

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE Civil Complex Center 751 W. Santa Ana Blvd Santa Ana, CA 92701	
SHORT TITLE: Still Protecting Our Newport vs. City of Newport Beach	
CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: 30-2024-01417895-CU-WM-CXC

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**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER**

MINUTE ORDER

DATE: 05/19/2025

TIME: 09:24:50 AM

DEPT: CX104

JUDICIAL OFFICER PRESIDING: Melissa R. McCormick

CLERK: V. Harting

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT: I. Olivares

CASE NO: **30-2024-01417895-CU-WM-CXC** CASE INIT.DATE: 08/08/2024

CASE TITLE: **Still Protecting Our Newport vs. City of Newport Beach**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

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APPEARANCES

There are no appearances by any party.

The court has read and considered State of California ex rel. Attorney General Rob Bonta and the California Department of Housing and Community Development's ex parte application for leave to file an amici curiae brief in opposition to the motion for judgment filed by plaintiff and petitioner Still Protecting Our Newport. ROA 182, 186. For good cause shown, the ex parte application is granted. The brief of amici curiae attached as Exhibit A to the ex parte application is deemed filed as of the date of this order.

The ex parte hearing scheduled for May 20, 2025 at 1:30 p.m. is vacated.

Clerk to give notice.

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Exempt from Filing Fees
Government Code § 6103

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ORANGE
13

14 STILL PROTECTING OUR NEWPORT,
15
Plaintiff and Petitioner,
16
v.
17 CITY OF NEWPORT BEACH,
18
Defendant and Respondent.

Case No. 30-2024-01417895-CU-WM-CXC
Related Case No. 30-2024-01428295-CU-WM-CXC

ASSIGNED FOR ALL PURPOSES TO: HON.
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**[PROPOSED] BRIEF OF AMICI CURIAE
THE STATE OF CALIFORNIA EX REL.
ATTORNEY GENERAL ROB BONTA
AND CALIFORNIA DEPARTMENT OF
HOUSING AND COMMUNITY
DEVELOPMENT IN SUPPORT OF
DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR JUDGMENT**

Date: May 22, 2025
Time: 9:00 a.m.
Dept.: CX104

25 AND RELATED CASE
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Reservation No. 74472051
Trial Date: May 22, 2025

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The Attorney General and the Department of Housing and Community Development (HCD), both charged with enforcing the State’s Housing Element Law, submit this brief to assist the Court in ruling on a matter that seeks to impose a local voter measure in a manner inconsistent with the State’s Housing Element Law. Amici curiae do so because the relief Plaintiffs Newport Beach Stewardship Association (NBSA) and Still Protecting Our Newport (SPON) seek against the City of Newport Beach—to set aside a general plan amendment (the Program Action) on the grounds that its enactment violated the City charter—would, if granted, compel the City to violate the Housing Element Law. For that reason, amici curiae respectfully submit this brief to support the City’s position that state law, under these facts, absence of local voter approval does not invalidate the City Council’s action, as set forth under the City’s own charter.

The Housing Element Law requires every local government in California to adopt and implement a plan, called a “housing element,” that accommodates the housing needs across all household income levels. (Gov. Code, § 65583.)¹ The law sets judicially enforceable deadlines for local governments to complete the actions necessary to comply with this obligation. (See §§ 65583, subd. (c)(1)(A), 65588, subd. (e).) And it prohibits local governments from taking any action that would be inconsistent with its adopted housing element. (§ 65585, subd. (i)(1)(A).) The City of Newport Beach has a charter provision, Section 423, subjecting any major amendment to its general plan for voter approval before it can take effect. But that measure “shall not apply if state or federal law precludes a vote of the voters on the amendment.” (Newport Beach City Charter, art. IV, § 423.)

Plaintiffs nevertheless ask this Court to order the City to vacate the Program Action for the purpose of giving the City’s voting residents the opportunity to reject a legally mandatory rezoning. But, as Section 423 itself implicitly acknowledges, voter approval requirements cannot obstruct compliance with state law, and state law requires the City’s Program Action to be in effect. For that reason, the Attorney General and HCD respectfully urge the Court to deny Plaintiffs their requested relief.

¹ All statutory references are to the Government Code unless otherwise indicated.

LEGAL BACKGROUND

I. THE HOUSING ELEMENT LAW IMPOSES STRINGENT AND LEGALLY ENFORCEABLE OBLIGATIONS ON LOCAL GOVERNMENTS

A. Local Governments Must Accommodate the Development of Sufficient Housing for All Income Levels

The Housing Element Law seeks to solve a collective action problem that has contributed to the State’s housing shortage. Local governments often succumb to opposition to new housing, and so they do not accommodate its development. (*AIDS Healthcare Foundation v. Bonta* (2024) 101 Cal.App.5th 73, 85.) That collective failure has made housing more expensive for people at all income levels across the State. (*Ibid.*)

To solve that problem, the Housing Element Law creates a comprehensive framework for statewide and regional coordination to ensure that each local government accommodates its fair share of new housing. (*Committee for Responsible Housing v. City of Indian Wells* (1989) 209 Cal.App.3d 1005, 1013.) Local governments must adopt general plans, and those general plans must include housing elements that substantially comply with the Housing Element Law. (§ 65302, subd. (c).) Those housing elements must accommodate the housing “needs of all economic segments of the community.” (§ 65583.) Housing elements accommodate those needs primarily by requiring rezoning actions “that allow sufficient opportunities to construct multi-family residences.” (*Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 219.)

The statute treats “the early attainment of decent housing and a suitable living environment for every Californian” as “a priority of the highest order.” (§ 65580, subd. (a).) That priority requires “the cooperation of all levels of government” to designate and maintain “a supply of land and adequate sites suitable, feasible, and available for the development of sufficient housing to meet the locality’s housing needs for all income levels.” (§ 65580, subds. (c), (f).)

In enacting the statute, the Legislature intended for localities to “recognize their responsibilities in contributing to the attainment of the state housing goal”—which is the availability of housing for every Californian regardless of income level. (§ 65581, subd. (a).) That requires local governments to “prepare and implement housing elements” that help the State

1 attain its housing goal. (§ 65581, subd. (b).) Local efforts to comply with the law must be
2 “compatible with the state housing goal and regional housing needs.” (§ 65581, subd. (c).)

3 **B. The Housing Element Law Obligates Local Governments to Prepare,**
4 **Adopt, and Implement Adequate Housing Elements by Legally**
5 **Enforceable Deadlines**

6 Due to the “vital statewide importance” of housing, the housing element plays a
7 “preeminent role” in the general plan. (*City of Indian Wells, supra*, 209 Cal.App.3d at p. 1013,
8 quoting § 65580, subd. (a).) Unlike other general plan elements, housing elements must be
9 updated in accordance with a “fixed schedule.” (*DeVita v. County of Napa* (1995) 9 Cal.4th 763,
10 793, fn. 11.) That schedule requires local governments to update their housing elements by the
11 first date of each planning period. (*Martinez, supra*, 90 Cal.App.5th at p. 222.) That obligation is
12 judicially enforceable. (§ 65587, subds. (a), (b).)

13 A planning period typically lasts eight years. (*Martinez, supra*, 90 Cal.App.5th at p. 222.)
14 The statute requires periodic updates to the housing element to ensure that housing elements
15 continuously accommodate each locality’s regional housing needs allocation (RHNA), which is
16 “the locality’s proportionate share of regional housing needs for each income level.” (*Id.* at p.
17 223.) A locality’s housing needs include, and can exceed, its RHNA. (*Ibid.*) HCD sets the
18 housing need for each region, and the regional council of governments allocates that housing need
19 among its constituent jurisdictions. (*Ibid.*) The RHNA allocation is not subject to judicial review.
(*City of Coronado v. San Diego Assn. of Governments* (2022) 80 Cal.App.5th 21, 39.)

20 After the RHNA is assigned, the local government must update its housing element.
21 (§ 65585, subds. (b)-(g).) The housing element has three core components: (1) an assessment of
22 housing needs, for which the RHNA is the “centerpiece”; (2) an inventory of sites suitable to
23 meet those needs; and (3) a program to accommodate those housing needs. (*Martinez, supra*, 90
24 Cal.App.5th at pp. 223-225.) The program sets forth a schedule of actions, and that schedule
25 forms the “substantive heart” of the housing element. (*Id.* at p. 225.)

26 The actions identified in a program are called “program actions,” which are legally binding
27 and judicially enforceable. (§§ 65583, subd. (h), 65585, subd. (i)(1)(A).) Program actions include
28 the rezoning actions necessary to accommodate identified housing needs. (See *Martinez, supra*,

1 90 Cal.App.5th at p. 225.) State law fixes the deadlines to undertake those rezoning actions,
2 although the statute sets different deadlines based on the circumstances facing each locality. (See,
3 e.g., § 65583.4, subd. (a).) Those deadlines are judicially enforceable. (§ 65587, subd. (d)(2).)

4 **C. Local Governments Prepare, Adopt, and Implement Their Housing**
5 **Elements Subject to the State Oversight and Enforcement**

6 The Housing Element Law requires local governments to submit draft housing element
7 updates to HCD so that HCD can review and provide comments on the draft. (§ 65585, subd.
8 (b)(1)(A).) The local legislative body then adopts the draft, which is then submitted to HCD so
9 that HCD can determine whether the update substantially complies with the Housing Element
10 Law. (§ 65585, subds. (e), (f), (g)(1), & (h).)

11 The Housing Element Law confers on HCD the authority to review the actions of the local
12 government to determine whether they substantially comply with the locality’s adopted housing
13 element or the Housing Element Law. (§ 65585, subd. (i)(1)(A).) If HCD determines that “any
14 action or failure to act” by the locality “is inconsistent with an adopted housing element or
15 Section 65583,” then it may notify the local government that it has violated the law. (*Ibid.*) The
16 action or failure to act giving rise to liability can include “any failure to implement any program
17 actions included in the housing element pursuant to Section 65583.” (*Ibid.*) If HCD makes these
18 findings, “there shall be a rebuttable presumption of invalidity in any legal action challenging that
19 action or failure to act.” (§ 65585, subd. (i)(1)(B).)

20 After giving the locality a reasonable time to respond to its written findings, HCD may
21 revoke any previous findings that the locality’s housing element substantially complies with the
22 Housing Element Law. (§ 65585, subd. (i)(1)(C).) It can also refer any violation of the Housing
23 Element Law or an adopted housing element to the Attorney General for enforcement. (§ 65585,
24 subd. (j).) The statute, in summary, makes local governments directly accountable to the State for
25 the performance of all actions that are necessary to comply with the Housing Element Law, and
26 specifically enumerates programs, like rezoning, among those required actions.

1 **II. THE LEGAL CONSEQUENCES FOR VIOLATING THE HOUSING ELEMENT LAW**
2 **INCLUDE ORDINARY MANDAMUS, FINES, LOSS OF LAND USE AUTHORITY, AND THE**
3 **BUILDER’S REMEDY**

4 For actions to enforce the Housing Element Law, the State can obtain fines if a local
5 government fails to bring its actions into compliance with the law within a year of a court order,
6 and those fines can increase over time by a factor of six. (§ 65585, subd. (l)(1)-(3)(A).)
7 Additionally, continued noncompliance can result in a court-appointed receiver who is
8 empowered to “take all governmental actions necessary to bring the local jurisdiction’s housing
9 element into substantial compliance pursuant to [the Housing Element Law] in order to remedy
10 identified deficiencies.” (§ 65585, subd. (l)(3)(B).)

11 The statute also authorizes the State to pursue all other remedies available under law.
12 (§ 65585, subd. (n).) Among the remedies available in actions to enforce the obligations under
13 Section 65585 are those set forth in Article 14 of the Planning Law. (§ 65009.1, subd. (e)(2).)
14 Those remedies allow courts to revoke a locality’s land use powers by suspending its permitting,
15 subdivision, and rezoning authority. (§ 65755, subd. (a)(1)-(3).) The court may also compel the
16 locality to approve new housing that it otherwise would have been required to approve had it not
17 violated the Housing Element Law. (§ 65755, subd. (a)(4).) State law also includes certain
18 automatic remedies, like the Builder’s Remedy. (§ 65589.5, subds. (d)(5), (f)(6), & (h)(11).)
19 Under the Builder’s Remedy, a local government whose housing element does not substantially
20 comply with the Housing Element Law cannot use its planning or zoning policies to deny new
21 affordable housing opportunities. (*Ibid.*)

22 **PROCEDURAL BACKGROUND**

23 Plaintiffs challenge the City’s adoption of the Program Action. (See SPON’s Verified
24 Petition for Writ of Mandate at p. 8; NBSA’s Verified Petition for Writ of Mandate and
25 Complaint for Declaratory Relief at p. 16.) According to Plaintiffs, the City Council improperly
26 bypassed the electorate in violation of Section 423, which provides that “[v]oter approval is
27 required for any major amendment to the Newport Beach General Plan.” (Newport Beach City
28 Charter, art. IV, § 423.) But, the measure “shall not apply if state or federal law precludes a vote
of the voters on the amendment.” (*Ibid.*)

1 NBSA additionally seeks declaratory relief that the City’s housing element would remain in
2 substantial compliance with the Housing Element Law in the event the City vacates the Program
3 Action to hold a Section 423 vote. (NBSA’s Verified Petition at p. 16.) It also asks this Court to
4 issue declaratory relief that the City need not comply with the Builder’s Remedy in the event the
5 Program Action is set aside, and that the Builder’s Remedy is unconstitutional under the
6 California Constitution in any event. (*Ibid.*)

7 Both parties have moved for judgment. The trial court related the matters and set a hearing
8 on both motions on May 22, 2025. Amici curiae submitted a request, on an ex parte basis, to file
9 this brief on May 16, 2025.

10 ARGUMENT

11 I. THE HOUSING ELEMENT LAW MAKES IT LEGALLY INFEASIBLE FOR THE CITY TO 12 HOLD A REFERENDUM ON THE PROGRAM ACTION NOW

13 A. State Law May Preclude Referenda When They Call for Legally Infeasible 14 Outcomes

15 In California, state law may preempt local law “either *expressly* or *by implication*.” (*AIDS*
16 *Healthcare Foundation, supra*, 101 Cal.App.5th at p. 86, original italics.) State law “impliedly
17 preempts—and thus invalidates” local law if the local enactment “contradicts or is inimical to the
18 state law”—such as where the local law “directly prohibits what the state enactment *demand*s.”
19 (*Ibid.*, original italics; see also *Chevron U.S.A., Inc. v. County of Monterey* (2021) 70 Cal.App.5th
20 153, 162.)

21 Here, the Housing Element Law precludes the City from conditioning its implementation of
22 the Program Action on the outcome of a Section 423 vote that, if successful, would render
23 compliance with Housing Element Law infeasible. That is true even if the Housing Element Law
24 does not expressly preempt Section 423, or preempt local voter measures in all circumstances,
25 and thus Plaintiffs’ argument that the Housing Element Law does not include a clear indication of
the Legislature’s intent to preempt local laws like Section 423 is inapposite.

26 Regardless, the Legislature clearly intended to preclude referenda that, if successful, would
27 force local governments to violate state law by failing to implement program actions that satisfy
28 the requirements of state law by mandatory state deadlines. Because the Legislature adopted the

1 Housing Element Law to “assure” that local work to attain the State’s housing goal—and
2 specifically, to “assure” that local governments like the City “will prepare and *implement* housing
3 elements” to further that goal—it necessarily follows that the Legislature did not intend for
4 implementation of the housing element to hinge on the outcome of a local referendum to reject
5 *legally mandatory* actions of its local government after those actions are due. (§ 65581, subd. (a),
6 italics added.) The Legislature imposed a judicially enforceable and ministerial *duty* on localities
7 to timely implement their housing elements. (See §§ 65583, subd. (h), 65587, subd. (d)(2).) To
8 adopt Plaintiffs’ position would undermine the effective operation of the Housing Element Law,
9 because voters across the State could force their local governments to abandon the timely
10 implementation of their local housing elements.

11 Plaintiffs further argue that because one of the purposes of the Housing Element Law is “to
12 recognize that each locality is best capable of determining what efforts are required by it to
13 contribute to the attainment of the state housing goal,” voter referenda are not precluded.
14 (SPON’s Mem. at p. 14, quoting § 65581, subd. (c).) But the Legislature made clear that any such
15 voter determination must be compatible with attaining the State’s housing goal and
16 accommodating regional housing needs. (§ 65581, subd. (c).) An automatic referendum cannot, as
17 Plaintiffs would have it here, serve as grounds to rescind a local government’s approval of a
18 mandatory housing element program after it is due.

19 Nor is Section 423 as strict as Plaintiffs argue. On its own terms, it “shall not apply if state
20 or federal law precludes a vote of the voters on the amendment.” (Newport Beach City Charter,
21 art. IV, § 423.) As discussed, Plaintiffs’ reading of the law would undermine the effective
22 operation of the Housing Element Law itself. Even the cases on which Plaintiffs rely recognize
23 this, suggesting that state law may preclude referenda under case-specific circumstances, even
24 where state law may not facially preclude referenda in all cases. (See *City of Morgan Hill v.*
25 *Bushey* (2018) 5 Cal.5th 1068, 1091; *Yost v. Thomas* (1984) 36 Cal.3d 561, 574.)

26 In *City of Morgan Hill*, the California Supreme Court held that referendum sponsors could
27 challenge an ordinance to conform local zoning to an updated general plan, as required by Section
28 65860(c), “where the local government has other means to make the zoning ordinance and

1 general plan consistent.” (*City of Morgan Hill, supra*, 5 Cal.5th at p. 1076.) Since Section
2 65860(c)’s consistency requirement afforded local jurisdictions a “reasonable time” to comply
3 with it, the statute left open the possibility that local governments could comply with the statute,
4 hold a referendum, and then comply with a successful referendum without ever violating Section
5 65860. (*Ibid.*) The Supreme Court left it for the lower courts to determine whether the City had
6 “legally feasible means to comply with a successful referendum while” also complying with
7 Section 65860(c). (*Id.* at p. 1091.)

8 *Yost* involved the Coastal Act, which left “wide discretion to a local government not only to
9 determine the contents of its land use plans, but to choose how to implement those plans.” (36
10 Cal.3d at p. 573.) That discretion made it feasible to comply with both a successful referendum
11 and the Coastal Act, but the Court observed that “if down the road the people exercise their
12 referendum power in such a way as to frustrate any feasible implementation of the LUP, some
13 way out of the impasse will have to be found.” (*Id.* at p. 574.)

14 Both *City of Morgan Hill* and *Yost* thus contemplate that, even where state law does not
15 facially preclude referenda in all circumstances, state law may preclude referenda when their
16 case-specific application would make it legally infeasible to comply with state law. Here, given
17 the stringent and judicially enforceable timetable that governs the implementation of the housing
18 element, and given that state law compels the accommodation of identified housing needs,
19 holding a referendum—an up-or-down vote—on the Program Action *after* the deadline to adopt
20 the Program Action has passed would “frustrate any [legally] feasible implementation of the”
21 City’s housing element. (*Ibid.*)

22 **B. It Is Legally Infeasible for the City to Vacate the Program Action**

23 The Housing Element Law prohibits the City from taking “any action” inconsistent with its
24 adopted housing element. (§ 65585, subd. (i)(1)(A).) The City adopted the Program Action to
25 implement its housing element’s mandatory rezoning, and, as all parties acknowledge, the City’s
26 deadline to complete that rezoning was February 12, 2025. (See § 65583.4, subd. (a).) To vacate
27 the Program Action with no legally sufficient alternative in its place would accordingly violate
28 the City’s housing element, which would in turn violate the Housing Element Law. (§ 65585,

1 subd. (i)(1)(A).) Under these circumstances, the City Council lacks the discretion to vacate the
2 Program Action, and thus so does the City’s electorate. (See *DeVita v. County of Napa* (1995) 9
3 Cal.4th 763, 775 “[T]he local electorate’s right to initiative and referendum ... is generally co-
4 extensive with the legislative power of the local governing body.”.)

5 Plaintiffs’ authorities are not to the contrary. *DeVita* expressly declined to address whether
6 housing elements were subject to the initiative or referendum power, and thus it provides no
7 support for Plaintiffs’ position. (*Id.* at p. 793, fn. 11.) And unlike the Housing Element Law, the
8 statutes in *Yost* and *City of Morgan Hill* left local governments with discretion in determining the
9 timing of compliance. (See *City of Morgan Hill*, *supra*, 5 Cal.5th at p. 1076; *Yost*, *supra*, 36
10 Cal.3d at p. 573.) Under the Housing Element Law, however, local governments cannot delay
11 compliance with the statute’s legally enforceable rezoning deadlines, except under circumstances
12 not applicable here. (See § 65587, subd. (d)(1)-(2).)

13 At this point, the City has no discretion but to keep the Program Action in place. Otherwise,
14 the City will be in violation of Section 65583, which makes implementation of program actions
15 judicially enforceable. (See § 65583, subd. (h).) Moreover, if the City’s voters reject the Program
16 Action, then the City’s zoning will no longer accommodate its housing needs, including its
17 RHNA, in violation of the Housing Element Law. (See § 65583.)² The City, in short, lacks the
18 discretion to vacate the Program Action at this point. Vacating the Program Action would justify
19 a judicial mandate to *reinstate* the Program Action. (See §§ 65583, subd. (h), 65587, subd. (c).)

20 Plaintiffs nevertheless argue that the Housing Element Law permits the City, in effect, to
21 repeal the Program Action pending the outcome of a local plebiscite. But Plaintiffs are wrong.
22 First, SPON argues that the City may disregard the Housing Element Law’s deadlines because
23 they are directory, and not mandatory. (SPON’s Mem. at pp. 12-13.) But the directory-mandatory
24 distinction is irrelevant here. That distinction only addresses whether “invalidation of the
25 ultimate governmental action” is appropriate when a statutory deadline is missed. (*Kabran v.*
26 *Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 340, quoting *People v. Allen* (2007) 42 Cal.4th

27
28 ² Amendments by initiative might be permissible if they are consistent with the housing
element, accommodate housing needs, and substantially comply with the Housing Element Law.

1 91, 101.) What matters here is the *obligatory-permissive* distinction. (*Kabran*, 2 Cal.5th at p.
2 340.) The obligatory-permissive distinction addresses whether a governmental agency “is
3 required to conform to a certain procedure,” thereby making it obligatory, or whether it may
4 disregard the obligation, making it permissive. (*Ibid.*) That distinction applies to the question
5 here, which is whether the City may disregard the Housing Element Law’s deadlines. It clearly
6 cannot. (See *Martinez*, *supra*, 90 Cal.App.5th at pp. 222, citing §§ 65583, subds. (a) & (c), 65588,
7 subds. (a), (b), (e)(3), & (f)(1).)

8 Second, both SPON and NBSA argue that the consequences facing the City for violating
9 the law are speculative. But evading accountability for an unlawful action does not make the
10 action lawful. Prosecuted or not, unlawful actions remain unlawful. Deadlines do not become
11 permissive simply because they might not be enforced. (See *Kabran*, *supra*, 2 Cal.5th at p. 340.)

12 Here, the City would face substantial legal consequences were it to vacate the Program
13 Action. In any civil litigation, its action to vacate the Program Action under these circumstances
14 would be presumptively invalid.³ (§ 65585, subd. (i)(1)(B).) It could lose its permitting,
15 subdivision, and rezoning authority. (See § 65755, subd. (a)(1)-(3).) A court could order the City
16 to approve housing development applications that it would have been required to approve had it
17 kept the Program Action in place. (See § 65755, subd. (a)(4).) If the State brought an enforcement
18 action, it could obtain fines that compound over time, and a court-appointed receiver could
19 reinstate the Program Action. (See § 65585, subd. (l)(3)(B).) And the Builder’s Remedy,
20 summarized in Section II, *infra*, would preclude the City from invoking its planning and zoning
21 policies to deny affordable housing projects, as vacating the Program Action would take the City
22 out of compliance with the Housing Element Law. (§ 65589.5, subds. (d)(5), (f)(6), & (h)(11).)

23 Finally, Plaintiffs argue that because the Housing Element Law requires public
24 participation, it allows for the electorate to vote on a housing element’s program actions. But the
25 statute requires public participation in the preparation of the housing element. (See §§ 65583,
26 subd. (c)(1)(B)(9) [local government must make a diligent effort “to achieve public participation
27 of all economic segments of the community in the development of the housing element”], 65585,

28 ³ As would, of course, any vote by the electorate to reject the Program Action.

1 subd. (b)(1)(B) [requiring the local planning agency to “collect and compile public comments” on
2 its draft housing element update].) The public can help HCD oversee the implementation of a
3 housing element to ensure substantial compliance. (See § 65585, subd. (i)(2).) But
4 implementation by the schedule set forth in the statute is mandatory. (See § 65587, subd. (d)(2).)

5 **II. IF THE CITY VACATES THE PROGRAM ACTION, IT WILL NO LONGER**
6 **SUBSTANTIALLY COMPLY WITH THE HOUSING ELEMENT LAW, AND THE BUILDER’S**
7 **REMEDY WILL TAKE EFFECT**

8 The Builder’s Remedy prevents local governments without compliant housing elements
9 from using their local land use laws to deny certain types of new affordable housing
10 developments. (§ 65589.5, subds. (d)(5), (f)(6), & (h)(11).) To apply adverse local land use laws
11 to those types of housing developments, localities must have in place “a revised housing element”
12 that substantially complies with the Housing Element Law. (*Ibid.*) If a local government wants to
13 retain its authority to apply its planning and zoning laws to these types of projects, it must ensure
14 that its land use policies, in both their adoption and their implementation, comply with the
15 Housing Element Law. (See *ibid.*)

16 NBSA asks this Court to find that the Builder’s Remedy would not apply in the event the
17 Court ordered the City to vacate the Program Action. It asserts two arguments. First, it argues that
18 the City’s housing element would remain in substantial compliance with Housing Element Law
19 even if the City vacated the Program Action. Second, it argues that the Builder’s Remedy violates
20 the City’s home rule authority under the California Constitution. (See Cal. Const., art. XI, § 5,
21 subd. (a).) Both arguments lack merit.

22 **A. The Program Action Must Remain in Effect for the City’s Housing**
23 **Element to Substantially Comply with the Housing Element Law**

24 NBSA argues that the Builder’s Remedy “does not apply where, as here, the City has
25 adopted a compliant Housing Element but takes longer than expected to obtain voter approval to
26 implement it.” (NBSA’s Mem. at p. 16.) This argument contravenes the Housing Element Law.
27 The Legislature adopted the Housing Element Law so that local governments would “prepare *and*
28 *implement* housing elements” to help the State achieve its goal of providing housing for every
California family. (*Buena Vista Gardens Apartments Assn. v. City of San Diego* (1985) 175

1 Cal.App.3d 289, 295, italics added.) To that end, the housing element must create a program that
2 sets forth a schedule of actions—again, this is the housing element’s “substantive heart”—that
3 local governments must follow. (*Martinez, supra*, 90 Cal.App.5th at p. 225.) And the Legislature
4 expressly empowered HCD to determine that a housing element no longer substantially complies
5 with the Housing Element Law if the local government fails to implement it. (§ 65585, subd.
6 (i)(1)(C).) Without implementation, there is no *actual compliance* with the substantive
7 requirements of the statute, and thus, no substantial compliance with the Housing Element Law.
8 (See *Martinez*, at p. 237.)

9 The Program Action is essential to the City’s compliance with the Housing Element Law. It
10 implements the City’s mandatory rezoning, which the City must undertake in order to
11 accommodate its housing needs. Vacating the Program Action, for any purpose, would render the
12 City’s housing element noncompliant as a matter of law, which would cause the Builder’s
13 Remedy to take effect in the City. (§ 65589.5, subds. (d)(5), (f)(6), & (h)(11).)

14 **B. The Builder’s Remedy Is Constitutional**

15 Under the California Constitution, charter cities may “govern themselves, free of state
16 legislative intrusion, as to those matters deemed municipal affairs.” (*State Building &*
17 *Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555.) Courts
18 apply a four-part test in determining whether the Legislature may regulate a charter city’s
19 activities. (*Cal. Renters, supra*, 68 Cal.App.5th at p. 847.) First, the court determines whether the
20 subject matter of the statute could be characterized as a municipal affair. (*Ibid.*) Second, the court
21 must determine whether there is a conflict between state law and municipal law. (*Ibid.*) Third, the
22 court must determine whether the statute addresses an issue of statewide concern. (*Ibid.*) Finally,
23 if the statute addresses a matter of statewide concern, the court must decide whether it reasonably
24 relates to that concern and whether it is narrowly tailored “to avoid unnecessary interference in
25 local governance.” (*Ibid.*, quoting *City of Vista*, 54 Cal.4th at p. 556.)

26 On the first two prongs, planning and zoning are considered municipal affairs, and the
27 Builder’s Remedy would require the City to ignore its local laws to approve certain affordable
28 housing developments, which means there is a conflict. (See *Cal. Renters, supra*, 68 Cal.App.5th

1 at p. 847.) For the third prong, “the sub-issue of ensuring affordable housing has been a matter of
2 statewide concern for nearly six decades.” (*AIDS Healthcare Foundation, supra*, 101 Cal.App.5th
3 at p. 84.) Both the Legislature and the courts of this State have determined “that the issue of
4 assuring an adequate supply of affordable housing is one of statewide or regional concern ... even
5 though it might appear to be a local issue at first blush.” (*Ibid.*)

6 NBSA does not dispute this. Instead, it claims that the Builder’s Remedy is not narrowly
7 tailored by “offer[ing] a one-size-fits-all punishment that would allow developers to dictate the
8 location of affordable housing projects without regard to the City’s” general plan. (NBSA’s Mem.
9 at p. 20.) But NBSA fails to address, let alone distinguish, *California Renters*, which upheld the
10 Housing Accountability Act (HAA) against a home rule challenge, or any other case upholding
11 one of the State’s housing laws against a home rule challenge. (See *Cal. Renters, supra*, 68
12 Cal.App.5th at p. 854 [“The HAA is today strong medicine precisely because the Legislature has
13 diagnosed a sick patient. We see no inconsistency between the provisions of the HAA and the
14 California Constitution.”]; see also *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th
15 277, 315 [upholding Section 65913.4].)

16 Although *California Renters* did not involve a home rule challenge to the Builder’s
17 Remedy, its reasoning supports upholding the Builder’s Remedy, a subsection of the HAA.
18 There, the court addressed whether the HAA’s prohibition on the use of nonobjective criteria
19 violated a charter city’s home rule authority. (See § 65589.5, subds. (f)(4), (j)(1).) The court held
20 that it did not because the Legislature adopted the HAA to help solve the “collective action
21 problem” of individual localities using their land use authority to “contribute to the collective
22 shortfall in housing.” (*Cal. Renters, supra*, 68 Cal.App.5th at p. 851.) The “extent and
23 intractability” of that collective shortfall justified the HAA’s limitation of the allowable bases on
24 which local agencies may disapprove new housing projects. (*Ibid.*)

25 In addressing whether the HAA is narrowly tailored, the Court of Appeal found that the
26 statute left “local governments free to establish and enforce policies and development standards
27 appropriate to local circumstances, as long as those policies and standards are” objective and,
28 critically here, “consistent with meeting the jurisdiction’s” RHNA. (*Id.* at p. 850.) That reasoning

1 also shows why the Builder’s Remedy is narrowly tailored. The Builder’s Remedy takes effect
2 *only* when a local government’s housing element falls out of substantial compliance with the
3 Housing Element Law. (§ 65589.5, subd. (d)(5), (f)(6), (h)(11).) That can happen when a local
4 government fails to adopt a substantially compliant housing element, or when it fails to comply
5 with its program actions. (See § 65585, subd. (i)(1).) Housing elements that are outdated or
6 unimplemented are not consistent with meeting RHNA, and the Builder’s Remedy helps ensure
7 that a local failure to update or implement housing elements does not unduly interfere with a
8 locality’s ability to meet its RHNA while it works to comply with the law.

9 The Builder’s Remedy also only benefits housing “for very-low, low-, or moderate-income
10 households” and emergency shelters. (§ 65589.5, subd. (h)(11)(A).) Local agencies can continue
11 to apply objective criteria to disapprove projects that do not qualify for the Builder’s Remedy.
12 (§ 65589.5, subd. (d)(6).) It thus leaves localities free to apply objective criteria to proposed
13 housing developments that are not covered by the statute. (See *Cal. Renters, supra*, 68
14 Cal.App.5th at p. 850.) And the Legislature recently reformed the Builder’s Remedy to ensure
15 that Builder’s Remedy projects comply with certain statewide density standards so that they can
16 be processed in a uniform and predictable manner. (See Stats. 2024, ch. 268 (A.B. 1893).)

17 NBSA addresses neither *California Renters* nor A.B. 1893. Instead, it argues that the
18 Builder’s Remedy does not clearly preempt the local electorate’s powers under Section 423. But
19 that argument is inapposite. Section 423 gives the electorate the power to vote on certain general
20 plan amendments, which are legislative enactments. (See § 65301.5.) It does not give the
21 electorate the authority to vote on proposed new housing under the HAA, which sets forth the
22 sole bases on which local governments can disapprove new housing developments. (See
23 § 65589.5, subds. (d), (j)(1).) The Legislature, moreover, already preempted the field of
24 mandatory referenda on affordable housing *projects* with Section 65008. (See *Bruce v. City of*
25 *Alameda* (1985) 166 Cal.App.3d 18, 22.) Builder’s Remedy projects are, by definition, affordable
26 housing projects. (See § 65589.5, subd. (h)(11)(A).) Whether or not the Program Action is subject
27 to a mandatory referendum, Builder’s Remedy projects are not. (See *Bruce*, at p. 22.)
28

The “locally unrestricted development of low-cost housing is a matter of vital state concern.” (*Ibid.*) For that reason, the Legislature applied the HAA in full to charter cities, as the California Constitution permits. (See § 65589.5, subd. (g) [“This section shall be applicable to charter cities because the Legislature finds that the lack of housing ... is a critical statewide problem.”]; *Cal. Renters, supra*, at p. 851 [“Given the extent and intractability of the housing shortfall, we see nothing improper in the Legislature addressing it on a statewide basis.”].) The Builder’s Remedy advances the State’s interest in the unrestricted development of affordable housing while leaving localities empowered to apply land use policies to other types of housing developments. (§ 65589.5, subd. (d)(6).) It is thus narrowly tailored to advance the State’s interest in new affordable housing. (See *Cal. Renters*, at pp. 850-851.)

CONCLUSION

The Housing Element Law compels the City’s ongoing performance of its duty—one that the City owes to the State, its region, and to all economic segments of the community—to accommodate its housing needs. Plaintiffs ask the Court to interfere with the City’s ongoing performance of that duty. Section 423 does not require the Court to provide such drastic relief. Amici curiae respectfully request that the Court deny the motions.

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