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

PETITIONERS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

The central question in this case is whether a residential subdivision proposed by Real Party Milan is consistent with the City of Orange's 2010 General Plan.

Any member of the public examining the City's General Plan would find that its Land Use Policy Map sets forth the land uses permitted on all properties throughout the City. On this map, Milan's Property is designated solely "Open Space."

The General Plan also references a document called the "Orange Park Acres Plan," which it identifies as a "specific" or "neighborhood" plan that "must be consistent with" the General Plan. A member of the public who obtained a copy of this OPA Plan would likewise find that it designates Milan's Property solely for open space uses.

Based on these investigations, the only reasonable conclusion would be that the General Plan (as well as the OPA Plan) prohibits residential development on Milan's Property. Milan and the City initially came to this exact same conclusion. That is why in 2007 Milan requested—and in 2011 the Orange City Council approved—a General Plan Amendment ("GPA"), changing the designations for Milan's Property from Open Space to residential. The GPA, however, was rejected by the voters in November 2012.

Having lost at the ballot box, Milan and the City (collectively, "Real Parties") now attempt to evade the effect of the voters' Referendum based on a remarkable legal theory. This theory is centered on a 1973 Planning Commission resolution that Milan's lawyers unearthed late in the planning process, which recommended amending the OPA Plan to designate a portion of the Property for residential use. After its adoption, this recommended residential designation was promptly forgotten, was never implemented, and was, in any case, entirely superseded by the City's adoption of new general plans in 1989 and 2010. Nevertheless, Real Parties now insist that this obsolete 1973 residential designation is the controlling "general plan" designation for the Property today.

Although their theory defies common sense and directly contradicts decades of black-letter law, Real Parties claim it is entitled to "great weight" and "considerable deference." Likewise, Real Parties repeatedly invoke, and ask this Court to defer to, the City Council's alleged findings that the Project did not need the General Plan Amendment to be consistent with the General Plan.

The City Council, however, never made any such findings. Rather, the City repeatedly acknowledged that the Project was *inconsistent* with the existing Open Space designation in the 2010 General Plan, as well as with the open space designations in the OPA Plan. Accordingly, only after adopting the General Plan Amendment did the City Council approve

the Development Agreement and Zone Change for Milan's Project, finding that these approvals were consistent with the 2010 General Plan "*as amended by*" the GPA to allow residential use on the Property.

What Milan and the City truly seek from this Court is not deference to the City Council's legislative findings (which recognize that the Project's approval was wholly contingent on the GPA), but rather deference to the City's litigation theory (which posits that the GPA was meaningless). While the validity of this litigation theory is a legal question that this Court reviews *de novo*, Real Parties' theory cannot be upheld under any standard of review. Every element of Real Parties' litigation theory conflicts not only with fundamental principles of planning law, but also with Real Parties' previous positions and with the undisputed facts of this case.

In fact, the true story of what actually transpired in this case is almost unrecognizable in Real Parties' briefs, which attempt to re-write the land use history of the Property, ignore the plain text of the City's General Plans, and fundamentally distort the nature and effect of the General Plan Amendment adopted by the City Council.

For example, while Real Parties now argue that the General Plan Amendment is irrelevant, prior to its adoption, both the City and Milan repeatedly recognized that the GPA was critical for Project approval. Indeed, as Milan emphasized to the City Council at the public hearing on

the GPA, "the one point we agree with" Orange Citizens on is that *"you need to do a General Plan amendment."* AR-13:5434.

While Real Parties now argue that the Project can proceed even though it is "not entirely consistent with the City-wide land use policy map," the General Plan itself expressly mandates that City land use decisions *must be* "consistent" with "the land uses shown on the Land Use Policy Map." Exhibit A to Opening Brief on the Merits ("Exhibit A") at 9.

While Real Parties now argue that the 2010 Open Space designation for Milan's Property was a "clerical error," the record establishes that the City Council affirmatively retained this long-standing designation in adopting the 2010 General Plan.

While Real Parties now argue that the "OPA Plan from time of adoption . . . has been considered as the land use element of the General Plan" (City Answer at 27), this claim is demonstrably false. It is directly contradicted by, among other things, the plain text of the City's 1989 and 2010 General Plans, the certified environmental impact reports ("EIRs") for each of these documents, numerous City Council resolutions, and Milan's own development application. These documents, and the record as a whole, demonstrate that the City and the public have long treated the OPA Plan *not* as "part of" the general plan, but rather as a subordinate plan that must be consistent with general plan policies.

Finally, while Real Parties now argue that the Property is controlled by the long-forgotten 1973 residential designation, every single reference to the Property in the administrative record, from immediately after the adoption of the OPA Plan in 1973 until Milan developed its new theory in 2009, states that the Property is designated as Open Space in both the City's General Plan and the OPA Plan.

The critical facts in this case are an undisputable matter of record. It is undisputed that the comprehensive 2010 General Plan designates the Property exclusively as Open Space. It is undisputed that Milan's proposed subdivision is inconsistent with this designation. And it is undisputed that the GPA—adopted for the express purpose of making Milan's Project consistent with the General Plan—was rejected by the voters and never took effect.

As an inescapable matter of fact, law, and logic, the Property's Open Space designation in the 2010 General Plan thus remains in effect and precludes Milan's Project. Real Parties' briefs consist of little more than an elaborate series of smokescreens to obscure the consequences of this inevitable conclusion and defeat the will of the voters.

ARGUMENT

I. THE PRIMARY ISSUES BEFORE THIS COURT ARE QUESTIONS OF LAW BASED ON UNDISPUTED FACTS.

A. Determining What Constitutes the "Applicable" General Plan Under State Law Is a Question of Law.

To decide whether Milan's Project is consistent with the City's General Plan, this Court must first determine, under State law, what that "General Plan" *is*. On March 9, 2010, the City Council adopted Resolution No. 10436, approving a Citywide "Comprehensive General Plan Update" ("2010 General Plan"). AR-14:6277-81. 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" under State law. *See* Gov. Code § 65300.[1] Real Parties, however, claim that the City's General Plan is an entirely different document, one that was never made available to the public, and that somehow incorporates both the OPA Plan and the provisions of the 1973 Planning Commission resolution.

The meaning of the State Planning and Zoning Law, including the question of what constitutes the general plan "applicable" to a development project, presents a "question of law requiring an

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

independent determination by the reviewing court." *Harroman Co. v. Town of Tiburon,* 235 Cal.App.3d 388, 392, 395 (1991).

Milan insists that *Harroman* is inapposite because "[t]his Court is not being asked to interpret the Government Code." Milan Answer at 26. However, it is the Government Code that requires the City to adopt a "comprehensive, long-term general plan" and make it available to the public. §§ 65300, 65357. The Government Code also requires development agreements to be consistent with the applicable "general plan." § 65867.5. Likewise, with regard to zoning, the Government Code provides:

> A zoning ordinance shall be consistent with a city or county general plan only if both of the following conditions are met:
>
> (1) The city or county has *officially adopted* such a plan.
>
> (2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.

§ 65860(a) (emphasis added); *accord* § 65855 (zoning must be consistent with "*applicable* general and specific plans") (emphasis added).

Thus, this Court must determine what, under State law, constitutes the "applicable" and "officially adopted" general plan to which Milan's Zone Change and Development Agreement must conform. This is nearly identical to the question presented in *Harroman,* 235 Cal.App.3d at

395, which was whether the term "applicable general plan," in section 65589.5, meant the general plan existing at the time the developer filed its application, or a proposed "draft" prepared pursuant to section 65361. The court concluded that this was a "question of law." *Id.* at 392; *see also City of Coachella v. Riverside County Airport Land Use Comm'n,* 210 Cal.App.3d 1277, 1289-91 (1989) (determining, as a "matter[] of law," whether an adopted airport plan constituted the "comprehensive land use plan" to which surrounding local governments must conform).

Likewise, in *Lesher Communications, Inc. v. City of Walnut Creek,* 52 Cal.3d 531, 541-43 (1990), this Court determined whether an initiative should be considered part of the city's general plan as a question of law, which the Court resolved based on the initiative's plain meaning and the materials presented to the public.

Contrary to the City's claim (City Answer at 2), Orange Citizens' assertion that the City "abused its discretion" in approving the Zone Change and Development Agreement does not suggest otherwise. It is well established that, under the arbitrary and capricious standard governing review of quasi-legislative actions, courts must "exercise independent judgment" in determining whether an agency action is "consistent with applicable law." *Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n,* 21 Cal.4th 352, 361 (1999); *see also Citizens for East Shore Parks v. California State Lands Comm'n,* 202

Cal.App.4th 549, 572 (2011) (courts apply *de novo* review "'when the case involves resolution of questions of law where the facts are undisputed'") (citation omitted).

Because determining what constitutes the "general plan" applicable to Milan's Project is a question of law, this Court owes no deference to the erroneous legal conclusions of City officials or the courts below.

B. The City Council's Consistency Findings Do not Support Real Parties' Theory Because They Address the Project's Consistency with the General Plan *as Amended* by the General Plan Amendment.

In examining the other main issue before this Court—whether Milan's Project is consistent with the City's "applicable" General Plan—it is critical to keep in mind that the City Council, in adopting its consistency findings, *assumed* that the GPA was in place. Due to the Referendum, however, that GPA never took effect. Thus, the Court here is making an entirely different determination than the City Council did in approving Milan's Project in 2011. The Council determined only that the Project was consistent with the 2010 General Plan *as amended* to designate Milan's Property for residential use. This Court, by contrast, must determine whether the Project is consistent with the *pre-existing* General Plan, which unambiguously designates the Property "Open Space."

1. The City Council's Consistency Determinations Were Contingent on Its Adoption of the General Plan Amendment.

In approving Milan's Development Agreement and Zone Change, the City Council did not find that the Project approvals were consistent with the existing General Plan, but only that these approvals were consistent with the "General Plan, *as amended by [the] General Plan Amendment.*" AR-4:1834 § III(A) (resolution approving Development Agreement) (emphasis added); AR-4:1828 § II (identical finding regarding Zone Change).

Ironically, Real Parties cite to the Council's resolution *amending* the General Plan to allow residential use on Milan's Property as evidence of the Project's alleged consistency with the General Plan *without* the amendment. *See, e.g.,* City Answer at 9 n.3, 16, 47. Not surprisingly, however, the GPA Resolution fails to support Real Parties' position. Rather, the GPA Resolution provides "*[u]pon approval of the proposed amendments to the General Plan*, the project is consistent with the goals and policies of the City's [2010] General Plan." AR-4:1950 (emphasis added) (also stating that Milan's Project is consistent with the "General plan, as texturally [sic] amended" by the proposed GPA). Moreover, because the GPA Resolution was rejected by the voters, it is legally void. *Midway Orchards v. County of Butte,* 220 Cal.App.3d 765, 781-83 (1990).

Real Parties studiously ignore the fact that the relevant consistency findings for the Zone Change and Development Agreement were expressly contingent on the GPA's adoption. Instead, the City cites over and over to "56 pages" in the Project's EIR, alleging that the asserted "findings" on these pages demonstrate that the Project is consistent with the pre-GPA General Plan. City Answer at 4-5, 37, 46, 48, 51.

In fact, the EIR provides just the opposite. It states that the Property's "General Plan" designation is "Open Space" and concludes that "*the proposed project is inconsistent with the existing City General Plan land use designation for the project site.*" AR-6:2182, 2388 (emphasis added). The EIR further acknowledges, under the heading "General Plan Consistency," that its consistency determinations are "contingent on" the adoption of the GPA:

> The Draft EIR . . . concludes that, ***contingent on passage of the proposed General Plan Amendment*** the proposed project would be both consistent [with] and in many cases furthers the City's policies. . . . ***With the approval of the General Plan Amendment*** all General Plan goals and policies would be met by the proposed project.

AR-7:2620 (emphasis added); *see also* AR-7:3240 (EIR stating that "the proposed project is consistent with the General Plan Update, *provided that the General Plan Amendment sought by the applicant is approved*") (emphasis added).

By contrast, the "56 pages" of EIR text repeatedly cited (and erroneously described as "findings") by the City do not even purport to address the Project's consistency with the General Plan *land use designation* for the Property. Instead, they merely discuss the 2010 General Plan policies applicable to new development citywide.[2]

Continuing its attempt to fabricate relevant consistency findings, Milan also cites extensively to the City's resolution certifying the Project EIR. Milan Answer at 13-14. The cited recitals, however, do not find, or even imply, that the Project is consistent with the General Plan in the absence of the GPA. To the contrary, they conclude:

> ***In approving [the GPA],*** it is the intent of the City Council . . . ***to honor the intent*** of the original adoption of the OPA, 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. . . .
>
> ***Changing the zoning of the Project Site*** from [open space to residential] ***is consistent with*** the 1973 OPA Plan Land Use designations and ***the land use designations adopted by the City Council's approval of [the GPA]. Therefore,*** the [residential] zoning is consistent with the City's General Plan.

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[2] *See, e.g.,* AR-7:2670 (finding Project consistent with policy requiring that "new development [be] compatible with the style and design of established structures").

AR-4:1895 (emphasis added). In other words, the City Council found: (1) the General Plan *amendments* would make the General Plan consistent with what it believed the City Council intended to do in 1973; and (2) the residential zoning would "therefore" be consistent with "the land use designations adopted by the [GPA]."

In fact, the only "determination" cited by Real Parties that addresses whether the Project was "consistent with its existing general plan (without the general plan agreement)" is the City Attorney's "opinion"—issued two months *after* the GPA's adoption—that the GPA's repeal would "not necessarily preclude [Milan's Project] from going forward." PA-I:7:APP283-84; Milan Answer at 16, 27. However, the City Attorney's opinion is not a "finding," and it is not entitled to any deference whatsoever. *See, e.g., Floresta, Inc. v. City of San Leandro,* 190 Cal.App.2d 599, 610 (1961) (City Attorney's opinion "cannot change the plain meaning of the ordinance"). Milan cites no authority for the remarkable proposition that this Court should defer to the hedged opinion of a city attorney that a general plan amendment *might* be unnecessary for project approval, despite the fact that his city council earlier came to the exact opposite conclusion.

2. Where, as Here, There Are no Relevant Consistency Findings, the Courts Have Uniformly Determined Consistency Based on the General Plan's Plain Language.

Because the City Council never found that the Project was consistent with the existing (pre-GPA) General Plan, there are no "consistency findings" to which this Court can defer. Thus, the cases cited by Real Parties—all of which address the appropriate standard of review in a challenge to a city council or board of supervisor's express determination that a project is consistent with its general plan—are inapposite. *See, e.g., No Oil, Inc. v. City of Los Angeles,* 196 Cal.App.3d 223, 244-45 (1987).

By contrast, where an inconsistency between a project and the applicable general plan is alleged to result from an initiative or referendum—and, thus, as here, no relevant consistency findings exist—the courts have uniformly determined whether the project and the applicable designations are inconsistent on their face. *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); *see also Merritt v. City of Pleasanton,* 89 Cal.App.4th 1032, 1034, 1036-38 (2001) (determining that a referendum did not create an inconsistency with the city's general plan simply by examining the language of the relevant documents); *Chandis*

Securities Co. v. City of Dana Point, 52 Cal.App.4th 475, 484-85 (1996) (referendum on its face not inconsistent with general plan).

C. Milan's Project Approvals Cannot Be Upheld Under Any Standard of Review.

Even if the Council had found that the Project was consistent with the existing General Plan, such a finding could not withstand judicial scrutiny. A city council's interpretation of its general plan is entitled to deference only where the languge contains "ambiguity" (*No Oil,* 196 Cal.App.3d at 244-45) or requires the agency to "weigh and balance" competing plan policies (*Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors,* 87 Cal.App.4th 99, 142 (2001)).

By contrast, as this Court has explained, neither a city nor a court can interpret its general plan in a manner contrary to its plain language. *Lesher*, 52 Cal.3d at 543. Moreover, "'deference is not abdication.'" *California Native Plant Soc. v. City of Rancho Cordova,* 172 Cal.App.4th 603, 642 (2009) ("*CNPS*") (citation omitted). In *CNPS,* for instance, the court determined that the city's interpretation of the word "coordination" was "unreasonable" and that "deference to the City's interpretation of its general plan" was therefore "unwarranted." *Id.* Likewise, in *Endangered Habitats League, Inc. v. Orange County,* 131 Cal.App.4th 777, 789 (2005), the court held that an agency "cannot articulate a policy in its general plan and then approve a conflicting

project." *See also id.* at 783; *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County,* 62 Cal.App.4th 1332, 1336, 1341-42 (1998) ("*FUTURE*") (setting aside county consistency finding where the project clearly conflicted with a "fundamental, mandatory and specific land use policy").

Thus, where, as here, a project is inconsistent with a specific and unambiguous general plan policy or designation, the courts have not hesitated to overturn its approval, even where the agency adopted relevant consistency findings.

D. The City's Litigation Position Is not Entitled to Deference.

In reality, Real Parties' argument that the Project can go forward despite the Referendum is based not on the City Council's 2011 findings, but on the City's current litigation theory. Thus, contrary to Milan's assertions, the no "reasonable or rational basis" standard of review applicable to "quasi-legislative decisions" (*see American Coatings Assn., Inc. v. South Coast Air Quality Dist.,* 54 Cal.4th 446 (2012)), does not apply here. Indeed, this Court has expressly disapproved cases applying this standard to agency "litigating positions," emphasizing that while such positions may be entitled to some weight, "'the ultimate resolution of such legal questions rests with the courts.'" *Culligan Water Conditioning v. State Bd. of Equalization,* 17 Cal.3d 86, 93, 93 n.4 (1976) (citations omitted); *accord American Coatings,* 54 Cal.4th at 462 (holding that "the

proper interpretation" of a legislative enactment "is ultimately the court's responsibility"); *County of Sutter v. Board of Admin.,* 215 Cal.App.3d 1288, 1295 (1989) (agency "litigation position" based on "the legal reasoning of staff counsel" not entitled to deference).

Moreover, while courts will sometimes defer to an agency interpretation where the agency "'has consistently maintained the interpretation in question,'" a "'vacillating position . . . is entitled to no deference'" whatsoever. *Yamaha Corp. of America v. State Bd. of Equalization,* 19 Cal.4th 1, 13 (1998) (citations omitted); *see id.*at 14 (The "weight" afforded agency interpretations of their laws "turns on a legally informed, commonsense assessment of their contextual merit."). These same "rules of statutory construction apply equally to the construction of" local legislation such as general plans. *Russ Bldg. Partnership v. City and County of San Francisco,* 44 Cal.3d 839, 847 n.8 (1988); *see also Lesher,* 52 Cal.3d at 540, 544.

As detailed below, the City's current litigation position has not been "consistently maintained." To the contrary, every element of this litigation theory conflicts with the City's previous positions, as well as with the undisputed record facts and controlling case law.