4th Civil No. G054570

# 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,**

*Plaintiffs and Appellants,*

**vs.**

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

*Defendants, Real Party in Interest and Respondents.*

**PACIFIC COAST HOMES,**

*Real Party in Interest and Respondent*

# APPELLANTS' REPLY BRIEF

Appeal from the Superior Court of Orange County
Hon. Judge William D. Claster

(Orange County Superior Court Case No. 30-2016-00834366-CU-WM-CXC)

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## INTRODUCTION

We would not be here but for the clash between the drafting excesses of an overreaching discretionary termination clause appearing in one document, and the sublime simplicity of an automatic termination clause appearing in another document.[1] How those clauses are interpreted implicates the voters' constitutional power of the referendum and the voters' statutory power to referend a development agreement in particular. Voters should not bear the burden of poor draftsmanship for exercising those powers, particularly where the referendum power is to be jealously guarded and liberally construed. (*Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 821; *Perry v. Brown* (1991) 52 Cal.4th 1116, 1140.)

Respondents engage in an awful lot of statutory construction to make the problem seem less serious than it really is. But they only make it worse. For if respondents' view of how the discretionary termination clause is supposed to work is accepted, a future City Council – indeed, *any* City Council in the State of California who opts for an aberrant discretionary termination clause like the one used here – may still "terminate" its development agreement for no reason other than a past referendum. That is absurd. Future councils could also shield procedural and substantive rules (like the right to terminate) in the text of a development agreement, effectively guaranteeing

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[1] The discretionary termination clause is section 2.3 of the Development Agreement as appears in Ordinance No. 3169. The automatic termination clause is Condition 26 as appears in Resolutions 2011-32 and 2011-33.

those provisions' survival even if the development agreement is disapproved by voters. The result is a dilution of the voters' constitutional and statutory powers to referend a development agreement to the point of meaninglessness.

Respondents double-down on their defense of an indefensible provision by dismissing even the *relevance* of appellants' asking whether it was legally proper for the trial court to question the development agreement's legal existence in light of the Measure W vote. There is also ample room in the statutes, however, to not only question, but to reject, the trial court's conclusion that the vote meant the development agreement never legally existed and thus was not terminable.

Respondents view the statutes more as a check, and not a grant, of the voters' referendum powers. In their view, the voters' power to referend a development agreement does not extend to a basic issue like termination because the statutes do not give voters the power of termination, and even if they had termination powers, voters cannot then insist that other development approvals must be voided as well – just as the automatic termination clause provided. Despite such hostility to the grassroots democracy that played out below, there is ample room in the statutory scheme, and in this record, to reject those arguments.

Nothing in the statutes bars the legal conclusion that the "No" vote on Measure W terminated the development agreement. The only interpretation of Condition 26 that makes sense and is consistent with the constitutional referendum power is petitioners'.

## ARGUMENTS IN REPLY

There are only three possible interpretations of Condition 26, the automatic termination provision appearing in Resolutions 2011-32 and 2011-33.[2]

► Interpretation #1: Condition 26 was triggered by the referendum vote on Measure W because the referendum vote terminated the development agreement. This is appellants' position.

► Interpretation #2: Condition 26 was not triggered by the referendum vote because the City and PCH retained a discretionary right to terminate the development agreement under section 2.3 of the agreement, regardless of the outcome of the referendum. This is respondents' position.

► Interpretation #3: Condition 26 means nothing because the development agreement never became effective, and thus no development agreement legally existed in the first place to be terminated by Condition 26. This was the trial court's position, also embraced by respondents.

Interpretation #2 makes no sense and is in derogation of the voters' referendum powers. It is an interpretation that confers unfettered discretion upon the contracting parties to ignore what voters said, allows the contracting parties to ensure that *their* assessment of what is in the public interest will never by second-guessed by the public, and grants the City roving

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[2] Condition 26 states: "In the event the Development Agreement is terminated, all other development approvals for the project shall be null and void." (2011 AR 1:155; 2011 AR 1:212.)

termination rights exercisable *in futuro* regardless of the outcome of a referendum vote. This is constitutionally skewed and allows an unacceptable level of mischief to taint the development process.

Interpretation #3 is equally unacceptable. If Condition 26 is meaningless, so too is the idea that private benefits (as conferred by development approvals) is the *quid pro quo* for public benefits (as required by the development agreement). If the referendum vote meant the development agreement never legally existed in the first place, then the developer is freed from the requirement to provide public benefits that voters decided were unsatisfactory or public burdens that voters decided were unacceptable, and substitute, in lieu of the development agreement's requirements, an alternative offering of "public benefits" and burdens that is never referendable. That PCH thinks the benefits of its VTTM are a "new and improved" version of what it originally offered is neither relevant nor correct. Thus, like interpretation #2, interpreting Condition 26 as meaningless in light of the referendum vote increases the opportunities to game the development process.

That leaves interpretation #1 as the only alternative that makes sense, that is workable, and is consistent with voters' jealously guarded constitutional rights.

We elaborate below.

## I. Respondents' construction of the referendum statutes means the voters' decision will always be inferior to a discretionary power to terminate a development agreement regardless of the outcome of the referendum.

### A. In this case, a holding that the Measure W vote terminated the development agreement can be reconciled with the statutory scheme.

In respondents' view, "termination" of a development agreement is a meaningless concept under the referendum statutes. As the argument goes, there is little, if any, need to look at "termination" through statutory lenses because "termination" is relevant only in the context of Condition 26 and section 2.3.

We address respondents' discussion of termination vis-à-vis Condition 26 and section 2.3 later in this reply. Here, we focus on respondents' arguments in the context of whether there is any room in the statutory scheme for construing the vote on Measure W as a termination of the development agreement.

All agree that, under the statutes, a development agreement ordinance that is disapproved by voters means the development agreement ordinance never goes into effect. A central issue in this appeal, however, is how we get from "never goes into effect" to "terminated." Respondents stop short of embracing a prophylactic rule that says voter disapproval of a development agreement ordinance can never, under any circumstances, be deemed a termination of a development agreement. That is wise, as nothing in the statutes operates as a

*per se* bar to holding that a disapproved development agreement ordinance means the development agreement is terminated. Indeed, PCH cites to only one instance in the Development Agreement statute where the Legislature used the word "terminate." (PCH Brief at p. 56, quoting Gov. Code, § 65865.1.)[3] But that statute covers termination in the context of periodic reviews of an ongoing development agreement that has either survived a referendum vote, not qualified for a referendum vote, or been deemed beneficial enough by voters to not warrant a referendum effort at all. It is not a helpful analogy in this context where the voters have overwhelming rejected the development agreement in the first place. Thus, there is ample room in the statutory scheme to construe the "No" vote on Measure W as a termination of the development agreement.

Both respondents emphasize that the referendum statutes already address the effectiveness of an ordinance pending a referendum. (City Brief at pp. 43; 51; PCH Brief at pp. 45; 57.)[4]

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[3] Government Code section 65865.1 addresses periodic reviews of the applicant's (here, the developer's) performance. It states, in pertinent part, "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."

[4] Elections Code section 9235 provides that "No ordinance shall become effective until 30 days from and after the date of its final passage . . . ." Upon submission of a qualifying petition, "the effective date of the ordinance shall be suspended . . . ." (Elections Code, § 9237.) "The ordinance shall not become

None of the referendum statutes, however, expressly say that disapproval of the ordinance means the development agreement is not terminable. Rather, the statutes speak of the ordinance being "suspended" or not taking effect pending the outcome of the vote. And if voters disapprove the ordinance, the statutes are silent as to whether that means the development agreement is terminated. Termination by referendum is simply not covered by these statutes, and a matter not covered is to be treated as not covered. (Scalia, et al., *Reading Law: The Interpretation of Legal Texts* (2012) p. 93.)

Thus, standing alone, the referendum statutes do not bar a holding that, in this case, the vote on Measure W terminated the development agreement.

The trial court, however, looked at the route from "never took effect" to "terminated" and carved out its own path by saying there was nothing to terminate because the development agreement never legally existed in the first place. How respondents dealt with that judicial curveball is discussed next.

### B. Respondents cannot explain away the trial court's rule of non-existence.

For better or worse, the trial court re-framed the parties' initial positions in terms of whether or not the development agreement "existed in the first place such that it could later be

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effective until a majority of the voters voting on the ordinance vote in favor of it." (Elections Code, § 9241.)

terminated."[5] In this Court, the parties' response to that re-framing speaks volumes as to how each side views the vote. We labeled it a rule of non-existence and examined its consequences. Respondents would prefer that the trial court have avoided that nomenclature altogether, and either deny that's what the trial court said[6], or dismiss the entire question of the agreement's existence as "utterly irrelevant."[7] Respondents' positions are incorrect.

Clearly, the trial court forged a new analytical path by asking whether the development agreement even existed. We followed that path, while respondents believe it does not matter. According to respondents, the agreement's existence does not matter because termination (and, by implication, the agreement's existence or non-existence) is relevant only because of Condition

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[5] See 3 AA 613 [question #1 on order requesting supplemental briefing; "Thus, the Court's first question to the parties is whether the Development Agreement was valid or existed in the first place such that it later could be terminated."]; 3 AA 717 [final order stating that "Because the Development Agreement never legally existed in the first place, it could not later be terminated. . . ."]; 3 AA 715 [final order stating that the development agreement "was not valid and/or did not legally exist in the first place such that it could later be terminated"].

[6] PCH Brief at p. 41 ("The trial court did not rule that the Development Agreement was 'deemed to have never existed in the first place.'")

[7] City Brief at p. 32.

26 – a condition that, as the City points out, voters never saw. (City Brief at p. 30; RT 25:1-4.) [8]

There are two problems with that line of argument.

First, the development agreement was not presented to voters in a vacuum. As noted in our opening brief, the development agreement is not even mentioned (or referred to) in any of the arguments in favor of or against Measure W. Rather, the competing arguments were cast in terms of the Project as a whole, and some of those arguments – such as job creation and taxes – went beyond the scope of the development agreement. (AOB at p. 45; AR 6:3874-3879; see also 2011 AR 20:25575 [voter who opposed Measure W describing the vote in terms of project as a whole]; 2011 AR 21:27034 [voter who favored Measure W also describing the vote in terms beyond the development agreement, such as creation of new jobs and increased economic activity].)

Moreover, the text of Ordinance No. 3169 itself defined the question before the voters in broad, public benefit terms. Paragraph five of Ordinance No. 3169 stated:

> "That the approval, implementation and operation of the Development Agreement as submitted will not be injurious or detrimental to the property and improvements in the neighborhood of the property subject to the Development Agreement, nor to the general welfare of the City of Fullerton, and should therefore be approved." (2011 AR 1:240.)

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[8] "The City's voters did not draft Condition 26 or § 2.3 of the Development Agreement. They did not even see Condition 26, . . . ." (City Brief at p. 30.)

Thus, contrary to PCH's belief, there *was* a nexus between Measure W and the project. (PCH Brief at p 59 ["There was no 'nexus' between Measure W and the 'project as a whole.'"].) Even the City drafted Measure W's original ballot title in terms of the "Project," only to replace the word "Project" with "Agreement" in the ballot title shortly before the election. (See AOB at pp. 44-45.) Nonetheless, the public benefit considerations that were expressed in competing ballot arguments, and the text of Ordinance No. 3169 itself, made the development agreement's "existence" relevant for reasons far beyond Condition 26.

Second, while the City contends that voters "did not even see Condition 26" (City Brief at pp. 30; see also RT at 25:1-4), that is only partly correct.

Yes, the text of Resolutions 2011-32 and 2011-33 (both of which contained Condition 26) were not part of Measure W. But the impact of Condition 26 was before the voters – and the City put it there. Keep in mind that nothing within the four corners of the development agreement said that if the development agreement was terminated, then other project approvals shall be null and void. That effect was spelled out in the two resolutions that contained Condition 26 – and that effect was later imported into the City's Clerk's Analysis of Measure W. The City Clerk's Analysis states: "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 shall be null and void*." (AR 6:3872; emphasis added.) Thus, while the actual text of Condition 26 was not before the voters,

the *impact* of Condition 26 was before the voters – and it was the City who put it there.[9]

* * *

In the end, it does not matter that a different court stated in a different context that a different development agreement was "not in existence" prior to its effective date. (City Brief at p. 45, discussing *216 Sutter Bay Associates v. County of Sutter* (1997) 58 Cal.App.4th 860, 869.) The development agreement in *216 Sutter Bay* was legislatively repealed by an interim urgency zoning ordinance (*id.* at p. 865), and none of the development approvals risked becoming null and void under a different enactment if the development agreement was "terminated." Thus, neither the trial court nor the Court of Appeal in *216 Sutter Bay* had reason to plumb the meaning of "termination" in the context of a referendum and separate enactments.

Nor does it matter, as respondents note, that a development agreement is "optional" under the statutes. (City Brief at p. 31; PCH Brief at p. 63.) "Optional" or not, it does not follow that questioning a development agreement's existence is an exercise in futility where the City, by its own laws, conditioned its other approvals on a currently existing development agreement, i.e., a development agreement that has not been terminated.

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[9] It does not matter that the City Clerk's ballot analysis linked Condition 26 to the contracting parties "right to terminate." The point is that voters were told of at least one circumstance where termination of the development agreement would stop the project – a concept and an effect found only in Condition 26.

### C. Contrary to respondents' view, reversing the trial court does not run afoul of well-established law regarding the scope of the referendum powers.

Both respondents worry that well-established limits on the voters' referendum power would be breached if the development agreement is deemed terminated by the Measure W vote, thus triggering Condition 26 and rescinding the 2011 Development Approvals. Because the 2011 Development Approvals became law more than a year before the Measure W vote, the argument goes, those approvals were beyond the reach of Measure W. (City Brief at pp. 50-51; PCH Brief at p. 46; citing *Referendum Committee v. City of Hermosa Beach* (1986) 184 Cal.App.3d 152, 157; *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 781; *City of Morgan Hill v. Bushey* (2011) 12 Cal.App.5th 34, 42; *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504 1509.)

We agree with the general propositions recited in these cases as to the scope of the referendum power. Voters cannot, by referendum, repeal laws that have already taken effect. But that principle does not apply in this case because the City gave itself the power to rescind the 2011 Development Approvals when it passed Condition 26 as part of Resolutions 2011-32 and 2011-33. The power to declare the 2011 Development Approvals null and void if the development agreement is terminated is found in these legislative pronouncements, not Measure W.

Looking at *Marblehead,* discussed in PCH's Brief at p. 46, we can see this distinction most clearly. There, the initiative itself directed the City to amend both the general plan and the zoning ordinances according to specifications set forth in the

initiative. (*Id.* at pp. 1507, 1510.) "This type of measure," *Marblehead* declared, "is not within the electorate's initiative power." (*Id.* at p. 1510.) Here, in contrast, it was the City itself who wrote Condition 26 into its own resolutions. All we ask is for the City to follow its own resolutions.

### D. That other development approvals did not garner sufficient signatures to qualify for a referendum does not dilute the significance of the one approval that did.

Respondents read far too much into the absence of sufficient signatures to qualify all four referendum petitions.[10] As respondents pointed out below,

> "You can't read too much into that. This is belts and suspenders common practice that there are multiple referendable approvals, you go for as many as you can. It's volunteers at the Safeway gathering signatures. There's no guarantee that you're going to get all of them. It was fortunate in this case that the ones – well, they actually got two. One, the City on its own rescinded. But that the other one that got the most signatures

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[10] Friends of Coyote Hills submitted four referendum petitions challenging two ordinances (the development agreement ordinance and a portion of the oil and gas zoning ordinance) and two resolutions (the resolutions approving the General Plan revision and Specific Plan Amendment #8.) The City responded to the petitions by repealing the challenged portion of the oil and gas zoning ordinance. (AOB at pp. 41-42.)

> was this sort of keystone approval." (RT 34:23 through 35:5.)

And keystone it was. Condition 26 decreed that the other development approvals would be null and void if the development agreement was terminated. Thus, only a decision to terminate the development agreement could trigger Condition 26. None of the other petitions, even if successful, would have triggered Condition 26.

Thus, we turn next to respondents' primary claim that deference is owed to the City's interpretation of the relevant provisions.

## II. Respondents' case for deference is not persuasive.

In its final ruling, the trial court never reached respondents' claim of deference. (3 AA 704-711 [Final Ruling].) But the trial court hinted at the hearing that the case for deference was not so cut and dried. For example, the trial court observed that a "first glance reading" of Condition 26 reasonably implies that "terminate means the thing is no longer in effect." (RT 24:4-5.) Other hints were dropped that deference was problematic.[11] Faced with our reasons why deference is not

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[11] "I don't know who the legal team was drafting the development agreement," the trial court remarked, "but whoever it was assumed, I think perhaps incorrectly, that if a referendum passed nixing the development agreement, it still would be something that could be terminated, which I found to the contrary." (RT 27:12-16.) While the trial court's final ruling acknowledged the discretionary termination provision, the ruling stopped short of invalidating the provision. (3 AA 717.)

warranted in this case (AOB at pp. 81; 85-87), respondents renew the claim of deference with increased vigor in this Court. It does not withstand scrutiny.

### A. Drafting history generally: Respondents collapse an eight-year chronology to support erroneous characterizations of the drafting history behind Condition 26 and section 2.3, and to gloss over what the City Council was – and was not – told about the various drafts of the development agreement.

The City contends that Condition 26 "was drafted at the same time and tracked the language of § 2.3." (City Brief at p. 32, fn. 7; see also City Brief at p. 36 ["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"].)[12] Condition 26, the City contends,

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Turning to Condition 26, the trial court asked the City: "Wouldn't you agree that the City could have been a little more careful in drafting 26 so we wouldn't have this argument?" (RT 23:24-26.) In apparent reference to Condition 26, the City argued that "[w]ith the benefit of hindsight, I probably would have written that sentence to be a page long and we wouldn't have this lawsuit today." (RT 10:3-5.) The trial court replied, "You think you could erase it with one sentence? I do not think that is the case." (RT 10:6-7.)

[12] As noted, Condition 26 appeared in Resolutions 2011-32 and 2011-33 and provided that the other project approvals would be deemed "null and void" if the development agreement was

"expressly cross-references 'termination' of the Development Agreement, and the place in the Development Agreement where 'termination' is addressed in § 2.3" (City Brief at p. 36.) Later in its brief, however, the City asserts that section 2.3 "clarifies what the City intended in Condition 26 when it referred to the termination of the Development Agreement." (*Id.* at p. 57.) Similarly, PCH asserts that the City used the word "terminate" in Condition 26 "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.'" (PCH Brief at p. 58.).

Let's unpack all of this.

First, Condition 26 does not come close to tracking the language of section 2.3. Condition 26 is simply stated in 20 words: "In the event the Development Agreement is terminated, all other development approvals for the project shall be null and void." (2011 AR 1:155; 2011 AR 1:212.) The sentence in section 2.3 containing the discretionary termination clause contains multiple clauses and weighs in, as one sentence, at slightly more than 300 words. (AR 6:3773.)[13]

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terminated. Section 2.3 appeared in the development agreement and provided for discretionary termination if, among other circumstances, voters disapprove the development agreement ordinance.

[13] "And who has not read the text of one law or another and not wished that its author had learned to diagram sentences if not the law's consequences?" (E. Rothstein, *Illustrating the Letter Of the Law* (September 27, 2017), The Wall Street Journal at p. A13.) The City acknowledges that section 2.3 is "a bit clumsy."

Second, Condition 26 contains *no* cross-reference to section 2.3 or anything else.

Third, section 2.3 – with all its verbiage – says nothing about being a "clarification" of Condition 26.

Fourth, we look at the evolution of the development agreement drafts vis-à-vis Condition 26. And this is what we see:

► Early drafts of the development agreement repeatedly provided for termination by referendum. (2011 AR 9:15620, 15628 [2003 Draft]; 2011 AR 13:22357 [2008 Draft]; 2011 AR 18:24419 [2009 Draft]; 2011 AR 1:4770 [2/26/10 Draft].)

► Condition 26 was first proposed in 2010 for consideration at the City Council's May 11, 2010 meeting. (2011 AR 1:4554; 4614; 4615; 4651.)[14]

► At the May 11, 2010 City Council hearing, City staff advised the council that their packet contained "the same draft of the Development Agreement as was presented to the Planning Commission, which was a very early draft of the Agreement." (2011 AR 1:6450-6451.)

► The Planning Commission's draft development agreement, dated 2/26/10, provided for termination by referendum. (2011 AR 1:4761; 4770.) The City acknowledges this point, City Brief at p. 35, but omits the Council's contemporaneous consideration of the original versions of Condition 26.

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(City Brief at p. 35 fn. 9.)

[14] In 2010, Condition 26 appeared in Resolutions 10-31 and 10-28, which were the precursors to Resolution 2011-32 and 2011-33.

Thus, as matters stood before the Council adjourned on May 11, 2010, any "tie back" or "cross-reference" within Condition 26 to the development agreement was a "tie back" or "cross-reference" to a development agreement draft that provided for termination by referendum.

Two days later – on May 13, 2010 – the discretionary termination provision appears in the development agreement draft. (2011 AR 1:5108.) Nothing in the record explains the change.

When the City Council re-convened on May 25, 2010, the City Attorney advised the council that the development agreement had been "refined, but is essentially the same document that was presented at the Planning Commission and that you saw in draft form at your earlier meeting." (2011 AR 1:6540.)[15] The record does not reflect that the change from termination by referendum to discretionary termination was called to the Council's attention.

The Council voted on May 25, 2010, to deny the project (2011 AR 1:6589). A formal denial was memorialized on June 15,

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[15] Earlier, on May 10, 2010, the City Attorney told the Planning Commission that the draft development agreement "allows for modification or termination if there's a finding that there's been a breach and that the draft was a "fairly standard Development Agreement in that regard. . . ." (2011 AR 1:6337.) Nothing was said about termination by referendum, presumably because termination by referendum was still in the draft agreement, as it had been since 2003. Three days after the Planning Commission hearing, termination by referendum is replaced with discretionary termination regardless of the outcome of the vote. (2011 AR 1:5108.)

2010. (2011 AR 21:27081-082.) On August 23, 2010, PCH sued the City over the denial of the project (2011 AR 1:5703), and demanded over $1 million in damages. (Request for Judicial Notice, Exh. 1 at ¶ 30; 2011 AR 22:27119.)

When in July of 2011 the Council (with two new members) re-visited the project approval, at least one member publicly expressed her concern over being asked to approve PCH's project "with that cloud [the lawsuit] over our head." (2011 AR 1:6697.) This time, the project was approved. (2011 AR 1:6704.) Again, nothing in the record reflects that the elimination of the City's long-standing termination by referendum clause was brought to the Council's attention in a public forum.

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All of this is collapsed by respondents into the conclusory assertion that Condition 26 and section 2.3 were contemporaneously drafted. (City Brief at pp. 32, fn. 7; 35; 37; PCH Brief at pp. 48; 53-54.)

Moreover, when the Council first considered Condition 26 in 2010, they were told that the development agreement before them was the Planning Commission draft that, as noted, provided for termination by referendum. Nowhere in the record do we see the Council being advised, in a public forum, that the provision providing for termination by referendum – a provision that appeared in drafts of the development agreement dating back to 2003, 2008, 2009, and early 2010 – was being replaced by a fundamentally different provision providing for discretionary termination even if voters disapprove the development agreement

ordinance, i.e., discretionary termination regardless of the outcome of the vote.[16]

### B. Drafting history as to Condition 26 and section 2.3 in particular: Respondents' reliance on statutory cannons regarding omitted language is misplaced.

The City contends that even though section 2.3 did not take effect because of the referendum, section 2.3 nonetheless "clarifies" the City's intent in using the word "terminated" in Condition 26. (City Brief at p. 57.) To support this contention, much stock is put into a standard rule of statutory construction. To quote the City: "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 strong evidence that the act as adopted should not be construed to incorporate the original provision." (City Brief at pp. 35-36; quoting *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 634 and citing *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1107; *Doe v. Saenz* (2006) 140 Cal.App.4th 960, 984-985; see also PCH Brief at p. 53, quoting *Murphy,* 40 Cal.4th at p. 1103 and citing *Security Pacific National Bank v. Wozab* (1990) 151 Cal.3d 991, 998.)

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[16] Termination by referendum appears to have been the City's standard provision. Back in 2001, in a different development agreement with Centex Homes, the City used a termination by referendum clause just like the one used in the PCH drafts of 2003, 2008, 2009 and February of 2010. (2011 AR 6:11060, 11068.)

On the surface, that general rule regarding omitted language would seem to fit this case. But it doesn't. The general rule applies where, as in *Central Delta Water Agency,* the omitted provision is from a law that has actually passed. That makes sense, since the revised version of the law (with language now omitted) has actually been adopted with the imprimatur of either the voters or their elected representatives. But section 2.3, as respondents acknowledge, never took effect because the voters disapproved the development agreement ordinance. No case is cited for the proposition that omitted language from a law that never took effect sheds any light on legislative intent.

But there is more to respondents' stretch of the general rule. The termination clause that, in their view, needs interpreting is Condition 26 as appeared in Resolutions 2011-32 and 2011-33. But the omitted language they rely upon occurred during the drafting of the development agreement, an entirely separate enactment via Ordinance No. 3169. No case is cited for the proposition that omitted language from one law (and one that never took effect) can be used to construe or "clarify" language from an entirely different law.[17]

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[17] The City relies on the doctrine that statutes *in pari materia* should be read together. (City Brief at pp. 36-37, citing *People v. Honig* (1996) 48 Cal.App.4th 289, 327 and *People v. Lamas* (2007) 42 Cal.4th 516, 525.) That doctrine, as illustrated in the City's cases, applies where *both* statutes are in effect. But, as respondents point out, section 2.3 never took effect. No case is cited for the proposition that the rules of statutory construction for statutes *in pari materia* apply when one of the statutes never became effective because it was expressly disapproved by voters.

On this record, respondents' default to general rules of statutory construction does not withstand scrutiny.

Reliance on the omitted language of termination by referendum is especially unwarranted where for seven years – from the 2003 draft (2011 AR 9:15620, 15628) to the February 2010 draft (2011 AR 1:4770) – the City included a termination by referendum provision in PCH's draft development agreements. Indeed, termination by referendum was included in an even earlier development agreement between the City and a different developer that was entered in 2001. (2011 AR 6:11060, 11068.) But termination by referendum mysteriously disappeared from the draft by May of 2010, on the eve of the 2010 Council's consideration (and ultimate rejection) of the development approvals.

Later, after the City was sued by PCH, and PCH and the City reached a "procedural settlement" (2011 AR 1:6636), the 2011 Council was advised that the May 25, 2010, and May 5, 2011, drafts of the development agreements were "substantially the same." (2011 AR 1:5704.) Yet nothing in the record reflects that the 2011 Council (which ultimately approved the project that ignited the referendum) was ever apprised of the City's long-standing inclusion of a termination by referendum provision in prior drafts of the development agreement that, to outsiders' eyes, were inexplicably deleted from the final version.

That history is telling. To quote PCH, "in questions of statutory interpretation, a page of history is worth a volume of logic." (PCH Brief at p. 48, quoting *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 235.)

### C. Public policy is not served by respondents' interpretation of Condition 26.

The City posits that its interpretation of Condition 26 – that the word "terminated" as used in Condition 26 means discretionary termination as set forth in section 2.3 of the development agreement – is entitled to deference as a matter of public policy. (City Brief at pp. 38-39.) "[T]he obvious underlying public purpose for the City Council's inclusion of the discretionary 'termination' provisions in Development Agreement §2.3 and Condition 26," the City contends, "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." (*Id.* at p. 39; original italics.)

This echoes a theme identified by the trial court at argument: "You're arguing," the trial court remarked to the City's attorney, "that there was almost a quid pro quo that the approvals were conditioned on some of the benefits that are guaranteed by the development agreement." (RT 10:24-26.)

"Quid pro quo," however, is a phrase found nowhere in either respondent's brief.[18] Instead, the City asserts that public

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[18] Below, the City agreed with petitioners that the purpose of section 2.3 and Condition 26 was "to ensure that PCH would not receive the (private) benefits of the 2011 Approvals without providing the public benefits guaranteed by the DA." (1 AA 140-141.)

policy is served by its interpretation of Condition 26 because it 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)." (City Brief at pp. 39-40; original italics.)

That is only partly correct. It is true that under VTTM 17609, Neighborhood Area #2 would be acquired for open space preservation. (AR 2:22; 33.) The trade-off, however, was an increase in density in other parts of the project, especially in the Multiple Use Area. (AR 2:22.) Specifically, more units would be added to Neighborhoods 6 and 8. (AR 2:22.) And the density per acre for the Multiple Use Area would increase from 4.1 to 4.8 (AR 2:21; 23.) We noted those trade-offs earlier. (See AOB at p. 51.) The City ignores those trade-offs, even as it touts the purported public policy benefits of its interpretation.

The City also glosses over the negative policy ramifications of its position. While it is sound policy for any city contemplating a development agreement to have a termination provision to prevent being saddled with concessions if the developer breaches, what doesn't make policy sense in this case was the last-minute elimination of the termination by referendum provision and its replacement with a discretionary termination provision specifically tied to a referendum vote. Discretionary termination in that context diminishes accountability, makes it impossible for voters to cancel the private benefits inuring to a developer under a development agreement, and renders the voters' constitutional referendum powers inferior to discretionary calls to be made by

the city and developer.[19] And if this passes muster here, other cities and municipalities are sure to follow.

Respondents' position boils down to this: "Even though you, the voters, rejected the development agreement, we are the only ones who can trigger Condition 26." That is how section 2.3 was structured – to make it impossible for voters to wipe out the private benefit side of the quid pro quo equation contemplated by Condition 26.

### D. Respondents' explanation for the delay and absence of a consistent, contemporaneous interpretation of how the Measure W vote affected the 2011 approvals rings hollow.

Almost two years after the referendum vote, the City and PCH agreed to postpone the City's determination of whether the 2011 approvals remained valid. (AR 6:3983 ["The City and Pacific Coast Homes have agreed that the City is not required to determine whether the prior approvals remain valid and in effect at the time the City accepts the current VTTM application as complete and, instead, that that determination need only be made when the City takes final action to approve, conditionally approve, or disapprove the VTTM application."]; see AOB at p. 49.]

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[19] PCH asserts that the right of referendum "did not carry with it the right to overpower the intent, express language and history of Section 2.3 and Condition 26. . . ." (PCH Brief at p. 37.) Then what was the point of the referendum?

Nonetheless, respondents contend that the City has consistently interpreted Condition 26 as providing for discretionary termination, and dispute our assertion that the City waited until 2015 to resolve the impact of the Measure W vote on the 2011 approvals. (City Brief at p. 40; PCH Brief at pp. 54-55.)

It was not until October 22, 2015, that a Planning Commission Staff report was published with this conclusion: despite the "No" vote on Measure W, the remaining development approvals "remained intact." (AR 4:1296; see AOB at pp. 49; 87.) Shortly thereafter, the City prepared an informal "Response To Concerns Raised At Hearing And In Appeals" for a November 17, 2015, City Council meeting. (AR 4:2498; 2503; 2845 [quoted in City's Brief at p. 41].) Both of these pronouncements occurred in 2015, five years after the 2010 Council denied the project and four years after the 2011 Council approved the project. That is not a contemporaneous interpretation warranting deference.

Both respondents, however, point to the City Clerk's Impartial Ballot Analysis of Measure W as evidence that the City consistently interpreted Condition 26 as providing for discretionary termination. (City Brief at p. 40; PCH Brief at p. 54.) Their reliance on the ballot analysis is misplaced. The ballot analysis was filed on August 10, 2012, shortly before the vote. (AR 6:3872.) It was not contemporaneous with the enactment of either Condition 26 or the development agreement in July of 2011.

The City takes it one step further by acknowledging that it "allegedly declined other opportunities to opine on the effect of Condition 26." (City Brief at p. 41.) In particular, the City

dismisses as hearsay an exchange between the Mayor and the City Attorney as recounted in an October 2011 letter from one of appellants' attorneys. The letter states that the City Attorney indicated he was still evaluating what effect the referendum would have on the existing development approvals. (AR 3747.) "Even if accurate," the City asserts, the letter "does not show the City ever adopted an inconsistent interpretation of Condition 26." (City Brief at p. 41.) Fair enough – but the letter, even if accurate, *does* show that the City then had *no* interpretation of Condition 26 vis-à-vis the referendum's impact on the development approvals.

Below, the trial court summed up our argument on this point by characterizing the City's actions as a "wishy-washiness" that undercuts the usual presumption of deference. (RT 18:26-19:2.) And, moments later, the trial court asked the City, "But if this was so crystal clear, how come in 2014 the City isn't saying why are you even asking this? Obviously they're still in effect. The City apparently as recently as two years ago is saying we're not sure." (RT 24:14-17.)

The City's response? We discuss that next, and explain why even that does not warrant deference.

### E. "Leveraging" as a reason for delay is neither credible nor worthy of deference.

"What the City was doing," the City told the trial court, "was leveraging the developer in every way we could because we were attempting to achieve the objective of restoring the public benefits that were not [sic] included in the development agreement." (RT 24:19-24.) In this Court, the City modifies its

"leveraging" argument to recast the balance of power that shifted once it was sued by PCH for disapproving the project in 2010.[20]

"Without the benefit of the Development Agreement's vesting rights," contends the City, "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 . . . ." (City Brief at p. 39.) PCH concurs, suggesting that it was the City who had PCH over a barrel because without vested rights under the development agreement, the City could have rescinded the other approvals during the four years preceding the enactment of the VTTM. (PCH Brief at p. 60.)

This is fantasy. The City had already been sued by PCH for disapproving the project in 2010 and, in the wake of the referendum, was operating in the context of a "procedural settlement" with PCH when this so-called leveraging was taking place. Why would the City risk a second lawsuit by PCH by rescinding the existing approvals?

PCH, for its part, could have moved forward without waiting for a decision from the City by taking steps to perfect common law vesting. PCH's tentative maps were approved by the City in 2001. (2011 AR 1:178-213.) All PCH needed to do to

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[20] PCH embraces the leveraging concept. In the aftermath of the vote, PCH asserts that the City retained leverage by postponing its determination as to whether the prior approvals remained valid. (PCH Brief at p. 27, fn. 21.)

proceed with the project was to "final" its maps by complying with any relevant conditions on the tentative maps and submit final maps to the City. (Gov. Code, § 66457.)[21] Upon submission of its final maps, there would be no need for a VTTM and PCH would not have been "vulnerable."

Moreover, as noted above, the "restoration" of public benefits under the VTTM came at a price – more units in Neighborhoods 6 and 8, and increased density in the Multiple Use Area. Other than the VTTM, there is no other evidence of "leveraging" or a "bargain[ed] for" restoration of public benefits. At best, the argument that the City retained leverage by holding back its view on whether the Measure W triggered Condition 26 is a litigation position. And litigation positions are not entitled to deference. (*Idaho Dept. of Health and Welfare v. U.S. Dept. of Energy* (9th Cir. 1992) 959 F.2d 149, 153 ["We grant no deference to an interpretation put forth merely as a litigation position."].)

Thus, this is not a "paradigm case" for deference. (PCH Brief at p. 52.) It is a most problematic case for deference.

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[21] Government Code section 66457 provides: "A final map or parcel map conforming to the approved or conditionally approved tentative map, if any, may be filed with the legislative body for approval after all required certificates or statements on the map have been signed and, where necessary, acknowledged."

## III. Respondents' attempts to delink the development agreement from the other 2011 development approvals lack merit and underscore the absurdity of deeming Condition 26 as meaningless in light of the referendum vote.

If Condition 26 was meaningless in light of the referendum vote, then the numerous references to the development agreement in the project's other documents were equally meaningless. Even if those references were, as respondents contend, intended to refer to a "contemplated" agreement, a contemplated agreement that never takes effect leaves the contracting parties free to recalibrate the balancing of private versus public interests with no check by the voters and regardless of the voters' assessment of how the development agreement balanced those interests in the first place.

Turning to specifics, the City contends that the SPA "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." (City Brief at p. 58.) The project document, however, was clear: "Discretionary approval by the City of Fullerton will be required for the following items . . . ." "Required" means "required." It makes no difference that the agreement was then only "contemplated to be processed."

Similarly, both respondents contend it would be contrary to state law for project documents to require a development agreement because development agreements are optional and, as PCH puts it, "a development agreement must be consistent with both the general and specific plans, but not the other way

around." (City Brief at p. 58; PCH Brief at p. 62; citing Gov't Code, §§ 65865(a), (c); and 65867.5(b).) That is a sidestep. Nothing prohibits a city from incorporating a statutory option into its planning documents. And conditioning a specific plan on compliance with a development agreement of course assumes that the development agreement will be "consistent with" the specific plan.

As to the Engineering Department Letter, both the Specific Plan Amendment (Resolution No. 2011-32) and the TTM approval (Resolution No. 2011-33) state that "Project approval shall be subject to compliance with all conditions included in the Engineering Department Letter dated May 11, 2010." (2011 AR 1:152, 209.) The letter, in turn, states that approval of the TTMs (among other items) should be contingent on a number of conditions, including the development agreement. (2011 AR 1:156, 214.) [22] What difference does it make if the letter, as the City puts it, "does not affirmatively require PCH to enter into the Development Agreement. . . ."? (City Brief at p. 59.) Even if the agreement was then "being finalized," as the City points out, the City can contemplate compliance with the agreement as a condition of approval.

Of course, if Condition 26 was meaningless, it really does not matter what the City "contemplated" as to the development

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[22] We inadvertently misquoted the Engineering Department letter. In our opening brief and in the trial court, we wrote that the letter stated: "If approved, approval shall be contingent on compliance with the following conditions: Development Agreement." (AOB at p. 95; 3 AA 670.) The use of "shall" was incorrect. The letter stated, "should." (2011 AR 1:156, 214.)

agreement, or whether the agreement was being "finalized" or not, because voters would never be able to terminate the agreement in the first place.

## CONCLUSION

For these reasons, appellants respectfully ask this Court to reverse the judgment below with instructions as set forth in their opening brief. (AOB at p. 97.)

Date: November 2, 2017

Respectfully submitted,

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## CERTIFICATE OF WORD COUNT

The text of this brief, including footnotes, consists of 7920 words as counted by the Microsoft Office Word 2010 word-processing program used to generate this brief.

Date: November 2, 2017

Respectfully submitted,

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## PROOF OF SERVICE

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**Mary Pillars**

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