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By: A. Wagoner

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO**

Petitioners Building Industry Association of San Diego County, San Diego Tenants United and Lorraine Del-Rose,

Petitioners,

vs.

Respondent City of Encinitas,

Respondent.

) Case Nos.: 37-2017-00023267-CU-WM-NC/  
) 37-2017-00013257-CU-WM-NC

) **ORDER**

) Judge: Hon. Ronald F. Frazier  
) Dept: N-29

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This ruling addresses the petitions for writ of mandate filed by San Diego Tenants United and Lorraine Del-Rose (17-13257) and Building Industry Association of San Diego County (17-23267).

Petitioners San Diego Tenants United and Lorraine Del-Rose's request for judicial notice dated November 20, 2017 is granted. Petitioner Building Industry Association of San Diego County's request for judicial notice dated January 29, 2018 is granted. Respondents City of Encinitas and Encinitas City Council's requests for judicial notice dated January 12, 2018, November 20, 2018 and November 21, 2018 are granted.

1 California law mandates that every city adopt a “housing element” as a component of its  
2 general plan. State law requires cities and counties to accommodate their fair share of affordable  
3 housing based on their demographics as allocated by regional associations such as the San Diego  
4 Association of Governments (SANDAG). State law requires a city to revise the housing element of  
5 its general plan on a statutorily determined schedule and to rezone sites (and make associated  
6 changes in the land use element) if required to implement programs in the housing element. The  
7 General Plan was adopted by the City on March 29, 1989. The most recent revision to the Encinitas  
8 Housing Element was due by April 30, 2013 to cover the housing element planning period from  
9 2013 to 2021.

11 In 2013, the City passed a local growth control initiative titled Proposition A (codified in the  
12 Encinitas Municipal Code at § 30.00.010 *et. seq.*). Proposition A requires voter approval of major  
13 land use and zoning changes, including increases in zoning density and building heights necessary  
14 to accommodate the unmet housing need in the City of Encinitas. Pursuant to Municipal Code §  
15 30.00.040, “[n]o Major Amendment of any of the Planning Policy Documents shall be effective  
16 unless and until it is approved by a simple majority vote of the voting electorate of the City of  
17 Encinitas voting 'YES' on a ballot measure proposing the Major Amendment at a regular or special  
18 election.” RJN Ex. D at p. E0106. The voters passed Proposition A in June 2013.

21 In May 2015, the City submitted draft Housing Element updates to the Department of  
22 Housing and Community Development (HCD) for review and approval. The HCD indicated that  
23 numerous revisions were necessary to comply with the law and a second draft Housing Element was  
24 submitted to the HCD for review on September 10, 2015. The HCD indicated that the second draft  
25 would comply with statutory requirements if the required zoning to accommodate the current  
26 Regional Housing Need Allocation (RHNA) and carry-over housing needs was complete. On June  
27 15, 2016, City passed a resolution adopting, pending voter approval, the housing element and  
28 zoning amendments. The resolution was presented to the voters as Measure T (also referred to by

1 the parties as the “At Home in Encinitas Plan”) and was rejected by the voters in November 2016  
2 (City approved a resolution certifying the defeat of Measure T by a vote of 17,943 to 14,144 on  
3 December 13, 2016). On August 8, 2018, City passed a resolution adopting, pending voter approval,  
4 a second measure which was presented to the voters as Measure U. Measure U was rejected by the  
5 voters in November 2018. The Court takes judicial notice that Measure U failed (52.94% against  
6 and 47.06% in favor).

8 The petitions for writ of mandate presented by petitioners BIA and San Diego Tenants  
9 United/Del-Rose present identical issues for the Court’s review. The issue presented by the  
10 petitions is whether Proposition A conflicts with the City’s obligations under state Housing Element  
11 Law.

12 Administrative mandamus review under § 1085 “is limited to an examination of the  
13 proceedings to determine whether the City’s actions were arbitrary, capricious, entirely lacking in  
14 evidentiary support or inconsistent with proper procedure. There is a presumption that the City’s  
15 actions were supported by substantial evidence, and [petitioner/plaintiff] has the burden of proving  
16 otherwise. We may not reweigh the evidence and must view it in the light most favorable to the  
17 City’s actions, indulging all reasonable inferences in support of those actions. Mandamus is an  
18 appropriate remedy to compel the exercise of discretion by a government agency, but does not lie to  
19 control the exercise of discretion unless under the facts, discretion can only be exercised in one  
20 way. [Citations omitted.]” *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223  
21 Cal. App. 4th 1181, 1187.

24 Code of Civil Procedure § 1085 provides that a court may issue a writ of mandate to compel  
25 the performance of an act that “the law specifically enjoins.” CCP § 1085; *Buena Vista Gardens*  
26 *Apartments Assn. v. City of San Diego Planning Department* (1985) 175 Cal. App. 3d 289, 297-298.  
27 Adopting an updated housing element by the statutory deadline is a requirement of Housing  
28 Element Law and a mandatory duty for every California city. Government Code § 65302(c); *Buena*

1 *Vista v. City of San Diego Planning Department, supra*, 175 Cal.App.3d at 295. Housing Element  
2 Law imposes a strict penalty on jurisdictions that fail to timely adopt an updated housing element,  
3 requiring another update in four years. Government Code § 65588(f)(4)(A).

4 The Court generally agrees with the principle that the statutory provisions governing local  
5 planning, Government Code §§ 65100-65763, do not prohibit the exercise of the initiative power to  
6 amend the land use element of a general plan and that the initiative power must be construed  
7 liberally to promote the democratic process when utilized to enact statutes; however, if the people  
8 exercise their referendum power in such a way as to frustrate any feasible implementation of the  
9 land use plan, the Court is required to find a way out of the impasse. *Yost v. Thomas* (1984) 36  
10 Cal.3d 561, 569-570. On November 28, 2018, during oral argument, all parties agreed that an  
11 impasse has been reached. Therefore, the Court finds that an impasse has occurred.

12  
13 The parties also agree that Proposition A should be preempted because, as applied in this  
14 instance, Proposition A and the applicable Government Code sections are in conflict. The Court  
15 declines to preempt Proposition A for all purposes for three reasons: (1) the time for a facial  
16 challenge to Proposition A has long passed (Government Code § 65009(c) and CCP § 338(a)); (2)  
17 there could be circumstances where the City could apply Proposition A regarding changes that are  
18 not necessary to comply with state law and would not trigger an impasse; and (3) the state  
19 Constitution “speak[s] of the initiative and referendum, not as a right granted the people, but as a  
20 power reserved by them” and “courts have consistently declared it their duty to ‘jealously guard’  
21 and liberally construe the right so that it ‘be not improperly annulled.’” *California Cannabis Coal.*  
22 *v. City of Upland* (2017) 3 Cal. 5th 924, 934. The Court further declines to preempt Proposition A  
23 for the next housing cycle as urged by petitioners San Diego Tenants United and Lorraine Del-Rose  
24 because the issue is not ripe and the “rendering of advisory opinions falls within neither the  
25 functions nor the jurisdiction of this court.” *People ex rel. Lynch v. Superior Court* (1970) 1 Cal. 3d  
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1 910, 912. The Court agrees with City that Proposition A should be preempted relating to the 2013-  
2 2021 housing element planning period only.

3           The Court finds that the existing general plan does not substantially comply with the  
4 requirements of Article 5 of the Government Code commencing with Section 65300 and directs  
5 City to bring its general plan into compliance with the requirements of Article 5 (commencing with  
6 Section 65300) within 120 days. As set forth in Government Code § 65754(a), the planning agency  
7 of the City shall submit a draft of its revised housing element or housing element amendment at  
8 least 45 days prior to its adoption to the Department of Housing and Community Development for  
9 its review, notifying the department that the element is subject to the review procedure set forth in  
10 this section. The department shall review the draft element or amendment and report its findings to  
11 the planning agency within 45 days of receipt of the draft. The legislative body shall consider the  
12 department's findings prior to final adoption of the housing element or amendment if the  
13 department's findings are reported to the planning agency within 45 days after the department  
14 receives that draft element or amendment.

15           The Court is not persuaded that it is appropriate to order the implementation of any  
16 particular measure under Government Code § 65754 only that whatever measure is implemented  
17 must receive Department of Housing and Community Development approval. The Court is further  
18 not persuaded that specific challenges to Measure U are appropriate at this stage of the case (e.g.,  
19 carry-over provisions and specific land site locations).

20           Finally, the Court is not persuaded that issuing an injunction against City relating to building  
21 permits is appropriate *at this time*; however, the Court reserves the right to reconsider this issue at a  
22 later date.

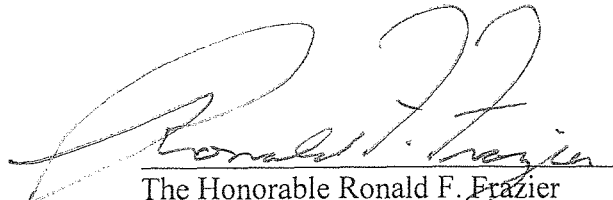
23           IT IS ORDERED, ADJUDGED, AND DECREED that the City shall bring its general plan into  
24 compliance with the Government Code within 120 days pursuant to Government Code § 65754 and  
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1 to comply with the requirements relating to the Department of Housing and Community  
2 Development as set forth in Government Code § 65754(a).

3 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the City shall make an initial  
4 return of the Peremptory Writ of Mandate under oath specifying what City has done or is doing to  
5 comply with the Writ, and to file that return with the Court, and serve that return by hand or  
6 facsimile upon petitioners' counsel of record in this proceeding, no later than 90 days after issuance  
7 of the Writ and service on City. City shall file a supplemental return after taking all actions to  
8 comply with the peremptory writ of mandate.  
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DATED: December 12, 2018

  
The Honorable Ronald F. Brazier  
Judge of the Superior Court