California's legislature can prevent costly conflicts between state housing laws and local voters

Overview

California has a housing crisis: according to one housing affordability index, only 15% of California households can afford a home at the state's median home price.[1] The legislature has attempted to increase housing supply by requiring cities to meet new housing targets through *housing elements*, which are part of a city's general plan.[2] But current housing element law leaves untouched the local direct democracy powers of initiative and referendum.[3] This has generated lawsuits and confusion. For example, Encinitas voters have quashed multiple housing element amendments with referenda, spurring litigation challenging that practice.[4] Those lawsuits produced divergent results: one judge temporarily suspended this use of referenda, while another held that state housing policies did not preempt local direct democracy.[5] The legislature can clarify this area of law by exclusively delegating housing element approvals to local governing bodies like city councils. This will help cities adopt timely, compliant housing elements while also removing a potential tool for blocking new housing construction.

Analysis

Statewide housing laws and *City of Encinitas*: how did we get here?

Decades of housing underproduction have increased homelessness and the number of people leaving California in search of affordability.[6] The legislature has responded by pushing local governments to build more housing.[7] This includes bolstering housing element laws requiring local governments to plan for more housing.[8] During the Regional Housing Needs Allocation (RHNA) process, the state

assigns each local government a number of housing units to plan for, and the local government is required to incorporate those units in its housing element.[9] As the housing crisis has grown worse, the state has increasingly attempted to preempt local discretion in housing approvals.[10] Yet initiatives and referenda still allow public votes to reject compliant housing elements.[11] This creates an anomaly: city governments must comply with state law by adopting housing elements, but local voters can force cities to violate state law.

The Encinitas episode exemplifies the consequences. In 2013, Encinitas voters adopted Proposition A.[12] Proposition A requires a simple majority vote for any "Major Amendment" to "Planning Policy Documents" like a housing element that would, for example, "[increase] the maximum allowable number of residential units which may be constructed on any parcel."[13] Following Proposition A, Encinitas voters rejected housing elements proposed by the city government in 2016 and 2018.[14]

Those rejections created cycles of litigation and political tension. In 2018, in *San Diego Tenants United v. City of Encinitas*, a judge suspended Proposition A for the housing element cycle ending in 2021 because the referendum had "[frustrated] any feasible implementation of the land use plan" and created an "impasse" demanding judicial resolution.[15] The judge gave Encinitas 120 days to "bring its general plan into compliance" with state housing element laws.[16] Encinitas officials then rushed to adopt a housing element that contained "several controversial recommendations from state housing department officials" on subjects such as maximum building heights.[17] The city ultimately adopted a housing element that the state certified in October 2019.[18]

In its housing element, Encinitas established a policy goal seeking "judicial determination that state law preempts portions of Proposition A."[19] The city wanted a "simple majority of the City Council" to be able to adopt housing elements.[20] Encinitas then sued, arguing in *City of Encinitas v. Cal. Dept. of Housing &*

Community Development that state law preempts the portions of Proposition A allowing the electorate to wield local direct democracy powers over housing element adoption.[21]

The court rejected that argument, holding that state housing element laws do not "preempt local rule."[22] The court reasoned that Encinitas did not overcome "the high burden placed on a claim local regulation is preempted" given the lack of legislative intent suggesting preemption.[23] In the court's view, housing element laws' deference to "local expertise" and the state's various "enumerated powers of enforcement" also precluded finding preemption.[24]

City of Encinitas **correctly found no preemption as applied to general law cities.**

The judge in *City of Encinitas* correctly held that local direct democracy powers are not preempted here, but we think the holding was incomplete. Before getting to the substance of this case, it is important to clarify the scope of this analysis, which is limited to general law cities. California has two different types of cities: general law and charter cities.[25] General law cities, like Encinitas, are organized by the state and are granted authority by statute.[26] In contrast, charter cities' power flows from the California constitution, affording their actions on municipal affairs higher levels of protection from state preemption.[27] We will return to charter cities later, but we focus first on general law cities like Encinitas.

Although the courts "jealously guard" the initiative and referendum powers, the state can preempt local direct democracy by satisfying two elements.[28] First, the state must be legislating on a matter of statewide concern.[29] Second, there must be a "'definite indication' or a 'clear showing'" that the legislature intended to preempt local direct democracy powers.[30] Although current housing element statutes deal with a statewide concern, they evince no intent to preempt local direct democracy.

Meeting the test's first requirement is easy, as courts generally view housing

element statutes as addressing matters of statewide concern.[31] And the amendment or adoption of a general plan may also create "regional or statewide impacts."[32] Given these impacts, and the fact that the legislature "possesses the *constitutional authority* to limit" local direct democracy for general law cities, the question is whether there is a definite indication of such intent.[33]

This element of a "definite indication to preempt" is likely unmet. In general, intent to preempt can be found either expressly or implicitly.[34] In local direct democracy cases, courts find an implicit intent to preempt if there is such pervasive state regulation that the statute renders local government actions "administrative," or if the statute evinces an intent to exclusively delegate specific legislative authority to the local legislative body, as distinct from the local electorate.[35]

Regarding express preemption, the housing element statutes are silent on the use of a local initiative or referendum.[36] The legislative findings in the housing element statutes show the legislature's intent to promote the provision of housing, but nothing expressly preempts local direct democracy.[37] As for implicit preemption, the administrative/legislative route is already foreclosed. At first blush, housing elements set a basic statewide policy of planning for housing and leave the specifics to local governments.[38] But state law and the California Supreme Court classify the amendment or adoption of a general plan and its constituent elements as legislative acts.[39] Thus, both express and implied preemption are ruled out.

This leaves exclusive delegation as the only available path to establishing the legislature's preemptive intent. The exclusive delegation doctrine comes from *Committee of Seven Thousand v. Superior Court*.[40] In *COST*, the court looked for two factors to determine whether the legislature intended to exclusively delegate power to the local governing body: the statutory text and the degree of statewide interest.[41] The court adopted a test that looks to the precise language used, with generic references supporting a weaker inference than specific references to local legislative bodies.[42] Exclusive delegation varies directly with a higher state interest

in the legislation.[43] This results in a test where a combination of specific text and heightened statewide interest can create inferences of legislative preemption.

Applying the *COST* exclusive delegation inquiry, there is no definite indication of preemption regarding housing element laws. The text of Government Code sections 65580 to 65589.11 cannot support the clear indication of exclusive delegation that *COST* and *City of Morgan Hill* require.[44] Take, for instance, the definitions section of housing element law.[45] In this section, the legislature defines "local government" — the most significant term for the *COST* exclusive delegation inquiry — as "a city, city and county, or county."[46] Contrast this broad language with the text at issue in *COST*, which specifically tasked the Orange County Board of Supervisors with authority.[47] The text of the housing element statutes does not provide the specificity that *COST* requires.[48]

In contrast to the housing element laws' lack of exclusive references to local legislative bodies, the legislature defined the Councils of Governments (COGs) in the RHNA process as "a single or multicounty council created by a joint powers agreement."[49] As in *COST*, the specific references to COGs strongly suggest the legislature intended to delegate the allocation power exclusively to COGs and to preempt local referenda.[50] This specificity contrasts with the legislature's use of the general phrases "local government" or "city, city and county, or county" throughout the rest of the housing element statutes.[51] To avoid a superfluous reading of the text, one must read the specific references to COGs to mean something distinct from local governments.[52] That cuts against exclusive delegation — if the legislature had intended to preempt local direct democracy, it could have done so through specificity.

Under both express and implied preemption tests, housing element laws cannot currently provide the definite indication that is necessary to preempt local direct democracy.[53] That said, because both providing housing and adopting (or amending) a general plan involve statewide concerns, the legislature has the power

to preempt local initiatives or referenda.[54] To prevent future protracted fights in the courts like *City of Encinitas* and encourage timely housing elements, the legislature should amend the law to exclusively delegate housing element adoption and implementation to local governing bodies.

What about charter cities?

Charter cities get another layer of protection from statewide preemption because the California constitution grants charter cities exclusive domain over municipal affairs.[55] Although the state can preempt the exercise of local direct democracy for charter city electorates in some circumstances, there is an additional layer of analysis.[56] In evaluating charter city preemption, courts look at whether a city ordinance regulates a municipal affair; whether there is actually a conflict between that ordinance and state law; whether the state law addresses a matter of statewide concern; and whether the state law is reasonably related to resolving that statewide concern and is narrowly tailored to avoid unnecessary interference in local governance.[57] As in housing element law writ large, courts are likely to find that a challenge to the proposed exclusive delegation statute meets the first three prongs.[58]

The analytically difficult part of this test is the fourth prong: whether the law is narrowly tailored and reasonably related to resolving a statewide concern. We think a court would find a reasonable relationship between housing element laws and resolving the housing crisis. After all, removing local discretion is the hallmark of recent state housing laws.[59] The tougher question is whether a court would deem the statute narrowly tailored to avoid unnecessary interference in municipal governance and that "the sweep of the state's protective measures [is] no broader than its interest."[60] Although courts have generally found housing element laws to be narrowly tailored, the scope of this statute would be broader because it pertains to local elections, not just housing-specific laws.[61]

Even so, we think a court would find the proposed exclusive delegation to be

narrowly tailored if it only applied to housing elements.[62] For example, the recent decision in *AIDS Healthcare Foundation* upheld a state law "[granting] local legislative bodies discretion whether to supersede local housing density caps" even when the caps were adopted by voter initiative.[63] Although the Court of Appeal acknowledged that the legislature could have effected "an across-the-board nullification of all local housing density caps across the state," the opinion approved the statute's "more modest and novel approach."[64] Exclusive delegation on housing elements would similarly address the statewide "housing shortage" by "cloaking counties and cities in the mantle of state preemptive authority," without completely overriding local control over planning.[65]

Applying that modest approach here, narrowly tailoring the exclusive delegation means that initiatives and referenda on other zoning issues would be allowed. The holding in *City of Morgan Hill* allowing local electorates to reject zoning changes via referendum, even though those changes were necessary to comply with the general plan, would still stand.[66] Likewise, initiatives and referenda on single project approvals would be allowed. The exclusive delegation proposal is narrowly tailored because it promotes the state's interest in requiring cities to craft timely plans for housing, while preserving local discretion by emphasizing the role of local officials in the housing element process.

Why bother passing this law?

Our solution would go a long way towards breaking the housing logjam. Expressly delegating the exclusive power to adopt or amend housing elements to local legislative bodies would prevent complex fights involving the state, localities, and the courts. By clarifying the role of local governing bodies, the legislature would streamline the implementation of state housing laws. Absent exclusive delegation, local voters can stymie housing plans and subject their cities to statutory penalties for failing to approve compliant housing elements.[67] Although it has imposed harsh penalties for local jurisdictions lacking compliant housing elements, the legislature has yet to address statutory language permitting ineffective public votes demanding noncompliance. All this puts local governments in the impossible position of being

liable to the state for voter acts they cannot control.

Encinitas proves the costs of this contradiction. After voters rejected two housing elements, litigation forced a rushed rerun of the process. As it stands, housing element referenda like those in Encinitas fail to advance the principle that "[a]ll political power is inherent in the people."[68] All that does is throw the decision to the courts, giving jurists a policymaking role in resolving impasses when public votes force local jurisdictions to flout state housing laws. Judges are already playing that role when cities fail to enact compliant housing elements. For example, a Los Angeles judge "blocked [Beverly Hills] from issuing all building permits except for new residential development as a penalty for [the city's] failure" to meet its housing targets.[69] Housing policy expert Bill Fulton attributes this decision to "the state's more aggressive housing targets combined with outside groups' willingness to sue."[70]

In this environment, local jurisdictions whose voters reject state housing goals will grapple with litigation and judicial limitations on local decision-making just like Beverly Hills. Cities unable to enact a housing element will be sanctioned by the state. The exclusive delegation doctrine, and a simple statutory fix, could save cities from being trapped in this no-win scenario.

Conclusion

Encinitas presents both a cautionary tale and an important opportunity for statutory clarification. Now more than ever, the state is taking an active role in promoting housing development, and cities are struggling to comply. The state should ensure that city governments making good faith efforts to address California's housing crisis are not thwarted by electorates opposed to housing plans — and then punished by the state after referenda make compliance impossible. The legislature should exclusively delegate housing element laws to city councils, boards of supervisors, and similar local governing bodies.

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1. Cal. Assn. of Realtors, *Third quarter 2023 housing affordability report* (Nov. 10, 2023). ↑

2. Tobias, *How much do California housing goals really mean?*, Cal Matters (Mar. 21, 2022). ↑

3. Perhaps because the legislature has no choice, and the only checks on the electorate are the judiciary and future electorates. *See* Carrillo, Duvernay, Gevercer & Fenzel, *California Constitutional Law: Direct Democracy* (2019) 92 S.Cal. L.Rev. 557, 611 (arguing that for certain separation of powers purposes the California electorate "should be considered an independent branch of the state government with legislative power"). ↑

4. *San Diego Tenants United v. City of Encinitas* (Super. Ct. San Diego County, 2019, No. 37-2017-00013257-CU-WM-NC), 2019 Cal. Super. LEXIS 21227, 1–3 (hereafter "*San Diego Tenants United*"). ↑

5. *Compare id.* at 3 *with City of Encinitas v. Cal. Dept. of Housing & Community Development* (Super. Ct. San Diego County, 2022, No. 37-2019-00047963-CU-OR-NC), 2022 Cal. Super. LEXIS 1969, 9–15 (hereafter "*City of Encinitas*"). ↑

6. *Ibid.*; Margot Kushel and Tiana Moore, *Toward a New Understanding: The California Statewide Study of People Experiencing Homelessness*, UCSF Benioff Homelessness and Housing Initiative (2023); Leonard, *California exodus: Charts show huge shift in which U.S. states most people are moving to*, S.F. Chronicle (Oct. 22, 2023). ↑

7. Christopher, *Year in review: California homelessness worsens even as housing bills pass*, Cal Matters (Dec. 19, 2023); Office of Atty. Gen. Rob

Bonta, *Attorney General Bonta Launches Housing Strike Force, Announces Convening of Tenant Roundtables Across the State* (Nov. 3, 2021). ↑

8. Gov. Code §§ 65584-65584.6 (codifying the RHNA allocation process). ↑

9. For more detail about the housing element process, we recommend Los Angeles County's explainer. *See* L.A. County Dept. of Regional Planning, *What is the Housing Element?* (2021). The housing element is a portion of a city's general plan, which is considered the local government's constitution for local planning and must be followed. *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 535–36. Charter cities are exempted from following parts of a general plan, but this is beyond the ambit of our article since charter cities are required to adhere to their housing element. Gov. Code § 65700; *see Garat v. City of Riverside* (1991) 12 Cal.App.4th 259, 284, disapproved on another ground in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725. ↑

10. *See, e.g.*, *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 314 ("The ministerial approval statute was intended to decrease delays and local resistance to such developments and does so by removing local governments' discretion to deny applications"). ↑

11. *See DeVita v. County of Napa* (1995) 9 Cal.4th 763, 779–80 (holding that voters could amend a county's general plan with the initiative power); *but see Devita*, 9 Cal.4th 793 n.11 (failing to reach whether voters could amend a housing element via the initiative power). ↑

12. San Diego Registrar of Voters, *City of Encinitas – Special Municipal Election – Tuesday, June 18, 2023 – Official Results* (June 24, 2013). ↑

13. Encinitas Code of Ordinances, ch. 30, §§ 30.00.020, 30.00.041(a); *City of Encinitas*, 2022 Cal. Super. LEXIS 1969 at 3. ↑

14. *City of Encinitas*, 2022 Cal. Super. LEXIS 1969 at 5. ↑

15. *San Diego Tenants United*, 2019 Cal. Super. LEXIS 21227 at 4–5. ↑

16. *Id.* at 5. ↑

17. Burgin, *Encinitas finalizes housing element update*, The Coast News Group (March 28, 2019). ↑

18. City of Encinitas, *Housing Plan Update 2019* (Oct. 8, 2019). ↑

19. City of Encinitas, *2013–2021 Housing Element: Section 1* (2019) 26–27. ↑

20. *Ibid.* ↑

21. *City of Encinitas*, 2022 Cal. Super. LEXIS 1969 at 4. ↑

22. *Id.* at 13. ↑

23. *Id.* at 9. ↑

24. *Id.* at 13–14. ↑

25. Gov. Code § 34100. ↑

26. *See, e.g., City of Orange v. San Diego County Employees Retirement Assn.* (2002) 126 Cal.Rptr.2d 405, 411. ↑

27. Cal. Const., art. XI, §§ 3, 5(b). ↑

28. *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117; *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1078–79. ↑

29. *City of Morgan Hill*, 5 Cal.5th at 1078–79. ↑

30. *Ibid.* ↑

31. *See, e.g., Cal. Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 847–49. ↑

32. *See, e.g., DeVita v. County of Napa* (1995) 9 Cal.4th 763, 784. ↑

33. *Ibid.* (italics in original); *City of Morgan Hill*, 5 Cal.5th at 1078–79. ↑

34. *Chevron U.S.A. Inc. v. County of Monterey* (2023) 15 Cal.5th 135, 142. ↑

35. *City of Morgan Hill*, 5 Cal.5th at 1079. ↑

36. *See generally* Gov. Code §§ 65580–65589.11. ↑

37. Gov. Code §§ 65580, 65581, 65582.1, 65584, 65589.5. *See also* Gov. Code § 66300 (giving an example of the legislature expressly prohibiting the use of local initiatives or referenda in the context of other housing statutes). Note that § 66300 does not resolve the problem *Encinitas* poses for three reasons: first, the law sunsets in 2025; second, it applies only to the land use elements and zoning plans, not housing elements; and third, because a referendum rejects a proposed ordinance instead of discarding an enacted law, a referendum rejecting new housing elements would not be subject to this law. *See City of Morgan Hill*, 5 Cal.5th at 1082. ↑

38. *Cf. Simpson v. Hite* (1950 36 Cal.2d 125, 130–31. Like *Simpson*, the housing

element process is the state telling a local government to plan and build something specific but leaving the location up to local governments. ↑

39. Gov. Code § 65301.5 (adopting the general plan or any part or element thereof or the adoption of any amendment to such plan or any part or element thereof is a legislative act); *DeVita*, 9 Cal.4th at 780 ("As an initial matter, there is no question that a general plan amendment is a legislative act, for the planning law itself declares as much"). ↑

40. *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 500–09 (hereafter *COST*). ↑

41. *Id.* at 500–12. ↑

42. *Id.* at 501. ↑

43. *City of Morgan Hill*, 5 Cal.5th at 1079. ↑

44. *See COST*, 45 Cal.3d at 508; *City of Morgan Hill*, 5 Cal.5th at 1079. ↑

45. Gov. Code § 65582. ↑

46. *Ibid.* ↑

47. *Ibid.* ↑

48. *COST*, 45 Cal.3d at 508. ↑

49. Gov. Code § 65582. ↑

50. *See COST*, 45 Cal.3d at 501. ↑

51. *See, e.g.*, Gov. Code § 65582. ↑

52. *See, e.g., Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1253. ↑

53. *See City of Morgan Hill*, 5 Cal.5th at 1078–79. ↑

54. *See City of San Mateo*, 68 Cal.App.5th at 851. ↑

55. Cal. Const., art. XI, § 2. ↑

56. *See, e.g., Rossi v. Brown* (1995) 9 Cal.4th 688, 698 n.4 ("The scope of the initiative and referendum powers, even in charter cities, is limited to control over municipal affairs. The state has plenary authority over matters of statewide concern and, in areas in which the Legislature has specifically and exclusively delegated authority in those matters to a local legislative body, may bar exercise of either referendum or initiative"). ↑

57. *State Bldg. & Constr. Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 556; see *Cal. Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 13. ↑

58. *See, e.g., City of San Mateo*, 68 Cal.App.5th at 848. ↑

59. *See, e.g., Ruegg*, 63 Cal.App.5th at 312–15. ↑

60. *Cal. Fed.*, 54 Cal.3d at 25. ↑

61. *See, e.g.*, *City of San Mateo*, 68 Cal.App.5th at 50; *Anderson*, 42 Cal.App.5th at 717. ↑

62. *See, e.g.*, *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 802 (limitations on charter city elections were narrowly tailored advancements of statewide public policy goals). ↑

63. *AIDS Healthcare Foundation v. Bonta* (2024) 101 Cal.App.5th 73, 88. ↑

64. *Id.* at 91. ↑

65. *See id.* at 78. ↑

66. *City of Morgan Hill*, 5 Cal.5th at 1091. ↑

67. Courts have upheld stiff penalties for local jurisdictions that fail to comply with housing element laws. *See, e.g.*, *City of San Mateo,* 68 Cal.App.5th at 846–54. The legislature has sharpened these penalties by enacting heavy fines "on jurisdictions with noncompliant housing elements." Elmendorf et al., *Making it Work: Legal Foundations for Administrative Reform of California's Housing Framework* (2020) 47 Ecology L.Q. 973, 1013. And the legislature has reformed the Housing Accountability Act by enhancing the Attorney General's enforcement powers. Clare, *Because Housing is What? Fundamental. California's RHNA System as a Tool for Equitable Housing Growth* (2019) 46 Ecology L.Q. 374, 401. ↑

68. Cal. Const., art. II, § 1. ↑

69. Dillon, *In Beverly Hills, no kitchen remodels or pool grottoes as judge orders building moratorium over lack of affordable housing*, L.A. Times (Jan. 18, 2024). ↑

70. *Ibid*. ↑