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NEWPORT BEACH STEWARDSHIP ASSOCIATION

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE COUNTY OF ORANGE

11 NEWPORT BEACH STEWARDSHIP
12 ASSOCIATION,

13 Petitioner and Plaintiff,

14 v.

15 CITY OF NEWPORT BEACH,

16 Respondent and Defendant.
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Case No. 30-2024-01428295-CU-WM-NJC

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY RELIEF**

Assigned for All Purposes Judge Nathan Vu

1 Petitioner Newport Beach Stewardship Association (“Petitioner” or “NBSA”) brings this
 2 Verified Petition for a Writ of Mandate and Complaint for Declaratory Relief against Respondent
 3 City of Newport Beach (the “City” or “Newport Beach”), and alleges as follows:

PRELIMINARY STATEMENT

5 1. This case is about the Newport Beach City Council disregarding the right of
 6 Newport Beach residents to vote on how housing will develop and grow in the City over the next
 7 decade.

8 2. In November 2000, Newport Beach residents voted overwhelmingly in favor of
 9 the Greenlight Initiative, a ballot measure that added Section 423 to the City Charter (hereafter
 10 referred to as “Section 423”). Section 423 prevents the Newport Beach City Council from
 11 amending the City’s General Plan to permit major development projects without first securing
 12 approval from City residents. Section 423 specifically requires that any amendment to the City’s
 13 General Plan allowing for the development of more than 100 housing units be approved by local
 14 residents.

15 3. The California Constitution expressly grants the “[i]nitiative and referendum
 16 powers . . . to the electors of each city or county.” (Cal. Const., art. II, § 11.) As “one of the most
 17 precious rights of our democratic process,” (*City of Fresno v. Fresno Building Healthy*
 18 *Communities* (2020) 59 Cal.App.5th 220, 227), only a vote of the electorate can alter a right
 19 granted by initiative, (Elec. Code § 9217). Yet on July 23, 2024, the City Council did just that by
 20 taking action in derogation of the Greenlight Initiative and the right to vote enshrined in Section
 21 423. Through a meeting on that date, the City Counsel purported to adopt an amendment to its
 22 General Plan that would allow for the development of more than 8,000 new dwelling units, and
 23 potentially more than 16,000 with state housing density bonuses, without first allowing local
 24 residents to vote on that amendment.

25 4. The City Council’s decision lacked any valid justification and was the product of
 26 unusual circumstances. State law housing mandates do not preempt local residents’ right to vote
 27 under Section 423. And the overblown parade of horrors the City Council claimed would occur

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1 were a Section 423 vote allowed is no legal justification to disenfranchise the voters of Newport
2 Beach.

3 5. A writ of mandate should issue directing the City Council to comply with Section
4 423.

5 6. Further, to allay any purported concerns, a judicial declaration should issue to
6 confirm the City would remain in substantial compliance with State housing laws during the
7 period it complies with its obligations under Section 423, or alternatively, that the City's home
8 rule authority on issues of municipal affairs found in article XI, section 5 of the California
9 Constitution displaces the consequences that otherwise flow from not being in "substantial
10 compliance" under State housing laws during the period the City complies with its Section 423
11 obligations.

12 JURISDICTION AND VENUE

13 7. This Court has jurisdiction under laws including California Code of Civil
14 Procedure §§ 1060 and 1085 and article VI, section 10 of the California Constitution.

15 8. Venue is proper in this Court under California Code of Civil Procedure § 394
16 because the City is situated in Orange County, California.

17 9. Petitioner has exhausted any administrative remedies and has no plain, adequate,
18 or speedy remedy at law.

19 THE PARTIES

20 10. Petitioner and Plaintiff Newport Beach Stewardship Association is an
21 unincorporated association dedicated to the vitality, development, and future of Newport Beach.

22 11. Respondent City of Newport Beach is a chartered city under the California
23 Constitution and operates through a City Charter per Government Code § 34450, *et seq.* The City
24 is governed by a seven-member City Council, and has adopted a General Plan controlling all
25 residential and commercial development in the City.

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FACTUAL ALLEGATIONS

A. Section 423 of the City Charter Gives Newport Beach Residents the Right to Vote on Any Major Amendment to the City’s General Plan.

12. Since the 1960s, California law has mandated that every city adopt “a comprehensive, long-term general plan for the physical development of the county or city.” (Gov. Code § 65300, *et seq.*) As the so-called “constitution” of future development within a city (*Friends of “B” Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 997), all local land use decisions, including zoning ordinances, must be consistent with the general plan, (Gov. Code § 65860). Each general plan includes a “housing element” that sets forth statutorily mandated elements and analyses regarding residential housing zoning and growth. Specifically, it contains “an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and a scheduled programs for the preservation, improvement, and development of housing.” (*Id.* § 65583.)

13. Section 423 requires voters to approve any amendment to the City’s General Plan that would significantly increase the amount or intensity of development in the City. Section 423 was added to the City Charter by voter approval through the so-called “Greenlight Initiative.” That initiative was presented to the voters of Newport Beach as Measure S in the November 2000 general election, and voters overwhelmingly approved it. Section 423 has now been a core component of the City Charter for over two decades.

14. Section 423, as enacted, states the following:

Voter approval is required for any major amendment to the Newport Beach General Plan. A “major amendment” is one that significantly increases the maximum amount of traffic that allowed uses could generate, or significantly increases allowed density or intensity. “Significantly increases” means over 100 peak hour trips (traffic), or over 100 dwelling units (density), or over 40,000 square feet of floor area (intensity); these thresholds shall apply to the total of: 1) Increases resulting from the amendment itself, plus 2) Eighty percent of the increases resulting from other amendments affecting the same neighborhood and adopted within the preceding ten years. “Other amendments” does not include those approved by the voters. “Neighborhood” shall mean a Statistical Area as shown in the Land Use Element of the General Plan, page 89, in effect from 1988 to 1998, and new Statistical Areas created from time to time for land subsequently annexed to the City.

1 “Voter approval is required” means that the amendment shall not take effect unless
2 it has been submitted to the voters and approved by a majority of those voting on
3 it. Any such amendment shall be submitted to a public vote as a separate and
4 distinct ballot measure notwithstanding its approval by the city council at the same
5 time as one or more other amendments to the City’s General Plan. The city council
6 shall set any election required by this Section for the municipal election next
7 following city council approval of the amendment, or, by mutual agreement with
8 the applicant for the amendment, may call a special election for this purpose with
9 the cost of the special election shared by the applicant and the City as they may
10 agree. In any election required by this Section, the ballot measure shall be worded
11 such as a YES vote approves the amendment and a NO vote rejects the
12 amendment; any such election in which the ballot measure is not so worded shall
13 be void and shall have no effect.

14 This section shall not apply if state or federal law precludes a vote of the voters on
15 the amendment.

16 (Added effective December 15, 2000)

17 **B. The City Explicitly Contemplated Section 423 Approval of the Proposed**
18 **Revision to the Housing Element.**

19 15. The housing element of a general plan does not remain static. California law
20 requires a city to regularly review and revise the housing element for the appropriateness and
21 effectiveness of, and progress towards, that city’s housing goals, objectives, and policies. (Gov.
22 Code § 65588.) That schedule has varied over time but is generally five to eight years. As part of
23 the revision process, the California Department of Housing and Community Development
24 (“HCD”) determines the existing and projected need for housing for each region, and those
25 regional needs are then allocated between all the municipalities in the region. (*Id.* § 65584.) The
26 housing allocation for each municipality is commonly referred to as a Regional Housing Needs
27 Allocation or RHNA. The City is currently in the sixth “cycle” of housing element amendments
28 and its deadline to implement the latest housing element is in early 2025.

16. On September 13, 2022, the City adopted the proposed housing element at issue
here (the “Housing Element”)—which includes comprehensive disclosure of the City’s plan to
comply with the City’s Regional Housing Needs Allocation. The City’s Housing Element notes
that for the “2021-2029 planning period the City was allocated a total of 4,845 units” to be added
in Newport Beach. (Housing Element at 1-4.)

17. On September 15, 2022, the City submitted the proposed Housing Element to
HCD for review and certification. The proposed Housing Element notes multiple times that a

1 Section 423 vote was required to amend other portions of the General Plan to align with the
2 proposed Housing Element.

3 18. In an October 5, 2022 letter, after conducting a review of the proposed Housing
4 Element, HCD certified that it was “in full compliance with [the] State Housing Element Law”
5 and informed the City that it “must continue timely and effective implementation of all programs
6 including . . . [i]nitiating a Ballot Measure for a Charter Section 423 Vote.”

7 **C. The City Works to Implement the Housing Element.**

8 19. Following HCD’s approval, the City began taking steps to bring its Housing
9 Element into effect. As set forth in the Housing Element itself, the City envisioned that
10 implementation of the Housing Element would require considerable effort, including preparing an
11 inventory of available land in the City, identifying areas for potential zoning changes, and
12 formulating potential rezoning strategies. Implementation of the Housing Element also required
13 several major land use approvals, including amendments to the City’s General Plan Land Use
14 Element, Zoning Ordinance, and Local Coastal Program. The City referred to those approvals
15 collectively as the “Housing Element Implementation Program Amendments.”

16 20. According to a City staff report prepared for the July 23, 2024 meeting, beginning
17 in early 2023, City staff and appointed committees began to undertake the necessary planning
18 efforts and drafted the Housing Element Implementation Program Amendments. (See July 23,
19 2024 City Council Staff Report re Agenda Item No. 23, at 13-14.) In August 2023, initial versions
20 of the Housing Element Implementation Program Amendments were released for public input.
21 (*Id.* at 14.) Those documents were subsequently revised and re-released for public review on
22 January 16, 2024, and again on March 29, 2024. (*Ibid.*)

23 21. The City also began taking steps to comply with the California Environmental
24 Quality Act (CEQA) in connection with those future approvals. On February 12, 2024, a draft
25 Environmental Impact Report (EIR) was released for a public review period. (*Ibid.*)

26 22. On April 18, 2024, the Housing Element Implementation Program Amendments
27 and corresponding and EIR were presented to the City’s Planning Commission for review so the
28 Planning Commission could provide a recommendation to the City Council. Following a

1 presentation from staff and an opportunity for public comment, the Planning Commission
2 recommended that the City Council certify the Final EIR and adopt the Housing Element
3 Implementation Program Amendments. (Resolution No. PC2024-006.)

4 **D. The City’s Continued Commitment to a Section 423 Vote on the Housing**
5 **Element.**

6 23. Throughout the period when the City worked to implement the Housing Element,
7 City staff and officials continued to make statements acknowledging its obligation to present the
8 necessary General Plan amendments to a vote under Section 423.

9 24. For instance, the Staff Report prepared for the April 18, 2024 Planning
10 commission meeting, which recommended various actions to implement the proposed Housing
11 Element Implementation Program Amendments, stated that the proposed General Plan
12 amendments “would not take effect unless it has been submitted to the voters and approved by a
13 majority of those voting on it.” That same staff report noted “the City has been working to bring
14 the matter to a ballot vote as part of the November 5, 2024 General Election.”

15 25. Further, in the June 2024 issue of Newport Beach Living, the Mayor and
16 Councilmember Will O’Neill confirmed that a Section 423 public vote would be held regarding
17 the proposed General Plan amendment: “In November [2024], our residents will have the choice
18 to approve that approach when the land use element of our city’s general plan (implementing the
19 housing element) is in front of them.”

20 **E. The City Council Bypasses Section 423’s Vote Requirement.**

21 26. Despite assurances to local residents that they would have the opportunity to vote
22 on the Proposed Housing Element, the City Council unexpectedly reversed its position and chose
23 not to submit the proposed General Plan amendments for a local vote, as mandated by Section
24 423.

25 27. On July 23, 2024, the City Council convened a public meeting during which
26 Agenda Item No. 23 presented two options. The first option involved complying with Section 423
27 by submitting the proposed General Plan amendments to local voters for their approval. The
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1 second option permitted the City Council to unilaterally approve the amendments without calling
2 for a local vote, which is required by Section 423.

3 28. The City Council selected the second option. In Resolution No. 2024-58, the City
4 Council “initiate[d] a narrowly focused amendment to the adopted and certified statutorily
5 compliant 6th Cycle Housing Element of the General Plan to *remove the reference to a vote of*
6 *the electorate* pursuant to Charter Section 423 as a constraint or as an implementing action.”
7 Resolution No. 2024-51 then purported to authorize amendments to the Land Use Element of the
8 City’s General Plan, enabling the development of many thousands of housing units without
9 submitting these amendments to local voters.

10 29. Just a week later, on July 30, the City released a proposed amended Housing
11 Element for public comment. In this amended version, the City eliminated previous statements
12 that indicated a public vote was necessary under Section 423. The amended document now claims
13 that a “Charter Section 423 vote is precluded, and the City will move forward with implementing
14 the Housing Element without a Charter Section 423 vote.” Following the City Council’s lead, on
15 September 5, 2024, the City’s Planning Commission adopted Resolution No. PC2024-019, which
16 recommends that the City Counsel adopt the amended Housing Element to, as a staff report put it,
17 “remove the requirement for a vote of the electorate pursuant to Charter Section 423.” The City
18 Council will vote to adopt the amended Housing Element that eliminates the Section 423 right on
19 September 24, 2024.

20 30. In other words, the City Council has unilaterally eliminated Newport Beach
21 residents’ right to vote under Section 423 with respect to significant new housing development in
22 Newport Beach in the coming years.

23 **F. The City Offers No Factually or Legally Valid Justification for Eliminating**
24 **the Section 423 Right to Vote.**

25 31. The City Council and the Mayor of Newport Beach have failed to justify their
26 decision to amend the Land Use Element of the City’s General Plan without submitting it to the
27 voters. In fact, Newport’s Beach’s Mayor has taken the opposite position: following the July 2024
28 decisions to bypass Section 423, Mayor O’Neill expressed that, regardless of the City Council's

1 decision, Section 423 necessitated a public vote on the General Plan amendments needed to
2 implement the Housing Element. He stated, “I thought that the policies, principles and politics all
3 leaned toward not sending to a vote. But I read 423 to require a vote. So I couldn’t support
4 motions that interpreted 423 opposite that.” Yet Mayor O’Neill apparently felt no need to express
5 this purported disagreement on the record, further highlighting the unusual circumstances
6 surrounding the City Council’s decision. Instead, Mayor O’Neill abstained from the vote entirely
7 and later defended his decision as demonstrating “professional courtesy” to his fellow Council
8 members, despite their unlawful actions.

9 32. It is thus unsurprising that the City has failed to offer any legal rationale for its
10 position that California law prohibits a Section 423 vote, and it cannot provide one. The narrow
11 exception Section 423 provides if state or federal law “precludes a vote of the voters on the
12 amendment” does not apply here. The mere fact that voters might reject the implementation of the
13 Housing Element (and potentially cause the City compliance issues) does not *preclude* that vote
14 from happening in the first place, especially when Newport Beach residents may well vote to
15 approve the land use changes to the City’s General Plan necessary to implement the Housing
16 Element.

17 33. The early 2025 state law deadline for the City to implement the housing element
18 does not preclude a Section 423 vote, nor could it. The initiative power is enshrined in the
19 California Constitution, (Cal. Const., art. II, § 11), and “courts must resolve all doubts in favor of
20 the people’s exercise of the initiative power and uphold the validity of an initiative wherever it is
21 possible to do so,” (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531,
22 539). The Greenlight Initiative and the right to vote in Section 423 further concern the local
23 development and zoning of Newport Beach, issues that courts consider to be “municipal affairs.”
24 (See *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 774.) Under article XI, section 5 of the
25 California Constitution, Charter cities like Newport Beach also have “home rule” powers, that is,
26 they “are specifically authorized by our state Constitution to govern themselves, free of state
27 legislative intrusion, as to those matters deemed municipal affairs.” (*State Building &*
28 *Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555.) The State

1 can only interfere with Newport Beach’s self-governance, and the voting mechanism under
2 Section 423, if the law “addresses a matter of statewide concern” and the law is “reasonably
3 related” and “narrowly tailored . . . to avoid unnecessary interference in local governance.” (*Id.* at
4 556.) And even if any State law possibly passed muster under this standard, because Section 423
5 was passed by initiative, there must be a “clear showing” that the California Legislature sought to
6 preempt it. (*DeVita*, at 775-776.)

7 34. None of the comments by City staff and City Council members during the July
8 2024 discussions of these issues satisfies the showing that state law “precludes” a Section 423
9 vote, especially under the stringent showing needed to preempt a procedure created by initiative
10 on issues of land use in a home rule charter city. Instead, the City staff and City Council made
11 clear that the amendment to remove Section 423 from the proposed Housing Element was
12 motivated by concern about what *might* happen if voters rejected the Housing Element and land
13 use changes needed to implement it. Those “concerns” about the “what if” scenario of voter
14 disapproval of the proposed Housing Element are not a legally valid reason to eliminate the
15 Section 423 right to vote—and certainly do not “preclude” any such vote. Those concerns are also
16 overblown. The City Council discussed vague concerns over loss of “local control” if the Housing
17 Element was rejected, but that preference for “local” control does not override the control Section
18 423 provides to Newport Beach voters. And in any event, the City Council made no finding (nor
19 could they) that Newport Beach would, in fact, lose local control if voters rejected the proposed
20 Housing Element.

21 35. Another “what if” scenario the City Council discussed was the so-called “builder’s
22 remedy” that purportedly might be triggered if voters did not approve the proposed Housing
23 Element and the City were unable to stay in substantial compliance with state law. Found in
24 Government Code § 65589.5, the builder’s remedy restricts the bases upon which a city or county
25 can deny an application to build very low or moderate income housing. If a city’s housing
26 element is in “substantial compliance” with state law, then lack of compliance with zoning
27 requirements can be a basis to deny an application; if, however, a city’s housing element is not in
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1 substantial compliance with state law, a city’s ability to invoke zoning and density requirements
2 to deny an application to build such housing is limited.

3 36. The City Council expressed concern that housing would be built under the
4 “builder’s remedy” that would not necessarily align with the City Council’s desired zoning plan
5 as a basis to reject the Section 423 right to vote. But again, the mere fact that housing potentially
6 might be developed in a manner the City does not prefer (which, as discussed below, would only
7 be a possibility if voters rejected the proposed changes to the General Plan associated with the
8 Housing Element, the City is unable to adopt a new Housing Element by the state deadline, HCD
9 revokes Newport Beach’s “substantial compliance” status, *and* developers file a qualifying
10 builder’s remedy application) in no way *precludes* a vote on the proposed Housing Element as
11 would be necessary to avoid Section 423’s requirements.

12 37. The City Council’s discussions also exaggerated the impact of the builder’s
13 remedy. City staff, for example, stated that the builder’s remedy “scares staff quite a bit” and
14 asserted that it “has been used around the state” to bypass zoning, including residence density
15 requirements. But the builder’s remedy, while it has spurred various applications and litigation,
16 has yet to result in any significant amount of housing projects being built.¹ And even when it is
17 available, local jurisdictions retain discretion to deny builder’s remedy projects if they are unsafe
18 or their approval would violate state or federal law. (See Gov. Code § 65589.5, subd. (d)(1)–(5).)

19 38. As of September 19, 2024, the Legislature has enacted and the Governor has
20 signed Assembly Bills 1886 and 1893 (which will go into effect later this year) that moderate the
21 potential impact of builder’s remedy applications. Assembly Bill 1893 imposes limits on the
22 locations and density of builder’s remedy projects, mandates that such applications must comply
23 with “objective standards” set by the City, and clarifies that CEQA and other similar laws still
24 apply to such housing applications. Assembly Bill 1886, meanwhile, adds provisions to the state
25 housing laws clarifying that “substantial compliance” exists “when the local agency adopts the
26 housing element or amendment for the current planning period” and either (a) the HCD has found

27 _____
28 ¹ See <https://sfstandard.com/2024/04/02/california-builders-remedy-yimby-housing-law> (“Few, if
any, builder’s remedy projects have actually resulted in new housing—yet.”).

1 substantial compliance or (b) a court has found substantial compliance, and no subsequent
2 decision have reversed those determinations. Here of course, as discussed above, the City adopted
3 a Housing Element in 2022 that the HCD found was substantially compliant with state law—and
4 only a decision by the HCD or a court can reverse that finding of substantial compliance.

5 39. As a result, the builder’s remedy will not go into effect here unless (1) voters reject
6 the implementation of the Housing Element at the ballot box; (2) the City is unable to
7 expeditiously adopt a new housing element to meet the February 2025 deadline to implement the
8 Housing Element; (3) the HCD exercises its discretion pursuant to Government Code § 65585,
9 subdivision (i) to revoke its prior finding of substantial compliance based on a “failure to act” by
10 the City even as the City pursues voter approval pursuant to Section 423; *and* (4) developers file
11 applications that qualify under the builder’s remedy.

12 40. In short, the City Council relied on vague concerns about potential future events
13 which may or may not come to pass to take away Newport Beach residents’ right to vote under
14 Section 423.

15 **FIRST CAUSE OF ACTION**

16 **(Petition for Writ of Mandate, Code Civ. Proc. § 1085)**

17 41. Petitioner hereby re-alleges and incorporates by reference herein the allegations in
18 the preceding paragraphs.

19 42. Mandamus relief is generally available to compel a public agency to comply with a
20 mandatory duty or remedy an abuse of discretion. (See Code Civ. Proc. §§ 1085, 1094.5.) A local
21 government’s “failure to follow its own procedures provides the basis for the issuance of a
22 traditional writ of mandate.” (*CV Amalgamated LLC v. City of Chula Vista* (2022) 82
23 Cal.App.5th, 265, 285.)

24 43. Section 423 states that “[v]oter approval is required for any amendment to the
25 Newport Beach General Plan.” A “major amendment” is one that “significantly increases”
26 allowed density or intensity, including, by adding more than 100 dwelling units. Under Section
27 423, any such amendment “shall not take effect unless it has been submitted to the voters and
28 approved by a majority of those voting on it.”

1 50. On July 23, 2024, the City Council purported to adopt amendments to the General
2 Plan Land Use Element that would allow for more than 8,000 new housing units.

3 51. At that same hearing, the City Council purported to exempt the General Plan Land
4 Use Element amendments from the requirements of Section 423. The City Council has yet to
5 explain in any meaningful detail why it believed a vote under Section 423 was not required.
6 However, the Staff Report prepared for the July 23, 2024 meeting states that complying with
7 Section 423 could “significantly jeopardize the City’s ability to meet the stated February 2025
8 deadline for implementation [of its Housing Element], and is almost inevitable [sic] to result in
9 loss of compliance with State Housing Element Law.”

10 52. Pursuant to Government Code § 65588, Newport Beach was required to adopt its
11 updated Housing Element in 2021. (Gov. Code §§ 65583.4, 65888, subd. (e)(1)(A).) State law
12 further provides that the City has “three years and 120 days from the statutory deadline in
13 § 65588 for adoption of the housing element to complete any rezonings” required to implement
14 its Housing Element. (*Id.* §§ 65583.4, subd. (a).) The City therefore has until February 12, 2025
15 to complete rezonings to implement its Housing Element.

16 53. State law authorizes HCD to determine whether a local jurisdiction’s action
17 “substantially complies” with specified housing laws, including due to “any failure to implement
18 any program actions included in the [jurisdiction’s] housing element.” (Gov. Code § 65585, subd.
19 (i).) The builder’s remedy applies only to jurisdictions that have failed to adopt a revised housing
20 element “that is not in substantial compliance with this article.” (*Id.* § 65589.5, subd. (d)(5).)

21 54. The terms “substantially complies” and “substantial compliance” are recently
22 defined by statute. (Gov. Code § 65585.03.) Substantial compliance exists if (1) a Housing Plan
23 has been adopted, and (2) the HCD or a court has found substantial compliance. The plain
24 language of the statutory scheme thus indicates that compliance with each and every specified
25 deadline or requirement is not necessary to remain in substantial compliance. To the contrary, the
26 key components of substantial compliance are the *adoption* of a Housing Element, as opposed to
27 its implementation, and HCD or Court findings regarding substantial compliance.

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1 55. Newport Beach Stewardship Association contends that even if the City has not
2 adopted the updated Land Use Element by February 2025, the City will have remained in
3 “substantial compliance” with State law. Under State law as amended by Assembly Bill 1886,
4 only a finding by the HCD revoking its prior finding of substantial compliance would result in the
5 City no longer being in substantial compliance. The HCD could make no such finding. As of this
6 submission, the City has made significant progress towards implementing its Housing Element,
7 including preparing an inventory of housing sites, identifying appropriate areas for rezoning, and
8 preparing an EIR for any future amendment of the Land Use Element. The primary remaining
9 implementation step is the right of voter approval under Section 423.

10 56. Newport Beach Stewardship Association understands that the City, by contrast,
11 has taken the position that any failure to adopt the updated Land Use Element by February 2025
12 would necessarily mean the City was no longer in “substantial compliance” with State law. As
13 such, the City has predicted an immediate revocation of “substantial compliance” status upon that
14 deadline.

15 57. The disagreement between Newport Beach Stewardship Association and the City
16 concerning the correct interpretation of the phrases “substantially complies” and “substantial
17 compliance” in State housing laws for purposes of the builder’s remedy presents an actual
18 controversy fit for declaratory relief.

19 58. In the alternative, Newport Beach Stewardship Association seeks a declaration
20 that, regardless of whether Newport Beach is in “substantial compliance” with State housing laws
21 as of February 12, 2025, the City would still be entitled to reject “builder’s remedy” applications
22 based on the City’s zoning rules (under Government Code § 65589.5, subdivision (d)(5)) while
23 seeking to comply with the requirements of Section 423. Because charter cities like Newport
24 Beach have “home rule” authority over issues of “municipal affairs” under article XI, section 5 of
25 the California Constitution, State law can only preempt local laws on issues of municipal affairs
26 in Newport Beach if the State law “addresses a matter of statewide concern” and is “reasonably
27 related” and “narrowly tailored . . . to avoid unnecessary interference in local governance.” (*Vista*,
28 *supra*, 54 Cal.4th at 555.) If the local law is also passed by voter initiative, the California

1 Supreme Court additionally requires a “clear showing” that the Legislature intended to preempt
2 the initiative. (*DeVita, supra*, 9 Cal.4th at 775-776.). Here, the State law at issue (the builder’s
3 remedy) cannot interfere with the right found in Section 423. Section 423 was passed by voter
4 initiative and concerns land use, which is an issue of “municipal affairs” for which Newport
5 Beach, as a charter city, has the right to “home rule.” The builder’s remedy, however, is not
6 “narrowly tailored” to serve an issue of statewide concern, but rather, in these circumstances,
7 would unnecessarily trammel the local Section 423 process. And there has been no “clear
8 showing” that the Legislature intended to preempt the right to vote under Section 423. (*DeVita,*
9 *supra*, 9 Cal.4th at 775-776.) In such circumstances, the builder’s remedy cannot interfere with
10 the right to vote in Section 423.

11 59. Newport Beach Stewardship Association understands that the City, by contrast,
12 has taken the position that the builder’s remedy would go into effect if the February 12, 2025
13 deadline is not met, even if the City were seeking to comply with the Section 423 right to vote,
14 and has based its decision to eliminate that Section 423 right partially on that basis.

15 60. The disagreement between Newport Beach Stewardship Association and the City
16 concerning whether the builder’s remedy would go into effect while it seeks to vindicate the right
17 to vote under Section 423 presents an actual controversy fit for declaratory relief.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Petitioner prays for judgment as follows:

- 20 1. A writ of mandate directing the City Council to set aside Resolution No. 2024-58
21 and Resolution No. 2024-51.
- 22 2. A judicial declaration:
- 23 i) that the City will remain in substantial compliance with State housing laws
24 while it takes appropriate steps to comply with Section 423 and sends the proposed Land Use
25 Element to a vote (including a second vote, should the first fail, as contemplated in the Housing
26 Element); or
- 27 ii) in the alternative, even if the City is no longer in substantial compliance,
28 that the City’s home rule powers allow the rejection of building project applications filed

1 pursuant to Government Code § 65589.5 (i.e., builder’s remedy applications) based on City
2 zoning while the City takes appropriate steps to comply with Section 423 and sends the proposed
3 Land Use Element to a vote (including a second vote, should the first fail, as contemplated in the
4 Housing Element).

5 3. A judicial declaration to the effect that the City Council cannot bypass the local
6 voter requirement set forth in Section 423 to enact Resolution No. 2024-58 and Resolution No.
7 2024-51, or related provisions concerning the Housing Element.

8 4. An award of Petitioner’s reasonable fees and costs.

9 5. For any other relief as the Court deems proper and just.

10 Respectfully submitted,

11 Dated: September 24, 2024

KEKER, VAN NEST & PETERS LLP

12
13 By: 

14 BAILEY W. HEAPS
15 JASON GEORGE
16 JACQUELINE CONCILLA

17 Attorneys for Petitioner NEWPORT
18 BEACH STEWARDSHIP
19 ASSOCIATION
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VERIFICATION

As authorized by Code of Civil Procedure section 446, subdivision (a), because my office is not in the County in which Newport Beach Stewardship Association is located, I submit this verification. I have read this Verified Complaint and Petition for Writ of Mandate and am informed and believe that the matters therein are true and correct.

Executed at San Francisco, California on September 24, 2024.



Bailey W. Heaps