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

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DEPARTMENT N-28 HON. EARL H. MAAS III, JUDGE

CITY OF ENCINITAS,)
)
Plaintiff,)
)
vs.)
)
THE CALIFORNIA DEPARTMENT)
OF HOUSING AND COMMUNITY)
DEVELOPMENT, and DOES 1-25,)
inclusive,)
)
Defendants.)
_____)

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

CERTIFIED COPY

REPORTER'S TRANSCRIPT
June 3, 2021
Pages 1 through 61

Suzanne M. Tate, CSR 8120
Official Reporter Pro Tempore

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APPEARANCES:

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1 SAN DIEGO, CALIFORNIA; THURSDAY, JUNE 3, 2021

2 2:02 P.M.

3 (The following hearing was reported via CourtCall
4 and/or MS Teams conference per Emergency Rule of Court
5 3(a).)

6
7 THE COURT: Department 28, this is the 2:00 o'clock
8 calendar. We will be hearing "The City of Encinitas vs.
9 Preserve Proposition A and the State of California."

10 Let's start with appearances. Do we have a court
11 reporter?

12 THE REPORTER: Yes, Your Honor, Suzanne Tate.

13 THE COURT: All right. Welcome, Ms. Tate.

14 THE REPORTER: Thank you.

15 THE COURT: So who do I have appearing for the
16 plaintiff?

17 MS. BASTIAN DALTON: Good afternoon, Your Honor,
18 Delores Bastian Dalton from Goldfarb & Lipman appearing
19 for the plaintiff The City of Encinitas.

20 THE COURT: Welcome.

21 Who do I have appearing for the -- shall we call it
22 the State of California?

23 MS. BASTIAN DALTON: And Your Honor, I should have
24 also said, my partner Barbara Kautz is also present
25 appearing.

26 THE COURT: All right. Which one of you is that?
27 Raise your hand.

28 All right. There you are.

1 Okay. Now, who is appearing for the State of
2 California?

3 MR. STRUHAR: Thank you, Your Honor, this is
4 Matthew T. Struhar, Deputy Attorney General with the
5 Attorney General's office appearing on behalf of the
6 California Department of Housing and Community
7 Development. Appearing with me is Deputy Attorney
8 General Hallie Kutak.

9 THE COURT: Welcome. All right.

10 And on behalf of the Intervenor?

11 MR. DELANO: Yes, good afternoon, Your Honor,
12 Everett DeLano on behalf of Intervenors.

13 THE COURT: All right. Welcome.

14 Is that everybody or did I miss somebody?

15 MS. BASTIAN DALTON: I think that's everyone, Your
16 Honor.

17 THE COURT: Okay. And I believe we may or may not
18 have other people listening in. That's fine. Welcome
19 to you all.

20 So this is the City's case, so I'm inclined to let
21 the City go first. Then I thought I would hear from the
22 Intervenor, then from California, and then back to the
23 City. That's my thought. I'm willing to entertain
24 other orders, but I -- after going through all of the
25 briefs, that struck me as the most logical way.

26 But let me ask the counsel for the City first, does
27 that order make sense to you?

28 MS. BASTIAN DALTON: Yes, it does, Your Honor.

1 THE COURT: The State.

2 MR. STRUHAR: That works for us, Your Honor.

3 THE COURT: And Intervenor.

4 MR. DELANO: That's fine, Your Honor, thank you.

5 THE COURT: All right. I know we got a couple of
6 phone calls yesterday asking if there was a tentative,
7 and I apologize, I thought I had told you way back when
8 that I didn't do tentatives on these and that I just
9 give you the floor to argue. So if that got lost
10 somewhere, I apologize. But I'm looking forward to your
11 presentations.

12 Is the City ready to proceed?

13 MS. BASTIAN DALTON: Yes, Your Honor.

14 THE COURT: All right. Floor is yours.

15 MS. BASTIAN DALTON: Thank you, Your Honor.

16 And also, thank you in advance for the Court's
17 attention to this interesting and novel case and the
18 issues presented in it, and they are important issues to
19 all of the parties.

20 What's at issue here and what is pleaded in the
21 City's complaint for declaratory relief is a request for
22 a very limited order of preemption. And that request
23 reaches to the vote requirements in the City of
24 Encinitas.

25 And by -- when I say, "vote requirements," just so
26 the record is clear, I'm referring not only to
27 Proposition A, which was the initiative measure passed
28 by the City's voters in 2013, but also to voter approval

1 requirements for certain land use changes that appear in
2 the Land Use Element of the City's General Plan. They
3 were enacted by the city council just shortly before the
4 electorate passed Proposition A.

5 And since the 2013 enactments of all of the vote
6 requirements, both those by the city council and those
7 by the voters by initiative, this is the fifth lawsuit
8 that has been filed involving the interplay between the
9 vote requirement and the City's mandated compliance with
10 Housing Element Law. The cost has been extremely high
11 to the City, to the other parties, including the
12 Intervenor, and to the Court.

13 And with this -- with this action, the City is --
14 the city council is engaging in the difficult task, very
15 difficult task of governing and trying to seek a third
16 way, practical and workable compromise that will put the
17 City in compliance with state law and also respect the
18 will of the voters in passing Proposition A and the city
19 council in enacting the land use requirements in the
20 General Plan requirement.

21 The City has -- and this is only increasing -- been
22 the harsh target of HCD enforcement efforts for an
23 alleged failure to comply with the Housing Element Law.
24 The City has also been the litigation punching bag of
25 developers and housing proponents, in some cases a
26 strange bedfellow. But as the Court is very well aware
27 in the last two rounds of litigation, the City was faced
28 with major lawsuits and major expense and major

1 attorneys' fees claims in litigation brought by the
2 Building Industry Association, a collection of real
3 estate developers, as well as the San Diego Tenants
4 Union, a nonprofit organization that advances the
5 interests of low-income tenants.

6 Everywhere the City has looked, it has looked at
7 possible litigation and attempts to obtain an order
8 staying the vote requirements and attorneys' fees
9 terminating.

10 As the Intervenors acknowledge, the City has fought
11 extremely hard to protect the will of Encinitas' voters
12 and to protect the vote requirements.

13 We are at a point where all of the requirements of
14 declaratory relief have been met. The City is facing
15 continually substantial and severe hardship in
16 attempting to put housing element package after housing
17 element package before the voters for approval,
18 attorneys' fees exposure if the voters don't approve,
19 actions by HCD if the City even attempts to put a
20 housing element package or rezoning required by Housing
21 Element Law before the voters.

22 We would like this controversy settled once and for
23 all. And we think that it is not just in the City's
24 interest, but also in the interest of the Intervenors of
25 Preserve Prop A and of the State to get judicial
26 guidance on this question and to grant the City the
27 permission and the direction to comply with state law,
28 allow the City to rezone and otherwise enact legislative

1 changes that are necessary to comply with the Housing
2 Element Law, while at the same time preserve the vast
3 majority of the vote requirement and allow the citizens
4 of Encinitas the opportunity to have a voice on the
5 City's land use future, the voice it is entitled to have
6 and that the City, again, has spent 2.4 million dollars
7 and counting in an attempt to preserve and protect that
8 right.

9 We understand very well the position of Preserve
10 Proposition A. Our problem with that proposition -- and
11 this is in our reply brief -- is that the Intervenor has
12 offered no practical path forward other than endless
13 rounds of future litigation every time the City tries to
14 enact legislative changes that are necessary to comply
15 with the Housing Element Law.

16 Once again, this is not an easy task for city
17 council to try to find a way to comply with the
18 competing mandates of state and local law. And the best
19 we can do is to offer this solution, a very limited
20 order of preemption that we think, as set forth
21 extensively in our brief and which we will address in a
22 moment, will actually protect the City's voice in land
23 use decisions in the future by warding off threat of a
24 court-appointed receiver making the City's land use
25 decision, a threat that appears not once but twice in
26 HCD's papers in this case, and the possibility that the
27 City -- that the Court in a future action could curtail
28 the City's land use authority by issuing an injunction

1 against building permits and order that housing be
2 required to be approved, et cetera, various forms of
3 relief that are set forth in Government Code Section
4 65755.

5 All of these forms of relief have been previously
6 sought against the City. And the City fought very hard.
7 We argued vigorously and strenuously against the
8 imposition of any of those sanctions even after this
9 court found that the City was not in compliance with the
10 state law and ordered the City to adopt a housing
11 element package without a vote. There is no guarantee,
12 however, that a court in the future would see the
13 availability of those sanctions the same way. And the
14 City is very, very concerned -- and this is the point
15 that the Intervenors have failed to address -- what will
16 happen in terms of possible curtailment of land use
17 authority in the future.

18 A very important party that also would be protected
19 and its resources conserved by issuing declaratory
20 relief at this juncture is the court. We are on lawsuit
21 number 5. And there is no doubt that if the City is
22 forced to put a future housing element package or a
23 rezoning that's required by the No Net Loss Law before
24 the voters once again, there will be another wave. And
25 this court, all of us as litigators know very well the
26 extreme pressure that the courts are under and the
27 importance, really the necessity of attempting to
28 conserve and preserve judicial economy by settling a

1 dispute rather than condemning all of us, including this
2 overburdened court, for future rounds of litigation over
3 this exact same question.

4 Now, the last time we litigated these questions
5 were in the -- what we call the BIA case, because the
6 BIA, the Building Industry Association, has sued the
7 City, not once, but twice over these exact same issues,
8 and the San Diego Tenants case.

9 And in those cases, the City fought hard and
10 obtained the relief that it wanted, which was an order
11 allowing the voters another chance to weigh in in
12 November 2018 in compliance with the vote requirements
13 on a housing element package. A housing element
14 package, by the way, Measure U, that was substantially
15 different from the housing element package that the
16 voters had turned down in November of 2016.

17 With respect to affordable housing, a point that
18 the Intervenors make mention about in their brief,
19 Measure U identified an entirely different site. The
20 state legislature in the intervening period between
21 Measure T and Measure U had greatly increased the
22 requirements in terms of site designation in housing
23 elements for affordable housing. So the City basically
24 went back to the drawing board and started over again
25 and prepared a housing element package, different sites,
26 et cetera, and the voters once again turned it down.

27 The Court, Judge Frazier, at our hearing when he
28 decided to issue a stay and allow that vote to proceed,

1 made it very clear that if the voters turned down the
2 second version of the housing element package, that the
3 Court would have no choice except to intervene, and that
4 is exactly what happened. Judgment was entered in March
5 of 2019 by Judge Dahlquist.

6 And I wanted to bring the Court's attention to
7 some language from the prior judgment. It appears at --
8 I believe it's Exhibit U to the City's RJN at page
9 ENC 0332. The Court declared in the judgment, "The
10 City's application of Encinitas Municipal Code Sections
11 30.00.010, et seq. -- that's Proposition A -- is
12 inconsistent with the State's Housing Element Laws and
13 is invalid and void to the limited extent necessary to
14 enable the City to adopt a valid housing element plan
15 for the 2013 to 2021 planning period. And number two,
16 the City has failed to comply with mandatory legal
17 duties set forth in the State Housing Element Laws by
18 failing to adopt a valid housing element plan for the
19 2013 to 2021 planning period as required by state law."

20 The relief the City is requesting in this case is
21 exactly that relief without the restriction as to the
22 2013 to 2021 planning period, and instead with respect
23 to legislative action necessary to comply with the
24 Housing Element Laws. So it is relief that has already
25 been granted by this court in litigation involving the
26 same parties. Preserve Prop A attempted to intervene,
27 but it was post final order in the case, and the Court
28 denied the request for intervention. But this is the

1 relief we think that this court has already passed
2 judgment on, at least with respect to the 5th Cycle
3 Housing Element.

4 Since that March 2019 entry of judgment in the
5 San Diego Tenants and the BIA cases, the legislative
6 landscape has changed, and the environmental -- I'm
7 sorry -- the enforcement environment has become much,
8 much more severe. As is no secret to any of us, the
9 legislature has identified the housing crisis in the
10 state, which there is no arguing about it. It's here
11 and it's prolonged and steps need to be taken to address
12 it as the highest legislative priority.

13 The State now has increased enforcement powers that
14 went into effect after judgment was entered in the prior
15 case. The attorney general has the power now to bring
16 an enforcement action, sanctions like appointment of a
17 receiver potentially available to take over the City's
18 land use authority, et cetera.

19 As to the record of correspondence in this case
20 makes clear, HCD has become -- has identified the City
21 of Encinitas as sort of a favorite punching bag, bad
22 housing -- poster child for bad housing behavior and has
23 launched a pretty relentless effort to portray the City
24 that way. And the City has fought hard in response. We
25 refer the City to Exhibit Z to the City's Request for
26 Judicial Notice in which the City very vigorously fought
27 back and it had to convince the attorney general not to
28 file an enforcement action with respect to Prop A.

1 But HCD has made it clear that it will, rightly or
2 wrongly, attempt every means necessary to invalidate
3 enforcement of the vote requirements with respect to the
4 housing element option. And I don't think HCD likes
5 Proposition A and the vote requirements in general, but
6 it's certainly 100 percent not the City's position. The
7 City is trying to protect Prop A by allowing this very
8 limited carve out of preemption.

9 Now, program 3C of the City's 5th Cycle Housing
10 Element -- and this is something that was discussed
11 extensively in the papers -- required that the City file
12 this action. In the correspondence I just referred to
13 exchanged between the City and HCD in February and March
14 of 2020, HCD, which had approved the City's housing
15 element after the Court issued the writ and the City
16 adopted a housing element and then ordered the City to
17 comply with state law regarding HCD review, HCD signed
18 off on the housing element. Then in February 2020,
19 threatened to revoke their invitation because the City,
20 it said, was not prosecuting this declaratory relief
21 action quickly enough.

22 So the fact of the matter is, the City has had no
23 choice except to prosecute the instant action, attempt
24 to obtain the carve out that we are requesting in this
25 case. And -- and I'll address in a minute the
26 requirements of declaratory relief, all of which have
27 been met in this case, and also the path that the
28 California Supreme Court has laid out which allows for

1 the relief that we are requesting in this case.

2 I do want to say on the HCD subject, and this is
3 something that we addressed in our reply papers and an
4 issue -- my partner and I represent a lot of cities in
5 the State of California on these issues, and it is
6 continually a source of aggravation and frustration to
7 see that -- the attempts by the State to lay all of the
8 blame of the state housing crisis at the feet of cities.

9 And the City disagrees very strongly with that
10 attempt by HCD that the causes of the State's housing
11 crisis are varied and complex. There is simply not
12 enough money to build affordable housing in this state.
13 CEQA reform has not happened, and there has been doubts
14 that compliance with CEQA has resulted in a delay in the
15 approval of housing in the state. The State of
16 California eliminated redevelopment in 2011, thereby
17 eliminating one billion dollars per year for housing in
18 the state. The legislature does not -- is not a
19 reference in many of the discussions about the causes of
20 the housing crisis. The state has a horrible shortage
21 of construction labor.

22 All of that being said, there is no doubt, as
23 pointed out previously, that the regulatory environment
24 is clear, and a city like Encinitas has no choice except
25 to attempt to comply or find a compromise that allows it
26 to comply both with the state and local law.

27 Turning to the legal underpinnings of the relief
28 that the City has requested in this case, we discussed

1 in some detail Code of Civil Procedure Section 1060, the
2 Declaratory Relief statute in our reply. If the party
3 is facing substantial hardship, which the City has --
4 respectfully believes that it has made that showing by
5 showing the expense and the time, et cetera, necessary
6 to deal with the litigation arising out of the interplay
7 between Proposition A, the vote requirement, and state
8 law. Substantial hardship is here.

9 Declaratory relief is also appropriate to avoid a
10 multiplicity of actions. That is certainly here. This
11 is lawsuit number 5. There is an actual controversy; I
12 think there's no doubt about that. The parties have
13 made that clear in their various submissions.

14 And Section 1060 says specifically that an order of
15 declaratory relief can be issued to provide guidance
16 about a future purported breach. In other words, the
17 Court doesn't have to wait until the City is in the
18 position of arguably not complying either with state or
19 federal law, but rather the Court can weigh in in
20 advance, again, for judicial economy to prevent that
21 scenario and provide guidance.

22 Now, the Intervenors have relied on the Yost and
23 DeVita cases, and also "City of Morgan Hill vs. Bushey."
24 In all of those cases, as we pointed out in our reply,
25 none of them involved housing element adoption or
26 compliance with the Housing Element Law. And the DeVita
27 court, the California Supreme Court, Justice Mosk in a
28 footnote made it very clear that he was not -- the Court

1 was not addressing the scenario of non-compliance with
2 the Housing Element Law as a result of an initiative or
3 a referendum, and that answering that question would
4 have to wait until another day.

5 "The City of Morgan Hill vs. Bushey" case is not a
6 housing element case. It is true that the California
7 Supreme Court in that case allowed -- upheld a
8 referendum even though there was temporary
9 non-compliance. There was inconsistency between the
10 general plan and the zoning ordinance. But there is
11 certainly language in that case that endorses the idea
12 that in certain limited situations when a state-wide
13 concern is present, that a referendum or an initiative
14 will not be allowed to have the effect of creating
15 non-compliance with state law.

16 The Yost case, which is probably the one that is
17 closest on point because Proposition A really works in
18 effect as a referendum; it imposes the voter approval
19 requirement. Not a housing element case. And the Court
20 in that case very clearly said, if down the road the
21 people exercise their referendum power in such a way as
22 to frustrate any feasible implementation of the land use
23 plan, some solution must be found. At this point,
24 however, the system is not put to so severe of a test.

25 The City respectfully submits that the system is
26 being put to a very severe test at present with respect
27 to trying to find a way to comply with both Encinitas'
28 vote requirement and state law.

1 And to promote judicial economy and to hear all of
2 the parties' reasons -- and I think I speak for all of
3 the parties here -- all of us would greatly appreciate
4 the Court's guidance and resolution at this time.

5 And that's all I have to say for now.

6 THE COURT: Let me ask you a question. Can you
7 hear me okay?

8 MS. BASTIAN DALTON: Yes.

9 THE COURT: All right. I may have a couple
10 questions for each of you. I don't want anybody to jump
11 to the assumption that because I ask a question that I'm
12 going to rule one way or the other.

13 I am troubled a little bit when I read all of the
14 papers that it does not appear to the Court that you are
15 all in agreement on the underlying facts of what has
16 happened, which causes me some concern.

17 So we're not really just arguing about the effect
18 of the law but, you know, there seems to be some
19 suggestion in here that the Court needs to determine
20 who's being reasonable and who is being unreasonable.
21 Everybody certainly paints the Prop A as being
22 unreasonable because they are trying to block the
23 implementation of housing policy that will assure that
24 people have adequate housing, especially those who have
25 limited means. Their counter to that is, that is not
26 accurate at all, that they are actually okay with the
27 housing elements that allow for -- for housing for
28 people of limited means. It's the bubble or the

1 increase of the housing for those with unlimited means
2 or excessive means that they object to.

3 And so my question for the City is twofold. One,
4 what is the City's process if it disagrees with the
5 State that it should be required to include housing for
6 well-to-do people in addition to those of limited means?
7 What avenues of recourse does it have and has it pursued
8 in that regard? Because you are asking me to basically
9 find another impasse, so I would like to know what
10 everybody's actions have been.

11 And second, what steps have been taken with the
12 Prop A people? I want to know what you have done with
13 the State, but also what you have done with Prop A
14 proponents or representatives since the case was before
15 Judge Frazier to try and come up with a plan that they
16 would support. So that's -- you can assume everybody
17 else is going to get questions that are similar, but let
18 me start with the City.

19 And I guess the third thing for the City is, when
20 is your next plan due and what has been done to -- other
21 than proceeding with this lawsuit, what has been done to
22 try and get a passable, both before the State as well as
23 the Prop A people, plan in place? Go ahead.

24 MS. BASTIAN DALTON: Okay. Thank you, Your Honor.

25 First of all, in terms of the factual dispute,
26 counsel can tell me if they disagree, but I don't think
27 that -- I'm not aware of a material dispute over -- over
28 any factual issue in this case.

1 I -- there is a disagreement between the
2 Intervenors and the City, and I think that HCD agrees
3 with the City on this, on whether or not there were
4 material differences between Measure T and Measure U,
5 the two packages that were not passed by the voters.
6 The voters refused to approve.

7 THE COURT: I hear what you are saying there, but
8 that doesn't seem to be what they are saying in their
9 papers and their declaration. After I said factual
10 issues, their position, whether it's T or U, is that
11 both of those plans that were put to the voters, they
12 were okay with the housing that was proposed for those
13 of limited means. Their complaint was with the high-end
14 housing that was available that was being added in,
15 which maybe I'm wrong, but I don't think the State is
16 going to be arguing to me in a few minutes that we have
17 to have more housing for rich people as part of this
18 plan. And, you know, I -- I -- everybody talks about we
19 need to have housing for the people of limited means so
20 that other people can live in the City of Encinitas
21 besides just the wealthy.

22 So my question, it doesn't -- it's not whether
23 U and -- Measure T and U are similar or different that
24 moves the Court. The factual dispute to me seems to be,
25 has the City put before its voters something that the
26 voters were rejecting the low-cost housing element of it
27 or were they rejecting the wealthy housing element of
28 it, which is what they are suggesting?

1 So that's where I think the dispute is. I think
2 everybody agrees both U and T or T and U went down to
3 defeat. But I sense a dispute as to what the reason for
4 that was. And of course without getting into each
5 voter's mind, I don't know that I can ultimately make
6 that determination. But that -- it troubles me that
7 that seems to be your dispute on whether you can get a
8 plan in place. And how do I resolve that?

9 MS. KAUTZ: Can I respond a bit, if it's all right?

10 THE COURT: Yeah, but -- so for the court reporter,
11 and I mean, I'm assuming that you guys are tagging back
12 and forth and it's okay with me.

13 MS. KAUTZ: Your Honor, just in terms of market
14 rate --

15 THE COURT: I don't know if the court reporter can
16 see you, if you can just go ahead and restate your name.

17 MS. KAUTZ: Can you see me? Sorry. I'm Barbara
18 Kautz representing The City of Encinitas.

19 THE COURT: Thank you.

20 MS. KAUTZ: Your Honor, in terms of market rate
21 versus affordable housing, the Housing Element Law
22 actually requires the City to accommodate both types of
23 housing. There has been -- anyway, the regional
24 agencies, in this case SANDAG, the San Diego Association
25 of Governments assigns each city a regional housing
26 needs allocation that includes not only lower-income
27 housing, but also housing for moderate-income persons
28 and above moderate-income persons.

1 And the State generally believes now that there is
2 a shortage, not only of housing for lower-income people,
3 but also a shortage of housing for above moderate-income
4 people.

5 In terms of the housing element itself, the
6 portions that were at dispute in Measure U and Measure T
7 had to do with up-zoning of sites so that they could be
8 considered appropriate to accommodate lower-income
9 housing.

10 The issue, as I believe that the Intervenors are
11 arguing, is that it would have been acceptable to the
12 public if all -- if all of those sites had to be
13 developed 100 percent for lower-income housing.

14 But I think, as is generally conceded, the
15 lower-income housing requires substantial public
16 subsidies. And there is not -- and there's -- and
17 without such subsidies, the City cannot require
18 developers to provide 100 percent affordable housing.

19 I hope that is helpful. But the state law requires
20 the City to accommodate both lower-income housing and,
21 if you like, housing for rich people.

22 So I'll let -- turn it back to my partner. Hope
23 that was helpful.

24 MS. BASTIAN DALTON: Your Honor, I know that
25 Preserve Proposition A has said, "Well, if the City
26 would just give us a version of the housing element
27 that -- what we think adequately addresses the needs of
28 lower-income residents and more affordable housing, then

1 we would have passed it."

2 And with all due respect to the Intervenor and to
3 their counsel, we think that the record on that belies
4 that because Measure U extensively addressed affordable
5 housing and identified a number of additional sites for
6 affordable housing. So we think that that is just a
7 mischaracterization of what the history is here, what
8 the undisputed facts show here, that they -- even though
9 the City did that in Measure U and added a substantial
10 number of affordable housing sites, the Measure U went
11 down to defeat in a similar margin.

12 I will also point out that immediately after the
13 Measure T vote in November 2016, the City reached out to
14 the head of the Measure T opposition, put him on the
15 committee to try to come up with a version of the
16 housing element plan that would be acceptable to the
17 voters, held dozens and dozens -- and this is all set
18 forth in the declaration of Roy Sapa'u -- of public
19 meetings, focus groups, working groups, worked very hard
20 on the public outreach side to attempt to obtain voter
21 approval.

22 So it's -- so the City does have that history of
23 trying to work with those opposed to Measure T to put
24 together a package that would both comply with state law
25 and satisfy the members of the Preserve Prop A group.
26 So that is -- that history is there.

27 And the City has -- well, attempted to work with
28 Preserve Prop A early on in this case by inviting it to

1 participate in the litigation and seeing if we could get
2 the Court's guidance. And Preserve Prop A had a history
3 of representing that it wanted to be involved, but then
4 took the position that it didn't want to be involved.
5 So it has been a little bit difficult from the City's
6 standpoint to try and work with Preserve Prop A and come
7 up with something. And we do have a history of trying
8 to do it and still not having success at the polls.

9 So in our view, the problem is, even though the
10 Intervenors take the position now that, "Oh, if only
11 there were more sites for affordable housing, we will
12 approve it," that's not what the record shows, so --

13 THE COURT: Okay. And then the second part of my
14 question was, so that tells me a little bit about what
15 you're doing with those with Prop A. Other than filing
16 this lawsuit, which you suggested in your papers that
17 the State has pressed for, what are the City's options
18 with respect to if it disagrees with the State? State
19 says, "You need X amount of low cost, X amount of
20 moderate and X amount of expensive housing."

21 And the City says, "No, we need only 80 percent of
22 that across the board." And I'm making up numbers here.

23 What is the significance? Can the City appeal the
24 State or take the State to court or is its only option
25 to go after its citizens?

26 MS. BASTIAN DALTON: Well, Your Honor, it did take
27 the State to court in this case. And, Your Honor,
28 behind the scenes, there has been an extensive process

1 that's been going on with respect to the City's 6th
2 Cycle Housing Element adoption process. Because the
3 prior planning period, what Judge Frazier and Judge
4 Dahlquist ordered the City to put into effect is a
5 housing element only in effect until 2021, until this
6 year.

7 So the City, I believe -- and Ms. Kautz is the land
8 use advice lawyer here. She has been -- she, working
9 with the City, has submitted to HCD for approval an
10 extensive rewrite of the housing element to comply with
11 state law with respect to the next planning period. So
12 we're on the verge of obtaining some decision from HCD,
13 I believe, thumbs up or thumbs down. I think their
14 decision is in July about whether the housing element
15 for the 6th Cycle, which is the next planning period,
16 complies with the state law.

17 MS. KAUTZ: Your Honor, in terms of your specific
18 question about arguing about the regional housing needs
19 allocation, there's an appeal process to SANDAG which
20 has long passed.

21 And if the Court -- there's a case, "City of Irvine
22 vs. Southern California Association of Governments" --
23 I'm sorry, I don't remember the year or have the
24 citation -- where the Court of Appeal decided that the
25 regional housing needs allocation had been delegated to
26 the exclusive jurisdiction of the regional bodies and
27 could not be changed by the courts. I think because the
28 courts would find it an impossible situation to assign

1 what's really a fixed number for the region, you know,
2 among all of the jurisdictions in the region. But
3 that's the -- that's the current case law right now.

4 In terms of the 6th Cycle Housing Element, the City
5 is able -- the City in its -- in the draft -- I mean in
6 the adopted element that they have submitted to HCD
7 has -- was able to accommodate its regional housing
8 needs without doing any up-zoning.

9 The concern is that the City may run out of sites.
10 There was a new state law passed called the -- or a
11 change to the law called the No Net Loss Law, which says
12 that unless a site is developed a hundred percent, a
13 site designated as suitable for affordable housing is
14 actually developed a hundred percent for affordable
15 housing, then the City must demonstrate that it still
16 has enough sites suitable for affordable housing to
17 accommodate its regional housing need. And there is a
18 concern that because there is really not sufficient
19 funds to develop all of the sites designated for
20 affordable housing for affordable housing, that during
21 this planning period, the City may need to rezone
22 sites to make sure it has enough sites. And if so,
23 under state law, it would have only 180 days to do so,
24 which would make it very difficult to comply with
25 Proposition A.

26 THE COURT: All right. Thank you. All right.
27 Anything else from the City?

28 MS. BASTIAN DALTON: Not at this time, Your Honor,

1 thank you.

2 THE COURT: Thank you very much.

3 All right. And after all of that, I apologize, I
4 forgot who I said was going next. Was it the Intervenor
5 next?

6 MR. DELANO: You did say that, Your Honor. I'm
7 happy to defer if HCD would like to go ahead of me.
8 That's fine. We're in this kind of interesting position
9 where we have, you know, some interesting perspectives
10 on these things by different parties.

11 THE COURT: That's why we're here. So why don't we
12 hear from the Intervenor next and then go to the State.

13 MR. DELANO: Okay. All right. So let me start
14 with the arguments we heard from counsel for the City.
15 And let me be clear about something here. The --
16 although technically the City and HCD are opposing
17 parties and we certainly are hearing some differences
18 and will hear further, I'm sure, some differences in
19 their legal position, both of them are arguing for some
20 form of preemption of Proposition A. So I think we just
21 need to start recognizing what that means.

22 And really, I think there are two different burdens
23 that the City and HCD have with regard to overcoming
24 Proposition A's requirements, and I don't think they can
25 or do meet either of them. So those two just real
26 quickly are the standard, the burden for preemption in
27 the first place. And then secondly, the unique and
28 revered position of the voters' rights in the power of

1 referendum and initiative. So let me start with that
2 first one, then.

3 You know, I don't think there's any question -- we
4 cite this in our briefing -- that the courts have
5 repeatedly said that there is no -- that the Court does
6 not presume preemption. In fact, it must presume no
7 preemption, and that the burden is on the party claiming
8 preemption in order to show that. And indeed, in the
9 T-Mobile West case, which is a case that actually HCD
10 cited, which is a more recent case, 2019 decision cited
11 in our papers, the Court specifically said that no
12 inimical conflict exists where it is reasonably possible
13 to comply with both the state law and, in this case of
14 course, the local law, which would be Proposition A. I
15 mean, indeed there's no field preemption where -- unless
16 there's no room for local action at all, regulation at
17 all.

18 Of course, in this instance we have a Housing
19 Element Law and housing requirements. And don't get me
20 wrong, I don't dispute HCD's position that the
21 legislature has more recently adopted some changes to
22 the law. That is correct. But there's nothing in
23 either the housing law before it was changed or the
24 housing law since it was changed that indicates that the
25 legislature clearly intended preemption of the voters'
26 rights.

27 And indeed it's interesting because, if you read
28 the -- HCD's arguments on this -- and I'm sure we will

1 hear more from this today -- they interestingly say,
2 "Well, it's really not that we're taking away all the
3 local control. We just don't want the voters to have
4 rights. We still want the City to have rights."

5 But of course the whole point of the rights and
6 authority of the voters is that it's co-extensive with
7 the legislative body. So in this case that legislative
8 body is the City of Encinitas. Proposition A, which was
9 passed by a majority of the voters in the City of
10 Encinitas, grants the voters that right to have a review
11 in certain circumstances for changes to various plans
12 and zoning requirements within the City of Encinitas.

13 So that means that HCD's argument falls on its face
14 by that very fact, right? One cannot say, "Well, the
15 city council has the right to continue to move forward
16 with the housing elements and planning for housing, but
17 the voters do not."

18 And to come back to this fundamental question which
19 is the question about, well, did the -- did the
20 legislature either field preempt, right -- in other
21 words, either create a complete bar that would not allow
22 any regulation of housing within the City; or
23 alternatively, is there a contradictory inimical form of
24 preemption in which the ordinance directly requires that
25 the state statute forbids or prohibits what the state
26 enactment demands? And I'm quoting again from the
27 T-Mobile case in saying that. And the answer is no,
28 neither of those apply.

1 In fact, if you look at all of the Housing Element
2 Law, including all of the many citations in HCD's
3 briefing to what the Housing Element Law says, at no
4 point does it say the City doesn't have the right to
5 make decisions about housing. The City has all kinds of
6 rights to make decisions about where housing goes, what
7 it should look like. There are multiple rights.

8 The only obligations, and I don't take them
9 lightly, don't get me wrong -- I will agree with HCD
10 that housing is a state-wide concern, right? But that
11 does not mean that the legislature preempted the rights
12 of the City and the rights of the voters in doing so.

13 And indeed if you look at the Housing Element
14 Law -- we cited this in our opposition brief. If you
15 look at what the Housing Element Law says, it says you
16 need to look to what HCD says about its guidance and
17 that sort of thing, but ultimately the decision is with
18 the City to make those decisions.

19 Now, how does that then translate to the voters? I
20 mentioned it previously, but it certainly bears
21 repeating. And let me just start off by acknowledging
22 something that counsel just said a few minutes ago,
23 which is that the DeVita case does not specifically talk
24 about Housing Element Law other than the footnote that
25 recognizes they were not making a determination about
26 that. That is correct. Indeed, I don't think the
27 parties have cited to a case that has this unique set of
28 circumstances. And indeed, it wouldn't surprise me if

1 the Appellate Court is going to be considering this
2 matter at some point. But the DeVita court's discussion
3 of the rights of the voters couldn't be more clear.

4 I just want to read just briefly -- I'll sort of
5 summarize it so I don't take too long on this. Here is
6 part of the DeVita's decision, and I'm starting at page
7 775 of the case, "Any discussion of whether a general
8 plan amendment can be enacted by initiative must begin
9 with the recognition that the local electorate's right
10 to initiative and referendum is guaranteed by the
11 California Constitution and is generally co-extensive
12 with the legislative power of the local governing body.
13 We will presume, absent a clear showing of the
14 legislature's intent to the contrary, that legislative
15 decisions of a city council are subject to initiative
16 and referendum. This presumption rests on the fact that
17 the 1911 amendment to the California Constitution
18 conferring the right of initiative and referendum was
19 drafted in light of the theory that all power of
20 government ultimately resides in the people and that the
21 amendment speaks of referendum and initiative, not as a
22 right granted to the people, but as a power reserved by
23 them. It is duty of the courts to jealously guard this
24 right of the people. It has long been our judicial
25 policy to apply a liberal construction to this power
26 wherever it is challenged in order that the right to
27 local initiative or referendum be not improperly
28 annulled."

1 And I think those two factors, right, the notion
2 that there is a -- there is a presumption that
3 preemption is not -- does not occur simply because the
4 legislature says something and that the burden is on the
5 other party. And the fact that this is a particularly
6 high presumption in favor of the voters' rights argues
7 against the position both of the City and of HCD here.
8 I do appreciate the City and HCD have different
9 positions on this, but at the end of the day, both of
10 those positions fail.

11 Now, counsel faulted me at some point in there for
12 not proposing an alternative. And I think in that
13 context I appreciate the Court's questions, because I
14 think the Court actually got it right a few minutes ago
15 in the questions. There are facts in dispute here. No
16 question about that.

17 I think it's interesting, if you listened closely
18 to counsel's response to the question, "What steps have
19 been taken with the Proposition A people in recent
20 times," the answer is, other than filing a lawsuit
21 against Preserve Prop A -- which by the way sought fees
22 and costs against Preserve Prop A -- other than the
23 filing of that lawsuit, there has been no actions to try
24 and bring the voters into this process.

25 And let's be clear, right? I mean, of course we
26 can't bring all of the voters in and, you know, have
27 multiple days of testimony as to why they voted in the
28 way they voted. But clearly Preserve Prop A, the very

1 people who were involved in the drafting -- indeed, Your
2 Honor, I'm the attorney that drafted Proposition A in
3 the first place. And those -- the clients -- my clients
4 who are part of Preserve Prop A were part of those --
5 the initial supporters of the initiative. And there's
6 no question their involvement early on in the process
7 trying to figure out a resolution, I don't think anybody
8 is going to get everything they want, right? None of
9 the parties in this case are going to get everything
10 they want in some resolution. But it does need to be
11 fair. It does need to be just.

12 And I think Mr. Ehlers' declaration, which, by the
13 way, Mr. Ehlers was the person that was asked to
14 participate in the panel that counsel mentioned a moment
15 ago. I think Mr. Ehlers' declaration really lays out
16 very clearly why that's important and that that could
17 turn the tide in terms of any consideration of a housing
18 element in the future.

19 But let me just say something. It's interesting,
20 you know, counsel says, "This is the fifth case."

21 It's ironic because this fifth case was filed by
22 the City of Encinitas. It is very interesting to me to
23 talk about the prior judgment. So let's be really clear
24 what happened. We did seek to intervene in that prior
25 case. And admittedly, we filed that motion late. I
26 will grant you that. I will stipulate to that fact.
27 That motion was filed late because we thought for the
28 longest time that the City of Encinitas was actually

1 going to defend Proposition A.

2 And indeed, if you saw in our opposition brief, we
3 actually cited extensively -- we quoted the City's
4 filing in that prior case. Now, unfortunately the
5 judgment ultimately turned around when the City changed
6 its position late in the lawsuit. But of course since
7 we were not granted a right to intervene, we couldn't
8 appeal that decision. And obviously we're moving on
9 beyond that at this point anyway.

10 I think that at this point it's very clear in my
11 mind, neither the City nor HCD has met their high, high
12 burden, both their burden to show preemption and their
13 burden to try to preempt the voters' rights. They have
14 not met either of those burdens.

15 And I think it's very clear, there are remedies
16 available. The City may think those remedies are
17 somewhat Draconian, but they are remedies that are
18 available under the statute consistent with the statute
19 and that still preserve the voters' rights. If that
20 means there's more litigation to come in the future, I
21 suppose that's always a possibility. I don't think this
22 case would be a panacea for -- if the Court ruled in the
23 City's favor anyway.

24 But I would like to just, in conclusion, just if I
25 could maybe save a minute or two if the Court would
26 allow me to respond if I -- to HCD, if I could.

27 THE COURT: You know, I don't have to go in a
28 particular order. I recognize that you're in a position

1 where you kind of have two adversaries here, so my
2 inclination is I may come back to you, probably not with
3 a broad spectrum, but maybe to address a couple of
4 things that come up either with the State or from the
5 City in their arguments.

6 MR. DELANO: Thank you.

7 THE COURT: Now, Mr. Ehlers, as I read the
8 declaration, it does seem as though they brought him
9 into the process and that he is now the chair of the
10 planning commission, correct?

11 MR. DELANO: Correct.

12 THE COURT: All right. And so since he seems to
13 also be aligned with your client, what has the planning
14 commission done to try and come up with a plan that's in
15 compliance with the State's requirements for 2022
16 through 2028? Do I have those years right? Is it '28
17 or is it '30? Anybody? Is it a 6-year or an 8-year
18 compliance for the next round?

19 MS. KAUTZ: It's an 8 year.

20 THE COURT: So what has the planning commission
21 done under your declarant's guidance to try and
22 alleviate the issue such that I shouldn't find that the
23 initiative is a block towards getting things done?

24 MR. DELANO: So one of the things -- you can
25 actually see him discussing some of this in paragraph 12
26 of his declaration where he's offered to move forward
27 and trying to figure out a way to get better affordable
28 housing opportunities.

1 We have to remember something here. The planning
2 commission has limitations on what it can do because
3 it's limited by what staff presents to it, right? So
4 absent the staff coming to the planning commission and
5 asking them to do certain things, there are some
6 limitations on their ability just to simply kind of go
7 off on their own direction, if you will, right? But
8 there certainly has been attempts -- and you can see
9 this, as he says in paragraph 12 of his declaration, to
10 try to move this thing forward to allow for more
11 affordable housing discussions.

12 I do know that there is ongoing efforts to put
13 forward something that would provide for greater
14 affordable housing within the City, and that's just been
15 something that has not been well received by the City so
16 far. But that's an effort that certainly Mr. Ehlers and
17 others both on the commission and otherwise have tried
18 to accomplish.

19 THE COURT: All right. All right. Let's jump over
20 to the State.

21 MR. STRUHAR: Good afternoon, Your Honor. I'm
22 going to try and keep my remarks brief. I am going to
23 begin by actually answering -- by providing an answer to
24 the question that you posed to the City.

25 I do not think that there is a material factual
26 dispute that the Court needs to resolve in this case.
27 And to support that, I am going to refer the Court to
28 the reply brief filed by Preserve Proposition A, which

1 said that the preemption analysis necessarily requires
2 the Court to focus its attention on the test of the
3 measure itself. That means that the intent of the
4 voters, whether it's the voters who adopted the initial
5 initiative Proposition A or the voters exercising their
6 referendum authority under Proposition A is irrelevant
7 to the resolution of the issue at hand.

8 The test of Proposition A itself requires a
9 mandatory referendum for any major land use change to
10 add any level of housing density anywhere in Encinitas.

11 That imposes a substantial obstacle to Encinitas'
12 compliance with state law and creates a major inflection
13 point of liability for the City as the City has amply
14 demonstrated.

15 So the -- I don't believe a factual determination
16 is necessary. I think the Court can issue a legal
17 determination.

18 I do want to note that, in reference to Mr. Ehlers'
19 declaration, he does discuss that if the City had
20 adopted a housing element that did more to accommodate
21 affordable housing needs and not simply the regional
22 housing need allocation, he claims that the Preserve
23 Proposition A voters may have -- the voters of Encinitas
24 may have approved that. That's obviously highly
25 speculative. But there's already a remedy under state
26 law for that. It's the No Net Loss Rule. And under the
27 No Net Loss Rule, as the City approves a housing
28 development that has less affordability than what was

1 initially projected under the housing element, then the
2 City will have to take steps to ensure that that
3 affordability can be developed -- those affordable units
4 can be developed elsewhere in the city. The No Net Loss
5 Rule is the remedy to that situation.

6 And the fact of the matter is, mixed-income housing
7 is the only realistic strategy for creating affordable
8 housing in Encinitas.

9 So, you know, with that question answered, I also
10 want to note that counsel for Preserve Proposition A
11 just now, you asked him the question, Your Honor, what
12 options -- what has Preserve Proposition A done -- what
13 have they presented to try and resolve this impasse, and
14 they -- there's no argument in Preserve Proposition A's
15 papers that demonstrates that Proposition A is in any
16 way compatible with the requirements of the Housing
17 Element Law.

18 The arguments that HCD asserts does not touch every
19 single conceivable exercise of the initiative or
20 referendum power. It simply states -- our argument is
21 simply that the legislative body has an obligation under
22 the Housing Element Law to adopt and implement a housing
23 element that substantially complies with the terms of
24 the Housing Element Law. Specifically it must
25 accommodate the regional housing need allocation
26 assigned by, in this case, SANDAG, the San Diego council
27 of government.

28 That is the extent of the relief that Encinitas

1 seeks. Nobody disagrees that the City has the
2 obligation to do that. That is not actually in dispute
3 in this case. The -- nor is the fundamental importance
4 of the state housing goal. And I want to quote that
5 because it's from the Health and Safety Code, which is
6 Section 50003. "The state housing goal is to provide a
7 decent home and suitable living environment for every
8 Californian." That is the basic goal of state
9 government.

10 The Housing Element Law incorporates the state
11 housing goal. The Housing Element Law must be construed
12 to promote the state housing goal. That's under Section
13 65589, subdivision (d).

14 Preserve Proposition A's arguments have discussed
15 the limited discretion the City has on how it wants to
16 comply with its obligations under state law. But
17 there's no discretion to outright decline to adopt a
18 housing element and implement it. That discretion is
19 beyond the scope of the -- that decision is beyond the
20 scope of the limited discretion that the Housing Element
21 Law applies to local government.

22 As Mr. DeLano said, and I agree, the powers of the
23 voters are generally co-extensive with the powers of the
24 legislative body. That necessarily means that the
25 voters do not have the power to veto or reject or
26 decline to adopt a timely housing element.

27 If the legislative body of Encinitas had simply
28 declined to adopt a housing element, it would be in

1 violation of state law. If the legislative body of
2 Encinitas repealed its housing element and its
3 implementing legislation without any usable replacement,
4 then it would be in violation of state law.

5 Likewise, it follows that if the voters of
6 Encinitas reject the housing element, they are in
7 violation of state law. Mr. DeLano concedes that that
8 can result in consequences for the City through the 8072
9 enforcement process.

10 So the real dispute in this case is -- between
11 Encinitas and Preserve Proposition A is whether -- is
12 whether Encinitas is entitled to a limited order of
13 declaratory relief for a limited preemption to head off
14 future litigation or whether -- or whether they are not.
15 That's basically -- that's basically what issue --
16 excuse me, Your Honor. That is essentially the only
17 issue that -- of disagreement here.

18 And, you know, the -- I think, in my opinion,
19 Encinitas has the better of the arguments. And the
20 history of Proposition A speaks for itself. It has
21 posed a substantial obstacle to the creation of sites
22 that are suitable for affordable housing development.
23 We know from the Anderson case, "Anderson v. San Jose,"
24 the shortage of sites suitable for affordable housing is
25 a leading driver of the state housing crisis.

26 I'm happy to entertain any questions that His Honor
27 may have.

28 THE COURT: Well, I do have a couple of questions.

1 And again, you know, when I read through this, things
2 just jump out at me. And I'm hoping that I'm hammering
3 everybody with enough questions that you have no idea
4 what I'm thinking because I haven't decided yet.

5 But I -- you know, I will admit that as I read
6 through all of the papers -- and I'm going to apologize
7 because this is going to be sound critical, but I don't
8 know another way to phrase it -- it seems as though the
9 professionals of the planning area, whether it's City or
10 State, are frustrated with what some have called the SD
11 citizens who want to rise up and interfere with their
12 ability to do what they think is right. And that's why
13 I phrased my initial questions, which are -- you know, I
14 mean the reason, I think, that the Prop A plan is in
15 place to begin with -- and you're right, there's been
16 substantial litigation about this courthouse around it,
17 is because they didn't trust their professionals to do
18 the job that the people who live there want.

19 Now, that doesn't mean they get a runaway veto
20 power over everything and anything. And I understand
21 both the State and City's position that they feel that
22 the citizens' initiative has been in effect that, which
23 is they stand back, cross their arms and say, "No,"
24 which is why I phrased some of my questions in, "Well,
25 what has the Prop A people done to try and get this
26 process done?"

27 And I am -- you know, it's hard to tell on the
28 computer, but I think I'm the oldest one in the

1 discussion, which really hurts my pride, but I have been
2 around and watched what has happened when the
3 governments, whether they are state or local, have
4 pushed their will upon the local citizenry.

5 Even here in San Diego, not too long ago, probably
6 before a lot of your legal careers started, we had an
7 organization that was going out and setting fires. And
8 when they didn't like the houses that were being built
9 or the commercial projects that were being built because
10 they thought they were too big or too onerous, they
11 burnt them down. And, you know, obviously we're not at
12 that stage here, but I worry when I read everybody's
13 positions that this kind of, "It's my way or the
14 highway," which each of you suggests politely that the
15 other is doing, is how -- is how those problems develop.

16 And so as I go through this -- and like I said, I
17 think for the City's relief to be granted, I have to
18 determine to some extent who is being reasonable and who
19 is being unreasonable. Because if, for example, the
20 citizens are being perfectly reasonable in their
21 objection to the two prior things that were put before
22 them, well, then, the initiative process wouldn't need
23 to be circumvented. On the other hand, if they were
24 being unreasonable and just, as I said, simply sitting
25 back with their arms crossed and saying, "No," like a --
26 one of the Muppets up in the theater seats where they
27 have the old guy who is always sitting up on top and he
28 and his other old guy friend just sat there and said,

1 "Nope," that's not reasonable either.

2 So I am -- I'm trying to get a feel. And while I
3 know this perhaps does not have a linear relationship to
4 the issue, I -- the question kept popping up as I was
5 reading the briefs, which is, let's suppose the State
6 decided that the -- you know, you just needed more units
7 at the beach and so it authorized -- it required, let's
8 say, the City to approve five highrise towers at the
9 beach, you know, that would block everything behind them
10 and would result in extensive increases in traffic, in
11 sewer, in water, just all of the problems with the
12 planning. Granted, I know the Coastal Commission
13 probably wouldn't allow that, so there's that balance on
14 there. And I also have those cases. But so -- but I'm
15 using this as kind of a ridiculous example to kind of
16 get a grasp of what everybody's position is.

17 So let's suppose the State agencies decided that's
18 what was required. And the City, for whatever reason,
19 failed to appeal at the time such that it was just going
20 to be it. Is it the State's position that the
21 initiative process saying, "Wait, we can't have highrise
22 places at the beach; that's completely out of concept --
23 out of the norm with the community. It's going to cause
24 negative influence on everybody around it" -- is it the
25 State's position that those citizens are just out of
26 luck?

27 MR. STRUHAR: No, Your Honor, that is not our
28 position.

1 THE COURT: What's your offer to that ridiculous
2 circumstance?

3 MR. STRUHAR: That circumstance is simply not
4 applicable to the matter at hand. The issue is --

5 THE COURT: I know. But humor me, because I'm the
6 one that has to make a decision, so I've asked that
7 question.

8 MR. STRUHAR: Right. Your Honor, I want to refer
9 you to two provisions of the Housing Element Law, 65583
10 subdivision (c)(9), 65585 subdivision (b)(2), both of
11 which require cities to -- to make a community outreach
12 effort in order to receive input from the community when
13 a city is making decisions on how it's going to
14 implement its housing element and how it's going to plan
15 to accommodate its fair share of the regional housing
16 needs.

17 The fair share of the -- it's -- the obligation
18 that the City had is to accommodate its fair share of
19 the reasonable housing needs. It has some limited
20 discretion on how it wants to approach that. It does
21 not have the discretion to outright refuse to -- to
22 accommodate the regional housing need. Otherwise, it is
23 in substantial -- it is in noncompliance with the
24 Housing Element Law and is undermining the state housing
25 goal. That is what Proposition A necessarily does,
26 though, when it's applied in this context.

27 The obligation of the City is to ensure throughout
28 the entirety of the planning period that its regional

1 housing need accommodation is met. The only exception
2 to that is the 180-day period it has to comply with the
3 No Net Loss Rule, that it's simply unworkable to have a
4 referendum in that time period.

5 On the issue of where and how to and how best to
6 meet the regional housing allocation, there are -- you
7 know, the Housing Element Law has provisions on it, you
8 know, that provide -- you know, that requires the City
9 to, you know, identify sites that are reasonably -- that
10 present a reasonable probability of development. And,
11 you know, that is on the City.

12 In terms of the -- you know, whether the voters can
13 reject, like a highrise in a specific neighborhood or
14 more balanced housing elsewhere, at the end of the day,
15 it's the legislative body that has to make the decision
16 and it has to have -- it has to give the public a say in
17 the matter through a transparent process.

18 Proposition A's test forecloses that discretion
19 altogether. Proposition A requires getting voter
20 approval if the City wants a more balanced approach in
21 adding, you know, R-30 zones elsewhere in the city. Or
22 if it wants to take a more density forward approach and
23 add R-60 or R-90 at a site, there's a referendum vote
24 either way.

25 And a referendum vote is not -- it's different from
26 an initiative. You know, with an initiative, you know,
27 it implements a policy. With a referendum vote, it's
28 tantamount to a veto. And I would refer you to Preserve

1 Proposition A's own papers. They state that Proposition
2 A gives the voters of Encinitas final word on major
3 increases in zoning density or intensity of land use.

4 The purpose of this, according to their papers, is
5 to protect natural resources of Encinitas, maintain the
6 characters of the City's five communities, ensure that
7 infrastructure and public benefits are adequately
8 planned and funded prior to any increase in zoning, and
9 preserve the zoning and property rights of the voters.

10 The Housing Element Law section 65584, subdivision
11 (d), that is -- that provides the factors that go into
12 the generation of the regional housing need allocation
13 for each city. The regional housing need allocation
14 plan that SANDAG -- that SANDAG provides, the factors
15 are entirely different. It's about ensuring ample
16 housing for all economic segments of the community.

17 So in terms of the decision of where to put
18 housing, that is left within the discretion of the
19 legislative body of Encinitas under the Housing Element
20 Law, but the legislative body must receive substantial
21 public input in making that decision.

22 If the voters of Encinitas object to the plan that
23 the legislative body -- objects to the plan that the
24 legislative body wants to adopt, they can choose to
25 re-elect -- they can choose to elect a different
26 legislative body that will approach it in a different
27 way.

28 What the City cannot do, whether it's under its

1 referendum power or through its ordinary legislative
2 power is simply outright reject the housing element and
3 outright reject housing element implementation
4 legislation. That has happened twice. The record and
5 history here are clear. There's no dispute that the --
6 that each referendum prevented the creation of sites
7 that would be hospitable to the accommodation of
8 affordable housing development. And there's no dispute
9 that it ultimately befalls on the legislative body to
10 ensure that the City is in substantial compliance with
11 state law, nor is there any dispute from Preserve
12 Proposition A or the City that the State has remedies.

13 If the Court decides that it's not going to preempt
14 Proposition A at this juncture and a vote happens and
15 the City falls out of compliance with the Housing
16 Element Law, then the State has remedies under 8072.

17 It is in my opinion that Encinitas is appropriately
18 trying to get ahead of the matter by pursuing
19 declaratory relief in this action.

20 THE COURT: Okay. So, listen, I want to make sure
21 my question got answered. So if I read from that, while
22 the City has extensive obligations to consult with and
23 communicate with its citizenry, at the end of the day,
24 if it decides to do something that the -- call it the
25 professional society needs to be done to be in
26 compliance with the state law even if it's a bunch of
27 high towers at the coastline, the citizens, then, under
28 your analysis, their remedy should be to vote out those

1 people at the next election, not to prevent the City
2 from going forward with the high towers at the
3 coastline? Is that a fair --

4 MR. STRUHAR: That's -- I'm sorry, Your Honor.
5 Your Honor, that is one avenue of accountability that
6 the voters have.

7 Another avenue of accountability that is
8 unaddressed, I believe, by the limited -- by the limited
9 remedy that Encinitas is seeking -- the remedy that they
10 are seeking is very limited. It is to preempt the vote
11 requirements under Proposition A and under the City's
12 General Plan. To the extent they prevent the City from
13 bringing its housing element into substantial compliance
14 with state law and abiding the No Net Loss Rule, that
15 remedy does not touch the hypothetical that I posed in
16 the -- that we -- that HCD posed in its reply brief,
17 which is, can voters use their initiative power to amend
18 the housing element even knowing that it's procedurally
19 incompatible with the -- or procedurally inconsistent
20 with 65585? If the resulting housing element is
21 substantially compliant with the terms of the Housing
22 Element Law, that might be legally permissible. We have
23 not taken that position that it is legally permissible.
24 I'm simply saying that it is an issue that is not before
25 the Court.

26 So there may be other avenues of accountability
27 that the voters have in Encinitas. It's simply that a
28 mandatory referendum under Proposition A is not one of

1 those avenues of accountability because it necessarily
2 prevents the City from maintaining a substantial
3 compliance with state law.

4 THE COURT: All right. Thank you very much.

5 Let's go back to the City. And before you start --
6 so I am familiar, as you have all raised the case that
7 existed before Judge Frazier and Judge Dahlquist, and
8 from my review of that case, which you have all pointed
9 me to, it looks like this same relief was asked in that
10 case of Judge Frazier, and he declined to do it.

11 And I'm curious if this is an appropriate venue
12 after the request to throw out this requirement was
13 raised with Judge Frazier and rejected and then signed
14 into judgment by Judge Dahlquist, if proceeding with a
15 separate action isn't really just a collateral attack on
16 a prior ruling by a judge that was never appealed.

17 So City, you get that one. Sorry to dump it on you
18 in rebuttal, but it is -- you represent the City and I
19 think you probably technically are the only one that was
20 actually in that case, so it comes back to you. And as
21 well, if there is anything else you want to address.

22 MS. BASTIAN DALTON: Okay. Your Honor, to answer
23 your question, I think that the relief granted by Judge
24 Frazier and Judge Dahlquist in the prior cases is
25 exactly the relief and the order of preemption that the
26 City is asking for here without the limitation as to the
27 5th Cycle, because we have moved beyond the 5th Cycle.
28 The facts on the ground changed. It's not a collateral

1 attack on a prior judgment, but instead it's a request
2 for relief with respect to the 6th Cycle and future
3 housing element cycles with a factual backdrop of the
4 State of California telling the City that it had to
5 address and remove the constraint on housing production
6 imposed by Proposition A with respect to the 6th Cycle
7 and future cycles. That fact was absolutely not present
8 in the prior cases. That happened after the writ and
9 the order and judgment were issued in the prior cases
10 that the City's under an obligation; otherwise it would
11 have been in contempt of court if it hadn't filed this
12 action and proceeded, because HCD -- the Court ordered,
13 "You need to produce a housing element that is
14 acceptable to HCD."

15 HCD said, "The only way we will certify your
16 housing element is if you agree to address the
17 constraints on housing imposed by the vote requirements
18 by way of an action for declaratory relief."

19 So that -- those are subsequent facts that were not
20 present at the time of the prior judgment.

21 Also for all of the reasons pointed out in oral
22 argument and in our papers, the regulatory landscape has
23 changed. The City -- and also the plot has changed.
24 There is an increasing focus in the cases on the needs
25 of the State to address the housing element -- the
26 housing crisis with respect to local control. The City
27 of San Jose case, et cetera, have made it clear that at
28 least with respect to affordable housing, the State --

1 there is a preemption and that the State does -- the
2 State's requirements with respect to cities and counties
3 for enacting legislation that produces more housing is
4 controlling.

5 So I hope that that answers the Court's question.
6 And in the City's view, we are most definitely not
7 asking for the same relief. Instead, we're addressing a
8 set of circumstances with respect to the 6th Cycle
9 Housing Element.

10 The requirements of the No Net Loss Law, which were
11 not so much in play during the last housing element
12 cycle, the 5th Cycle -- and again, just to be clear --
13 and this is covered in the papers and has been touched
14 on in oral argument, the No Net Loss -- the application
15 of Not Net Loss Law, Government Code Section 65863 means
16 that there's a very good chance that there's going to
17 need to be a rezoning soon to -- in order to comply with
18 the Housing Element Law. And that would then trigger
19 the vote requirement.

20 And, Your Honor, I very much appreciate and
21 understand the Court's questions focused on who is being
22 reasonable here. And with all due respect to Preserve
23 Prop A, we very strongly assert that the City has
24 created a record here of attempting to enforce the
25 voters' rights, protect the right of voters to weigh in.

26 The Court made it very clear when it -- after a
27 very hard fought battle -- stayed the litigation until
28 the voters had one more chance. And the Court made it

1 very clear it was one more chance to weigh in on the
2 housing element, that the Court, if there were an
3 impasse created by a thumbs down vote a second time that
4 the Court would need to intervene.

5 So the City has been reasonable, has tried to
6 effect and protect the right of the voters. It's
7 interesting the Court's question about the voters having
8 the ultimate remedy of throwing out the folks on the
9 city council who they see as not sufficiently protective
10 of the voters' interest. And in fact, in this last city
11 council election, there was a very concerted effort by
12 Preserve Prop A to put its folks on the city council and
13 defeat Mayor Blakespear, the one who has been very
14 carefully trying to lead the effort to walk the fine
15 line and get the City in compliance with the state law.

16 Mayor Blakespear was resoundingly reelected and the
17 Preserve Prop A candidates were not. So I think that
18 gives you some indication of where the City is. The
19 City is tired of this -- of this drain on City
20 resources.

21 And by no means, if the Court grants the relief
22 that the City is requesting, that does not by any
23 stretch of the imagination mean that the voters and the
24 citizens of Encinitas will not have a say in their
25 housing element going forward.

26 Bruce Ehlers, he is the chair of the planning
27 commission and he had extensive input, as did the entire
28 planning commission, into this current version of the

1 housing element that has been submitted to HCD for
2 approval.

3 Finally, I would like to point to some evidence
4 that shows that the City is the reasonable one here with
5 respect to this whole question about affordable housing.
6 And it's the sites that appears on page 9 of our reply
7 brief which shows -- and you have to get a bit in the
8 weeds here into the two versions of Measure T and
9 Measure U, that if you -- if you look at the sites --
10 HCD's request for judicial notice, Exhibit E is
11 Measure T, and Exhibit F is Measure U, and there are
12 repeated sites on that page, page 9 of the City's reply
13 brief that refer to actual evidence in Measure U of
14 extensive designation of affordable housing sites.

15 And once again, as everyone admits, Measure U was
16 turned down by the voters. So I think that that
17 evidence bolsters and supports the City's argument that
18 it has been reasonable here. I'm -- the City has filed
19 this action, this fifth action so that there will be no
20 sixth, seventh and eighth actions evolving and then
21 we're right back before you once again with this exact
22 same issue. That's why the City has filed this action.

23 The City very cordially -- I had a very cordial
24 conversation with Mr. DeLano sitting at counsel table in
25 Department N-29 before Judge Dahlquist and when Judge
26 Dahlquist made it clear he was going to deny the motion
27 to intervene the last time because it was just not
28 timely. And I had a very -- Mr. DeLano and I had an

1 understanding that we will be able to hash this out and
2 each -- all of our clients will be able to hash this out
3 and litigate this question in another round.

4 And then Preserve Proposition A did a 180 and
5 objected to being named. But the City is certainly not
6 trying to pick on the citizens group. It wants the
7 citizens group to have a say. And it has fought hard to
8 protect the voice of its citizens. And the current city
9 council is trying very hard not to except those -- the
10 voice of those pesky citizens, but rather to respect the
11 voice of those citizens and do it reasonably, but do it
12 in a way that does not create this continual drain on
13 City resources, and that, at the end of the day,
14 preserves local control rather than take it away.

15 THE COURT: Counsel, didn't that argument just
16 undercut your position here, which is, you just had an
17 election where the Prop A people, according to you, ran
18 a slate against the mayor? And I'm not familiar with
19 your election numbers, but I'm just using your
20 description, and they were overwhelmingly beat back.
21 Doesn't that suggest that if you put -- and because, as
22 you said, they are tired of this, doesn't that suggest
23 that if you put together a reasonable plan that complies
24 with the State's requirements and put it to that same
25 electorate with Mayor Blakespear's -- "Blakespear"?

26 MS. BASTIAN DALTON: Yes.

27 THE COURT: His support, that it, too, would pass
28 resoundingly such that the Court doesn't need to take

1 away this right and that, in fact, it would work exactly
2 as it's supposed to?

3 MS. BASTIAN DALTON: Your Honor, with all due
4 respect, we think the requirements of declaratory relief
5 have been met. A crucial part of Mayor Blakespear's
6 efforts have been obtaining the declaratory relief that
7 we're requesting in this case, getting the City out of
8 the endless round of litigation. That is what she's
9 trying to do.

10 And I think that the -- what the election tells you
11 is that the voters are behind that and wants the City to
12 move forward with respect to the housing element option
13 and do what it can to preserve local control without the
14 continual expenditure of -- let's face it, with the cost
15 of litigation and attorneys' fees exposure in this case,
16 it's millions of dollars of the City's resources.

17 So I reach the opposite conclusion in terms of
18 the -- the acceptability and the availability of
19 declaratory relief in this case from the election
20 results. I think this is what the voters of Encinitas
21 want.

22 THE COURT: The voters of Encinitas may want it to
23 come before this court, and of course, I'm guessing a
24 number of your voters are familiar with this particular
25 courtroom's rulings in the past with respect to the City
26 of Encinitas. Sometimes I rule in their favor.
27 Sometimes I do not. So they could never guess what it
28 is that I would do.

1 But it -- you kind of avoided my question, which
2 was, if the voters are now behind Mayor Blakespear and
3 she is supportive of a plan that will comply with the
4 State's requirements, then why would I -- why would I
5 take away the initiative when, under your scenario, it
6 would probably be successful, and they would support her
7 and then this whole thing would go away? The State
8 wouldn't have anything to complain about because the
9 voters supported it. Prop A people, it would have
10 worked exactly as they intended; people would support
11 it. And Mayor Blakespear's supporters would
12 theoretically have got what they want.

13 I mean, the whole reason for being here, other
14 than, you know, if I listen to Prop A that this is a
15 plot between the State and the City to -- to come in and
16 get the courts to throw away what they politically can't
17 do. But I'm concerned that under your last comments,
18 why I would take away that right without giving this
19 newfound mayor with her political power the ability to
20 try and get something done.

21 MS. BASTIAN DALTON: Well --

22 THE COURT: I mean, saying they want to get it
23 before the Court, it's not -- it's aptly a resolution
24 path. That's a roll of the dice.

25 So tell me why I shouldn't let the people of
26 Encinitas have one more bite at a plan that's approved
27 by Mayor Blakespear and the majority of the council.

28 MS. BASTIAN DALTON: Your Honor, for a number of

1 reasons. One more bite is going to create additional
2 substantial hardship on the part of the City, attorneys'
3 fees exposure, possible curtailment of the City's land
4 use authority.

5 And Your Honor, the reason I mentioned the election
6 is I was responding to the Court's comment about
7 ultimately at the end of the day, isn't it the voters'
8 remedy -- doesn't have to be being able to weigh in on
9 each version of the housing element or each rezoning
10 necessary to comply with the No Net Loss, but rather
11 going to the polls and voting on city council
12 candidates.

13 And once again, essential to Mayor Blakespear's
14 approach has been this kind of compromise that we are
15 seeking in this case.

16 So I think that ultimately the question is, when is
17 it going to end? It's always one more bite, one more
18 bite, one more election. And -- and I think the City
19 has made an adequate showing of substantial hardship.
20 And certainly judicial resources as well as the parties'
21 resources will be conserved. And the requirements for
22 declaratory relief are present.

23 But not only that, Your Honor, but it is in the
24 case law. It's in the DeVita case. It's in the Yost
25 case, the Committee of Seven Thousand case, which HCD
26 cited, the City of San Jose case, the Anderson case.
27 There is a line of authority pointing the Court in the
28 direction of limited preemption when it comes to housing

1 element adoption. I think given this trend and
2 recognition, that is the correct and the most reasonable
3 result here rather than a continual prolonging of -- and
4 lack of resolution of the issues, which I think all of
5 the parties want, so --

6 THE COURT: Well, in every case all the parties
7 want a resolution; they just want a resolution in their
8 favor.

9 All right. Anything else the City wants to add?

10 MS. BASTIAN DALTON: No, Your Honor, that's -- we
11 have nothing else.

12 THE COURT: All right. Mr. DeLano, I'm going to
13 give you a little bit of room only because I peppered
14 both the other two lawyers with questions, but I didn't
15 pepper you with, to address those particular questions,
16 but I'm not going to give you an open rebuttal.

17 MR. DELANO: No, that's fine, Your Honor. In fact,
18 I just really wanted to respond to one thing Ms. Dalton
19 said and one thing that counsel for HCD said, so I'm
20 going to be really quick.

21 I do -- I would certainly welcome, you know,
22 testimony from witnesses. I think we will more than
23 adequately show the reasonableness of the Preserve
24 Proposition A, and indeed of the voters generally,
25 right? I mean, let's remember something here. Counsel
26 for HCD said that Proposition A necessarily involves a
27 rejection. I made sure to quote that because I wanted
28 to make sure I got that right. But think about what's

1 actually happening here, right? The voters have been
2 given two -- that's it, two attempts to consider whether
3 there was an adequate housing element.

4 And here's what's interesting about that, is that
5 essentially what counsel for both HCD and the City are
6 saying is that the voters violated the state law by
7 rejecting the second one, which means basically that the
8 voters had no choice as to the second one, which means
9 that really, counsel is essentially saying that the
10 voters only had one choice. They had one choice once.
11 And the first measure was presented. And after that,
12 their only choice was to approve the measure, and doing
13 anything else is immediately a violation of the law.

14 That's not what's intended here. That's not how to
15 make sure that the voters' rights are protected.

16 Is Prop A compatible with the Housing Element Law?
17 Of course it's compatible with the Housing Element Law.
18 And I think that it would be very clearly -- it would be
19 great if the City were focused on trying to get another
20 measure on the ballot so we can get through this and get
21 this moving. That's the direction this is going to go.

22 In closing, Your Honor, I quoted Winston Churchill
23 in my opposition brief, and to paraphrase him here, you
24 know, democracy is messy.

25 It's clear the City is tired of the mess, but
26 that's the nature of the beast, right? They are a city.
27 They are going to have to deal with this mess, including
28 respecting the will of the voters.

1 THE COURT: All right. I want to thank you all
2 very much. I know sometimes my questioning comes out of
3 the far reaches of the outfield. That's on purpose
4 because I'm trying to test how far your arguments in the
5 tight realm of the case, if we take those to an
6 ideological extreme, how would you support that and
7 what's your analysis? So I know when I throw that stuff
8 at you guys as I do other lawyers, it's probably a
9 little bit frustrating, but it very much helped me get a
10 grip on the concept of the factual arguments you're
11 making in the case itself.

12 I want to thank you. You were all very
13 professional. Your briefs were all very well done. I
14 truly have absolutely no idea what I'm going to do yet
15 because your arguments were all strong. But, you know,
16 fortunately or unfortunately because of the limits on
17 our jury trials, I have time which I might not normally
18 have to sit down and really spend some time -- more
19 time, I guess I should say, with the case. So it is
20 submitted.

21 Unless I come up with questions -- there is a
22 possibility I will come up with questions that I have
23 not asked you. If you get something from the Court
24 saying, "I would like a short comment on X, Y or Z," I
25 would submit it to all three of you at the same time.
26 If I do that, again, don't jump to any conclusions as to
27 where I'm going, but it is designed to help me guide
28 through what is, quite honestly, a thorny issue for all

1 of the participants. And, you know, I doubt seriously
2 that my resolution will make everyone happy. That's not
3 the nature of my job. But you will at least be assured
4 that I -- it is as a result of a lot of thought and
5 consideration.

6 And as I think Mr. DeLano suggested, it is not
7 going to shock me if my ultimate decision ends up before
8 the Court of Appeal. I had suggested in the past that
9 sometimes on these and maybe the CEQA cases, maybe we
10 should just skip the trial court and go straight to the
11 Court of Appeal since they are very rarely bound by
12 anything that we do at this low level. But my friends
13 on the Court of Appeal tell me that's why I'll always be
14 a trial judge and never on the Court of Appeal.

15 With that, I want to thank you all very much. Have
16 a good weekend. Do not anticipate a decision quick. So
17 I don't want you waiting by your phone. I'm going to
18 spend some time with your case and try and get out a
19 decision that at least the Court of Appeal will have to
20 respect even if they choose not to follow.

21 Have a good weekend. Thank you very much.

22 MS. BASTIAN DALTON: Thank you very much, Your
23 Honor.

24 MR. STRUHAR: Thank you, Your Honor.

25 MR. DELANO: Thank you, Your Honor.

26 (The proceedings concluded at 3:43 p.m.)
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I, Suzanne Tate, CSR 8120, a Certified Shorthand Reporter, certify that the foregoing proceedings were taken before me at the time and place therein set forth;

That all statements made were recorded stenographically by me and were thereafter transcribed;

That the foregoing pages 1 through 60 are a true and correct transcript of my shorthand notes so taken.

I certify that I am not a relative or employee of any attorney of the parties, nor financially interested in the action.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Dated this 23rd day of June, 2021.

Suzanne Tate

Suzanne Tate, CSR 8120