

**FILED**  
Clerk of the Superior Court

AUG 26 2021

By: N. McKinley, Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION**

CITY OF ENCINITAS, a municipal corporation, ) CASE NO.: 37-2019-00047963-CU-OR-NC

Plaintiff, ) **ORDER**

vs. )

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

Defendants. )

PRESERVE PROPOSITION A, an unincorporated )  
association, )

Intervenor. )

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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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

1 resources of the City of Encinitas, maintain the character of the City's five communities, ensure that  
2 infrastructure and public benefits are adequately planned and funded prior to any increase in zoning, and  
3 preserve the zoning and property rights of the voters. *Id.*

4 Proposition A provides: "No Major Amendment of any of the Planning Policy Documents shall  
5 be effective unless and until it is approved by a simple majority vote of the voting electorate of the City  
6 of Encinitas voting 'YES' on a ballot measure proposing the Major amendment at a regular or special  
7 election." HCD RJN, Ex. D at § 30.00.050.5.1. Accordingly, any proposed amendment to the City's  
8 land use and planning documents that would, among other things, increase density, change zoning "from  
9 Agricultural, Public/Semi-Public, Ecological Resource/Open Space/Parks or Open Space to a different  
10 zone type," increase the maximum allowable height of development or how height is measured, or change  
11 a parcel or parcels from residential land use to any other nonresidential land use, must be subjected to a  
12 vote of the voting electorate. *Id.* at § 30.00.040.41. No such amendment is effective unless the voters of  
13 Encinitas approved it with a simple majority "yes" vote.

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15 of this measure may be amended or repealed except by a majority of the voters of the City of Encinitas  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

19 In the event a final judgment of a court of proper jurisdiction determines that a provision  
20 of this initiative measure, or a particular application of a provision, is invalid or  
21 unenforceable pursuant to a state or federal law or constitution, the invalid or  
22 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.

23 *Id.* at § 30.00.100.10.1.

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

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

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

8 On July 18, 2018, City Council adopted Measure U, another attempt by the City to update its  
9 housing element for the Fifth Cycle, subject to voter approval. Ehlers Dec., ¶ 8. Measure U was  
10 remarkably similar to the previously rejected Measure T. *Id.*, ¶ 9. For example, both measures provided  
11 only minimal affordable units. *Id.* Voters rejected Measure U during the November 2018 election. *Id.*,  
12 ¶ 8.

13 The California Constitution defines an initiative as “the power of the electors to propose statutes  
14 and amendments to the Constitution and to adopt or reject them.” *Marblehead v. City of San Clemente*  
15 (1991) 226 Cal.App.3d 1504, 1509 (citing Cal. Const. Art. II, § 8). Voters have the authority of the local  
16 legislative body. *Legislature of the State of California v. Deukmejian* (1983) 34 Cal.3d 658, 675.

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

19 The amendment of the California Constitution in 1911 to provide for the initiative  
20 and referendum signifies one of the outstanding achievements of the progressive  
21 movement of the early 1900’s. Drafted in light of the theory that all power of government  
22 ultimately resides in the people, the amendment speaks of the initiative and referendum,  
23 not as a right granted the people, but as a power reserved by them. Declaring it “the duty  
24 of the courts to jealously guard this right of the people,” the courts have described the  
25 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.”

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

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

6 *Id.* at 1035 (emphasis and citations omitted).

7 “Once an initiative measure has been approved by the requisite vote of electors in an election, ...  
8 the measure becomes a duly enacted constitutional amendment or statute.” *San Francisco Tomorrow v.*  
9 *City and County of San Francisco* (2014) 29 Cal.App.4th 498, 516 (quoting *Perry v. Brown* (2011) 52  
10 Cal.4th 1116, 1147). The City does not have the authority to amend Proposition A’s requirements; only  
11 the voters have that authority. *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1509.

12 In *Yost v. Thomas* (1984) 36 Cal.3d 561, the California Supreme Court ruled that a referendum  
13 could proceed despite the fact that it would clearly result in inconsistencies with the city’s adopted Local  
14 Coastal Program. *Id.* at 574. The court noted while the California Coastal Act does require a city to act  
15 in a manner consistent with its Land Use Plan (LUP), it “does not provide blanket immunity from the  
16 voter’s referendum power.” *Id.* at 565. And it reasoned: “if down the road the people exercise their  
17 referendum power in such a way as to frustrate any feasible implementation of the LUP, some way out  
18 of the impasse will have to be found. At this point, however, the system is not being put to so severe a  
19 test.” *Id.* at 574.

20 And in *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, the California Supreme Court ruled  
21 a referendum could proceed despite the fact that it would clearly result in inconsistencies with the city’s  
22 adopted general plan. The city had amended its general plan to change a land use designation for a  
23 particular property from “Industrial” to “Commercial.” *Id.* at 1076. Subsequently, the city changed the  
24 zoning for the site to “CG-General Commercial” in order to make it consistent with the general plan  
25 designation. *Id.* at 1077. After sufficient signatures were gathered for a referendum on the zoning  
26 change, the city refused to process the referendum, reasoning that to do so would create inconsistencies  
27 with the general plan designation. *Id.* The Supreme Court disagreed, noting that a “referendum  
28 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

1 zoning ordinance and the general plan.” *Id.* at 1081. It remanded the matter to the trial court “to  
2 determine whether existing alternative zoning designations would be viable for the property post  
3 referendum, and if not, what would prevent the City from creating a new zoning designation that would  
4 be consistent with both the general plan and a successful referendum.” *Id.* at 1090.

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

11 In *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th  
12 729, the California Supreme Court quoted extensively from *Big Creek Lumber Co.* in noting the high  
13 burden placed on a claim local regulation is preempted, noting, for example: “when local government  
14 regulates in an area over which it traditionally has exercised control, such as the location of particular  
15 land uses, California courts will presume, absent a clear indication of preemptive intent from the  
16 Legislature, that such regulation is not preempted by state statute.” *City of Riverside*, 56 Cal.4th at 743  
17 (first emphasis added) (citations omitted).

18 Here, there is no such indication of Legislative intent to preempt local control. Defendant  
19 acknowledges “a weak inference of legislative intent to preclude the use of local referenda.” Section  
20 65585 does not provide that the State prepares a city’s housing element. Rather, “each city and county”  
21 is required to “consider the guidelines adopted” by the State, which are only “advisory to each city or  
22 county in the preparation of its housing element.” Gov. Code § 65585(a)

23 Defendant focuses upon certain procedural requirements in Section 65585 to claim that  
24 “Encinitas’ City Council has the exclusive duty to adopt and update its housing element.” However, as  
25 the California Supreme Court in *DeVita* noted, “it is well established in our case law that the existence  
26 of procedural requirements for the adoptions of local ordinances generally does not imply a restriction  
27 of the power of initiative or referendum.” 9 Cal.4th at 785 (citations omitted); *see also Associated Home*  
28 *Builders*, 18 Cal.3d at 596 (“The procedures [in Government Code Sections 65853 - 65857] refer only to

1 action by the city council, and are inconsistent with the regulations that the Legislature has established  
2 to govern enactment of initiatives”).

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

15 In *Yost v. Thomas* (1984) 36 Cal.3d 561, the court noted the question was “whether the California  
16 Coastal Act (Coastal Act) [] precludes a referendum on any local land use measure affecting the coastal  
17 zone which is adopted by a city council after the California Coastal Commission (Commission) has  
18 approved the city’s land use plan.” *Id.* at 564. The court concluded it did not. The court noted the  
19 several significant policy requirements of the Coastal Act and the significant role of the Commission in  
20 ensuring that a city’s land use plan complies with the Coastal Act. *Id.* at 566 - 67. The court observed:

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

24 *Id.* at 571 (citations omitted). Despite noting the substantial authority of the Commission and the clear  
25 statewide concern for the protection of coastal resources, the court observed “local governments ... have  
26 discretion to zone one piece of land to fit any of the acceptable uses under the policies of the act, but they  
27 also have the discretion to be more restrictive than the act.” *Id.* at 572. It concluded: “The act, therefore,

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1 leaves wide discretion to a local government not only to determine the contents of its land use plans, but  
2 to choose how to implement these plans.” *Id.* at 573.

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

6 It is the intent of Legislature ... To recognize that each locality is best capable of determining  
7 what efforts are required by it to contribute to the attainment of the state housing goal, provided such a  
8 determination is compatible with the state housing goal and regional housing needs.” Gov. Code § 65581.  
9 Rather than preempt local rule, the Legislature’s statement illustrates intent to defer to local governments  
10 in housing decisions. The Legislature intended to encourage local governments to determine the  
11 appropriate manner for each locality to conform with State law while also conforming “with the local  
12 land use planning process, recognizing that each city and county is required to establish its own  
13 appropriate balance in the context of the location situation when allocating resources to meet these  
14 purposes.” Gov. Code § 65300.9. The Legislature clearly recognized the necessity of deferring to local  
15 expertise to balance local land use planning requirements with State law.

16 Section 65585(j) provides that the State “shall notify the city ... and may notify the Office of the  
17 Attorney General that the city ... it is in violation of state law if the department finds that the housing  
18 element or an amendment ... does not substantially comply ...” Gov. Code § 65585(j).<sup>1</sup> Section  
19 65585(k) provides for meetings in advance of any suit filed by the Attorney General. Section 65585(l)  
20 provides that any suit brought by the Attorney General for failing to comply with State law may request  
21 “that the court issue an order of judgment directing the jurisdiction to bring its housing element into  
22 substantial compliance ...” It also provides for various possible remedies, including impositions of fines,  
23 the interception of various funds, and the appointment of an “agent of the court [to] take all governmental  
24 actions necessary to bring the jurisdiction’s housing element into substantial compliance ...” Gov. Code  
25 § 65585(l). But nothing in these enumerated powers of enforcement allows state to require a jurisdiction

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<sup>1</sup> The City’s brief acknowledges this enforcement authority. City’s Brief at 17:20 - 21.

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

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

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

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8 Dated: 8/26/21

  
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EARL H. MAAS III  
Judge of the Superior Court

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**SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO**

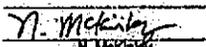
North County  
325 S. Melrose  
Vista, CA 92081

**SHORT TITLE:** The City Of Encinitas vs Preserve Proposition A [IMAGED]

**CLERK'S CERTIFICATE OF SERVICE BY MAIL**

**CASE NUMBER:**  
**37-2019-00047963-CU-OR-NC**

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at Vista, California, on 08/26/2021.

Clerk of the Court, by: , Deputy  
N. McKinley

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Additional names and address attached.