NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FRIENDS OF COYOTE HILLS et al., Plaintiffs and Appellants, v. CITY OF FULLERTON et al., Defendants and Respondents; PACIFIC COAST HOMES, Real Party in Interest and Respondent.	G054570 (Super. Ct. No. 30-2016-00834366) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William D. Claster, Judge. Affirmed.

Morris Polich & Purdy; Clark Hill and Richard H. Nakamura, Jr.; Shute, Mihaly & Weinberger, Winter King, Catherine C. Engberg and Edward T. Schexnayder; Ulwelling Siddiqui and Omar A. Siddiqui, for Plaintiffs and Appellants Friends of Coyote Hills and Friends of Harbors, Beaches and Parks.

Morris Polich & Purdy and Richard H. Nakamura, Jr.; Center for Biological Diversity and John T. Buse; Ulwelling Siddiqui and Omar A. Siddiqui, for Plaintiffs and Appellants Center for Biological Diversity.

Rutan & Tucker, Jeffrey M. Oderman and Peter J. Howell for Defendants and Respondents City of Fullerton and City Council of the City of Fullerton.

Pillsbury Winthrop Shaw Pittman, Kevin M. Fong, Ronald E. Van Buskirk and Stacey C. Wright for Real Party in Interest and Respondent.

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I. INTRODUCTION

In 2011, the Fullerton City Council passed four resolutions and two ordinances approving a development project for land then zoned for oil and gas production. The four resolutions were (1) approval of a new EIR[1] for the development project; (2) amendments to the city's general plan providing for development of the area; (3) a new specific plan for the area filling in the details of the development; and (4) and a set of subdivision maps reflecting the project. One of the two ordinances (5) changed the zoning from oil and gas to "specific plan district," making the area subject to the new specific plan. The other ordinance (6) gave authority to the mayor to sign a complex development agreement hammered out between the city and the owner of the land.

Project opponents, led by Friends of Coyote Hills (Friends), were only able to obtain enough valid signatures to subject number (6), the ordinance authorizing Fullerton to enter into the development agreement, to a referendum. That authorizing ordinance was voted down in the November 2012 election.

But the opposition did not fare as well in their court challenge to the EIR. They lost their court challenge to the EIR. Nonetheless, having prevailed in the election

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1 Environmental impact report.

on the development agreement, they dismissed their appeal from the trial court's judgment.

Three years later, Fullerton approved what in land use law is called a "vesting tentative tract map" or "VTTM"[2] for the area. Opponents did not attempt to undo the new VTTM by referendum. They believed VTTM's are administrative acts, not legislative, thus not subject to referenda. (See *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776 [administrative acts not subject to referendum].) Rather, they filed this action. Their theory was that the rejection of the development agreement in the election of 2012 automatically nullified all the 2011 approvals.

The trial court disagreed and denied the opponents' petition. We concur. As we explain in detail below, the elimination of a development agreement does not, by itself, stop a project. Development agreements are not zoning laws. Under Government Code section 65866, a development agreement merely *freezes* existing land use regulations for enough time for a developer to complete a project that might often take many years. The idea is the developer doesn't have to worry about adverse changes to the general plan, specific plan or zoning laws in the interim. Thus, eliminating a development agreement is a relatively inefficient way to try to stop a project. If you want to stop a project, you have to attack the EIR, the general plan, the specific plan, or the zoning laws that permit that project. Attacking a development agreement only buys you time to try to undo those things later. In this case, all survived the 2012 election and the decision upholding the EIR is now res judicata. Those 2011 project approvals are still extant and support the VTTM. Accordingly we affirm the trial court's judgment.

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[2] A vesting tentative tract map – "VTTM" in land use jargon – is a device provided for by section 66498.1, subdivision (a) of the Government Code. According to one commentator, a VTTM is "a protective mechanism to alleviate the harsh effects of California's late vesting rule," i.e., a rule that does not vest a right to develop property until an actual permit has been issued, something otherwise very late in the process. (See Dittman, *Map Quest* (2007) 29-Jan. L.A. Lawyer 23, 25.)

II. BACKGROUND

Nestled in the northwest corner of Orange County, in the City of Fullerton (Fullerton or the City), is a 510-acre oil field. It was originally owned by Chevron, which later transferred it to its subsidiary, Pacific Coast Homes (Homes). The area is generally referred to by the parties as "West Coyote Hills," or WCH. As early as 1977, the City passed a specific plan for WCH calling for 1,169 homes with 122 acres left to open space. But the zoning remained oil and gas.

For 33 years no development took place and the zoning remained the same. Then, in 2010, the Fullerton city council denied proposed amendments to the city's general plan, amendments to the specific plan for the WCH area, and a zoning change. That action generated a lawsuit from Homes. That lawsuit is still active, having been periodically stayed now for the last eight years while further developments trudged ahead.

In the summer of 2011, the Fullerton city council passed four resolutions and two ordinances allowing for the development of the 510 acres by Homes.[3] One of the two ordinances incorporated by reference a seventh document, a development agreement between the City and Homes.

The 2011 approvals envisioned a different project from the one anticipated back in 1977. In contrast to 1977's 1,169 homes, the number of homes was reduced to 760. In contrast to 1977's 122 acres, the amount of open space was expanded to 283 acres, i.e., now more than half the oil field. All seven documents in the package require explication to understand this appeal:

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[3] We take judicial notice of the fact Homes sued the City (see *Pacific Coast Homes v. City of Fullerton* et al., Orange County Superior Court case No. 30-2010-00401519 (*Homes' Contract Action*)) and the basis of that suit. Among other things, Homes alleges that in denying the necessary approvals in 2010, Fullerton was reneging on an agreement it made with Chevron back in 1977, allowing Chevron to develop the property. In return, the City got Chevron to agree to discontinue oil production by the early 1990's. *Homes' Contract Action* also alleges that the 2010 disapprovals constituted an unconstitutional taking of the property. We express no opinion on the merits of any of the allegations in *Homes' Contract Action*, except to note the existence of the suit in 2010 does explain the City's subsequent amenability to allowing some development on the property in 2011.

(1) *Resolution No. 2011-30* (Resolution 30): Resolution 30 was a short, 16-paragraph document, certifying the EIR for the development.

(2) *Resolution No. 2011-31* (Resolution 31): Resolution 31 was another relatively short document, this time amending Fullerton's general plan. The new general plan contemplated residential development on the property. There were no conditions to it taking effect. As written, Resolution 31 was its own stand-alone piece of legislation.

(3) *Resolution No. 2011-32* (Resolution 32): By contrast, Resolution 32 was a long (36-page) document, this one amending the specific plan for the area. The document allowed up to 556 single family detached homes and 204 attached ones. It also provided for a retail district, five vista trails, nature preserves and schools.

Most of Resolution 32 consisted of a long list of standard conditions and mitigation measures bearing on the proposed development. By way of illustration, these included minimization of construction noise, usage of clean fuels by construction equipment, archaeological preservation, venting systems for any residences in close proximity to abandoned oil wells, and phasing of the project to minimize impacts to gnatcatchers and coastal sage scrub.

At the very end of Resolution 32 came 27 "conditions of approval." These went on for three and a half pages. They included minimum lot sizes for various residential neighborhoods, provisions for homeowner associations, fiber optic networks, and then, almost last, a short, one-sentence condition 26. Because it is so important to Friends' appeal, we quote condition 26 verbatim: "In the event the Development Agreement is terminated, all other development approvals for the project shall be null and void."

(4) *Resolution No. 2011-33* (Resolution 33): Resolution 33 was another hefty document. It approved three separate tract maps corresponding to the western, central and eastern portions of the property. Like Resolution 32, Resolution 33 consisted mainly of a long series of standard conditions and mitigation measures (which appear to

be identical to those contained in Resolution 32) and, like Resolution 32, a list of 27 conditions of approval, including the same condition 26 we have just quoted.

(5) *Ordinance Number 3168* (Ordinance 68): Ordinance 68 consisted of two short sections, 1 and 2. Section 1 changed the zoning from "O-G" (oil and gas) to "SPD" (specific plan district). Section 2 stated the project would be subject to the zoning established by the new specific plan, i.e., Resolution 32. There were no conditions of approval in Ordinance 68.

(6) *Ordinance Number 3169* (Ordinance 69): Ordinance 69 was just over two pages. It incorporated a lengthy development agreement (the Development Agreement) by reference. Then it authorized the mayor to execute the agreement on behalf of the city.

(7) *The Development Agreement*. The Development Agreement was 37 pages long with 12 accompanying exhibits. The exhibits included such things as a construction phasing plan, a guaranty by Chevron of pollution cleanup, and nature preserve endowment guidelines. At its heart was section 3, entitled "development of the property." Section 3 provided Homes would have a "vested right to develop the Project during the Term of this Agreement" in accordance with existing land use regulations, and provided that right would survive any "voter-approved initiative measure" adopted afterwards.

Section 2.3 of the agreement, governing its termination, is, like condition 26 of Resolution 32, central to this appeal. Section 2.3 is complex, but in sum it details seven contingencies that must occur before the Development Agreement even *begins* (the "Commencement Date") and another three contingencies before it terminates ("the Termination Date"). The most important language provides that *if* the Development Agreement is rejected in a referendum election, then either party "shall have the *right to terminate* this Agreement upon delivery of a written notice of termination to the other Party . . . ." (Italics added.)

Project opponents mounted a two-prong attack on the 2011 approvals. First, they attacked the EIR in court. (See *Center for Biological Diversity et al. v. City of Fullerton et al.*, Orange County Superior Court case No. 30-2011-00499466 (*Friends' EIR action*)). Second, they circulated four referendum petitions seeking to challenge: (1) section 2 – and only section 2 – of Ordinance 68, thus leaving section 1's zoning change from oil and gas to specific plan district alone; (2) Ordinance 69 and the incorporated Development Agreement; (3) Resolution 31, approving the new general plan contemplating housing in the WCH area; and (4) Resolution 32, approving the new specific plan for the area detailing the provisions for housing, retail, open space. The electoral attack was thus made on four fronts.

But two of those four were unsuccessful. Opponents failed to obtain enough valid signatures to subject Resolution 31, the new general plan, or Resolution 32, the new specific plan, to a referendum vote. They *were* able to obtain enough valid signatures to put section 2 of Ordinance 68 on the ballot. And they were also able to obtain enough valid signatures to put Ordinance 69 to a vote as well.

The attack on section 2 of Ordinance 68 never made it to the ballot, though. In October 2011, special counsel for Fullerton wrote a formal memo to the council opining that because the specific plan was now not subject to referendum, the land remained subject to the land use regulations set forth in that specific plan. The specific plan thus rendered the challenged section 2 of the zoning change mere "surplusage" because zoning laws must conform to specific plans, not vice versa. The council agreed with their counsel's memo and subsequently repealed section 2 of Ordinance 68. The council, however, rejected the option of repealing Ordinance 69. It was destined for the ballot a year or so later, in November 2012.

Having obtained enough signatures to put Ordinance 69 to a ballot test, project opponents hoped that if the electorate rejected Ordinance 69 it would be enough to sink the entire project. Adumbrating the issues now before us in this appeal, counsel

for Friends wrote to special counsel for Fullerton on October 31, 2011, focusing on the termination language in section 2.3 of the Development Agreement. She wrote: "If voters reject the Development Agreement in the referendum election, all the development approvals for the project must terminate. Specifically, paragraph 2.3 of the Development Agreement contemplates that all development approvals will be null and void if the ordinance adopting the Development Agreement is disapproved by a referendum vote." She then quoted the "right to terminate" language we have ourselves quoted above. Next she asserted that if the voters rejected the Development Agreement, the City "would be compelled to invoke provision 2.3 to terminate the Development Agreement, thereby voiding the project."

In support of compelling the city council to "invoke" its right to terminate, Friends' counsel presented two arguments. She said the City would have to invoke its right to terminate "so as to effectuate the will of the voters." And such an invocation of its right was a good idea anyway. It was in the "best interest of the City." She pointed out that rejection of the Development Agreement in a referendum election would mean Homes would be no longer required to provide the benefits to the City that *Homes* was obligated to provide under the Development Agreement. So that was Friends' position. If the referendum succeeded, the City would have no option but to terminate the agreement and if the agreement was terminated, all the approvals would die with it.

As events progressed into 2012, the court challenge to the EIR did not go well for the project opponents. On June 22, 2012, less than five months before the November election, the superior court filed a judgment denying the requested petition in *Friends' EIR Action*. Friends timely appealed from that judgment.

Ordinance 69 was on the November ballot as "Measure W." The Fullerton city clerk prepared an "impartial analysis" which impliedly rejected the argument that had been made by counsel for Friends in her October 31, 2011 letter. The analysis stated: "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*." (Italics added.) For its part, in its ballot arguments against Measure W, Friends emphasized the inevitable increase in traffic, pollution, school crowding and draw on water resources that any addition of 760 homes to the city would bring.

Thus the operative sentence of Measure W asked voters: "Shall Ordinance No. 3169 . . . be adopted?"[4] The vote in the November 2012 election was 17,551 yes; 27,253 no. Ordinance 69 was thus repudiated by 60.83 percent of the voters who cast votes on Measure W. In the wake of its victory on Measure W, Friends dismissed its appeal in the Friends EIR action, thinking it was now "moot."

The election did not, however, stop Homes' pursuit of the project. Homes still wanted to develop its property. Friends appears to have wanted the land left as entirely open space, perhaps acquired by a conservation trust. The City, for its part, pursued a "two-track" strategy, trying to provide something for each side: There were "continuing acquisition discussions" for a sale of the land for open space and the "simultaneous processing of a new development application for the site."

There was enough optimism about a compromise in which the land would be acquired to be open space that in April 2014 the city issued a press release claiming a

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[4] Here is the entirety of the language: "Shall Ordinance No. 3169, entitled 'An Ordinance of the City Council of the City of Fullerton, California, Approving a Development Agreement Between Pacific Coast Homes and the City of Fullerton Pursuant to California Government Code Sections 65864 Through 65869.5 for Property Located at 2701 Rosecrans Avenue That Provides Public Benefits to the City of Fullerton, Including Dedication of Approximately 283 Acres of Open Space, Endowment for Habitat Management, Support Grant for Perpetual Maintenance of Recreation Facilities and Other Benefits in Exchange for Granting the Property Owner a Vested Right to Build the Project in Accordance with Approved Plans,' be adopted?"

"Historic Multi-Party Agreement" had been achieved to leave it as open space. All that remained was to ascertain a "fair price and reasonable acquisition terms."

But the parties never agreed on a price for the property, leaving only the development application "track" to be followed.[5] On November 17, 2015, just prior to the vote on the VTTM now before the court, Friends' counsel wrote another letter to the city council, voicing similar themes to her letter of October 31, 2011, four years prior. This time, however, counsel's letter made no concession to the idea that the City had to "invoke" an existing "right to terminate." Rather, the letter asserted that Measure W *automatically* triggered the "null and void" conditions in the "remaining development approvals" (the letter did not specify which remaining development approvals it was referring to). For Friends' counsel, condition 26 in the (unreferended) Ordinances 32 and 33 was a "poison pill" that had already killed off the project three years before.

On November 17, the same day as Friends' counsel's letter, the City approved the VTTM for the project.[6] There was no attempt on Friends' part to subject the new VTTM to a referendum.

Friends, along with two other environmental organizations,[7] then filed this action, seeking a writ of mandate to compel Fullerton to vacate and set aside "its approval of the Project." The theory of the petition is the same as Friends' November 17 2015 letter – the referendum election automatically rendered null and void all the other 2011 project approvals that had not been the subject of a referendum. Under Friends' theory,

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[5] It would be fair to say that a theme of much of the opposition to Homes' application was a hope the property would never be anything other than open space. One email to the city council that is part of the administrative record exemplified that hope, asserting that a "fair price" and three to five years to raise the money would "save this precious resource forever." It is important to note that we have neither the power nor the expertise to draw any conclusions about the best use of the property in this proceeding.

[6] This court recently discussed VTTMs in *1901 First Street Owner, LLC v. Tustin Unified School Dist.* (2018) 21 Cal.App.5th 1186. Like development agreements, they create vested rights. "When, as here, a local agency approves a vesting tentative map ([Gov. Code] § 66498.1, subd. (b)), or enters into a development agreement ([Gov. Code] §§ 65865, 65866), the builder is entitled to proceed on the project under the local rules, regulations, and ordinances in effect at the time of the approval." (*Id*. at p. 1195.)

[7] The Center for Biological Diversity and the Friends of Harbors, Beaches and Parks. For purposes of this appeal we use "Friends" to include both organizations.

the rejection of the Development Agreement caused the general plan, the specific plan, and even the zoning change from oil and gas to a special plan district to revert to what they were prior to the 2011 approvals, and those plans and zoning did not allow for the project.

The trial court disagreed. The trial court reasoned that the Development Agreement was "never legally executed" because of the referendum. In its wake the mayor had no authority to sign it on behalf of the city. The Development Agreement thus never existed, therefore it could never have been "terminated" either. That meant the other 2011 development approvals "remained in effect following the referendum." The court denied the petition. Friends then filed this appeal.

III. DISCUSSION

A. *The Trial Court's Rationale*

Friends devotes the bulk of its appellate arguments to refuting the trial judge's conclusion that the Development Agreement never really existed in the first place.

But we review judgments, not rationales. "If the trial court's ruling or decision is correct upon any theory of law applicable to the case, it will be upheld without regard to the considerations underlying the court's determination." (*Woods v. Union Pacific Railroad Co.* (2008) 162 Cal.App.4th 571, 576.) We therefore proceed to the main event – the issue of whether the referendum election *itself* "terminated" the Development Agreement.

It seems clear to us that both the City and Homes intended the Development Agreement to exist – indeed, to exist beyond the referendum election. In fact, they were at great pains to assure it would survive a referendum election. Even Friends acknowledges that. To quote from its opening brief: "Moreover, the development agreement itself assumed that the development agreement would continue to exist even in the aftermath of a disapproved ordinance. [Quotation from section 2.3 of

the agreement.] In other words, the City and [Homes] agreed that even if a referendum rendered the ordinance ineffective, the Development Agreement *would continue to exist unless and until either one of them gave written notice of termination*." (App. Opn. br. at p. 73, italics added.) Unfortunately for Friends, that never happened.

Under the Development Agreement only Fullerton or Homes had the right to "terminate" it, and they never did. The key provision is section 2.3, and specifically those parts of section 2.3 that define the "Termination Date." The operative sentence is the third one. It is a sentence of Faulknerian length that applies to three contingencies: (1) "by the City's voters at a referendum election;" (2) a final judgment holding any of the various development approvals, including, of course, the Development Agreement itself, is invalid; and (3) the failure of any of the conditions to the effective date involving fuel modification zones, an interpretive center, or a water delivery agreement. In the event of any of those three contingencies, "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 except that Owner shall remain liable for timely payment/reimbursement of City's costs and expenses in accordance with Section 5.11 of this Agreement [and on and on about what the Owner shall continue to be liable for] and the Existing Development Approval for the Project shall similarly be null and void at such time." (Italics added.)

Courts must interpret the words in both legislation and contracts by reading them whole, not in isolation, considering those words in context, and, at least in the case of agreements, the circumstances in which they were made. (E.g., *In re Isaiah W.* (2016) 1 Cal.5th 1, 13 [legislation]; *London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 655–656 [agreements].) Here, the Development Agreement, the general plan, specific plan, and zoning change were all part of an interrelated package.

When the package is looked at as a whole, it is clear that the one use of the word "terminated" in condition 26 of the specific plan and tract map approvals that was

never intended was the figurative sense in which Friends now tries to use it – "terminated" by a referendum election. And, as we have noted, Friends themselves recognizes this. We recall the concession Friends made on page 73 of its opening brief concerning the "existence" of Ordinance 69 about which we spoke earlier: "The City and [Homes] agreed that even if a referendum rendered the ordinance ineffective, the Development Agreement would continue to exist unless and *until either one of them gave written notice of termination.*" No such written notice was ever filed.

We need only add that our conclusion dovetails with the nature of development agreements as set out by the Legislature. Government Code section 65866 outlines a scheme in which development agreements merely *freeze* a set of land use regulations. A development agreement is certainly not a legal prerequisite for a project, nor does its absence necessarily stop one. A development agreement gives a developer the assurance that relevant land use regulations will not change during the life of a project that might take many years. In return, the municipality usually obtains concessions such as more open space or funding of public facilities that it might not be able to obtain without the agreement. (See generally, Callies et al., *Symposium of the Seventy-Fifth Anniversary of Village of Euclid v. Ambler Realty Co.: Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan* (2001) 51 Case W. Res. L. Rev. 663, 663-665; see e.g., *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 528, fn. 28; *Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors* (2000) 84 Cal.App.4th 221, 227.)

So all the referendum did was to disapprove Ordinance 69, thus preventing the City from entering into the Development Agreement. Under Article 2, section 11, of the state Constitution, plus Elections Code sections 9237 through 9242, only specific ordinances are nullified by referendum elections. This is not one of the ordinances

specified. The November 2012 election was thus an important, but not dispositive victory for project opponents.

The next three years, in fact, represented a compendium of opportunities to sink the project that Friends and other project opponents did not seize. They could have pursued their appeal of the trial court's approval of the EIR; instead, they dismissed it. They might have lobbied harder to convince the city council to exercise its right to "terminate" the agreement. They might even have taken the opportunity given them by their election victory over the development agreement to mount initiative campaigns to change the general plan, specific plan and zoning governing the WCH area to something more to their liking. They did none of these things – or anything else.

In its briefing, Friends relies heavily on *Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475 (*Chandis*), a decision from this division. According to Friends, *Chandis* means this court "knows a referendum end-run when it sees it."

Yes we do, and this case is no end-run. *Chandis* is not only distinguishable, it highlights what Friends did *not* do here.

There is a hierarchy in land use regulation. At the top is the general plan, which is the constitution for future development. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773.) A specific plan is the step below the general plan and is used to implement the general plan in particular places. (Gov. Code, § 65450.) Beneath these is the applicable zoning. (Gov. Code. § 65455.) A development agreement, as we have noted, functions outside this hierarchy only by freezing it for a specific period of time. In *Chandis*, project opponents were able to attack the top two tiers of the hierarchy – the general plan and the specific plan – by subjecting both of them to a referendum, a referendum which then disapproved both. The developers realized that toppling the general plan and specific plan were fatal, and so aimed their attack at the referenda

directly, arguing the referenda themselves violated *constitutional* rights. Nothing of the sort happened here, where the general and specific plans both survived.

IV. DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

GOETHALS, J.