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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

SAN DIEGO TENANTS UNITED; and LORRAINE DEL-ROSE, Petitioners/Plaintiffs, vs. CITY OF ENCINITAS, a municipal corporation; ENCINITAS CITY COUNCIL; and DOES 1 through 20, inclusive, Respondents/Defendants. PRESERVE PROPOSITION A, an unincorporated association, Intervenor.	Case No. 37-2017-00013257-CU-WM-NC **INTERVENOR'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND TO VACATE WRIT** Date: February 14, 2019 Time: 8:30 a.m. Judge: Hon. Robert P. Dahlquist Dept.: N-29 Petition Filed: April 10, 2017

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INTRODUCTION

Proposed Intervenor Preserve Proposition A seeks to intervene in this litigation to protect the rights of the voters of the City of Encinitas and to seek to vacate the January 31, 2019 Writ issued in these cases. Proposition A was lawfully enacted by the voters of the City of Encinitas in order to ensure certain land use requirements in the city and to provide for the citizens' rights to vote on changes under certain circumstances. Preserve Proposition A includes members who were the original proponents of Proposition A. Preserve Proposition A is concerned that this litigation could essentially and completely undo the important protections provided by Proposition A.

While no judgment has yet been issued in these cases, the Writ violates the rights of the voters. It preempts Proposition A's requirements in their entirety, rather than providing a more narrowly-tailored injunction that balances the protections of Proposition A with the need to comply with State housing law requirements. This is in violation of the rights of voters, which are reserved powers recognized by the California Constitution and numerous seminal cases.

Unfortunately, while the City initially took steps to defend Proposition A, more recently it appears to have relaxed its defense of the initiative's requirements. Meanwhile, the State Department of Housing has come out in a clear frontal attack of Proposition A. Accordingly, Intervenor seeks an order allowing its intervention in this case and an order shortening time on a motion to vacate the Writ.

STATEMENT OF FACTS

Preserve Proposition A ("Preserve Prop A") is an unincorporated association of residents of Encinitas concerned with the preservation of Proposition A, the "Encinitas Right to Vote Amendment." Declaration of Susan Turney in Support of Intervenor's Application for Leave to Intervene and Vacate Writ ("Turney Dec."), ¶ 2. Several members of Preserve Prop A were official proponents of Proposition A. *Id*. at ¶ 3. These members were involved with the development of, campaigning for, and supporting Proposition A both financially and with volunteer time. *Id*. at ¶ 5. The intent of Proposition A's official proponents was to utilize the initiative power to provide the residents of Encinitas with a meaningful and tangible manner through which to participate in the land use planning for their city during a time of increasing development. *Id*. at ¶ 4. After extensive campaigning by the official proponents and nearly two hundred volunteers, proponents of Proposition A gathered

signatures from more than fifteen percent of Encinitas residents to force a special election. *Id*. at ¶ 6. In June 2013, Encinitas residents voted to pass Proposition A. *Id*.

Among other things, Proposition A provides: "No Major Amendment of any of the Planning Policy Documents shall be effective unless and until it is approved by a simple majority vote of the voting electorate of the City of Encinitas voting 'YES' on a ballot measure proposing the Major Amendment at a regular or special election." Intervenor's Request for Judicial Notice ("RJN"), Ex. 1 at § 30.00.050.5.1. In addition, Proposition A provides a means for the Court to carefully craft an appropriate, narrowly tailored resolution in the event that Proposition A 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., Ex. 1 at § 30.00.100.10.1.

The City of Encinitas ("City") undertook efforts to update the housing element of the City's General Plan for the 2013 to 2021 period. RJN, Ex. 4 at 10:14 – 11:17. Consistent with Proposition A, the City placed the first proposed housing element ("Measure T") before voters on the November 8, 2016 ballot. *Id*. at 11:15-16. Voters rejected Measure T. *Id*. at 11:17.

Immediately after voters rejected Measure T, the City began work on another proposed housing element ("Measure U"). RJN, Ex. 4 at 11:20-21. The City convened a task force to assist in developing Measure U so it would be more likely to be passed by voters. Turney Dec., ¶ 9. Preserve Prop A members, who were official proponents of Proposition A, participated in the development of Measure U, hoping to aid the City in designing a housing element that would meet all State law requirements while also passing a vote under Proposition A. *Id*.

While this was occurring, on April 10, 2017, San Diego Tenants United ("SDTU") filed a petition for writ of mandate seeking, among other things, a permanent injunction seeking to prevent the City from fulfilling its obligations under Proposition A. RJN, Ex. 5 at 24:19-24. SDTU sought, among other things, to have the Court preempt Proposition A. RJN Ex. 4 at 6:4-5. On June 26, 2017,

Building Industry Association ("BIA") filed a separate action seeking to preempt Proposition A. RJN, Ex. 6 at 13:13-14. The actions brought by SDTU and BIA (collectively "Petitioners") largely concern the same issues. Petitioners did not name any proponent of Proposition A.

Upon reviewing the City's position in both cases, members of Preserve Prop A believed the City would properly defend Proposition A and represent the interests of the official proponents. Turney Dec., ¶ 10. On January 12, 2018, the City filed its opposition briefs in both cases. The arguments the City proffered in defense of Proposition A noted seminal cases protecting the voters' rights through the initiative process. RJN, Ex. 4 at 15:11-17:27.

On July 18, 2018, during the pendency of this litigation, the Encinitas City Council voted to adopt Measure U subject to Encinitas voters' approval as required by Proposition A. Turney Dec., ¶ 14. Measure U identified 19 parcels in Encinitas totaling 63.12 net acres that would provide 1,504 "very low" and "low-income" housing units. *Id*. at ¶¶ 12-13. This would exceed the City's allocation of 1,141 such units as required by State law. *Id*. at ¶12 . The staff report on Measure U included a map illustrating the area of Encinitas intended to meet the City's housing requirements. *Id.* at ¶ 13, Ex. 2. The City placed Measure U on the November 2018 ballot and the voters rejected it. *Id*. at ¶ 15.

After considering all arguments the Court issued its Order dated December 12, 2018 ("Order"). Several of the official proponents of Proposition A were shocked to discover the City appeared to abandon its defense of Proposition A. Turney Dec., ¶ 17 . The Order asserted: "The parties also agree that Proposition A should be preempted because, as applied in this instance, Proposition A and the applicable Government Code sections are in conflict." RJN, Ex. 2 at 4:14-15. It stated: "The Court agrees with City that Proposition A should be preempted…" *Id*. at 5:1.

A Writ was issued on January 31, 2019. RJN, Ex. 3. It directed the City to "bring its general plan into compliance with the Government Code within 120 days pursuant to Government Code § 65754 and to comply with the requirements relating to the Department of Housing and Community Development as set forth in Government Code § 65754(a)." RJN, Ex. 3 at 2:5-8.

In a letter dated February 4, 2019 concerning its review of the draft housing element, HCD informed the City that the housing element "must be revised to commit the city to take necessary action(s) to amend or invalidate Proposition A…" Turney Dec., ¶ 20, Ex. 3 at 3 – 4. In light of the

Writ's overly broad requirement that the City comply with HCD requirements, and HCD's attempt to attack the initiative power reserved by the people in the California Constitution, Preserve Prop A determined that it must take action to ensure its interests are adequately represented in this litigation.

ARGUMENT

I. Preserve Prop A Should be Granted Leave to Intervene

The Court "may, upon timely application, permit a nonparty to intervene in the action or proceeding if the person has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both." Code Civ. Proc. § 387(d)(2). "The purpose of allowing intervention is to promote fairness by involving all parties potentially affected by a judgment." *Simpson Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192, 1199. Permissive intervention is proper if: "(1) the proper procedures have been followed; (2) the nonparty has a direct and immediate interest in the action; (3) the intervention will not enlarge the issues in the litigation; and (4) the reasons for the intervention outweigh any opposition by the parties presently in the action." *Royal Indemnity Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194, 203 (quoting *City and County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, 1036 (*San Francisco*)). Here, Preserve Prop A satisfies all the elements for permissive intervention.

A. Preserve Prop A Has a Direct and Immediate Interest in the Action

Preserve Prop A's interest in the litigation is clear. The Writ and recent developments in the case directly impact Proposition A and the initiative power under Article II, Section 8 of the California Constitution. To support a motion for permissive intervention, "it is well settled that the proposed intervener's interest in the litigation must be direct rather than consequential, and it must be an interest that is capable of determination in the action." *San Francisco*, 128 Cal.App.4th at 1037 (quoting *People v. Superior Court* (1976) 17 Cal.3d 732, 736). A direct and immediate interest means the proposed intervener "will either gain or lose by the direct legal operation and effect of the judgment." *Jersey Maid Milk Products Co. v. Brock* (1939) 13 Cal.2d 661, 663.

Multiple members of Preserve Prop A were official proponents of the initiative, who participated in drafting, campaigning for, and providing support to the efforts to pass Proposition A. Turney Dec., ¶ 5. Their participation included financial investments as well as contribution of

hundreds of hours of volunteer time in support of the initiative. *Id*. "A person has a direct interest justifying intervention in litigation where the judgment in the action of itself adds to or detracts from his legal rights without reference to rights and duties not involved in the litigation." *Continental Vinyl Products Corp v. Mead Corp.* (1972) 27 Cal.App.3d 543, 549 (citing *Olson v. Hopkins* (1969) 269 Cal.App.2d 638, 643). The official proponents of Proposition A have legal rights and interest directly impacted by this litigation. The California Supreme Court has noted:

> (O)fficial proponents of initiative measures in California have uniformly been permitted to participate as parties—either as interveners or as real parties in interest—in numerous lawsuits in California courts challenging the validity of the initiative measure the proponents sponsored. Such participation has routinely been permitted (1) without any inquiry into or showing that the proponents' own property, liberty, or other personal legally protected interests would be specially affected by invalidation of the measure, and (2) whether or not the government officials who ordinarily defend a challenged enactment were also defending the measure in the proceeding.

Perry v. Brown (2011) 52 Cal.4th 1116, 1125 (emphasis added).

Standing to intervene for an official proponent of an initiative is grounded in the initiative power reserved for the people in the California Constitution. As the Court in *Perry* warned:

> We have cautioned that in most instances it may well be an abuse of discretion for a court to fail to permit the official proponents of an initiative to intervene in a judicial proceeding to protect the people's right to exercise their initiative power even when one or more government defendants are defending the initiative's validity in the proceeding.

Id. at 1126. This warning is consistent with the long-understood obligation of the Court to "jealously guard the people's reserved right of initiative…" *Rossi v. Brown* (1995) 9 Cal.4th 688, 711. Indeed, the Court in *Perry* broadly agreed: "Permitting intervention by the initiative proponents … would serve to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." *Perry v. Brown,* 52 Cal.4th at 1148 – 1149 (citing *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 822 (*BIA*)).

In *BIA*, the Supreme Court ruled that in a challenge to the validity of a growth control initiative where the city must shoulder the burden of proof under Section 669.5:

> the trial court in most instances should allow intervention by proponents of the initiative. To fail to do so may well be an abuse of discretion. Permitting intervention by the initiative proponents under these circumstances would serve to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts. (See *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117.)

Id. In examining the discussion in *BIA*, the *Perry* Court explained that the passage, *supra*, "is properly understood as more broadly instructive in a number of respects." *Perry*, 52 Cal.4th at 1149. "[A] court should ordinarily permit the official proponents of an initiative measure to intervene in an action challenging the validity of the measure in order 'to guard the people's right to exercise initiative power.'" *Id*. The *Perry* Court explained that from the *BIA* passage, "it is apparent that the official proponents of the initiative are participating on behalf of the people's interest, and not solely on behalf of the proponents' own personal interests." *Id*. In this case, the Court should permit Preserve Prop A to intervene not only because it represents its and its members' interests, but because it also represents the interests of the voters more broadly.

B. Preserve Prop A's Interest is Not Adequately Represented

The standard does not require that the existing parties "would intentionally thwart" Preserve Prop A's rights, but rather that its interests are "not adequately represented by" the existing parties. *Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 555. The inadequacy of the representation of Preserve Prop A's interest results from the unique process of the initiative power under the California Constitution and the inexplicable softening of the City's defense of Proposition A.

The Court in *Perry* explained:

> (B)ecause the initiative process is specifically intended to enable the people to amend the state Constitution or to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure in question, the voters who have successfully adopted an initiative measure may reasonably harbor a legitimate concern that the public officials who ordinarily defend a challenged state law in court may not, in the case of an initiative measure, always undertake such a defense with vigor or with the objectives and interests of those voters paramount in mind.

Perry v. Brown, 52 Cal.4th at 1125 (emphasis added). The Court explained that permitting official proponents of an initiative to defend the validity of the initiative measure serves to assure:

> voters who supported the measure and enacted it into law that any residual hostility or indifference of current public officials to the substance of the initiative measure will not prevent a full and robust defense of the measure to be mounted in court on the people's behalf and … ensures a court faced with the responsibility of reviewing and resolving a legal challenge to an initiative measure that it is aware of and addresses the full range of legal arguments that reasonably may be proffered in the measure's defense.

Id. at 1125 – 1126. Doing so ensures the fairness of the judicial process. *Id*. at 1126. This explanation from the Court is directly applicable to the instant matter.

The existing parties fail to adequately represent the interests of Preserve Prop A, and more importantly the interests of all of the City's residents that voted to approve Proposition A. In the City's Opposition to Petition for Writ of Mandate, the City appeared to vigorously defend the validity of Proposition A. RJN, Ex. 4 at 14 – 22. The City correctly asserted that the relief sought by Petitioner would unconstitutionally infringe upon the initiative power. *Id*. at 14:1 – 4. In addition, the City appropriately noted the initiative power is "one of the most precious rights of our democratic process," which courts must "jealously guard" and "liberally construe." *Id*. at 6:10 – 11.

The City's defense of Proposition A appeared to fade as litigation wore on. In the Court's Order dated December 12, 2018, the Court stated: "On November 28, 2018, during oral argument, all parties agreed that an impasse has been reached. Therefore, the Court finds that an impasse has occurred." RJN, Ex. 2 at 4:11 – 12. The Court continued: "The parties also agree that Proposition A should be preempted because, as applied in this instance, Proposition A and the applicable Government Code sections are in conflict." *Id*. at 4:13 – 14 (emphasis added). Most shockingly, the Order stated: "The Court agrees with the City that Proposition A should be preempted..." *Id*. at 5:1-2 (emphasis added). This observation in the Order illustrates an abandonment by the City of its representation of the interests of the official proponents of Proposition A. The California Supreme Court explained this very risk: "[A]lthough public officials ordinarily have the responsibility of defending a challenged law, in instances in which the challenged law has been adopted through the initiative process there is a realistic risk that the public officials may not defend the approved initiative measure 'with vigor.'" *Perry*, 52 Cal.4th at 1149 (emphasis added). Thus, Preserve Prop A's intervention is necessary to ensure the adequate representation of its interest in the litigation.

Perhaps more troubling is a February 4, 2019 letter from HCD, which states that HCD's review of the draft housing element included multiple conversations with counsel for the City, Barbara Kautz and Eric Phillips. Turney Dec., ¶ 20, Ex. 3 at 1. In concluding its review, HCD demands the City "take necessary action(s) to amend or invalidate Proposition (A)…" *Id*. at 4 (emphasis added). In doing so, HCD is advocating a usurpation by the City of the very initiative power the City is obligated to defend. The *Perry* Court explained:

> (P)ermitting the official proponents of an initiative to participate as parties in postelection cases, even when public officials are also defending the initiative measure,

> often is essential to ensure that the interests and perspective of the voters who approved the measure are not consciously or unconsciously subordinated to other public interests that may be championed by elected officials, and that all viable legal arguments in favor of the initiative's validity are brought to the court's attention.

Perry, 52 Cal.4th at 1151. Intervention of an official proponent of an initiative appropriately arises out of Article II, Section 8 of the California Constitution "at least in those circumstances in which the government officials who ordinarily defend a challenged statute or constitutional amendment have declined to provide such a defense…" *Id*. at 1151 – 1152.

C. Preserve Prop A's Motion to Intervene is Timely

Code of Civil Procedure Section 387(d)(2) only requires that a nonparty's application to intervene be "timely." The statue does not provide any specific time in the litigation by which an application or motion to intervene must be made. "Thus intervention is possible, if otherwise appropriate, at any time, even after judgment." *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 437. "The fact that section 387 allows for a 'timely' application means that intervention after a judgment is possible." *Hernandez v. Restoration Hardware, Inc*. (2018) 4 Cal.5th 260, 267 (citing *Mallick*, 89 Cal.App.3d at 437 (intervention not barred by fact that judgment was rendered)). Preserve Prop A did not move to intervene earlier because it believed its interest and those of its members would be adequately represented by the City. Turney Dec., ¶ 10. However, following the City's apparent agreement that Proposition A should be preempted, the need for Preserve Prop A's intervention in this litigation became important.

D. Intervention Will Not Enlarge the Issues in the Litigation

Preserve Prop A seeks to intervene to ensure that any final update to the City's housing element, as directed by the Court in the Writ, is narrowly tailored to ensure consistency with all applicable laws without unnecessary threat to Proposition A or infringement upon the initiative power. Granting intervention in this instance will not enlarge the scope of issues in the litigation. Preserve Prop A is not raising any additional issues in this litigation. Preserve Prop A seeks to defend Proposition A's validity, the issue at the heart of this litigation, and should be permitted to intervene.

II. The Writ Violates the Rights of the Voters of Encinitas and Should Be Vacated

Pursuant to Code of Civil Procedure Section 663, a judgment "may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered" when there is "incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts." *Id*. § 663(1). A motion to vacate judgment may be brought by a party aggrieved, which includes a person who was not a party of record in the trial court. *In re The Clergy Cases I v. Franciscan Friars of California, Inc.* (2010) 188 Cal.App.4th 1224, 1233. "Those aggrieved 'by a judgment may become a party of record and obtain a right to appeal by moving to vacate the judgment pursuant to Code of Civil Procedure section 663[, even if the motion is unsuccessful].'" *Id.* at 1233 (citing *County of Alameda*, 5 Cal.3d at 736.) Preserve Prop A, including its members who were official proponents of Proposition A, has standing to move to set aside and vacate the Writ.

A. Preserve Prop A is Aggrieved by the January 31, 2019 Writ

Members of Preserve Prop A contributed to the successful campaigning and adoption of Proposition A as official proponents. Turney Dec., ¶ 5. The members of Preserve Prop A are aggrieved by the Order and Writ's preemption of Proposition A, an initiative they expended tremendous efforts to advocate for and support.

"One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment." *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737. Moreover, California law provides "one who is legally 'aggrieved' by a judgment … may become a party of record and obtain a right of appeal by moving to vacate the judgment pursuant to section 663 pf the Code of Civil Procedure." *Bates v. John Deere Co.* (1983) 148 Cal.App.3d 40, 53 (citing *County of Alameda*, 5 Cal.3d at 736.) As discussed at length in Section IA and IB above, this litigation and the Writ directly impact the rights and interests of Preserve Prop A's members. Additionally, California law recognizes the proponents of an initiative as a party aggrieved by judgment providing standing to make a motion under Code of Civil Procedure Section 663. *See Simac Design v. Alciati* (1979) 92 Cal.App.3d 146, 153 (where the validity of an initiative was at issue, and nonparty was involved in organizing support for and sought to implement the initiative, nonparty had standing as party aggrieved to move to set aside and vacate judgment under Code of Civil Procedure Section 663).

This view is consistent with the law regarding an official proponents' authority to defend an initiative from a postelection attack of the initiative's validity:

> In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.

Perry, 52 Cal.4th at 1127 (emphasis added). Members of Preserve Prop A, as official proponents of the initiative, have standing as a party aggrieved to make this motion to set aside and vacate the Writ.

B. The Writ Violates the Rights of the Voters of Encinitas

1. The Voters' Rights are Revered

The California Constitution defines an initiative as "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1509 (citing Cal. Const., Art. II, §8). Voters have the authority of the local legislative body. *Legislature of the State of California v. Deukmejian* (1983) 34 Cal.3d 658, 675. The California Supreme Court has explained: "The initiative and referendum are not rights 'granted the people, but … power[s] reserved by them…. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.'" *Rossi v. Brown* (1999) 9 Cal.4th 688,695. 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.

The California Supreme Court has explained:

> 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.

Toulumne Jobs & Small Business Alliance v. Superior Court (2014) 59 Cal.4th 1029, 1035 (emphasis and citations omitted). "Once an initiative measure has been approved by the requisite vote of electors in an election, … the measure becomes a duly enacted constitutional amendment or statute." *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 516 (quoting *Perry v. Brown* (2011) 52 Cal.4th 1116, 1147).

The City's opposition to Petitioner's writ of mandate in this very case recognized that an "order that all future housing elements should not be subject to Proposition A … could unconstitutionally infringe upon the initiative and referendum power." RJN, Ex. 4 at 14:1 – 2. The City noted: "The inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed." *Id.* at 14:14 – 18 (quoting *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 738). And it argued:

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

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

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

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

Id. at 17:22 – 27.

And the Order seems to recognize the special place held by voters under the initiative and referendum power. It gives three reasons why it rejects "preempt[ing] Proposition A for all purposes":

> (1) the time for a facial challenge to Proposition A has long passed (Government Code § 65009(c) and CCP § 338(a)); (2) there could be circumstances where the City could apply Proposition A regarding changes that are not necessary to comply with state law and would not trigger an impasse; and (3) the state Constitution 'speaks[s] of the initiative and referendum, not as a right granted the people, but as a power reserved by them' and 'courts have consistently declared it their duty to "jealously guard" and liberally construe the right so that it "not be improperly annulled."' *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934.

RJN, Ex. 2 at 4:15 – 24. Yet without further elaboration or explanation as to why those rights could not be protected or a more narrowly-tailored order could not have been imposed, the Order simply declares "an impasse has occurred." *Id.* at 4:12.

Perhaps more remarkable is that although the City had defended the voters' rights under Proposition A in its briefing to the Court, the Order states: "The Court agrees with City that Proposition A should be preempted relating to the 2013 – 2021 housing element planning period only." *Id.* at 5:1 – 2. Rather than tailoring an order that respected the voters' rights while ensuring compliance with housing law, the Writ throws out Proposition A's protections for, at a minimum, the next two years.

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

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

And in *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, the California Supreme Court ruled a referendum could proceed despite the fact that it would clearly result in inconsistencies with the city's adopted general plan. The city had amended its general plan to change a land use designation for a particular property from "Industrial" to "Commercial." *Id.* at 1076. Subsequently, the city changed

the zoning for the site to "CG-General Commercial" in order to make it consistent with the general plan designation. *Id.* at 1077. After sufficient signatures were gathered for a referendum on the zoning change, the city refused to process the referendum, reasoning that to do so would create inconsistencies with the general plan designation. *Id.* The Supreme Court disagreed, noting that a "referendum challenging an amendment to the zoning ordinance does not result in the final imposition of an invalid zoning designation …, at least where a county or city can use other means to bring consistency to the zoning ordinance and the general plan." *Id.* at 1081. It remanded the matter to the trail court "to determine whether existing alternative zoning designations would be viable for the property postreferendum, and if not, what would prevent the City from creating a new zoning designation that would be consistent with both the general plan and a successful referendum." *Id.* at 1090.

Likewise here, the City can take a number of actions to address providing an adequate housing element without a blanket rescission of Proposition A throughout the entire city. For example, Proposition A imposes height limits throughout the city. RJN, Ex. 1 at § 30.00.060. Yet the Writ exempts any project from those height limits, even though not all projects are directly related to compliance with State housing law requirements. Proposition A provides that 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.*, Ex. 1 at § 30.00.100.10.1 (emphases added). Yet the Writ did not allow any portions of Proposition A to remain in effect.

It may be that the voters twice rejected the City's proposed drafts of a housing element for good reason. But certainly their rejections were not intended to mean that Proposition A's requirements can be ignored. Voters did not vote against what the City presented in order to ensure that they would not have the authority to vote again. Had they wanted that outcome, they merely would have voted to defeat Proposition A.

The Order claims, without any evidence to support it, that "all parties agreed that an impasse has been reached." RJN, Ex. 2 at 4:11 – 12. But there is no evidence what steps had been taken and

what steps could be taken to present a compliant housing element while protecting the voters' rights. Unlike the situations in *Yost* and *City of Morgan Hill*, the Order does not respect the rights of the voters and insist that the City go back and figure out a way to craft a legal housing element that does not ignore the voters' rights in those parts of the city that are not necessary to obtain such an element.

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

The Writ's handling of Proposition A is an improper overreach. The total area of Encinitas is 12,514 acres. Turney Dec., ¶ 13. Measure U identified 19 parcels, totaling 63.12 net acres, needed to comply with State law. *Id*., Ex. 2 at 84. Those 63.12 acres would accommodate 1,504 "very low" and "low-income" housing units. *Id*. at ¶ 12, Ex. 1 at 2 Utilizing these parcels, the City would exceed its 1,141 "very low" and "low-income" housing unit allocation under State law by 363 units. *Id*. Yet the Writ removed Proposition A's protections for all of the area in Encinitas for at least the next two years.

The City's opposition in this case noted:

> "'(W)hen 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.'" (*Big Creek Lumber Co. v. County of Santa Cruz* (2006), 38 Cal.4th 1139, 1149.)

RJN, Ex. 4 at 14:18-22 (emphasis added). The Writ failed to make any such finding of clear intent from the State Legislature to preempt local regulations such as Proposition A. Quite the opposite, the Legislative intent for State housing element law states: "It is the intent of the Legislature … To recognize that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state housing goal and regional housing needs." Gov. Code § 65581. Rather than preempt local rule, the Legislature's statement illustrates intent to defer to local governments in housing decisions. Indeed, the Legislature intended to encourage local governments to determine the appropriate manner for each locality to conform with State law while also conforming "with the local land use planning process, recognizing that each city and county is required to establish its own appropriate balance in the context of the local situation when allocating resources to meet these purposes." Gov. Code § 65300.9 (emphasis added). The Legislature clearly recognized the necessity of deferring to local expertise to balance local land use planning requirements, such as Proposition A, with State law.

Despite the lack of any intent for State general plan and housing element law to preempt local rules, HCD is directing the City to subvert the intent of the Legislature and take actions to invalidate a local law adopted through the initiative power. In its February 4, 2019 letter, HCD stated the City's draft housing element "must be revised to commit the city to take necessary action(s) to amend or invalidate Proposition A…" Turney Dec., ¶ 20, Ex.3 at 3 – 4. HCD is inappropriately attempting to expand the Writ by advocating for an analogue of permanent preemption of Proposition A's protections for Encinitas residents. HCD's position conflicts with the California Constitution, Legislative intent for State general plan and housing element law, and with provisions concerning appropriate resolutions for a lawsuit challenging the adequacy of a city's general plan. Indeed, the State law allowing a court to enjoin a city that has not complied with requirements for an adequate general plan specifically notes that its provisions "shall not be construed to preclude a public agency from exercising discretion, in a manner authorized by any other provision of law, to alter plans, zoning, or subsequent development approvals applicable to those lands, or from enacting and enforcing further regulation upon their use." Gov. Code § 65754.5(c).

Furthermore, the Order states: "whatever measure is implemented must receive [HCD] approval." RJN, Ex. 2 at 5:18 – 19. This direction from the Court improperly infringes upon the discretion of the City, which is not required to adopt the position of HCD. State housing law provides that the City may either make the changes requested by HCD or it may "[a]dopt the draft element or draft amendment without changes. The legislative body shall include in its resolution of adoption written findings which explain the reasons the legislative body believes that the draft element or draft amendment substantially complies with this article despite the findings of the department." Gov. Code §65585(f)(2). The Order's overreach on this point is perplexing.

CONCLUSION

Preserve Proposition A should be allowed to intervene, and the Writ should be vacated.

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Respectfully Submitted,
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