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Orange Citizens: Degradation of Procedural Fairness in Municipal Zoning

INTRODUCTION

In Orange Citizens for Parks & Recreation v. Superior Court (Orange Citizens I), the California Court of Appeal for the Fourth District considered an issue that detrimentally impacts public participation in city zoning decisions. This case is of great importance because it addresses how a city should treat a land use designation that was never explicitly reflected in any of three general plans. Ultimately, this In Brief argues that the Court of Appeal’s analysis of this case grants too much deference to city decision-making authority and does not adequately consider procedural fairness concerns. The California Supreme Court granted review of this case in October 2013. This In Brief argues that the Supreme Court should weigh the procedural abuse and confusion that could result from this precedent and find for Orange Citizens.

I. BACKGROUND

A. California Planning and Zoning Law

Under California’s Planning and Zoning Law, cities and counties have authority over local land use decisions. State law does, however, outline a hierarchy of authority for land use designations: the most binding of these authorities is the general plan, followed by any specific plans, and finally, the zoning code. California’s Planning and Zoning Law requires each municipality to develop a general plan as a “constitution” for future development. After adopting a general plan, an entity that is delegated planning authority can “prepare specific plans for the systematic implementation of the general plan and for all or part of the area covered by the

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2. Orange Citizens for Parks & Recreation v. Superior Ct. (Orange Citizens II), 311 P.3d 236, granting review and superseding 159 Cal. Rptr. 3d 249.
3. CAL. GOV’T CODE § 65100 (West 2014).
4. Orange Citizens I, 159 Cal. Rptr. 3d at 254.
5. Id. at 255.
general plan.” Any specific plan affecting areas controlled by the general plan must be consistent with the general plan.7

Municipalities must follow certain procedures in adopting general plans. California law requires cities to seek public involvement. Specifically, municipalities must incorporate widespread feedback through “public hearings and any other means the planning agency deems appropriate.”8 Before a general plan or an amendment to a general plan can be adopted, at least one public hearing must be held.9

B. History of the City of Orange’s General Plans

In Orange Citizens I, the Court of Appeal reviewed a zoning designation for a parcel of land within the City of Orange.10 The case arose out of inconsistencies between three of the City’s general plans, enacted in 1973, 1989, and 2010.11 As a result of clerical errors in adopting the 1973 General Plan, changes recommended by the Planning Commission and subsequently adopted by the City Council were never reflected in the general plan document.12 These clerical errors are at the heart of this case. In the forthcoming California Supreme Court case, the Court must decide what is included in the current general plan and what is not. To understand the administrative record behind the most current general plan, one must go back to the 1973 General Plan.

In 1973, the City drafted the Orange Park Acres Plan, which contained the fifty-one-acre parcel of land at issue in this case (“the Property”).13 It was unclear whether the Orange Park Acres Plan was a specific or a general plan.14 On November 19, 1973, during a Planning Commission meeting, the Commission decided to designate the Property as “Other Open Space and Low Density (1 acre).”15 The City incorporated this decision through a resolution adopting the General Plan for the Orange Parks Area “as amended . . . on November 19.”16 The resolution provided no further details as to the Planning Commission’s November 19 decision, nor any indication that the Property would be designated as “Other Open Space and Low Density (1 acre).”17

The result was that while the City Council approved the land use designation, the Council never presented it to the public then or in any subsequent document. As a result of the City’s failure to transfer the

6. Gov’t § 65450.
7. Id. § 65860(a).
8. Id. § 65351.
9. Id. § 65355.
10. 159 Cal. Rptr. 3d at 253–54.
11. Id. at 267.
12. Id. at 264.
13. Id. at 258–59.
14. See id. at 257–58.
15. Id.
16. Id. at 259 (emphasis omitted).
17. Id.
information to a general or specific plan, the City lost record of the designation.\(^\text{18}\) Thus, over the course of decades, the Property appeared to be zoned solely as “Recreation-Open Space,” rather than “Other Open Space and Low Density (1 acre).”\(^\text{19}\)

The additional “low density (1 acre)” designation was also absent in subsequent general plans.\(^\text{20}\) The City adopted a new General Plan in August 1989, which included a land use map characterizing the Property as Open Space Golf.\(^\text{21}\) Existing in conjunction with the City’s General Plan was the “Orange Park Acres Plan,” which explicitly classified the Property as Open Space Golf.\(^\text{22}\) Finally, in the 2010 General Plan, the map similarly characterized the Property as Open Space.\(^\text{23}\)

C. Project Approval and Ensuing Referendum

In 2007, defendant Milan Rei IV, LLC submitted an application to develop a thirty-nine-unit residential subdivision on the Property.\(^\text{24}\) Though the City initially determined that residential use was inconsistent with the General Plan, the City reversed its determination upon reviewing the records and discovering that the Orange Park Acres Plan allowed for “Other Open Space and Low Density (1 acre),” based on the 1973 resolution.\(^\text{25}\) Explaining the City’s reversal, the City Attorney speculated that the City had forgotten the 1973 designation.\(^\text{26}\) The developer ultimately proposed a general plan amendment to ensure consistency with the project’s residential nature and to prevent a challenge to the Property’s zoning.\(^\text{27}\)

On June 14, 2011, the City Council adopted Resolution 10566 stating that the existing land use designation for the Property was “Other Open Space and Low Density (1 acre)” and amending the General Plan to reflect this usage.\(^\text{28}\) The resolution also clarified the Orange Park Acres Plan’s inclusion as part of the General Plan.\(^\text{29}\) Additionally, the City passed resolutions designating the Property as “Recreation/Open Space to Residential 43,560 square feet (R-1-40)” and finding this zoning consistent with the General Plan.\(^\text{30}\) On November 6, 2012, however, the City’s voters invalidated the City Council’s general plan amendment and zoning decisions through a citywide referendum.

\(^{18}\) Id.

\(^{19}\) Id. at 260–61.

\(^{20}\) Id. at 260.

\(^{21}\) Id.

\(^{22}\) Id. at 261.

\(^{23}\) Id.

\(^{24}\) Id. at 254, 262.

\(^{25}\) Id. at 262–63.

\(^{26}\) Id.

\(^{27}\) Id. at 263.

\(^{28}\) Id.

\(^{29}\) Id. at 263–64.

\(^{30}\) Id. at 264.
Orange Citizens for Parks and Recreation (Orange Citizens) filed suit, arguing that the City’s interpretation was outside its authority.\textsuperscript{31} Specifically, Orange Citizens argued that: (1) the proper standard of review was \textit{de novo}, instead of the more deferential arbitrary and capricious standard; (2) the 1973 General Plan was irrelevant to interpreting the 1989 and 2010 General Plans; (3) the City only determined the consistency of the General Plan post the General Plan amendment; and (4) the General Plan only allows open space as the designation for the Property.\textsuperscript{32}

\textbf{II. The Orange Citizens Decisions and the Potential for Procedural Unfairness}

\textit{A. Oversights in the General Plan}

The primary dispute in \textit{Orange Citizens I} was whether the Property’s land use designation is “Open Space” or “Other Open Space & Low Density (1 acre)”—only the latter of which would allow for housing construction.\textsuperscript{33} The resolution of this dispute hinged on whether a provision that was mistakenly excluded from the 1973 General Plan should be considered binding authority on the City’s land use policy nearly forty years later. For the reasons below, the Court of Appeal erred in answering these questions.

The court in \textit{Orange Citizens I} held that because the record had some evidentiary support for the City Council’s contentions, the City’s determination that the Property was zoned as “Other Open Space and Low Density (1 acre)” was not arbitrary and capricious.\textsuperscript{34} The court noted that under this standard, the court must defer to an agency’s factual findings of general plan consistency unless “no reasonable person could have reached the same conclusion on the evidence before it.”\textsuperscript{35} Here, the court found that allowing a land use permitted in the 1973 General Plan was not arbitrary and capricious given that the land use designation was at some point approved by the City and had not been overturned.\textsuperscript{36}

The Court of Appeal’s reasoning threatens to reduce the arbitrary and capricious standard to the point of near uselessness. If a city can reach into dark crevices of its past,\textsuperscript{37} which were not recorded or entered into the public record, to “correct” an issue in its general plan amid controversy and evidence to the contrary, the obligations for disclosure are obviated. Even if the ruling of this case is limited to instances in which there is a legitimate rationale for a city’s

\textsuperscript{31} Id. at 266, 269.
\textsuperscript{32} Id. at 263–64, 267, 269.
\textsuperscript{33} Id. at 254.
\textsuperscript{34} Id. at 274. Explaining the applicable standard of review, the court framed the inquiry as “whether the decision is arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.” Id. at 268.
\textsuperscript{35} Id. at 268.
\textsuperscript{36} Id. at 272.
\textsuperscript{37} See id. at 272–73.
interpretation, the effect will be that unnoticed or improperly recorded land use
designations will be immune from objection so long as the initial designation is
later interpreted to be a part of a city’s general plan.

The Court of Appeal used the complex record to allow the City to uncover
and incorporate provisions buried in the administrative record. The court’s
assessment of the City’s actions focused on whether the City had a reasonable
basis for its decision. This “arbitrary and capricious” standard focuses too
exclusively on whether the agency action was entirely “lacking in evidentiary
support,” without adequately assessing potential procedural unfairness to the
public. To avoid procedural unfairness, legislative and agency actions should
have both a rational basis and should not be unpredictable and random. Yet
the parcel’s designation of “Other Open Space and Low Density (1 acre)” was
both unpredictable and random, as it was thrust into the General Plan without
an opportunity for groups such as Orange Citizens to object.

While the court states that reasonable people could disagree about whether
the City’s consistency finding was correct, given the complex record, the
court ignored the prospect of significant procedural unfairness to other land
developers and Orange Citizens. Procedural unfairness plays into the zoning
decisions as part of the arbitrary and capricious test when the City reviews its
zoning plans and determines whether the proposed land use is consistent with
the zoning documents.

B. The Implications of Procedural Unfairness

A city’s zoning board manages the interplay between individuals’ private
property rights and the needs of the community as a whole. In 1984, the
California legislature increased reporting requirements in the general plan
amendment process. The Orange Citizens I court contended that those
reporting requirements were inapplicable here because the 1984 laws were
enacted after the 1973 Orange Park Acres Plan. This argument fails because
as the new general plans were implemented, they would have been required to
provide this information to the public in any event. Land that was designated a
certain use in a previous general plan should not be exempted from notice
requirements in subsequent general plans.

1. The Community’s Interest in a Fair Process

Admittedly, barring inclusion of the 1973 language in the most recent
General Plan may impose some burden on the City, given that the City simply

38. Id. at 276.
39. See id. at 268.
40. See id. at 274.
41. Id. at 270.
42. See id. at 272.
43. See CAL. GOV’T CODE § 65357 (West 2014).
44. 159 Cal. Rptr. 3d at 272–73.
sought to correct what may have been a minor error in the post-1973 General Plan maps. The City’s determination here appears to be reasonable given the complicated record, but there are other considerations at play. General plans and other planning devices implicate many different types of community interests and needs. Each property holder’s ability to use their property is based upon the City’s determination of community standards and needs, and reflects a balancing that the City has undertaken.

The City’s clerical mistake upset the balance of community and property interests, resulting in significant conflict and litigation. This pattern will repeat itself at the expense of developers and community members alike if a review of forty-year-old land use records can be used to trump contrary evidence in more recent general plans. While prior zoning can certainly be used in determining potential uses of land, the court here found a land use designation buried in layers upon layers of city documents and records. This leads to significant procedural unfairness because community members would need to dig through a vast history of documents to be aware of such a provision.

2. **Lack of Notice**

Community members had effectively no notice of the residential land use designation in the General Plan or the administrative record. It is therefore troubling that the Court of Appeal allowed the City to use an error of its own creation to justify its interpretation of the administrative record. The lack of disclosure at issue in *Orange Citizens I* implicates the precise legislative purpose for which notice of a general plan is required.\(^{45}\) The court’s decision, moreover, ran afoul of general principles of fairness in allowing interested parties to air their concerns to their elected representatives. By looking back into the record more than forty years later, the City has carved both current and past citizens out of the decision-making process by converting a post hoc interpretation into a final determination.

C. **Supreme Court Review**

The big question now is how the California Supreme Court will view this case. The Court could find an inherent need for public disclosure of records, despite the fact that no law expressly mandated such disclosure when the 1973 General Plan was enacted. This presents significant policy issues, as it would require the court to retroactively apply the law, which could create further procedural unfairness. Alternatively, the Court could affirm the Court of Appeal’s holding in its entirety and allow the General Plan to become a living document, affected by the subjective intent of past general plans. This result would be tremendously detrimental to the zoning process and modern public disclosure requirements. Finally, the Court could affirm that all amendments constitute a new general plan independent of any older versions. This would

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\(^{45}\) See Gov’t § 65357.
certainly clear up the record for cities, and would create a very predictable bright-line rule. The California Supreme Court should uphold the General Plan as it was passed in its most recent iteration; for the purposes of procedural fairness, if the proposed usage of the Property is inconsistent with what the current language states, the City should follow the normal process for amending a general plan.

CONCLUSION

For purposes of both sound public policy and statutory compliance, a city must explicitly provide notice of changes to a property’s land use designation.\footnote{See id. § 65357.} Admittedly, this particular case may be an exception to that rule given that the General Plan in question was approved in 1973. The current General Plan should not be interpreted based on a previous iteration of a general plan that gave a cursory approval of a committee’s recommendation. What the current General Plan states is what should be binding.

\textit{Xavier Johnson}