



SUPREME COURT  
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Case No. S212800

**In the Supreme Court**  
*of the*  
**State of California**

Frank A. McGuire Clerk  
Deputy

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

vs.

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.*

**MILAN REI IV LLC'S ANSWER BRIEF ON THE MERITS**

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

From Judgment of the County of Orange, Honorable Robert J. Moss  
(Superior Court Case No. 30-2011-00494437)

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MILAN REI IV, LLC

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## I. INTRODUCTION

Local legislative bodies are most qualified to interpret, construe, and give effect to their own legislative acts. A court can only intervene if there is no basis for the legislative act. This Court should re-affirm this well-established law.

This Court has framed the issue as follows:

Is the proposed development project of low density housing at issue in this case consistent with the city's general plan?

The answer is yes. The City Council of the City of Orange<sup>1</sup> has answered this question "yes" and this Court should uphold that determination because it is supported by both the law and the record.

The issue presented has three fundamental parts: (1) who has the authority to determine consistency between the proposed project and the general plan, (2) what is the general plan that must be evaluated, and (3) is the Project consistent with that general plan? The applicable land use law and the City's record of actions and determinations establish:

1. The City Council is the proper legal entity to construe its laws to determine if the proposed Project is consistent with the City's General Plan.

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<sup>1</sup> Hereinafter the following abbreviations will be used: the City of Orange is the "City"; the City Council for the City is the "City Council", the City Attorney for the City is the "City Attorney", and the City's Planning Commission is the "Planning Commission".

2. The 1973 Orange Park Acres Plan (“OPA Plan”) land use designation for the property of “other open space and low density (1 acre)” was validly enacted as part of the City’s General Plan and was never subsequently repealed or modified. (See Exhibit 1.) Thus, the OPA Plan land use designation governs development on the Property.

3. The City Council acted reasonably in interpreting its own General Plan to determine that the Project is consistent with the open space and residential designation. Thus, the Court must defer to the City Council’s finding of consistency.

The Petitioners failed to meet their burden to refute any of these points. Petitioners cannot establish the City’s conduct is not supported by the record. To the contrary, Petitioners’ position is premised on the presumption that a clerical error trumps official legislative acts. However, when there is a mere clerical error in failing to update legal documents to reflect the law as adopted, the local legislative body does not need to resubmit that issue for a vote. Rather, the staff should correct the administrative error.

The Court of Appeal correctly held that the City Council acted reasonably in finding Milan’s proposed development consistent with the General Plan designation for the Property. The Court of Appeal also correctly determined that the Petitioners’ arguments were not supported by

either the law or the facts. The same is true in the Petitioners' Opening Brief on the Merits ("OB").<sup>2</sup>

This Court should affirm the Opinion and remand the case to the trial court to issue the writ of mandate directing the City to permit Milan to develop the Property in accordance with the actual and original General Plan designation for the Property, "Other Open Space and Low Density (1 acre)," the Development Agreement, and all other applicable requirements of the City.

## **II. STATEMENT OF FACTS**

### **A. The City Adopted the OPA Plan as Part of the General Plan in 1973**

Orange Park Acres is a semi-rural region in the City and County of Orange, which covers both incorporated and unincorporated land. (AR2:492.) In 1973, the City and County of Orange put together a committee of various individuals and interest groups to collect information and address controversies about the development of the area. (AR11:4915.) After detailed discussions and information gathering, the committee prepared a document entitled "Orange Park Acres Specific Plan" (the "proposed plan"). (AR9:3674-3675; AR11:4901.) As noted by the Court

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<sup>2</sup> Milan agrees with, joins in, and adopts the City's Answer Brief, which discusses the factual liberties taken by Petitioners with the record and all arguments set forth therein. In turn, Milan focuses this Answer Brief on the legal and policy issues presented to the Court.

of Appeal “[a]lthough the document referred to itself as a ‘specific plan,’ there is no discussion within the document as to whether it was intended to be a statutory ‘specific plan’ under [Govt. Code] section 65450.” (Slip Opinion (“Op.”) p. 10, fn 4; AR9:3903.)

The proposed plan listed a variety of goals, objectives and policies, including that the community should include a mix of low-density homes, one acre residential lots with clusters of denser single-family homes, and contain new open spaces, including trails, parks, hillside slopes, and greenbelts. (AR9:3677; AR11:4902.) As for the Ridgeline Property, the proposed plan suggested that the General Plan should require the permanent retention of the golf course, and if the golf course did not create a viable economic return, the area should be preserved for recreation. (AR11:5033.)

The citizens expressed a different view about the Ridgeline Property during the public review process.

On November 19, 1973, the Planning Commission, in conjunction with the County of Orange’s planning commission, held a joint public hearing to consider the adoption of the proposed “Orange Park Acres Plan as a part of the land use element of the General Plan encompassing a portion of incorporated territory and unincorporated territory in the General Planning Area of the City....” (AR9:3680-3689; AR11:4901-4903.) During the hearing many residents expressed the wish to designate the golf course for low density residential housing to match the surrounding area.

(AR9:3681-83; AR9:3676-3678.) The Planning Commission amended the general plan based on these comments.

By Resolution No. PC-85-73, the Planning Commission recommended the adoption of the “Orange Park Acres Plan,” with several amendments to the proposed plan. (*Id.*) The Planning Commission specifically found that “the Orange Park Acres Plan meets General Plan criteria set forth in Section 65302, (a)...Sections 65352 and 65357 further authorize the Planning Commission and local legislative body to adopt General Plan elements and amendments for all or a portion of a city and a surrounding planning area by resolution....” (*Id.*) One of the amendments was to “[d]esignate the Golf Course as Other Open Space and Low Density (1 acre).” (*Id.*) The Planning Commission further resolved to direct its staff “to prepare implementation ordinances or resolutions...consistent with this resolution and the Orange Park Acres Plan.” (*Id.*)

On December 26, 1973, the City Council adopted Resolution 3915, which approved the OPA Plan, with the Planning Commission amendments, as “part of the required land use element to be included in a General Plan for the City of Orange.” (AR3:1148-1149; AR9:3688-3689; AR11:4899-4900.) Resolution 3915 found that the OPA Plan met the “General Plan criteria set forth in Section 65302(a) of the California Government Code.” (AR3:1148-1149; AR9:3688-3689.) It also adopted amendments proposed by the Planning Commission, which included an

amendment to “designate the Golf Course as Other Open Space and Low Density (1 acre).” (AR3:1141-1347; AR9:3683-3689.) The Resolution and Committee Meeting Notes were made available to the public with the OPA Plan.

Apparently, the City staff did not revise the proposed plan to make the OPA Plan reflect the Planning Commission amendments adopted by the City Council. This clerical oversight is central to Petitioners’ position.

**B. No Subsequent Legislative Planning Activity Changed the OPA Land Use Designations**

Between 1973 and 1977, the portions of the Ridgeline Property where the golf course was ultimately constructed were zoned for single-family residential lots. (AR9:3784.) In 1977, the City Council approved Resolution 4448, which contained certain revisions to the OPA Plan including, “deletion of the word ‘specific’ from the text of the Orange Park Acres Area Plan.” (AR9:3774.) Later that year the same City Council adopted Resolution 4659, which re-zoned some unincorporated portions of the Ridgeline property to recreation open space from the County designation of E4-1, one-acre minimum lot sizes, which it indicated was necessary to permit the use of a clubhouse. (AR9:3784-3785.) This re-zoning did not change OPA Plan dual land use designation.

In 1985, the owner of the golf course sought to have the City annex the remainder of the Ridgeline Golf Course. (AR9:3798-3804, 3818, 3892-



3895.) The general plan land use designation adopted by the City and the County permitted both open space and residential zoning for the Property. The Planning Commission staff report, which preceded the City Council's action, reflects the open space and residential dual land use designation for the Property of "City of Orange R-O *and R-1-40.*" (AR9:3892, emphasis added.)

The City adopted Resolution 6443 to annex the remainder of the Property, including the golf course, clubhouse and tennis courts. (AR9:3798-3804.) The County zoned the unincorporated portion of the Property as residential; however, the City Council re-zoned the entire Property to Recreation-Open Space. (AR9:3798, 3818.) Both the zoning designations were consistent with the OPA Plan dual land use designation.

In July 1989, the City Council resolved to amend a portion of the OPA Plan. (AR9:3902-3908.) Although the amendment did not affect the Property, the findings of fact are relevant because the City found that "although the Orange Park Acres Plan labels itself as a 'specific plan', it does not contain the level of detail required of a Specific Plan under state law .... Therefore due to its contents, and the manner in which it was adopted, the Plan has the authority of a General Plan, rather than a Specific Plan." (*Id.*)

### **C. The City Adopts the 1989 General Plan**

In 1989, the City Council adopted a new General Plan to address certain areas where the goals of the City had changed. The Land Use portion of the 1989 General Plan acknowledges that there are a series of existing plans which are included in the Land Use Element. (AR11:4634.) The 1989 General Plan specifically references two “area plans,” one of which is the OPA Plan, which “was prepared in 1973. This plan *outlines land use policy for the semi-rural Orange Park Acres area ...*” (AR9:3970, AR11:4619, AR11:4635-4637. AR11:4899-4905, emphasis added.) As a result, the OPA Plan continued to govern the General Plan land use designation for the area.

Eight months later, in April 1990, the same City Council adopted a resolution amending the OPA Plan and specifically referred to the OPA Plan as “part of the Land Use Element of the City’s General Plan.” (AR:3909-3910.)

In July 1998, the City Council observed in a resolution approving a conditional use permit that “the proposed project is consistent with the City’s General Plan and, more specifically, the Orange Park Acres Plan, which was adopted as part of the City’s General Plan....” (AR9:3921.) Although in 2000, 2003, and 2008, the City Council adopted resolutions which referred to the “Orange Park Acres Specific Plan” (AR9:3930, AR9:3938-3955; AR14:6032-6036), the City never took any action to

formally change the status of the OPA Plan to a specific plan or remove it from the General Plan.

The 2003 resolution was adopted as a “general plan amendment” to remove portions of the “Fieldstone Communities” from the scope of the “Orange Park Acres Specific Plan.” (AR14:6032-6036.) These resolutions, however, did not have the effect of removing the OPA Plan from the Land Use Elements of the General Plan.

**D. 2010 General Plan**

In March 2010, the City Council again updated the General Plan, this time to address eight “focus areas” that required additional land use planning. (AR10:4053, 4079-4101.) These eight focus areas did not include the Ridgeline Property. While there are some other contradictory references to Orange Park Acres in the “Specific Plans and Neighborhood Plans” section, the OPA Plan is not listed in the section that discusses adopted, subordinate plans. Rather, the 2010 General Plan reaffirmed that the City intended for the General Plan to continue to implement previously adopted plans for several neighborhoods, including the OPA Plan. (AR10:4028, 4050.)

The 1989 General Plan included the OPA Plan as originally adopted by the City Council in 1973. The 2010 General Plan, specifically revised only eight focus areas, none of which included the Ridgeline Property. As a result, no action has ever been taken by the City to change the General

Plan designation of the Ridgeline Property to something other than “Other Open Space and Low Density (1 acre).” The clerical error regarding the dual OPA Plan designations has remained unaffected for nearly forty years. (See Exhibit 1.)

**E. Milan’s Application to Develop the Property**

Since 1973, the Orange Park Acres area was developed in sections and inhabited primarily by people who resided on large parcels and who enjoyed outdoor and equestrian activities. (APP1:061.) Over time, the Ridgeline Golf Course and Country Club went out of business. (*Id.*)

In 2006, Milan purchased 51.5 acres of land in the Orange Park Acres area that was the struggling Ridgeline Golf Course and Country Club (previously and hereinafter referred to as the “Property”). Due to the surrounding residential one-acre homes, Milan determined that the area would be excellent for single-family equestrian oriented homes that mirror the land use surrounding the Property (the “Ridgeline Project” or the “Project”). (AR1:1.) Additionally, the Project contains provisions for a 2.30 acre public Ride-In-Only Equestrian Arena, Open Space/Passive Park and the donation of an off-site 3.9 acre parcel known as the Mara Brandman Arena Site. (AR4:1841.) In 2007, after careful consideration of the area and community needs, Milan submitted an application to the City to develop the Ridgeline Project. (AR9:4000.)

In 2009, during standard City processing and review of Milan's application, questions arose regarding the General Plan's land use designation for the Ridgeline Property. The City Attorney conducted a comprehensive analysis of all documents and public proceedings that related to the General Plan for the Ridgeline Property to address those questions. (AR7:2642-2650; AR9:3956-3965.)

In December 2009, the City Attorney sent a letter to interested parties with two findings: (1) "The [Orange Park Acres] Plan is a part of the land use element of the City"; and (2) "The [Orange Park Acres] Plan designates the golf course portion of the [Property] as 'Other Open Space and Low Density (1 acre).' As such, [the Project] would be consistent with the Plan's designation of the [P]roperty, although somewhat inconsistent with other aspects of the Plan." (AR7:2646.)

In June 2010, the Planning Commission issued a memorandum, which stated "the [Orange Park Acres] map does not accurately depict the designation as 'Other Open Space and Low Density (1 acre)' as approved by the City Council in 1973. Since the [Orange Park Acres] map was not updated after the City Council action, the City's General Plan Land Use Map reflects the [Orange Park Acres] Plan as it is shown currently." (AR1:484.) In essence the planning commission acknowledged that the 2010 Planning Map did not accurately reflect the land use designation in the OPA Plan because of the 1973 clerical error.

During one of the later hearings regarding Milan's development of the Property, James A. Jackman, a member of both the Orange Park Acres committee and the City Council in 1973, provided insight into the purpose of the amendments to the OPA Plan proposed and adopted in 1973. "The concern of the committee at the time was really what happens if the golf course no longer is the function of the golf course? What are we to do next? And the answer was we were worried that it would be developed as commercial which was inconsistent with the...large parcel of land right in the center of Orange Park Acres, right in the very heart of the area that we were planning and we said it has to be the one-acre estates." (AR13:5464.) He went on to add that "an opportunity to put in a development that we would have, in my opinion, have approved in a heartbeat had it come before us back in 1973, had the golf course wanted to go out at that time." (*Id.*)

#### **F. Project Approval**

In May 2011, the City Attorney reiterated the following findings in a memorandum to the City Council: (a) the OPA Plan is part of the land use element of the City's General Plan; (b) the subsequent adoption of the 1989 and 2010 General Plans did not change the General Plan designation of "Other Open Space and Low Density (1 acre)" for the Ridgeline Property, as originally adopted by the City Council in 1973; and (c) there has never been an amendment to the General Plan to change the designation of the

Ridgeline Property set forth in the 1973 General Plan. (AR4:1446-1450, AR6:2542-2550.)

On June 14, 2011, the City Council approved Resolution 10565, which adopted and certified the Final Environmental Impact Report (“FEIR”) for the Ridgeline Project. (AR4:1455-1458, AR4:1713-1716.)

This approval relied on the City Council’s extensive review and consideration of evidence and information regarding the Ridgeline Property, its General Plan, related planning documents, and public hearings and comments.

Through Resolution 10565, the City specifically found that the FEIR reflected the City Attorney’s and City Council’s independent judgment and analysis, based on a series of Findings of Fact and Statements of Overriding Consideration.

The City’s Findings of Fact included the following:

1. At “the time of the adoption of the [Orange Park Acres] Plan, it was not the intent of the City Council to prohibit residential development on the Property, but rather the very specific intent that one-acre residential lots be permitted on the Property.”
2. “As adopted in 1973, the [Orange Park Acres] Plan specifically permitted low density residential uses on minimum one-acre lots on the Project site.”
3. “The [Orange Park Acres] Plan was adopted by the City in 1973 as part of the Land Use Element of the City’s General Plan. Although since its original adoption, various City documents have incorrectly referred to the [Orange Park Acres] Plan as a specific plan, community plan, and/or area plan, the official records of the City clearly establish that [Orange Park Acres] Plan was adopted only as part of the Land Use Element of the General Plan. There is no evidence that the city has ever adopted (as opposed to incorrectly

referenced) the [Orange Park Acres] Plan as anything other than part of the City's General Plan."

4. "The Record indicates that, most likely through clerical oversight and contrary to the express terms of Resolution No. 3915, the textual changes recommended by the Planning Commission and approved by the City Council were never entered into any official copy of the [Orange Park Acres] Plan."
5. "In approving [General Plan Amendment] 2007-001, it is the intent of the City Council to exercise its legislative discretion to honor the intent of the original adoption of the [Orange Park Acres] Plan, remove any uncertainty pertaining to the permitted uses of the Property, and allow uses on the Property which the City Council believes to be appropriate."
6. "The City's existing zoning classification for the Property (RO) excludes residential land use as permitted use. Changing the zoning of the Project Site from RO to R-1-40 is consistent with the 1973 [Orange Park Acres] Plan land use designations and the land use designations adopted by the City Council's approval of [General Plan Amendment] 2007-001. Therefore, the R-1-40 zoning is consistent with the City's General Plan."<sup>3</sup>

(AR4:1894-1895.)

On June 14, 2011, the City Council also approved the Ridgeline Project, through Resolution 10567, by approving the Tentative Tract Map for the Ridgeline Property, and related plans. The City Council also adopted, for first reading, Ordinance No. 10-11, approving the Zone Change for the Ridgeline Property to establish single family residential ("R-1-40") for a portion of the Property and designating the remainder open space ("R-O"), and Ordinance No. 11-11, approving a Development Agreement between the City and Milan. (AR4:1828, 1832) The City Council also found the zone change was "consistent with and furthers the objectives and policies of the Orange Park Acres Plan, which is part of the

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<sup>3</sup> Petitioners' attempt to challenge to the City's approval of the FEIR or the Findings of Fact failed.



land use element of the General Plan...” (AR4:1828.) The City adopted the ordinances for final reading on July 12, 2011. (AR4:1455-1458, AR4:1713-1716, AR4:1879-1947.)

The City Council adopted Resolution 10566 on June 14, 2011, which approved and incorporated a General Plan Amendment (“GPA”). (AR4:1948-1965.) The title of the resolution was “AFFIRMS THE SITE’S EXISTING LAND USE DESIGNATION OF ‘OTHER OPEN SPACE AND LOW DENSITY (1 ACRE).” (*Id.*) The recital stated “affirms the site’s existing land use Designation of ‘Other Open Space and Low Density (1 acre).” It also stated that the purpose of the GPA was to “clarify the *original and unchanged terms* of the existing [Orange Park Acres] Plan” and to “make the General Plan land use designation for the subject property consistent throughout the General Plan.” (*Id.*, italics added.) The GPA made textual revisions to the original language of the OPA Plan (as opposed to the 2010 General Plan) to ensure that the City’s planning documents were internally consistent and included a new map establishing the Property as “Other Open Space & Low Density (1 ac).” (*Id.*) It also removed reference to retention of the golf course in the OPA Plan, changed the circulation plan map in the OPA Plan, allowed for vinyl fencing (as opposed to only wood fencing), and updated land use statistics detailed in the original OPA Plan. (*Id.*)

All three resolutions were presented for final adoption and approval on July 12, 2011. (AR4:1721-1729.) Thus, the City Council approved the Project, found it was consistent with the current General Plan for the City, changed the zoning to accommodate the Project, and entered into the Development Agreement through the adoption of Ordinances 10-11 and 11-11. (AR4:1730-1756.) The City Council's adoption of the GPA did not change land use elements of the General Plan, but rather it corrected inaccuracies. The inaccuracies were not previously noticed because this was the first instance where the City reviewed the General Plan land use designation for the Property to determine permissible uses.

#### **G. The Referendum**

On June 17, 2011, Petitioners sponsored and circulated a referendum petition asking for voter approval of the GPA set forth in Resolution 10566. (APP1:138-280.) On August 23, 2011, the City Attorney prepared an opinion for the City Council regarding the City's ability to proceed with the Ridgeline Project in light of the referendum. (APP1:281-285.) The City Attorney determined that the repeal of GPA 2007-0001 would "not necessarily negate the other actions the City Council took related to the Ridgeline Equestrian Estates project, such as the change in zoning and approval of the Development Agreement." (APP1:282.) The City Attorney opined that the GPA would function to remove some of the internal inconsistencies which occurred over time. (APP1:282-284.) He went on to

state that “the Project is compatible with just about all of the objectives, policies, general land uses and programs specified in the General Plan and this compatibility analysis is not altered to any significant degree by a repeal of the GPA.” (APP1:284.)

On September 6, 2011, the City Council placed the referendum calling for approval of the GPA on the November 6, 2012 election ballot. (APP1:286-288.) In the November 6, 2012 election, the voters in the City rejected the GPA.

### **III. PROCEDURAL HISTORY**

#### **A. Trial Court Litigation**

On July 26, 2011, Milan filed a petition for writ of mandate and complaint for injunctive and declaratory relief to stop the referendum from proceeding because of multiple violations of the Elections Code, which was later amended. (APP1:001-017, AA004-041.)

On October 5, 2011, Petitioners filed a “Cross-Petition for Writ of Mandate and Cross-Complaint for Declaratory Relief” against the City and the City Council, and cross-real party in interest, Milan. Petitioners alleged a single cause of action, for “Violations of State Planning and Zoning Law,” alleging that the City abused its discretion through its June 14, 2011 approval of the Zone Change and Development Agreement because “the Project is not consistent with the General Plan or the OPA Specific Plan.” (APP1:019-029.)