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

~~[PROPOSED]~~ JUDGMENT

Date: June 30, 2021
Time: 2:00 PM
Judge: Hon. Earl. H. Maas, III
Dept.: N-28

First Amended Complaint Filed: March 10, 2020

The above-entitled matter came on regularly for hearing before the above-entitled court on June 3, 2021, the Honorable Earl H. Maas III presiding. At the hearing, Dolores B. Dalton appeared on behalf of Plaintiff City of Encinitas, Mathew T. Struhar and Hallie E. Kutak appeared on behalf of Defendant California Department of Housing and Community Development, and Everett L. DeLano, III appeared on behalf of Intervenor Preserve Proposition A. The Court, having reviewed all briefs and other evidence submitted by the parties, and having considered the arguments of counsel at the hearing, and having issued an Order denying relief dated August 24, 2021, determines as follows:

IT IS HEREBY ORDERED:

1. The relief requested by Plaintiff and the separate relief requested by Defendant are both denied in their entirety for the reasons set forth in the August 24, 2021 Order, a copy of which is attached hereto.

2. Judgment is hereby entered in favor of Intervenor Preserve Proposition A, and against Plaintiff City of Encinitas and Defendant California Department of Housing and Community Development.

3. Intervenor Preserve Proposition A is entitled to recover costs in an amount to be determined.

4. Intervenor Preserve Proposition A is found to be the prevailing party and the Court will retain jurisdiction over further proceedings in this case including any motion for attorneys' fees and costs pursuant to Code of Civil Procedure Section 1021.5 or other applicable law.

DATED: 1-25-22

HON. EARL H. MAAS, III
JUDGE OF THE SUPERIOR COURT

FILED
Clerk of the Superior Court
AUG 26 2021
By: N. McKinley, Deputy

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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 **ORDER**

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

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resources of the City of 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.*

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.

The present action is brought by the City of Encinitas (City) against the California Department of Housing and Community Development (State) seeking to invalidate, or carve out, a portion of Proposition A. The City, and the State, seek to exclude decisions on density, related to housing supply,

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from the requirement of a public vote. Preserve Proposition A intervened asserting, correctly, that neither the City nor the State would defend the interests of those citizens of Encinitas who voted for Proposition A.

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.

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) 29 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 *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 post referendum, 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.

Defendant argues Proposition A is preempted by State Housing Law. 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).

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. Defendant acknowledges "a weak inference of legislative intent to preclude the use of local referenda." 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 the State, which are only "advisory to each city or county in the preparation of its housing element." Gov. Code § 65585(a)

Defendant 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." However, 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 fn. 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.

In *Yost v. Thomas* (1984) 36 Cal.3d 561, 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,

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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.

It is the intent of 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 location situation when allocating resources to meet these purposes." Gov. Code § 65300.9. The Legislature clearly recognized the necessity of deferring to local expertise to balance local land use planning requirements with State law.

Section 65585(j) provides that the State "shall notify the city ... and may notify the Office of the Attorney General that the city ... it 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 state to require a jurisdiction

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[1] The City's brief acknowledges this enforcement authority. City's Brief at 17:20 - 21.

to seek to invalidate a voter initiative, nor is there any provision for a jurisdiction to sue either private citizens or to invalidate a voter initiative.

State law provides substantial tools of enforcement to ensure compliance with the requirements for an adequate housing element. Invalidating the citizens' right to vote should only be a last resort. Weighing the evidence before the Court, the present dispute has not reached this level.

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

Dated: 8/26/21

EARL H. MAAS III
Judge of the Superior Court

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NOTICE OF LODGMENT OF PROPOSED JUDGMENT

IMAGED FILE

First Amended Complaint Filed: March 10, 2020