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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

CITY OF ENCINITAS, a municipal corporation,

Plaintiff,

vs.

THE CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, and DOES 1-100, inclusive,

Defendants.

PRESERVE PROPOSITION A, an unincorporated association,

Intervenor.

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

INTERVENOR'S OPPOSITION TO BRIEFS OF CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT AND CITY OF ENCINITAS

Date: June 3, 2021
Time: 2:00 PM
Judge: Hon. Earl. H. Maas, III
Dept.: N-28

First Amended Complaint Filed: March 10, 2020

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INTRODUCTION

Make no mistake – this case is about power. The voters of the City of Encinitas have the inherent initiative and referendum power, coextensive with the authority of the City itself, to make land use decisions within the City. Defendant California Department of Housing and Community Development ("HCD") does not like the voters' power and wants this Court to take it away. HCD thinks the power of the voters is simply too "messy" and prefers to cajole and threaten the City into "compliance." Meanwhile, Plaintiff City of Encinitas ("City") engages in double-speak, simultaneously claiming to recognize the voters' powers but throwing out a "punching bag" defense, that it is tired and worn down from having to litigate these issues.

Neither position is legally defensible. Compliance with both Proposition A and State housing law is possible. The laws should be interpreted to be consistent, not in conflict. It may be that two measures attempting to achieve voter support for amended housing elements have failed in the City, but that neither means the voters will not pass an appropriately drafted housing element nor means that the voters have somehow "lost" their power because they somehow did not exercise it appropriately.

HCD and the City have a very high burden to show that somehow State housing law preempts the voters' rights. The California Supreme Court has repeatedly recognized the "reserved" power of the voters through the process of initiative and referendum. And the decisions have repeatedly noted that if there is a way to protect those powers, courts are obligated to do so. There is nothing submitted either by HCD or the City that in any way supports finding that the voters have lost their rights here.

Ironically, both parties blame the voters for a situation they created. Indeed, the City's brief acknowledges the City was not in compliance with State housing law even before Proposition A was passed. Furthermore, the relief sought by HCD and the City is inconsistent with State housing law. The statute clearly provides for remedies where a city is not in compliance, but those remedies do not include revoking the voters' rights.

HCD and the City may not like how difficult planning in the City can be, but that is not an excuse to take away the voters' rights. As Winston Churchill noted, "democracy is the worst form of government except all other forms that have been tried from time to time." The requests for declaratory and injunctive relief should be denied.

STATEMENT OF FACTS

I. Proposition A

Preserve Proposition A is an unincorporated association of residents of Encinitas concerned with the preservation of Proposition A, the "Encinitas Right to Vote Amendment." Declaration of Bruce Ehlers in Support of Internenor's Opposition ("Ehlers Dec."), ¶ 2. The intent of Proposition A's official proponents was to utilize the initiative power to provide the residents of Encinitas with a meaningful and tangible manner through which to participate in the land use planning for their city during a time of increasing development. *Id*. at ¶ 5. After extensive campaigning by the official proponents and nearly two hundred volunteers, proponents of Proposition A gathered signatures from more than twenty-six percent of Encinitas residents to force a special election. *Id*. at ¶ 6.

The City held a special election for Proposition A on June 18, 2013. Ehlers Dec., ¶ 6, Ex. 1-001. The voters approved Proposition A at the special election. *Id*. at ¶ 6. Proposition A passed with a majority "Yes" vote of 51.85% of the ballots cast during the special election. *Id*., ¶ 6, Ex.1-005.

Proposition A "gives the Voters of Encinitas final word on major increases in zoning density or intensity of land use." The California Department of Housing and Community Development Request for Judicial Notice (HCD RJN), Ex. D at § 30.00.020. In doing so, Proposition A seeks to protect the natural resources of the Encinitas, maintain the character of the City's five communities, ensure that infrastructure and public benefits are adequately planned and funded prior to any increase in zoning, and preserve the zoning and property rights of the voters. *Id*.

Among other things, Proposition A provides: "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 a ballot measure proposing the Major Amendment at a regular or special election." HCD RJN, Ex. D at § 30.00.050.5.1. Accordingly, any proposed amendment to the City's land use and planning documents that would, among other things, increase density, change zoning "from Agricultural, Public/Semi-Public, Ecological Resource/Open Space/Parks or Open Space to a different zone type," increase the maximum allowable height of development or how height is measured, or change a parcel or parcels from residential land use to any other nonresidential land use, must be subjected to a vote of the voting electorate. *Id.* at §

30.00.040.41. No such amendment is effective unless the voters of Encinitas approved it with a simple majority "yes" vote.

In addition, Proposition A states: "Once this initiative measure becomes effective no provision of this measure may be amended or repealed except by a majority of the voters of the City of Encinitas voting on a ballot measure for that purpose." HCD RJN, Ex. D at § 30.00.120.12.1. Proposition A also provides a means for the Court to carefully craft an appropriate, narrowly tailored resolution in the event that it may conflict with other laws as applied in a particular situation:

> In the event a final judgment of a court of proper jurisdiction determines that a provision of this initiative measure, or a particular application of a provision, is invalid or unenforceable pursuant to a state or federal law or constitution, the invalid or unenforceable portion or application shall be severed from the remainder of this measure, and the remaining portions of this measure shall remain in effect without the invalid or unenforceable provision or application.

Id. at § 30.00.100.10.1.

II. The City's Housing Element Updates

In June 2016, the Encinitas City Council ("City Council") adopted an update to the housing element of its General Plan subject to voter approval as required by Proposition A. Ehlers Dec., ¶ 7. The City placed this draft update of its housing element, known as Measure T, on the November 8, 2016 ballot for the general election. *Id.* Voters rejected Measure T. *Id.*

On July 18, 2018, City Council adopted Measure U, another attempt by the City to update its housing element for the Fifth Cycle, subject to voter approval. Ehlers Dec., ¶ 8. Measure U was remarkably similar to the previously rejected Measure T. *Id*., ¶ 9. For example, both measures provided only minimal affordable units. *Id.* Voters rejected Measure U during the November 2018 election. *Id.*, ¶ 8.

ARGUMENT

I. The Power of the Voters Must Be Respected

A. The Voters' Rights are Revered

The California Constitution defines an initiative as "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1509 (citing Cal. Const., Art. II, §8). Voters have the authority

of the local legislative body. *Legislature of the State of California v. Deukmejian* (1983) 34 Cal.3d 658, 675.

In *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, the California Supreme Court explained:

> The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people," the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process." "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."

Id. at 591 (citations and footnotes omitted); *see also Rossi v. Brown* (1999) 9 Cal.4th 688,695. In *Toulumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, the California Supreme Court observed:

> Voter initiatives have been compared to a "legislative battering ram" because they "may be used to tear through the exasperating tangle of the traditional legislative procedures and strike directly toward the desired end." In light of the initiative power's significance in our democracy, courts have a duty "to jealously guard this right of the people" and must preserve the use of an initiative if doubts can be reasonably resolved in its favor.

Id. at 1035 (emphasis and citations omitted).

"Once an initiative measure has been approved by the requisite vote of electors in an election, … the measure becomes a duly enacted constitutional amendment or statute." *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 516 (quoting *Perry v. Brown* (2011) 52 Cal.4th 1116, 1147). The City does not have the authority to amend Proposition A's requirements; only the voters have that authority. *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1509.

In briefing in a prior case regarding Proposition A, the City recognized that an "order that all future housing elements should not be subject to Proposition A … could unconstitutionally infringe upon the initiative and referendum power." RJN, Ex. 4 at 14:1 – 2. The City noted: "The inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law

is not lightly presumed." *Id.* at 14:14 – 18 (quoting *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 738). And it argued:

> Stunningly, in arguing that two decisive local votes should be judicially nullified, Petitioners largely ignore the vast body of California case law upholding the initiative and referendum power of local voters, particularly in the land use context. (*e.g.*, *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596; *DeVita v. County of Napa* (1995) 9 Cal.4th 763; *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523.) The votes represent constitutionally-protected exercises of the initiative and referendum power, described just four months ago by the California Supreme Court as "one of the most precious rights of our democratic process" which the courts "should protect and liberally construe." (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 928.)

Id. at 14:23 – 15:4 (emphasis in original). The City observed "critically, no case has ever held that the initiative and referendum power cannot be used in connection with a local jurisdiction's adoption of a housing element and related zoning changes." *Id.* at 16:13 – 15 (emphasis in original). And it noted that courts have "held that a statutory scheme does not restrict the power of initiative or referendum merely because some elements of statewide concern are present." *Id.* at 17:2 – 4.

Indeed, in its prior briefing the City specifically observed that the Supreme Court in *DeVita* rejected the very same argument proffered by the City now, "holding that except for mandating the development of a [general] plan and the elements to be included in the plan, the Legislature has not preempted the decision-making power of local governments as to the specific contours of the elements of a general plan." *Id.* at 17:17 – 21 (citing *DeVita*, 9 Cal.4th at 783). The City correctly noted:

> The *DeVita* Court acknowledged that the housing element is supposed to be amended every five years – but also held that "We should not presume – nor, given the rule that doubts should be resolved in favor of the initiative and referendum power, should we assume the Legislature presumed – that the electorate will fail to do the legally proper thing." ([9 Cal.4th] at 792 – 793; accord *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523.)

Id. at 17:22 – 27.

B. Courts Have Protected the Voters' Rights Even Where it Caused Delay

In *Yost v. Thomas* (1984) 36 Cal.3d 561, the California Supreme Court ruled that a referendum could proceed despite the fact that it would clearly result in inconsistencies with the city's adopted Local Coastal Program. *Id.* at 574. The court noted while the California Coastal Act does require a city to act in a manner consistent with its Land Use Plan ((("LUP"), it "does not provide blanket immunity

from the voter's referendum power." *Id.* at 565. And it reasoned: "if down the road the people exercise their referendum power in such a way as to frustrate any feasible implementation of the LUP, some way out of the impasse will have to be found. At this point, however, the system is not being put to so severe a test." *Id.* at 574.

And in *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, the California Supreme Court ruled a referendum could proceed despite the fact that it would clearly result in inconsistencies with the city's adopted general plan. The city had amended its general plan to change a land use designation for a particular property from "Industrial" to "Commercial." *Id.* at 1076. Subsequently, the city changed the zoning for the site to "CG-General Commercial" in order to make it consistent with the general plan designation. *Id.* at 1077. After sufficient signatures were gathered for a referendum on the zoning change, the city refused to process the referendum, reasoning that to do so would create inconsistencies with the general plan designation. *Id.* The Supreme Court disagreed, noting that a "referendum challenging an amendment to the zoning ordinance does not result in the final imposition of an invalid zoning designation …, at least where a county or city can use other means to bring consistency to the zoning ordinance and the general plan." *Id.* at 1081. It remanded the matter to the trial court "to determine whether existing alternative zoning designations would be viable for the property postreferendum, and if not, what would prevent the City from creating a new zoning designation that would be consistent with both the general plan and a successful referendum." *Id.* at 1090.

C. The Housing Element Law Does Not Do Away With Local Control

HCD argues Proposition A is preempted by State Housing Law. HCD Trial Brief at 14:10 – 24. In *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, the California Supreme Court explained: "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. We have been particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is significant local interest to be served that may differ from one locality to another.'" *Id.* at 1149 (citations omitted).

And in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, the California Supreme Court quoted extensively from *Big Creek Lumber Co.* in noting the high burden placed on a claim local regulation is preempted, noting, for example: "when local

government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute." *City of Riverside*, 56 Cal.4th at 743 (first emphasis added) (citations omitted).

Here, there is no such indication of Legislative intent to preempt local control. Even HCD acknowledges "a weak inference of legislative intent to preclude the use of local referenda." HCD Trial Brief at 17:25 – 26. Indeed, Government Code Section 65800, titled "Purpose," provides:

> It is the purpose of this chapter to provide for the adoption and administration of zoning laws, ordinances, rules and regulations by counties and cities, as well as to implement such general plan as may be in effect in any such county or city. Except as provided in Article 4 (commencing with Section 65910) and in Section 65913.1, the Legislature declares that in enacting this chapter it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.

Gov. Code § 65800 (emphasis added). And Section 65585, which HCD claims provides a "weak inference," is consistent with this purpose. Section 65585 does not provide that the State prepares a city's housing element. Rather, "each city and county" is required to "consider the guidelines adopted" by HCD, which are only "advisory to each city or county in the preparation of its housing element." Gov. Code § 65585(a). Then, once it has adopted a housing element or amendment to a housing element, "the planning agency shall submit a copy to" HCD. *Id.* § 65585(g). HCD "shall, within 90 days, review adopted housing elements or amendments and report its findings to the planning agency." *Id.* § 65585(h). But the statute does not in any way take local control away from the city or the electorate.

HCD focuses upon certain procedural requirements in Section 65585 to claim that "Encinitas' City Council has the exclusive duty to adopt and update its housing element." HCD Trial Brief at 19:13 (emphasis added). But these arguments also miss the mark. As the California Supreme Court in *DeVita* noted, "it is well established in our case law that the existence of procedural requirements for the adoptions of local ordinances generally does not imply a restriction of the power of initiative or referendum." 9 Cal.4th at 785 (citations omitted); *see also Associated Home Builders*, 18 Cal.3d at 596 ("The procedures [in Government Code Sections 65853 – 65857] refer only to action by the city

council, and are inconsistent with the regulations that the Legislature has established to govern enactment of initiatives").

It is correct that the California Supreme Court in *DeVita* explained in a footnote that it had "no occasion to consider whether" a housing element could be amended by initiative. 9 Cal.4th at 793 n.11. But when looking at what the Court did consider in *DeVita*, it is clear there is nothing about the City's housing element that would distinguish it from any other aspect of the voters' powers of initiative and referendum. Quoting other cases, the California Supreme Court noted "it is still the case that [i]f doubts can [be] reasonably resolved in favor of the use of [the] reserve initiative power, courts will preserve it." *Id.* at 777 (citations and internal quotations omitted). "[T]he amendment of a general plan is primarily a matter of local concern and therefore not one the Legislature can be supposed to have delegated exclusively to the local governing body." *Id.* at 780. "[S]tate regulation of a matter does not necessarily preempt the power of local voters to act through initiative and/or referendum." *Id.* at 781 (citations omitted). "[T]he planning law incorporates the state's interests in placing some minimal regulation on what remains essentially locally determined land use decisions." *Id.* at 782.

It may be correct that Section 65585 provides certain procedural mechanisms and certain remedies where an agency's housing element does not comply with State law, but that does not in any way mean HCD has met its high burden to show that the Legislature clearly and unequivocally intended to preempt the voters' powers. HCD has not and cannot meet that burden. In this regard, the California Supreme Court's decision in *Yost v. Thomas* (1984) 36 Cal.3d 561, is instructive.

In *Yost* the Court noted the question was "whether the California Coastal Act (Coastal Act) [] precludes a referendum on any local land use measure affecting the coastal zone which is adopted by a city council after the California Coastal Commission (Commission) has approved the city's land use plan." *Id.* at 564. The Court concluded it did not. The Court noted the several significant policy requirements of the Coastal Act and the significant role of the Commission in ensuring that a city's land use plan complies with the Coastal Act. *Id.* at 566 – 67. The Court observed:

> There is no doubt the Coastal Act is an attempt to deal with coastal land use on a statewide basis. Nor it is disputed that in matters of general statewide concern the state may preempt local regulation. However, state regulation of a matter does not necessarily preempt the power of local voters to act through initiative and/or referendum.

Id. at 571 (citations omitted). Despite noting the substantial authority of the Commission and the clear statewide concern for the protection of coastal resources, the Court observed "local governments … have discretion to zone one piece of land to fit any of the acceptable uses under the policies of the act, but they also have the discretion to be more restrictive than the act." *Id.* at 572. It concluded: "The act, therefore, leaves wide discretion to a local government not only to determine the contents of its land use plans, but to choose how to implement these plans." *Id.* at 573.

Likewise, State law governing housing elements requires local governments to provide adequate planning for housing, but it leaves wide discretion as to where and how such housing will actually be provided.

D. There is No Support for Preemption of the Voters' Rights

State law provides: "It is the intent of the Legislature … To recognize that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state housing goal and regional housing needs." Gov. Code § 65581. Rather than preempt local rule, the Legislature's statement illustrates intent to defer to local governments in housing decisions. The Legislature intended to encourage local governments to determine the appropriate manner for each locality to conform with State law while also conforming "with the local land use planning process, recognizing that each city and county is required to establish its own appropriate balance in the context of the local situation when allocating resources to meet these purposes." Gov. Code § 65300.9 (emphasis added). The Legislature clearly recognized the necessity of deferring to local expertise to balance local land use planning requirements, such as Proposition A, with State law. The City's brief acknowledges "if it is reasonably possible to comply with both the state and local laws, there is no inimical conflict." City Brief at 16:26 – 28 (quoting *San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 475).

HCD's position conflicts with the California Constitution, Legislative intent for State general plan and housing element law, and with provisions concerning appropriate resolutions for a lawsuit challenging the adequacy of a city's general plan. Indeed, the State law allowing a court to enjoin a city that has not complied with requirements for an adequate general plan specifically notes that its

provisions "shall not be construed to preclude a public agency from exercising discretion, in a manner authorized by any other provision of law, to alter plans, zoning, or subsequent development approvals applicable to those lands, or from enacting and enforcing further regulation upon their use." Gov. Code § 65754.5(c).

E. There is Nothing About Proposition A Prohibiting Implementation

HCD salaciously argues Proposition A "illicitly invit[es] the electorate to prevent Encinitas from implementing its housing element …." HCD Trial Brief at 20:22 – 24. The absurdity of this argument should be obvious. HCD apparently wants to disenfranchise the voters not only from considering any amendments to the City's housing element, but also wants to ensure the voters have no power to consider specific projects.

However, as discussed *supra*, the voters' powers of initiative and referendum cannot be so easily discarded merely because HCD believes City voters might not approve any project HCD likes.

F. The Voters are Not the Ones Standing in the Way of Affordable Housing

In perhaps its most dismissive and absurd argument, HCD claims Proposition A is deficient because it "offers no exemptions for low-income and senior housing." HCD Trial Brief at 23:1 – 2 (emphasis in original). The irony of this argument is not lost on those who have been fighting against the efforts of the City and HCD for some time now.

Proposition A supporters have repeatedly called for the provision of affordable housing throughout the City. Ehlers Dec, ¶ 12. Had the City developed a housing element that provided for affordable units, it would have received the support of Proposition A's biggest supporters. *Id.*

G. HCD and the City Misrepresent the Appropriate Remedies under State Law

Both HCD and the City want to blame someone for the City's failure to develop and implement a compliant housing element. They point fingers at the "voters" and try to undermine the voters' rights in doing so. But the "fault" here rests on their own shoulders. In fact, the City acknowledges the City was "out of compliance with the state's housing element update timetable" prior to the passage of Proposition A. City's Brief at 9:27 – 28.

As explained *supra*, State law does not preempt the voters' powers of initiative and referendum. But it does provide for remedies where a local jurisdiction fails to adopt and/or implement an adequate

housing element. For example, Section 65585(j) provides that HCD "shall notify the city … and may notify the office of the Attorney General that the city … is in violation of state law if the department finds that the housing element or an amendment … does not substantially comply …." Gov. Code § 65585(j).[1] Section 65585(k) provides for meetings in advance of any suit filed by the Attorney General. Section 65585(l) provides that any suit brought by the Attorney General for failing to comply with State law may request "that the court issue an order of judgment directing the jurisdiction to bring its housing element into substantial compliance …." It also provides for various possible remedies, including impositions of fines, the interception of various funds, and the appointment of an "agent of the court [to] take all governmental actions necessary to bring the jurisdiction's housing element into substantial compliance …." Gov. Code § 65585(l). But nothing in these enumerated powers of enforcement allows HCD to require a jurisdiction to seek to invalidate a voter initiative, nor is there any provision for a jurisdiction to sue either private citizens or HCD to seek to invalidate a voter initiative.

State law provides substantial tools of enforcement to ensure compliance with the requirements for an adequate housing element. Those tools do not include invalidating the voters' powers of initiative and referendum. This case should be dismissed for what it clearly is – an unsupported attack on the voters' powers.

CONCLUSION

For the foregoing reasons, the requested declaratory and injunctive relief should be denied.

DATED: May 6, 2021

Respectfully Submitted,
DELANO & DELANO

By: ___s//Everett DeLano
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[1] The City's brief acknowledges this enforcement authority. City's Brief at 17:20 – 21.