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current general plan contains an unambiguous land use designation for a piece of property, can this designation be superseded by a conflicting designation adopted 40 years ago in 1973?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