

CASE NO. S212800

FEB - 3 2014

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

Frank A. McGuire Clerk

Deputy

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**ORANGE CITIZENS FOR PARKS AND RECREATION; AND  
ORANGE PARKS ASSOCIATION,**  
*Plaintiffs and Appellants,*

vs.

**THE SUPERIOR COURT OF ORANGE COUNTY,**  
*Respondent;*

**MILAN REI IV, LLC; MARY E. MURPHY; CITY CLERK OF THE  
CITY OF ORANGE; CITY OF ORANGE; CITY COUNCIL OF THE  
CITY OF ORANGE; NEAL KELLEY, REGISTRAR OF VOTERS  
FOR THE COUNTY**  
*Real Parties in Interest.*

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**CITY COUNCIL OF THE CITY OF ORANGE'S ANSWER BRIEF  
ON THE MERITS/JOINDER IN THE ANSWER BRIEF ON THE  
MERITS FILED BY MILAN REI IV, LLC**

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After a Decision by the Court of Appeal  
Fourth Appellate District, Division Three  
Case No. G047013 (Consolidated with Case No. G047219)  
From Judgment of the County of Orange, Honorable Frederick P. Aguirre  
(Superior Court Case No. 30-2011-00494437)

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\*DAVID A. DEBERRY  
State Bar No. 140441  
WOODRUFF, SPRADLIN & SMART  
555 Anton Boulevard, Suite 1200  
Costa Mesa, California 92626-7670  
Telephone: (714) 558-7000  
Facsimile: (714) 835-7787

WAYNE W. WINTHERS  
State Bar No. 134659  
City Attorney, City of Orange  
300 East Chapman Avenue  
Orange, California 92866-1508  
Telephone: (714) 744-5580  
Facsimile: (714) 538-7157

Attorneys for Mary E. Murphy, City Clerk of the City of Orange,  
City Council of the City of Orange and City of Orange

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Telephone: (714) 558-7000  
Facsimile: (714) 835-7787

**WAYNE W. WINTHERS**  
State Bar No. 134659  
City Attorney, City of Orange  
300 East Chapman Avenue  
Orange, California 92866-1508  
Telephone: (714) 744-5580  
Facsimile: (714) 538-7157

Attorneys for Mary E. Murphy, City Clerk of the City of Orange,  
City Council of the City of Orange and City of Orange

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1. **ISSUE PRESENTED**

Did the City Council of the City of Orange abuse its discretion in finding the Project was consistent with the City's General Plan?

2. **INTRODUCTION**

Through a combination of misrepresenting the salient facts, taking positions contradicted by the Administrative Record, constant morphing of arguments, and seeking relief and advocating a standard of review contradicted by their own Cross-Petition, Petitioners overly complicate a case which is no more than Petitioners' disagreement with the City Council of the City of Orange's ("City Council") interpretation of its General Plan and findings that the Project, which consisted of a zone change and development of 39 one-acre equestrian estates, riding trails, a public park and two horse arenas, was consistent with the General Plan. It was Petitioners' burden to show that the City Council's interpretation was clearly erroneous and that the Project was not consistent with the General Plan and this showing must be "based on evidence from which no reasonable person could have reached the same conclusion." A Local & Regional Monitor v. City of Los Angeles (1993) 16 Cal. App. 4<sup>th</sup> 630, 648.

Although Petitioners contend otherwise, there is no reasonable doubt that the Orange Park Acres Plan ("OPA Plan") was adopted as and has been to this day, the land use element of the General Plan for Orange Park Acres in which the Project lies. Petitioners' ultimate quarrel is with the City

Council's conclusion that the land use designation on the Project property under the OPA Plan was the one the City Council adopted in 1973 and not the one reflected on a proposed OPA Plan land use map which was never adopted.

The land use designation adopted by the City Council under the OPA Plan was "Other Open Space/Low Density Residential (1 acre)", which permitted the Project. Because prior City staffs did not update the land use map to reflect the City Council's action, the map which appeared with the OPA Plan, which was a proposed map and was never adopted, reflected an Open Space only designation. The General Plan Amendment ("GPA") which was defeated at the election was primarily the City Council's directive to City staff to complete the work never undertaken by City staff in 1973 and did not change the land use designation of the Project property under the OPA Plan.

While Petitioners are now advocating the independent judgment test, in their Cross-Petition they requested the court to find that "the City prejudicially *abused its discretion* by approving the Zone Change and Development Agreement." (Italics added.) Appellants Appendix of Exhibits In Support Of Immediate Stay ("APP"), pg. 27. Petitioners did not in their Cross-Petition seek a declaration that the OPA Plan has been completely superseded as they now do, nor did they seek a declaration that the City's General Plan is so internally inconsistent that the Project may not

proceed until the inconsistencies are rectified, as they do now. Petitioners' contention, plain and simple, was "the Project is not consistent with the General Plan or the OPA Specific Plan" and the relief they sought was a declaration to that effect. APP, Cross-Petition, pg. 27.

This case is primarily about what actions determine the contents of the City's General Plan, those of the City Council embodied in resolution or those derived from ministerial errors of City staff? It is also about who resolve ambiguities within the General Plan? Put simpler, who interprets and determines the contents of the City's General Plan, a document the parties all agree is the constitution for development for the City—the City Council or City staff?<sup>1</sup>

The very first case cited in Petitioners Opening Brief provides the answer—it is the City Council. "The general plan *adopted by a legislative body* is [the] constitution for future development..." (Italics added.) DeVita v. County of Napa (1995) 9 Cal.4<sup>th</sup> 763, 773. Petitioners cite to no case and no statute which stands for their premise that a combination of time, misstatements by City staff and developers, and a failure of City staff to perform its ministerial functions can trump a General Plan which met all statutory requirements for adoption. This would turn land use law on its head and by sheer inaction, ultimately make City staff the de facto City

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<sup>1</sup> The City Council agrees with the policy reasons presented by Milan as to why the City Council's actions must determine the contents of a General Plan and joins in Milan's Answer Brief on the Merits.



Council.

If this Court determines that the City Council did not abuse its discretion in concluding that the land use designation in the OPA Plan was Open Space/Residential, a designation that the Project is clearly consistent with, the issue in this case boils down to one which is nearly identical to the issue addressed by the court in Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles (1986) 177 Cal. App. 3d 300 (review denied). In that case, the court upheld the board of supervisors' determination that the community general plan designation of urban/residential (15 dwelling units per acre) for the Malibu/Santa Monica Mountains area controlled over the designation of non-urban/rural in the county-wide general plan (1 dwelling unit per acre) and that the project, which proposed 15 units per acre, was legally consistent with the county's general plan, although not entirely consistent with the county-wide land use policy map.

Similarly, in this case the City Council's findings were that the Project was consistent with the existing land use designation of "Other Open Space/Low Density Residential (1 acre)" in the OPA Plan and other goals and policies of the General Plan, although not entirely consistent with City-wide General Plan land use map. In reaching this conclusion the City Council adopted 56 pages of General Plan consistency findings in the Final Environmental Impact Report for the Project ("Final EIR", AR, 7:2587) which Final EIR identified 68 goals and over 200 policies within the

General Plan that the Project was either consistent with or which did not apply. None of the Final EIR findings relied upon the General Plan Amendment ("GPA"). It is difficult to see how the City Council could have been more comprehensive in adopting findings that the Project did not need the GPA to be consistent with the General Plan.

Petitioners' contention that the Project cannot be consistent with the General Plan if not entirely consistent with the City-wide General Plan land use map is directly contradicted by Las Virgenes, "The mere examination of land use and other policy maps is insufficient to determine consistency." Las Virgenes, *supra*, 177 Cal.App. 3d at 310. "State law does not require perfect conformity between a proposed project and the applicable general plan..." Friends of Lagoon Valley v. City of Vacaville (2007) 154 Cal. App. 4<sup>th</sup> 807, 817. The reality is that no project is entirely consistent with a general plan "[b]ecause policies in a general plan reflect a range of competing interests..." San Franciscans Upholding the Downtown Plan v. City and County of San Francisco (2002) 102 Cal.App. 4<sup>th</sup> 656, 678.

From what was initially a straightforward contention in the Cross-Petition that the Project was not consistent with the City's General Plan and what the Petitioners called the Orange Park Acres "Specific" Plan, Petitioners' theories as to why the Project is inconsistent have grown almost exponentially as this case wound its way through the courts. They appear to be: (1) the OPA Plan is completely "inoperative" because it was

"superseded" when the City Council adopted the 1989 General Plan; (2) if it wasn't superseded in 1989, then it was superseded when the City Council adopted the 2010 General Plan; (3) if wasn't superseded either in 1989 or 2010, then these General Plans re-cast the OPA Plan as a "subordinate" document; (4) if the OPA Plan has not been superseded or re-cast as a subordinate document and is still a General Plan document, the sole Open Space designation in the never adopted OPA Plan land use map is the true OPA Plan designation on the Project property; and 5) even if the OPA Plan is a General Plan document and designates the Project Property as Open Space/Residential, it is so internally consistent that the Project cannot go forward.

None of Petitioners' "if not this, then that" theories have merit. The OPA Plan was adopted as a General Plan document and all five times it has been amended, from 1977-2011, it was amended by way of a General Plan amendment. To adopt a specific plan, the State Planning Law requires notice, hearing and adoption by City Council resolution. Petitioners point to no resolution in which the City Council adopted the OPA Plan as anything but a General Plan or designated the Project property under the OPA Plan as anything other than Open Space/Residential. The *same* City Councils which adopted the 1989 and 2010 General Plans within a year in each case, adopted resolutions in which they specifically found the OPA Plan to be part of the City's General Plan. Much of Petitioners'

inconsistency argument relies on the fact that a never adopted OPA Plan land use map was not updated by City staff to reflect the City Council's formal action to designate the Project property as Open Space/Residential. As adopted by the City Council, the General Plan is not legally inconsistent.

Petitioners' position is also belied by their own pre-litigation words. In a 2009 letter submitted during the 2010 General Plan update process by Petitioners' legal counsel (Shute Mihaly & Weinberger) on Petitioners' behalf, Attorney Rachel Hooper wrote, "OPA greatly values the Orange Park Acres Specific [*sic*] Plan, which enunciates the values and features that make Orange Park Acres a wonderful place to live." Shute Mihaly Letter, AR, 14:6253. And as noted above, in their Cross-Petition Petitioners state that the OPA Plan "is applicable to the Project site." APP, pg. 27. In spite of this, Petitioners argue in this litigation that the OPA Plan was completely superseded—as early as 1989, and is inapplicable to any property.

Petitioners' version of the City's General Plan is much different than the one adopted by the City Council. It is a version derived by the passage of time, City staff's omissions, sporadic incorrect references, the words of developers, staff reports, and inferences of city council intent which completely contradict the City Council's formal pronouncements. They contend that the OPA Plan, against which all development in Orange Park

Acres has been measured for the past 40 years, became completely "inoperative" without any public notice, public hearings and indeed, without anyone's knowledge or alternatively that it is a "subordinate plan, even though it has never been adopted as such. They rely on the same type of administrative evidence that the court in No Oil v. City of Los Angeles (1987) 196 Cal.App. 3d 223, found to be unpersuasive and which, in addition, directly contradicts the formal findings of the City Council.

The GPA that was defeated at the Referendum election did not change the land use designation in the OPA Plan, but rather was the City Council's effort to bring greater internal consistency to its General Plan to reflect the existing Open Space/Residential designation in the OPA Plan by directing City staff to perform its ministerial function to update the OPA Plan to reflect past actions taken by the City Council that prior City staffs had failed to perform. The GPA was an attempt to at least start the process that the Petitioners themselves requested in 2009, "OPA believes that the time has come to update the Orange Park Acres Specific [*sic*] Plan so that it can continue to usefully guide the development of this community." Shute Mihaly Letter, AR, 14:6254.

The Appellate Court found the "City may fix errors in the Orange Park Acres Plan and the Policy Map by reference to previously adopted resolutions of the City Council." Appellate Court Opinion, pg. 43. The Appellate Court was mindful that the GPA was not necessary to direct City

staff to perform its ministerial function to reflect past City Council actions that were beyond challenge. If the Referendum accomplished anything, its chief accomplishment was to keep the Open Space designation on the City-wide General Plan land use map. But under the holding of Las Virgenes and other cases, this alone did not cause the Project to be legally inconsistent with the General Plan.

Petitioners continue to misrepresent some of the significant facts in this case. First, they contend that the City Council approved the developer's request to change the General Plan designation to solely Low Density Residential.<sup>2</sup> This misstates the record. The undisputed fact is that the City Council rejected this request, finding the Project was consistent with the existing and controlling General Plan designation of Open Space/Residential in the OPA Plan.<sup>3</sup> It directed that the City-wide General Plan reflect this designation to make the General Plan designations consistent. Second, Petitioners contend that "the City Council adopted

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<sup>2</sup> "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 on Milan's property on the General Plan's 'Land Use Policy Map' from Open Space to residential." Petitioners' Opening Brief, pg. 3.

<sup>3</sup> "The title of the resolution, 'AFFIRMS THE SITE'S EXISTING LAND USE DESIGNATION OF 'OTHER OPEN SPACE AND LOW DENSITY (1 ACRE).' The first recital of the resolution again 'affirms the site's *existing* land use Designation of Other Open Space and Low Density (1 acre)...Resolution No. 10566 further states that the purpose of the General Plan Amendment is to 'clarify the *original and unchanged terms* of the existing Orange Park Acres Plan...' Appellate Court Opinion, pg. 20 (italics not added). Resolution 10566 is attached as Exhibit 1.

Milan's requested Zone Change, rezoning the Property from 'Recreation/Open Space' to residential, 'R-1-40')." The City Council did not adopt Milan's requested zone change, but rather adopted a dual designation of R-1-40 and Open Space. AR, 4:1828, 1832.

Petitioners bemoan the Appellate Court's conclusion, contending it thwarts the people's constitutional right of referendum because it allegedly renders their Referendum meaningless. However, doesn't Petitioners' position that the OPA Plan is "inoperative", "outdated", or completely "superseded", do the same thing? If the OPA Plan is completely superseded, then the GPA which amended the OPA Plan and directed that the City-wide General Plan land use map be made consistent with the OPA Plan would necessarily be meaningless. If the GPA was meaningless, then it would follow that the Referendum was meaningless. Since Petitioners contend that the OPA Plan was superseded when the City Council adopted the 1989 General Plan, this would also render meaningless two general plan amendments to the OPA Plan adopted in 1990 and 2003. Under what is now their primary theory, Petitioners indeed ask this Court to find the entire OPA Plan meaningless.

Petitioners' argument is contradictory and irreconcilable. Petitioners hold up the General Plan as the constitution for development, but take a position which relies upon wholesale articles of this constitution completely falling out or being re-cast as an undefined subordinate plan without notice,

hearing or formal adoption by the City Council and without anyone's knowledge. Petitioners argue for a standard of review that is contrary to the standard they espoused in their Cross-Petition. Petitioners contend that the 2010 General Plan "unambiguously" superseded the OPA Plan, yet in their Cross-Petition contend it is a specific plan applicable to the Project. Petitioners assert that the OPA Plan was as early as 1989 completely superseded, yet by their own words stated as late as 2009, that they "greatly value the Orange Park Acres Specific [*sic*] Plan." They ask the City Council "to update the Orange Park Acres Specific [*sic*] Plan...so that it can continue to usefully guide the development of this community", but when the City Council attempts to do so they contend it no longer exists. Petitioners were blissfully wed to the OPA Plan in 2009, stating that it "enunciates the values and features that make Orange Park Acres a wonderful place to live." Shute Mihaly Letter, AR: 14:6254. Now because they disagree with the City Council's interpretation, they want a divorce.

As Petitioners themselves contend in their Cross-Petition, this case ultimately revolves around Petitioners' quarrel with the City Council's interpretation of the contents of its General Plan and findings of General Plan consistency. The law is clear, a "city's findings that the project is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion." A Local & Regional Monitor v. City of Los Angeles (1993)



16 Cal. App. 4<sup>th</sup> 630, 747. Petitioners fall well short of making the necessary showing.

3. **STATEMENT OF THE CASE**

A. **The Contents Of The City's General Plan May Be In More Than One Document And Are Determined Through Formal Actions Taken By The City Council**

One thing the parties do agree upon is the place that the General Plan has among the City's land use regulations. "The general plan adopted by a legislative body is a 'constitution for future development' [citation] located at the top of the hierarchy of local government law regulating land use." DeVita v. County of Napa (1995) 9 Cal.4<sup>th</sup> 763, 773.

However, a City's general plan is not required to be, as Petitioners contend, contained within a single document. Pursuant to Government Code section 65301, "(a) The general plan may be adopted in any format deemed appropriate or convenient by the legislative body, including the combining of elements. (b) The general plan may be adopted as a single document or as a *group of documents* relating to subjects or geographic segments of the planning area." (Italics added.)

Many cities and counties have general plans covering their entire jurisdiction and more focused community general plans for subareas of their jurisdictions. See Vineyard Area Citizens v. Rancho Cordova (2007) 40 Cal. 4th 412, 421; Gonzales v. County of Tulare (1998) 65 Cal.App. 4<sup>th</sup>

777, 781; discussing the consistency of a proposed zone change "with a general plan for the area, known as the 1988 Cutler-Orosi Community Plan..." The court in Las Virgenes, in discussing the consistency of a zone change with a county's general plan, noted that the county's "General Plan consists of two major components: (1) the countywide chapters and elements which set countywide policy framework, and (2) area wide and community plans which deal with local issues of unincorporated communities." Las Virgenes, supra, 177 Cal.App. 3d at 310.

The OPA Plan is no different. It was adopted as a general plan relating to the geographic segment of the City's planning area known as Orange Park Acres and has never been adopted or amended as anything else. While the City-wide General Plan land use element consists of "goals, policies, and implementation programs [to] address eight citywide issues" (2010 General Plan, AR, 10:4053), as stated by the City Council in 1989, "the Orange Park Acres Plan, which is part of the General Plan, *provides a more specific direction for the Plan area.*" (Italics added.) AR, 9:3903. The City Council in 1989 was doing no more than describing the nature of a community general plan, whose "role is to identify more specific land uses, determine actual boundaries between land use categories, and establish more specific residential density ranges within the general parameters established by the countywide goals and policies." Las Virgenes, supra, 177 Cal.App. 3d at 310.

Petitioners' contention that having a general plan as a group of documents "breeds instant confusion" (Petitioners' Brief, pg. 48) is without merit. To the extent confusion is caused by a city or county having a jurisdiction-wide general plan in one document and a more focused general plan for a specific geographic area in another, State law specifically permits it. If Petitioners desire a requirement that a city's general plan must be contained in a single document to avoid this alleged "confusion", that is something they should take up with the Legislature.

In adopting or amending its General Plan, the City must follow the procedures set forth in Government Code section 65350 et seq., which provides, "Cities and counties shall prepare, adopt and amend general plans and elements of the general plans in the manner provided in this article." In summary, the requirements are opportunities for the involvement of citizens, public agencies and other community groups, a noticed public hearing before the planning commission and written recommendation, a noticed public hearing before the City Council and finally, the City Council must "adopt or amend a general plan by resolution..." Government Code sections 65351-65355. "A specific plan shall be prepared, adopted, and amended in the same manner as a general plan...[and]...may be repealed in the same manner as it is required to be amended." Government Code section 65351.

There are several relevant things to take away from this summary.

First, is the statement in DeVita that the general plan "adopted by the legislative body" is the constitution for future development. Second, is that as provided in Government Code section 65301(b), a general plan may be adopted as a group of documents. Third, is that adoption and amendment of a general plan and specific plan must provide for involvement of the public, be noticed, public hearings must be held, and they must be adopted by a resolution of the City Council.

**B. Project Description, Setting And Processing**

The Project lies within a "sub-community of the City of Orange known as Orange Park Acres (OPA) which includes County and City properties...OPA is characterized by rural environment and equestrian activities...Many of the lots and residents maintain equestrians, other farm animals, and structures associated with their care...The Zoning Designation of property surrounding the project...is designated Single Family Residential with a...square foot minimum lot size (R-1-40)." AR, 2:492. "The project site contains 51.1 acres." AR, 1:61. "The site was formerly used as a golf course, tennis club, private pool and clubhouse banquet facility. All former uses...have been discontinued." AR, 3:1093. The Project lies in the middle of Orange Park Acres and as noted above, is completely surrounded by the same uses it proposes, i.e., one-acre equestrian estates with trails.

The Project came forward initially to the Planning Commission.

Milan's Project application consisted of: (1) a proposed change in the General Plan Land Use designation in the City-wide General Plan from Open Space to Estate Low Density Residential; (2) a change in the OPA Plan general plan land use designation from Other Open Space/Low Density (1 acre) to Single Family Residential (1 acre minimum); (3) a zone change from the existing Recreation Open Space to Single Family Residential, R-1-40; and approval of the Development Agreement. AR, 2:491-492. The Planning Commission "unanimously (5-0) recommended that the City Council approve the project as presented...with the exception that they recommended that the General Plan Land Use Designation for the site remain as 'Other Open Space and Low Density Residential (1 acre).'" AR, 3:1101.

In considering the Planning Commission's recommendation, the City Council, by way of Resolution No. 10566, also rejected Milan's proposed General Plan land use designation changes and instead adopted a general plan amendment which made text amendments to the OPA Plan to "clarify the *original and unchanged terms* of the *existing*" land use designation" and which "affirms the site's *existing* land use Designation of 'Other Open Space and Low Density (1 acre)'. " (Italics added.) AR, 4:1948, Exhibit 1. The City Council also directed staff to "make the General Plan's land use designations for the subject property consistent throughout the General Plan", meaning consistent with the Open Space/Residential designation.

AR, 4:1948, Exhibit 1.

Although not recommended by the Planning Commission, the City Council also rejected Milan's proposed zone change to solely residential, choosing instead to adopt a dual Open Space/Residential zoning (the "Zone Change") to delineate Open Space zoning for the trails, ride-in-arena and park from the residential portion of the Project. AR, 4:1827-1832. The City Council also approved the Development Agreement. AR, 4:1833-1835. Thus, as approved by the City Council, the OPA Plan designation of Open Space/Residential stayed the same, City staff was to update the OPA Plan to reflect this designation, the City-wide General Plan land use policy map was to be modified to reflect this designation and the Zone Change was adopted to mirror that designation.

**C. Adoption Of The Orange Park Acres Plan**

In 1973 a development committee for Orange Park Acres was established to create a "specific plan identifying goals, objectives, policies and recommended land uses," to resolve issues of "major controversy between the developers, major landowners and residents of the area." AR, 11:4915. "Members of this Committee represent the City of Orange, County of Orange, residents of Orange Park Acres, major land owners and developers of Orange Park Acres." AR, 11:4915. This Committee developed the "Orange Park Acres Specific Plan" which covered both areas in the City and in the unincorporated area of the County. It was "the result

of a ten (10) week study prepared by the J.L. Webb Consulting Firm under the direction of the Orange Park Acres Development Committee. The Committee members, appointed by the City Council, represent the City of Orange, County of Orange, Orange Park Acres, residents and property owners." AR 9:3674. It was presented jointly to the City's Planning Commission and the County of Orange Planning Commission, which held a duly advertised public hearing on November 19, 1973. AR, 11:4901.

Although presented as a specific plan by the Committee, both the County and City's Planning Commissions, recommended adoption of the OPA Plan as the General Plan for Orange Park Acres. In adopting Planning Commission Resolution 85-73, the City Planning Commission recommended, among other things, "that said Plan be adopted as representing a portion of the land use element of the General Plan" and further to "Designate the Golf Course as Other Open Space and Low Density (1 acre)." AR, 9:3677. The Golf Course referenced in the OPA Plan is the site of the Project. Joint Resolution 86-73 adopted by both the City and County Planning Commissions at the same meeting states, "the unincorporated portion of the plan is included in the Orange County General Plan..." AR, 9:3679. The minutes of the November 19, 1973 meeting reflect that the City Planning Commission adopted Resolution 85-73 "recommending the adoption of the [OPA] Plan, as amended by the County." AR, 9:3683. The County's amendments included, "3. Designate