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IN THE SUPREME COURT OF CALIFORNIA
Case No. _____

ORANGE CITIZENS FOR PARKS AND RECREATION et al.,
Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,
Respondent;

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

ORANGE CITIZENS FOR PARKS AND RECREATION et al.,
Plaintiffs and Appellants,

v.

MILAN REI IV LLC et al.,
Defendants and Respondents.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three
Case No. G047013 (consolidated with Case No. G047219)

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

PETITION FOR REVIEW

Rachel B. Hooper (SBN 98569)
*Robert S. Perlmutter (SBN 83333)
Susannah T. French (SBN 168317)
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Fax: (415) 552-5816
Attorneys for Petitioners Orange Citizens for Parks and Recreation and Orange Park Association

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ISSUES PRESENTED 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current general plan contains an unambiguous land use designation for a piece of property, can this designation be superseded by a conflicting designation adopted 40 years ago in 1973?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?

GROUNDS FOR REVIEW

The Fourth District's decision in *Orange Citizens for Parks and Recreation v. Superior Court*, 217 Cal.App.4th 1005 (July 10, 2013) ("Opinion," attached as Exhibit A), turns California planning law upside-down. It holds that a land use designation in a city's recently adopted general plan—the city's "constitution" for development—can be trumped

by a designation set forth in a 1973 resolution that was buried in a file drawer and forgotten for decades. It mandates deference to a city council's post-hoc litigation position, upholding an untenable "interpretation" of the city's general plan that flatly contradicts its plain language. Finally, the Opinion holds that a city council can thwart the will of the voters by claiming that, under its new interpretation, its own general plan amendment—which the voters resoundingly rejected—was never necessary in the first place and the referendum is therefore irrelevant.

The property at issue in this litigation has been designated "Open Space" in the City of Orange General Plan for decades. Thus, in order to proceed with its controversial development project, Respondent Milan REI IV LLC ("Milan") requested, and the Orange City Council approved, a General Plan Amendment ("GPA"), changing the land use designation of Milan's Property in the General Plan Land Use Map from Open Space to residential.

Milan and the City understood that the GPA was critical to ensure consistency between Milan's proposed residential subdivision ("Project") and the General Plan. Indeed, it was precisely for this reason that Milan vigorously urged the City Council in May 2011—and throughout the previous four years—to adopt the GPA; otherwise, Milan cautioned, its Project would not be "approvable." In adopting the GPA, the City Council likewise found that the GPA would make the designations for

Milan's Property "consistent throughout the General Plan." After the referendum challenging the GPA was placed on the ballot, however, Milan and the City changed their tune. They now argued, to the courts below, that the GPA was entirely unnecessary and that Milan's Project could go forward regardless of the referendum.

The Court of Appeal agreed. Despite the voters' rejection of the GPA on November 6, 2012, the Court held that Milan's Project conforms to the City's General Plan and can proceed. But how can a residential subdivision be consistent with a General Plan that clearly designates the Property for Open Space? Because, the Court of Appeal found, the long-standing Open Space designation is "erroneous"; the Property's real and controlling "General Plan" designation is a *residential* one buried in a 1973 City resolution proposing to amend the "Orange Park Acres Specific Plan" and incorporate that document into the City's previous (and long since superseded) general plan at that time.

This Court has not issued a significant decision addressing general plan law since its landmark decision in *DeVita v. County of Napa,* 9 Cal.4th 763 (1995), more than 18 years ago, which reaffirmed the general plan's role as a community's land use constitution. The Opinion undercuts not only *DeVita,* but also at least four other lines of cases establishing the most basic tenets of modern planning law. Accordingly, review is warranted to re-establish the primary role of the general plan in local

planning throughout California and to resolve several direct conflicts between the Opinion and established appellate and Supreme Court precedent. *See* Cal. Rule of Court 8.500(b)(1).

First, decades of Supreme Court precedent establish that the general plan is "located at the top of 'the hierarchy of local government law regulating land use.'" *DeVita,* 9 Cal.4th at 773 (citation omitted); *see Citizens of Goleta Valley v. Board of Supervisors,* 52 Cal.3d 553, 570-71 (1990) ("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.'"). The Court of Appeal, however, held that the controlling land use designation for the Property is a residential designation that appears nowhere in the City's current—or any previous—General Plan, but is set forth *solely* in a 1973 City resolution.

The Opinion also ignores this Court's mandate that courts must give effect to the plain text of a city's general plan. *Lesher Communications, Inc. v. City of Walnut Creek,* 52 Cal.3d 531, 543 (1990). The City's 2010 General Plan unambiguously designates the Property as Open Space and defines the Orange Park Acres Plan as a *subordinate* "specific" or "neighborhood" plan that must be revised to comport with current General Plan policies. The Court of Appeal, however, ignored this

objective language and effectively rewrote the City's General Plan to eliminate its long-standing Open Space designation and replace it with a residential one from a subordinate plan. In so doing, the Court of Appeal engaged in precisely the type of retroactive amendment by "judicial fiat" that this Court has roundly condemned. *Id.* at 541 (holding that a land use regulation that is not understood by the adopting body as being part of the current general plan cannot "become such retroactively by judicial fiat").

Second, the Opinion is inconsistent with *Harroman Co. v. Town of Tiburon,* 235 Cal.App.3d 388, 396 (1991), which holds that where a city adopts a comprehensive revision to its general plan, the revised general plan supersedes the previous general plan. The Court of Appeal instead held that, despite its blatant inconsistency with the 2010 General Plan, the 1973 version of the City's general plan is controlling today because it was never expressly repealed.

Third, the Opinion directly conflicts with *City of Poway v. City of San Diego,* 229 Cal.App.3d 847, 862-63 (1991), which holds that a general plan amendment is ineffective where it is never implemented, never appears on the face of the publicly-available version of the general plan, and conflicts with the current general plan. The Court of Appeal here held that the 1973 residential designation, which never appeared on the face of *any* City plan and was forgotten for decades, was nevertheless valid *and*

that it superseded the Open Space designation for the Property in the current General Plan.

Fourth, the Opinion creates a conflict with the Third and Fifth Districts' decisions in *Sierra Club v. Kern County,* 126 Cal.App.3d 698, 703-04 (1981), and *Concerned Citizens of Calaveras County v. Board of Supervisors,* 166 Cal.App.3d 90, 104 (1985), which hold that where a general plan contains inconsistent designations for a piece of property, no development may be approved until the inconsistencies are resolved through a general plan amendment. Here, after noting that the GPA proposed by the City to resolve the Property's conflicting designations was rejected by referendum, the Court of Appeal simply dismissed the current Open Space designation as "erroneous" and declared that Milan's development could proceed under the conflicting 1973 residential designation.

Finally, the Opinion is inconsistent with *Rossi v. Brown,* 9 Cal.4th 688, 704 (1995), which holds that the constitutionally reserved powers of initiative and referendum give the people "the final legislative word." Here, the voters rejected the City Council's attempt to change the Property's General Plan designation from Open Space to residential. The Opinion, however, effectively nullifies the referendum by dismissing the Open Space designation as invalid. While this Court has repeatedly admonished 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,'" (*id.* at 695 (citations omitted)), the Opinion declares the referendum power here to be meaningless.

Central to all these issues is a question of vital importance to land use planning throughout the State: can a city or county circulate a general plan for public review, formally adopt it, distribute it to the public, and place it on its website as its official General Plan, and then turn around and declare that its "real" general plan contains entirely different land use designations and land use plans?

Prior to this Opinion, the case law—and common sense—uniformly held that the answer was "No." This Court should accordingly grant review to reaffirm what the Court of Appeal has now called into question: that the "constitution" for development for cities and counties throughout California is the general plan formally adopted by the legislative body and that it can be amended only through a general plan amendment subject to referendum by the voters.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

1. The Project Application

In 2007, Milan applied to the City for permission to develop a 39-unit residential subdivision within an area of the City known as "Orange Park Acres." Milan's application, as well as all initial planning documents,

acknowledge the Property's Open Space designation in the City's General Plan, the Orange Park Acres Specific Plan, and the City's applicable zoning. *See generally* Administrative Record ("AR"), volume 6, pages 2177-82 (hereinafter cited as AR-6:2177-82) (Project summary from the City's Draft Environmental Impact Report ("DEIR")). Milan therefore requested a General Plan amendment, a specific plan amendment, and a rezone to change the Property's designation from Open Space to residential. *Id.*

2. Milan's New Theory

In late 2009, after facing considerable community resistance to its proposed development, Milan's lawyers presented the City Attorney with a binder of historic resolutions allegedly supporting a remarkable new theory:[1] that the applicable land use designation for the Property was not the Open Space designation in the City's official General Plan, as had been universally understood, but rather a "low-density" residential designation appearing in a 1973 Planning Commission Resolution (and nowhere else).

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[1] *See* Petitioners' Appendix of Exhibits, filed 06/08/12 in consolidated case G047013, volume II, tab 11, page 389, ¶ 3 (hereinafter cited as PA-II:11:APP389).

3. Early Land Use History

The City adopted the Orange Park Acres Specific Plan ("OPA Plan") in 1973, when the Property lay exclusively within the jurisdiction of Orange County. On its face, the OPA Plan has always designated the Property as "Golf Course" and "Local Parks," designations which do not allow residential development. AR-11:5037.

At the end of the planning process, and apparently in an effort to forestall development pressures in the area, the City's Planning Commission recommended that the OPA Plan be approved as "part of" the general plan. AR-9:3676. It also recommended that the Property's land use designation be amended to allow for both open space *and* residential uses. AR-9:3677. On December 26, 1973, the City Council adopted the OPA Plan as amended by the Planning Commission. AR-9:3688-89. Over the years, the City has inconsistently referred to this document as a "specific plan," a "part of" previous general plans, an "area plan," and a "neighborhood plan." However, during this 40-year period, neither the text nor the maps of the OPA Plan (or the General Plan) were ever amended to apply the residential designation recommended by the Planning Commission to the Property. Rather, as Milan and the City have repeatedly conceded, the OPA Plan available to the public has always designated the Property solely for open space uses. AR-4:1895 ¶ 4, 1429.

4. The 1989 General Plan

In 1985, the Property was annexed to the City. In approving the annexation, the City Council found:

> 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). In other words, the City Council expressly found that a General Plan *amendment* would be required to allow residential uses on the Property.

In 1989, the City adopted its first comprehensive general plan update since the mid-1970's. 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 designates the Property solely as Open Space/Golf ("OS/Golf"). AR-14:5919; PA-II:8:APP295.

5. The 2010 General Plan

On March 9, 2010, the City Council approved a City-wide "Comprehensive General Plan Update" ("2010 General Plan"). AR-

14:6277-80. The 2010 General Plan also designates the Property exclusively as "Open Space." Exhibit B hereto at 7-8;[2] Opinion at 17.

6. Project Approvals and the Referendum

Although Milan was largely successful in persuading the City Attorney to adopt its self-serving theory, City staff recognized that this theory created a new problem: the 1973 residential designation conflicted with the existing open space designations in the 2010 General Plan and the OPA Plan.

Accordingly, given the well-established law requiring general plan consistency, the City acknowledged that the Project could not be approved without a General Plan amendment. AR-2:502-03. Just weeks before the approval, Milan's lawyers also reiterated their request for the GPA so that the Project would be "100% approvable." AR-4:1429.

On June 14, 2011, the City Council approved Resolution No. 10566, adopting a GPA for the Project that:

> (1) changes the 2010 General Plan Land Use Policy Map designation for the Property from "Open Space" to "Other Open Space & Low Density";

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[2] Pursuant to Rule of Court 8.504(e)(1)(C), highlighted excerpts of the City's 2010 General Plan are attached hereto as Exhibit B. The entire General Plan is at AR-10:4010.

(2) changes the OPA Plan Map designation for the Property from "Golf" and "Local Parks" to "Other Open Space & Low Density"; and

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

AR-4:1952-53, 1960, 1963; *see* Opinion at 21.

One month later, after Petitioners Orange Citizens for Parks and Recreation and Orange Park Association (collectively, "OCFPR") submitted the Referendum of the GPA to the city clerk, the City rezoned the Property from "Recreation/Open Space" to residential (the "Zone Change"), and adopted a Development Agreement for the Project. AR-4:1827-32, 1833-78.

On November 6, 2012, City voters defeated the Referendum by a 56% vote, thereby rejecting the GPA adopted by the City Council. Opinion at 3.

B. PROCEDURAL HISTORY

On July 26, 2011, Milan filed suit against the City, followed by cross-complaints by both OCFPR and Milan. 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 ultimately severed and briefed based on the Administrative Record. PA-I:5:APP090. The trial court granted Judgment for Milan, and against OCFPR, on these claims and

issued a writ commanding the City to remove the Referendum from the November ballot. AA055-59, AA078-83.

Following an appellate writ petition by OCFPR, the Court of Appeal stayed the trial court's Order and writ, thereby allowing the Referendum election to proceed. OCFPR's appellate writ action was ultimately consolidated with its appeal from the Judgment.

C. THE COURT OF APPEAL DECISION

On July 10, 2013, the Court of Appeal, in a published decision, upheld the trial court's Judgment. No petition for rehearing was filed. The Opinion holds that Milan's Project is consistent with the General Plan because: (1) the OPA Plan is part of the 2010 General Plan, and (2) the 1973 residential designation is part of the OPA Plan and is the controlling land use designation for the Property today. Opinion at 32-37.

The Court of Appeal 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. *Id.* 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 this was insufficient to change the 1973 designation absent evidence of an express intent to do so. *Id.* at 37-38.

The Court of Appeal 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, however, 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" and that the City was therefore entitled to ignore it, despite the Referendum. *Id.* at 42.

ARGUMENT

I. THE COURT OF APPEAL ERRED IN FAILING TO APPLY THE UNAMBIGUOUS DESIGNATIONS IN THE CITY'S CURRENT GENERAL PLAN.

This case revolves around a central legal question: what was the City's statutorily mandated "comprehensive, long-term general plan" (Gov. Code § 65300[3]) when the City approved Milan's Project in 2011?

In answering this question, the Court of Appeal rejected the "straightforward" argument put forth by OCFPR: that, as a "matter of law," a city's general plan consists 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 3, 27, 32 (emphasis in original). Rather, the Court concluded that even if the "uninformed observer" might look to the face of the general plan to determine applicable land use designations (*id.* at 27), the *real* designations could be found elsewhere, in this case, in a long-

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

forgotten 1973 resolution amending the OPA Plan. This conclusion is a dramatic departure from established planning law and will radically transform the role of general plans throughout California.

A. The 2010 General Plan Plainly Designates the Property Exclusively for Open Space Use and Does Not Incorporate the OPA Plan.

The Court of Appeal accurately summarizes the law concerning the interpretation of general plan language:

> 'Absent ambiguity, we presume that the' adopting body intended the meaning on the face of an enactment 'and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.'

Opinion at 37 (quoting *Lesher*, 52 Cal.3d at 543). In contravention of this bedrock principle, however, the Opinion then proceeds to ignore the unambiguous language of the 2010 General Plan.

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 applicable land uses by including a map in their general plans, as the City did here, which is then relied upon by public officials, planners, developers, and the entire community to determine the governing development standards. *See* Governor's Office of Planning and Research, *General Plan Guidelines* at 14 (2003) (noting 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") (emphasis added).[4]

The 2010 General Plan contains *no* ambiguity with regard to 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 B at 7. The Plan's map of "Open Space Resources" likewise designates the Property exclusively for Open Space. Exhibit B at 8. *No other designation for the Property appears anywhere in the 2010 General Plan.*

Nor is there any ambiguity with regard to the role of the 2010 Land Use Policy Map. The Land Use Element provides:

> 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.

Exhibit B at 4 (emphasis added). Indeed, the General Plan expressly 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 B at 9.

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[4] Available at http://www.opr.ca.gov/s_generalplanguidelines.php.

The 2010 General Plan is also unambiguous with regard to its own scope. The 2010 General Plan itself states: *"The General Plan document is comprised of this Introduction, and eleven elements."* Exhibit B at 2; *id.* at 1.

Finally, the 2010 General Plan is unambiguous regarding the subordinate status of the OPA Plan. The 2010 General Plan expressly underscores its own role as the City's controlling land use charter, declaring 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." Exhibit B 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.*" *Id.* at 6 (emphasis added); *see also id.* at 10 (directing the City to "implement and update, as needed" the City's "adopted specific plans and neighborhood plans," including "Orange Park Acres").

Thus, while the Court of Appeal suggests, without citation, that the 2010 General Plan contains "contradictory references" to the OPA

Plan (Opinion at 39), the plain text of the 2010 General Plan shows otherwise.

In support of its conclusion that the plain text of the 2010 Plan is not controlling, the Court of Appeal relies on *Las Virgenes Homeowners Federation Inc. v. County of Los Angeles,* 177 Cal.App.3d 300 (1986). *Las Virgenes*, however, presents a completely different factual scenario from the present case. Indeed, it confirms that, in interpreting a general plan, the courts must look to the plan's plain language.

Las Virgenes found that, although the maps in an area plan and the county general plan appeared superficially to have conflicting residential density levels for the property at issue, these seeming inconsistencies were reconciled by the plain text of that county's general plan. As the court emphasized, that plan "*states repeatedly* that [its] policy maps are *general in character and are not to be interpreted literally or precisely.*" *Id.* at 310 (emphasis added). It also expressly included the area plans as "component parts" that "establish more specific residential density ranges." *Id.* at 310-11.

Here, the City's 2010 General Plan could not be more different. It mandates that all other City land use decisions *must* be "consistent with . . . the land uses shown on the Land Use Policy Map" and defines the OPA Plan as a specific or neighborhood plan that must "be consistent with" General Plan policies. Exhibit B at 6, 9.

Thus, the General Plan makes clear that it is the OPA Plan which must conform to the General Plan, and not the other way around. Indeed, "no reasonable person . . . could conclude otherwise." *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors*, 62 Cal.App.4th 1332, 1341-42 (1998) (invalidating county's finding that project is consistent with general plan policy).

Neither the courts nor a city council can "interpret" a general plan in a manner contrary to its plain language. Where there is a conflict between a general plan provision and a provision outside the general plan, "[t]he general plan stands." *Lesher*, 52 Cal.3d at 541 ("The tail does not wag the dog."). Thus, here, the plain language of the City's 2010 General Plan—which unambiguously designates the Property as Open Space and identifies the OPA Plan as a subordinate document—must stand.

By law, a land use approval "that conflicts with a general plan is invalid at the time it is passed." *Lesher*, 52 Cal.3d at 544; *id.* at 536, 545 (invalidating inconsistent zoning ordinance); *Midway Orchards v. County of Butte,* 220 Cal.App.3d 765, 783 (1990) (invalidating inconsistent development agreement); §§ 65860(a), 65867.5(b), 66473.5, 65567 (mandating consistency between development and the applicable general plan). Because Milan's Project is inconsistent with the current General Plan's clear Open Space designations, the Project cannot go forward.

B. The 1973 Residential Designation Is Irrelevant Because It was Never Implemented and Conflicts with the 2010 General Plan Open Space Designation.

Rather than upholding the unambiguous 2010 General Plan's Open Space designation, the Court of Appeal determined that the 1973 residential designation constitutes the City's controlling general plan designation today. Opinion at 43. This finding is directly contrary to *Poway,* 229 Cal.App.3d at 863.

In *Poway*, a city amended a community plan to allow a long-term road closure, and subsequently adopted a resolution incorporating this amendment into its general plan. *Id.* at 853-54, 861-62. 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 amendment. *Id.*

The Court of Appeal disagreed, holding 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" only for 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.

The Opinion acknowledges that *Poway* provides "some authority" to support OCFPR's position. Opinion at 35. However, it then sets forth a number of grounds for distinguishing *Poway.* None of these are persuasive. For example, the Opinion states that, unlike *Poway,* it is "reviewing the City Council's characterization of its own general plan." *Id.* But in *Poway,* the respondent city was also urging the court to adopt its own characterization of its own general plan. While viewing the "evidence in the light most favorable to respondent" city, *Poway* nevertheless held it was the *general plan available to the public*, not the never-implemented version relied upon by the city, which controlled. 229 Cal.App.3d at 859, 861-62.

The Opinion also notes that the forgotten resolution in *Poway* amended the city's general plan to incorporate changes to a community plan, whereas, here, the forgotten resolution amended the city's general plan to incorporate and amend the OPA Plan. In both cases, however, the allegedly binding amendment was never included in the 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 resolution was adopted "in the 1970's." Opinion 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 40 years since.

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 own lawyers acknowledged that all available copies of the OPA Plan over the past 40 years 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). Likewise, in approving the Project a month later, the City Council 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. While granting great deference to the City's

litigation position elsewhere, the Court of Appeal trivializes this factual finding of the City Council, erroneously characterizing it as "specula[tion]" in an "environmental planning document." *See* Opinion at 13; *but see id.* at 32-33 (acknowledging there is "no evidence" that the OPA Plan was ever amended to include a residential designation).

The City, moreover, expressly 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, in 1985, when the Property owners submitted an application to annex the Property into the City, their 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 likewise found at the time that "a General Plan Amendment and zone change *would be required* to allow other uses" than recreation on the Property. AR-9:3880..

In 2007, Milan too certified in its development application and Initial Study that the Property was designated for Open Space in the City's General Plan and requested amendments to the General Plan and OPA "Specific Plan" to allow residential use. AR-9:4002; AR-14:6068. And both the 1989 and 2010 General Plans clearly designated the Property exclusively for Open Space.

Thus, *Poway* indisputably controls here: the 1973 residential designation is legally ineffective today both because it was immediately forgotten and never implemented and because it directly conflicts with the Property's Open Space designation in all applicable City land use plans for the past 40 years.

C. The 2010 General Plan Supersedes All Prior General Plan Policies.

Even if, as the Court of Appeal concludes, "the City's general plan in the 1970's included a designation of the Property as . . . low density residential" (Opinion at 36-37), 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.

Harroman establishes the unremarkable proposition that when a city or county adopts a new general plan, the land use designations in previous general plans are no longer applicable. In *Harroman,* a developer alleged that the "applicable general plan" for its development proposal was not the draft general plan being prepared under section 65361, but the general plan in place at the time of its development application. 235 Cal.App.3d at 391-92. The court disagreed, finding that the revised general plan "effectively suspend[s] the provisions of the existing general plan under review" and that the existing plan was therefore "abated or

suspended." *Id.* at 396. *Harroman* recognizes that, under the circumstances set forth in section 65361, development may be required to comport with a revised general plan even *before* it is officially adopted, and that even a *draft* revised general plan will "abate" and "suspend" the operation of the existing general plan policies.

The facts here are even more compelling. The applicable General Plan is not a draft revision prepared under section 65361, but a comprehensive City-wide General Plan Update formally adopted by the City Council a year prior to Project approval.

The record makes indisputably clear that the 2010 General Plan was prepared and adopted as a complete, comprehensive city-wide revision of the entire prior general plan. AR-10:4028, 4031. 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; *see also* AR-14:6170 (The "Comprehensive General Plan Update represents a complete updating of the City's 1989 General Plan."). Four years later, in its resolution approving the 2010 General Plan, the City Council likewise expressly found that it "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 (emphasis added).

The City's formal adoption of the 2010 General Plan thus clearly "abated" and "suspended" the operation of the 1989 General Plan, which, in turn, "abated" and "suspended" the operation of any pre-existing general plan policies, including those in effect in 1973. *Harroman,* 235 Cal.App.3d at 396; *see also Cow Hollow Improvement Club v. DiBene,* 245 Cal.App.2d 160, 176 (1966) (zoning ordinance that "constitutes a completely new expression on the subject by the . . . local legislative body [and] affects every parcel of real property within the city . . . effects a repeal of all existing zoning ordinances"); *Professional Eng'rs in Cal. Gov't 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).

D. The Court of Appeal's Holding that General Plan Amendments Are Not Sufficient to Supersede Pre-Existing Policies Will Cause Planning Chaos.

By ignoring the well-established principles discussed above, the Opinion effectively holds that general plan designations which have been amended through a formally-adopted general plan revision nevertheless remain in effect unless they have been *expressly* repealed. This holding not only conflicts with existing law, but also will throw land use planning throughout California into chaos.

Here, for example, under the logic of the Opinion, the *entirety* of the City's 1989 General Plan, as well as the entirety of the 1973 General