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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF CONTRA COSTA

FRIENDS OF PINE MEADOW, an unincorporated association; and TIM PLATT, an individual,

Petitioners and Plaintiffs,

v.

CITY OF MARTINEZ, a municipal corporation; CITY COUNCIL OF THE CITY OF MARTINEZ; and DOES 1 TO 20,

Respondents and Defendants.

DE NOVA HOMES, INC., a California corporation; and DOES 21-40,

Real Parties in Interest.

Case No. N17-0681

Assigned for All Purposes to the Honorable Steven K. Austin

JOINT RESPONSE BRIEF OF RESPONDENTS AND REAL PARTY IN INTEREST DENOVA HOMES, INC.

Hearing Date: December 20, 2018
Hearing Time: 1:30 p.m.
Department: 33

Petition Filed: April 17, 2017

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners ask this Court to second-guess the adjudicatory determination of the Martinez City Council ("Council") that an application for a vesting tentative map for the proposed subdivision of the Pine Meadow Property ("Property") was complete. To make this determination, the Council interpreted and applied the City's General Plan and reviewed its decades-long history—actions that fall within the core of the Council's discretionary authority under State law. The Council considered the plain text of the General Plan (which explicitly assigns a "base residential density" to the area including the Property), and weighed extrinsic evidence and testimony from percipient witnesses, some of whom were personally known to Council members. The evidence presented before the Council included but was not limited to:

- A sworn declaration by the City's former Mayor who served on the Council during the relevant time period.
- A sworn declaration by the City's recent former Planning Manager.
- A sworn declaration by the developer who developed parcels immediately adjoining the Property.
- Testimony and evidence from the County Assessor that *residential property taxes* were collected from the Property's owners continuously throughout the decades since it was added to the City.

After weighing the evidence presented to it and the credibility of the witnesses before it, the Council determined that Property's existing approved General Plan land use designation permits residential development, and that the Council and its predecessors never had taken or approved the actions that would have been necessary to deprive the Property of its development potential and restrict it to "open space" uses. The Council found that City staff's belief that the Property was restricted to "open space" was an error that was unsupported by any General Plan resolutions that had been approved by the Council.

Petitioners' primary argument challenging the Council's determination is jaw-dropping. Petitioners argue that *even if the Council's decision was correct, it does not matter*. Petitioners contend that the staff error—despite being unsanctioned by the City's legislative body and despite no notice having ever been provided to the property owner—*legally and validly* stripped the Property of its previously existing development potential, turning it into an open space preserve that allowed no economically productive activities. Petitioners argue that this

stunning result is compelled by *Orange Citizens for Parks & Recreation v. Superior Court*, 2 Cal.5th 141 (2016) ("*Orange Citizens*"), but the Supreme Court did not adopt any such dramatic departure from basic principles of due process, property rights, fairness, and common sense.

Petitioners' over-simplification of the facts and law in *Orange Citizens* overlooks the substantial difference between that case and this one. The most fundamental distinction is this: the property in *Orange Citizens* had *always* been restricted to open space, and the question was whether the Orange City Council had ever validly memorialized its action to *give the property* a residential development potential it otherwise would not have possessed. But *Orange Citizens* cannot possibly be read to say that a staff error alone, carried forward over time, can convert privately-held property into undevelopable "open space." Such a rule would mean that a local staffer could legally take private property, without compensation and without notice to the property owner, merely by using the wrong color on a map or by periodically asserting that various planning documents in the City's files have somehow become part of the Council-approved general plan. *Orange Citizens* cannot plausibly be stretched to apply to a situation such as this. Also, *Orange Citizens* applies only where the property has "continuously been designated on every publicly available document as 'Open Space.'" That simply was not the case here. Numerous publicly available versions of the General Plan, including the version on the City's website in January 2017, lacked any map showing the Property to be restricted to open space.

If the Court does not accept Petitioners' argument that property owners can lose their property rights based on a staff error, then the question turns on whether the Council acted within its legal authority in interpreting its General Plan as it did. It unquestionably did. *The record contains no Council resolution* stating that it is converting private property into an undevelopable open space preserve. Such an action could not plausibly have been accomplished except over the property owner's strenuous objection. The far more compelling explanation of the evidence and the documents in the City's files is that the Council adopted a plan providing that *if the City could acquire an interest in the Property*, it would become *public* open space, but that it would otherwise have residential development rights. Petitioners fails to show, as they must, that "no reasonable person" could agree with this interpretation.

Petitioners' Elections Code claim fails as well. Petitioners acknowledge that Elections Code section 9241's one-year prohibition only applies to actions that are "essentially the same" as one another. The Council's March 2016 decision to adopt a general plan amendment to permit a planned unit development is not, under any reasonable definition, "essentially the same" as the Council's January 2017 decision to grant an appeal of an incompleteness determination for a vesting tentative map application, especially in view of the fact that the actual issuance of the vesting tentative map did not occur until well after one year had elapsed.

STANDARD OF REVIEW

"[A legislative body's] reading of its own General Plan 'comes to this court with a strong presumption of regularity.'" *San Franciscans Upholding the Downtown Plan v. City & Cty. of San Francisco* ("*San Franciscans*"), 102 Cal.App.4th 656, 679 (2002) (quoting *Sequoyah Hills Homeowners' Ass'n v. City of Oakland*, 23 Cal.App.4th 704, 717 (1993)). "[C]ourts accord great deference to a local governmental agency's determination of consistency with its own general plan, recognizing that 'the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity.'" *San Franciscans*, 102 Cal.App.4th at 677-78 (citing *Save our Peninsula Comm. v. Monterey Cty. Bd. of Supervisors*, 87 Cal.App.4th 99, 142 (2001)). "Reviewing courts must defer to a procedurally proper consistency finding unless <u>*no reasonable person*</u> could have reached the same conclusion." *Orange Citizens*, 2 Cal.5th at 155 (citing, *inter alia*, *San Franciscans*, 102 Cal.App.4th at 677) (emphasis added).

In challenging this adjudicatory General Plan determination (*Orange Citizens*, 2 Cal.5th at 155), Petitioners bear the "burden to show why, based on *all of the evidence in the record*, the determination was unreasonable." *Pfeiffer v. City of Sunnyvale City Council*, 200 Cal.App.4th 1552, 1563 (2011) (quoting *California Native Plant Society v. City of Rancho Cordova*, 172 Cal.App.4th 603, 639 (2009)) (emphasis added). Challengers who fail to "discuss all of the evidence in the record pertinent to the issue of general plan consistency . . . fail[] to meet their burden…" *Pfeiffer*, 200 Cal.App.4th at 1552; see also *id.* at 1572 (on "all substantial evidence challenges," a petitioner "must lay out the evidence favorable to the other side and show why it is lacking . . . [f]ailure to do

so is fatal" to petitioner's claims) (quoting *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934-35 (2009)).

STATEMENT OF FACTS

The Pine Meadow Property is an approximately 26-acre parcel of land in the City of Martinez that was formerly occupied by the Pine Meadow Golf Course. 1 AR 4; 4 AR 2293. At the time the Property was annexed into the City, the Property was part of an approximately 54-acre parcel known as the "Coward-Valerga Property." 4 AR 1567, 2293. James and Julia Coward owned the Property since approximately 1951, and the Cowards' children, Christine Coward Dean and her siblings, inherited the Property in 2008. 4 AR 2293.

It is undisputed that the Property was not designated "open space" at the time it was annexed into the City. Petitioners' Memo. Pts. & Auth. ("PMPA") 8:17-22 (as of 1970, "permitted uses . . . included agriculture, single-family dwellings on existing legal lots, and (with a conditional use permit) '[a]ny legal use deemed appropriate by the Planning Commission, and in keeping with the intent of the General Plan.'" (citing 2 AR 324); see also 4 AR 1567. The only dispute is when, if ever, the Council adopted a General Plan resolution that restricted the Property to open space uses.

The City Council weighed the evidence on both sides of this question at a public hearing on January 18, 2017, at which both arguments were fully aired and thorough evidence presented. Special Advisor Jim Reese presented a staff report and evidence supporting City staff's belief, at the time, that the City's General Plan restricted the property to open space and recreational uses. 2 AR 275-797, 801-09, 909-12.[1] Ms. Dean and Dana Tsubota presented detailed statements and evidence on behalf of Real Party in Interest DeNova Homes, Inc. ("DeNova"),[2] supporting the

[1] Not only did City staff "review[] countless documents in the City" to present all of the best evidence available to support the view that the property was designated "open space" (2 AR 283), but Petitioners also had the opportunity, of which they availed themselves, to introduce any testimony and evidence that they thought supported that argument (2 AR 926).

[2] DeNova is one of the two named real parties in interest in this action. Contrary to Petitioners' assertion, DeNova never "purchased an interest" in the Property. PMPA 6:5. The entity that *did* own an interest in the Property at the time of the challenged action—Real Party in Interest Civic Martinez, LLC—was dismissed from this case with prejudice because it was not timely served. *See* Judgment of Dismissal as to Civic Martinez, LLC (Mar. 23, 2018). Respondents and DeNova continue to reserve their right to argue that Civic Martinez, LLC and successor owners of the Property are necessary parties whose absence is fatal to Petitioners' pursuit of this action.

contention that the Council had never taken any action to deprive the Property of its development potential under the General Plan. 2 AR 809-908, 4 AR 1566-1677, 1974-2311. After hearing and considering both presentations and evidence, the Council adopted a resolution and findings of fact agreeing with DeNova's presentation of the facts. 3 AR 1046-52.

A. 1970-72. The City Plans for the Property To Become Public Open Space, if Acquired by the City.

Beginning in October 1970, a committee of the City's Planning Commission, the Hidden Lakes Open Space Planning Committee ("Committee") met in order to develop a plan for the Hidden Lakes area, which included the Property. 4 AR 1993. On June 3, 1971, the Committee issued its *Hidden Lakes Open Space Study Committee Report on Hidden Lakes Area Open Space, Conservation and Development Study* (the "Report"). *Id.*; 2 AR 353-414.

The Report unambiguously states the City's plan for the Property to become *public* open space, *if* the city could acquire an interest in the property—but that the Property would otherwise be assigned a base residential density consistent with the City's R-1-7500 (*Residential*) zoning.[3] 4 AR 1998-2003. The Report designates areas planned for "Public Open Space" - which should be "preserved, *acquired and held* as Public Open Space"—as distinguished from "Private Open Space, Conservation." 2 AR 363-67 (emphasis added).[4] The Report specifically identifies the Property as one of four properties the Committee sought to acquire as potential "public open space," and recognized that the City would need to acquire an interest in the property before it could be restricted to open space uses. 2 AR 363-66. "Consideration should be given to purchasing fee title to the property," but if this could not be accomplished, the Report recommended the City acquire "open space easements, either through purchase, or through density transfer and bonus concepts, where the potential density possible on the properties is transferred to an area designated for development on another property." 2 AR 360, 364-65. As the second priority among four

[3] "R-1-7500," providing a minimum residential site area of 7,500 square feet, is equivalent to the City's current R-7.5 zoning district. *See* Martinez Municipal Code ("MMC") § 22.12.110.

[4] For areas that "should be preserved as permanent *private* open space areas, owned by the individual homeowners corporations or associations," the Report planned for the City to impose a regulatory open space restriction on portions of those properties at the time that the remainder of those properties was planned for development. 2 AR 366 (emphasis added).

properties for "open space purchase," the Report stated that the Property's "permanent use as open space/recreation land should be guaranteed through purchase of fee title, development rights, open space easement, or execution of a long-term open space contract." 2 AR 365.

There is no indication that the Committee sought to preserve the land for open space use by imposing a regulatory land use restriction that deprived the Property of its development potential. Quite to the contrary: in the plan, a residential base density of R-1-7500 "was applied to all properties" in the study area, including the Property. 2 AR 371-72. The Report *specifically lists* the Coward-Valerga Property (listed as "Parcel No. 16"), and explicitly states that it has a base density permitting 183 housing units, with greater density permitted if development rights were transferred to another site and the property acquired as public open space. 2 AR 385-86.

Petitioners do not argue that the Report can be read in any other way, but they attempt to sidestep it through obfuscation. Specifically, they suggest, falsely, that the Report contemplated the Property would become private open space, saying that "The Committee recommended that well over half of the Study Area's 565 acres - including all of the Coward property (Parcel #16) 'be preserved as permanent Open Space, some in public ownership, some in private hands'" (PMPA AR 9:2-5, citing 2 AR 360), but declining to mention that the Report explicitly states that the Property is discussed only as a candidate for *public* ownership. See 2 AR 364.

In a July 1972 report, the Committee affirmed that the Report had by then become the City's "adopted policy," reiterated that the policy called for preserving this open space through "purchase," and recommended against allowing development to proceed on a portion of the Coward-Valerga Property "until the community has had an opportunity to vote on the proposed purchase." 2 AR 416, 419.[5] At the time, the Committee believed there might be public support for the purchase of the Property (2 AR 418), but later survey results showed that the majority of respondents were opposed. 2 AR 819, 852-53; 4 AR 2004-09, 2183-92, 2280.[6] The City never

[5] In the City's March 21, 1972, staff report on this application, staff notes that "[o]nce [a property] it is surrounded by R-1-7500 zoning, no other zoning (R-1-40,000 or "H") would be permissible." 2 AR 428, 4 AR 2045. The Property is now surrounded almost completely by R-7.5 zoning, and the remaining perimeter is adjoined by R-6, R-10 and R-20 zoning.

[6] The City also prepared to place the question of the Property's acquisition on the November 1972 ballot, but it appears that this did not occur. 2 AR 852-83; 4 AR 2006, 2188-89.

acquired any interest in the Property, and never permitted any transfer of its development potential to any other parcel. 2 AR 618, 854, 863; 4 AR 2007, 2009, 2032, 2280, 2283.

B. June 20, 1973. Council Adopts Resolution 69-73.

On June 20, 1973, the City Council adopted Resolution No. 69-73, resolving that "the General Plan as recommended by the Planning Commission and prepared by Sedway Cooke be and the same is hereby adopted." 2 AR 432. Contrary to Petitioners' misstatements (PMPA 9:14-20), the Council did not, in June 1973, adopt any text or any maps specific to the Hidden Lakes area.[7] Petitioners believe that in June 1973, the City abruptly changed the course it had set to acquire the Property as *public* open space, and suddenly decided to *restrict* the property to *privately* owned open space, without providing any compensation to the Property's owners. But nothing in Resolution 69-73 says this. 2 AR 432. As discussed *infra* at Part H-1, the only relevant figure that might have been adopted on this date (Figure 21.1) only re-emphasizes that the Property was a candidate for public ownership, not privately owned open space.

Between June and November 1973, the City explored acquiring an open space easement over the Property, but never did so. 2 AR 854; 4 AR 2009, 2262-64. This would have been irrational if the City had already used its regulatory authority to restrict the property to open space.

C. Sometime in 1973, the Council Adopts the Hidden Lakes Specific Area Plan into the City's General Plan.

The Committee recommended that its Report be "adopted as a Specific Plan Element of the Martinez General Plan" (2 AR 363), and city documents indicate that this is what happened. 5 AR 2386-92 (Chapter 32 of the City's 1973 General Plan document is dated "6/71," the month the Report was adopted); 5 AR 2324 ("The date appearing on the bottom right hand corner indicates the most recent date of all policies and amendments contained on a particular page").[8]

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[7] Staff included in its report excerpts of what it believed to be the General Plan as adopted in June 1973; none of these excerpts include any material related to the Hidden Lakes area. 2 AR 431-46. Staff's report indicated that "[i]t wasn't until later" that the Hidden Lakes portions of the General Plan were added. 2 AR 284, 803; 4 AR 2008.

[8] All parties to this action, and City staff in its January 2017 presentation, agree that the Council did, at some point, adopt a resolution adding the Hidden Lakes Specific Area Plan to the General Plan. However, City staff has not located the resolution that effectuated this important General

The text of Chapter 32 of the City's General Plan, "Hidden Lakes Specific Area Plan," which no party disputes, is essentially a codification of the Committee's Report. 4 AR 2017, 2255-60. General Plan Policy 32.4231, exactly following the Report, establishes that "[t]he base density for the plan area shall permit one dwelling unit per 7,500 square feet of site area as allocated under R-1 Zoning classification." 4 AR 2258. Like the Report, the text of the General Plan identifies the purchase of property as the primary means of retaining open space, but provides a 20% density bonus above the base for owners who choose to dedicate land for public open space, and a 100% increase above the base for owners who transfer their development rights to another property in order to preserve public open space. *Id.* This text, with its clear statement affording a residential density to the Property, was part of the City's General Plan as of the date of the challenged action and to this day.

D. <u>December 12, 1973. Council Adopts Resolution 154-73.</u>

Council minutes indicate that the Council adopted a resolution numbered 154-73 on December 12, 1973. 2 AR 449. However, the City does not have a signed copy of Resolution 154-73. Other than the minutes, the only record of this resolution an unsigned document, the operative text of which states only that "the General Plan, 'Hidden Lakes Study Area,' parcels #12-16 is hereby amended," with no reference to any exhibit and no information about what amendment was adopted. 2 AR 448.

Contrary to Petitioners' claims, the unsigned "Resolution 154-73" in the City's files is not accompanied by any map or attachments of any kind. 4 AR 2048. In a City compendium of general plan resolutions, this resolution is produced on its own, with no attachments or maps accompanying it.[9] A contemporaneous *Martinez Gazette* article reported that the resolution adopted a new "*policy . . .* for open space requirements *in case of development of these existing large parcels of land*," but makes no reference to the City adopting any map or any revisions to any map. 4 AR 2307-08

Plan Amendment, so there is no direct evidence of the specific text and figures, if any, that accompanied the resolution. 2 AR 854; 4 AR 2010-11.

[9] This is in notable contrast to many other resolutions that are shown to have attachments and maps accompanying them. Compare 5 AR 2442 (Reso. 154-73 with no attachments) with, e.g., 5 AR 2444-45 (Reso. 38-74 with map accompanying), 5 AR 2446-49 (Reso. 101-75 with maps accompanying).

(emphasis added); see also 2 AR 876-78. At some point, however, Staff found a map "stored with the other maps in the planning department" (2 AR 288), and assumed that it related to Resolution 154-73. 2 AR 452, 5 AR 2710. Someone, or many people, have hand-written notes all over this map. *Id*. Former City Planning Manager Dina Tasini "was always under the impression that the map was drawn upon during a planning process but never finalized," that "the map was marked up by a previous employee," and declared that after diligent search of the City's records she concluded that "there is no associated ordinance or resolution to support such markings." 4 AR 2286-87. The words on the map which Petitioners believe to reflect the land use designation the Council applied to the Property ("Permanent Open Space / Recreation") *was not even a land use designation* in the General Plan text at the time.[10]

The unsigned document, the text of which says nothing about restricting any property to open space, and which is unaccompanied by any attachments, is the document that staff presented to the Property's owners as proving that the Council decided to restrict the Property to become privately owned open space rather than target it for public open space acquisition. 4 AR 2013, 2301. Needless to say, the Council had the legal discretion to find this an insufficient basis to support this contention. 3 AR 1051.[11]

E. <u>1974-2010.</u>

After 1974, confusion began to emerge with respect to whether the Property was *restricted* to open space, as opposed to merely being *planned* to become open space if acquired. Part of the confusion likely relates to an important change in law that occurred at this time. The Report, and the text and figures that were included as Chapter 32 of the City's General Plan document, all date from June 1971. 5 AR 2324, 2386-92. At that time, "the general plan was 'just an interesting

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[10] See 5 AR 2329 (General Plan land use element listing open space land use designations as either "Public Permanent Open Space" or "Open Space/Conservation Use Land"); cf. also 5 AR 2388 (even on Figure 32.1, "Permanent Open Space/Recreation" is not listed as type of open space).

[11] The Council's interpretation is on a firm basis because even if the map *had* been adopted, it would hardly compel the Council to find that the Property was restricted to open space uses in December 1973. There is no dispute that the Council aspired for the Property to become some type of open space—the question is whether the Council planned to restrict the property to become privately owned open space or to acquire it and use it as public open space once acquired. The map is perfectly consistent with the latter interpretation.

study,' which did not bind local land use decisions," *Orange Citizens*, 2 Cal. at 153, but rather "was only an idealistic statement of policy which might or might not be carried out." *City of Santa Ana v. City of Garden Grove*, 100 Cal.App.3d 521, 532 (1979).[12] Staff, seeking to represent the Council's decision to adopt the Report, may have relied upon a map whose drafters in June 1971 were demonstrating that the property was *planned* to be "open space," without expecting that this would later be construed as a restriction on the Property's permissible uses. The original plan to acquire the Property as public open space may have been lost in some staff members' minds after the City's voters rejected plans to acquire the Property. 4 AR 2073. *Whatever the reason for the error, however, the record contains no Council resolution whose text or attachments show that the Council adopted a General Plan amendment depriving the Property of its residential development potential and turning it into privately owned open space.*

As the staff error took hold, staff reports accompanying certain Council resolutions related to *other* properties could be read to reflect staff's understanding that the Property was restricted to open space uses, but none of these resolutions amended the General Plan as applied to the Property. PMPA 10:7-11:24.[13] And since the General Plan in fact afforded a base residential density to the Property, to the extent any zoning ordinance the Council enacted could be read to prohibit such uses, it was void at the time it was enacted. *Lesher Commc'ns, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 544 (1990); 3 AR 1051. But numerous actions taken and statements of City officials

[12] It was not until after November 1971, when Governor Brown signed into law Stats. 1971, ch. 1446, that General Plans gained legal effect.

[13] The resolutions and ordinances cited by Petitioners at PMPA 11:4-24 affected neighboring parcels, not the Property. With respect to the figure accompanying Reso. No. 149-77, neither Petitioners nor Staff ever previously argued that this figure supported Staff and Petitioners' argument (compare 2 AR 569 [version of Reso. 149-77 included in staff report] with 5 AR 2458-60 [version cited and relied upon in PMPA 11:16-24]), and therefore this argument cannot be raised for the first time in litigation. *See, e.g.*, *Hagopian v. State of California*, 223 Cal.App.4th 349, 371, (2014) ("[a]n interested party must present the exact issue to the administrative agency that is later asserted during litigation"). Even putting all of this aside, the fact these resolutions may have removed a "public permanent open space" designation that staff believed to apply to these neighboring parcels may very well signal nothing more than the Council's recognition that those parcels were no longer likely to be acquired as public open space and that the City was no longer planning for them to become such.

after 1973 are impossible to reconcile with Petitioners' contention that the Council imposed an open space restriction on the Property in 1973:

- According to John Sparacino, the City's former Mayor and Councilmember at the time, "[t]he City Council at that time was a pro-development Council," and when the Council approved the Hidden Lakes Area Plan, "the City Council anticipated development of the Pine Meadow Golf Course property with housing at some point in the future." 4 AR 2281; see also 2 AR 838-39; 4 AR 2028-30, 2072. (Mayor Sparacino declared in October 2016 that the "[P]roperty is currently zoned for housing." 4 AR 2281.)
- In March 1974, the City placed Measure O on the ballot, asking whether the voters were willing to be taxed to purchase open space areas including the Property. 2 AR 894, 4 AR 2073, 2310. Measure O failed. *Id.* It would be strange if the City was still proposing to acquire the Property to restrict it to open space if, as Petitioners contend, the City had already accomplished that goal by restricting the Property to open space uses by regulation.
- In 1975, James Busby applied for a General Plan Amendment and zoning change for a portion of the Coward-Valerga Property, Tract 4744, which is adjacent to the Property. 2 AR 508. The April 1976 EIR for the Busby Application, prepared by City Planning Director Barry Whittaker, states that the Property's "land is not of sufficient quality as open space land to warrant serious consideration of retention of the property as permanent open space" (2 AR 546) that the golf course exists on "highly developable residential property," and that if the City failed to enter into an Agricultural Preserve contract with the Property owner, Busby's project would "increase the probability that the golf course would eventually be developed to residential uses." 2 AR 564, 880-82; 4 AR 2054-55. This would be a plainly irrational concern if City staff believed that the Council had restricted the Property permanently to prohibit residential development.
- In 2008 and 2009, the City Manager and other City staff proposed directly to Ms. Dean that the Property be developed for residential uses. 4 AR 2295-96.
- The City's former Planning Manager carefully reviewed all reports and files within the City's records and concluded that there were no records supporting any "permanent open space" land use designation on the Property. 4 AR 2285-87.
- According to the County Assessor, during the years that the land was supposedly restricted to solely open space uses, it was *assessed and taxed as residential property*. 4 AR 2289-91.[14]

F. <u>2010 General Plan Resolution.</u>

On October 6, 2010, the City Council adopted Resolution No. 96-10. 2 AR 572. As the

[14] Petitioners claim that the County Assessor's opinion about tax assessment is "demonstrably incorrect," by citing a particularly self-serving source - *Petitioners' own* non-expert opinions about tax records - and the opinions of Mr. Reese, who also has no expertise in this area. PMPA 23:27-28 (citing [1] AR 243-45, 250; 2 AR 806-08); see also 2 AR 809 (Mr. Reese acknowledging that he is "not sure" what the tax assessor bases his tax rate on). The Council obviously had discretion to find the opinion of the County Assessor about this issue more persuasive than layperson opinions. Moreover, the Council had additional evidence before it, which Petitioners do not attempt to rebut, showing that the Property was assessed Mello-Roos school bond assessments which do not apply to open space property. 2 AR 923; 4 AR 1571, 1663-77.

title of the resolution states, its purpose was to "memorializ[e] changes *previously made* to the [General Plan] map by the city by separate resolutions since 1973," and the text of the resolution emphasizes that "the memor[i]alization and consolidation of the existing General Plan Land Use Maps does not permit any new or differing development to occur or change any existing land use designation in a manner which would permit any new or differing development to take place that does not exist or could not exist pursuant to the existing General Plan." *Id.* (emphasis added). If a property was not legally restricted to open space uses before adoption of this resolution, there is no way this resolution could have effected any such restriction.[15]

Staff also prepared a Citywide map, "Land Use Map 1," which merely "carried forward" the General Plan designation that staff at the time believed to apply to the Property. 2 AR 804. When creating this map, staff sometimes applied "some interpretation in order to map an amendment," particularly the case in the Hidden Lakes area, because various subdivisions were approved in this area "without specific documentation attached that precisely mapped how the General Plan Land Use Maps were being amended." 2 AR 580. When Planning Commissioners expressed concerns about potential mapping errors, staff explained that "the function of the map is memorialize existing land use designations, and any mapping errors will be addressed by the General Plan review committee process." 2 AR 597. Planning Commission Chair Allen said "she could not approve the map without verifying each change, to avoid future conflicts," while Commissioner Burt said "she was okay with the map, as long as it can be modified when errors are discovered." 2 AR 598. When the resolution came before the Council, Vice Mayor DeLaney expressed concern about "past actions [that] had not been properly recorded or established," and staff replied that the map was "not intended to make changes not already approved through General Plan Amendments," and "that if there are additions or omissions from what is intended, the corrections will need to be brought back to the Council for approval." 2 AR 610.

[15] Certainly, the City did not provide any notice directly to affected property owners that the City was planning to change the General Plan designations, and therefore the legally permissible zoning, on their properties, as would have been required pursuant to Gov. Code § 65091. Failure to provide adequate notice and hearing procedures prior to the imposition of zoning restrictions is cause to void such restrictions. *Sounhein v. City of San Dimas*, 11 Cal.App.4th 1255, 1260 (1992).

Staff had versions of the General Plan document in its files which included "Land Use Map 1," but City staff did not consistently include the map in copies provided to the public. 2 AR 856-57; 4 AR 2018, 2071. When a resident went to the Planning Department and paid for a copy of the General Plan, staff provided a copy that did *not* include Land Use Map 1. *Id.* DeNova included in its presentation a copy of the version of the General Plan which was online in January 2017; it does not contain "Land Use Map 1." 4 AR 2194-2260.[16]

G. 2014-2016. General Plan Amendment Application for PUD Development.

In 2014, Ms. Dean and her siblings conveyed an interest in the Property to Real Party in Interest Civic Martinez, LLC, which worked with DeNova to prepare a development plan for the Property. 4 AR 2293. Upon learning of staff's position that the Property was designated for open space in the General Plan, both Ms. Dean and DeNova made numerous requests, many pursuant to the Public Records Act, for the documents that supported staff's opinion. 2 AR 946-47, 4 AR 2013, 2018, 2071, 2296-2301. To the extent they received substantive responses, staff continually pointed back to Reso. No. 154-73, and the purportedly associated map, which as discussed *supra* was hardly persuasive. 2 AR 946-47; 4 AR 2013, 2301.

For the purposes of DeNova's development proposal, however, the disagreement about the Property's current General Plan designation was immaterial, because DeNova and City staff reached agreement to propose a "Planned Unit Development" ("PUD"), with varying densities, setbacks and development features, which are not permissible under an R-7.5 General Plan designation and zoning. MMC §§ 22.21.010-060; 2 AR 845-46; 4 AR 1986, 2066. Understandably, DeNova declined to use the application materials for this proposal as a forum to continue its disagreement with staff, since DeNova and City staff were all in agreement that a new General Plan designation and zoning was required for that version of the project regardless. But DeNova explicitly stated—since at least February 2014, when the General Plan Amendment

[16] Moreover, even to the extent the adopted General Plan is deemed to include a Citywide map labelling the Property "OS&R", this label must be read in context with the more specific provisions of Chapter 32 of the General Plan, which afford a base residential density to all portions of the Hidden Lakes area and state that the "open space" in that area is planned for public acquisition rather than restricted private property. *See* 4 AR 2112.

request was still pending—that it remained DeNova's position that the currently applicable General Plan land use designation was residential. 4 AR 1985, 2112. On January 21, 2015, the City Council adopted a resolution and ordinance approving the requested General Plan Amendment and rezoning (as well as a vesting tentative map and design review), but the Council rescinded the resolution and ordinance on March 9, 2016 in the face of a referendum campaign. 2 AR 720-30.

H. <u>April 2016-January 2017.</u>

With the Council having rescinded its approval of DeNova's request to re-designate and rezone the property to permit a PUD, DeNova applied for a vesting tentative map for a project that conformed to the Property's existing R-7.5 General Plan and zoning designation. 1 AR 1-76; 4 AR 1980. Staff determined that the application, and a subsequent resubmission, were incomplete because they did not include a General Plan Amendment and rezoning application that staff believed to be required. 1 AR 77-83, 85-99, 201-03; 4 AR 1980-83. DeNova appealed Staff's incompleteness determination pursuant to the Permit Streamlining Act, Gov. Code § 65943(c), giving the Council the responsibility to adjudicate the dispute. 1 AR 204-18; 4 AR 1984.

At the January 2017 hearing, presentations on both sides focused primarily on the facts surrounding Resolution 154-73, since this had always been the basis of Staff's opinion that the Property was restricted to open space uses. However, in the Staff Report prepared shortly before the hearing, and at the hearing itself, staff also relied upon two figures—Figure 21.1 and 32.1—which appeared in a "General Plan" document in staff's files. 2 AR 289, 909-09. Petitioners contend that these two figures in this document prove that the Council restricted the property to open space and recreational uses. But *this document was created by City staff.* When compiling General Plan documents, staff presumably made a good faith effort to reflect the Council's actions, and did so in most respects, but the 2017 Council was authorized to examine the evidence for itself to determine whether staff might have made errors in correctly depicting the actions that prior Councils had taken. As noted above, when compiling General Plan maps, it was staff's practice "to apply some interpretation in order to map an amendment." 2 AR 580.

Neither figure 21.1 nor figure 32.1 were part of any operative General Plan document when the Council made the challenged decision in January 2017. And most importantly, there is ample

evidence in the record contradicting Petitioners' claim that these figures had "been publicly available at all times during the past 45 years." PMPA 9:22. Mr. Reese stated that he believed this to be the case, but he lacked personal knowledge about which documents and figures were and were not provided to members of the public in prior decades. Ms. Dean and Ms. Tsubota, however, testified from personal experience that despite making numerous requests of staff for the documents that supported staff's belief that the Property had been restricted to open space, staff never provided these figures to them. 2 AR 856-57, 892-92, 907-08, 946-47; 4 AR 2013, 2018, 2071, 2296-2301.[17]

The fact that City staff had figures in its files that showed the property as open space does not prove that the Council actually took action to restrict the Property to open space uses—especially if those figures were not part of a general plan document that had been approved by the City Council and continually provided to property owners seeking information about their property. But even assuming *arguendo* that either figure had been adopted by the Council, neither figure makes Petitioners' interpretation of the General Plan legally compulsory.

1. Figure 21.1

Figure 21.1 was a citywide figure that did not provide anything close to the parcel-by-parcel level of detail necessary to show each property's land use designation. 5 AR 2331. This was not uncommon for General Plan policy maps at the time: "a parcel specific map is not required for the land use element of a general plan adopted by a city or county; a diagram of general locations illustrating the policies of the plan is sufficient." 67 Cal. Op. Att'y Gen. 75 (1984).[18] One thing, however, is clear: Just like the Report, Figure 21.1 explicitly distinguished between "*Public*

[17] Figure 21.1 appeared for the first time in an exhibit in the Staff Report, after not being provided to the Property's owners and potential developers at any previous point. 2 AR 443, 907-08. Figure 32.1 was not included in the Staff Report at all. See 2 AR 946-47.

[18] This map was very much like the one at issue in *Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles*, 177 Cal.App.3d 300, 310 (1986), which, as *Orange Citizens* noted, 2 Cal. 5th at 158, established a policy map that, when read in context with its other provisions, was permissibly "general in character and . . . not to be interpreted literally or precisely." See also *Paris v. Cmty. Redevelopment Agency*, 167 Cal.App.3d 489, 500 (1985) ("The general plan is a broad statement of policies and objectives, not a precise map of future development of particular parcels"). Whether or not Figure 21.1 sufficiently depicted individual parcels to satisfy any later-articulated standard for policy maps is, of course, a long-since moot point since the figure has not been part of the City's operative General Plan since 2010, and was given greater definition and clarity by numerous amendments adopted after 1973.

Permanent Open Space" and privately owned "Open Space/Conservation Use" land, and there is no "Open Space/Conservation Use" designation anywhere within the vicinity of the Property. 5 AR 2331.[19]

2. Figure 32.1

Figure 32.1 (which dated from *June 1971*) showed the majority of the Hidden Lakes Study Area as planned for "open space." 5 AR 2388. Without the Council resolution that added the Hidden Lakes Specific Area Plan to the General Plan, the record evidence does not confirm whether the Council ever adopted this figure, or whether staff erroneously included it. But even assuming this figure was adopted by the Council in 1973, it must be read in the context of Policy 32.31's overarching goal that planned open space was to be "*primarily preserved as public open space . . .*" (5 AR 2387 (emphasis added)), as well as in context with Figure 21.1 showing a plan for *public* open space in the Hidden Lakes area (5 AR 2331). "A general plan's text and its accompanying diagrams" must be read in concert with one another; both are "integral parts of the plan." Office of Planning & Research, *General Plan Guidelines* (2017), at p. 22. When read in conjunction with Figure 21.1, and the text of Chapter 32's policies, the areas shown as "open space" on Figure 32.1 are plainly areas the City sought to acquire as *public* open space, or to restrict for open space once their residential density had been transferred to other neighboring properties. These are not areas that the City had stripped of previously existing development potential.

I. <u>January 2017. Council Deliberation and Vote.</u>

After hearing the presentations and evidence, and public comment, four of the five Councilmembers indicated they would grant the appeal. 2 AR 954-69. Contrary to Petitioners'

[19] To the extent this map showed any planned "open space" within the vicinity of the Property, the Property is within a broad swath of land, which includes the location of city-owned properties such as Hidden Lakes Park and Hidden Valley Park, planned to become "*public* permanent open space." 5 AR 2331. Petitioners argue that this "public permanent open space" notation validly deprived private property of previously existing residential development potential. But Petitioners do not explain how it is rational—or even possible—for a city to turn private property into "public permanent open space" without the city ever acquiring any interest in the property. As applied to private property, the only reasonable reading of this figure is that it reflects the city's plan for areas it hoped to be a part of the city's network of publicly owned open space if the areas were acquired—which is fully consistent with the plans adopted by the Hidden Lakes Open Space Planning Committee.

negative aspersions (PMPA 17:8-14), the Councilmembers clearly knew exactly what they were voting on. Mayor Schroder emphasized that the Council was acting in its "quasi-judicial," rather than policy-making, capacity, and stated that "enough evidence has been brought to this dais today that . . . an error was made many, many years ago that incorrectly designated this property as permanent open space and not R-7.5." 2 AR 958. Councilmember Gipner concluded that City had wanted to buy the Property but that it could not possibly be restricted to "open space" once the City determined not to purchase it. 2 AR 960. Councilmember Ross also noted he was acting in a quasi-judicial capacity and that he was impressed by the "pile of evidence" DeNova presented that the Property was designated for residential development. 2 AR 961-62. Councilmember McKillop listed the specific evidence—"Chapter 32, Measure O, Mr. Whittaker's comments, Resolution 154"—that compelled her to conclude that despite her personal desire to see open space, "there's been an injustice somewhere along the line" with respect to the Property's designation. 2 AR 967.

After a recess, Staff prepared findings of fact and a resolution granting DeNova's appeal, which the Councilmembers reviewed carefully[20] before adopting by a 4-1 vote.[21] 3 AR 1046-52, 4 AR 979-80, 5 AR 2492-95.

ARGUMENT

I. A CLERICAL ERROR BY CITY STAFF CANNOT LEGALLY DEPRIVE A PROPERTY OWNER OF PROPERTY RIGHTS.

A. *Orange Citizens* Does Not Hold That a Staff Error Can Legally Deprive a Property of its Residential Development Potential.

Petitioners' primary argument is that even if the Property's "open space" General Plan designation derived from a staff error that was unsanctioned by the City Council, it nonetheless has binding legal effect. But "[t]he Planning and Zoning Law of the State of California (Gov. Code § 65000, et seq.) mandates the adoption of a general plan . . . [and] provides that its adoption is a *legislative* act. . . ." *Lesher* 52 Cal.3d at 535 (footnotes deleted, emphasis added). Thus, "[i]f it

[20] The fact that the Councilmembers took considerable time to review and consider the resolution and findings is, of course, not apparent from the transcript, but the video of the hearing, lodged with the Court, shows this.

[21] Even the lone dissenter, Councilmember Delaney, said she believed the "open space" designation "may have been erroneous[]." 2 AR 968.

deems it to be in the public interest, the *legislative body* may amend all or part of an adopted general plan." Gov. Code § 65358 (emphasis added). *Orange Citizens* cannot reasonably be read to hold that the power to revise a general plan is now vested in staff at the expense of legislative bodies—at the very least, not when the staff error would deprive property owners of previously existing property rights.

Orange Citizens is a case in which staff failed to revise a city's General Plan document to reflect a past action; it is not a case in which staff incorrectly included in a General Plan something that *never* happened. "An opinion is not authority for propositions not considered," *Ctr. for Cmty. Action & Envntl. Justice v. City of Moreno Valley*, 26 Cal.App.5th 689, 702 (2018) (quotation omitted), and there is no sense in which the *Orange Citizens* court considered the proposition that property owners would lose their property rights if staff were to unilaterally attribute to the General Plan an "open space" restriction that was never adopted by the legislative body.

In *Orange Citizens*, the subject property *began* with a use designation established by the city council "as a golf course or, should that prove economically infeasible, for recreation and open space." 2 Cal.5th at 146. The Orange City Council then failed to include, in the general plan that it had adopted and consistently made available to the public, subsequent resolutions that would have allowed residential development. The Court concluded that, "while '[t]he City is not bound by a clerical error,' it is bound by its failure to modify" its published land use plan to conform to its resolutions "and to incorporate those changes into the 2010 General Plan." *Id.* at 159. In other words, since the city's publicly available plan failed to reflect the adopted "upzoning" of the subject property, the subject property was stuck with its original designation.

In the case before this Court, the subject Property indisputably *started* with a legislatively-approved land use designation that was *not* an "open space" district, and there is no record of any legislative act "downzoning" the Property to deprive it of its development rights. 2 AR 321, 324, 328-18, 4 AR 1567. It is one thing to say that a developer may not be able to realize the benefit of an "upzoning" if it fails to ensure that the relevant documents are incorporated into the publicly available General Plan. But it is quite another to read *Orange Citizens* as holding that a staff error alone can deprive a Property of its previously existing development potential. Any such

interpretation would fly in the face of due process and common sense.

B. Even if Petitioners' Overreading of *Orange Citizens* Were Correct, the Decision Does Not Apply Here, Because It Is Not the Case That Every Publicly Available Version of the City's General Plan Document Showed the Property to Be Designated as Open Space.

Even if the Court were to credit Petitioners' reading of *Orange Citizens*—that property owners lose their property rights whenever a staff error is included in a General Plan document - the decision is limited, as both the Supreme Court and Petitioners emphasize more than a few times, to situations in which the error appears in every "publicly available" version of the General Plan. *Orange Citizens*, 2 Cal.5th at 148, 154, 156-57, 159; PMPA 6:24-25, 7:9, 7:26-27, 19:2-3, 9:5, 27:21-22. That simply is not the case here. DeNova included in its presentation the version of the General Plan that was on the City's website in January 2017, and this document lacks any map showing the Property to be restricted to open space. 4 AR 2008, 2018, 2193-2260. In *Orange Citizens*, 2 Cal.5th at 147, it was key to the Court's decision that "[i]f any members of the public had requested a copy of the . . . Plan, they would have received" a version that showed the property to be designated as open space. But as DeNova attested from direct experience, "when a resident goes to the Planning Department at the City and requests and pays for a copy of the City's General Plan, the City provides a copy that does not include Land Use Map 1," and does not show the Property as Open Space. 4 AR 2018. None of Petitioners' evidence shows anything to the contrary.

Needless to say, Respondents regret that City staff did not do a more consistent job of making General Plan documents available to the general public.[22] "Persons who seek to develop their land are entitled to know what the applicable law is at the time they apply for a building permit." *Orange Citizens*, 2 Cal.5th at 159 (quoting *Lesher*, 52 Cal.3d at 544). In this case, the persons seeking to develop their land, after consulting the publicly available version of the General Plan, very reasonably determined from reading it that the General Plan permitted residential

[22] The City acknowledges the importance of ensuring that the public has meaningful access to General Plan documents. The City now provides the currently operative General Plan land use map on its website, and staff have been instructed to provide this map to members of the public who request a copy of the City's General Plan. *See* http://www.cityofmartinez.org/civicax/filebank/blobdload.aspx?BlobID=17161 (.5 MB); http://www.cityofmartinez.org/civicax/filebank/blobdload.aspx?BlobID=17139 (47 MB);.

development on the Property. This determination, in fact, turned out to be correct, as a supermajority of the Council concluded after thoroughly reviewing the evidence.

II. THE COUNCIL'S INTERPRETATION OF ITS GENERAL PLAN IS AMPLY SUPPORTED BY ABUNDANT EVIDENCE IN THE RECORD.

A. Petitioners' Interpretation of the Evidence Is Less Compelling than the Council's.

As discussed *infra*, it is not Respondents' burden to prove that the Council's interpretation of its General Plan is the *most* reasonable interpretation of the evidence. But it is. At the end of the day, the record contains no Council resolution with text or exhibits showing that the Council was stripping the Property of its residential development potential in order to convert private property into an undevelopable open space preserve. Without such evidence, the question necessarily turns on the most persuasive interpretation of the extrinsic evidence. Petitioners' explanation of the evidence raises more questions than it answers. Why is there no evidence explaining why the Council changed its clear course to acquire the Property as public open space and determined instead to restrict it to private open space? Why would a property owner acquiesce in the Council stripping the Property of its previously existing development potential? Why did the Report and Figure 21.1 specifically describe the type of open space in the Hidden Lakes area as "*Public* Open Space" if the City's General Plan designation was, in fact, a restriction on the use of *privately* owned open property? How is the "density transfer" in Chapter 32 supposed to work if the areas sought to be preserved as open space actually *have no density* they can transfer to other parcels? The Council's interpretation of its General Plan reasonably answers these questions. Petitioners' interpretation cannot.

B. Petitioners Have Not Come Close to Meeting Their Burden to Lay Before the Court All of the Evidence That Supports the Council's Interpretation and Prove that "No Reasonable Person" Could Have Made the Same Conclusion.

Finally, even if there were evidence from which the Council *could* have agreed with Petitioners' interpretation of the City's General Plan, that is not the legal issue. As with all challenges governed by the "substantial evidence" standard (PMPA 22:20-21, 27:15-16), the Council's determination must be affirmed if there is enough "relevant evidence that a reasonable mind might accept as adequate to support" the Council's conclusion. *California Youth Authority*

v. State Personnel Bd., 104 Cal.App.4th 575, 584 (2002). Courts "resolve all reasonable doubts in favor of the administrative findings and decision and reverse the administrative determination only if, based on the evidence before the agency, a reasonable person could not have reached the conclusion reached by the agency." *Breneric Associates v. City of Del Mar*, 69 Cal.App.4th 166, 175 (1998). This is especially true for adjudicatory General Plan determinations, which courts have held are uniquely within "the province of elected city officials." *Sequoyah Hills Homeowners Ass'n v. City of Oakland*, 23 Cal.App.4th 704, 719-20 (1993). "[I]t is emphatically, *not* the role of the courts to micro-manage these development decisions." *Id.* (emphasis in the original).[23]

Moreover, under the Housing Accountability Act, since DeNova's project is composed of at least two-thirds residential square footage, the Council was required under State law to approve the project as long as it "[c]omplies with applicable, objective general plan, zoning, and subdivision standards and criteria." Gov. Code § 65589.5(h)(2) & (j).[24] And under that law, a project must be deemed consistent with the General Plan "if there is substantial evidence that would allow a reasonable person to conclude" that it is consistent. Gov. Code § 65589.5(f)(4). For this reason, the standard is doubly deferential: the Property must be deemed to have a residential designation as long there is substantial evidence from which any reasonable person could conclude that it does.

Certainly "[d]eference has its limits," *Orange Citizens*, 2 Cal.5th at 145, but it surely has its scope. And none of the facts that led the Supreme Court to withhold deference in *Orange Citizens* are present here. Here, unlike in *Orange Citizens*, the developer was not claiming that its property had been converted from open space to permit residential uses—the Property was not "open space" at the time it was annexed into the City, and no Council resolution has been produced that gave it

[23] Petitioners cannot dispute that this is the standard of review, since it is affirmed in what Petitioners believe is the "one decision" the Court needs to read to resolve this case. PMPA 4:3-5; *see Orange Citizens*, 2 Cal.5th at 155.

[24] The only exception that would allow the Council to reject the project, or to condition it in any way that would actually or effectively reduce its density, is if the project "would have a specific, adverse impact upon the public health or safety," based on based on "objective, identified written public health or safety standards, policies, or conditions" that could not possibly be mitigated in any other way. Gov. Code § 65589.5(j)(1)(A). The State Legislature recently affirmed its expectation that this type of condition would "arise infrequently," Ch. 243, Stats. 2018, and there is no reason to think the Project would have any unavoidable adverse impact.

any such designation. 2 AR 324. Unlike in *Orange Citizens*, the Property was assessed residential property taxes during the period it was supposedly restricted to open space uses. 2 AR 867-68, 923; 4 AR 1571, 1663-77, 2289-91. In *Orange Citizens*, the developer had always acknowledged that its property was restricted to open space until faced with a referendum, whereas here the developer maintained that the designation was residential long before any referendum was planned. 4 AR 1985, 2112. And here, unlike in *Orange Citizens*, the General Plan designation Petitioners believe to apply to the Property is not even listed in the General Plan text. 4 AR 2206.

More fundamentally, no deference was due in *Orange Citizens* because the Orange City Council had not engaged in any of the fact-finding or interpretation to which courts must defer. There, the contents of the publicly available General Plan were undisputed, as was the meaning of the text and figures in that plan. But here, at least some publicly available versions of the General Plan lacked *any* designation that could possibly be read to restrict the Property to open space, and even the versions of the plan that Petitioners believe to apply can very reasonably be read to permit a base residential density on the Property.[25] In concluding as much, the Council's determination was based on evidence including, but not limited to, the following:

- The Committee's Report, clearly affirming a base residential density for the Property (2 AR 360, 363-67, 385-86), which a later staff report would state was the City's "adopted policy" (2 AR 416, 419).
- The plain text of Chapter 32 of the publicly available General Plan, showing exactly the same base residential density. 4 AR 2258.
- A sworn declaration by former Mayor Sparacino, affirming that the Council at the time planned for the Property to be residential development. 4 AR 2280-81.
- A sworn declaration by James Busby. 4 AR 2283.
- A sworn declaration by County Assessor Gus Kramer and property tax records dating back decades. 2 AR 923, 4 AR 1571, 1663-77, 2289-91.
- A sworn declaration by former City Planning Manager Dina Tasini, explaining in detail the deficiencies in the City's mapping processes and the fact that there was no evidence of any

[25] Petitioners' legally unsupported argument that the Council's interpretation of its plan would introduce internal inconsistencies between the plans and its figures (PMPA 25:14-17) fails because "[a] court . . . cannot disturb a general plan based on violation of the [Planning & Zoning Law's] internal consistency and correlation requirements unless, based on the evidence before the city council, a reasonable person could not conclude that the plan is internally consistent or correlative." *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles*, 126 Cal.App.4th 1180, 1195 (2004);

resolution restricting the Property to open space uses. 4 AR 2285-87.

- A sworn declaration by Christine Coward Dean. 4 AR 2293-2302.
- Oral presentations by Ms. Dean, and Dana Tsubota and Dave Sanson on behalf of DeNova. 2 AR 809-900.
- The April 1976 EIR, in which Planning Director Whittaker stated that the Property was "highly developable residential property." 2 AR 546, 564, 880-82; 4 AR 2054-55.
- The Martinez Gazette's coverage of Resolution 154. 4 AR 2307-08.

Petitioners make no attempt to lay this evidence before the Court and show why none of it qualifies as substantial evidence, *Pfeiffer*, 200 Cal.App.4th at 1572, beyond asserting in a conclusory footnote that none of it was "probative." PMPA 23:26-27.[26] If this evidence is an insufficient basis from which the Council could grant an applicant's appeal, then it is hard to imagine how any applicant's appeal could possibly be granted.

As should be obvious, the records of Council and staff actions dating back to the early 1970s are less than perfectly clear. The Council did the only thing it could do in this situation: to consider the available information and to render a conclusion based on substantial evidence. With no direct evidence of the Council having adopted a General Plan resolution that deprived the Property of its development potential, the Council very reasonably concluded based on abundant evidence that the Property was not designated for open space. And the Council more than reasonably interpreted the text of its own General Plan—which affirm that a base residential density applied to the Hidden Lakes area—to permit residential development on the Property.[27] In this situation, "the body which adopted the general plan policies in its legislative capacity" is entitled to deference because of its

[26] Petitioners no doubt will attempt to meet this aspect of their burden of proof for the first time on reply, which should not be permitted. "[P]oints raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." *Animal Protection & Rescue League v. City of San Diego*, 237 Cal.App.4th 99, 109 n.9 (2015). Petitioners' failure to meet their burden is "fatal" to their claims. *Pfeiffer*, 200 Cal.App.4th at 1572.

[27] For these reasons, Petitioners' arguments about how *they* interpret the General Plan (PMPA 25:9-27:10) are simply beside the point, because they do not show that no reasonable person could conclude differently. Contrary to Petitioners' unsupported claims about "what any planner can explain," the Council was not compelled to conclude that the "base density" assigned to the Hidden Lakes area was designed to *only* be used if transferred. PMPA 26:11-27:10. The Report and the General Plan are both easily read to provide a base density for use on site which is further *increased* if transferred. 2 AR 360, 364-65, 385-56; 4 AR 2257-58; see also 2 AR 858-60.

"unique competence to interpret those policies when applying them in its adjudicatory capacity." *San Franciscans*, 102 Cal.App.4th at 677-78.[28]

III. PETITIONERS' ELECTIONS CODE CLAIM FAILS.

Petitioners argue that even if the Council *correctly concluded* that DeNova had submitted a complete application for a vesting tentative map, and even if the City's General Plan did in fact permit residential development on the site, Elections Code § 9241 forbade the Council from fulfilling its statutory responsibility under Gov. Code § 65943(c) to grant DeNova's incompleteness appeal. No authority supports this strange proposition.

Although Elections Code § 9241 prohibits the enactment of an ordinance that is "essentially the same" as the rescinded ordinance (*City of Morgan Hill v. Bushey*, 5 Cal.5th 1068, 1088 (2018)), it is well established that a council may rescind and enact ordinances that deal with closely related issues within the same year. *See, e.g., Rubalcava v. Martinez*, 158 Cal.App.4th 563, 574-75 (2007). Petitioners cite *no* authority finding two resolutions "essentially the same" which are as dissimilar as these. The first was a legislative action *re-designating and rezoning* a property to a PUD designation, and the second was a quasi-judicial adjudicatory action granting an appeal pursuant to the Permit Streamlining Act by determining that an applicant's vesting tentative map application was complete under the *current* zoning and General Plan designation.[29]

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[28] As for Petitioners' quibbles with the particular language of the Council's findings, findings need not be "extensive or detailed," *Environmental Protection & Info. Ctr. v California Dep't of Forestry & Fire Protection* 44 Cal.4th 459, 515 (2008), and can even be derived from the decision-makers' oral remarks or documents incorporated by reference. *City of Carmel-by-the-Sea v. Board of Supervisors*, 71 Cal.App.3d 84, 91-92 (1977). Here, the written findings (2 AR 1046-52), the Councilmembers' remarks (2 AR 954-68), and the documents referred to in both (2 AR 353-414; 4 AR 2280-91) demonstrate that the Council concluded there was insufficient evidence any prior Council had restricted the Property to open space, and that the Council interpreted its plan to allow residential development on the Property as stated in Policy 32.4231-- more than "bridg[ing] the analytic gap between the raw evidence and ultimate decision." *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles*, 11 Cal.3d 506, 515 (1974). The Council further expressly based its decision on, *inter alia*, "all documentary and oral evidence received at the public hearing or submitted to the City and related to this Appeal." 3 AR 1047-48. In any case, the proper remedy for any insufficiency in this regard would be to remand to the Council to make more detailed findings, rather than to set aside the Council's action. *Glendale Memorial Hospital & Health Ctr. v. State Dept. of Mental Health*, 91 Cal.App.4th 129, 140 (2001).

[29] Petitioners twist the words of the City Attorney on March 21, 2016, who was advising the Council that it could not take any legislative action to *amend the General Plan* within a year, and certainly

Under the Permit Streamlining Act, staff was required to review DeNova's vesting tentative act for completeness, and if staff had agreed with DeNova that the General Plan designation and zoning did not need to be changed to permit the project, then the application would have proceeded. Gov. Code § 65943(a)-(b). Since the "legislative body" would have taken no action, there could be no arguable violation of Elections Code § 9241. But once staff determined that the application was incomplete, the Council was *required by State law* to consider the appeal and render a written decision either granting or denying DeNova's appeal within 60 days. Gov. Code § 65943(c). What do Petitioners think the Council was supposed to do in that situation? Decline to take any action at all on the appeal? If the Council had done that, the application would have been deemed complete. *Id.* Do Petitioners contend that the Council should have denied the appeal, *despite* agreeing with its merits? By doing that, the Council would have been abdicating its statutory mandate to render a decision about whether the applicant had provided the information that is required for an applicant for a development project. Gov. Code §§ 65940, 65941, 65943(c).

Elections Code § 9241 might have prohibited the Council from granting DeNova's vesting tentative map within a year of rescinding the first resolution.[30] But the Council did not grant that approval until June 2018, more than a year after the one-year period in Elections Code § 9241. Irrespective of Petitioners' first cause of action, Petitioners' Elections Code claim is meritless.

CONCLUSION

At a time when "California has a housing supply and affordability crisis of historic proportions" which is "partially caused by activities and policies of many local governments that limit the approval of housing," Gov. Code § 65589.5(a), it would be a profound shame if a former golf course were compelled to sit as unused private property despite the City Council having exercised both its policy judgment, and its adjudicative authority, to conclude that the property is both designated and appropriate for the development of much-needed housing. Fortunately, as set forth above, the law does not require any such result. The Petition must be denied.

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was not saying that the Council was barred from taking an adjudicatory action under the Permit Streamlining Act that would require the Council to determine what the current General Plan designation actually was. PMPA 28:9-16.

[30] To be clear, Respondents and DeNova express no opinion on this question.

Respectfully submitted,

Dated: November 20, 2018

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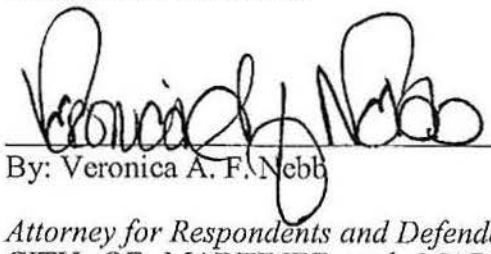
Attorneys for Real Party in Interest
DE NOVA HOMES, INC.

Dated: November 20, 2018

WALTER & PISTOLE



By: Veronica A. F. Nebb

Attorney for Respondents and Defendants
CITY OF MARTINEZ and MARTINEZ CITY COUNCIL

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PROOF OF SERVICE

FRIENDS OF PINE MEADOWS, et al. v. CITY OF MARTINEZ, et al.
Contra Costa County Superior Court Case No.: MSN17-0681

I, the undersigned, hereby declare that I am over the age of 18 years and not a party to the above-captioned action; that my business address at Holland & Knight LLP is 50 California Street, Suite 2800, San Francisco, California 94111-4624. On November 20, 2018, the following document was served:

JOINT RESPONSE BRIEF OF RESPONDENTS AND REAL PARTY IN INTEREST DENOVA HOMES, INC.

on the following persons or entities in the following manner:

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Attorneys for Petitioners and Plaintiffs *FRIENDS OF PINE MEADOW AND TIM PLATT*

☒ **(BY MAIL)** I caused a true copy of each document(s) to be placed in a sealed envelope with first-class postage affixed and placed the envelope for collection. Mail is collected daily at my office and placed in a United States Postal Service collection box for pickup and delivery that same day.

☒ **(BY ELECTRONIC MAIL)** I caused a true and correct scanned image (.PDF file) copy to be transmitted via the electronic mail transfer system in place at Holland & Knight, LLP, originating from the undersigned at 50 California Street, Suite 2800, San Francisco, California, to the addresses indicated above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I executed this document on November 20, 2018, at San Francisco, California.

Myrna M. Yee

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