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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

NEWPORT BEACH STEWARDSHIP ASSOCIATION,

Petitioner and Plaintiff,

v.

CITY OF NEWPORT BEACH,

Respondent and Defendant.

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT

Date: April 24, 2025
Time: 2:00 p.m.
Dept.: CX104
Judge: Hon. Melissa R. McCormick

Date Filed: September 24, 2024

Reservation Number: 74440753

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I. INTRODUCTION

The City of Newport Beach is subverting the democratic process. That should not be allowed.

The Newport Beach City Charter is clear: major residential land use amendments to the Newport Beach General Plan ("General Plan") must be submitted to City residents for a vote. In the fall of 2022, the City amended a portion of the General Plan (the Housing Element) to ***plan*** for the construction of thousands of new units over the next eight years, but that amendment did not and could not authorize development and therefore no vote was required. When adopting that amendment, however, the City expressly acknowledged that implementation of that plan through amendments to the Land Use Element of the General Plan would require voter approval.

Over the next two years, the City set about updating the Land Use Element of the General Plan and related zoning ordinances to ***implement*** the Housing Element. That the contemplated amendments to the Land Use Element must be put to a vote of Newport Beach residents was ***never*** disputed. Rather, for ***more than a year***, the City planned to have its citizens consider and vote upon the latest change to its Land Use Element. But the City Council abruptly changed its mind. In July 2024, for reasons never fully articulated, the City Council decided it would no longer honor its own Charter and allow the people of Newport Beach to vote on its proposed amendments to the Land Use Element. It attempted to justify that decision on the ground that such a vote was "precluded" by state law.

The City is wrong. It has never pointed to any state law that precludes a vote of the people. The reason for that omission is simple: no such state law exists. Rather, it appears the City Council speculates that local voters might reject the City Council's proposal—which is to add more than ten thousand housing units—as a justification to avoid holding a vote. The City Council has it backwards. The fact that voters might reject the City Council's proposal only highlights why a vote—required by law—is so important. At bottom, the City either misunderstands, or has chosen to misrepresent, applicable state law and its consequences.

For the reasons set forth herein, Petitioner and Plaintiff Newport Beach Stewardship Association ("NBSA") respectfully asks that the Court grant the Petition, issue a writ requiring

that a vote be held consistent with the City Charter, and order declaratory relief confirming what is already plain: the City can hold the vote that its own law requires free of the consequences it fears. Judgment should enter in favor of NBSA.

II. BACKGROUND

A. Section 423 provides Newport Beach residents the right to vote on any Housing Element amendment that would significantly increase development.

In November 2000, Newport Beach voters overwhelmingly approved the so-called "Greenlight Initiative," adding Section 423 to the City Charter. (Declaration of Bailey W. Heaps in Support of Motion for Judgment; Movant's Index of Exhibits ("MI") Ex. 60 at 3-28.)[1] Section 423 requires voter approval for any amendment to the City's General Plan that would "significantly increase" the density or intensity of development in the City. (MI Ex. 71.)

> 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) . . . .
>
> "Voter approval is required" means that the amendment shall not take effect unless it has been submitted to the voters and approved by a majority of those voting on it. . . .
>
> This section shall not apply if state or federal law precludes a vote of the voters on the amendment.

(MI Ex. 71) As required by California law, the City's General Plan is "a comprehensive, long-term general plan for the physical development of the county or city." (Gov. Code § 65300, *et seq.*) A general plan includes a "housing element" that sets forth statutorily mandated elements and analyses regarding residential housing zoning and growth. (*Id.* § 65583.) A general plan must also include a "land use element" that "designates the proposed general distribution and general location and extent of the uses of the land" within the jurisdiction. (*Id.* § 65302, subd. (a).) Every jurisdiction's zoning ordinance must be consistent with its general plan. (*Id.* § 65860.)

[1] Because NBSA seeks traditional mandamus challenging a legislative act, not "administrative" mandamus, NBSA properly submits documentary evidence in support of its motion for judgment. These documents are subject to judicial notice for the reasons detailed in the concurrently filed Request for Judicial Notice.

B. The City plans for a Section 423 vote to implement the Housing Element.

Housing elements in general plans are not static, and California law requires that they be updated regularly (every five to eight years, depending on the municipality). (Gov. Code § 65583.) As part of the revision process, the California Department of Housing and Community Development ("HCD") determines each region's housing needs and, working with the region's council of governments, allocates those needs among the regions' municipalities and counties (the "Regional Housing Needs Allocation" or "RHNA"). (*Id.* § 65584.)

The City is currently in its sixth cycle of housing element amendments. (See MI Ex. 15 at 1.) On September 13, 2022, the City adopted the proposed housing element relevant here (the "Housing Element")—which includes the City's plan to comply with its RHNA. (*Ibid.*) 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. (MI Ex. 15, Exhibit A [hereafter, "Housing Element"] at 1-4.) Two days later, on September 15, 2022, the City submitted the proposed Housing Element to HCD for review and certification. (See MI Ex. 16 at 1) The proposed Housing Element notes multiple times that a Section 423 vote is required to implement the Housing Element. (Housing Element at 3-28 to 3-30, 4-3 to 4-4.) In an October 5, 2022 letter, after conducting a review of the proposed Housing Element, HCD certified that it was "in full compliance with [the] State Housing Element Law" and informed the City that it "must continue timely and effective implementation of all programs including . . . [i]nitiating a Ballot Measure for a Charter Section 423 Vote." (MI Ex. 16 at 1.) Pursuant to Government Code § 65583.4, subd. (a), the deadline for the City to carry out these implementation steps is February 12, 2025 (three years and 120 days after the deadline to adopt the Housing Element).

Following HCD's October 2022 approval, the City began taking steps to bring its Housing Element into effect. As set forth in the Housing Element itself, the City envisioned that implementation of the Housing Element would require considerable effort, including identifying areas for potential zoning changes and formulating potential rezoning strategies. (Housing Element at 4-2 to 4-45.) Implementation of the Housing Element also required several major land use approvals, including amendments to the City's General Plan Land Use Element, Zoning

Ordinance, and Local Coastal Program. (*Id.* at 3-4 to 3-126.) The City referred to those approvals collectively as the "Housing Element Implementation Program Amendments." (MI Ex. 17 at 1.) In early 2023, City staff and appointed committees began to undertake planning efforts and drafted the Housing Element Implementation Program Amendments. (See *Id.* at 10-14.)

In August 2023, initial versions of the Housing Element Implementation Program Amendments were released for public input. (*Id.* at 10-11.) They were then revised and re-released for public review on January 16, 2024 and March 29, 2024. (*Ibid.*) The City also began taking steps to comply with the California Environmental Quality Act (CEQA) in connection with those future approvals; a draft Environmental Impact Report (EIR) was released for a public review period on February 12, 2024. (*Ibid.*)

While the City worked to implement the Housing Element, City staff and officials continued to acknowledge the City's obligation to present the necessary General Plan amendments to a vote under Section 423. For instance, the Staff Report for the April 18, 2024 Planning Commission meeting, which recommended various actions to implement the proposed Housing Element Implementation Program Amendments, stated that the proposed General Plan amendment "would not take effect unless it has been submitted to the voters and approved by a majority of those voting on it." (MI Ex. 17 at 10.) That same staff report noted "the City has been working to bring the matter to a ballot vote as part of the November 5, 2024 General Election." (*Ibid.*) Further, in the June 2024 issue of Newport Beach Living, then-Mayor and Councilmember Will O'Neill confirmed that a Section 423 public vote would be held: "In November [2024], our residents will have the choice to approve that approach when the land use element of our city's general plan (implementing the housing element) is in front of them."[2]

Prior to the City Council's July 2024 decision, the last public meeting on the Housing Element Implementation Program Amendments occurred on April 18, 2024. At that meeting, the Housing Element Implementation Program Amendments and corresponding EIR were presented

[2] Newport Beach Living, Local Love Mayors Corner by Mayor Will O'Neill, available at https://www.newportbeachlivingmagazine.com/articles/mayors-corner-will-oneill-june-2024?rq=housing element.

to the City's Planning Commission. Following a presentation from staff and an opportunity for public comment, the Planning Commission recommended certification of the Final EIR and adoption of the Housing Element Implementation Program Amendments. (MI Ex. 21.) Notably, the Planning Commission again confirmed that the Housing Implementation Program Amendments "individually and/or collectively require a majority vote of the electorate" pursuant to Section 423. (*Id.* at 2-3.)

C. The City reverses course, and purports to eliminate a Section 423 vote to implement the Housing Element through Land Use Element amendments.

Despite repeated assurances to local residents that they would have the opportunity to vote on the City's proposed significant amendments to the General Plan Land Use Element, the City Council unexpectedly reversed its position and chose not to submit the proposed General Plan amendments for a local vote, as mandated by Section 423. On July 23, 2024, the City Council convened a public meeting during which two options were presented: complying with Section 423 by submitting the proposed General Plan amendments to local voters for their approval, or unilaterally approving the amendments without calling for a local vote as required by Section 423. (MI Exs. 40 at 23-2 to 23-3, 43 at 5.)

The City Council selected the second option, ignoring the flood of comments from concerned citizens asking that the City Council respect the City Charter and send the matter to a vote. The City Council memorialized that decision by adopting Resolution No. 2024-51, which purports to authorize amendments to the Land Use Element to enable the development of many thousands of housing units without voter approval. (MI Ex. 49.) Immediately thereafter, the City Council adopted Resolution No. 2024-58 to "initiate a narrowly focused amendment to the adopted and certified statutorily compliant 6th Cycle Housing Element of the General Plan to ***remove the reference to a vote of the electorate*** pursuant to Charter Section 423 as a constraint or as an implementing action." (MI Ex. 38, emphasis added.)

A few days later, the City released a proposed amended Housing Element for public comment. (MI Ex. 64 at 4.) As requested by the City Council, the amended version eliminated previous statements requiring a public vote under Section 423. (*Ibid.*) The amended document

now claims that a "Charter Section 423 vote is precluded, and the City will move forward with implementing the Housing Element without a Charter Section 423 vote." (*Id.* at 19.) Following the City Council's lead, on September 5, the City's Planning Commission adopted Resolution No. PC2024-019, which recommends that the City Counsel adopt the amended Housing Element to, as a staff report put it, "remove the requirement for a vote of the electorate pursuant to Charter Section 423." (MI Ex. 54 at 1.)

The City Council adopted the amended Housing Element to eliminate the Section 423 right on September 24, 2024. (MI Exs. 60, 70.) In other words, the City Council sought to unilaterally eliminate Newport Beach residents' right to vote under Section 423 with respect to significant new housing development.

On September 24, 2024, NBSA filed this action seeking a writ of mandate and declaratory relief.

III. LEGAL STANDARD

Challenges to legislative or quasi-legislative decisions are properly considered traditional mandamus actions under Section 1085 of the Code of Civil Procedure ("CCP"). (See *Wilson v. Hidden Valley Mun. Water Dist.* (1967) 256 Cal.App.2d 271, 277–78.) In a traditional mandamus proceeding, the court should issue a writ if the City's action was "arbitrary, capricious, entirely lacking in evidentiary support, or failed to follow the procedure required by law." (*Martis Camp Community Assn. v. County of Placer* (2020) 53 Cal.App.5th 569, 594.) Such actions are distinct from administrative mandamus proceedings under CCP section 1094.5, which pertain to an agency's adjudicative or quasi-adjudicative actions. (See, e.g., *Yazdi v. Dental Bd. of Cal.* (2020) 57 Cal.App.5th 25, 32; CCP § 1094.6, subd. (f).)[3]

[3] NBSA seeks traditional mandamus relief under CCP section 1085 rather than "administrative mandamus" under CCP 1094.5 because the City's actions here (i.e., the adoption of the Land Use element without a Section 423 vote) are legislative acts, not adjudicative or quasi-judicial ones. (*See Cormier v. County of San Luis Obispo* (1984) 161 Cal.App.3d 850, 855 ["The actions of the legislative body in enacting zoning regulations are generally held to be legislative. For instance, a city council acts in a legislative capacity when it adopts a General Plan Amendment."].) Even if the administrative mandamus standard applied, the outcome would not change because the City acted outside of its jurisdiction, ignoring law and fact. (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 516.)

With respect to section 1086's "beneficial[] interest[]" requirement for writs of mandate, "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166.)

"If a petition for a writ of mandate . . . presents no triable issue of fact . . . the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ." (CCP § 1094.) Declaratory relief can be granted in conjunction with a petition for writ of mandate. (*Malott v. Summerland Sanitary Dist.* (2020) 55 Cal.App.5th 1102, 1109 ["Where the allegations of the mandamus petition are sufficient, declaratory relief may be awarded in a mandamus action."].)

IV. ARGUMENT

A writ of mandate should issue and the Court should grant declaratory relief, because the City has plainly violated Section 423: the City Charter required a vote on the City's planned amendments to implement the Housing Element, but none was taken.

A. The Court should enter judgment in NBSA's favor because the City violated Section 423.

1. Section 423 mandates a vote on the implementation of the Housing Element through amendments to the Land Use Element.

There can be no reasonable dispute that Section 423 mandates a vote on the proposed amendments to the Land Use Element that are necessary to implement the City's Housing Element. Section 423 explicitly requires "voter approval" of any "major amendment" to the City's General Plan that "significantly increases" allowed "density" under the General Plan. (MI Ex. 71.) In relevant part, Section 423 defines "significantly increases" as meaning, among other things, "over 100 dwelling units (density)." (*Ibid.*) Here, the City proposes amending the Land Use Element of the City's General Plan to allow more than ***8,000*** new dwelling units, far exceeding the "100 dwelling unit" threshold. Section 423 thus requires "[v]oter approval" before

the Land Use Element amendments implementing the Housing Element can be adopted and, in fact, without such voter approval any amendment to the General Plan "shall not take effect." (*Ibid.*)

2. The Section 423 exception where federal or state law "precludes" a vote does not apply.

The City cannot justify its decision to forgo a vote on the grounds that "state or federal law ***precludes*** a vote of the voters on the amendment." (*Ibid.*) The plain meaning of "precludes" requires the City to show that state or federal law "prohibits" a vote or makes one "impossible." (Black's Law Dictionary (12th ed. 2024) [defining "preclude" to mean "[t]o prevent or make impossible; to rule out beforehand by necessary consequence."].) The City's burden to show "preclusion" by state law is high. (*See Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149 [the party claiming that "general state law preempts a local ordinance has the burden of demonstrating preemption"].)

Article XI, section 5 of the California Constitution grants charter cities like Newport Beach "home rule" powers of self-governance over issues of "municipal affairs." (*State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555.) And a local rule regarding land use, such as the Section 423 right governing the procedure for increasing intensity and density of housing, is an issue of municipal affairs. (See *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 774, 782.) In such areas of legislation—including land use and zoning—state law can override local law only if there is an actual conflict, such that charter city law is "inimical" to the state law. (*Aids Healthcare Foundation v. Bonta* (2024) 101 Cal.App.5th 73, 86.) And even where such a conflict exists, preemption or preclusion is not automatic—state law only controls if it "addresses a matter of statewide concern" and is "reasonably related" and "narrowly tailored to avoid unnecessary interference in local governance." (*State Building & Construction Trades Council of California v. City of Vista*, *supra*, 54 Cal.4th at 556.) To meet that standard, the California Supreme Court requires a "clear showing" that the Legislature intended to preempt a right granted by a voter initiative. (*DeVita v. County of Napa*, *supra*, 9 Cal.4th at 775-776.) And because courts must "jealously guard" the people's initiative power, all

"doubts" regarding the initiative power's construction (like whether Section 423 grants citizens the right to vote) must be resolved "in favor of the use of [the initiative] power." (*Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.)

The reality is that no state law "precludes" a vote under Section 423, and the City knows it. Although the City Council invoked this exception to Section 423's vote requirement, (MI Exs. 38 at 3, 49 at 10, 40 at 23-11 to 23-12, 64 at 17-3, 70 at 2), at no point did the City Council or City staff identify any provision of state law that ***precluded*** a vote, i.e., that prohibited a vote or made a vote impossible. That silence is telling. Moreover, the City's new position is diametrically opposed to what it told voters for more than ***two years***. (MI Exs. 17 at 9-10, 16 at 1, 15 at 11.) Ever since it began preparing its housing strategy, the City proceeded with the understanding that Section 423 mandated a vote. In fact, the City's adopted Housing Element explicitly required a Section 423 vote for its implementation—and state regulators approved that Housing Element (finding the City in compliance with state housing law) and encouraged the City to timely implement the Housing Element through a Section 423 vote. (Housing Element at 3-28 to 3-30, 4-2 to 4-4; MI Ex. 16 at 1.) And until July 2024, the City never even hinted that such a vote was somehow precluded by state law.

Although the City has yet to provide any meaningful explanation for its sudden change of heart, it appears the City believes that a Section 423 vote is "precluded" because of potential consequences should voters reject the proposed amendments to the Land Use Element. City staff, for example, provided the following hypothetical in a presentation to the City Council: local voters ***could*** reject the proposed amendments to the Land Use Element, which may ***potentially*** cause the City to miss the February 2025 deadline to implement the Housing Element, which in turn ***might*** cause HCD to revoke its prior finding that the City is in substantial compliance with state housing laws. (MI Exs. 28 at 12-18, 40 at 12, 43 at 12-13, 47, 69; Gov. Code § 65585.03 (eff. Jan. 1, 2025) [stating that "substantial compliance," or revocation thereof, requires a finding of the HCD or a court].) That HCD finding ***could***, in the City's eyes, potentially trigger enforcement actions against the City or ***potentially*** allow developers' use of the so-called "builder's remedy." (Gov. Code § 65589.5, subd. (d)(5) [limiting bases to reject affordable

housing projects based on zoning if a city has not adopted a substantially compliant Housing Element].)

But none of these potential asserted consequences ***preclude*** a Section 423 vote. The parade of horribles the City cites—that a Section 423 vote ***might*** lead to the Housing Element being rejected by voters, which ***might*** cause the City to miss the February 2025 deadline to implement a Housing Element, which ***might*** cause the HCD to revoke its finding of substantial compliance with state housing laws, which ***might*** invite enforcement or limit the City's ability to reject affordable housing projects—is nothing more than speculation stacked on top of speculation. As the Court of Appeal previously held when rejecting a challenge to a local voter approval requirement based on alleged constitutional and statutory defects, courts "should not presume" that voters will reject local actions required to comply with state law. (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 544, quoting *Yost v. Thomas* (1984) 36 Cal.3d 561, 574.) And the City ignores the fact that even if City voters reject the Land Use Element amendment and the City misses the February 2025 compliance deadline, "substantial compliance" status is not automatically revoked, but rather would require the HCD to exercise enforcement discretion while complying with procedural requirements (a notice and response period, for example) that would allow additional time for the City to seek voter approval. (See Gov. Code § 65585, subd. (l).)

In any case, none of these hypothetical consequences ***precludes*** a vote. Although the Housing Element Law includes mechanisms to incentivize or mandate compliance, such as potential regulatory action (Gov. Code § 65585, subd. (i)) or the builder's remedy (*id.* § 65589.5), the City has not identified any provision that purports to automatically ***override*** local initiatives like Section 423. Indeed, as far as the undersigned is aware, even the HCD—the agency tasked with enforcing the Housing Element Law—has never taken the position that local voter approval requirements are preempted by state law. And in fact, the cities of Cypress and Yorba Linda just

put similar votes on the November ballot for their residents (both of which passed).[4] (See MI Ex. 72, 73.) The City should have done the same.

The law demands more than mere speculation and conjecture to preempt procedures of local governance, especially those created by initiative. (*Aids Healthcare Foundation v. Bonta*, *supra*, 101 Cal.App.5th at 89 ("a state statute preempts local laws adopted through initiative only if there is a 'clear showing' or 'definite indication' of legislative intent to do so"); see also *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 743 ["no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws"].) The City was required to point to a state law demonstrating a "clear showing" that the Legislature intended to preclude compliance with local voter initiative requirements. (*DeVita*,9 Cal.4th at 775-776.) Indeed, where state law leaves implementation in the hands of local governments (like the Housing Element Law), the Supreme Court has reserved preemption only for circumstances where local action would "frustrate any feasible implementation" of state law. (*Yost v. Thomas*, *supra*, 36 Cal.3d at 574.) The City can make no such showing.[5]

Finally, the City is simply wrong as a matter of law about the legal consequences that would flow from missing the February 2025 deadline due to a Section 423 vote. As detailed in Section B.2, below, the HCD could not immediately revoke the City's "substantial compliance" status based on missing the February 2025 deadline to seek voter approval, and the builder's remedy (Gov. Code § 65589.5) does not apply where, as here, the City has adopted a compliant Housing Element but takes longer than expected to obtain voter approval to implement it.

The Court should issue a writ of mandate reversing the City's improper evasion of Section

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[4] In the case of Yorba Linda, the November 2024 vote was the *second* time the city has presented its strategy to local voters for approval. After its first proposal was rejected, the city successfully revised its strategy to address community concerns.

[5] Although not published authority, at least one other court faced with a similar dispute has found that it is inappropriate for a jurisdiction to find a vote "precluded" before even attempting to hold the vote. In *Building Industry Association v. City of Encinitas*, the court held that the City of Encinitas's requirement that voters approve significant increases in housing (a requirement passed by voter initiative) was ***not*** preempted by state housing laws as a general matter. (Case No. 37-2017-00023267-CU-WM-NC, slip. opn. at 4-5, attached as MI Ex. 75). Instead, the Court held that state housing laws could only override such voter approval requirements ***after*** voters rejected amendments to the General Plan twice, causing an "impasse" between local and state law. *Id.* (quoting *Yost*, *supra*, 36 Cal.3d at 574).)

423 and enter declaratory relief rejecting the City's interpretation of state law.

B. The Court should issue a writ of mandate and grant declaratory relief.

The City's improper decision to bypass the Section 423 right to vote warrants a peremptory writ of mandate requiring the City to submit the proposed amendments to the Land Use Element to a Section 423 vote, and declaratory relief rejecting the City's interpretation of state law.

1. The Court should issue a writ of mandate reversing the City's decision to evade a Section 423 vote.

Mandamus relief, which is available to compel a public agency to comply with a mandatory duty or remedy an abuse of discretion, is appropriate here. (CCP §§ 1085, 1094.5.) A local government's "failure to follow its own procedures provides the basis for the issuance of a traditional writ of mandate." (*CV Amalgamated LLC v. City of Chula Vista* (2022) 82 Cal.App.5th 265, 283.) Here, the City purported to adopt and give effect to an amended Land Use Element allowing thousands of new dwelling units without first obtaining voter approval. The City had a mandatory duty to comply with Section 423 and it failed to do so. The Court should issue a peremptory writ requiring the City to submit the proposed amendments to the Land Use Element to City voters as required by Section 423. The Court should also retain jurisdiction and order a return on the writ to ensure the City's compliance within a reasonable period. (*City of Carmel-By-The-Sea v. Bd. of Supervisors* (1982) 137 Cal.App.3d 964, 971 ["[T]he court which issues a writ of mandate retains continuing jurisdiction to make any order necessary to its enforcement"].)

2. The Court should issue declaratory relief rejecting the City's legal bases for asserting "preclusion" under state law.

The Court should also issue declaratory relief rejecting the City's understanding of the "consequences" of pursuing a Section 423 vote. Declaratory relief can be awarded in conjunction with a judgment on NBSA's petition for writ of mandate. (See *Malott v. Summerland Sanitation Dist.*, *supra*, 55 Cal.App.5th at 1109.) And declaratory relief is needed here given the City has denied its residents' the right to a Section 423 vote based on a spurious interpretation of state

law—namely, by assuming that voter rejection of the Housing Element would deprive the City of "substantial compliance" status and cause the builder's remedy to go into effect. It is appropriate for the Court to address these issues because the Legislature has empowered courts to decide the issue of "substantial compliance" (Gov. Code § 65585.03 (eff. Jan. 1, 2025)), and the interpretation of the builder's remedy (*id.* § 65589.5) concerns a question of statutory interpretation that "is a particularly suitable subject for a judicial declaration" (*Kirkwood v. Cal State Automobile Assn. Inter-Ins. Bureau* (2011) 193 Cal.App.4th 49, 59).

First, declaratory relief is proper because the City is wrong that it would no longer be in "substantial compliance" with state law if voters reject the Land Use Element amendments and the City misses the February 2025 deadline. "Substantial compliance" exists if a party has complied "in respect to the substance essential to every reasonable objective of the statute, as distinguished from mere technical imperfections of form." (*Citizens for Positive Growth & Preservation v. City of Sacramento* (2019) 43 Cal.App.5th 609, 620 (internal quotation marks omitted); cf. *Asdourian v. Araj* (1985) 38 Cal.3d 276, 284 [discussing policies of contractor licensing statute].) Here, a brief delay in implementation to obtain Section 423 approval would still meet every "reasonable objective of the statute." (*Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, 1106.) The Housing Element law has the purpose of requiring cities to assess housing needs, inventory resources and constraints relevant to meeting those needs, and create a program of local action to meet those needs. (See *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 222.) The City has accomplished those goals and substantially completed every step towards implementing its "program of local action." The only remaining step is voter approval under Section 423. The City's original Housing Element, approved by the HCD, contemplated a two-step process to obtain voter approval: a Section 423 vote in March 2024 and, if that proposal was rejected, an amended proposal submitted for a second vote (likely as part of the November 2024 general election). (Housing Element at 4-2 to 4-4; MI Ex. 40 at 12.) Even though the City missed that schedule (purportedly because the City faced delays in complying with ***other*** state law obligations, like CEQA), a short and reasonable delay beyond February 2025

for a similar two-vote schedule would still meet the "reasonable objectives" of the Housing Element law. (*Hoffmaster v. City of San Diego*, *supra*, 55 Cal.App.4th at 1106.)

Second, declaratory relief is warranted because the City is wrong, both as a matter of statutory interpretation and constitutional law, that the builder's remedy in Government Code § 65589.5 would go into effect if it misses the February 2025 deadline. As a statutory matter, the builder's remedy limits a city's ability to deny applications to develop affordable housing based on zoning requirements only if a city fails to "adopt[]" a substantially compliant housing element. (Gov. Code § 65589.5, subd. (d)(5).) The remedy does ***not*** address the failure to meet the Housing Element implementation deadline, referred to as the "rezoning" deadline. (See *ibid.*; *id.* § 65583.) Where the "rezoning" deadline is missed, the Legislature created a different remedy, requiring cities to approve building applications so long as they comply with the proposed rezoning in the Housing Element (or current zoning in areas that will not be rezoned). (*Id.* § 65583, subd. (g)(1).). The Legislature thus created a remedy for missing the "rezoning" deadline that does not toss out a city's state-law-compliant plans for housing development, as the builder's remedy purportedly would do. To "avoid conflict" between these two remedies and satisfy the Legislative purpose of each (*People v. Trimble* (1993) 16 Cal.App.4th 1255, 1259), the "rezoning" remedy, not the builder's remedy, would apply if the City missed the February 12, 2025 deadline.

Applying the builder's remedy in these circumstances also would improperly interfere with the City's home rule under the state Constitution. As discussed above, Section 423, a provision passed by voter initiative, concerns an issue of "municipal affairs" within the City's "home rule" authority under Article XI, section 5 of the California Constitution. State law, such as the builder's remedy, can override the home rule authority of a charter city like Newport Beach only if the state law "addresses a matter of statewide concern" and is "reasonably related" and "narrowly tailored . . . to avoid unnecessary interference in local governance." (*Vista*, 54 Cal.4th at 555.) And, because it was passed by voter initiative, there must be a "clear showing" that the Legislature intended to preempt Section 423. (*DeVita*, 9 Cal.4th at 775-776.)

Here, even if the builder's remedy were to apply in these circumstances, that law is not

narrowly tailored to a matter of statewide concern. It offers a one-size-fits-all punishment that would allow developers to dictate the location of affordable housing projects without regard to the City's plans in its Housing Element for future development. (Gov. Code § 65589.5, subd. (d)(5).) Far from incentivizing affordable housing, application of the builder's remedy would be ***detrimental*** to the statute's purported goal by interfering with the City's plan for affordable housing development and the political process for implementing it. The builder's remedy thus cannot go into effect if the City misses the February 2025 deadline because of a Section 423 vote.

Overall, the City has misinterpreted state law to justify its decision to bypass Newport Beach Residents' Section 423 right to vote. The Court should provide the following declaration regarding state law for the reasons discussed in the prior section:

- The City will remain in substantial compliance with state housing laws even if it misses the February 12, 2025 deadline to implement the Housing Element if such delay is caused by an attempt to obtain voter approval under Section 423 and the City has proposed and has made good faith efforts to implement a plan for obtaining such approval on a reasonable timeline; and
- The City may reject builder's remedy applications submitted pursuant to Government Code § 65589.5 to the extent such applications are based on the City's purported failure to meet the February 12, 2025 deadline for implementation of the Housing Element, and so long as the City has proposed and makes good faith efforts to obtain voter approval under Section 423 on a reasonable timeline.

These declarations of state law incorporate a reasonable time frame for the City to obtain voter approval under Section 423. The Court thus should retain jurisdiction to ensure that the City creates and follows a plan for obtaining Section 423 voter approval on a reasonable timeline. (*City of Carmel-By-The-Sea v. Bd. of Supervisors*, *supra*, 137 Cal.App.3d at 971.)

V. CONCLUSION

For the foregoing reasons, the Court should grant NBSA's petition for writ of mandate and request for declaratory relief in the manner described above.

Dated: December 4, 2024

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