Case No. G054570

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FRIENDS OF COYOTE HILLS; CENTER FOR BIOLOGICAL DIVERSITY; FRIENDS OF HARBORS, BEACHES, AND PARKS,

Appellants,

v.

CITY OF FULLERTON; CITY COUNCIL OF THE CITY OF FULLERTON; PACIFIC COAST HOMES,

Respondents.

Appeal From the Superior Court of the State of California
for the County of Orange
Honorable William Claster, Judge Presiding
Case No. 30-2016-00834366

RESPONDENTS' BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION THREE	COURT OF APPEAL CASE NUMBER: G054570
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: Jeffrey M. Oderman (SBN 63765) / Peter J. Howell (SBN 227636) FIRM NAME: RUTAN & TUCKER, LLP STREET ADDRESS: 611 Anton Boulevard, Fourteenth Floor CITY: Costa Mesa STATE: CA ZIP CODE: 92626 TELEPHONE NO.: (714) 641-5100 FAX NO.: (714) 546-9035 E-MAIL ADDRESS: joderman@rutan.com / phowell@rutan.com ATTORNEY FOR (*name*): Respondents, City of Fullerton & City Council of the City of Fullerton	SUPERIOR COURT CASE NUMBER: 30-2016-00834366
APPELLANT/ PETITIONER: FRIENDS OF COYOTE HILLS; CENTER FOR BIOLOGICAL DIVERSITY; FRIENDS OF HARBORS, BEACHES, AND PARKS RESPONDENT/ REAL PARTY IN INTEREST: CITY OF FULLERTON; CITY COUNCIL OF THE CITY OF FULLERTON; PACIFIC COAST HOMES	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): City of Fullerton and City Council of the City of Fullerton

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 18, 2017

Peter J. Howell
(TYPE OR PRINT NAME)


(SIGNATURE OF APPELLANT OR ATTORNEY)

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CALIFORNIA STATUTES

I. INTRODUCTION AND QUESTIONS PRESENTED

Appellants challenge the validity of two actions taken by Respondent Fullerton City Council ("**City Council**") at its November 17, 2015, meeting: (1) approval of a vesting tentative tract map (the "**VTTM**") authorizing Respondent Pacific Coast Homes ("**PCH**") to subdivide 510 acres of former oil field land in the City of Fullerton (the "**Site**") and develop up to 760 residences and a small commercial center thereon (the "**WCH Project**" or "**Project**"); and (2) certification of an Addendum (the "**Addendum**") to a previously certified Environmental Impact Report ("**EIR**") for the Project. Appellants do not directly challenge the VTTM or Addendum, however. Instead, they make a convoluted indirect challenge: (1) that at a municipal referendum election held three years earlier, in November 2012 (the "**Measure W Election**"), a majority of the City's voters disapproved a statutory development agreement (the "**Development Agreement**") that had been approved by the City Council in July 2011 for a prior version of the WCH Project; (2) that the voters' disapproval of the ordinance approving the Development Agreement (the "**DA Ordinance**") had the effect of automatically and retroactively terminating five other Project approvals that were also granted by the City in July 2011 (collectively, the "**2011 Development Approvals**")[1]; and (3) since four of the five 2011

[1] The five 2011 Development Approvals included: (1) a resolution

Development Approvals (all except the Tentative Maps) were a necessary foundational basis for the VTTM and Addendum approved in November 2015, the City Council's failure in 2015 to *re-approve* the 2011 Development Approvals before it approved the VTTM and certified the Addendum was a prejudicial abuse of discretion and rendered the VTTM and Addendum approvals invalid and void. As the trial court correctly noted (Appellants' Appendix ["**AA**"] at 715), "[Appellants'] entire case hinges on the success of this argument."[2]

This appeal presents two issues for the Court's consideration:

1. Did the City voters' rejection of the DA Ordinance at the Measure W Election in November 2012 automatically and retroactively terminate the 2011 Development Approvals?

2. Does the validity of the 2011 Development Approvals somehow depend upon the existence of a valid Development Agreement?

As explained below, the answer to both questions is a resounding "no."

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certifying the EIR and adopting a Mitigation Monitoring and Reporting Program ("**MMRP**") for the Project under the California Environmental Quality Act ("**CEQA**"); (2) separate resolutions approving a general plan amendment ("**GPA**"), specific plan amendment ("**SPA**"), and three tentative tract maps (the "**Tentative Maps**") for the Project; and (3) an ordinance approving a Zone Change (the "**Zone Change**"). (*See* §III.B below.)

[2] The reader of Appellants' Opening Brief ("**AOB**") can be excused if he/she has difficulty identifying the basis for Appellants' legal challenge, as Appellants do not even mention the VTTM and Addendum until pp. 48-50, and they do not articulate their legal theory until pp. 53-54.

II. SUMMARY OF ARGUMENT

Under Elections Code §9241, the City voters' rejection of the DA Ordinance at the Measure W election resulted in the Development Agreement not becoming effective and prohibited the City from re-approving the Development Agreement (or taking another legislative action essentially the same as the Development Agreement) for a period of one year after the date of the election. Period.

The voters' action did not also create the domino effect of automatically—and retroactively—terminating the five 2011 Development Approvals *that were not the subject of the referendum election.* Such a bizarre result would be contrary to what the City's voters were informed—in the City Clerk's impartial analysis relating to the one legislative action they did vote on, the Development Agreement—and was not so much as whispered at in the Development Agreement or in any of the Measure W Election ballot materials relating thereto. Indeed, "automatic termination" of the 2011 Development Approvals would be demonstrably *contrary* to the Measure W petition circulators' and voters' expressed intent. Finally, such a result would violate fundamental limitations on the scope of the People's reserved referendum power, which is restricted to preventing legislative acts from becoming effective *prospectively* and does not extend to the retroactive repeal of legislative acts that have already been adopted and gone into effect.

The bizarre result for which Appellants argue—automatic and

retroactive termination of the 2011 Development Approvals based on the outcome of the Measure W Election which involved only the Development Agreement—would also be directly contrary to the City's and PCH's intent, as expressed in the words they carefully chose in negotiating the "termination" provision in the Development Agreement and the similar language the City incorporated into the conditions of approval for two of the 2011 Development Approvals—the SPA and Tentative Maps ("**Condition 26**"). The City reserved a discretionary "right to terminate" the 2011 Development Approvals if the Development Agreement did not go into effect due to a referendum, but the City did *not* provide for its many years of work that culminated in the 2011 Development Approvals to automatically "blow up" based on the outcome of a referendum election on the Development Agreement. It is undisputed the City never took an affirmative action to terminate the 2011 Development Approvals and, hence, they remained and remain in full force and effect.

Contrary to Appellants' lengthy and mostly irrelevant narrative, this case does *not* turn on the scope of the People's referendum power, nor does this case present a novel question of statutory interpretation. Appellants conceded the real issue at trial. (*See* Reporter's Transcript ["**RT**"] at 3 ["Condition 26 . . . is really at the heart of the case before the Court today."]; 33.) Having failed to convince the trial court of the inconvincible, Appellants now (with different counsel) have gone completely off track on this appeal.

In addition, as explained by the trial court, because the Development Agreement never went into effect, Condition 26 not only was not triggered by the referendum vote on the Development Agreement, but ***could not*** have been triggered:

> A dispute whether the Development Agreement was terminated presupposes the existence of a valid Development Agreement that can be terminated. . . . [T]he Court finds that the Development Agreement was not valid and/or did not legally exist in the first place such that it could later be terminated. Given this finding, the Court concludes that the 2011 Development Approvals remained in effect following the referendum.

(AA 715.)

The 2011 Development Approvals do not depend upon the Development Agreement for their existence or validity. Under California law, a development agreement is an *optional* contract that local land use agencies and developers may enter into to provide developers with the vested rights to develop their projects—it is not a mandatory or essential prerequisite to the validity of other land use approvals. Here, while a couple of the conditions of approval in the other 2011 Development Approvals refer to the Development Agreement, they do not link those approvals' validity and enforceability to the continued validity of the Development Agreement and reserved discretion to the City to ensure that PCH would satisfy the City's land use requirements. Moreover, as the trial court recognized, to the

extent Appellants argue the lack of a valid Development Agreement invalidates the certified EIR (one of the 2011 Development Approvals), this claim is barred since Appellants previously challenged the EIR and a final, non-appealable judgment was entered against them on that claim. Finally, the City was successful in transferring the "public benefits" that were formerly set forth in the Development Agreement into even more beneficial conditions of approval in the VTTM (less development, more habitat/open space), so the purpose of the "statements of overriding consideration" adopted with the EIR has been preserved and even enhanced.

In short, this case is straightforward. Since the Development Agreement never went into effect, it could not have been terminated, and Condition 26 is without any effect (as held by the trial court). Alternatively, assuming Condition 26 retained some relevance after the Measure W Election, it is required to be read in light of the City's manifest intent to retain its discretion to decide whether to terminate the 2011 Development Approvals in the event the Development Agreement was rejected by the voters in a referendum election. Either way, it is clear that the referendum of the DA Ordinance did not automatically void the other 2011 Approvals. The judgment of the trial court should be affirmed.

III. FACTUAL AND PROCEDURAL HISTORY

A. The 1970s Through 2010.

The WCH Project is the result of a planning process that goes back forty years. On February 8, 1977, the City Council adopted West Coyote Hills Master (Specific) Plan 2A ("MP-2A") (the "**1977 Specific Plan**"). (2011AR 1:6850-52.)[3] The 1977 Specific Plan envisioned the development of up to 1,169 homes on the Site and the preservation of (only) 122 acres of open space/habitat. (2011AR 9:302, 306.)

The entitlement process that culminated in the approvals at issue in this case began in the 1990s. On May 12, 1997, the City published a Notice of Preparation of a draft EIR for a project that initially was proposed to include up to 830 dwelling units. (2011AR 8:014340.) Over the next several years, the proposed project's size was adjusted downward and the City prepared and circulated several iterations of the draft EIR. (2011AR 1:3138-3835, 6:11210-13, 10:15236, 10:19443.)

The WCH Project was eventually presented to the City's decision-makers in 2010. On March 18, 2010, the Planning Commission voted 5-1 to recommend to the City Council that it approve the Project. (2011AR

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[3] The Administrative Record in this case is comprised of two parts: the record prepared in conjunction with a lawsuit filed by Appellants in 2011 that challenged the 2011 Development Approvals and the Development Agreement on CEQA grounds (referred to herein as the "**2011AR**") and the portion of the record covering events occurring since the 2011 AR was prepared (referred to herein as simply the "**AR**").

1:6351.)[4] On May 25, 2010, however, the City Council voted 3-2 to deny the Project. (2011AR 1:6518.) PCH then filed a lawsuit challenging the City's denial. (*See* AR 3752.)

B. The 2011 Development Approvals.

The makeup of the City Council changed after the November 2010 election, and the new council approved an interim settlement whereby the City agreed to reconsider the former Council's denial of the Project, without promising a different outcome or giving up any of its rights to deny or further condition the Project. (2011AR 22:27293-300.)

On July 12, 2011, the new City Council voted 4-1 to certify the EIR, adopt the MMRP, and approve the WCH Project. Contrary to Appellants' insinuation that Council members were bullied into changing their votes because "PCH had the City over a barrel" (AOB, pp. 91-92), the fact is that none of the three Council members who voted on the Project both times changed his/her vote. Rather, the different result was due to the fact that only one of the three Council members who voted against the Project in 2010 was still on the Council in 2011, and the two new members both voted in favor. (2011AR 1:AR 1:6518, 6631-32.)[5]

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[4] Appellants mischaracterize this action as an "approval" (AOB, p. 86), but the Planning Commission only had authority to make a recommendation to the Council. (*See* 2011AR 1:4494.)

[5] Any suggestion that the City only approved the Project to avoid litigation is also at odds with the fact that the City has now defended two lawsuits challenging the Project approvals.

Excluding the Development Agreement (discussed in §III.C below), there were five 2011 Development Approvals—(1) Resolution No. 2011-30 certifying the EIR, adopting the MMRP, and adopting certain findings and a "statement of overriding considerations" pursuant to CEQA (2011AR 1:5-110); (2) Resolution No. 2011-31 approving the GPA (2011AR 1:111-119); (3) Ordinance No. 3168 approving the Zone Change to change the zoning of the Site from O-G (Oil and Gas) to SPD (Specific Plan District) (2011AR 1:236-238); (4) Resolution No. 2011-32 approving the SPA (2011AR 1:120-177); and (5) Resolution No. 2011-34 approving the three Tentative Maps (2011AR 1:178-235.) (*See* footnote 1, *supra.*) Collectively, the 2011 Development Approvals slashed the maximum number of dwelling units PCH is authorized to develop on the Site from 1,169 to 760 (2011AR 1:120-121, 152-153, 156-157, and 209-210), increased the amount of open space/habitat areas PCH is required to preserve and restore from 122 acres to 283 acres (*id.*), and obligated PCH to satisfy the following requirements and conditions (among others):

- fully remediate all hazardous materials from both developed and open space/habitat areas in accordance with current regulatory standards (2011AR 1:21-23, 33, 37, 133-135, 142, 146, 190-192, 200, and 203);
- restore 143.9 acres of coastal sage scrub, preserve and/or enhance an additional 145.4 acres of coastal sage scrub,

preserve 14.9 acres of other native habitat, with all of these habitat areas, together with the adjacent 72.3 acre City-owned Ward Nature Preserve, to be incorporated into a 340.9-acre preserve, all in accordance with permits and approvals to be granted by the United States Army Corps of Engineers, United States Fish & Wildlife Service ("**USFWS**"), California Department of Fish and Game, and California Regional Water Quality Control Board (2011AR 1:27-42, 138-150, 195-207, and 212);

- place a perpetual conservation easement over the habitat areas in a form approved by USFWS, appoint a qualified third party management agency to maintain the habitat areas, and endow the management agency in perpetuity with sufficient funds (as determined by USFWS) to perform the work (2011AR 1:28-29, 38, 115, 139-140, 147, 155, 196-197, and 204);
- construct a network of 10 miles of interconnected public trails (2 miles within the adjacent Ward Nature Preserve), plus five public vista parks (2011AR 1:30, 115-118, 140, 159, 165-166, 171-172, 190-192, 197, 215-217, and 229-230); and
- construct an interpretive center in the Ward Nature Preserve and provide funding to finally fully open the preserve to the public (2011AR 1:154, 212 and 5704; AR 3323).

Appellants' implication that the WCH Project will have significant adverse impacts on native habitat (AOB, pp. 27-28) is an unwarranted effort to prejudice the Court. In fact, based upon the small development footprint of the WCH Project and the litany of habitat preservation, restoration, enhancement, and maintenance obligations imposed on PCH, the City found the Project will have no significant adverse impacts on biological resources. This finding that was confirmed in the judgment entered in the City's favor in Appellants' prior CEQA lawsuit, is *res judicata* and is not subject to being re-litigated. (*See* §III.D below.)

C. The Development Agreement and Condition 26.

At the same time the City Council approved the 2011 Development Approvals, it took a sixth action as well: approval of a statutory development agreement with PCH (the "**Development Agreement**"). (A copy of the DA Ordinance can be found at 2011AR 1:239-242 and the Development Agreement itself is set forth at AR 3761-3870.)

With characteristic rhetorical hyperbole, Appellants refer to the Development Agreement as "The Big One" (AOB, p. 22), but the City and PCH never viewed (or described) it as such. In this regard, the Development Agreement did not grant PCH any development approvals. All it purported to do, consistent with the Development Agreement statute (Government Code §§65864 *et seq.*), was to "vest" PCH's right to develop the WCH Project (subject to many limitations and reservations of authority) for a

limited period of time in accordance with the *other* five 2011 Development Approvals summarized in §III.B above. (*See* Development Agreement §3.1, at AR 3775, the definition of "Existing Development Approvals" in §1 at AR 3770, and AR 3776-3780.)

In exchange for the City's grant of limited vesting rights to PCH, PCH in turn promised to deliver certain "public benefits" described in the Development Agreement. (AR 3780-3788.) It is noteworthy, however, that most of these "public benefits" were already "baked into" the EIR/MMRP and conditions of approval placed on the GPA, Zone Change, SPA, and Tentative Maps. Thus, for example, when the City Council recited in the DA Ordinance the "substantial public benefits" PCH would be providing pursuant to the Development Agreement, it identified "dedications to the City of approximately 283 acres of open space, ten miles of public trails and five key vista public parks, endowments for restoration and maintenance of critical habitat and for perpetual maintenance of recreation facilities, improvements to existing roadway and trail infrastructure in the project vicinity and a Water Delivery Agreement to offset potential increases in the cost of water to Fullerton ratepayers." (2011AR 1:240.) All but the last item—the Water Delivery Agreement—were also covered by the EIR/MMRP and the terms and conditions of the GPA, Zone Change, SPA, and Tentative Maps. (*See* §III.B *supra*.)

Appellants would have the Court believe that the Development

Agreement was "inextricably tied" to the 2011 Development Approvals. (AOB, p. 21.) Not true. The manner in which the City drafted Condition #9 that was placed on both the SPA (at 2011AR 153) and the Tentative Maps (at 2011AR 211) is illustrative: "Prior to recordation of Tract Map 15671, 15672 or 15673, or any subsequent tract maps for the West Coyote Hills Specific Plan Amendment #8, the City Council must have given final approval to General Plan Revision LRP03-00001 [the GPA], Zoning Amendment LRP03-00002 [the Zone Change], West Coyote Hills Specific Plan Amendment #8 [the SPA], and Abandonment SUB03-00001." While an earlier version of the condition would have also required a final approval of the Development Agreement, that requirement was deliberately deleted. (2011AR 4551-52.) Obviously, the City contemplated the potential that the WCH Project could proceed *without* a Development Agreement.

Appellants focus on the "termination" provision in §2.3 of the Development Agreement and the corresponding language in Condition 26 to the SPA and Tentative Maps to support their position that the 2011 Development Approvals must automatically terminate without a valid Development Agreement. (*See* AR 3773-3774.) In fact, the language and history of the drafting of those provisions proves City and PCH both had the *opposite* intent.

When the WCH Project was first presented to the City's Planning Commission on March 10, 2010, the agenda packet included a draft

Development Agreement that provided the "Agreement shall be deemed terminated and have no further effect upon the occurrence of . . . [c]ompletion of a referendum proceeding or entry of a final judgment setting aside, voiding or annulling the adoption of the ordinance approving this Agreement." (2011AR 4769-70.) Condition 26 was not among a list of recommended conditions of approval presented to the Planning Commission at that time. (2011AR 4547-4549.)

When the WCH Project was presented to the City Council two months later, on May 11, 2010, staff explained that "[r]evisions to the Draft Development Agreement were not complete at the time this agenda packet was prepared, but will be finalized … prior to the May 25, 2010 hearing." The packet included a draft Specific Plan resolution that included, for the first time, Condition 26, which provided that if the Development Agreement were "terminated, all other development approvals for the project shall be null and void." (2011AR 4614.)

The Development Agreement revisions referenced by staff were finished just days later, and the new "May 13, 2010" version replaced the "deemed terminated" provision in the prior draft with discretionary "right to terminate" language:

> 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 by City's voters at a referendum election*** or (ii) a final non-appealable judgment is entered in a

> judicial action challenging the validity or legality of the Adopting Ordinance, this Agreement, and/or any of the Existing Development Approvals for the Project such that this Agreement and/or any of such Existing Development Approvals is/are invalid and unenforceable in whole or in such a substantial part that the judgment substantially impairs such Party' s rights or substantially increases its obligations or risks hereunder or thereunder, or (iii) any of the conditions to the occurrence of the Effective Date referred to in clauses (iv)-(vi), inclusive, of the definition of that term in Section 1 and in Sections 3.1, 5.3, and 5.12 of this Agreement fails to occur within the time(s) set forth therein, and the applicable deadline(s) is (are) not extended by a writing approved by both Parties, with each Party reserving the right to approve or disapprove such an extension or extensions in its sole and absolute discretion, ***then such Party shall have the right to terminate this Agreement upon delivery of a written notice of termination*** to the other Party, ***in which event*** neither Party shall have any further rights or obligations hereunder . . . and ***the Existing Development Approval[s] for the Project shall similarly be null and void at such time***.

(AR 3773, emph. added.)

Development Agreement §2.3 and Condition 26 were not revised again prior to City Council final approval of the Development Agreement and 2011 Development Approvals in July 2011. (2011AR 5:155, 2011AR 6:178*; see* AOB, p. 35 [noting the Development Agreement approved in 2011 was substantially the same as that considered by the Council in 2010].)

Thus, the "automatic termination" language in an earlier draft of the Development Agreement was consciously replaced with optional "right to terminate" language. The City did not intend to *automatically* void the certified EIR/MMRP, GPA, Zone Change, SPA, and Tentative Maps in the event a referendum resulted in rejection of the Development Agreement;

rather, the City intended merely to reserve its discretion and authority to do so.

It is undisputed the City never acted to terminate the Development Agreement or any of the 2011 Development Approvals.

D. The CEQA Lawsuit.

Shortly after the City approved the WCH Project in 2011, Appellants Friends of Coyote Hills and Center for Biological Diversity filed a CEQA lawsuit. That lawsuit resulted in a judgment on the merits in the City's favor on all issues, which became final when Appellants voluntarily dismissed their appeal. (AR 3752-57, 3958-60.)

E. The Referendum.

In addition to Appellants' CEQA lawsuit, persons associated with Appellants circulated four separate referendum petitions challenging: (1) the GPA; (2) the SPA; (3) the Development Agreement; and (4) Section 2 of the Zone Change Ordinance, which provided the Site would be subject to the SPA. The latter petition expressly did *not* contest Section 1 of the Zone Change Ordinance, which changed the Site's zoning classification from O-G (Oil and Gas) to SPD (Specific Plan District). (AR 3521-22 ["Proponent's Note: This portion of Ordinance No. 3168 [Section 1] is not contested by this petition."].)

The petitions challenging the GPA and SPA failed to receive enough

signatures to qualify for the ballot,[6] however, the other two petitions—challenging the Zone Change Ordinance and Development Agreement—obtained enough signatures to qualify. (AR 3442.)

The City Council considered the two petitions that received sufficient signatures on November 1, 2011. The Council effected the will of the voters by rescinding Section 2 of the Zone Change Ordinance (which was determined to be "surplusage"), leaving Section 1 in place. (AR 26:3750, 19:3438.) The Council voted to place the DA Ordinance on the November 2012 ballot.

Contrary to Appellants' claim that it "took the City more than three years after the referendum to conclude" how the other 2011 Development Approvals would be affected if the voters did not approve the DA Ordinance (AOB, p. 23), the Impartial Analysis of Measure W prepared by the City Clerk clearly explained:

> **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. If Ordinance No. 3169 is repealed, however, either party has the right to terminate the Development Agreement and in that circumstance the**

[6] Pursuant to Elections Code §9237, if a petition protesting the adoption of a city ordinance (or other legislative action) is signed by at least 10 percent of the voters of the city and submitted to the city's elections official within 30 days of its passage, the effective date of the ordinance shall be suspended and the city council shall reconsider it. The council must then either entirely repeal the ordinance or submit it to the city's voters. (Elec. Code §9241.)

other project approvals would become null and void.

(AR 3872, italics in original, bold added.) The voters were thus expressly informed that a rejection of the Development Agreement would *not* automatically terminate the other 2011 Development Approvals. (*See also* AOB, p. 44 [Appellants agree "[v]oters were not told" that referendum would trigger Condition 26]; *see also* AR 3880-81, 3884-85 [council action amending Measure W's ballot title to clarify the measure related only to the "Development Agreement"].)

The City Council resolutions approving the EIR/MMRP, GPA, SPA, and Tentative Maps and the Zone Change Ordinance were *not* presented to the voters. Apart from the statement in the City Clerk's Impartial Analysis quoted above, none of the ballot materials or arguments pro or con mentioned or referred to Condition 26. (AR 3874-79.)

At the November 2012 election, the voters voted not to approve the DA Ordinance. (AR 3922-23) The legal result was that the DA Ordinance (and the Development Agreement) did "not become effective" and the City Council was prohibited from enacting the same ordinance "for a period of one year." (Elec. Code §9241.)

F. The "Path Forward" and 2015 VTTM Approval.

As a result of the referendum, PCH "lost" its vested right to construct the WCH Project and the City "lost" the public benefits that were included only in the Development Agreement and not the other 2011 Development

Approvals. In this uncertain and mutually unsatisfactory environment, the City and PCH went back to the drawing board. Following a series of meetings with PCH and community groups, including Appellant Friends of Coyote Hills, the City announced in April 2014 that "the main parties in this issue—The Friends of Coyote Hills, Open Coyote Hills and Pacific Coast Homes—have now agreed on what we are calling a 'Path Forward' to resolve the issues over this property." (AR 3963, 4807.) The "Path Forward," contemplated: (1) further discussions intended to give the City an opportunity to purchase all or some of the Site in order to preserve it; (2) that concurrent with such acquisition discussions, PCH would file, and the City would process, a development application; and (3) that some period of time would be provided to raise funds to purchase and preserve the Site before development would proceed. (AR 3963, 4571.)

Consistent with the Path Forward, PCH submitted an application for a vesting tentative tract map (the VTTM) for a modified version of the Project, which after considerable negotiation eventually returned to the City Council for consideration three years after the Measure W Election, in November 2015.

The 2015 version of the WCH Project differed from the 2011 version in significant respects. Although the one-year "moratorium" period imposed by the November 2012 referendum vote had long since expired, the City Council took to heart its perception of the voters' concerns. As explained by

Mayor Pro Tem Fitzgerald:

> the voters who voted in that election said that open space, more open space was. . . important to them. And this Council listened, and Chevron [PCH's parent] listened as well. They went back to the table. They provided the ability for us to acquire more open space; in fact, the ability to acquire the whole parcel.

(AR 3411-12; *see also* AR 3431 [Councilmember Flory remarking "we were able to extract an agreement from—additional concessions from Chevron because of the vote on Measure W."].)

Specifically, the 2015 Project converted one of the nine development "neighborhoods" in the 2011 version of the Project (Neighborhood 2—comprising 18.5 acres) to permanent dedicated and restored habitat/open space, thereby increasing the habitat/open space areas from 283 acres to 301.5 acres (60% of the Site). This change creates a minimum of approximately 200 acres of contiguous open space and addresses one of Appellants' major complaints about the lack of "contiguous open space" in the 2011 version of the Project. Consistent with the Path Forward, the 2015 Project also granted to the City the option to purchase two additional previously approved development areas: Neighborhoods 1 (10.4 acres) and 3 (13.7 acres), which would result in the entire portion of the Site east of Gilbert Street and the adjacent Ward Nature Preserve being placed in an even larger contiguous habitat/open space conservancy. (AR 131-149, 2502, 2858-59; *compare* AR 2487 with AR 1287; *see* AOB, p. 32 [Appellants

complaining about the lack of "contiguous open space" in the 283 acres that would have been preserved by the 2011 Project].)

Moreover, other VTTM conditions of approval incorporate the "public benefits" that were formerly contained in the Development Agreement. (*See, e.g*., AR 149-158 [requiring, among other benefits, a grant to the Laguna Lake Capital Improvement Fund in the amount of $270,000, the construction of public trails and vista parks, the construction of an interpretive center in the Ward Nature Preserve at a cost of up to $2,800,000, the funding of an Open Space, Trails, and Interpretive Center Support Endowment in an amount not to exceed $3,840,000, the dedication of a $350,000 brush engine, and a minimum $176,000 library technology grant]; *see also* AR 122-123, 128-129, and 203-228.)

As a result, the 2015 version of the Project gained the support of some of the fiercest critics of the 2011 version. For example, Councilmember Chaffee—who as a Planning Commissioner not only voted against the Project in 2011 but helped gather signatures and even write the ballot argument against Measure W—joined a unanimous Council in voting to approve the 2015 version of the Project memorialized in the VTTM. (2011AR 30:6351; AR 3416-25 [explaining his intent to support the Project because it was designed to "accomplish some of the goals of Measure W"].)

IV. ARGUMENT

A. Standard of Review.

The ultimate question for the Court's determination is: what is the meaning of Condition 26 in the SPA and Tentative Maps approvals and the corresponding "termination" provision in §2.3 of the Development Agreement? Were those provisions intended to cause the *automatic* termination of all of the 2011 Development Approvals (EIR/MMRP, GPA, Zone Change, SPA, and Tentative Maps) if the City's voters rejected the Development Agreement at a referendum election? Or were they intended to merely grant to the City the discretionary *right to terminate* the 2011 Development Approvals in that scenario?

Condition 26 and the Development Agreement were drafted by the City and approved by the City Council. In this situation, the standard of review is exceedingly deferential to the City's interpretation. A city's interpretation of its own resolutions/actions is entitled to "great weight." (*Baldwin v. City of L.A.* (1999) 70 Cal.App.4th 819, 838; *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 186 Cal.App.4th 814, 825-826; *Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1090.) As recently stated by the court in *East Sacramento Partnership for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 305, in an analogous context, a local legislative body's interpretation of its own legislative acts "will be reversed only if, based on the evidence before the local governing

body, a reasonable person could not have reached the same conclusion." (Internal quotations and citations omitted.)

As will be explained below, Appellants' attempt to characterize this case as somehow involving attempted intrusions upon the People's referendum power completely misses the mark. *It is noteworthy that nowhere in the AOB do Appellants ask (or answer) the question of what did the voters who voted at the Measure W Election actually intend?* The reason is simple: all the voters intended or could have intended was to reject the Development Agreement. The City's voters did not draft Condition 26 or §2.3 of the Development Agreement. They did not even see Condition 26, and they did not have the authority, using their referendum power, to revise those provisions to accomplish a purpose different from the purpose the City Council (and PCH) designed them to accomplish (or not accomplish). Unlike an exercise of the initiative power, a referendum does nothing more than accept or reject—in its entirety—a previous legislative decision by the local governing body.

B. Appellants' "Questions Presented" Obfuscate the Issues Before the Court.

Appellants begin their AOB with three "Questions Presented." Unfortunately, Appellants' questions muddy the waters by attempting to direct the Court away from the straightforward issues actually before it.

1. Appellants' First Question Is Irrelevant.

Appellants' first question is: "When a referendum vote disapproves a development agreement ordinance, does the vote mean the development agreement is (1) terminated; or (2) transmuted into something that never legally existed in the first place?" Appellants claim "[t]he answer matters because if the development agreement is deemed non-existent, the project could go forward without public benefits," while if "the development is deemed terminated, the project stops." (AOB, p. 18.)

None of that is true. The effect of a referendum of a development agreement ordinance (like any other ordinance) is that the ordinance does not go into effect and cannot be enacted again for one year after the election, period. (Elec. Code §9241.) ***This is true whether the development agreement is "deemed terminated" or "non-existent."***

The lack of a development agreement does not necessarily "stop" the project at issue (or even delay it for a year), however, because a development agreement is not a necessary entitlement for any project, but rather an *optional* agreement that provides a vested right to build a project in accordance with existing regulations. (*See* Gov. Code §§65865(a), (c) [a city "may" enter into a development agreement and is to establish procedures for the consideration of such an agreement "upon application by, or on behalf of, the property owner"], 65865.4, and 65866 [setting forth the vested rights a developer can acquire through a development agreement].) It ***may*** prevent

a project from going forward—as the Measure W referendum did for several years here—by preventing the developer from acquiring a vested right to construct the project, but, again, ***this is true regardless of whether the development agreement is "deemed terminated" or "non-existent."***

Thus, Appellants' ontological musings about whether the Development Agreement here ever "existed" are wholly beside the point and the distinction they attempt to draw is utterly irrelevant. The reason why neither the Development Agreement statute nor any case authority answers the first question raised by Appellants (AOB, p. 18) is that it does not matter.

2. Appellants' Second Question Is Similarly Irrelevant and Based on a False Premise.

Appellants' second question is whether a discretionary "right to terminate" clause in a development agreement may "dilute voters' reserved power to reject a development agreement ordinance by referendum." But there is no disagreement among the parties that the voters have the right to reject a development agreement ordinance by referendum, regardless of any clause included in the proposed development agreement. Indeed, the parties further agree that the voters successfully exercised that right here and that the entire Development Agreement, including the clause referenced by Appellants (§2.3), never went into effect.[7] (*See* AOB, p. 58; AA 634, 647.)

[7] As discussed further below, while §2.3 has no legal effect, it is nonetheless highly relevant in understanding the meaning of Condition 26, which was drafted as the same time and tracked the language of §2.3.

Thus, the voter referendum power was in no way "diluted."

3. Appellants' Third Question Misstates the Issue Before the Court.

Appellants' third question finally gets *closer* to the real issue in this case (the meaning and effect of Condition 26), quoting Condition 26 and asking "If the development agreement was legally 'terminated' by the referendum vote, were all of the other development approvals automatically rendered null and void?" (AOB, pp. 19-20.)[8] But Appellants create confusion by clumsily attempting to separate the issue of whether the Development Agreement was "terminated" from the meaning and effect of Condition 26.

The ***only*** reason to be concerned with whether the Development Agreement was "terminated," as opposed to "legally ineffective," "non-existent," or some similar characterization, is that "terminated" is the word used in Condition 26, which provides "[i]n the event the Development Agreement is terminated, all other development approvals for the project shall be null and void." (2011AR 5:155, 6:178.). Thus, the real issue before the Court is what does it mean to "terminate" the Development Agreement ***for purposes of Condition 26***? As discussed herein, that question is easily

[8] Appellants also ask "[a]lternatively, were all the other development approvals void because those approvals required a valid development agreement to exist?" (AOB, p. 20.) This alternative theory of Appellants' case is discussed in §IV.G. below.

answered by reference to the agreement itself, which was part of the same package of entitlements that included Condition 26 and expressly addressed the circumstances under, and method by, which it could be "terminated."

C. Read in Context, Condition 26 Was Clearly Not Intended to Automatically Nullify the 2011 Development Approvals in the Event of a Referendum of the DA Ordinance.

1. The Development Agreement Required an Additional Affirmative Act to Terminate the Remaining 2011 Development Approvals In the Event the Development Agreement Was Rejected at a Referendum Election.

In drafting and negotiating the Development Agreement, the City (and PCH) anticipated the possibility the Development Agreement might not take effect due to a referendum, a legal challenge, or the failure of certain identified conditions precedent. That contingency was specifically addressed in §2.3, which provided in pertinent part:

> 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 by City's voters at a referendum election*** . . . ***then such Party shall have the right to terminate this Agreement upon delivery of a written notice of termination*** to the other Party, in which event neither Party shall have any further rights or obligations hereunder . . . ***and the Existing Development Approval[s] for the Project shall similarly be null and void at such time***." (AR 3773, emph. added.)

Thus, under the plain language of §2.3, the Development Agreement is not considered to be automatically "terminated" if it is disapproved by the

City's voters at a referendum election. Rather, if that event occurs, the City has "the right to terminate" and, if it does so, the remaining approvals ***then*** (and only then) also become "null and void." (*Id*.)

Significantly, as discussed above, the draft Development Agreement originally presented to the Planning Commission read differently. It provided the "Agreement shall be ***deemed terminated*** and have no further effect upon the occurrence of . . . [c]ompletion of a referendum proceeding or entry of a final judgment setting aside, voiding or annulling the adoption of the ordinance approving this Agreement." (2011AR 4769-70, emph. added.) By the time the Development Agreement reached the City Council for final approval, however, the "deemed terminated" language was replaced with the language giving the City (and PCH) the ***"right to terminate"*** in the event of a successful referendum, underscoring that the parties deliberately negotiated §2.3 to preserve the City's discretion regarding whether to terminate the other Project approvals in that situation.[9] (2011AR 21:5108-09.)

"The fact that the Legislature chose to omit a provision from the final version of a statute which was included in an earlier version constitutes

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[9] Admittedly, the way in which the DA purports to deal with this situation is a bit clumsy, since (as discussed further below) the DA, including §2.3, would never come into effect in the event of a referendum of the DA Ordinance. The process makes more sense with respect to a referendum of one of the other approvals. Notwithstanding the awkward execution, the City's intent was clear.

strong evidence that the act as adopted should not be construed to incorporate the original provision." (*Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 634. Accord, *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1107, and *Doe v. Saenz* (2006) 140 Cal.App.4th 960, 984-985 ["As a general principle, the Legislature's rejection of specific language constitutes persuasive evidence a statute should not be interpreted to include the omitted language."].)

2. Condition 26 Must Be Read Consistently With Development Agreement §2.3.

While the Development Agreement itself never went into effect because of the referendum, the same concept addressed in §2.3 was carried into Condition 26 in the SPA and Tentative Map approvals, which were drafted contemporaneously with §2.3 and adopted by the City Council at the same time at which it approved the DA Ordinance. (*See* 2011AR 1:4547-49, 4558, 4614, 4651, 5097, 5108, 5155.) Condition 26 expressly cross-references "termination" of the Development Agreement, and the place in the Development Agreement where "termination" is addressed is §2.3.

Statutes that "relate to the same person or thing . . . or have the same purpose or object" are considered to be "in pari materia." (*People v. Honig* (1996) 48 Cal.App.4th 289, 327.) "It is an established rule of statutory construction that similar statutes should be construed in light of one another [citations], and that ***when statutes are in pari materia similar phrases***

appearing in each should be given like meanings." (*People v. Lamas* (2007) 42 Cal.4th 516, 525, alterations in original, emph. added.) Thus, given that the Development Agreement and the resolutions incorporating Condition 26 are companion documents related to the same project that were drafted together and approved by the City at the same time, they must be read together, and terms used in both documents must be assumed to have the same meaning. Indeed, Appellants' own initial trial court brief agreed that Condition 26 must be construed in light of the Development Agreement, arguing that Condition 26's reference to "development approvals" should be given the same meaning as in the Development Agreement, and stressing the "interrelated nature" of the approvals. (AA 115-119.)

Accordingly, Condition 26's reference to termination of the Development Agreement must be construed to refer to the discretionary "termination" after a referendum or similar event described in §2.3. (*Placer County v. Aetna Cas. & Sur. Co.* (1958) 50 Cal.2d 182, 188-89. ["It has long been the rule in this state that statutes relating to the same subject matter are to be construed together and harmonized if possible."].) As aptly put by the trial court during oral argument:

> When I look at this Condition 26 using the word terminate, which is, obviously I think that's the crux of the dispute, having the development agreement in front of them at the same time, ***isn't the logical conclusion that the word terminate should correspond to what's in the development agreement***? It seems logical to me.

(RT, 5:26-6:5, emph. added.) The trial court was exactly right. There is no logical way to read Condition 26 other than to "correspond to" the discretionary "right to terminate" the Development Agreement set forth in §2.3.

In light of the above, Condition 26 could have been triggered only by the delivery of a written notice of termination consistent with the procedure set forth in §2.3. It is undisputed that did not happen here.

3. The City's Interpretation of Condition 26 is Reasonable and is Entitled to Deference.

The City respectfully submits that the meaning of Condition 26 is clear. Even if Condition 26 is ambiguous, however, the City's interpretation—that Condition 26 reserves to the City a discretionary "right to terminate" the 2011 Development Approvals if the City's voters rejected the Development Agreement at a referendum election—is absolutely reasonable and entitled to deference.

"If the language [of a statute or other legislative act] permits more than one reasonable interpretation. . . the court looks 'to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.'" (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992, quoting from *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 379.) The

City has already addressed the legislative history and the "statutory scheme" parts of the analysis (§IV.C.1 and 2, *supra*) and at this point will turn to the other extrinsic aids listed by the Supreme Court that assist in interpreting Condition 26.

In terms of the "ostensible objects to be achieved, the "evils to be remedied," and "public policy," the obvious underlying public purpose for the City Council's inclusion of the discretionary "termination" provisions in Development Agreement §2.3 and Condition 26 was to ensure that PCH would not have the unfettered right to develop the WCH Project without making good on its promise to deliver the "public benefits" listed in the Development Agreement—at least those public benefits that were *only* included in the Development Agreement and not one or more of the other 2011 Development Approvals. In this regard, the City's reservation of a discretionary right to terminate the 2011 Development Approvals completely served its purpose. Without the benefit of the Development Agreement's vesting rights, PCH was vulnerable to having the City Council rescind its other entitlements or, possibly, having the voters rescind or undermine them through the exercise of their initiative power. It was in that environment that the City ultimately was successfully able to bargain for restoration of the "public benefits" in the VTTM *plus* the elimination of all development from former Neighborhood 2 and the acquisition of an option to acquire substantial additional portions of the Site for permanent habitat/open space purposes as

well (Neighborhoods 1 and 3).

The City's "contemporaneous administrative construction" of Development Agreement §2.3 and Condition 26 also supports the City's interpretation. The City has consistently interpreted Condition 26 in particular as providing a *discretionary* right to terminate the other 2011 Development Approvals in the event of a referendum of the DA Ordinance, consistent with the process set forth in the Development Agreement. To repeat the statement in the City Clerk's Impartial Analysis of Measure W submitted to the City's voters back in 2012 (which Appellants never challenged):

> 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. **If Ordinance No. 3169 is repealed, however, either party has the right to terminate the Development Agreement and in that circumstance the other project approvals would become null and void**.

(AR 3872, italics in original, bold added.)

"[B]allot summaries and arguments," it must be noted, "may be considered when determining the voters' intent and understanding of a ballot measure." (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.) The City's voters at the Measure W Election presumably read and understood the limited scope of what they were voting on.

Given the wording of the Impartial Analysis in the official ballot materials, Appellants' assertion that it took the City "years" to tell voters how the referendum vote would affect the 2011 Development Approvals (AOB, pp. 47-49) is nonsense. And three years later, when the City acted on PCH's revised Project application, it construed Condition 26 exactly the same way, explaining that the 2011 Development Approvals were still valid because "[t]he City Council never took action to terminate the DA. 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." (AR 2845; *see also* AR 3157-59, 3299-3300.)

Appellants point to instances in which the City allegedly declined other opportunities to opine on the effect of Condition 26 (AOB, pp. 47-49),[10] but fail to show the City ever adopted an interpretation or took an action inconsistent with the construction set forth in the City Clerk's Impartial Analysis. Indeed, in declining to take the action demanded by Appellants' counsel (*see* AR 3913 ["If the voters reject the Development Agreement by referendum, the City would be compelled to invoke provision 2.3 to

[10] One of these, in which the City's attorney purportedly indicated he "was still evaluating what effect the referendum would have on the existing approvals" in October 2011, is based on multiple layers of hearsay. (*See* AOB, p. 47, citing AR 3747 [letter from Appellants' counsel relating her "understanding" of an exchange between the City's attorney and the Mayor].) In any event, even if accurate, it does not show the City ever adopted an inconsistent interpretation of Condition 26.

terminate the Development Agreement, thereby voiding the project."], the City unmistakably rejected their position.

Appellants make much of the fact that Councilmember Chaffee (an active opponent of the 2011 version of the Project) asserted shortly after his election in 2012 that "the slate [had] been wiped clean" by Condition 26. (AOB, p. 48.) But the opinion of a single Councilmember who was not even *on* the Council when it acted on the 2011 Development Approvals is obviously irrelevant in construing Condition 26. (*See, e.g., People v. Wade* (2016) 63 Cal.4th 137, 143: Even "the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation." [Internal quotes and citation omitted.].) If the opinion of the author of a bill cannot be used to interpret its meaning, surely the opinion of an opponent of the bill who did not even vote on the bill cannot be so used. Moreover, Councilmember Chaffee's "first take" on the meaning of Condition 26 obviously changed, as he was part of the unanimous Council that relied on the 2011 Development Approvals in approving the revised WCH Project in 2015. (AR 3416-25, 3436.)

Appellants make the bizarre argument that the fact the draft Development Agreement was revised *during the negotiation process* to reserve the City's discretion to terminate the Development Agreement and

other 2011 Development Approvals is evidence the City took "inconsistent positions." (AOB, pp. 85-87.) Obviously, however, the fact that a ***draft*** document was revised does not demonstrate that there was any confusion or inconsistency regarding the meaning of the ***final*** document.

In summary, while the City submits the meaning of Condition 26 is clear, even if it were ambiguous, the City's interpretation of its own resolutions is eminently reasonable, is entitled to "great weight," and must be followed "unless clearly erroneous." (*See Sacks v. City of Oakland*, *Baldwin v. City of L.A.*, and *Terminal Plaza Corp*. v. *City and County of San Francisco,* cited in §IV.A *supra*.)

D. The Trial Court Correctly Determined that Condition 26 Could Not Have Been Triggered Because the Development Agreement Never Became Legally Effective.

As indicated in the trial court's ruling, the process for approving a development agreement is set forth by statute and requires the adoption of an ordinance. (Gov. Code §65867.5.) If a referendum petition challenging such an ordinance receives sufficient signatures, "the effective date of the ordinance shall be suspended" and it does not become effective unless and "until a majority of the voters voting on the ordinance vote in favor of it." (Elec. Code §9241; *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 781 [The referendum is the power . . . to determine whether a legislative act should *become* law."], italics in original.) Thus, as a matter

of law, and as determined by the trial court, the ordinance authorizing the execution and recordation of the Development Agreement never became effective, and the Development Agreement itself never went into effect. (*See* AA at 708-709.) Given that fact, the trial court reached the unavoidable conclusion that there was no opportunity for the Development Agreement to be "terminated." (AA 715 ["the Court finds that the Development Agreement was not valid and/or did not legally exist in the first place such that it could later be terminated"].)

Faced with that straightforward analysis, Appellants resort to a convoluted game of semantics, seizing upon the trial court's statement that the Development Agreement did "not legally exist" to wrongly accuse the court of "conflat[ing] the issue of whether the development agreement took effect" (Appellants agree it did not) "with whether the development agreement legally existed in the first place." (AOB, p. 58.) They go on to spend many pages arguing against the propriety of a supposed "Rule of Non-Existence" they imagine the trial court adopted. (*See* AOB, pp. 67-79)[11] But the fact is the trial court's analysis did not rely on characterizing the Development Agreement as "non-existent," versus "non-effective." The trial

[11] Appellants claim this supposed rule came out of "an unwarranted extrapolation of *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099," and attempt to distinguish that case on its facts. (AOB, pp. 69-72.) In actuality, the trial court relied on *Lindelli* for nothing more than its general discussion of the referendum power. (AA 715-716.)

court never suggested—nor did its holding require—that the Development Agreement never "existed" in any form (or that it "disappeared" or "vanished"). To the contrary, the trial court used a number of terms, including "legally ineffective," "invalid," and "never legally existed" interchangeably, in making the point the Development Agreement could not have been terminated, because a ***valid, effective*** Development Agreement never existed. (AA 709.) A "legally ineffective" Development Agreement cannot be terminated any more than a "legally non-existent" one can, and the trial court's ruling certainly did not decide otherwise.

Moreover, the trial court's description of a development agreement that has not become effective as "non-existent" was not even unique. In *216 Sutter Bay Associates v. County of Sutter* (1997) 58 Cal.App.4th 860—a case cited in Appellants' own brief—the court found a "development agreement was *not* in existence," because it had not yet become effective. (*Id*. at 869 ["The plaintiff's development agreement **was *not* in existence** when Ordinance No. 1170 was enacted on January 6, 1993. Under the terms of the development agreement and the law, the **plaintiff's development agreement did not take effect** until January 14, 1993, 30 days after the ordinance approving it was enacted"], italics in original, bold added.) Accordingly, Appellants' various attempts to prove the Development Agreement "existed" miss the point.

Indeed, those efforts to elaborate on the supposed flaw in the trial

court's analysis merely underscore Appellants' own misreading of the trial court's decision. For example, Appellants puzzlingly argue that because the Development Agreement would have come into existence if the voters had not taken action, it cannot "'not exist' in a different context where the electorate takes unequivocal action." (AOB, p. 76.) But, of course it can, if the issue is whether a valid, effective development agreement exists. If a development agreement ordinance is rejected by the voters, a city has no authority to enter the development agreement. (Gov. Code §65867.5.)

Appellants note the City Council had the option to repeal the DA Ordinance upon the filing of the referendum petition, and ask "[i]f the trial court is correct that the development agreement never existed, how could the city council have repealed it?" (AOB, p. 76.) But no one is arguing the DA Ordinance did not exist, just that it never became effective, preventing the City from entering into a valid Development Agreement.

Appellants accuse the trial court of having improperly "construed the referendum through a ministerial lens," because the court noted that City officials were without authority to sign and record the Development Agreement. (AOB, p. 76.) But the only reason the court mentioned those acts was because the Development Agreement was prematurely signed and recorded; the court's point was that no legally effective Development Agreement existed in spite of (not because of) those ministerial actions, precisely because the prerequisite legislative action necessary to approve the

Development Agreement never became effective. (AA 716-17.) Appellants are correct that Measure W did not merely ask whether the Development Agreement should be signed, but rather whether it should be "adopted." (AOB, p. 77.) But that merely confirms an effective Development Agreement never came into being when the DA Ordinance was rejected.

Semantic games aside, the trial court's analysis was simple and irrefutable. Because the Development Agreement never went into effect it could not be "terminated"—via the process described in §2.3 or otherwise—and Condition 26 therefore could not have been triggered.

E. Appellants Misrepresent Both the Scope of the Referendum Power and Its Application to this Case.

The hook for Appellants' brief is that this case is about the limits of the referendum power reserved to the People via the California Constitution. (AOB, p. 19, 23, 79-87.) Appellants argue the City's actions and the trial court's ruling rendered the voters' power "meaningless" and "useless," by placing an "'insurmountable obstacle' in the path of the referendum process." (*See, e.g.*, AOB, pp. 24, 64, 79.) Nothing could be further from the truth.

The voters' exercise of their referendum power was unhindered and achieved meaningful results: the DA Ordinance was rejected and did not take effect. The referendum of the DA Ordinance alone, however, did not and could not have resulted in the automatic nullification of the several *other* City Council actions taken at the same time that were *not* the subject of the

referendum.

1. The Voters Do Not Have the Right to Challenge Every Governmental Approval.

As a preliminary matter, it is important to note that the referendum power extends only to legislative actions. (*Yost v. Thomas* (1984) 36 Cal.3d 561, 569 ["The powers of referendum and initiative apply only to legislative acts by a local governing body."].) Thus, the voters do not have the authority to referend every action with which they disagree. For example, the voters did not have the right to referend the Tentative Maps approved by the City Council in 2011, nor did they have the right to referend the VTTM that approved the 2015 version of the Project, because those decisions were adjudicatory in nature, not legislative. (*See Lincoln Property Co., Inc. v. Law* (1975) 45 Cal.App.3d 230 [tentative subdivision map is non-legislative act; trial court judgment enjoining referendum election affirmed]; *see also* AOB, p. 92.)

2. Appellants Ignore the Fact that the Voters Declined to Exercise the Full Extent of Their Referendum Powers With Respect to the 2011 Development Approvals.

Lost in Appellants' repeated laments that the voters' referendum power is rendered "meaningless" if the court does not nullify ***all*** of the 2011 Development Approvals (*see, e.g.*, AOB, pp. 24, 64, 79) is the fact that their efforts to referend the GPA and SPA included in the 2011 Approvals *failed*. Likewise, Appellants seem to forget that they consciously chose to not

challenge §1 of the Zone Change Ordinance, which changed the zoning of the Site from O-G (Oil and Gas) to SPD (Specific Plan District). Had the referendum circulators and voters desired to prevent those actions from going into effect, they had the power to do so. Conversely, their failure to exercise that power has consequences: the GPA, SPA, and §1 of the Zone Change Ordinance *did* go into effect by August 2011, 15 months before the Measure W Election on the DA Ordinance.

It is ironic to say the least that Appellants would now argue the voters' referendum power compels this Court to invalidate the GPA, SPA and §1 of the Zoning Ordinance when they failed to obtain sufficient signatures to qualify those decisions for the ballot (the GPA and SPA) or they preferred to see them go into effect (§1 of the Zone Change Ordinance). How does *that* result further the intent of the voters or the People's power of referendum?

Appellants downplay the significance of their failure to muster sufficient petition signatures to referend the GPA and SPA by insisting the DA Ordinance was "The Big One." (AOB, p. 22.) As noted above, however, they are flat wrong. The DA Ordinance was not even a necessary entitlement for the Project. (Gov. Code §65865(a), (c).) In contrast, as Appellants themselves explain, the GPA, SPA, and Zone Change *were* all necessary for the Project. (AOB, p. 90.) The voters' rejection of any of those actions would have prevented the Project from moving forward, unless and until a similar action was approved. Moreover, the fact that the proponents of the

referendums (including the principals of Appellants) circulated four separate referendum petitions in response to the 2011 Approvals shows they fully understood that each of the approvals stood (and stands) on its own. It was only after the DA Ordinance referendum was the only one to reach the ballot that Appellants began to argue it alone was sufficient to rescind all of the 2011 Development Approvals.

3. The Referendum Was Not Meaningless.

The Measure W Election was ***not*** a useless act. Appellants and their allies accomplished as much as they could. They prevented the Development Agreement from going into effect; they deprived PCH from obtaining a vested right to proceed with the Project; they effectively delayed the City's reconsideration of a revised Project for three years; and they created an environment in which the City was able to successfully negotiate with PCH for the dedication of a significantly larger contiguous open space/habitat area within the Project Site.

4. The Referendum Power Does Not Include the Power to Repeal Legislative Acts That Are Already In Effect.

But the referendum of the DA Ordinance could not, and did not, rescind other the other 2011 Development Approvals that were not the subject of the Referendum. This would have exceeded the voters' referendum power. "The referendum process allows the voters to veto statutes and ordinances enacted by their elected legislative bodies ***before***

those laws become effective." (*Referendum Committee v. City of Hermosa Beach* (1986) 184 Cal.App.3d 152, 157.) "The power is to determine whether a legislative act should *become* law." (*Midway Orchards v. County of Butte,, supra,* 220 Cal.App.3d at 781, italics in original.) ***"It is not to determine whether a legislative act, once effective, should be repealed."*** (*Id*., emph. added; *see also* Elec. Code §9237.) Thus, "[a] referendum that rejects an ordinance simply maintains the status quo." (*City of Morgan Hill v. Bushey* (2017) 12 Cal.App.5th 34, 42 ["unlike an initiative, a referendum cannot 'enact' an ordinance"].) Here, as discussed above, the other 2011 Development Approvals all went into effect more than a year before the Measure W Election, and thus, could not have been rejected via the referendum even if the referendum had purported to apply to those approvals.

Appellants' claim that the referendum power is rendered "meaningless" unless it allows the voters to belatedly and implicitly rescind legislative acts they allowed to go into effect (not to mention non-legislative acts that were not subject to referendum) is not only at odds with the plain facts of this case, but utterly inconsistent with the nature of the power.

5. Appellants' Focus on the Voter's Purported Power to "Terminate" the Development Agreement Is Misplaced.

Appellants argue that the voters had a "constitutional power to terminate the development agreement" that must prevail over any power the City possessed to terminate the Development Agreement. (*See, e.g*., AOB,

pp. 23, 68, 82, 84.) But what Appellants fail to acknowledge is that the only reason it matters whether they had the power to "terminate" the Development Agreement, as opposed to the power to prevent it from becoming effective, is because Condition 26 purports to nullify the other 2011 Development Approvals in the event the Development Agreement is "terminated."

Setting aside Condition 26, whether a development agreement that is rejected by the voters is deemed "terminated" in some general sense of the word makes no difference. Under the relevant Government and Elections Code provisions, such an agreement clearly does not become effective, and thus neither obligates nor benefits its intended parties in any respect.

That Condition 26 is the ***only*** reason to be concerned with whether the Development Agreement was "terminated" is important, because Appellants have never claimed the City was *required* to include Condition 26 in any of the 2011 Development Approvals. Nor is there any basis for such an argument. The inclusion of Condition 26 in two of the 2011 Development Approvals was at the complete discretion of the City Council. Once that fact is understood, Appellants' argument that the voters had a constitutional right to "terminate" the Development Agreement and thereby render the remaining 2011 Development Approvals null and void quickly falls apart.

Similarly, if instead of deleting Condition 26 in its entirety the City had written Condition 26 even more clearly, *e.g.*, by stating "in the event the ordinance authorizing the Development Agreement is disapproved at a

referendum election, the City in its discretion shall have the right but not the obligation to terminate the other Project Approvals upon delivery of a written notice of termination, in which case such other Project Approvals shall be null and void," there would be no room for Appellants' argument the referendum of the DA Ordinance somehow triggered Condition 26 or the voters' rights were in any way impaired.[12]

The fact that the constitutional "rights" supposedly rendered meaningless by the trial court's decision could easily have been eliminated if the City had drafted Condition 26 differently (or eliminated it altogether) shows that such "rights" never existed in the first place. And, in fact, Appellants' counsel essentially admitted as much at trial, acknowledging that this case turns on the meaning of the term "terminate," as used in Condition 26—not on some implicit right of the voters to rescind the other approvals:

> ***We're not saying that Measure W secretly referended other approvals***. We're saying the way the City structured the approvals, including Condition 26, they set it up so that if the development agreement were not—were no longer one of the approvals, that the other ones would be rendered null and void. So ***I think we're sort of back to the beginning in terms of what does terminate mean***.

(*See* RT 33:2-9, emph. added.) Appellants' attempt to repackage this case as

[12] This fact belies Appellants' assertion that the 2011 Development Approvals were "artfully written to evade the effect of the referendum petition." (AOB, p. 80.)

implicating a "constitutional power to terminate" development approvals that were not even the subject of the referendum is baseless.

6. There Was No "Referendum End-Run" Here.

Appellants compare the present situation to that addressed by this Court in *Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475, asserting both situations involve a similar "referendum end-run." (AOB, p. 78.) An objective review of that case is instructive.

Chandis involved "referendums for the approval of a specific plan and a general plan amendment." (*Id*. at 482.) The developer directly contested the voters' right to referendum such approvals, arguing that because the city council had determined the proposed project was superior to alternatives, "the electorate's failure to approve [the measures] was unreasonable." (*Id*.) The Court rightly rejected that argument, explaining that "since timely petitions were filed to present the matters to the voters, the city council's initial approval of the plan and amendment never became effective. [Cite.] ***The subsequent rejection by the voters simply maintained the status quo; it did not repeal a specific plan previously adopted by the city council."*** (*Id*. at 482–83, emph. added.) It was in that context that the Court noted "[a] rule declaring the voters cannot reject a proposed plan falling within the parameters of the city's general plan would render the exercise of the power of referendum meaningless." (*Id*. at 482.)

The case at hand is completely inapposite, as the City and PCH have

never argued the voters were without power to reject the approval that was the subject of the referendum. All parties agree the referendum successfully prevented the DA Ordinance (and Development Agreement) from going into effect. Further, there is no dispute that the voters ***could*** have exercised their referendum power to reject the GPA, SPA, and §1 of the Zoning Amendment when those legislative actions were taken by the City in 2011, but did not do so. Unlike the referendum proponents in *Chandis*, Appellants are arguing that the referendum here not only rejected the Development Agreement, but ***changed the status quo*** by effectively repealing ***other*** approvals that went into effect more than a year before the referendum vote.

Appellants' attempt to compare the situation at hand to that in *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 815 is equally inapt. At issue there was whether a statute requiring "the legislative body" of a city to engage in a balancing process before adopting a growth-control ordinance was applicable to a voter initiative. (*Id*. at 823.) In holding it did not, the court found the requirements of the statute "reasonably cannot be satisfied by the initiative process," and noted "[t]o hold otherwise would place an insurmountable obstacle in the path of the initiative process and effectively give legislative bodies the only authority to enact this sort of zoning ordinance." (*Id*. at 824.)

No similar obstacle is involved here because, again, there is no dispute that the referendum was fully effective in rejecting the legislative act that was

the subject of the referendum. Nor has there been any attempt to limit the voters' initiative power with respect to the Project. As noted above, nothing would have prevented the voters from using their initiative power to rescind or amend the GPA, SPA, and/or §1 of the Zone Change Ordinance after the unsuccessful attempts to referend those actions (or in the case of §1 of the Zone Change Ordinance, the decision of the referendum proponents to not challenge it in the first place).

F. The Trial Court Did Not Err In Finding That To The Extent Condition 26 Could Still Be Triggered After the Referendum, the City Had Discretion Regarding Whether to Trigger the Provision.

Appellants argue the trial court committed an error of "constitutional magnitude" by concluding that "even if the Development Agreement was valid and could be terminated," termination was "not automatic," but the "subject of negotiation between the parties." (AOB, p. 79.) Appellants argue that allowing the termination process to be defined by a contractual provision in the Development Agreement would effectively give the City "a pocket veto over the Measure W vote." (AOB, p. 82.) Again, Appellants' confuse the voters' undisputed right to prevent the City from entering into the Development Agreement—which the referendum accomplished—with the non-existent right to trigger a condition contained in ***other*** approvals that were ***not*** the subject of the referendum in the first place.

The trial court's statement that if the Development Agreement

somehow ***was*** valid and in effect after the referendum, then termination would be discretionary under the Development Agreement's plain terms (AA 717), is correct,[13] but unimportant, since the court and all parties agreed the Development Agreement was not in effect.

More important than that hypothetical is the trial court's recognition that the City intended to reserve its discretion to terminate the Development Agreement and other approvals in the event of a referendum of the DA Ordinance. (AA 717.) As discussed above, although §2.3 did not go into effect as a result of the referendum, it clarifies what the City intended in Condition 26 when it referred to the termination of the Development Agreement.[14] (RT, 5:26-6:5 [trial court remarking on the "logical conclusion" that the word "terminate" in Condition 26 "should correspond to what's in the development agreement"].)

Accordingly, assuming the referendum did not preclude the City from "terminating" the Development Agreement via the process described in §2.3, the City had discretion regarding whether to exercise that right of termination. Since it did not do so, the remaining approvals remained in

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[13] Appellants concede as much, describing the DA as providing "that even if a referendum rendered the ordinance ineffective, the [DA] would continue to exist unless and until [the City or PCH] gave written notice of termination." (AOB, p. 73.)

[14] Appellants appear not to grasp this significant distinction, in suggesting the City contends "section 2.3 gave the City" discretion. (AOB, pp. 80-81.) Again, the City has never contended that §2.3 itself has any effect, only that it is relevant in interpreting Condition 26.

effect.

G. The Other Development 2011 Approvals Were Not Contingent Upon a Development Agreement.

Finally, Appellants briefly argue that even if the 2011 Development Approvals were not rendered void by Condition 26, they "must still be deemed null and void because those approvals required a valid development agreement to exist." (AOB, pp. 94-96.)

Appellants' first argument is that "the draft amendment to the specific plan called the development agreement one of six discretionary approvals that were 'required' for the project." (AOB, p. 94.) But that is a mischaracterization of the SPA, which did not state a development agreement was required for the Project, but rather that it was one of six items then contemplated to be processed for the Project that would require discretionary approval from the City. (2011 AR 14:22660 ["Discretionary approval by the City of Fullerton will be required for the following items..."].) Moreover, even if a project document had erroneously stated the Project would "require" a development agreement, that would not change the requirements of the state law authorizing such agreements, which indicates they are optional. (*See* Gov. Code §65865(a), (c) [a city "may" enter into a development agreement and is to establish procedures for the consideration of such an agreement "upon application by, or on behalf of, the property owner"].)

Next, Appellants claim the Development Agreement was made a "'Condition of Approval' via a two-step process," arguing one of the conditions imposed on the Project required compliance with an Engineering Department letter, which, in turn, requires the Development Agreement. (AOB, p. 95.) The letter does ***not*** affirmatively require PCH to enter into the Development Agreement, however, but rather notes that, at the time of the letter, the Development Agreement was "being finalized" and was anticipated to include multiple conditions. (2011AR 1:156; *see* RT at 14:9-10 [Trial Court noting "it doesn't say its conditioned on the development agreement"].) Indeed, the letter reserves the Director of Engineering's discretion to determine "which conditions prevail" in the event the Development Agreement conflicts with the conditions specified in the letter. (2011AR 1:156.)

The City's express decision to *not* condition PCH's development rights on a valid Development Agreement is also supported by the wording of Condition 9 in the resolutions approving the SPA (at 2011AR 1:153) and Tentative Maps (at 2011AR 1:211). As noted above (in §III.C), the City provided in those conditions that PCH could not record any of its three Tentative Maps and thereby proceed with its Project unless the City Council had given final approval to the GPA, SPA, and Zone Change—but the conditions say *nothing* about the need for a valid Development Agreement. The exclusion of the Development Agreement from such condition was

deliberate; an earlier version of the condition included the Development Agreement, but that requirement was deleted. (*See* 2011AR 1:4551-52.) Thus, the Development Agreement was clearly not an essential part of the entitlements package for the WCH Project. As the City's and PCH's actions subsequent to the Measure W Election show, the Development Agreement could be—and was—replaced (in this case, with the VTTM).

As explained by the trial court, while the resolutions approving 2011 Development Approvals "assumed the validity of a Development Agreement, it does not necessarily follow that the Resolutions depend on one." (AA 718.) "Because the 2011 Approvals were never conditioned on the existence of a valid Development Agreement, they remained effective." (AA 717.)

Finally, Appellants argue that the City's certification of the EIR for the Project was dependent upon the Development Agreement, since the Statement of Overriding Considerations cited public benefits to be provided pursuant to the Development Agreement. (AOB, p. 95.) But again, almost all of the same public benefits are also embedded in the terms and conditions of the 2011 Development Approvals (§III.B, *supra*) and, in any event, are still required to be provided, now via the VTTM. And, as determined by the trial court, Appellants may not re-litigate "the adequacy of the City's CEQA review," which was the subject of the 2011 action that resulted in favor of a judgment on the merits in favor of the City. (AA 717-18.)

The mere fact that some of the other 2011 Approvals anticipated the Development Agreement does not mean they were dependent upon the Development Agreement. The City acted well within its authority when it approved the 2015 VTTM in place of the originally anticipated Development Agreement.

V. CONCLUSION

The trial court did an excellent job of cutting through the noise and zeroing in on the real issue in this case: whether the Development Agreement was "terminated," as that term is used in Condition 26. (AA 714-15.) The court correctly determined both: (1) that the Development Agreement could not be terminated, because it never went into effect; and (2) that even if it could be, any termination of the 2011 Development Approvals was within the City's discretion. Appellants have failed to show any error in either of those determinations, each of which provides a separate basis for upholding the trial court's decision.

For the reasons set forth above, the City respectfully requests that the Court affirm the judgment of the trial court.

Dated: September 18, 2017

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed Respondent's Brief is produced using 13-point Roman type including footnotes and contains approximately 12,869 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 18, 2017

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PROOF OF SERVICE BY TRUEFILING AND MAIL

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 am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-1931. My electronic notification address is kwilson@rutan.com.

On September 18, 2017, I served on the interested parties in said action the within: **RESPONDENTS' BRIEF** as stated on the attached Service List:

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Executed on September 18, 2017, at Costa Mesa, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Beth P. Vaca	*/s/Beth P. Vaca*
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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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