] By law, submission of the Referendum stopped the GPA from taking effect. *Midway Orchards v. County of Butte,* 220 Cal.App.3d 765, 783 (1990); Elec. Code § 9241.

Later that day, the City Council adopted Milan's requested Zone Change, rezoning the Property from "Recreation/Open Space" to residential, "R-1-40." AR-4:1827-32. The City also adopted a Development Agreement for the Project. AR-4:1833-78. Both approvals expressly relied upon the referended (and thus legally inoperative) GPA to make the legal finding that the Project was consistent with the City's General Plan. AR-4:1828, § II (finding that Zone Change "is consistent with . . . the land use element of the General Plan, *as amended by [the] General Plan Amendment*") (emphasis added); AR-4:1834, § III(A) (same finding for Development Agreement).

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[3] *See* Petitioners' Appendix of Exhibits, filed 06/08/12 in consolidated case G047013, volume I, tab 3, page 25 (hereinafter cited as PA-1:3:APP025); PA-1:7:APP139-280 (Referendum Petition).

E. Milan and the City Revise Their Theory and Proclaim that the General Plan Amendment Was Unnecessary.

In an effort to evade the legal consequences of the Referendum, Milan then abruptly revised its tactics. In August 2011, Milan wrote the City Attorney "to suggest an elegant solution" to the filing of the Referendum: "that the City re-evaluate the requirement for [the] General Plan amendment" it had adopted two months earlier. AR-9:3982. The City Attorney promptly sided with Milan. He now opined that the GPA was *not* necessary to ensure consistency with the General Plan and that the Referendum, if rejected by the voters, would not bar Milan's Project. PA-III:17:APP648.

On November 6, 2012, the voters defeated the Referendum by a 56% vote, thereby rejecting the GPA. Appellants' Supplemental RJN ("SRJN") 002 (filed 01/30/13).[4]

II. Procedural History

A. Trial Court Proceedings

On July 26, 2011, Milan filed a Petition for Writ of Mandate and Complaint against the City and the County Registrar of Voters. Milan then immediately moved ex parte for a TRO to enjoin the City Clerk and

[4] The Fourth District granted Orange Citizens' requests for judicial notice. Opinion at 44. These materials are, accordingly, considered "part of the record on appeal." *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal.4th 910, 922, n.4 (2004).

the Registrar from processing the Referendum. PA-I:1:APP001-17. The trial court denied the TRO. PA-I:2:APP018.

Orange Citizens thereafter filed a Cross-Petition for Writ of Mandate and Cross-Complaint ("Cross-Complaint"), seeking to set aside the Zone Change and Development Agreement as inconsistent with the General Plan's Open Space designation. Orange Citizens also sought a declaration that the Project could not proceed without voter approval. PA-I:3:APP019-55.

A month later, Milan filed its own Cross-Complaint, seeking a declaration that it could proceed with its development regardless of the Referendum and a writ directing the City to remove the Referendum from the ballot. PA-I:4:APP056-82.

All claims regarding the GPA's legal effect, the validity of the Development Agreement and Zone Change, and the legal effect of the Referendum were bifurcated and briefed on an "Administrative Record." PA-I:5:APP090. On July 9, 2012, the trial court granted judgment for Milan on these claims and issued a writ commanding the City to remove the Referendum from the ballot. Appellants' Appendix ("AA) at AA055-59, AA078-83.

B. Appellate Proceedings

On July 12, 2012, following an appellate writ petition by Orange Citizens, the court of appeal stayed the trial court's order and writ, thereby allowing the Referendum election to proceed.

A year later, on July 10, 2013, the Fourth District issued the Opinion, upholding the trial court's judgment regarding the Project approvals. The court first held that the City Council in 2011 could reasonably have concluded that the general plan in the 1970's designated the Property for low density residential use. Opinion at 36-37. While the court acknowledged that both the 1989 and 2010 General Plans designated the Property exclusively for Open Space, it held that these designations were insufficient to change the 1973 designation absent evidence of an express subjective intent to do so. *Id.* at 37-38.

The Fourth District also acknowledged that if the OPA Plan was considered part of the City's current General Plan and designated the Property for residential use, this designation would conflict with the Open Space designation in the 2010 General Plan. *Id.* at 40. The court, nevertheless, held that such a stark inconsistency did not render the development approvals invalid, concluding instead that the long-standing Open Space designation was simply "erroneous." *Id.* at 42. The court then reversed the judgment with respect to Milan's claims challenging the validity of the Referendum. *Id.* at 42-44.

STANDARD OF REVIEW

The issues before this Court revolve around a central legal question: what was the City's statutorily mandated "comprehensive, long-term general plan" (Gov. Code § 65300) at the time of Milan's Project approvals?

Orange Citizens submits that it was the 2010 General Plan adopted by the City Council in March 2010 and that this document alone constitutes the "general plan" adopted under section 65300, subject to public hearings under section 65353, and made "available to the general public" under section 65357 of the Government Code.[5] Likewise, Orange Citizens submits that the 2010 General Plan is "the general plan" to which zone changes (§ 65860(a)) and development agreements (§ 65867.5(b)) must conform under State law. The Fourth District, by contrast, accepted Milan and the City's argument that the applicable general plan was a never-existing document comprised of the 2010 General Plan and the OPA Plan, as somehow modified and "corrected" by the provisions of a 1973 resolution that were never implemented and were forgotten for 36 years.

Determining which version of the general plan applies to a piece of property presents "a question of law requiring an independent determination by the reviewing court." *Harroman*, 235 Cal.App.3d at 392.

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[5] Undesignated statutory references are to the Government Code.

In analyzing such a "purely legal question," a court must "exercise independent judgment." *County of San Diego v. State of California,* 15 Cal.4th 68, 109 (1997) (citations and internal quotations omitted).

In *Lesher*, for example, this Court addressed an issue similar to that presented here: "We are asked to decide whether an initiative measure limiting municipal growth which conflicts with a city's general plan amends that plan, and, if it is not an amendment, whether it is invalid." 52 Cal.3d at 535. The Court did not defer to the city's interpretation of whether the initiative was part of the general plan, but instead treated the issue purely as a question of law to be determined based on the plain language of the initiative and the official ballot materials. *Id.* at 541-44. Thus, the "reasonableness" test employed by the Fourth District (Opinion at 39) has no application to the initial determination of what, under State law, constitutes "the general plan" applicable to Milan's development approvals.

The Fourth District was also mistaken in applying the "reasonableness" test to the question of whether the City Council erred when it assertedly found the Project consistent with the 2010 General Plan. Opinion at 27-30. The City Council never made any such finding. Instead, as detailed below, it found only that the Project was consistent with the 2010 General Plan "as amended by" the GPA. Where, as here, the issue of a project's consistency with a general plan arises as a result of voter action, the courts have uniformly determined consistency as a matter of law, based

on the face of the operative general plan. *See, 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).[6]

The voters' rejection of the Referendum also informs this Court's review. In *DeVita,* this Court noted that voter action is the "most direct form" of community input on a general plan, and it recognized the importance of "limit[ing] the power of a hostile city council to evade or repeal" voter initiatives and referenda. 9 Cal.4th at 786, 797 (citation and internal quotations omitted). This Court has also repeatedly emphasized that the local referendum power is "'one of the most precious rights of our democratic process,'" which it is the "duty of the courts to jealously guard." *Rossi,* 9 Cal.4th at 695 (citations omitted). Thus, *de novo* review is also warranted here to ensure that the voice of the City's voters is not "improperly annulled." *Id.*

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[6] Even if the City had made applicable consistency findings, in reviewing these findings, the courts are bound by the general plan's plain language. *Lesher,* 52 Cal.3d at 543. Where a city's interpretation is not consistent with the document's plain language, "deference to the City's interpretation of its general plan . . . is unwarranted." *California Native Plant Soc. v. City of Rancho Cordova,* 172 Cal.App.4th 603, 642 (2009).

ARGUMENT

On March 9, 2010, the City Council adopted the 2010 General Plan. AR-14:6277-81 (Resolution No. 10436). 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. Orange Citizens also submits that the 2010 General Plan's unambiguous Open Space designation for Milan's Property is controlling and that Milan's proposed residential subdivision is inconsistent with this designation. Thus, Milan's Project cannot go forward.

The Fourth District, however, rejected this "straightforward" argument. Opinion at 3. According to the Fourth District, as a "matter of law," a city's general plan does not necessarily consist of "the most recent *objective* evidence of the general plan (i.e., text and diagrams presented to the public as the general plan)." Opinion at 27, 32 (emphasis in original).

Rather, after recognizing that an "uninformed observer" might look to the face of the City's most recently adopted General Plan to determine applicable land use designations (*id.* at 27), the Fourth District concluded that the City's *real* general plan was an entirely different document, one that was never presented to the public during the plan's most recent update. Based on this conclusion, the Fourth District held that the controlling "general plan" designation for the Property was the long-

forgotten 1973 residential designation—a designation that has never appeared on the face of *any* version of *any* City plan and that blatantly conflicts with the designation on the face of the 2010 General Plan.

The Fourth District's conclusion turns decades of established planning law upside-down and should be reversed.

I. MILAN'S PROJECT APPROVALS ARE VOID BECAUSE THEY ARE INCONSISTENT WITH THE UNAMBIGUOUS OPEN SPACE DESIGNATION IN THE CITY'S CURRENT GENERAL PLAN.

A. The 2010 General Plan Is the "Constitution" for Development within the City.

"The general plan has been aptly described as the 'constitution for all future developments' within the city or county," and thus "'[t]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.'" *Goleta,* 52 Cal.3d at 570-71 (citations omitted). "General Plans are also required to be 'comprehensive [and] long[] term' as well as 'internally consistent.' The planning law thus compels cities and counties to undergo the discipline of drafting a master plan to guide future local land use decisions." *DeVita,* 9 Cal.4th. at 773.

Recognizing that land use planning can change over time, this Court has emphasized that general plans must "remain current" and that agencies "must periodically review and revise their general plans as circumstances warrant." *Goleta,* 52 Cal.3d at 570, 572 (citing § 65103(a));

accord DeVita, 9 Cal.4th at 792 (holding that each local government has an "implied statutory duty to keep its general plan current"). "Most jurisdictions select 15 to 20 years as the long-term horizon for the general plan." Governor's Office of Planning and Research, *General Plan Guidelines* at 14 (2003).[7] The planning process is an open and transparent one. Thus, where a general plan is amended in whole or in part, copies of the amended general plan must "be made available to the general public" within one working day. § 65357(b)(1).

The heart of the general plan is the "land use element," which designates the "location and extent of the uses of the land for housing, business, industry [and] open space." § 65302(a). Cities and counties almost universally establish the required land use designations by including a map in their general plans, which public officials, planners, developers, and the entire community then rely upon to determine the governing development standards. *See General Plan Guidelines* at 14 (explaining that "a diagram or diagrams, along with the general plan's text, should be detailed enough so that the users of the plan, whether staff, elected and appointed officials, or the public, can reach the same general conclusion on the appropriate use of any parcel of land").

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[7] Available at http://opr.ca.gov/docs/General_Plan_Guidelines_2003.pdf.

As this Court has also recognized, "the keystone of regional planning is consistency—between the general plan, its internal elements, subordinate ordinances, and all derivative land use decisions." *Goleta,* 52 Cal.3d at 572. "Th[is] consistency doctrine [is] the linchpin of California's land use and development laws; it is the principle which infuses the concept of planned growth with the force of law." *Families Unafraid to Uphold Rural El Dorado County v. County of El Dorado,* 62 Cal.App.4th 1332, 1336 (1998) (citations omitted). Thus, zoning ordinances (§ 65860(a), development agreements (§ 65867.5(b)), subdivision maps (§ 65567), and all other subordinate plans (§ 65359) must be consistent with a community's general plan.

B. The 2010 General Plan Unambiguously Designates Milan's Property Solely as Open Space.

The City has undertaken two comprehensive revisions of its General Plan in the past 25 years. The City's current General Plan, which "describes the planned distribution and development intensities of all land uses in the City" (AR-10:4059), was adopted in March 2010, a year before the City Council approved Milan's Project. The 2010 General Plan is thus the controlling charter for development within the City today.

The 2010 General Plan describes its own scope as follows: "The General Plan document is comprised of this Introduction, and eleven

elements." Exhibit A at 2; *id.* at 1. The element most relevant to the present case is the "Land Use Element," which begins by noting:

> The Land Use Element provides a key policy foundation for the entire General Plan. . . . The goals and policies contained in this Element establish a constitutional framework for future land use planning and decision-making in the City.
>
> Another important feature of this Element is *the Land Use Policy Map, which indicates the location, density, and intensity of development for all land uses citywide.* The proposed land use designations identify the types and nature of development permitted throughout the planning area.

Id. at 4 (emphasis added); *see also id.* (General Plan "goals and policies will be implemented through land use diagrams and maps depicting assigned land uses, locations, and the extent of future use envisioned by the community"); AR-10:4073 (Land Use Policy Map "graphically represents the planned distribution and intensity of land use citywide"). Further emphasizing the dominant role of the Land Use Policy Map, the General Plan's Implementation Program directs the City to "[e]nsure that City land use decisions are consistent with . . . the land uses shown on the Land Use Policy Map." Exhibit A at 9.

The 2010 General Plan is unambiguous regarding the land use designation for the Property. As the Opinion notes, "The 2010 Policy Map designated the Property as 'OS' (Open Space)." Opinion at 17; *see* Exhibit A at 7. The Plan's map of "Open Space Resources" likewise designates the

Property exclusively for Open Space. Exhibit A at 8. "Open Space," in turn, is defined to mean areas "that should not be developed" and to include "privately held open spaces." *Id.* at 5. *No other designation for the Property appears anywhere in the 2010 General Plan.*

The 2010 General Plan is also unambiguous regarding the subordinate status of the OPA Plan. The 2010 General Plan first underscores its own role as the City's controlling land use charter. It declares that "State law places the General Plan atop the hierarchy of land use planning regulations" and that "other City plans *must conform to General Plan policy direction* and work to implement the General Plan." *Id.* at 2 (emphasis added).

The General Plan then identifies these subordinate "other City plans" as including "Orange Park Acres." *Id.* at 3; *see also id.* at 6 ("Specific Plans and Neighborhood Plans currently in effect include: . . . Orange Park Acres"). "Each of these plans and any future specific plans adopted by the City," the 2010 General Plan confirms, "*must be consistent with the policies expressed in this Element* [of the General Plan]." *Id.* at 6 (emphasis added); *see also id.* at 10 (directing City to "implement and update, as needed" its "adopted specific plans and neighborhood plans," including "Orange Park Acres").

In one of its leading cases on general plans, this Court held that, "[a]bsent ambiguity," courts must presume that the legislative body

"intend[ed] the meaning apparent on the face of" an enactment. *Lesher,* 52 Cal.3d at 543. Thus, the City Council is "presumed to have meant what it said" in adopting the 2010 General Plan, and that document's "plain meaning . . . governs." *Stephens v. County of Tulare,* 38 Cal.4th 793, 802 (2006) (citation omitted). Here, the plain language of the City's 2010 General Plan designates the Property as Open Space. At the same time, it identifies the OPA Plan as a subordinate plan that must conform to the land use designations in the 2010 General Plan.

C. Milan's Project Is Unquestionably Inconsistent with the General Plan's Open Space Designation.

The Project approvals adopted by the City include: (1) a Development Agreement for a 39-unit residential subdivision; and (2) a Zone Change, from "Recreation Open Space" to "R-1-40," to permit residential development on one-acre lots. AR-4:1840, 1827-31.

As the City repeatedly acknowledged during the administrative proceedings, Milan's Project is flatly inconsistent with the Open Space designation in the 2010 General Plan (as well as the OPA Plan), and a GPA was therefore necessary before the Project could be approved. The EIR for the Project, for example, states that the Property's "General Plan" designation is "Open Space." AR-6:2182. It accordingly concludes that, "[a]lthough the proposed project is *inconsistent* with the existing City General Plan land use designation for the project site, *upon*

approval of a General Plan Amendment it would be in substantial compliance with the Land Use Element." AR-6:2388 (emphasis added).

Because the GPA never went into effect due to the Referendum, Milan's Development Agreement and residential Zone Change remain inconsistent with the General Plan today. Indeed, the Third District reached this exact conclusion on nearly identical facts in *Midway Orchards, supra,* a case repeatedly cited with approval by this Court. There, a county board of supervisors adopted a resolution changing a property's general plan designation from agricultural to residential. It then approved a development agreement for a residential project, finding it consistent with the newly amended general plan. In response, county citizens filed a referendum petition. 220 Cal.App.3d at 770-71.

The court held that because the referendum prevented the general plan amendment from taking effect, the development agreement was inconsistent with the existing general plan and therefore legally invalid:

> The resolution which would have provided consistency between Midway's development agreement and the general plan was therefore never effective. Consequently, Midway's development agreement was never consistent with the general plan as required by [ ] section 65867.5 and the Board was without legal authority to approve the agreement. The development agreement was therefore unlawfully approved and executed.

Id. at 783 (footnote omitted). The court also held that the developer had no rights under the development agreement. *Id.*

The same is true here for Milan's Development Agreement and Zone Change. *Id.; see also Lesher,* 52 Cal.3d at 544-45 (holding that a zoning ordinance that conflicts with the general plan is "invalid *ab initio*"). Accordingly, as a matter of law, Milan's Project approvals are void *ab initio,* and the Project cannot go forward.

II. THE FOURTH DISTRICT'S RULING THAT THE 1973 RESIDENTIAL DESIGNATION IS CONTROLLING CONFLICTS WITH BEDROCK PLANNING LAW.

Despite the unequivocal case law set forth above, the Fourth District did not set aside Milan's Project approvals as inconsistent with the 2010 General Plan's Open Space designation. Instead, the Fourth District upheld the Project based on its determination that a residential designation set forth *solely* in a 1973 City resolution constitutes the Property's controlling general plan designation today. Opinion at 43. Because this determination conflicts with decades of black-letter planning law, it should be reversed.

A. The 1973 Residential Designation Is Ineffective Because It Was Never Implemented and It Conflicts with the 2010 General Plan Open Space Designation.

The question of whether a forgotten general plan amendment can trump the express terms of the general plan distributed to the public has been addressed before. In *Poway, supra,* a different division of the Fourth

District held that it could not. Rather, *Poway* confirms that the controlling general plan is the document made *available to the public*.

In *Poway*, the City of San Diego amended a community plan to allow a long-term road closure and subsequently adopted a resolution incorporating this amendment into its general plan. 229 Cal.App.3d at 853-54, 861-62. The amendment, however, was immediately forgotten and never implemented. *Id.* at 862-63. When the road closure was challenged three years later, the city argued that the continued road closure was consistent with its general plan, as modified by the forgotten amendment. *Id.*

The court of appeal disagreed. It held that the amendment was not legally effective because the resolution "was forgotten by the public officials charged with creating and implementing it" and because the general plan was never amended in a publicly-available document to reflect the proposed change. *Id.* at 862-63. In addition, the court noted that the city's general plan and maps showed "the road to be an open major road." *Id.* at 862. Thus, the amendment was also invalid because it was inconsistent with the publicly-available general plan. *Id.* at 863.

Here, the facts are essentially identical, except that the resolution at issue in *Poway* was "forgotten" for only three years (*id.* at 854-56 & n.4), whereas the 1973 residential designation was forgotten by the City, the Property owners, and the public for *36 years*—from 1973 until

late 2009. Moreover, since the 1973 residential designation, the City here has adopted two comprehensive general plan revisions, both of which unambiguously designated Milan's Property as Open Space.

While the court below offered a number of grounds for distinguishing *Poway,* none are persuasive. For instance, the court states that, unlike *Poway,* it is "reviewing the City Council's characterization of the contents of its own general plan." Opinion at 35. But in *Poway,* the City of San Diego also urged the court to adopt its own characterization of its own general plan as including the forgotten amendment. *Poway* nevertheless held that the general plan available to the public controlled, not the never-implemented version relied upon by the city. 229 Cal.App.3d at 859, 861-62.

The Opinion also notes that while the forgotten resolution in *Poway* amended the city's general plan to incorporate changes to a "community plan," here the forgotten resolution amended the City's general plan to incorporate and amend the OPA Plan. Opinion at 35. This distinction is irrelevant. The key common fact is that here, as in *Poway,* the allegedly binding amendment was never reflected in any official general plan and therefore was legally ineffective.

In addition, the Opinion states that "because of the lengthy amount of time" that has passed, here it is "less clear here what was made available to the public" when the OPA Plan was adopted "in the 1970's."

Id. at 36. But the dispositive issue is not what documents were available to the public in the 1970's, but what was available to the public in the ensuing four decades.

Here, as in *Poway,* it is undisputed that the City never implemented the 1973 resolutions by amending either its General Plan or any publicly-available copy of the OPA Plan to reflect a residential designation for the Property. Indeed, Milan's counsel acknowledged that all available copies of the OPA Plan have always show the Property designated for open space uses:

> It is our understanding that the "over-the-counter" copy of the OPA Plan, as well as the copy available on the City's website, . . . does not include the Planning Commission's recommended changes to the text which were adopted by the City Council. *Additionally, there appear to be no copies of the OPA Plan which have been edited to reflect the OPA Plan as originally adopted.*

AR-4:1429 (emphasis added).

Milan likewise specifically certified that it understood the Property was designated for Open Space in the City's General Plan and would therefore require a GPA to re-designate the Property for residential use. In the Initial Study accompanying its development application, Milan

stated:

> **General Plan Amendment**
>
> The City of Orange General Plan Land Use Element Map designates the project site as R-O, Recreation Open Space. The Project Applicant requests a General Plan Amendment that would amend the Land Use Element Map to designate the project site as Estate Residential.

AR-14:6068; 9:4002; *see also id.* (requesting a "Specific Plan Amendment" to the OPA Plan to permit residential development).

In approving the Project, the City Council also expressly found that "the textual changes recommended by the Planning Commission and approved by the City Council [in 1973] were never entered into any official copy of the OPA Plan." AR-4:1895, ¶ 4. The City, moreover, conceded below that "between 1973 and 2009 it appears to have been forgotten that the City Council adopted the Open Space/Residential designation." PA-II:11:APP384 (lines 1-2). Thus, until late 2009, when Milan conceived and began promoting its new legal theory, City staff and consultants identified the General Plan designation as Open Space and referred to the OPA Plan as a "Specific Plan" that unequivocally designated the Property for "Golf Course" and "Local Parks." AR-6:2178-82 (Draft EIR), 2418-27 (same); 2:690 (City staff report).

To ascertain the Property's general plan designation, Milan and City staff naturally looked to the face of the general plan on file with

the City and available to the public. It was only after Milan's lawyers, in late 2009, unearthed the long-forgotten resolutions that Milan persuaded the City Attorney to adopt its new theory concerning the Property's designation. AR-9:3980-86. The City Attorney testified below exactly how Milan helped him arrive at his "opinion" that the "General Plan" included the OPA Plan and the 1973 residential designation:

> When first presented with this possible scenario by Tim Paone, a well respected land use lawyer in Orange County representing Milan, he provided me with an entire notebook of resolutions and minutes dating back to 1973.

PA-II:11:APP389, ¶ 3.

The declaration of the City Attorney underscores precisely why the logic of *Poway* should control here. A city's general plan is not a "possible scenario" contained in the notebook of a developer's attorney. Nor is it a series of historical ordinances or a city attorney "opinion." Rather, it is the general plan "available to the general public." § 65357(b); *see also Poway,* 229 Cal.App.3d at 862.

All official versions of the General Plan (and the OPA Plan) available to the public over four decades, including the current 2010 General Plan, designate the Property as Open Space. Milan's posited 1973 residential designation not only directly conflicts with the City's subsequent designations of the Property, it was also completely hidden from public view because it was immediately forgotten and never

implemented. Moreover, due to the City's failure to implement the 1973 amendment, the scope of that amendment remained obscure even after the City embraced Milan's theory four decades later. Thus, while the public and the City Council were informed in 2011 that the 1973 residential designation affected the entire "project site,"[8] the 1973 amendment on its face affected only the "Golf Course" portion of the site. AR-9:3677 (1973 resolution); 11:5033, 5037 (OPA Plan). Likewise, the City Council's findings in its resolution adopting the GPA state that the "OPA Plan designates the *golf course portion* of the Ridgeline project property" as residential. AR-4:1949 (emphasis added). Thus, even under Milan's flawed theory, the remaining 17 acres are still designated "Local Parks" (and are still inconsistent with Milan's development). *See* AR-1:07; 6:2181 (OPA Plan maps).

Accordingly, as a matter of law, the residential designation cannot be the controlling land use designation for the Property, or even a portion of it, today.

B. The 2010 General Plan Superseded All Prior General Plan Policies.

Even if, as the Fourth District concluded, the City's "general plan in the 1970's" designated the Property as "low density residential"

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[8] *See* AR-7:2620 (EIR); 9:3975 (5/10/11 City Attorney memo to City Council).

(Opinion at 37), it no longer does today. The relevant land use designation for the Property is not the general plan designation from 1973, but the designation in effect in 2011, when Milan's Project was approved. Thus, even if *Poway* were not dispositive, reversal would still be required here.

It is well-established that when a city or county adopts a new general plan, the land use designations in previous general plans no longer apply. *Harroman,* 235 Cal.App.3d at 396; *see also Professional Engineers in California Government v. Kempton,* 40 Cal.4th 1016, 1038 (2007) (where later law "constitute[s] a revision of the entire subject," it will "repeal or supersede" the prior law); *Cow Hollow Imp. Club v. DiBene,* 245 Cal.App.2d 160, 176 (1966) (zoning ordinance that "constitutes a completely new expression on the subject by the city planning commission and the local legislative body [and] affects every parcel of real property within the city . . . effects a repeal of all existing zoning ordinances"). Numerous other cases are in accord.[9]

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[9] *See, e.g., Meyers v. County of Los Angeles,* 110 Cal.App.2d 623, 629 (1952) (rejecting claim that zoning ordinance was still in effect because it was not expressly repealed by the adoption of comprehensive zoning ordinance: "[T]he later act operates as a repeal of the former although it contains no express words to that effect."); *Neuber v. Royal Realty Co.,* 86 Cal.App.2d 596, 614-15 (1948) ("Manifestly, the new [building code] ordinance was intended as a substitute for the existing one. . . . The new ordinance must from its very terms be regarded as revisory of the entire matter of the earlier ordinance, and the latter must be held to have been superseded."), overruled in part on other grounds by *Porter v. Montgomery Ward & Co.,* 48 Cal.2d 846, 850 (1957)

Harroman, supra, illustrates this principle well. There, a developer challenged a town's denial of its development application, arguing that the "applicable general plan" was the town's existing general plan. 235 Cal.App.3d at 391-92. The town, however, was preparing a revised general plan pursuant to Government Code section 65361, which allows an agency to require development applications to be "consistent with the general plan proposal being considered or studied," rather than the existing plan. *Id.* at 395; § 65361(c)(3). The court held that the "applicable general plan" was the new draft plan and that this revised general plan "effectively suspend[s] the provisions of the existing general plan under review." 235 Cal.App.3d at 396. To hold otherwise, the court emphasized, "would require the town to approve a development proposal based upon an abated or suspended general plan." *Id.*

The facts here are even more compelling than in *Harroman.* The applicable general plan is not a draft revision prepared under section 65361. Rather, it is the comprehensive new 2010 General Plan formally adopted by the City Council only one year prior to Project approval. This comprehensive revision was conducted pursuant to, and as required by, the State Planning and Zoning Law.

The record makes indisputably clear that the 2010 General Plan was prepared and adopted as a comprehensive, new city-wide general plan. In its Notice of Preparation, for example, the City announced its

intention to complete a "comprehensive update of its adopted General Plan." AR-14:6121. The City's website for the update stated that that the "Comprehensive General Plan update will cover all of Orange" and "provides a blueprint for development throughout the community." AR-14:6495. The General Plan, too, presents itself as a "comprehensive" plan for the entire City. AR-10:4028-31.

The City also made clear that the new general plan would comprehensively update the obsolete 1989 General Plan:

> The City of Orange General Plan was last comprehensively updated in 1989. Over the past 20 years, both the City and surrounding region have experienced significant growth and change. . . . Early in 2004, the Community Development Department commenced a comprehensive update to the City's General Plan. . . . The comprehensive General Plan update provides the City with an up-to-date community vision and multi-disciplinary strategy for achieving that vision . . . .

AR-14:6139-40 (Planning Commission staff report). Thus, the City's public notice for the Planning Commission hearing on the 2010 General Plan stated that the "Comprehensive General Plan Update represents a complete updating of the City's 1989 General Plan." AR-14:6170; *accord* AR-14:6198 (General Plan EIR explaining same).

In approving the 2010 General Plan, the City Council likewise found that it would replace the 1989 Plan, declaring that its new Plan "provides the City and its citizens with a shared community vision,

goals, policies, and implementation programs . . . , *rather than relying on the content of the 1989 General Plan* which has realized diminished relevance over the course of its 20 year lifespan." AR-14:6278 (Resolution No. 10436) (emphasis added). A month later, in its Final EIR for Milan's Project, the City confirmed the effect of adopting the 2010 General Plan: it rendered the 1989 General Plan "inoperative." AR-7:3181.[10]

The City's adoption of the 2010 General Plan therefore clearly "abated" and "suspended" the operation of the 1989 General Plan, just as the 1989 plan had "abated" and "suspended" the operation of any prior general plan policies. *Harroman,* 235 Cal.App.3d at 396; *see Kempton,* 40 Cal.4th at 1038 (where later law "constitute[s] a revision of the entire subject," it will "repeal or supersede" the prior law); *see also supra* n.9.

In particular, the City's designation of Milan's Property for Open Space in the 1989 and 2010 General Plans indisputably replaced any conflicting 1973 designation of the Property for residential use. That replacement is, by definition, what general plan amendments do. *See, e.g., Harroman,* 235 Cal.App.3d at 396; *Ideal Boat & Camper Storage v. County of Alameda,* 208 Cal.App.4th 301, 313 (2012) (rejecting appellants'

[10] The 1989 General Plan, likewise, was adopted as a "Revised City-Wide General Plan" after extensive public review and at least four public hearings. AR-9:3918-19.

reliance on approvals adopted before applicable general plan amendments, noting that "[a]ppellants ignore the current reality—the current general plan . . . as amended," and holding that the project "is tested against these [current] planning tools for consistency").

Thus, even if part of the Property had been designated residential in the City's 1973 general plan, and even if that designation had been validly implemented, the residential designation was completely replaced by the Open Space designations adopted in both 1989 and 2010. Because Milan's Project is inconsistent with this Open Space designation today, it cannot proceed.

C. The Fourth District's Holding that a Forgotten 1973 Resolution Trumps the Current General Plan Undercuts Vital Public Planning Principles.

The Fourth District effectively held that the plain language of City's 2010 General Plan could be ignored. The Opinion not only invalidated the unambiguous Open Space designation applicable to the Property, it also redefined the scope of the "General Plan" in a manner contrary to the 2010 General Plan's plain language. The Opinion thus allowed the City to have one general plan that it released to the public and a conflicting general plan that it applied to Milan's development. To permit cities and counties to have two "general plans"—one for public consumption and one hidden from view—is contrary to fundamental planning principles and would lead to planning chaos.

1. The 2010 General Plan Is the General Plan Presented to the Public and City Legislators.

As this Court recently emphasized in considering the scope of the Public Records Act, "Openness in government is essential to the functioning of a democracy. Implicit in the democratic process is the notion that government should be accountable for its actions." *Sierra Club v. Superior Court,* 57 Cal.4th 157, 164 (2013) (citations and internal quotations omitted).

In adopting the State Planning and Zoning Law, the Legislature expressly mandated such openness and accountability when local governments adopt and amend general plans:

> The Legislature recognizes the importance of public participation at every level of the planning process. It is therefore the policy of the state and the intent of the Legislature that each state, regional, and local agency concerned in the planning process involve the public through public hearings, informative meetings, publicity and other means available to them, and that at such hearings and other public forums, the public be afforded the opportunity to respond to clearly defined alternative objectives, policies, and actions.

§ 65033; *accord* § 65351. Accordingly, a city must provide neighboring public entities and the public with an opportunity to comment on the proposed general plan (§ 65352), hold a public hearing (§ 65353), and provide an opportunity for appeal (§ 65354.5). Once a general plan is adopted or amended, copies must immediately be "made available to the

general public." § 65357(b); *see generally DeVita,* 9 Cal.4th at 773-74 (describing public participation requirements); *Goleta,* 52 Cal.3d at 571 (noting that "[p]ublic participation and hearings are required at every stage, in order to obtain an array of viewpoints").

This public process would be meaningless if a city—or the courts—could simply declare that a city's "real" general plan is not the plan the city actually circulated and approved, but instead includes other plans or policies never presented to the public *as part of that general plan.*

This Court's reasoning in *Lesher* is instructive. The Court held that a challenged traffic control initiative could *not* be considered an amendment to the city's general plan because the ballot measure available to the public had not described it as such:

> We cannot at once accept the function of a general plan as a 'constitution,' or perhaps more accurately a charter for future development, and the proposition that it can be amended without notice to the electorate that such amendment is the purpose of an initiative.

Lesher, 52 Cal.3d at 540 (citations omitted).

In *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,* 40 Cal.4th 412, 443 (2007), this Court likewise emphasized that the public's understanding of a planning document defines its scope. The city in that case argued that its EIR "incorporated" a separate environmental analysis simply by referencing it. *Id.* The Court rejected that argument, explaining that the EIR failed to inform readers that they

"must separately read" the earlier analysis to understand what the EIR "intends to convey." *Id.* Thus, the city's belated attempt to redefine the scope of its EIR was invalid:

> The audience to whom an EIR must communicate is not the reviewing court but the public and the government officials deciding on the project. That a party's briefs to the court may explain or supplement matters that are obscure or incomplete in the EIR, for example, is irrelevant, because the public and decision makers did not have the briefs available at the time the project was reviewed and approved. The question is therefore not whether the project's significant environmental effects *can* be clearly explained, but whether they *were.*

Id.

Here, too, the "audience" for the 2010 General Plan was "the public and the government officials" approving that plan in 2010. The post-hoc reinterpretation of the 2010 General Plan that Milan's and the City's attorneys subsequently devised—and presented to the *courts*—cannot change the plain language of the General Plan presented to the *public* at the time of its adoption.

Indeed, nothing in the extensive public review process for the 2010 General Plan (*see* AR-10:4043-44) gave any indication to the public or City legislators that the 2010 General Plan incorporated the outdated OPA Plan, much less the long-forgotten 1973 designation. To the contrary, the 2010 General Plan expressly defines its scope: "The General Plan

document is comprised of this Introduction, and eleven elements." Exhibit A at 2. The General Plan adopted by the City Council on March 9, 2010, consisted *solely* of this self-contained document. AR-14:6277-81. It is this 2010 General Plan that the City distributed to the public and placed on its website as the "General Plan." AR-14:6483-85 (relevant website pages).

Moreover, the plain language of the 2010 General Plan identifies the OPA Plan as a subordinate and outdated "specific plan" or "neighborhood plan." *See supra,* Part I.B. In fact, the status of the OPA Plan was directly at issue during the 2010 General Plan's public review period. A comment on the 2010 General Plan Draft EIR, for example, noted that "the [OPA] Specific Plan was written in the 1970s," and "the time has come to update the Orange Park Acres Specific Plan so that it can continue to usefully guide the development of this community." AR-14:6254. The City responded to this comment in the 2010 General Plan Final EIR by agreeing that the OPA "Specific Plan" needed to be updated:

> 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 the 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).

Similarly, the City did not place the "Orange Park Acres Plan" on its website under the heading of "General Plan." Instead, it was placed under the heading of *other* "Plans and Documents" along with other specific plans, design guidelines, and similar documents. AR-14:6483-92.

The Fourth District, however, ignored the General Plan presented to the public. Instead, it redefined the "2010 General Plan" to include both the OPA Plan and the 1973 residential designation—and to eliminate the 2010 Land Use Map's Open Space designations. By doing so, the court engaged in precisely the type of retroactive amendment by "judicial fiat" that this Court condemned in *Lesher*. 52 Cal.3d at 541 (holding that land use regulation not understood as being part of current general plan "does not become such retroactively by judicial fiat"). This approach plainly contradicts the legislative mandate requiring open and democratic land use planning. Rather than "public participation at every level of the planning process" (§ 65033), the Fourth District effectively amended the 2010 General Plan with no public input at all.

2. To Hold that General Plan Amendments Are Insufficient to Supersede Pre-Existing Policies Would Cause Planning Chaos.

Under the Fourth District's holding, general plan designations that have been amended through formally-adopted general plan amendments nevertheless remain in effect unless they have *also* been *expressly* repealed. Accepting this holding would not only conflict with

existing law, but also would seriously disrupt land use planning throughout California.

Under the logic of the Opinion, the *entirety* of the City's 1989 General Plan, as well as the *entirety* of the 1973 General Plan, necessarily remain in effect today because neither of these documents was expressly repealed. In other words, the City now does not have one comprehensive general plan—as state law expressly requires (§ 65300) and as the 2010 General Plan proclaims itself to be—but at least three.

Such a holding also breeds instant confusion. For example, after the City Attorney endorsed Milan's novel theory in late 2009, the staff reports reflect the bewilderment of City planners. While the initial planning documents for the Project faithfully reflected the Property's long-time General Plan designation as "Open Space" (*see, e.g.,* AR-2:594, 690), in the wake of Milan's new theory, City staff no longer knew what the status of the Property was. One staff report provides two different designations for the Property—"Open Space" and "Other Open Space and Low Density (1 acre)"—both of which are attributed to the City's "general plan." AR-2:491. Another staff memo identifies "not one, but four sources staff utilized to determine the General Plan Land Use Designation." AR-1:483.

Unless this Court reverses the Opinion, such confusion will result in every jurisdiction that has ever adopted a general plan amendment

or a new comprehensive general plan without *expressly* repealing the pre-existing policies—a widespread practice throughout California. Planners, public officials, property owners, and concerned community members could no longer simply look to the most recently adopted general plan to determine the applicable designation. Rather, they would also need to: (1) search historic resolutions, plans, and policies for conflicting designations; (2) determine whether these conflicting designations were ever expressly repealed; (3) ascertain the "true" intent of the adopting body based on the legislative histories; and then (4) attempt to resolve which designation controls. Even after undertaking this analysis, no one could be sure whether some other person or entity might unearth different historic documents, as Milan's attorneys did here, or how the local government and the courts would resolve any conflicting policies.

Clearly, this is not and cannot be the law. The Fourth District's holding flies in the face of this Court's insistence that, in determining a proposal's consistency with the general plan, "[o]nly the general plan in effect at the time the [proposal] is adopted is relevant." *Lesher*, 52 Cal.3d at 545.

III. EXAMINATION OF THE CITY'S LEGISLATIVE INTENT IS UNNECESSARY GIVEN THE 2010 GENERAL PLAN'S PLAIN LANGUAGE AND, IN ANY CASE, SHOWS THAT THE GENERAL PLAN AMENDMENT WAS ABSOLUTELY NECESSARY FOR PROJECT APPROVAL.

The Fourth District's conclusion that the OPA Plan "remained part of the City's general plan [in 2010], as it was when adopted in 1973," purports to rely on the "intent of the adopting body." Opinion at 38, 37 (quoting *Lesher,* 52 Cal.3d at 543). Given the unambiguous language of the 2010 General Plan, however, an examination of legislative intent is not appropriate here. Even if it were, the Fourth District erred by ignoring the actual contemporaneous statements and findings of the City Council and instead deferring to the City's post-hoc litigation position.

A. Legislative Intent Is Irrelevant in Interpreting Unambiguous Language.

The language of the 2010 General Plan is unambiguous with regard to both the Open Space designation of Milan's Property and the subordinate status of the OPA Plan. *See supra,* Part I.B. Thus, it was not only unnecessary, but also plainly improper, for the Fourth District to look elsewhere to determine the General Plan's meaning. *Lesher,* 52 Cal.3d at 543; *see also Diamond Multimedia Systems, Inc. v. Superior Court,* 19 Cal.4th 1036, 1047 (1999) (Where statutory language "is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it.").

B. In Adopting the 2010 General Plan, the City Council Intended to Replace All Prior General Plan Policies, Reaffirm the Subordinate Status of the OPA Specific Plan, and Retain the Existing Open Space Designation on Milan's Property.

Even if it were appropriate to examine legislative intent in interpreting the scope and meaning of the City's 2010 General Plan, the relevant "intent" here is the City Council's intent in adopting that plan in March 2010.

The record shows that the City Council clearly intended to adopt a self-contained general plan that did *not* incorporate the OPA Plan, but instead repeatedly identified it as an outdated and subordinate "specific" or "neighborhood plan." Exhibit A at 2-3, 6; *see supra,* Part II.C.1. This 2010 General Plan, moreover, was plainly intended to replace all pre-existing General Plan policies in their entirety. *See supra,* Part II.B.

With regard to Milan's Property specifically, the record shows that the City Council in March 2010 intended to do just what it did: retain the Open Space designation for the Property shown on the existing General Plan land use map. At that time, after all, Milan's request for a GPA to *change* the Property's existing designation (in the 1989 General Plan) from Open Space to residential had been pending for three years. Public comments on Milan's Project in November 2009 had expressly pointed out that the "Project site is designated 'Open Space' by the existing [1989] Orange General Plan," and that "the proposed General Plan Update

also contemplates that the Project site remain in its 'Open Space' land use designation." AR-7:3090. In April 2010, a month after adopting the 2010 General Plan, the City responded to these comments by confirming that "*the City's General Plan update does not incorporate or include private development applications such as [Milan's] proposed project.*" AR-7:3189 (Final EIR for Milan's Project) (emphasis added). It also informed the public that "the project application includes a General Plan Amendment that will result in consistency with the General Plan and Orange Park Acres Plan." *Id.*

Thus, rather than modifying the existing Open Space designation as somehow "erroneous," the City Council instead *retained the Open Space designation unchanged from the 1989 General Plan,* anticipating that it would process the proposed modification through Milan's pending GPA application. The City Council did so even though Milan had unearthed the 1973 residential designation in 2009 and presented it to the City Attorney. Likewise, despite ample opportunity, Milan never challenged the 2010 General Plan designation for its Property as erroneous. *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").

The designation of the Property as Open Space in the 1989 General Plan, following the Property's annexation to the City, was likewise

consistent with the City Council's (and everyone else's) understanding of the Property's designation at that time. For instance, the Property owners' 1985 annexation application listed the "General Plan Land Use designation for the site" as "Recreation/Open Space." AR-9:3818. City staff concurred. AR-9:3893 ("[T]he Land Use Element of the General Plan and the [OPA] Plan designate[] the area for Open Space and Recreation uses."). The City Council accordingly adopted an express finding that "*a General Plan Amendment and Zone Change would be required*" to allow any development on the Property other than the existing recreation-oriented and open space uses. AR-9:3880 (10/8/85 City Council Resolution) (emphasis added).

In short, the record shows that the intent of the City Council in 2010 was to adopt a comprehensive new general plan that would supersede all existing general plan policies. The record also makes clear that the Council intended to retain the existing Open Space designation on Milan's Property, to thereafter update the "Orange Park Acres Specific Plan" to be consistent with the newly adopted general plan, and to consider any change to the Property's designation via Milan's pending application for the GPA. The relevant legislative intent thus fully supports the position of Orange Citizens that the 2010 Open Space designation is controlling.

C. Even After Finding, in 2011, that the OPA Plan Was Part of the City's General Plan, the City Still Recognized the Necessity for a General Plan Amendment.

The Fourth District completely ignored the foregoing indices of legislative intent. Instead, it attempted to divine the intent behind the 2010 General Plan's adoption based on the City Council's subsequent resolutions approving Milan's development proposal *the following year*. But, as this Court has explained, such post-hoc interpretations cannot trump contemporaneous evidence of the Council's intent at the time of the 2010 General Plan's adoption: "The declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law. [Citations.] This is especially true when . . . such declared intent is without objective support in either the language or history of the legislation and (until recently) is contrary as well to the practice of the affected agency." *Peralta Cmty. Coll. Dist. v. Fair Emp't & Hous. Comm'n,* 52 Cal.3d 40, 52 (1990).

While the City's 2011 findings do assert that the OPA Plan is "part of" the 2010 General Plan (*see* AR-4:1828, 1834), this finding lacks "objective support." Indeed, it directly contradicts the express language of the 2010 General Plan. *See* Exhibit A at 3, 6, 10 (referring to the OPA Plan as a subordinate "neighborhood" or "specific plan"). This finding likewise contradicts the recent practice of the City Council, which adopted numerous resolutions and planning documents from 2000 onward that

consistently refer to the OPA Plan not as "part of" the City's general plan, but as a "Specific Plan."[11]

More importantly, the City Council's 2011 findings recognize that, even under Milan's erroneous legal theory, a general plan amendment was still necessary to eliminate the Open Space designations in both the 2010 General Plan and the OPA Plan. AR-4:1948 (explaining that the GPA would thus "make the General Plan land use designations for the subject property consistent throughout the General Plan"). That was the central purpose of the GPA.

Thus, in approving Milan's Development Agreement and Zone Change, the Council did *not* find that they were consistent with the existing 2010 General Plan. Rather, it found only that they were consistent with the "General Plan, *as amended by [the] General Plan Amendment*." AR-4:1828, § II (emphasis added), 1834 § III(A) (same).

Only after the Referendum was filed did the City, at Milan's urging, adopt its new litigation position that the Project could proceed without the GPA under the pre-existing 2010 General Plan. PA-

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[11] *See, e.g.,* AR-9:3930, 3939, 3945; 14:6034; *see also* SRJN 007-09 (city council resolution requiring developers "within the OPA Specific Plan area" to give written notice of "[p]roposed specific plan amendments"). The City's CEQA documents throughout this period also refer to the OPA "Specific Plan." *See* AR-14:6230, 6262 (General Plan EIR, March 2010); 14:6297 (Initial Study for Housing Element, February 2010).

III:17:APP648; *see also* AR-9:3982 (Milan suggesting to the City Attorney that, as "an elegant solution" to the Referendum problem, the City should "re-evaluate" the need for the GPA that Milan had previously said was necessary and that the City had adopted two months earlier). This post-hoc litigation position is entirely unwarranted and deserves no deference at all. *See 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).

IV. IF THE 1973 RESIDENTIAL DESIGNATION WERE PART OF THE 2010 GENERAL PLAN, THE GENERAL PLAN WOULD BE INTERNALLY INCONSISTENT AND THE CITY'S DEVELOPMENT APPROVALS WOULD BE VOID *AB INITIO.*

The Fourth District Opinion rests on its erroneous legal determination that the 1973 residential designation is an operative part of the City's General Plan today. However, even assuming, *arguendo,* that this determination were correct, it would not justify the Fourth District's finding that Milan's development can proceed. Instead, it would indicate that the City's current General Plan is internally inconsistent with regard to Milan's Property. Because a proposed development cannot be consistent with two conflicting land use designations, the City's Project approvals would still be invalid as a matter of law.

A. A Project Cannot Lawfully Be Approved Where the Applicable General Plan Designations Are Internally Inconsistent.

State law requires that "the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies." § 65300.5; *DeVita,* 9 Cal.4th at 777. This requirement for internal consistency ensures that the general plan can serve its core purpose:

> If a general plan is to fulfill its function as a 'constitution' guiding 'an effective planning process,' [it] must be reasonably consistent and integrated on its face. *A document that . . . displays substantial contradictions and inconsistencies cannot serve as an effective plan because those subject to the plan cannot tell what it says should happen or not happen.*

Kings County Farm Bureau v. City of Hanford, 221 Cal.App.3d 692, 744 (1990) (citations omitted; emphasis added). Indeed, one reason why the scope and definition of the general plan must be clearly presented to the legislative body *before* its adoption is to avoid unwittingly creating "impermissible inconsistencies" in the general plan. *Lesher,* 52 Cal.3d at 542-43.

Where a general plan is internally inconsistent, subordinate land use decisions affected by the inconsistency are *ultra vires* and void. "[A] proposed project cannot be consistent with an invalid general plan." *Guardians of Turlock's Integrity v. Turlock City Council,* 149 Cal.App.3d

584, 598 (1983). In *Sierra Club, supra,* the seminal case on this point, the court held that a general plan was "internally inconsistent" where its land use and open space maps had conflicting designations for a property. 126 Cal.App.3d at 701-04. Because the challenged zone change in that case "could not be consistent with such [a] plan (§ 65860)," it was "invalid when passed." *Id.* at 704.

B. Under Milan's Theory, the City's "General Plan" Has Conflicting Designations for the Property.

Of course, Orange Citizens has always maintained that the current General Plan is internally consistent because it designates the Property exclusively for Open Space.

The Fourth District, however, concluded differently. It held, as a matter of law, that the City's current "General Plan" is not the document formally adopted by the City Council in 2010, but an entirely different conglomeration of documents, comprised of the official 2010 General Plan, the 1973 OPA Plan, and the never-implemented provisions of a 1973 City resolution. Assuming, *arguendo,* that this conclusion is correct, this "General Plan" would have two starkly inconsistent land use designations for Milan's Property: (1) the Open Space designations in the 2010 General Plan Land Use and Open Space maps and the similar designations ("Golf Course" and "Local Parks") in the OPA Plan, all of

which forbid residential development; and (2) the 1973 residential designation, which permits it. Opinion at 40.

C. Under Milan's Theory, the Project Approvals Are Therefore Void.

The inarguable legal consequence of these conflicting "General Plan" designations for Milan's Property would be that the Zone Change and Development Agreement were "invalid when passed." *See Sierra Club,* 126 Cal.App.3d at 704.

The Fourth District attempted to distinguish *Sierra Club,* proposing a newly-minted distinction between "substantive" and "erroneous" general plan inconsistencies and dismissing the General Plan's long-standing Open Space designation as an "error of omission." Opinion at 42, 39. This distinction, however, would render the requirement for internal consistency meaningless. After all, any time a general plan contains conflicting designations, one of the designations is necessarily "erroneous."

In *Sierra Club,* for instance, the county attempted to preemptively cure the inconsistencies in its general plan maps by adopting a "precedence clause," which declared that the designations in the land use element "should take precedence until the open space and conservation [element] can be reevaluated and amended, if necessary." 126 Cal.App.3d at 703. Essentially, the county declared that the land use map contained the

correct and applicable designations and that any conflicting designations in another plan element were "erroneous." The court, however, struck down the precedence clause, holding that a county cannot simply "subordinate" one element of its plan to another. *Id.* at 704, 708.

If a public agency cannot subordinate one element of its general plan to another, a court cannot do so either. An internally inconsistent general plan can be remedied only by a general plan amendment, which is a *legislative* (not a judicial) action. *See id.* at 707; § 65301.5 (amendment of a general plan is a legislative act). Thus, in *Concerned Citizens*, the court concluded that where two general plan elements were inconsistent, it is the role of the legislative body, not the courts, to choose which element to amend:

> The Board may wish to establish correlation and consistency by amending the land use element, the circulation element, or both. . . . [I]n order to maximize the Board's range of choices we shall invalidate the Board's adoption of both land use and circulation elements. The Board can then choose whether to amend either element, or both, to achieve statutorily required correlation and consistency.

166 Cal.App.3d at 104.

Similarly here, it was the role of the City Council and the voters, not the court of appeal, to resolve any alleged General Plan inconsistencies.

Moreover, while the Fourth District purported to base its new construction of the General Plan on the City Council's 2011 findings, in fact the court went far beyond those findings. The City's findings never suggested that the Open Space designations in the 2010 General Plan (and the OPA Plan) could be ignored. Rather, the findings recognize that a General Plan Amendment to *change* these designations to residential was necessary to "make the General Plan land use designations for the subject property consistent throughout the General Plan." AR-4:1948.

The Fourth District, however, declared that the Open Space designations were not just "inconsistent," but also were legally irrelevant and should be deleted. In its gratuitous rewriting of the City's General Plan, the Fourth District ignored this Court's admonishment that the judicial role is to "construe, not to amend" a legislative enactment: "'the office of the judge is simply to ascertain and declare what is . . . contained therein, not to insert what has been omitted or omit what has been inserted.'" *California Fed. Sav. & Loan Ass'n v. City of Los Angeles,* 11 Cal.4th 342, 349 (1995) (citation omitted); *see Lesher,* 52 Cal.3d at 543. Here, by effectively inserting a residential designation into the 2010 General Plan and deleting the conflicting Open Space designations as "erroneous," the Fourth District violated this fundamental limitation on the courts.

V. THIS COURT SHOULD UPHOLD THE INTENT OF THE VOTERS IN REJECTING THE GENERAL PLAN AMENDMENT'S PROPOSED RESIDENTIAL DESIGNATION FOR THE PROPERTY.

The voters, of course, had every right to reject the City Council's action changing the Property's designation from Open Space to residential. It is well established that general plan amendments are subject to referendum. *Yost v. Thomas,* 36 Cal.3d 561, 570-74 (1984). Indeed, in the area of local planning, *DeVita* emphasized that voter action is the "most direct form" of community input on a general plan. 9 Cal.4th at 786. Thus, the statutory requirements for public input on general plan amendments do not preclude voters from amending a general plan by initiative:

> Obviously, when the governing body votes on a general plan amendment, the expression of public opinion on the amendment must come before that vote. When the people exercise their right of initiative, then public input occurs in the act of proposing and circulating the initiative itself, and at the ballot box. We cannot conclude that, for the sake of eliciting public involvement, the Legislature intended to preclude this more direct form of public participation.

Id.

DeVita's protection of the public's right to "direct" participation in land use planning furthers the "major impetus" underlying the initiative and referendum power: "to enable the people of this state, on the local level and statewide, to reclaim the legislative power from the

influence of what in contemporary parlance is called the 'special interests.'" *Id.* at 795. To effectively reclaim this power, the voters' rights must be "greater than that of the [legislative body]," giving the people "the final legislative word." *Rossi,* 9 Cal.4th at 704.

Here, the Referendum proponents' argument against the GPA in the official Voter Information Pamphlet urged City voters:

> 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. By rejecting the GPA, the voters expressly rejected the Council's attempt to change the Open Space designation for Milan's Property in the 2010 General Plan.

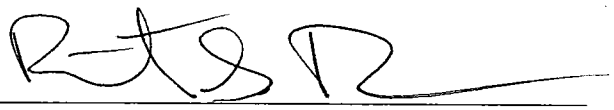
Rather than upholding the clear intent of the voters, the Fourth District effectively implemented a different "amendment" of the General Plan, one that was subject neither to referendum nor to the requirements of public participation and transparency. The Fourth District thus accomplished precisely what the voters acted to prevent the City Council from doing: it replaced the Open Space designation for Milan's Property with a residential one. In so doing, the Fourth District robbed the City's voters of their successful Referendum and "improperly annulled" the voters' fundamental constitutional rights. *See Rossi,* 9 Cal.4th at 695.

This Court should give the voters "the final legislative word" and uphold the longstanding Open Space designation for Milan's Property.

CONCLUSION

Orange Citizens respectfully requests that the Court: (1) reverse the Fourth District's Opinion upholding judgment for Milan on the first and fourth causes of action in Milan's Cross-Complaint and all causes of action in Orange Citizens' Cross-Complaint; and (2) direct that a new judgment be entered that (a) grants all claims in Orange Citizens' Cross-Complaint (PA-I:3:APP019-55) and appellate writ petition (filed June 8, 2012), (b) sets aside the City's approvals of the Development Agreement and Zone Change, (c) declares that Milan's Project is inconsistent with the City's General Plan and cannot be proceed; and (d) denies all of Milan's claims.

DATED: December 2, 2013 SHUTE, MIHALY & WEINBERGER LLP

By: 

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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 **Opening Brief on the Merits** is proportionally spaced and, not counting the verification or other exclusions referenced in Rule 8.486(a)(6), contains **13,987** words.

DATED: December 2, 2013 SHUTE, MIHALY & WEINBERGER LLP

By: _____
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OPA.LIT 520821.17

these workshops, the City made a special effort to reach out to both youth and seniors, with individual workshops focused upon each of these groups.

Other community participation tools included Joint Workshops with the City Council and the Planning Commission, and working with the Chamber of Commerce's Junior Leadership group.

The City also invited representatives of the regions' Native American tribes to contribute to the process. The tribes contacted included the Juaneno Band of Mission Indians and the Gabrieleno/Tongva Tribal Council.

Organization and Use of the General Plan

The Orange General Plan contains goals, policies, and plans to guide land use and development decisions in the future. The General Plan consists of the following elements, or chapters:

- Land Use Element
- Circulation & Mobility Element
- Natural Resources Element
- Public Safety Element
- Noise Element
- Growth Management Element
- Cultural Resources &Historic Preservation Element
- Infrastructure Element
- Urban Design Element
- Economic Development Element
- Housing Element

As shown in Figure I-4, Orange's General Plan sometimes deviates from the state- and county-mandated elements in non-substantive ways to better conform to the objectives of the Vision Statement. For example, the state-required Conservation and Open-Space Elements have been combined in the Natural Resources Element. In addition to the state-mandated elements, stipulations of Orange County's Measure M require cities to prepare a Growth Management Element, addressing timely provision of capital facilities and public services associated with new development.

The Orange General Plan also includes optional elements that address unique concerns that will affect Orange's quality of life in the future. These optional elements include Cultural Resources & Historic Preservation, Infrastructure, Urban Design, and Economic Development.

Several supporting documents were produced during the development of the General Plan, including the General Plan Program Environmental Impact Report (Program EIR). Other technical reports and studies used in preparing the Plan include an existing land use survey, a traffic/circulation model, a historic resources inventory and cultural resources predictive model, and market studies and fiscal impact reports for opportunity areas identified in the Land Use Element.

General Plan Structure

The General Plan document is comprised of this *Introduction*, and eleven elements. Each element may stand alone, but is also an integral part of the overall plan. The General Plan is accompanied by an Implementation Program and Glossary. Each of the elements is organized according to the following format: 1) Introduction; 2) Issues, Goals, and Policies; and 3) the Plan.

The *Introduction* of each element describes the focus and the purpose of the element. The relationship of the element to other General Plan elements is also specified in the Introduction.

The *Issues, Goals, and Policies* section of each element contains a description of identified planning issues, goals, and policies related to the element topic, based on input received from the community, members of the GPAC, and members of the City Council, Planning Commission, and City staff. *Issues* represent the needs, concerns, or desires addressed by the General Plan. *Goals* are overall statements of community desires and consist of broad statements of purpose or direction. *Policies* serve as guides to the City Council and City staff in reviewing development proposals and making other decisions that affect future growth and development in Orange.

Each element also contains a *Plan* section. The Plan section offers an overview of the City's course of action to implement identified goals and policies. Many of the elements also contain one or more policy maps which consolidate the various opportunities, constraints, classifications, and policies expressed in the Element in graphic form. For example, the Land Use Element contains a "Land Use Policy Map" and a "Land Use Plan" identifying and describing the locations of future land uses by type, density, and intensity within the City of Orange.

Following the elements is the *Implementation Program*, which identifies specific actions to achieve the goals, policies, and plans identified in each General Plan element. The Implementation Program is provided as an Appendix to the General Plan.

The organization of the General Plan allows users to identify the section that interests them and quickly obtain a perspective of the City's policies on that subject. However, General Plan users should realize that the policies in the various elements are interrelated and should be examined collectively. Policies are presented as written statements, tables, diagrams, and maps. All of these components must be considered together when making planning decisions.

Related Plans and Policies

State law places the General Plan atop the hierarchy of land use planning regulations. Several local ordinances and other City plans must conform to General Plan policy direction and work to implement the General Plan. Also, regional governmental agencies, such as the Southern California Association of Governments (SCAG), the South Coast Air Quality Management District (SCAQMD), and the Regional Water Quality Control Board (RWQCB) have been established in recognition of the fact that planning issues extend beyond the boundaries of individual cities. Efforts to address regional planning issues such as air and water quality, transportation, affordable housing, and habitat conservation have resulted in the adoption of regional plans. The policies adopted by Orange will be affected by these plans, and will in turn have effects on these other plans. The paragraphs below describe ordinances, plans, and programs that should be consulted in association with the General Plan when making development and planning decisions.

Orange Zoning Code

The Zoning Code, the primary tool used to implement the General Plan, regulates development type and intensity citywide. Development regulations imposed include those setting limits on building height, requiring setbacks, and specifying the percentage of a site that must be landscaped. The Zoning Code also outlines standards for residential planned unit development and affordable housing, among many other land use issues.

Orange Redevelopment Plans

Under California law, cities can form redevelopment agencies and adopt redevelopment plans as mechanisms for facilitating community renewal. The Orange Redevelopment Agency (Agency) was established with redevelopment authority on August 11, 1983, with the adoption of Ordinance No. 21-83. Since then, the Agency has been instrumental in upgrading the Tustin Street project area, redeveloping the Southwest Project area that includes the City's southwest quadrant and the Old Towne Historic District, and renewing the Northwest Project area, which includes a large section of the City's industrial areas. In 2001, the three redevelopment project areas were merged into one, known as the Orange Merged and Amended Redevelopment Project Area. The Agency strives to achieve its three-fold mission: to enhance the commercial and industrial areas of the City; to revitalize those areas; and to increase, improve, and preserve the community's supply of low- and moderate-income housing available at affordable housing cost. Orange's City Council acts as the governing board of the Redevelopment Agency.

Specific Plans and Neighborhood Plans in Orange

A Specific Plan is a detailed plan for the development of a particular area. Falling under the broader umbrella of the General Plan, Specific Plans are intended to provide more finite specification of the types of uses to be permitted, development standards (setbacks, heights, landscape, architecture, etc.), and circulation and infrastructure improvements within identified subareas of the City. Specific Plans are often used to ensure that multiple property owners and developers adhere to a single common development plan. Further, they can provide flexibility in development standards beyond those contained in the Zoning Ordinance. Orange has utilized Specific Plans and Neighborhood Plans as tools to achieve the coordinated development of individual parcels within a broader context. Adopted Specific Plans and Neighborhood Plans include:

- Archstone Gateway
- Chapman University
- Immanuel Lutheran Church
- Orange Park Acres
- Pinnacle at Uptown Orange
- St. John's Lutheran Church and School
- Santa Fe Depot Area
- Serrano Heights
- Upper Peters Canyon

Earlier planning efforts that have influenced the growth and change within Orange include the 1975 East Orange General Plan and the Orange Park Acres development plan.

The Land Use Element provides a key policy foundation for the entire General Plan. Through the use of text and diagrams, the Land Use Element establishes clear and logical patterns of land use as well as standards for new development. The goals and policies contained in this Element establish a constitutional framework for future land use planning and decision-making in the City.

Another important feature of this Element is the Land Use Policy Map, which indicates the location, density, and intensity of development for all land uses citywide. The proposed land use designations identify the types and nature of development permitted throughout the planning area. The goals and policies contained in this Element are designed to ensure land use diversity and balanced development; encourage mixed-use development; promote commercial enterprise in Orange; encourage high quality industrial development; maintain and enhance the role of Old Towne within the community; encourage an efficient and responsible relationship between land use, transit, open space, and areas of environmental sensitivity; ensure City interests are achieved through inter-jurisdictional and regional planning; and encourage public involvement in land use planning decisions.

Purpose of the Land Use Element

The Land Use Element is one of seven elements required by the State to be included in Orange's General Plan. The Land Use Element directs and defines development patterns by designating allowable uses, requirements, and locations for both existing and future development. This Element has the most wide-ranging scope in the General Plan, and affects all of the others. Although the interpretation of the Land Use Element is the responsibility of the community's policymakers, this vision of long-term land use will influence short-term plans such as infill development, Specific Plans, and public works investments.

Scope and Content of the Land Use Element

The Land Use Element is divided into three sections:

(1) Introduction
(2) Issues, Goals, and Policies
(3) Land Use Plan

The *Introduction* defines the purpose, scope, and content of the Land Use Element, and its relationship to other General Plan Elements. The *Issues, Goals, and Policies* section describes the City's intent to encourage diverse land uses that foster a vibrant and sustainable community, and to coordinate planning and public participation activities in determining future land uses. The *Land Use Plan* section communicates how these goals and policies will be implemented through land use diagrams and maps depicting assigned land uses, locations, and the extent of future use envisioned by the community.

The Land Use Plan complies with the requirements of the Land Use Element as stated in Section 65302 of California's Government Code. Land uses requiring future planning include "housing, business, industry, open space, forest/timber, agriculture, natural resources, recreation, scenic beauty, education, public buildings and land, solid and liquid waste disposal facilities, and other public and private uses of land." The Land Use Plan also establishes standards for residential

Table LU-1
Land Use Designations

Land Use Designation		Density or Intensity		Description
		Range	Expected	
YSCO	Yorba South Commercial Overlay	Max. 1.0 FAR	0.35 FAR	A wide range of potential retail and service commercial uses, in conjunction with on-site parkland improvements, off-site parkland, and/or park improvements. Commercial use may only be activated through a Development Agreement with the City that identifies specific parkland obligations.
Industrial Designations				
LI	Light Industrial	Max. 1.0 FAR 3-story height limit	0.50 FAR	Allows for manufacturing, processing, and distribution of goods. Wholesale activities associated with industrial operations, as well as small-scale, support retail, service commercial and office uses may also be established in areas with ready access to major circulation routes. A 3-story building height limit applies within Light Industrial designated areas.
I	Industrial	Max. 0.75 FAR	0.65 FAR	
Public Facilities and Open Space Designations				
PFI	Public Facilities and Institutions			Provides for several types of public, quasi-public and institutional land uses, including schools, colleges and universities, City and County facilities, hospitals, and major utility easements and properties. Includes service organizations and housing related to an institutional use, such as dormitories, employee housing, assisted living, convalescent homes, and skilled nursing facilities.
Civic uses/Schools		Max. 0.50 FAR		
Cemeteries, Corporate yard, Water towers, Southern California Electric facilities			.05 FAR	
Schools, Water Department facilities			.15 FAR	
Civic Center, Libraries, Police and Fire Department facilities			.25 FAR	
Institutions		Max. 2.0 FAR		
Colleges and Universities			.35 FAR	
Hospitals			1.0 FAR	
OS	Open Space	NA	NA	Steep hillsides, creeks, or environmentally sensitive areas that should not be developed. Although designated as permanent open space, most areas will not be developed as public parks with the exception of river and creekside areas that promote connectivity of the City's trails system. Lands in this category include both privately held open spaces and public lands.
OS-P	Open Space–Park	NA	NA	Public lands used for passive and active recreation. Includes all parklands owned and maintained by the City of Orange, as well as parks operated by the County.
OS-R	Open Space–Ridgeline	NA	NA	Areas designated open space to preserve visually significant ridgelines identified on the Land Use Policy Map. No development or grading is permitted.
RA	Resource Area	NA	NA	Allows for agricultural uses and continued use of stream and river channels for aggregate mining. Passive and active recreational uses are also permitted. May serve as a holding zone for future uses compatible with established and planned land uses in surrounding areas.

General Plan and Zoning Consistency

The Land Use Element is primarily implemented by the City's Zoning Code, which specifies districts and performance standards for various types of land uses described in the General Plan. Table LU-3 indicates the corresponding zone district that applies to each General Plan land use designation. The zone districts specify the permitted uses for each category as well as applicable development standards. Zone districts specified in Table LU-3 for Mixed-use General Plan designations are new districts, and will be developed as part of the Zoning Code update implementing the General Plan.

Specific Plans and Neighborhood Plans in Orange

A specific plan is a detailed plan for the development of a particular area. Specific plans are intended to provide finite specification of the types of uses to be permitted, development standards (setbacks, heights, landscape, architecture, etc.), and circulation and infrastructure improvements that are only broadly defined by the General Plan. Specific plans are often used to ensure that multiple property owners and developers adhere to a single common development plan. Specific plans are also used as a means of achieving superior design by providing flexibility in development standards beyond those contained in the Zoning Ordinance.

The City has used Specific Plans and Neighborhood Plans as tools to achieve the coordinated development of individual parcels. Specific Plans and Neighborhood Plans currently in effect include:

- Archstone Gateway
- Chapman University
- East Orange Plan (1975)
- Immanuel Lutheran Church
- Orange Park Acres
- Pinnacle at Uptown Orange
- St. John's Lutheran Church
- Santa Fe Depot Area
- Serrano Heights
- Upper Peters Canyon

Each of these plans and any future specific plans adopted by the City must be consistent with the policies expressed in this Element. The City will continue to utilize specific plans to achieve development objectives consistent with the General Plan.

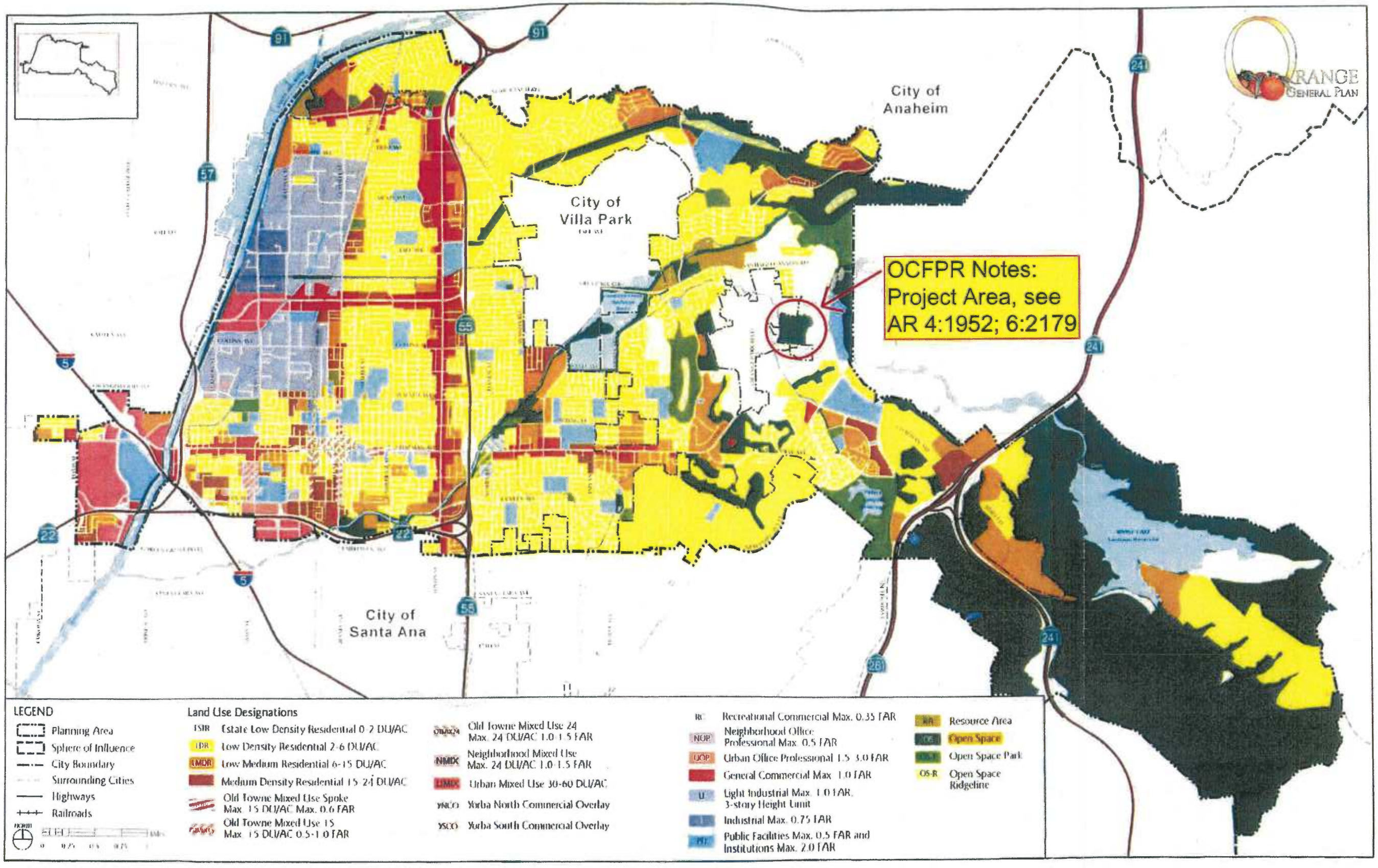

Figure LU-5 Land Use Policy Map

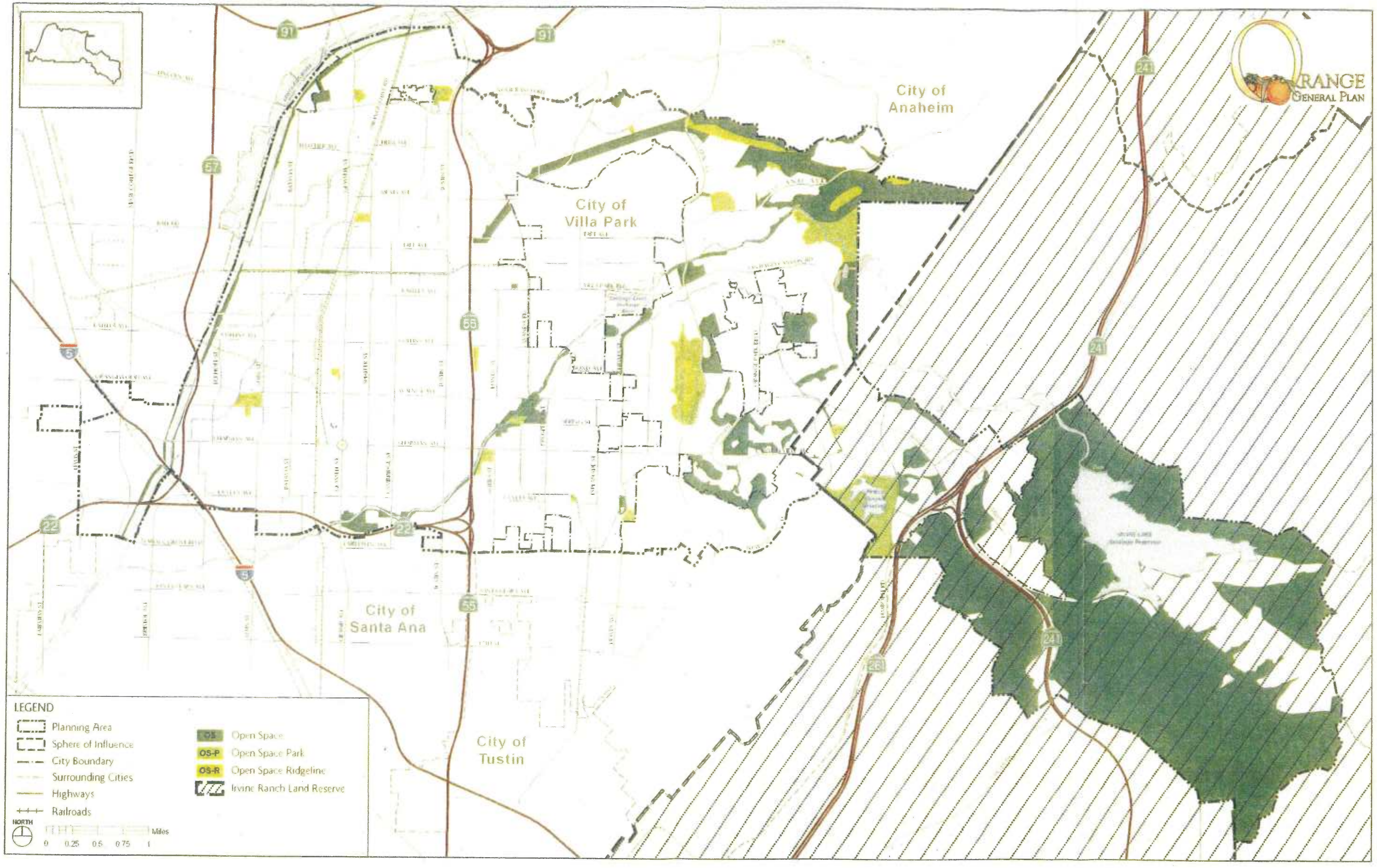

Figure NR-1 Open Space Resources

- Incorporation of sustainable development principles, such as the adoption of resource conservation measures for building codes and standards, and specifications for multi-modal transportation;
- Maintenance of the building security ordinance and addition of a cpted element to those standards; and
- Preparation of development standards that address national pollutant discharge elimination system (npdes) requirements.

Agency/Department:	Community Development Department, Police Department, Public Works Department
Funding Source:	General Fund, redevelopment funds
Time Frame:	Updated by December 2013
Related Policies:	
Land Use:	1.1, 1.2, 1.3, 1.4, 2.1, 2.2, 2.3, 2.4, 2.5, 2.7, 2.8, 2.9, 4.1, 4.2, 4.4, 4.5, 5.1, 5.2, 5.3, 6.1, 6.2, 6.4, 6.7, 6.8, 6.9, 8.1
Cultural Resources & Historic Preservation:	1.3, 1.4, 1.5, 2.1, 2.3, 3.2, 4.5
Public Safety:	2.3, 2.4, 3.3, 7.2, 7.5, 7.6, 9.1
Noise:	1.1, 1.2, 1.3, 2.1, 2.2, 3.1, 4.3, 5.1, 5.2, 5.3, 6.1, 6.2, 7.3
Urban Design:	1.1, 1.4, 1.7, 4.1, 5.1, 5.2, 5.3, 6.1, 6.3, 6.6
Economic Development:	1.1, 1.3, 1.4, 4.5, 5.3, 5.5

Program I-2 Land Use Policy Map and Focus Area Development Objectives

Ensure that City land use decisions are consistent with the policies of the Land Use Element and the land uses shown on the Land Use Policy Map. Using the development review process and other tools outlined throughout the General Plan, ensure that the development objectives specified for each of the eight focus areas described in the Land Use Element are achieved for new development and infill projects located in the focus areas.

Agency/Department:	Community Development Department
Funding Source:	General Fund
Time Frame:	Ongoing
Related Policies:	
Land Use:	All
Economic Development:	1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 3.1, 3.2, 3.3, 3.4, 7.1, 7.2

Program I-3 Specific Plans and Neighborhood Plans

Prepare, adopt, and implement specific plans and neighborhood plans consistent with state law to establish permitted densities, intensities, and uses within Orange for the systematic implementation of the General Plan.

Continue to implement and update, as needed, the following adopted specific plans and neighborhood plans:

- Archstone Gateway
- Chapman University
- East Orange General Plan (1975)
- Immanuel Lutheran Church
- Orange Park Acres
- Pinnacle at Uptown Orange
- St. John's Lutheran Church and School
- Santa Fe Depot Area
- Serrano Heights
- Upper Peters Canyon

New specific plans may be permitted elsewhere within the planning area in the future. Through the specific plan process, encourage developers to include or provide:

- Context sensitivity and connectivity to surroundings,
- Complementary mix of uses,
- Pedestrian-oriented places,
- Transit-oriented design,
- Public spaces,
- Green spaces, and
- CPTED design features.

Agency/Department:	Community Development Department
Funding Source:	General Fund, redevelopment funds, private property owners
Time Frame:	As needed
Related Policies:	
Land Use:	2.1, 2.4, 3.4, 5.1, 5.2, 5.3, 5.5, 5.8, 5.9, 6.7, 6.10, 6.11, 7.1, 7.2
Circulation & Mobility:	3.2, 3.3
Public Safety:	7.2
Urban Design:	1.1, 5.1, 5.3, 6.1, 6.2, 6.4

Program I-4 Plans, Standards, and Guidelines

Adopt, review, implement, and update as necessary the following master plans, standards, and guidelines:

PROOF OF SERVICE

Orange Citizens for Parks and Recreation, et al. v. Superior Court of Orange County 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 December 2, 2013, I served true copies of the following document(s) described as:

OPENING 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 December 2, 2013, at San Francisco, California.

David Weibel

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

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The Superior Court of Orange County