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CITY OF ENCINITAS

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF SAN DIEGO, NORTH DISTRICT

11 CITY OF ENCINITAS,

12 Plaintiff,

13 v.

14 THE CALIFORNIA DEPARTMENT OF  
HOUSING AND COMMUNITY  
15 DEVELOPMENT; and DOES 1-25, inclusive

16 Defendants.

Case No.: 37-2019-00047963 CU-OR-NC

Assigned for all Purposes to:  
Department N-28  
THE HON. EARL H. MAAS, III

**PLAINTIFF CITY OF ENCINITAS'S  
OPENING BRIEF**

IMAGED FILE

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 The crux of this case involves the interplay between the City of Encinitas (the City)'s  
3 Proposition A, a recently-enacted voter initiative that requires voter approval for certain land use  
4 changes,<sup>1</sup> and state Housing Element Law.<sup>2</sup> State law requires that local governments update the  
5 housing elements of their general plans according to a fixed timetable (Section 66588), and adopt  
6 zoning and general plan changes implementing the updated elements. (Section 65583(c).) Since  
7 the initiative adopting Proposition A was passed by the City's voters in 2013, the voters have  
8 rejected two comprehensive housing element packages, putting the City seriously out of  
9 compliance with the Housing Element Law.

10 Because the City did not timely update its Housing Element, it has been sued in four  
11 lawsuits seeking various forms of relief: writs of mandate, injunctions against development in the  
12 City, damages and attorneys' fees.<sup>3</sup> In fact, Encinitas has incurred approximately \$2.4 million in  
13 defending and settling the litigation, as well as for extensive legal representation on housing  
14 element compliance issues. (Declaration of Jace Schwarm (Schwarm Decl.) ¶ 6.) In light of the  
15 November, 2018 election in which the City's voters, for the second time, rejected a housing  
16 element package, this Court issued Writs ordering the City to adopt a housing element and  
17 related implementing legislation for the 2013-2021 planning period (the Fifth Cycle), without a  
18 vote. (City's Request for Judicial Notice (RJN) Ex. T.) The Writs were directed to the City's  
19 Fifth Cycle only, leaving the question of whether the Court should order a limited preemption of  
20 Proposition A to allow future compliance with the Housing Element Law for another day.

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21 \_\_\_\_\_  
22 <sup>1</sup> The voter approval requirements at issue in this case were enacted by voter initiative in 2013,  
23 and are known as "Proposition A." Additional voter approval requirements appear in the Land  
24 Use Element of the City's General Plan. Proposition A, together with the Land Use Element  
25 voter approval provisions, are collectively referred to in this Brief as "the Vote Requirements."

<sup>2</sup> Government Code sections 65580 et seq. and Section 65863. All unlabeled statutory references  
are to the Government Code.

26 <sup>3</sup> *Building Industry Association of San Diego County v. City of Encinitas*, San Diego Superior  
27 Court Case No. 37-2014-00034550-CU-WM-NC; *DCM Properties v. City of Encinitas*, San  
28 Diego Superior Case No. 37-2016-00002342-CU-MC-NC; *San Diego Tenants United, et al. v.*  
*City of Encinitas and Encinitas City Council*, San Diego Superior Court Case No. 37-2017-  
00013257-CU-WM-NC; and *Building Industry Association of San Diego County v. City of*  
*Encinitas*, San Diego Superior Court Case No. 37-2017-00023267-CU-WM-NC (BIA2).

1 That day has now come. Defendant California Department of Housing and Community  
2 Development (HCD) refused to certify the City's Fifth Cycle Housing Element unless and until  
3 the City agreed to either file this action for declaratory relief, or ask the voters to amend  
4 Proposition A, seeking to carve out an exception from the Vote Requirements for the adoption of  
5 future housing elements and implementing legislation. Encinitas has therefore filed this action,  
6 which seeks a judicial declaration that state law preempts the City's Vote Requirements to a  
7 limited extent, with respect to Housing Element Law compliance only, so that the City may  
8 remain in compliance with the Housing Element Law and adopt future required updates by a  
9 vote of the City Council.

10 One final note. In the prior cases, Encinitas vigorously defended the initiative power of  
11 the City's voters and the corresponding right of the voters to weigh in on crucial decisions  
12 affecting the City's land use future. The City has and will continue to oppose wholeheartedly  
13 any and all attempts to gut the Vote Requirements in their entirety. It must, however, escape the  
14 endless and crushingly expensive litigation morass it finds itself in each time it lags behind the  
15 mandated timetable for housing elements. To be clear, the only judicial declaration it seeks in  
16 this case is specific and limited, relating solely to compliance with the Housing Element Law.

17  
18 **II. STATEMENT OF FACTS**

19 **A. Encinitas Requires a Vote of the People before Certain Land Use Changes Go Into Effect.**

20 In 2013, the Encinitas City Council enacted legislation requiring an affirmative vote of  
21 the people prior to redesignating or rezoning certain residential properties within the boundaries  
22 of the City. Specifically, in 2013, the Land Use Element of the City's General Plan was amended  
23 to require voter approval for certain land use changes (the Land Use Element Vote  
24 Requirements.) The Land Use Element Vote Requirements were further amended in 2019 and  
25 state:

26 **POLICY 3.7:** With the exceptions described in Policy 3.11, once  
27 acknowledged as being consistent with the General Plan and Local  
28 Coastal Program, the allowable maximum density of any property  
designated for residential use shall not be increased except by the  
affirmative vote of a majority of those voting in the election  
approving the proposed increase.

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1 POLICY 3.8: With the exceptions described in Policy 3.11, once  
2 acknowledged as being consistent with the General Plan and Local  
3 Coastal Program, property designated/zoned for non-residential  
4 uses shall not be redesignated/rezoned to allow residential uses  
except by the affirmative vote of a majority of those voting in the  
election approving the proposed change. (RJN Ex. B.)

5 In addition to the above, in June 2013, the City's voters passed Proposition A, an  
6 initiative measure, which requires a vote of the people before any repeal, amendment or adoption  
7 of all or part of certain land use policy documents becomes effective. (RJN Ex. A.) Proposition  
8 A states:

9 **30.00.030 Section 3 – Planning Policy Documents Covered.**

10 3.1. After this measure becomes effective, no repeal, amendment  
11 or adoption of all or part of the following land use planning policy  
12 documents of the City of Encinitas may become effective unless  
and until there is compliance with provisions of this initiative  
measure:

- 13 a. The text of the Encinitas General Plan's Land Use  
14 Element,
- 15 b. The Land Use Policy Maps of the Encinitas General  
16 Plan (including the following policy maps: [citations  
17 omitted]),
- 18 c. The text of the Encinitas Zoning Regulations (Title 30 of  
the Encinitas Municipal Code),
- 19 d. The Zoning Map of the City of Encinitas,
- 20 e. Any Specific Plan for a geographic area within the City,  
or
- 21 f. Any Development Agreement granting rights to develop  
private or public land.

22 3.2. In this initiative measure the above six items are referred to as  
the "Planning Policy Documents." (Ord. 2013-04)

23 **30.00.040 Section 4 – Types of Amendments Covered.**

24 4.1. A "Major Amendment" of any of the Planning Policy  
25 Documents means any amendment which results in any of the  
26 following changes to the development standards for any parcel of  
land affected by the proposed amendment:

- 27 a. Increases the maximum allowable number of residential  
28 units which may be constructed on any parcel or group of  
parcels.

- b. Increases the maximum allowable number of separate parcels which may be created from an existing parcel or group of parcels.
- c. Changes zone type for a parcel or parcels from Agricultural, Public/Semi-Public, Ecological Resource/Open Space/Parks or Open Space to a different zone type.
- d. Changes zone type for a parcel or parcels from a non-mixed-use zone to mixed-use type zone resulting in additional residential units where none were previously permitted or increasing the maximum allowable residential units.
- e. Changes a parcel or parcels from any residential land use to allow any other nonresidential land use.
- f. Increases the allowed maximum height of development or changes how height is measured such that additional height could be permitted than previously permitted.
- g. Increases the maximum allowable commercial or retail square footage for a parcel or group of parcels.
- h. Repeals any of the Planning Policy Documents.

4.2. A "Regular Amendment" of any of the Planning Policy Documents includes any amendment which is not a Major Amendment. (Ord. 2013-04)

**30.00.050 Section 5 – Amendments to Encinitas Planning Policy Documents.**

**5.1. No Major Amendment of any of the Planning Policy Documents shall be effective unless and until it is approved by a simple majority vote of the voting electorate of the City of Encinitas voting "YES" on the ballot measure proposing the Major Amendment at a regular or special election. (Emphasis added.)**

Although technically the Housing Element by itself is not within the scope of Proposition A, a vote is required on any zoning, specific plan, or Land Use Element amendments that are required to implement the Housing Element and result in an increase in residential density or allow residences in commercial zones. Indeed, in the Fact Sheet circulated to voters before the 2013 election in which Proposition A was passed, the public was informed that the passage of the initiative would not relieve the City of its obligation to comply with state housing element law. (RJN Ex. G.)

In 2016 and 2018, the City twice attempted to comply with state and local law by

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1 adopting a housing element and corresponding legislation implementing the housing element,  
2 and putting both housing element packages on the ballot for voter approval. The voters rejected  
3 the packages each time, as described below.

4 **B. State Law Mandates that Cities Regularly Update the Housing Elements of Their**  
5 **General Plans.**

6 Under the Housing Element Law, a city's mandated housing element must identify local  
7 housing needs, adopt programs to meet local and regional housing needs, and identify adequate  
8 sites for all types of housing (Government Code §§ 65583, 65580 *et seq.*) A key requirement for  
9 housing elements is that a city demonstrate that it has enough land zoned for housing at  
10 appropriate densities to accommodate its share of the regional housing needed (the Regional  
11 Housing Need Allocation, or RHNA.) (Government Code § 65583(c)(1).) The RHNA  
12 represents the expected need for housing in a city at each income level. In order to demonstrate  
13 that a city has enough land zoned for each income level, in the housing element, a city must  
14 complete an inventory of land zoned for housing that identifies specific sites, describes existing  
15 uses and the density permitted, and states specifically how many units can be accommodated on  
16 each site and for which income level. (Government Code §§ 65583(a)(3); 65583.2.) Cities must  
17 often agree to enact zoning and Land Use Element amendments that increase density if there is  
18 insufficient land zoned at the appropriate densities to accommodate each income level.  
19 (Government Code §§ 65583(c), 65583.2(c)(3).)

20 For its Fifth Cycle Housing Element, Encinitas was required to amend its zoning  
21 ordinance, specific plans, and Land Use Element to increase the density of many sites to 30 units  
22 per acre to provide adequate sites suitable for lower income housing. Pursuant to the Vote  
23 Requirements, such implementing legislation must be approved by the City's voters before going  
24 into effect.

25 **C. In 2016, Encinitas put a Housing Element Package before the Voters for Approval,**  
26 **and the Voters Rejected It.**

27 Before the 2013 enactment of the Vote Requirements, Encinitas had fallen out of  
28 compliance with the state's housing element update timetable. For the 2013 to 2021 housing

1 element planning period (the Fifth Cycle), Encinitas staff, working with outside consultants,  
2 began the arduous process of preparing a comprehensive update to the Housing Element, and  
3 drafting related zoning changes and general and specific plan amendments (the Housing Element  
4 Package.) (Sapa'u Decl. ¶ 5.)

5 In June 2016, the Encinitas City Council adopted the 2013-2021 Fifth Cycle Housing  
6 Element, subject to voter approval before it went into effect, as mandated by the Vote  
7 Requirements. (RJN Ex. C.) The City Council also adopted zoning changes and specific plan  
8 amendments that were required to be put into place to ensure consistency with the newly adopted  
9 Housing Element, which legislative changes were only effective unless and until approved by the  
10 voters of Encinitas. The element, together with the implementing legislation, was placed on the  
11 ballot for the 2016 general election as "Measure T." (RJN Ex. T.)

12 City staff engaged in extensive public outreach about Measure T. This included holding  
13 dozens of public meetings and community dialogue sessions, attended by hundreds of persons,  
14 and an extensive mail campaign. (Sapa'u Decl. ¶ 6.) Encinitas put Measure T before the voters  
15 for approval on the November 8, 2016 ballot. By a vote of 55.92 per cent to 44.08 per cent,  
16 Encinitas's voters rejected the measure. (RJN Ex. E.)

17 **D. After the November 2016, Election, the City Revised the Housing Element Package;**  
18 **the Voters Rejected the Revisions in the November, 2018 Election.**

19 The day after the Measure T vote, Encinitas immediately began work on a revised  
20 Housing Element Package for the Fifth Cycle. (Sapa'u Decl. ¶ 7.) The City convened a Housing  
21 Element Subcommittee, consisting of the Mayor and Deputy Mayor and community  
22 representatives, including a leader of the Measure T opposition. (*Id.* ¶ 6.)

23 In September 2017, as part of a broad package of new housing bills, the Legislature  
24 substantially amended the Government Code sections codifying the required contents of housing  
25 elements. Among other things, the new legislation created significant new requirements relating  
26 to the size, vacancy status and development capacity of potential housing sites to be included in  
27 the housing element inventory. (§§ 65583.2(c), (g)). Because of the changes in the new  
28 legislation, Measure T, the version of the Housing Element rejected by the voters in the

1 November 2016 election, no longer complied with state law.

2 City staff worked very hard to incorporate the public's concerns into the revised Housing  
3 Element Package, and update the package to fully comply with recent legislative changes.  
4 (Sapa'u Decl. ¶ 8.) It convened 24 public meetings and hearings, attended by hundreds of  
5 residents, to obtain and incorporate comments on the Package, before it was sent to the City  
6 Council for review and approval. (*Id.*) On June 20, 2018, the City Council adopted the revised  
7 Housing Element, subject to voter approval. (RJN Ex. J.) On August 8, 2018, the City Council  
8 adopted the zoning ordinance and specific plan changes necessary to complete the Housing  
9 Element Package, again, subject to voter approval on the November, 2018 ballot.

10 By a vote of 52.94 per cent to 47.06 per cent, the voters rejected Measure U. (RJN  
11 Ex. K.)

12 **E. Encinitas Has Been Repeatedly Sued for Failing to Timely Update the Housing**  
13 **Element, and Was Ordered by this Court to Adopt a Housing Element Package**  
14 **without a Vote of the People.**

15 Encinitas settled two lawsuits filed prior to the 2016 vote on Measure T, each of which  
16 partially concerned the Housing Element: *Building Industry Ass'n v. City of Encinitas, et al*, San  
17 Diego Superior Court Case No. 37-2014-00034550-CU-WM-NC, and *DCM Properties, Inc. v.*  
18 *City of Encinitas, et al.*, San Diego Superior Court Case No. 37-2016-00002342-CU-MC-NC.  
19 (RJN Exs. L, M, N, O.) The primary claim in each case involved issues regarding the City's  
20 implementation of state density bonus law (§ 65915); each plaintiff also included causes of  
21 action based upon claims that the City's Housing Element no longer complied with state law.  
22 (RJN Exs. L, N.))

23 After the failure of Measure T and before the Measure U vote, the City was sued in two  
24 additional cases for an alleged failure to comply with the Housing Element Law. (*San Diego*  
25 *Tenants United v. City of Encinitas; Building Industry Association v. City of Encinitas*) (RJN  
26 Exs. P, Q.) In each case, the plaintiffs sought orders staying the November 2018 election on  
27 Measure U, arguing that Proposition A was preempted by the Housing Element Law. (*Id.*)

28 Encinitas opposed the request to stay the election, arguing that the City's voters should be  
given the chance to vote on a revised housing element package. This Court agreed with the City

1 and allowed the election to proceed, continuing any further proceedings in the two cases until  
2 after the November 2018 election. (RJN Ex. R.)

3 In December 2018, after it became clear that Measure U had been defeated, the Court  
4 decided that the parties were at an impasse and an Order directing the City to adopt a revised  
5 housing element without a vote of the people was required. (RJN Ex. S.) In the Order, this  
6 Court noted:

7 Adopting an updated housing element by the statutory deadline is a  
8 requirement of Housing Element Law and a mandatory duty for  
9 every California city. Government Code § 65302(c); *Buena Vista*  
10 *v. City of San Diego Planning Department, supra*, 175 Cal.App.3d  
11 at 295. Housing Element Law imposes a strict penalty on  
jurisdictions that fail to timely adopt an updated housing element,  
requiring another update in four years. (Government Code  
§ 65588(f)(4)(A).)  
(*Id.* at ENC-0312.)

12 The Court reasoned that although generally the initiative and referendum power should  
13 be construed liberally:

14 [I]f the people exercise their referendum power in such a way as to  
15 frustrate any feasible implementation of the land use plan, the  
Court is required to find a way out of the impasse. *Yost v. Thomas*  
(1984) 36 Cal.3d 561, 574.)  
16 (*Id.* at ENC-0314.)

17 The Court ordered the City to bring the housing element into compliance within 120  
18 days, and to comply with Government Code section 65754, requiring that the City submit the  
19 draft housing element to HCD for review:

20 The Court finds that the existing general plan does not  
21 substantially comply with the requirements of . . .the Government  
Code. . .and directs City to bring its general plan into compliance  
22 with the requirements of Article 5 (commencing with Section  
65300) within 120 days. As set forth in Government Code  
23 § 65754(a), the planning agency of the City shall submit a draft of  
its revised housing element or housing element amendment...to the  
Department of Housing and Community Development for its  
24 review....The department shall review the draft element or  
amendment and report its findings to the planning agency within  
25 45 days of receipt of the draft. The legislative body shall consider  
the department's findings prior to final adoption of the housing  
26 element or amendment if the department's findings are reported to  
the planning agency within 45 days after the department receives  
27 that draft element or amendment.  
28 (*Id.* at ENC-0315.)

1 **F. HCD Refused to Approve the City's Fifth Cycle Housing Element unless the City**  
2 **Agreed to Seek Limited Preemption of the Vote Requirements to Allow Timely**  
3 **Housing Element Updates.**

4 The City complied with the Writs, revised and finalized a draft housing element and  
5 accompanying legislative changes, and in compliance with the Writs and Section 65754(a),  
6 submitted the package to HCD for review. (Sapa'u Decl. ¶ 9.) HCD identified the Vote  
7 Requirements as a constraint on the City's adoption of future housing element updates and the  
8 passage of necessary implementing legislation. Given the repeated failure to successfully obtain  
9 voter approval of a Housing Element Package, HCD required as a condition of its approval that  
10 the City make a commitment in the Element to take necessary actions to "amend or invalidate  
11 Proposition A, relevant to state housing laws." (Sapa'u Decl. ¶ 9; RJN Ex. X.) Because HCD  
12 required it to do so, in Program 3C of the Fifth Cycle Housing Element, the City agreed to:

13 Take actions in advance of the next Housing Element due date  
14 (April 2021) to ensure that future Housing Elements and  
15 implementing actions (i.e., amendments to the Land Use Element,  
16 upzoning of sites in connection with the adoption of the Housing  
17 Element, upzoning of sites to the extent required by Gov't Code  
18 § 65863, and adoption of development standards required to  
19 implement a Housing Element) can be adopted in a timely fashion  
20 consistent with State law. These actions will include:

- 21 • **Seek judicial determination that state law preempts**  
22 **portions of Proposition A and any vote requirements in**  
23 **the City's General Plan Land Use Element so that a**  
24 **simple majority of the City Council may adopt future**  
25 **Housing Elements and implementing actions without**  
26 **requiring a vote of the people.** (RJN Ex. W; emphasis  
27 added.)

28 Thereafter, the City filed this action for declaratory relief, seeking a judicial declaration  
of limited preemption. The City originally named Preserve Proposition A, the intervenor, as the  
defendant in the action. A dispute ensued over Preserve Proposition A's willingness to  
participate in the litigation, which resulted in a delay in service of the Summons and Complaint.  
On February 7, 2020, HCD issued to the City a Notice of Violation of California's Housing  
Element Law and Revocation of Compliance. (Sapa'u Decl. ¶ 10; RJN Ex. Y.) The February 7  
Notice stated that HCD had partially based its finding that the Fifth Cycle Element complied  
with state law on the City's adoption of Program 3C. (*Id.*) HCD found that the delay in service

1 constituted a violation of Program 3C, and threatened to revoke its finding that the Fifth Cycle  
2 Element complied with state law:

3 Program 3C recognizes that as long as Proposition A's local voting  
4 requirements are in place, the City is unable to meet its obligations  
5 under state law to adopt revised Housing Elements and related  
6 implementing legislation. Accordingly, the Department has  
7 determined that, by the City's failure to implement Program 3C,  
8 the City has failed to act in compliance with Section 65583  
9 [governing housing element content] and has failed to substantially  
10 comply with Housing Element Law. (RJN Ex. Y at ENC-0371.)

11 The February 7 Notice contained a laundry list of other supposed violations of state law  
12 committed by the City, all of which the City vigorously contested. (RJN Ex. Z.) HCD's threat to  
13 revoke the City's compliance finding, however, amply demonstrates that the City must deal with  
14 increased regulatory scrutiny and enforcement actions by the State, so long as the Vote  
15 Requirements impede the City's ability to comply with the Housing Element Law.

### 16 III. LEGAL ANALYSIS

#### 17 A. State Housing Element Law May Preempt Local Law with Respect to Timely 18 Housing Element Updates.

19 The state constitution expresses California's law of supremacy: "A county or city may  
20 make and enforce within its limits all local, police, sanitary, and other ordinances and regulations  
21 not in conflict with general laws." (Cal Const, Art. XI § 7.) It follows from this that the state  
22 Legislature may engage in such preemption only if it acts within its constitutionally granted  
23 authority to legislate on issues of "statewide concern." (*Voters for Responsible Retirement v.*  
24 *Board of Supervisors* (1994) 8 Cal.4th 765, 779 ("the Legislature may restrict the right of  
25 referendum if this is done as part of the exercise of its plenary power to legislate in matters of  
26 statewide concern").) (*City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1078-79.)

27 Courts have found a statewide concern with respect to the Housing Element Law and  
28 housing element adoption. (*Buena Vista Gardens Apartments Assn. v. City of San Diego*  
*Planning Dept.* (1985) 175 Cal.App.3d 289, 306 (finding the "need to provide adequate housing"  
to be a statewide concern and upholding provision that mandated charter city to include certain  
components in its housing element); *cf. California Building Industry Ass'n. v. City of San Jose*

1 (2015) 61 Cal.4th 435, 444-45; *Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 694.)  
2 Additionally, courts have found that, in certain limited situations, while zoning and general plans  
3 implicate quintessentially local concerns that should be addressed by local governments, housing  
4 elements of general plans can sometimes also raise issues of statewide concern. (E.g. *DeVita v.*  
5 *County of Napa* (1995) 9 Cal.4th 763, 784.)

6 In *DeVita*, the California Supreme Court rejected a challenge to an initiative measure that  
7 amended the land use element of Napa County's general plan. The purpose of the amendment  
8 was to preserve agricultural land. (*Id.* at 771-72.) Similar to Encinitas's Proposition A, Napa  
9 County's initiative measure imposed a voter approval requirement for future amendments to the  
10 general plan. (*Id.*) The plaintiffs argued that the general plan was not properly the subject of an  
11 initiative or referendum, but the Supreme Court rejected the argument. The *DeVita* Court held  
12 that the Legislature has not preempted the power of local governments to determine the specific  
13 contours of the element of a general plan. (*Id.* at 783.)

14 In *DeVita*, however, the Supreme Court observed that the housing element is different  
15 from other general plan elements because it must be amended according to a fixed timetable.  
16 (*Id.* at 790-91.) The Court was careful to distinguish initiatives affecting housing elements on  
17 that ground, noting that, in deciding that the land use element of a general plan could be  
18 amended by initiative, it was not deciding whether an initiative hindering the adoption of a  
19 legally compliant housing element was permissible:

20 In deciding today that the land use element of the general plan may  
21 be amended by initiative, we have no occasion whether the same is  
22 true for the housing element [.....] [T]he housing element, unlike  
23 the other mandatory elements, must be amended according to a  
24 fixed schedule—at least once every five years.<sup>4</sup> (Gov. Code §  
25 65588, subd., (b). Moreover, any draft amendment to the housing  
26 element must be submitted to the State Department of Housing and  
27 Community Development for review and comments. (Gov. Code,  
28 § 65585.) . . . . In the present case, Measure J neither purports to  
amend the housing element nor was found inconsistent with it.  
Thus we do not decide the status of an initiative that either amends  
or conflicts with the housing element of a general plan. (*Id.* at 793;  
emphasis added.)

<sup>4</sup> Since *DeVita* was decided, the Legislature has extended the period between housing elements to eight years in most cases, including San Diego County. *See* § 65588.

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1 The *DeVita* Court was also careful to caution that its decision should not be construed as  
2 a green light to allow general plans to fall out of date:

3 [Our decision] does not imply that localities may allow their  
4 general plans to become obsolete...It is of course conceivable that  
5 the Napa County General Plan will, as a result of Measure J, fall so  
6 far behind changing local conditions that the County will fail to  
7 fulfill an implied statutory duty to keep its general plan current.  
(*Id.* at 792.)

8 Indeed, the *DeVita* court acknowledged that if the local electorate interferes with the  
9 locality's ability to comply with the Planning and Zoning Law, "courts may be asked to intervene  
10 to remedy deficiencies in the general plan, as they would likely act if the board itself failed to  
11 properly revise the general plan." (*Id.* at 793.)

12 An amendment adopted by initiative is "subject to the same constitutional limitations and  
13 rules of construction as are other statutes." (*Leshar Communications, Inc. v. City of Walnut  
14 Creek* (1990) 52 Cal.3d 531, 540.) Local law cannot escape preemption merely because it was  
15 enacted by initiative. (See, e.g., *Denham, LLC v. City of Richmond* (2019) 41 Cal.App.5th 340,  
16 347.) As this Court stated in its December 12, 2018 Order in the prior cases: "if the people  
17 exercise their referendum power in such a way as to frustrate any feasible implementation of the  
18 land use plan the Court is required to find a way out of the impasse." (RJN Ex. S at ENC-0314,  
19 citing to *Yost v. Thomas* (1984) 36 Cal.3d 561, 574.)

20 "For purposes of the preemption analysis, local legislation conflicts with state law if it  
21 duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by  
22 legislative implication.... To 'contradict' state law, the local legislation must be 'inimical  
23 thereto.' (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-98.) Moreover,  
24 the 'contradictory and inimical' form of preemption does not apply unless the ordinance directly  
25 requires what the state statute forbids or prohibits what the state enactment demands." (*Id.* at  
26 898; quoting *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013)  
27 56 Cal.4th 729, 743.) In other words, if it is reasonably possible to comply with both the state  
28 and local laws, there is no inimical conflict." (*San Francisco Apartment Assn. v. City and County  
of San Francisco* (2016) 3 Cal.App.5th 463, 475 (internal quotations and citations omitted).



1 With respect to housing element adoption, since the enactment of the Vote Requirements,  
2 it has been impossible for the City to "reasonably...comply with both the state and local laws."  
3 *San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463,  
4 475. The City was able to comply with Housing Element Law only because this Court ordered it  
5 to adopt an updated element, in light of the two failed attempts at obtaining voter approval. As  
6 this Court recognized, the Vote Requirements "frustrate[s] any feasible implementation of the  
7 land use plan." (RJN Ex. S, citing *Yost v. Thomas* (1984) 36 Cal.3d 561, 569-570.)

8 Additionally, defending the Vote Requirements and obtaining Housing Element  
9 compliance, after years of effort, has forced the City to expend approximately \$2.4 million in its  
10 own legal fees and costs, as well as settling the attorneys' fees and costs claims brought by the  
11 plaintiffs in the four cases. (Schwarm Decl. ¶ 4,5.) And, unless this Court decides that housing  
12 elements and implementing legislation may be adopted without a vote of the people, the City will  
13 inevitably face an onslaught of extremely costly future litigation—undoubtedly, with the plaintiff  
14 in each such case seeking attorneys' fees, in addition to other relief.

15 Further, as HCD's February 7, 2020 Notice of Violation proves, the State strenuously  
16 contends that so long as the Vote Requirements remain in place with respect to state law-  
17 required housing element updates, the City is violating state law. This removes any doubt that,  
18 unless the declaratory relief requested by the City is granted, in addition to lawsuits filed by  
19 private parties, the City will be forced to deal with regulatory actions brought by the State.  
20 Indeed, the Housing Element Law gives HCD the option of referring housing element  
21 enforcement actions to the Attorney General's Office. (Section 65585(j).) Given the February 7,  
22 2020 threat to revoke the City's hard-fought finding of compliance with the Housing Element  
23 Law (RJN Ex. Y), the City is deeply concerned that, unless it is granted the requested relief in  
24 this case, it will face additional regulatory attempts by the State, along with incurring the  
25 crushing expense of defending a wave of lawsuits brought by private parties.

26 Finally, in a future action brought to challenge the validity of Encinitas's Housing  
27 Element, if the court finds that Housing Element does not comply with state law, the court has  
28 the power to: (1) suspend the City's authority to issue building permits for, or otherwise approve,

1 any construction or development in the City, except for housing units available to low and very  
2 low-income households; (2) suspend the City's authority to grant zoning changes, variances or  
3 subdivision map approvals, with certain limited exceptions, mainly pertaining to low, very low  
4 and moderate income housing; (3) mandate the approval of residential housing projects and  
5 subdivision map applications for residential housing projects. (Section 65755.) Such relief  
6 would dramatically curtail the City's ability to make its own decisions about its land use future.  
7 This is another crucial reason that Encinitas is seeking a limited preemption Order in this case.

8  
9 **B. An Order of Limited Preemption Will Allow the City to Comply with No Net Loss Requirements.**

10 Cities must begin each housing element cycle by demonstrating that they can  
11 accommodate their share of the regional housing need (RHNA) by income category for the  
12 coming planning period. (Government Code §§ 65583(c), 65583.2(a).) Additionally, cities must  
13 zone for (and continuously make available throughout the planning period) adequate sites at  
14 appropriate densities for each income level: lower income housing (affordable to households  
15 with incomes less than 80 percent of the area median income); moderate income housing  
16 (affordable to households with households with incomes between 80 percent and 120 percent of  
17 the area median income); and above moderate income housing. (Government Code §§ 65583(c);  
18 65863.)

19 This ongoing obligation requires that if, during the planning period, development projects  
20 are approved for sites included in the housing element, but the projects will either result in fewer  
21 units than the number projected in the housing element, or a different income level than shown in  
22 the housing element, the city must demonstrate that it still has adequate sites available to fulfill  
23 its housing needs in each income category (Government Code § 65863; the "No Net Loss"  
24 principle). If the City does not have adequate sites, it must accomplish any rezoning required to  
25 achieve adequate densities within 180 days. (Government Code § 65863(c)(2).)

26 In Encinitas, sites suitable for lower income housing must be zoned to allow 30 units per  
27 acre. (§ 65583.2(c)(3)(B)(iv).) The only sites zoned at this density are those designated in the  
28 Housing Element as suitable for lower income housing. Should project approvals result in fewer

1 lower income units than projected, the City will have 180 days to upzone other sites to  
2 accommodate 30 units per acre.

3 The Vote Requirements mandate that such an increase in density must be approved by the  
4 voters. Given general election schedules, it is unlikely that a vote can be consolidated with a  
5 general election within any 180-day period, and the Vote Requirements will likely prevent the  
6 City from complying with this deadline established by State law. Alternatively, the City will  
7 face an extremely onerous burden if it is forced to schedule a special election each time it must  
8 meet the 180-day upzoning requirement. The City's estimated cost of a special election is  
9 \$500,000. (Schwarm Decl. ¶ 6.)

10 In order to ensure that the City remains in compliance with state law, including No Net  
11 Loss requirements that will continue during the Sixth Cycle and beyond, the City seeks a judicial  
12 declaration that Housing Element updates and related implementing legislation, including actions  
13 to comply with No Net Loss requirements, may be adopted by the City Council and are not  
14 subject to the Vote Requirements.

15 **IV. CONCLUSION**

16 The City has fought hard in prior litigation to protect its citizens' right to determine the  
17 City's land use future. It has and will continue to resist any efforts to dismantle the Vote  
18 Requirements in their entirety. In order to protect the City from additional and expensive  
19 housing element litigation, threatened regulatory actions by the State, and the possible court-  
20 ordered curtailment of its land use authority, the City is respectfully requesting a limited judicial  
21 declaration that state law preempts the Vote Requirements only to the extent necessary for the  
22 City to comply with state law regarding housing element adoption and implementation.

23 DATED: April 6, 2021

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24  
25 By: 

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