In the Court of Appeal of the State of California

Fourth Appellate District

Division Three

FRIENDS OF COYOTE HILLS; CENTER FOR BIOLOGICAL DIVERSITY; and FRIENDS OF HARBORS, BEACHES, AND PARKS, Petitioners, Plaintiffs and Appellants, v. CITY OF FULLERTON; and CITY COUNCIL OF THE CITY OF FULLERTON, Defendants and Respondents; PACIFIC COAST HOMES, Real Party in Interest and Respondent	No. G054570 (Orange County Superior Court No. 30-2016-00834366-CU-WM-CXC, Hon. William D. Claster, Judge)

BRIEF FOR REAL PARTY IN INTEREST AND RESPONDENT PACIFIC COAST HOMES

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Real Party in Interest and Respondent PACIFIC COAST HOMES states that Chevron Land and Development Company has an ownership interest of 10 percent or more in PACIFIC COAST HOMES.

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PRELIMINARY STATEMENT

The issue in this case is whether the Fullerton City Council, in approving a vesting map for the West Coyote Hills ("WCH") development project in 2015, acted within its discretion and reasonably interpreted permit conditions it had imposed four years earlier. The trial court found the Council's interpretation was supported by the record and rejected claims that a local referendum dictated otherwise. While Appellants now assert that local referendum rights were unconstitutionally infringed, these claims are groundless as the local referendum process was fully respected and carried out according to law.

In 2011, the City Council granted a number of approvals for the WCH development project ("2011 Approvals").[1] These included a development agreement that gave each party a "right to terminate" the agreement on written notice if any enabling ordinance for any of the project approvals was rejected by voter referendum. This "right to terminate" in Section 2.3 of the agreement was accompanied by adoption of Condition 26 in two other approvals, providing that if the development agreement was "terminated," all other project approvals would become "null and void." In effect, the Council retained discretion to rescind all project approvals, or

[1] Along with a development agreement, the approvals included general and specific plan amendments, a zoning amendment, and three subdivision maps.

not, if it exercised its "right to terminate" the development agreement under Section 2.3.

In 2011, project opponents circulated referendum petitions against four of the approvals. However, two of them failed to make the ballot and a third was superfluous. Measure W challenging the development agreement did qualify for the ballot and the voters ultimately declined to adopt the enabling ordinance in November 2012.

Following the vote, the City chose not to invoke Condition 26 and the other 2011 Approvals remained in effect. Instead, the City undertook a three-year "Path Forward" process in the community to negotiate for greater public benefits than the development agreement had provided. Because the project lacked "vested rights" without the development agreement, it could not move forward without providing a level of benefits acceptable to the City.

In November 2015, the City Council unanimously approved a vesting tentative tract map ("VTTM") for a revised project with a reduced development footprint, reduced site density, and enhanced open space preservation of over 60% of the site. The conditions also included an option for the City to acquire even more of the property for open-space purposes. The VTTM replaced the 2011 subdivision maps, and the Council found the VTTM to be consistent with the 2011 general and specific plan amendments and the zoning change which remained in effect.

Appellants then filed the instant lawsuit challenging the VTTM.[2] Their theory was that the referendum had "terminated" the development agreement, and under Condition 26, this "automatically" nullified all the other 2011 Approvals as well. The trial court rejected these claims because they were contrary to the record, which showed the City's intent in simultaneously adopting Section 2.3 and Condition 26 was that nullification of other approvals would ***not*** be "automatic," but only upon the exercise of a discretionary "right to terminate" which the City had chosen not to exercise. The court also questioned whether the development agreement could be "terminated" in the first place, since in light of the referendum it never came into legal effect. Finally, the court rejected Appellants' alternative theory that the other 2011 Approvals were expressly "conditioned" on continued existence of the development agreement.

Appellants now describe their claims differently before this Court. At trial, they had admitted the voters' intentions under Measure W had nothing to do with interpreting Condition 26. Instead, their argument was one based on the "plain meaning" rule. Reporter's Transcript ("RT") at 8:3-5. On appeal, however, Appellants' now assert there was an infringement of the voters' power of "constitutional magnitude."

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[2] A prior challenge to the 2011 Approvals by two of the Appellants was denied and they abandoned an appeal. *See infra*, p. 22.

Appellants' Opening Brief ("AOB") 79. Appellants spend most of their time arguing the voters were unconstitutionally deprived of their rights unless ***all*** the 2011 Approvals were deemed "automatically" rescinded by the Measure W vote.

There is no basis for such claims. Measure W on its face was directed only to the development agreement ordinance and not at rescinding the other 2011 Approvals. The City's Impartial Analysis issued prior to the vote advised the voters that the other project approvals "are *not* the subject of this referendum" and would not become null and void as a result. AR 6:3872 (italics in original).[3] The title of Measure W was revised to make this very clear as well. AR 6:3884-86. Underscoring these points is the fact that separate referendum petitions against the three other "legislative" approvals either failed to make the ballot or made no difference. The record does not support the proposition that the Measure W vote was directed at or was intended to "nullify" the other 2011 Approvals by declining to adopt the enabling ordnance for the development agreement.

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[3] The administrative record here includes (i) the record from Appellants' unsuccessful challenge to the 2011 Approvals (cited as "**2011AR [volume:page]**"), and (ii) the record covering the subsequent approvals at issue herein (cited as "**AR [volume:page]**").

The same is true legally as well. As a matter of law, Measure W could not have been directed to Condition 26 or any other project approval. The referendum power lies only to ***prevent effectiveness*** of a specific measure, here, the enabling ordinance for the development agreement. It's "effect" is solely to approve the ordinance or not. It cannot repeal other legislative approvals already in effect. Thus, the "effect" of Measure W could not encompass questions not placed before the voters, much less how to interpret a permit condition in other project approvals. In addition, the "effect" of Measure W by law lasted only one year and expired long before the VTTM was considered. Thus, far from being "useless" (AOB 24), the voters' rights under Measure M were fully respected and carried out as the development agreement did not come into legal effect.

The interpretation of the term "terminated" in Condition 26 is determined not by voter rights or referendum law, but simply by ordinary rules of statutory and contract interpretation. That includes, most importantly, reference to the contemporaneously-adopted provisions of Section 2.3 and the parties' drafting/negotiation history. As the record shows, the City Council included Condition 26 in other approvals[4] so that

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[4] The City was under no requirement to impose Condition 26 in the first place. There is no requirement in planning or zoning law, much less referendum law, to have a condition allowing rescission of other project

in three specific situations identified in Section 2.3(i)-(iii) of the development agreement, the Council would have a right (but not a duty) to terminate the agreement, and thereby rescind other project approvals as well. But nothing in referendum law or the permit conditions prevented the Council from electing ***not*** to give notice of termination, and to move forward with the "Path Forward" initiative while the other 2011 Approvals remained intact.

Appellants asked the trial court to interpret the word "terminated" in Condition 26 as requiring "automatic" nullification of other approvals due to the referendum, citing the "plain meaning" rule. But the trouble for Appellants was that the drafting history showed just the opposite – that such "automatic termination" had been rejected in favor of a "right to terminate." *See infra*, pp. 18-20. Accordingly, the court did not err in finding the City had reasonably interpreted and applied its own permit conditions. Nor did the court err in rejecting Appellants' alternative theory that the other project approvals "depended on" the development agreement. Because of these rulings, Appellants' continued argument over the trial court's initial holding – whether the development agreement even "existed" such that it could be "terminated" in the first instance – would not change the outcome in this case. Accordingly, the judgment should be affirmed.

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approvals, just as there was no requirement even to have a development agreement. *See infra*, pp. 62-66.

STATEMENT OF FACTS

The City of Fullerton has a long history of thorough and balanced planning. Over 20 years ago, the City's General Plan acknowledged decades of earlier City planning that produced specific plans to guide future development of then-operating oil fields, including the West Coyote Hills project site. 2011 AR 10:17824. While Appellants state that Fullerton is approaching a build-out level of 90 percent (AOB 24, citing 2011 AR 10:17825), that developed area is exclusive of open space, parks, and recreational facilities (2011 AR 10:17825).[5]

The project here continues to provide well-planned residential development to accommodate the growing population,[6] while providing "extensive open space" (2011 AR 10:17825) under the longstanding Greenbelt Concept General Plan designation (2011 AR 10:17830).

A. The Site's Four-Decade Planning History.

In the mid-1970s, the City undertook a long-range master planning process for approximately 1500 acres known as the East and West Coyote

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[5] The 1997 planning documents cited by Appellants included development of the West Coyote Hills Specific Plan (at a higher density) in projections of full "buildout." 2011 AR 10:17858.

[6] Even at that time, the City's General Plan concluded there was "insufficient vacant land to meet the future growth needs." 2011 AR 10:18030. The City has balanced additional housing needs with the desire to preserve open space.

Hills. 2011 AR 1:6728. On February 8, 1977, the City Council adopted West Coyote Hills Master (Specific) Plan 2A ("MP-2A") for future development in the area (2011 AR 1:6850-52; AR 2:17), including densities, housing location, amenities, public uses, and open space (2011 AR 1:4495).[7]

To implement MP-2A, the City and Pacific Coast Homes' ("PCH") predecessor-in-interest, Chevron U.S.A. Inc., entered into an agreement on June 15, 1977 ("1977 Agreement") for development of the property (which then consisted of 550 acres in oil and gas production). 2011 AR 1:6860-74; AR 2:17. The 1977 Agreement contemplated that once those activities ceased, the property would be developed with a mixture of residential development, public recreational amenities, and preserved open space. 2011 AR 1:6860-6874. It recited that Chevron was "relying on said plan to control and guide future uses in said 550 acre parcel." 2011 AR 1:6860. Under the Agreement, Chevron was required to transfer property to the City for "open space, vista trails, greenbelts, and other public purposes" (2011

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[7] In discussing the important public open space designated under the Specific Plan (AOB 24-25), Appellants neglect to mention that preservation and access to these areas are key components under the VTTM. *See, e.g.*, 2011 AR 1:6852 (describing preservation and public access via recreational trails and vista points, along with compatible residential design); 2011 AR 1:6853 (1977 map of residential areas, community open space, and other planning areas).

AR 1:6860), including a 38-acre nature park and trails which reduced the developable area to 510 acres. 2011 AR 1:6984-85.[8]

Prior to 1988, there were seven (7) amendments to Master Plan MP-2A, none of which materially affected the approved housing density for the site. AR 2:4.14.[9] Amendment No. 8 was proposed in the 1990s and began a long development review process that ultimately led to the 2015 VTTM. AR 2:17.[10] Amendment No. 8 proposed to increase open space by 87%, reduce the number of homes by 400 units, and update development standards. 2011 AR 1:5203. That application proposed up to 830 dwelling units, later reduced to 820. *Id.*

The draft environmental impact report ("EIR") for the project was released in September 2003. In response to comments, the draft EIR was

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[8] Appellants argue Chevron did not obtain statutory or common law vested rights under the 1977 Agreement (AOB 25). Although we disagree, that is beside the point here.

[9] Master Plan MP-2A originally provided for development of up to 2,694 housing units in the area. AR 2:17. In connection with plan amendments over the years, 1,525 units have been built, leaving 1,169 units remaining under the original plan. *Id.*; *see also* 2011 AR 1:6976, 2:7013-14. Prior amendments included dedication and improvement of a park site, an agreement with prior property owners for dedication of open space, designation of regional county park land, and preservation of a high point for park purposes.

[10] The project under the VTTM involves 757 units (AR 2:22) and the map (and Specific Plan as amended) allow for no more than 760 units (*id.*; AR 2:120).

revised with reduced density up to a maximum of 760 dwelling units (AR 2:17) and 50 more acres of open space. Following additional comments from agencies and the public, it was revised and re-published in April 2006. *Id*. Thereafter, four sections were revised and updated again, and were released by the City in January 2008.[11] AR 2:17. In addition, the City released a new climate change section in October 2009. AR 2:18; 2011 AR 1:4167. The final EIR including responses to comments was issued in January, 2010. 2011 AR 1:3836-4162, 1:4414-4483.

B. The Development Agreement.

A development agreement was considered in tandem with Master Plan MP-2A Amendment No. 8 (Specific Plan Amendment No. 8); however, a development agreement was never "required" for the project (AOB 27, citing 2011 AR 14:22660). It was included in a list of regulatory and implementation guidelines as one item that would require discretionary approval from the City (if and when processed) only because a development agreement had been prepared. 2011 AR 14:22660. Unlike planning actions such as amending the General Plan or Specific Plan that are legally required for a project, a development agreement is a voluntary contract between a city and a developer. It is not a mandatory land use

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[11] These were sections on air quality, public health and safety, hydrology and flood control, and biological resources. 2011 AR 1:3145.

approval, nor is it a required element or condition for a specific plan. *See infra*, pp. 62-63.

The Development Agreement was initiated at PCH's request and was intended to supersede the parties' rights and obligations under the 1977 Agreement. 2011 AR 1:4504 (as modified, 2011 AR 1:4552). Negotiations between PCH and the City concerned the nature and level of public benefits that would be provided in exchange for a vested right to develop.[12] The Development Agreement set forth these rights and responsibilities. 2011 AR 1:5192, 1:5700, 1:5197-98 (presentation explaining Development Agreement application as list of public benefits).

Of most significance here, the legislative history of the Development Agreement shows the nuanced nature of Section 2.3, including the City's intent that a referendum would ***not*** automatically "terminate" the Agreement:

Early Draft Development Agreement	**Final Executed Development Agreement**
"This Agreement shall be ***deemed terminated*** and have no further	"if either Party reasonably determines that the Effective Date of

[12] Several drafts were presented to the Planning Commission and City Council in 2010, and the document underwent revisions during the public hearing process. 2011 AR 1:5704. A preliminary draft was revised to include updated public benefits after public discussion, while negotiations over certain provisions continued. 2011 AR 1:5095-96, 1:5097-5183 (May 13, 2010 Revised Draft Development Agreement). The May 5, 2011 Final Draft was updated to reflect the status of the Water Delivery Agreement and other minor changes. 2011 AR 1:5704.

effect upon the occurrence of any of the following events:…Completion of a referendum proceeding or entry of a final judgment setting aside, voiding or annulling the adoption of the ordinance approving this Agreement." (2011 AR 1:4769-4770 at §§ 2.6 and 2.6.3, emphasis added.)	this Agreement will not occur because (i) the Adopting Ordinance or any of the Existing Development Approvals for the Project is/are ***disapproved*** by City's voters at a referendum election or…then such Party shall have ***the right to terminate*** this Agreement upon delivery of a written notice of termination to the other Party…and the Existing Development Approval for the Project shall similarly be null and void ***at such time***." (AR 6:3773 at § 2.3, emphasis added.)

The parties rejected an earlier proposal that a referendum would result in "deemed termination" of all approvals, in favor of flexibility under the agreed-upon "right to terminate" in three different circumstances.[13] Each of the Development Agreement versions cited by Appellants contains the discretionary "right to terminate" provision. AOB 35-36. Appellants allude vaguely to a version of the Agreement that "had been prepared as early as March 2009" (AOB 35), but do not cite the Court to the document containing the rejected "deemed terminated" language.

[13] These included not just a referendum failing to enact an enabling ordinance for any of the legislative approvals (§2.3(i)), but also an adverse court ruling (§2.3(ii)), and a failure of certain conditions (§2.3(iii)), each of which could be the basis for issuing a written notice of termination and triggering Condition 26.

C. The City's Consideration Of The 2011 Approvals.

On March 18, 2010, the Planning Commission recommended (5-1) that the City Council approve the project (2011 AR 1:6351). However, the City Council voted (3-2) on May 25, 2010, to deny it. 2011 AR 1:6518. PCH filed a lawsuit to preserve its rights, which was conditionally settled when the City Council agreed to reconsider, but without giving up any rights to deny or condition the project. 2011 AR 22:27293-300.[14]

On July 12, 2011, the Council reconsidered the project and voted (4-1) to adopt four resolutions: (1) No. 2011-30 (certifying the EIR); (2) No. 2011-31 (approving minor General Plan amendments) (the "GPA");[15] (3) No. 2011-32, (amending MP-2A increasing open space from 122 acres to 283 acres, decreasing dwelling units from 1,169 to 760, and imposing new development standards) ("SPA-8"); and (4) No. 2011-33 (approving three tentative tract maps ("Tract Maps"). *See* AR 3:328; 2011 AR 1:5-235.

The Council also introduced and then adopted upon a second reading Ordinance No. 3168, changing the zoning from Oil and Gas to Specific

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[14] If the project is upheld, and rights under the VTTM are enforced, the lawsuit will be dismissed. *See* AR 2:170.

[15] The project implements the property's pre-existing "Greenbelt Concept" land use designation for clustered development. AR 4:1295-96; 2011 AR 24:28756. Maximum density under the Greenbelt Concept is 3 units per acre, but the VTTM proposed only 1.5 units per acre. AR 5:3139.

Plan District in order to be consistent with MP-2A ("2011 Rezoning"), and Ordinance No. 3169, approving the Development Agreement with public benefits beyond those the City could require under its development regulations and in excess of mitigation of the project's impacts. 2011 AR 1:6631-32, 1:236-42, 1:6285.[16]

Two of those approvals (SPA-8 and Tract Maps) contained Condition 26: "In the event the Development Agreement is ***terminated***, all other development approvals for the project shall be null and void." 2011 AR 1:155, 1:212 (Condition 26, emphasis added). None of the approvals were contingent upon "compliance with the development agreement" (AOB 38). Indeed, the City ***deleted*** a proposed condition that "The applicant shall comply with all provisions" in the Development Agreement. Compare 2011 AR 1:4552 to 1:4549.

Appellants quote one line out of context from the engineering department letter attached to SPA-8 and the Tract Maps for a misleading quote. AOB 37-38. The letter listed the Development Agreement, as one of many items, as a subject heading for the letter's conditions and requirements. 2011 AR 1:156, 1:214. The engineering department

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[16] Appellants' suggestion that the City Council was bullied into approving the project due to the litigation (AOB 32-35) is inaccurate and unsupported. Rather, the 2011 vote was a reflection of a change in Council membership (none of the three Council members who voted on the project both times changed his/her vote). 2011 AR 1:6518, 1:6631-32.

recognized that the Development Agreement was not finalized, and established a conflict resolution procedure and standards for public improvements that could be identified in the Development Agreement. *Ibid*. There was no "requirement," however, for a development agreement as such.

Nor did the City Council's CEQA findings or statement of overriding considerations "rely upon" the Development Agreement. AOB 38. Numerous economic, legal, social, technological and other benefits of the project supported approval of the project, including over alternatives. 2011 AR 1:107-109. (Appellants also ignore the City's findings and modified statement of overriding considerations for the revised project [AR 1:5-8] under the VTTM.)

D. The EIR And The 2011 Approvals Are Upheld.

Two of the current Appellants along with others challenged the EIR and the 2011 approvals on August 11, 2011. *Center for Biological Diversity, et al. v. City of Fullerton, et al.,* No. 30-2011-00499466. Ultimately, the trial court rejected all of their claims (AR 6:3752-57) and Appellants dismissed their appeal on February 7, 2013 (AR 6:3958-61). This was after the Measure W vote, and while Appellants were fully aware of their purported Condition 26 claim (AOB 47; AR 6:3747, 6:3911-14). They made no attempt at an amendment, supplement, or new action to seek

declaratory or other relief regarding the (alleged) effect of the Measure W vote to "automatically" nullify the other 2011 approvals.

E. The Referendum Petitions Fail Except For Measure W.

In August 2011, Appellant Friends of Coyote Hills began circulating referendum petitions to challenge four of the 2011 Approvals. However, challenges to the GPA and SPA-8 failed to qualify for the ballot. AR 6:3438, 6:4815. As to the Rezoning, the City Council repealed § 2 in response to the petition as it was superfluous (AR 6:4815, 6:3750-51); but the proponents did not challenge §1 changing the zoning and allowing a mix of residential, open space and recreational facilities on the site. *Ibid*.; AR 6:3520-24. Only Measure W addressed to the Development Agreement ordinance actually reached the ballot. AR 6:3723-26. Measure W asked voters this question: "[s]hall Ordinance No. 3169" approving a Development Agreement that provides public benefits in exchange for a vested right to build the project in accordance with approved plans "be adopted?" AR 6:3871.

The City Council directed preparation of an Impartial Analysis "showing the effect of the measure on the existing law and the operation of

the measure." AR 6:3732.[17] The Impartial Analysis issued by the City Clerk stated the following:

> In addition to the Development Agreement, in July 2011 the City Council certified an Environmental Impact Report ("EIR") and approved a general plan amendment, zone change, specific plan amendment, and subdivision maps for the WCH project. Those other actions are *not* the subject of this referendum. AR 6:3872-73 (italics in original, underline added).

The Impartial Analysis also advised the electorate that if Ordinance No. 3169 was not approved, the City would have "the right," but not the duty, to terminate the Development Agreement and render the other project approvals null and void. *Id*. On August 7, 2012, the Council also amended the ballot title to make clear that Measure W was directed to the Development Agreement alone, "not the entire project." AR 6:3884-86.[18]

On November 7, 2012, the voters declined to approve the enabling ordinance for the Development Agreement. AR 6:3922-23. As City Staff

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[17] The City has been represented and advised by Special Counsel on the project for many years, and it was not surprising that the City Clerk published the City's Impartial Analysis, rather than the City Attorney. Cf. AOB 43.

[18] Appellants admit that voters were "not told" that the "other project approvals would become null and void under Condition 26 if the development agreement was terminated by their vote." AOB 44. As Appellants also admitted, "[t]he Ballot Arguments addressed" – not "the project," but – whether the Development Agreement's *public benefits* outweighed the impacts of PCH's *vested right to develop* the West Coyote Hills. AR 3874-79." 1 Appellants' Appendix ("AA") 112 (emphasis added).

later confirmed to the City Council in considering the VTTM, the other 2011 Approvals were not affected by Measure W. AR 6:4644, 6:4815.

F. The "Path Forward" Discussions Begin In 2013.

Appellants assert that the City delayed "more than three years" after the referendum to determine its effect on the other development approvals. AOB 23, 47 (citing their own counsel's letter (AR 6:3747, 10/31/2011) and email (AR 6:3911-14, 11/08/2012)).[19] They state that not until October 22, 2015, was "an official view" made public. AOB 49.[20] But this ignores the City's August 10, 2012 Impartial Analysis ***which was*** the City's official view. AR 6:3872. More importantly, Appellants omit any reference to the stakeholder discussions held after the referendum, which would not have proceeded if the City agreed with Appellants' views that Measure W "automatically" nullified the other 2011 Approvals.

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[19] The City was under no obligation to respond to counsel's correspondence and legal arguments. In any event, the City's position was clear in light of the ongoing litigation and the prior Impartial Analysis which contradicted counsel's arguments, coupled with the City declining to take the action that counsel argued the City was compelled to perform (i.e. "invok[ing] provision 2.3 to terminate the Development Agreement," *see* AR 6:3748).

[20] Appellants concede that Council member Chaffee's comments (AOB 48) did not constitute an "official view" or statement by the City Council. Nor were those comments adopted or ratified by any other Council member. Mr. Chaffee was not on the Council in 2011 and cannot speak to the intent when the 2011 Approvals were granted. 2011 AR 1:177, 1:235. He also made it clear that his statements were his own personal view. AR 6:3957. As such, these one-person comments do not constitute cognizable or useful legislative history.

In 2013, the City initiated discussions with interested parties regarding modifications to the public benefits, including increases in permanent open space through dedication and/or public acquisition of more property. In April 2014, the City Council announced a two-track "Path Forward" partnership between Appellant Friends of Coyote Hills, Open Coyote Hills (a community group supporting the opening of Coyote Hills), PCH, and the City. AR 6:4807, 6:3963 (April 15, 2014 General Press Release–Fullerton Strikes Historic Multi-Party Agreement on West Coyote Hills), 6:3998. "The goal of the 'Path Forward' has always been to create an opportunity for parties to acquire and preserve more of the site as open space, while respecting private property rights." AR 6:4571.

This initiative included continuing acquisition discussions and attempts to secure funding, while simultaneously processing ***a new subdivision application.*** AR 4:1296. After two years of discussions, the Path Forward resulted in a potential acquisition plan and a revised project. AR 6:4807, 6:4571, 6:4574. All of this, too, cannot be located in the Opening Brief.

G. The City Approves VTTM 17609 With Greater Benefits.

PCH applied to the City for VTTM 17609 on April 16, 2014. AR

2:5, 2:18, 6:3964-70.[21] The project under the VTTM includes a total of 757 residential units on the site, slightly below the maximum of 760 units allowed by SPA-8. AR 2:22. It was re-designed to implement the Path Forward acquisition plan, as well as SPA-8 (AR 4:1292, 4:1297, 6:4597), and proposed public benefits going beyond the Development Agreement.[22] The City also continued public outreach with Friends of Coyote Hills while processing the VTTM. AR 6:3992-93 (meetings).

Under the VTTM as approved, PCH must dedicate 301 (of the total 510) acres as public open space, including an additional 18.5 acres adjacent to the Ward Preserve, resulting in almost 200 acres of contiguous open space. AR 3:331-33, 3:341, *see id*. 4:2858-59. Cumulatively, the project will open over 350 acres to public use. *Id*.; 2011 AR 1:4502. The 72.3-acre Ward Preserve, though previously dedicated to the City, had never had

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[21] The VTTM revises the maps, subdivides the site, provides public benefits and acquisition opportunities, but provides a shorter vested rights period than the Development Agreement. While negotiations to enhance and replace public benefits continued, the City and PCH agreed to postpone the City's determination as to whether the prior approvals remained valid until the outcome of those negotiations. AR 6:3981; *see* AOB 49. In other words, the City retained "leverage" under its "right to terminate." *See also* RT at 25:19-24.

[22] In response to public comments requesting additional contiguous open space, the VTTM re-allocates residential and open space land uses on the site, including the elimination of any residential development in Planning Area (Neighborhood) 2, with increased residential density in Western areas of the site. AR 2:13, 4:1301-02 ("Path Forward"), 6:3989.

allocated "funds to fully open it to the public" (AR 5:3323) (only a trail area at the southeast corner of the site has been opened). The VTTM project will install improvements and provide funding to fully open the Ward Preserve, including funds for a new Interpretative Center.

The VTTM subdivides the balance of the property in a manner that allows for public acquisition of additional property (Neighborhoods 1 and/or 3) or the entire site, and postpones development activity to allow time for the City to seek acquisition funding. AR 2:131-149. The project will create and add to the habitat acreage, as well as restore and enhance the quality of existing disturbed and newly-revegetated habitat both at the site and inside the Ward Preserve. 2011 AR 1:83-91, 1:3359, 1:2129. This is important because, if the project goes forward, disturbed areas currently suffering natural degradation and invasion by other less desirable species will benefit from re-vegetation and ongoing maintenance. 2011 AR 1:3881-82.[23] In addition, elimination of Neighborhood 2 reduces impacts to sensitive habitat. AR 3:358. The plan will also restore habitat affected by a September 2015 fire and includes a fire protection plan and other

[23] As the project biologist explained, with the project "the habitat will be uniformly high quality instead of the current state, which is a mixture of high quality and low quality habitat, or non-functioning habitat." AR 3:587-90.

features to reduce wildfire risk. AR 5:3298, 5:3160-61.[24]

Additional public benefits under the VTTM Conditions of Approval include a $270,000 Laguna Lake Capital Improvement Fund grant; construction of public trails and key vistas and other additional trail improvements; repair, maintenance, security, and liability obligations up to $3,840,000 for an open space, trails, and Interpretive Center support endowment; dedication of a brush engine up to $350,000; landscaping improvements; water equipment and software; a minimum $176,000 library technology grant; and development impact fees. AR 2:131-149 (Condition L, Public Acquisition); 2:149-158 (Condition M, Public Benefits); 4:1299-1300 (Staff Report summary).[25] The project also provides significant funding for public schools to add facilities, enhance parking, and increase student capacity. AR 3:1277, 6:4925; 2011; 10:19125-75.[26] Chevron Land and Development Company, the parent company of PCH, must guarantee

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[24] Appellants' characterization of project-provided open space of only 283 acres (AOB 32) is outdated. Moreover, their description of the property is inaccurate (*id*.). Oil field roads already transverse the site (*see* map at 2011 AR 1:5191), which has never been zoned as "open space."

[25] Dedication of Neighborhood 2 allows for close to 200 acres of contiguous open space (AR 4:2858-59), and the contiguous acreage would be 203 acres if Neighborhood 1 is acquired or 217 acres if both Neighborhoods 1 and 3 are acquired. AR 6:4820-21.

[26] PCH also dedicated a 1.3-acre site for Fire Station No. 6, which is already built and operational. AR 4:1296-97.

environmental remediation and indemnification obligations, as it did before under the Development Agreement. AR 2:119-289 (Conditions 16, 24, and 25; Exhibit 7 (Guaranty Agreement)). Remediation will be conducted in accordance with requirements of multiple agencies. AR 4:1307.

The Planning Commission held a study session on the proposed VTTM on October 14, 2015, and a public meeting on October 22, 2015 (AR 4:1289-91), when it voted 6-1 to approve the VTTM and EIR Addendum No. 1 (AR 2:4.1-4.5, 2:4.115-4.121, 2:4.287-89). Following appeals by Appellants Friends of Coyote Hills and others, and now fully three years after the Measure W referendum, the City Council unanimously approved the VTTM on November 17, 2015, and adopted resolutions certifying Addendum No. 1 to the EIR, with findings and a modified Statement of Overriding Considerations;[27] approving VTTM 17609; and declaring the Council's intention to abandon certain unneeded easements. AR 2:5-8, 2:118-124, 2:289-290, 2:316. The City also found that project benefits, as modified, still outweighed any adverse air quality and cumulative greenhouse gas impacts. AR 2:7-8, 6:4843.

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[27] The City found that the VTTM would not result in new or more severe impacts than those evaluated in the EIR (certain impacts would be reduced). AR 2:7-8, 6:4843. The City's environmental review also demonstrated an adequate water supply. AR 6:4813, 6:4777-86, 6:4790-93, 5:3297, 2:122-23.

H. The City Council Expressly Considered Measure W.

During the VTTM proceeding, the City Council considered Appellants' contention that under Measure W all the 2011 approvals had been "automatically" nullified. *See, e.g.*, AR 5:3410-12. City Staff presented the following statement:

> So one thing that the City would like to point out is that only the Development Agreement was overturned by the referendum vote. Other decisions made in 2011 were not affected by that vote. The EIR stands. It was upheld by final judgment by Orange County Superior Court. The general plan revision, zone change from oil and gas to specific plan district, amendment to the Master Specific Plan, and the tentative tract maps were all approved.
>
> Additionally, under California law, a referendum prohibits the City from reapproving Development Agreement for taking a very similar [sic], essentially the same action, for a period of one year after a referendum election. After the one-year period, the referendum has no further legal effect. (AR 5:3298-99.)

Special Counsel explained that the City Council's intent in adopting Condition 26 in 2011 was to ensure it would not be legally bound by the other development entitlements, unless it could at least maintain the level of benefits provided under the Development Agreement:

> The word "terminate" is considered in the same sense as used in the DA, meaning that the City would have to give notice and formally terminate the agreement. The City's intent was that the project not go forward without the public benefits. (AR 4:2845-46, 5:3158-59.)

As Special Counsel explained, the purpose was to give the City Council another option it could use, if necessary, to ensure that the community benefits were maintained or even increased, should the Development Agreement ordinance not be approved. In the end, this is exactly what happened under the VTTM.

I. City Acquisition Of Neighborhoods 1 And 3.

Pursuant to Condition L.2 of the Conditions of Approval, the City delivered an Acquisition Notice to purchase Neighborhoods 1 and 3, and also stated an interest in acquiring Neighborhood 4. 2 AA 186, 556-557. Under the conditions, any property acquisition by the City is contingent upon two things: a favorable and timely resolution of this lawsuit and the City's success in securing funding.[28]

PROCEDURAL BACKGROUND

On February 9, 2016, Appellants filed their petition for writ of mandate and complaint for declaratory relief challenging the City's approval of the VTTM. 1 AA 7, 12. They alleged essentially one claim: that Measure W had "automatically" rendered the other 2011 Approvals null and void, thereby placing the VTTM in violation of "consistency"

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[28] If the 2011 Approvals were to be set aside, MP-2A would still apply to the site and allow much greater residential density than the VTTM.

requirements in state and local planning law. *Id*., 12-15. The petition was heard on October 28, 2016. 3 AA 721, 731.

At the hearing, Appellants argued that the primary question before the court was one of "statutory interpretation"—what does Condition 26 mean and "in particular, when the voters rejected the Development Agreement in Measure W, did they terminate the Development Agreement such as to trigger this automatic repeal of the other 2011 Approvals?" RT at 4:2-14.[29] The court agreed the crux of the dispute was the City's use of the word "terminated" in Condition 26, which logically would correspond to the termination provisions of the contemporaneous Development Agreement. *Id*., 6:25-7:5. The point was not that Section 2.3 was in effect, but that it "sheds light on what the meaning of the word terminate is in Condition 26." *Id*., 21:15-21. The City's counsel confirmed that was the City's intent: Condition 26 referenced (in some respect shorthand) the "termination" provision in the Development Agreement, Section 2.3, and the two documents are and should be read together. *Id*., 11:8-17.

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[29] Appellants are incorrect in saying that nullification or repeal of the other approvals would ever be "automatic." RT 12:13-17, 26:23-27:4 (the City "did not want to automatically blow up nearly 20 years of work"). The City also addressed the purpose of Condition 26: Automatic nullification "is not and was not essential to achieving the City's objective" of ensuring the continuation of public benefits. It was one means, but the VTTM achieves that same objective. *Id*., 10:18-25.

The court rejected any argument that it should infer that voters really wanted not only to "not approve" the Development Agreement, but also implicitly to disapprove the other 2011 Approvals, which were not on the ballot and in light of the City's Impartial Analysis "that said exactly the opposite." *Id*., 8:18-9:1.[30] The court noted there was an unsuccessful effort to put two of the other approvals on the ballot. *Id*., 22:22-23:3. For over four years the development approvals had been in effect, and the City did not take action to affect them, nor did the electorate. *Id*.

The court issued a final ruling denying the petition and complaint on October 31, 2016. 3 AA 721-729. As framed by the court, the "chief dispute" between the parties was whether the Development Agreement was "terminated" by virtue of the vote on Measure W, which asked voters whether Ordinance No. 3169 "shall be adopted." *Id*., 724. The court rejected Appellants' "automatic termination" theory and ruled that the other 2011 Approvals "remained in effect" following the referendum on two grounds: (i) the word "terminated" presupposes a valid agreement that has fully gone into effect such that it could later be terminated, and (ii) "automatic termination" is inconsistent with the legislative history of the Development Agreement and the parties' intent. *Id*., 725-27. The court further ruled that the other 2011 Approvals were never "conditioned" on the

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[30] Appellants ultimately conceded voter intent was irrelevant. RT 9:2-5.

existence of a valid Development Agreement. *Id*. Judgment was entered in favor of the City and PCH on December 5, 2016. *Id*., 730-31. On February 2, 2017, Appellants filed the instant appeal. *Id*., 734.

QUESTIONS PRESENTED

The principal question before this Court is whether the City Council abused its discretion in approving the VTTM in November 2015, by interpreting permit conditions it had adopted in 2011 and relying upon the continued validity of the other 2011 Approvals. Condition 26 states that, "In the event the Development Agreement is ***terminated***, all other development approvals for the project shall be null and void." (2011 AR 1:155; emphasis added). Section 2.3, adopted together with Condition 26, states that either party would have a "right to terminate" the development agreement (and the other project approvals as well) if one of three situations occurred (*see* Section 2.3(i)-(iii)), including a voter referendum disapproving any of the legislative approvals.

This issue is one answered by ordinary rules of interpretation of permit conditions and agreements in order to determine their intent at the time they were adopted, guided by the requirement to give deference to an agency's interpretation of its own measures. Nothing in Measure W or referendum law answers or even bears upon this question.

Appellants, in contrast, present a series of "questions" (AOB 18-20) that largely miss the point. Their Question I (AOB 18) addresses the trial court's initial ruling questioning whether a development agreement that never takes legal effect because of a referendum is nonetheless able to be "terminated" within the meaning and intendment of Condition 26. This was an appropriate question for the trial court to ask. But Appellants make this issue the mainstay of their appeal (AOB 58-79), claiming that if it is upheld, the referendum right would be unconstitutionally eviscerated.

However, the truth is that Appellants' convoluted arguments over whether the Development Agreement "never existed," or "existed but was terminated" as a result of Measure W, does not matter in the end.[31] Either way, the voters' rights were respected as the referendum was carried out and the Development Agreement by law never came into legal effect. This is the end of the referendum issues. Thus, the true question is not what the voters thought in 2012, but whether the City Council in 2011 intended that Condition 26 could be triggered "automatically" by a referendum of the

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[31] Appellants also claim that if the trial court is upheld on this preliminary issue, "The project could forward without public benefits approved by the voters." AOB 18. This statement is inexplicable. Due to the referendum, the Development Agreement was not legally effective and the project had no vested rights. The project could go forward if and only if such enhancements were made, which happened in the context of the VTTM approval. The fact the VTTM is not subject to referendum is a matter of governing state statues, not a constitutional defect.

Development Agreement. As we will show, the right of referendum to disapprove the adoption of an enabling ordinance, for any of the 2011 legislative approvals, did not carry with it the right to overpower the intent, express language and history of Section 2.3 and Condition 26 which had rejected the very "automatic" termination interpretation Appellants now seek.

Question II in Appellants' brief contends that if Section 2.3 provides only a "right to terminate," then the City Council by including such a right had effectively created a "pocket veto" to defeat the referendum power (AOB 19, 79-84). But this presupposes that the referendum power ***extends beyond*** just approving or disapproving the enabling ordinance, and can reach out to mandate that Condition 26 be interpreted as providing for an "automatic" termination. The City Council would be interfering with the referendum power if it refused to either rescind the ordinance or put it on the ballot. But the Council does not interfere with or "veto" the referendum power when it adopts conditions in permits, nowhere required by law, that can serve to render other approvals cancelable on such terms as the Council may deem in the City's best interests.

Finally, Appellants' Question III comes in two parts: (i) that the "plain meaning" rule of interpretation should govern here (AOB 88-89), and (ii) that other provisions in the other 2011 Approvals (beyond Condition 26) made them "legally dependent" on the Development

Agreement for continuing legal validity (AOB 94-90). While these claims were front and center for Appellants in the trial court, they occupy just two pages and five pages, respectively, in their Opening Brief here. That is because the record is directly against both theories.

STANDARD OF REVIEW

Appellants contend that "[t]he effect of a "No" vote on Measure W presents questions of law reviewed *de novo*." AOB 57. However, this misconstrues the question presented on appeal. The question is not the effect of the voters' failure to adopt the Development Agreement via Measure W, but instead whether the outcome on the vote "automatically" triggered Condition 26. This in turn depends on what Condition 26 means when read together with Section 2.3, as they were approved together in 2011. The critical issue is one of interpretation of the City's ordinances, permit conditions and the contemporaneous Development Agreement to which the City was an intended party.

While the interpretation of local ordinances and resolutions "is subject to ordinary rules of statutory construction" (*County of Humboldt v. McKee* (2008) 165 Cal.App.4th 1476, 1490) and courts generally review "legal questions, including questions of statutory construction, *de novo*" (*Scotts Valley v. Santa Cruz* (2011) 201 Cal.App.4th 1, 24), well-established authority states that a city's interpretation of its own acts is

entitled to substantial deference. *City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1091 (city's interpretation of its own code is "entitled to deference"); *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193 (city's interpretation of its own ordinance entitled to "great weight"). Such deference extends to a city's interpretation of its own conditions of approval. *Citizens for Beach Rights v. City of San Diego* (2017) 10 Cal.App.5th 1301, 1312 (deferring to city's view of its own ordinances and conditions in a site development plan).

Thus, this Court should give substantial weight to the City's interpretation, fully explained in approving the VTTM, that Condition 26 was not automatically triggered by the "no" vote on Measure W.

ARGUMENT

I. APPELLANTS' ARGUMENTS ABOUT AN ALLEGED "RULE OF NON-EXISTENCE" DO NOT ADVANCE THE APPEAL.

Appellants attack the trial court's initial ruling as a "rule of non-existence," claiming it somehow prejudiced the rights of Measure W voters (AOB 58-78). After reciting general background on development agreements and referendum law (AOB 59-66), Appellants postulate that there is a "lacuna" in the law (AOB 66) and the court erroneously "filled the gap" (AOB 67) in a manner rendering Measure W "meaningless." This

"lacuna," Appellants say, is the difference between the Development Agreement becoming "effective" versus being "in existence" (AOB 67). Appellants suggest it is critical to distinguish a development agreement's legal "ineffectiveness" after a successful referendum against it, and its "existence" as being initially approved even though effectiveness is suspended during the referendum process. They claim the trial court erred by adopting a "rule of non-existence" which left the Measure W voters with no development agreement to "terminate" and thus no ability to reach out and nullify the other 2011 Approvals under Condition 26 (AOB 58).

There are two things plainly wrong with these assertions. First, Appellants misconstrue the trial court's statements and rulings, as well as the cases and statutes. It is entirely understandable why the court below would ask this initial question and conclude that "terminating" an approval which never took legal effect seems highly questionable.[32] Second, the obvious thread running through Appellants' argument is that if the Development Agreement could be "terminated" by Measure W, that

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[32] Actually, the Government Code and Elections Code provide the procedures for a referendum challenging a development agreement. Gov. Code § 65867.5(a); Elec. Code §§ 9235, *et seq*. There is no "legislative lacuna" requiring judicial remedy (AOB 66-67).

Midway Orchards v. County of Butte (1990) 220 Cal.App.3d 765 concerned a different situation of a statutory scheme that, at that time, failed to mention how a legislative act accomplished by resolution—as opposed to ordinance—could be subject to referendum. *Id*. at 774.

automatically "would trigger Condition 26" (AOB 58). But as we have explained, neither Measure W itself nor referendum law say anything about the kind and manner of "termination" intended by the City Council when it adopted Section 2.3 and the corresponding provisions in Condition 26.

A. Appellants Misconstrue The Trial Court's Ruling.

The trial court did not rule that the Development Agreement was "deemed to have never existed in the first place" (AOB 74, 76). Rather, the court found that because the ordinance was not approved by the voters, the Agreement itself was never "legally" effective and did not "legally" exist. 3 AA 726-27. In the court's view, it did not become operative such that it could be terminated – regardless of the type of "termination" required to trigger Condition 26.

Appellants note that the trial court cited *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099 (rehearing denied, review denied December 13, 2003), for several points of black letter law. 3 AA 726-27; *see* AOB 70-72. *Lindelli* involved the stay provision of Elections Code § 9241 and does not speak to the effect of a referendum after an election. *Id*. at 1109 ("The function of the stay provision is to enforce the electorate's power to approve or reject measures provisionally adopted by a legislative body *before* they take effect."). The case does, however, support the court's ruling that the Development Agreement never took effect.

Appellants argue that the "rule of non-existence cannot be squared with how the contracting parties themselves viewed the effect of a referendum vote." AOB 74. The idea appears to be that the parties believed the Development Agreement "existed" and could be terminated, and therefore the referendum should have automatically terminated it. But the record establishes just the contrary – that the City and PCH never intended automatic "termination" by referendum or at all.

Contrary to Appellants' contention, *Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475 does not compel a different result. In *Chandis*, under two separate referenda, the electorate failed to approve adoption of a specific plan and a general plan amendment to allow 120 acres of development, thereby "preventing enactment" of the proposed plans. *Id*. at 479-80. Judicial review was limited to the question of whether the electorate's decision was arbitrary or capricious. *Id*. at 482.[33] The court held that just because a specific plan falls within the parameters of a city's general plan does not mean voters are compelled to approve it. *Id*. ("A rule

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[33] Unlike the case at bar, *Chandis* involved a challenge by the developers, who argued that the electorate's failure to approve the two measures violated the developers' constitutional rights to due process and equal protection and constituted an unconstitutional taking. *Chandis Securities Co. v. City of Dana Point, supra*, 52 Cal.App.4th at 480. While the court rejected those claims, it also noted that the power of referendum is itself subject to constitutional limits, including unconstitutional takings. *Id*. at 484.

declaring the voters cannot reject a proposed specific plan falling within the parameters of the city's general plan would render the exercise of the power of referendum meaningless."). The decision adds no support for Appellants' claim about an erroneous "rule of non-existence."

Nor is the instant case controlled by *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, which addressed pre-election procedural requirements to place an initiative on the ballot. The court there held that findings, which could not reasonably be satisfied by the electorate, were not a pre-requisite for an initiative. *Id*. at 823-24. The case says nothing about the effect of a referendum after the vote.

B. The Trial Court's Ruling Is Consistent With Law.

Appellants misconstrue the trial court's ruling as stating that the Development Agreement "never existed in the first place" (AOB 74). They argue the trial court's ruling meant that the voters had to approve Measure W in order for the Development Agreement even to "exist" (AOB 75). But they also admit that the only question posed by Measure W was "whether the ordinance 'approving' a development agreement should be 'adopted'" (AOB 77). Adoption (or not) is not equivalent to "termination." The voters were not asked whether an existing and effective Development Agreement should be "terminated," but only whether it should become law in the first instance.

The trial court's point was that the Development Agreement never became legally effective. 3 AA 725 (Agreement was "not valid and/or did not legally exist in the first place such that it could later be terminated."). This comports with both the Government Code (*see* § 65867.5(a), development agreements are approved by ordinance and subject to referendum) and the Elections Code (§ 9235, ordinances are generally subject to an automatic 30-day stay before becoming effective, and § 9237, the effective date of an ordinance is suspended by a valid referendum petition). The legislative body's decision to "repeal" an ordinance or to submit it to a vote comes at the same time—before the ordinance becomes effective. Elec. Code § 9241. Any purported inconsistency here is one of Appellants' own making. AOB 76.

Nor is there any validity to Appellants' argument that the trial court improperly adopted a "ministerial rationale" to decide that the Development Agreement could be not be signed or recorded. AOB 76-77. In *Referendum Committee v. City of Hermosa Beach* (1986) 184 Cal.App.3d 152, 156 (review denied October 23, 1986), the court held that a referendum petition "suspended the effect of the ordinance" that authorized a city to enter into a development agreement. Here, Ordinance No. 3169 on its face authorized execution of the Development Agreement (2011 AR 1:240), but was similarly suspended by Measure W. 3 AA 726-27.

In short, because the Development Agreement never went into effect under applicable law, the trial court found it could not later be "terminated." 3 AA 727.

C. The Voters Were Allowed To Exercise The Full Power Of Referendum.

Appellants' argument that the City performed an "end-run" around the referendum (AOB 78-79) is beyond the pale. In addition to rejecting Ordinance No. 3169, the referendum had one other effect: It precluded the City from enacting the Ordinance for one year. Elec. Code § 9241 (If the ordinance fails at the ballot box "the ordinance shall not again be enacted by the legislative body for a period of one year after the date of … disapproval by the voters.").

The City took no action to re-approve the Development Agreement even after the one-year effective period lapsed. The City listened to voter concerns raised in Measure W and for several years held meetings and discussions with the some of the Appellants and other stakeholders to find a Path Forward. Those discussions resulted in a revised project under the VTTM to address the primary concerns expressed by proponents of Measure W— increased open space and acquisition opportunities.[34]

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[34] Measure W prevented the enactment of the Development Agreement ordinance, but did not concern any statutory procedural requirement to

Moreover, the referendum could not carry with it a right to compel the City Council to repeal the 2011 Approvals that had already gone into effect. (Nor could the effectiveness of those approvals be suspended by the Measure W referendum.) "Even under the most liberal interpretation…the reserved powers of initiative and referendum do not encompass all possible actions of a legislative body." *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1509 (invalidating initiative directing city council to revise plan and zoning ordinances to reflect concepts expressed in measure). Measure W asked the voters only whether Ordinance No. 3169 should be adopted. The procedure to challenge the other 2011 Approvals was to qualify referenda petitions for the ballot, which Appellants tried to do, but failed. *See* Elec. Code § 9235 (legislative acts not effective for 30 days to allow for referendum); *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 774-75 (general and specific (master) plan amendments and zoning enactments subject to referendum).[35]

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enact an initiative. *Chandis Securities Co., supra,* at 480-82 (voters have the power to referend a specific plan, thus "preventing [its] enactment") and *Building Industry Assn., supra,* at 824 (statutory procedural requirements that are prerequisite to enactment of local ordinances would be suspect if applied to preclude enactment by initiative) (AOB 78-79) are thus inapposite.

[35] The right to referendum is "nullified" only if there is no window of opportunity to submit a petition. *E.g., Midway Orchards v. County of Butte, supra*, 220 Cal.App.3d at 781 ("a rule allowing for the immediate effectiveness of all resolutions would nullify the power of referendum in

Appellants' arguments against the trial court's initial ruling should be rejected. But even if Appellants could prevail on that claim, the outcome in this case would not change.

II. A "RIGHT TO TERMINATE" IS NOT AN UNLAWFUL "POCKET VETO."

Appellants recognize that the trial court also found that even if Measure W arguably "terminated" the Development Agreement, that would not trigger Condition 26 in light of the contemporaneously-negotiated provisions of Section 2.3 providing for a "right to terminate" in each party, rather than "automatic" termination. AOB 82; *see* 3 AA 727. Appellants now label the court's interpretation an error of "constitutional magnitude" (AOB 79), arguing that having such a "right to terminate" in the Development Agreement usurps the "superior power" of the electorate to terminate the Development Agreement via referendum (and with it "automatically" the other 2011 Approvals). Appellants say this gave the City a "pocket veto" over Measure W by "inaction," i.e. the City's decision not to exercise the right to terminate and to leave the other 2011 Approvals in place (AOB 82).

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some cases"). Here, the project opponents had that opportunity and took full advantage of it. There was no "insurmountable obstacle" in the path of the referendum petitions (nor is any procedural requirement to enact legislation by initiative at issue), and thus Appellants' reliance on *Building Industry Assn. v. City of Camarillo, supra*, 41 Cal.3d at 823-24 is misplaced.

These arguments once again conflate the effect of a referendum under law with the separate subject of interpretation of permit conditions in other project approvals. The "intent" at issue in this case is ***not*** the voters' intent in 2012 on Measure W, but the ***City Council's intent*** in 2011 when it adopted Section 2.3 and Condition 26. A referendum must take the legislative approval at stake as it finds it. A referendum only enacts the enabling ordinance or not. It cannot "repeal" previously enacted legislation already in full effect. Appellants ignore the will and intent of the City Council that adopted Condition 26.

Had the City Council in 2011 intended for a referendum against the Development Agreement to cause "automatic nullification" of the other 2011 Approvals, it could have said so.[36] However, the drafting history shows the Council rejected just such a provision. Retaining a discretionary "right to terminate," rather than providing for "automatic" termination, is not a "pocket veto" and does not violate any facet of referendum rights.[37]

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[36] Under Appellants view, Condition 26 must be construed to effectively say: "In the event a referendum is brought that fails to enact the Development Agreement ordinance, all other project approvals shall automatically become null and void."

[37] Appellants elsewhere rely on "logic" to stretch the effect of the referendum that by its terms "rejected the development agreement ordinance" to mean the Agreement was "terminated" within the meaning of Condition 26. *See* AOB 22. But in questions of statutory interpretation "a

A. Appellants' Case Citations Are Off The Mark.

Appellants again cite cases dealing solely with procedures for referenda (AOB 82-83; *Midway Orchards v. County of Butte, supra*, 220 Cal.App.3d at 778 [Legislature cannot deny right of referendum with respect to legislative acts accomplished by resolution (as opposed to ordinance) by failing to enact legislation prescribing procedures for exercise of the right]; *Building Industry Assn. v. City of Camarillo, supra*, 41 Cal.3d at 823-825 (findings that could not reasonably be made by the electorate would be an insurmountable obstacle to putting an initiative measure on the ballot). These cases address questions of pre-requisites for ***qualifying*** a measure for the ballot. Here, the City raised no impediment to putting Measure W on the ballot. Certainly, Section 2.3 in the development agreement had no effect on bringing Measure W to a vote—the vote was carried out according to all applicable legal requirements.

The other case Appellants' cite, *Orange Citizens for Parks and Recreation v. Superior Court* (2016) 2 Cal.5th 141 (AOB 80), does not speak to the circumstances here. There, a city sought to evade a referendum against a new general plan amendment (needed for a project) by resorting to an older 1973 amendment that had never been processed into effect. The court held that "no reasonable person could conclude" that

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page of history is worth a volume of logic." *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 235.

the property could be developed without a new general plan amendment changing the land use designation (*id*. at 156), and the city could not "evade the effect of the referendum petition" by resort to the older ineffective actions (*id*. at 160).

That is clearly not the situation here. The City carefully considered and addressed voters' concerns, continuing many years past the one-year mark of the referendum's effect. Moreover, Section 2.3 and Condition 26 ***predated*** the referendum petition and there is no evidence in the record that the City interposed them to evade a future referendum election.

In addition, contrary to Appellants' suggestion (AOB 83), a contract clause such as Section 2.3 that leaves termination to the parties' discretion is not unique or improper. In fact, the Development Agreement Statute itself provides for discretionary termination of a development agreement. *See* Gov. Code § 65865.1 ("If, as a result of such periodic review, the local agency finds and determines, on the basis of substantial evidence, that the applicant or successor in interest thereto has not complied in good faith with terms or conditions of the agreement, the ***local agency may terminate or modify*** the agreement," emphasis added). That termination (or modification) is in the discretion of the local agency, and having such a provision, is not a violation of the voters' referendum rights.

Appellants also argue that Section 2.3 "implied" that the "right to terminate" would be exercised "immediately" after the Measure W vote in

November 2012 (AOB 84). There is nothing in the record to support this assertion. It is inconsistent with the language of Section 2.3, the City Clerk's Impartial Analysis for Measure W, and the City's refusal to take any such action despite letters and emails from Appellant's counsel claiming the City was required to do so.[38]

B. The City's Interpretation Is Entitled To Deference.

Appellants question giving deference to the City's interpretation and point out that giving deference "has limits" (AOB 85). It does, but there is no basis to limit deference here.

Generally, the courts give deference to a city's interpretation of its own ordinances and permit conditions unless that interpretation is impermissible. *Anderson First Coalition v. City of Anderson, supra*, 130 Cal.App.4th at 1193 (city interpretation entitled to "great weight" unless clearly erroneous or unauthorized); *Citizens for Beach Rights v. City of San Diego, supra*, 10 Cal.App.5th at 1312 (deferring to city's view of its own ordinances and of conditions in a site development plan it obtained from a city advisory planning board). Greater deference should be given to

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[38] If there was such a legal duty on the City's part to take "immediate action," as Appellants suggest, then the instant lawsuit would be time-barred by the statute of limitations for a writ of mandate to compel City action as of November 2015 (or at the latest on December 4, 2015, three years after results were officially declared, AR 6:3953). Code Civ. Proc. § 338 (3-year mandamus limitations period); 1 AA 177-78.

an agency's interpretation especially where the text is "entwined with issues of fact, policy, and discretion." *Citizens for Reasonable Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032, 1041 (deferring to city's interpretation of its own code).

This is a paradigm case in which deference should be accorded. For Appellants to prevail, their "automatic nullification" theory must be the one and only interpretation possible as a matter of law. But clearly that is not the case. Both the language of the measures and the record support the City's interpretation—that the City Council did not intend a referendum against the enacting ordinance of the Development Agreement (or any other 2011 legislative approvals) would "automatically" nullify all the 2011 Approvals.[39]

Consistency. Appellants argue the Court should not defer to the City's interpretation of Condition 26 because the first draft of the Development Agreement contained the "deemed terminated" (automatic termination) provision and the City was somehow bound by that. *See* AOB 85-86. In Appellants' view, the City's rejection of automatic termination

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[39] Appellants again rely on *Orange Citizens, supra*, 2 Cal.5th at 146 for the statement that deference "has limits" (AOB 85). But in *Orange Citizens*, the court held a city abused its discretion by interpreting its general plan in a manner that "no reasonable person could interpret" it. *Id*. at 146. Here, not only is the City's interpretation reasonable, it is the only interpretation supported by the record.

prior to City Council approval of the final agreement meant the City's interpretation of Condition 26 (as providing a discretionary right to terminate) could not be "consistent" or "contemporaneous" because of an earlier draft. AOB 85-87.

This line of argument is upside down. Far from supporting Appellants' position, the deletion of the "deemed terminated" provision from the earlier draft is strong evidence against it. "The rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should ***not*** be interpreted to include what was left out." *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 (emphasis added); *Security Pacific National Bank v. Wozab* (1990) 151 Cal.3d 991, 998 (a court must not "insert what has been omitted" from a statute). By the same token, the language providing for the exercise of discretion by the City Council under a "right to terminate" cannot be ignored or treated as mere surplusage. *Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730 ("An interpretation which renders part of the instrument to be surplusage should be avoided.").

Contemporaneous interpretation. Appellants look to the wrong point in time for purposes of deference. Substantial deference is owed to a city's interpretation that is "contemporaneous with enactment of the statute subject to interpretation" and thereafter. *See* AOB 85, citing *Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 974-76 (providing

some deference to agency's interpretation of statute enacted after the Tax Code even where the agency abandoned its interpretation).

Here, Condition 26 and the Development Agreement were "enacted" in July 2011 (not February 2010). The City Council had full legislative discretion over and took final action on the Development Agreement and the conditions of approval in July 2011. *See also* Fullerton Municipal Code § 2.18.080 (Planning Commission powers and duties include "recommendations" to the City Council).[40] The Council was not bound by or required to adopt a "deemed terminated" provision. In the first instance it was purely a proposal as part of the parties' negotiations and inherently subject to deletion or change. The City was not "interpreting" when "termination" would occur; it was establishing when it would occur.

Appellants also argue the City did not take a position until October 2015. AOB 87. This ignores the City's official statement in the Impartial Analysis of Measure W, which evidences the City's clear intent to provide only for discretionary termination of the Development Agreement. Additionally, the position that the other 2011 Approvals remained fully in effect following the Measure W vote was the underpinning for the Path Forward initiative in 2013-2015 and the ultimate issuance of the VTTM in

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[40] http://library.amlegal.com/nxt/gateway.dll/California/fullertn/fullertoncaliforniamunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:fullerton_ca.

November 2015. All of these actions are "consistent" in rejecting Appellants' "automatic" termination theory.

The intent underlying Section 2.3 and Condition 26 is evidenced by the manner in which the City adopted, interpreted, and applied these provisions and is entitled to deference. *City of Monterey v. Carrnshimba, supra*, 215 Cal.App.4th at 1091 (conclusion of Deputy City Manager charged with responsibility of interpreting city code provided evidence of the city's interpretation, and was entitled to deference).

III. THE "PLAIN LANGUAGE" OF CONDITION 26 DOES NOT "COMPEL" TERMINATION.

When Appellants reach the main argument they presented to the trial court, they assert in conclusory terms that the "plain meaning" of Condition 26 was "unequivocal" – that if the Development Agreement was "terminated" ("whether by a vote of the electorate or a notice under section 2.3 of the agreement"), all other approvals "automatically" became null and void. AOB 88-89. They essentially suggest that no other reasonable interpretation can be given as a matter of law. But they offer nothing to support that claim.

Having dubbed Section 2.3 as an impermissible "pocket veto," Appellants must assume they can completely ignore it, even though Section 2.3 is the critical provision and involves the most important legislative

history in the case. Appellants ignore those things and the record, and attempt instead to rely on a "plain meaning" argument, as it is all they have.

However, even under a purely "common sense construction" (*Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 389), a referendum could not "terminate" the Development Agreement for purposes of Condition 26. Taking the plain language of the word "terminated," there is a distinction between agreements that are not approved (for example, by referendum), as opposed to approved and then later terminated. Generally, the word "terminate" as used in the Development Agreement Statute (Gov. Code § 65864, *et seq*.) applies to situations where an agreement is first approved and then later terminated—in the local agency's discretion—for some reason:

> Procedures established pursuant to Section 65865 [by which a city may enter into a development agreement] shall include provisions requiring periodic review at least every 12 months, at which time the applicant, or successor in interest thereto, shall be required to demonstrate good faith compliance with the terms of the agreement. If, as a result of such periodic review, the local agency finds and determines, on the basis of substantial evidence, that the applicant or successor in interest thereto has not complied in good faith with terms or conditions of the agreement, ***the local agency may terminate or modify the agreement***. (Gov. Code § 65865.1, emphasis added.)

It is undisputed that the Development Agreement did not come into effect here. As such, the trial court concluded it could not be "terminated" within the meaning of the Development Agreement Statute. Gov. Code

§ 65867.5(a) (development agreements subject to referendum); Elec. Code § 9241 (Where a referendum petition garners sufficient signatures, the adopting ordinance "shall not become effective until a majority of the voters voting on the ordinance vote in favor of it.").

Nowhere in any statute or case is there any mention of a referendum "terminating" a development agreement. Indeed, Appellants cite none, hence their "lacuna" in the law. But Appellants themselves use various and sundry terms in trying to describe the effect of a referendum against the ordinance approving a Development Agreement: e.g., "disapproves" (AOB 18); "rejected" (*e.g.*, AOB 19, 21-22).[41] They query whether the Development Agreement was "deemed terminated" (AOB 18) or "legally 'terminated'" (AOB 19, as used in Condition 26). But that is not the language used in Condition 26.

Moreover, statutes do state the effect of a referendum and it is not "termination." Elec. Code §§ 9237 ("effective date…suspended"); 9241 ("disapproval by the voters"); *see also id*. § 9235 (no ordinance shall "become effective" for 30 days); *see also Midway Orchards v. County of Butte, supra*, 220 Cal.App.3d at 780-81 (the power of referendum is to determine whether a legislative act should *become* law…not to determine

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[41] *See also* AOB 23 (Measure W "asked voters whether the development agreement should be adopted.").

whether a legislative act, once effective, should be repealed."). Whatever debate may be had on the similarity of any of these words with "termination," those separate concepts cannot be equated. "Suspended" or "rejected" does not mean "terminated."[42]

Here, the record shows that the City used the word "terminated" in Condition 26 with a purpose: to tie it back to the parties' intent that "termination" would be a right either party would have in three specific situations identified in Section 2.3(i)-(iii) and would never be "automatic." The City Council anticipated a possible referendum against any of the legislative approvals, and built into Section 2.3 a discretionary right to give written notice of termination or not. Whether or not Section 2.3 ever became effective due to the referendum, it certainly sheds light on the meaning of the word "terminated" used in Condition 26:

> Condition 26: "In the event the Development Agreement is ***terminated,*** all other development approvals for the project shall be null and void." (2011 AR 1:155.)
>
> Section 2.3: "if either Party reasonably determines that the Effective Date of this Agreement will not occur because (i) the Adopting Ordinance or any of the Existing Development Approvals for the Project is/are ***disapproved***

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[42] In *Garcia v. Four Points Sheraton LAX, supra*, 188 Cal.App.4th at 389 (cited by Appellants, AOB 88-89), the court held that the "plain meaning" of even similar terms "performs" and "provides" differed. So too, here, "terminated" should not be equated with "rejected" or other terms used to describe the effect of a referendum. *See also Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

> by City's voters at a referendum election or…then such Party shall have the ***right to terminate*** this Agreement upon delivery of a written notice of termination to the other Party…and the Existing Development Approval for the Project shall similarly be null and void ***at such time***." (AR 6:3773 at § 2.3, emphasis added.)

There was no "nexus" between Measure W and the "project as a whole." AOB 88. Rather, Section 2.3 must be interpreted to give effect to the "mutual intention of the parties as it existed at the time of contracting." Civ. Code § 1636. That intent can be inferred from the language of the agreement itself (Civ. Code § 1639) and explained "by reference to the circumstances under which it was made, and the matter to which it relates" (Civ. Code § 1647). *See Mason v. Retirement Board* (2003) 111 Cal.App.4th 1221, 1229 ("[w]e do not interpret statutes . . . in isolation"); *Pacific Gas Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152 (context is relevant to interpretation); *Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1371 ("[s]tatutory language which seems clear when considered in isolation may in fact be ambiguous or uncertain when considered in context"]).

Not only do Appellants' ignore the language of Section 2.3 and the importance it has for interpreting Condition 26, they ignore many things in

the record as well.[43] In the end, their argument that the City's approval of the VTTM in 2015 was unlawful because the 2011 Approvals had all been automatically repealed by Measure W (AOB 89-91) must be rejected. As the City Council found, the other 2011 Approvals were (and are) in effect, and there was no need in 2015 to re-approve them (AOB 91-92).

Finally, Appellants' add two more suggestions to support their cause, but neither of them is helpful. First, Appellants suggest that the City was forced to approve the VTTM. But while Appellants argue "PCH had the City over a barrel" (AOB 92), exactly the opposite was true. Without vested rights under the Development Agreement, the City could have rescinded the other legislative 2011 Approvals during the four years prior to enactment of the VTTM. Instead, the City took the lead in requiring submission of a revised project to respond to public concerns through the Path Forward process. The City Council vote approving the revised project under the VTTM was unanimous (following the nearly unanimous 4-1 project approval vote in 2011) as being in the best interests of the City.

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[43] As we have noted before, Appellants fail to recognize such things as the changed ballot title (from "Project" to "Agreement") (AOB 88), the text of Measure W itself, and the City's Impartial Analysis ("either party has the right to terminate the Development Agreement and ***in that circumstance*** the other project approvals would become null and void," AR 6:3872 [emphasis added]), which all made clear that the referendum on the Development Agreement would ***not*** affect the other 2011 Approvals.

Second, it does not matter that by State law the VTTM is not subject to referendum (AOB 92). Appellants admit that several paths exist to obtain vested rights under State law: (i) common law vested rights (AOB 59); (ii) a development agreement (AOB 60); and (iii) a vesting tentative map (AOB 62; Gov. Code § 66498.1). Only a development agreement is subject to referendum; the other two are not. But that does not frustrate voters' constitutional rights. The Legislature has acted twice to allow and encourage early vesting for development projects. The vesting tentative map statute was enacted several years after the Development Agreement Statute to provide another sanctioned method of obtaining statutorily vested rights (*see* AOB 62)—the second time without providing a right to referendum. As Appellants concede, a vesting map is not subject to referendum because it is adjudicatory in nature, with the major trade-off being that the vesting period can be much shorter. AOB 62.

IV. THE 2011 APPROVALS DID NOT "DEPEND" ON THE DEVELOPMENT AGREEMENT FOR THEIR VALIDITY.

Appellants' back-up argument is that three of the 2011 Approvals were legally "conditioned" on the existence of the Development Agreement

(AOB 94-96).[44] This argument fares no better as there were no such conditions.

A development agreement is an optional device between a municipality and a property owner who proposes to obtain a vested right to proceed with a project. Gov. Code § 65864, *et seq*. Consistent with this principle, in processing the 2011 Approvals, the City ***deleted*** a proposed condition that "The applicant shall comply with all provisions found in the Development Agreement LRP0300003." Compare 2011 AR 1:4552 to 1:4549; 1 AA 172, n. 31. The City also removed "the Development Agreement" from the list of final approvals needed prior to recordation of tract maps for SPA-8. 2011 AR 1:153 (Condition 9), 1:211 (same), 1:4551 (Condition 5); 1:4650 (same).

Appellants ignore those portions of the record, and mischaracterize others. For example, the draft specific plan amendment Appellants cite did not state a development agreement was "required" for the project. AOB 94 (citing 2011 AR 14:22660). Indeed, that would be contrary to state law. Appellants' argument turns the hierarchy of local land use regulation on its head. A specific plan amendment must be consistent with a city's general plan (Gov. Code §§ 65359, 65454) and a development agreement must be

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[44] Appellants suggest these points are relevant if the referendum vote meant only that the Development Agreement never legally existed. AOB 93.

consistent with both the general and specific plans (Gov. Code § 65867.5(b)), but not the other way around. Appellants cite no authority that a development agreement is legally required for a specific plan amendment, and there is none.

Instead, the draft specific plan amendment stated it established "regulatory processing and implementation guidelines" and that "Discretionary approval by the City of Fullerton will be required for" certain listed items, including a development agreement and other project approvals. 2011 AR 14:22660. At the time, the draft amendment simply recognized a development agreement had been prepared (2011 AR 14:22662) and was accordingly mentioned as a possible project approval. The point was that the City's discretionary approval was required to obtain a development agreement, not that a development agreement was "required" in order for a specific plan amendment to be approved. *Id.*; Gov. Code § 65865(a) (the city "may enter into a development agreement").

Appellants also misquote the engineering department letter they rely on. AOB 95. That letter in fact stated "If approved, approval ***should*** be contingent upon compliance with the following conditions: DEVELOPMENT AGREEMENT [discussion] …." 2011 AR 1:156 (emphasis added), 1:214 (same). Appellants lift those two words (Development Agreement) out of context and ignore the discussion

following the heading. As the trial court correctly observed, the letter states, "'in compliance with the following conditions,' then it discusses the Development Agreement. So there is a missing transition somewhere…it doesn't say it's conditioned on the Development Agreement." RT at 15:6-10.

The section of the letter discussing the Development Agreement (one of many headings) simply recognized that at the time the Agreement had not been finalized, and certain conditions were being negotiated – onsite and offsite improvements, open space, dedications, phasing, fees, and maintenance provisions. *Id*. It was possible that any of those conditions could conflict with engineering conditions. *Ibid*. The engineering department letter provided the conflict resolution procedure that would be followed should that occur. *Ibid*. It also established standards for public improvements that could be identified in the Development Agreement. *Ibid*. The letter thus established conditions on improvements (whether undertaken pursuant to a development agreement or otherwise). There was no requirement, however, for a development agreement as such.

Finally, Appellants argue the Development Agreement was "an expressly stated condition behind the City's decision to invoke" two overriding considerations for approving the EIR. AOB 95 (citing 2011 AR 1:108-109, Nos. 7 and 11 [sic]). The City identified numerous economic,

legal, social, technological and other benefits of the project – 12 categories with many subparts – that it determined outweighed project-related air quality impacts and greenhouse gas emissions. 2011 AR 1:107-109. Of the over 50 lines of text describing important project-related benefits, in two places the City made reference to the Development Agreement: (1) "improvement/restoration of the Coyote Hills Drive Greenbelt Park consistent with the Development Agreement and consistent with City Fire Department and USFWS requirement" among numerous infrastructure improvements (Item 7), and (2) "The Project applicant will be required to pay to City a Development Agreement fee as the Project is implemented, which funds can be used by City to fund important City services" (Item 10). 2011 AR 1:108-109. Neither of these statements rises to the level of a ***condition*** of approval requiring a development agreement itself. Furthermore, Appellants do not argue that any important public benefits are not provided under the VTTM in any event.

Nor is the City's statement of overriding considerations rendered inadequate (even if a challenge at this late date could somehow be timely). The City's balancing of considerations heavily favored certification of the EIR in 2011 and of Addendum No. 1 in 2015. Appellants wholly ignore the City's findings and modified statement of overriding considerations for the revised project (AR 1:5-8) under the VTTM.

Appellants do not argue the GPA or Rezoning were "conditioned" on the existence of a valid development agreement and their attack on the specific plan amendment, tentative tract map approval, and EIR certification fails. *See* AOB 94-96. None of the 2011 Approvals "required a valid development agreement to exist." AOB 96.

CONCLUSION

For the reasons stated above, Real Party respectfully submits the judgment should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

(California Rules of Court 8.204(c))

The text of this brief consists of 13,519 words, not including tables of contents and authorities, the Certificate of Interested Parties, and this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: September 19, 2017

Ronald E. Van Buskirk

PROOF OF SERVICE

Friends of Coyote Hills, et al. v. City of Fullerton, et al.

State Court of Appeal, 4th Appellate District, Division 3

Case No. G054570

I, Rita M. Breaux, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the County of San Francisco, State of California.

2. My email and business addresses are rita.breaux@pillsburylaw.com; Four Embarcadero Center, 22nd Floor, San Francisco, California 94111-5998.

3. On September 19, 2017, at Four Embarcadero Center, 22nd Floor, San Francisco, California 94111-5998, I served a true copy of the attached document(s) titled exactly **BRIEF FOR REAL PARTY IN INTEREST AND RESPONDENT PACIFIC COAST HOMES** by sending it/them via electronic transmission to the following persons at the electronic-mail addresses so indicated:

[See Attached Service List]

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of September, 2017, at San Francisco, California.

/s/ Rita M. Breaux

Rita M. Breaux

SERVICE LIST

Friends of Coyote Hills, et al. v. City of Fullerton, et al.

State Court of Appeal, 4th Appellate District, Division 3

Case No. G054570

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