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### CALIFORNIA SUPREME COURT: CITY CANNOT THWART REFERENDUM VOTE BY "CORRECTING" ITS GENERAL PLAN

The California Supreme Court has unanimously rejected an attempt by the City of Orange to "correct" its general plan to allow a residential project on property previously designated as open space, after opponents of the project successfully mounted a referendum battle against it. In *Orange Citizens for Parks and Recreation v. Superior Court*, No. S212800 (December 15, 2016), the Court emphatically affirmed the importance of extensive local public participation in the land use planning process. In a detailed analysis, the Court recognized the public's central role at every stage in adopting and amending a general plan. The Supreme Court held that no reasonable person could conclude that the property in question could be developed without a general plan amendment changing its land use designation.

The Court decided that the City of Orange had impermissibly thwarted rather than advanced public participation in deciding to change the "open space" designation of the property in question to allow development, after the citizens of Orange had passed a referendum rejecting reclassification of the property. The Court disagreed with the Court of Appeal's decision to defer to the City's finding that the development was consistent with the general plan, holding that "deference has limits," especially when the City's interpretation was not consistent with the version of the plan available to the public. Instead, the Supreme Court held that the City had abused its discretion in attempting an end-run around the citizens' vote on the referendum.

#### 1. CASE FACTS

The developer Milan REI IV LLC (Milan) proposed developing 50 acres of open space in the Orange Park Acres area of the city and replacing it with a 39-unit residential development. The project was controversial because it would diminish the City's open space. In spite of the controversy, the City approved Milan's application for a general plan amendment reclassifying the property as low-density residential. In response, the Orange Parks Association and a political action committee challenged the City's amendment by referendum.

Historically, the general plan's classification of the Orange Park Acres area was contradictory and confusing. In 1973, after ongoing disputes among landowners, developers and residents, the City adopted an Orange Park Acres specific plan, and also passed a resolution amending the general plan's land use element to permit low-density residential development in Orange Park Acres, if the area could not financially sustain a golf course. The City, however, never actually amended its official maps and the text of the land use element of the general plan to reflect the new residential designation. This led to years of confusion, and in light of the area's murky planning history, Milan and the City believed that a general plan amendment was necessary to develop the property. In 2011, the City Council adopted the general plan amendment and approved Milan's project.

After the referendum opposing the amendment and the development was put on the ballot, the

City changed course at the suggestion of Milan's counsel, who offered an "elegant solution." He suggested that the previous inadvertent failure to update the maps and text of the general plan to designate Orange Park Acres as eligible for residential development was a "clerical error" that did not change the substantive designation of the property. Hence, counsel suggested, and the City agreed, that no general plan amendment was required. The developer then filed a mandate action to stop the referendum.

In 2012, the trial court decided the case in favor of Milan and ordered the City to remove the referendum from the ballot. The citizens group immediately filed a petition in the Court of Appeal for a writ reinstating the referendum on the November 2012 ballot. The Court of Appeal issued the writ and the election proceeded. Fifty-six percent of voters rejected the general plan amendment and Milan's development.

Despite the referendum, the Court of Appeal affirmed the project's approval. Recognizing the "contradictions and ambiguities" in the historical land use classification of the property, the Court of Appeal deferred to the City's interpretation of its own general plan, that arguably allowed the project despite the referendum vote.

## **2. THE SUPREME COURT'S HOLDING**

In reversing the Court of Appeal's holding, the Supreme Court relied extensively on authorities stressing the crucial importance of public participation in the land use planning process. The Court held that meaningful public participation requires that the public have access to an accurate version of the current general plan. The Court noted that the structure of Orange's general plan left no room for the City's interpretation; the land use element unambiguously designated the Orange Park Area as

open space, and no reasonable person could conclude that the property could be developed without a general plan amendment changing the land use designation to residential. Because "public access has little value if the general plan's policies are not readily discernible," the Court held that Orange had abused its discretion in concluding that no amendment was required. This was particularly true given the successful referendum campaign against the previously proposed amendment. In invalidating the City's approval of the project, the Court relied upon the established principle that cities cannot nullify the referendum right by taking a legislative action that is substantially identical to a recently rejected referendum measure.

## **3. IMPLICATIONS FOR CITIES**

Given the Supreme Court's recognition of the crucial importance of meaningful public participation in the planning process, cities should create and document their efforts to involve the public at each stage of the general plan adoption and amendment process. Likewise, cities should pay close attention to the structure of a general plan, which can either constrain or facilitate city discretion when the land use classification history of a particular property is ambiguous. Cities should clarify those ambiguities in a publicly transparent process. Finally, the Supreme Court has emphatically reaffirmed the importance of the referendum power in making land use decisions. In this case, upholding the referendum's results was consistent with the Supreme Court's recognition that the public has the most important role in making land use decisions.

For more information on this case or any of the issues discussed above, please contact Barbara E. Kautz, Dolores Bastian Dalton, or any other attorney at Goldfarb & Lipman LLP at 510-836-6336.

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