Final Ruling

CASE NUMBER:	22TRCP00203
CASE NAME:	*New Commune DTLA, LLC; Leonid Pustilnikov v. City of Redondo Beach; City Council of the City of Redondo Beach*
MOVING PARTY:	Plaintiff/Petitioner, New Commune DTLA, LLC and Leonid Pustilnikov
RESPONDING PARTY:	Defendants/Respondents, City of Redondo Beach, and City Council of The City of Redondo Beach
TRIAL DATE:	Not Set.
MOTION:	(1) Petition for Writ of Administrative Mandamus
Ruling:	(1) The Writ is DENIED. The Court finds Measure DD to be pre-empted by statewide law, nullifying Measure DD's requirement of voter approval of the zoning changes contemplated by the Draft Housing Element at issue. The challenged Draft Housing Element is thus not void or voidable because of an absence of voter approval, and no voter referendum is required as a condition subsequent to the passage of Resolution CC-2207-048. Further, the Court finds the City substantially complied with the statewide law's requirement of HCD approval as of the July 5, 2022 date of Resolution No. CC-2207-048, given the series of HCD's conditional approvals leading up to that date, the City's inclusion of HCD's previously required components in that Resolution and Draft Housing Element, and HCD's September 1, 2022 ratification of Resolution CC-2207-048 as substantially complying with the statewide Housing Element Law as amended.

RULINGS

I. Legal Standard

This matter concerns a petition for writ of administrative mandamus under Code of Civil Procedure section 1094.5. Evidence Code section 664 creates a presumption "that official duty has been regularly performed." (Evid. Code, § 664.) "In a section 1094.5 proceeding, it is the responsibility of the petitioner to produce a sufficient record of the administrative proceedings; '... otherwise the presumption of regularity will prevail, since the burden falls on the petitioner attacking the administrative decision to demonstrate to the trial court where the administrative proceedings were unfair, were in excess of jurisdiction, or showed' prejudicial abuse of

discretion." (*Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 354.) This presumption of correctness includes giving great weight to the agency's credibility determinations. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 819.) Here, there is no dispute that Petitioner has produced the record of the administrative proceedings.

A writ of mandate will issue "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station ...." (Code Civ. Proc., § 1085, subd. (a).) Under Code of Civil Procedure section 1094.5(b), the issues for review of an administrative decision are: whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (Code Civ. Proc., § 1094.5(b).)

"A trial court's review of an adjudicatory administrative decision is subject to two possible standards of review depending upon the nature of the right involved. (Code Civ. Proc., § 1094.5, subd. (c).) If the administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32 . . .) The trial court must not only examine the administrative record for errors of law, but must also conduct an independent review of the entire record to determine whether the weight of the evidence supports the administrative findings. . . If, on the other hand, the administrative decision neither involves nor substantially affects a fundamental vested right, the trial court's review is limited to determining whether the administrative findings are supported by substantial evidence. (*Strumsky v. San Diego County Employees Retirement Assn.*, supra, at p. 32; . . .)" (*Wences v. City of Los Angeles* (2009) 177 Cal. App. 4th 305, 313 [Citations omitted].)

A petition for traditional mandamus is appropriate in all actions "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station...." CCP §1085. "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person." (CCP §1085(a).)

A traditional writ of mandate under CCP section 1085 is the method of compelling the performance of a legal, ministerial duty. (*Pomona Police Officers' Assn. v. City of Pomona*, (1997) 58 Cal.App.4th 578, 583-84.) Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance. (*Id.* at 584 (internal citations omitted).) Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health*, (2011) 197 Cal.App.4th 693, 701.)

A ministerial act is one that is performed by a public officer "without regard to his or her own judgment or opinion concerning the propriety of such act." (*Ellena v. Department of Insurance*, (2014) 230 Cal.App.4th 198, 205.) It is "essentially automatic based on whether certain fixed standards and objective measures have been met." (*Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v. County of Solano Dept. of Resource Mgmt.*, (2008) 167 Cal.App.4th 1350, 1359.) By contrast, a discretionary act involves the exercise of judgment by a public officer. (*County of Los Angeles v. City of Los Angeles*, (2013) 214 Cal.App.4th 643, 653-54.)

II. Discussion

Petitioners move under Code of Civil Procedure § 1094.5 and have requested this Court issue a writ requiring the City to comply with the Housing Element Law. Based on the briefings, supplemental briefings, and oral arguments, the Court issues the following rulings and analysis set forth below.

A. Redondo Beach Local Measure DD

In 2008, City voters adopted Measure DD, which added Article XXVII to the City Charter. (AR 1295-1299.) Petitioner contends that per Article XXVI, section 27.4(a):

"Each major change in allowable land use shall be put to a vote of the People; provided, however, that no such change shall be submitted to the voters unless the City Council has first approved it. A major change in allowable land use shall become effective only after approval by the City Council and a majority of the voters of the City voting 'YES' on a ballot measure proposing such change at either a regular or special municipal election."

The primary purpose of Measure DD was to "[g]ive the voters of Redondo Beach the power to determine whether the City should allow major changes in allowable land use, as defined below, by requiring voter approval of any such proposed change...." (AR 1295 [Charter, Art. XXVII, § 27.1(a)].) Article XXVII emphasizes the voters' intent to receive "environmental information on proposals for major changes in allowable land use" and to ensure that the City provides "accurate and unbiased environmental review of all proposals for major changes in allowable land use, so that they may minimize their adverse traffic and land use impacts and maximize neighborhood compatibility before the voters decide on any such change." (Id., § 27.1(b) and (c).)

A "major change in allowable land use" is a defined term, meaning any "proposed amendment, change, or replacement of the General Plan ..., of the City's zoning ordinance ... or of the zoning ordinance for the coastal zone ..." that meets certain conditions, largely focused on potential impacts resulting from the land use change. (AR 1296-1297 [Charter, Art. XXVII, § 27.2(f)(1)-(3)].) Concerns regarding increased traffic congestion resulting from excess development were a particular concern underlying Article XXVII. (See AR 1295 [Charter, Art. XXVII, § 27(b) ["The City's traffic circulation system is already oversaturated, and at or near gridlock during rush hours, and, as such, is inadequate to support the City's existing level of

development"]; see also AR 1295-1297 [Charter, Art. XXVII, § 27.2(c)(1)-(3), (d)(1)-(21)]. Petitioner highlights that "Major Change in Allowable Land Use" is defined to include, among other things, any proposed amendment to the General Plan that would result in an increase of more than 25 additional residential units, as compared to the as-built condition or that would "change a nonresidential use to residential or a mixed use resulting in a density of a greater than 8.8 dwelling units per acre whether or not such unit is used exclusively for residential purposes." (Charter, Art. XXVII, § 27.2, (c)(2) & (f)(1)-(3).) Article 27 further provides that it is to be "liberally construed to accomplish its purposes." (Charter, Art. XXVII, § 27.10.)

B. Was City Required to Obtain Voter Approval of the Draft Housing Element

The City's Planning Commission and City Council have both indicated in the Administrative Record that the Housing Element is not a Measure DD zoning change, but rather is a "policy document" that is prefatory to implementing the intentions of the Housing Element such as by adopting a zoning change. In fact, City argued that City Council found that a negative declaration under CEQA was appropriate and that because there would be no significant environmental impacts, no mitigation measures were required. (AR 8075.) Instead, City notes that City Council found that future updates to the City's land use plan to accommodate the RHNA allocation "will require further CEQA analysis and will constitute a major change in allowable land use pursuant to Article XXVII Section 27.2 (f) Definitions" of the City's Charter. (AR 8077.)

The Court disagrees with City's contention that the Housing Element is merely a policy document. Here, the Housing Element designates dozens of sites, most of which are currently zoned for industrial or commercial uses, for residential use at densities of up to 55 du/ac, in order to facilitate the development of hundreds of new residential units. (Housing Element, Table B-2, pp.158–60.) Although the Court understands the City's argument that their Housing Element has proposed potential changes to land use, and that the Charter's vote requirement does not apply to hypothetical situations, the Court also understands that pursuant to Government Code § 65589.5(d)(1-5) a local agency shall not disapprove a housing development project unless it makes specified written findings. Specifically, Government Code § 65589.5(d)(5)(A) will allow for disapproval of a local agency "if the housing development project…is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with section 65588 that is in substantial compliance with this article." (Gov. Code § 65589.5(d)(5).) However, this section also specifies that the above "paragraph cannot be utilized to disapprove or conditionally approve a housing development project if the housing development project is proposed on a site that is identified as suitable or available for very low, low- , or moderate-income households in the jurisdiction's housing element, and consistent with the density specified in the housing element, even though it is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation." (Gov. Code § 65589.5(d)(5)(A).) Thus, so long as the proposed sites are identified as suitable or available for very low, low- , or moderate-income households, the likelihood the proposed land use will become an actual change in the land use is quite high. This

indicates to the Court that the City's Housing Element is more akin to an actual change in land use than it is a potential change in land use.

Based on the above, the Court agrees that, if not for preemption (discussed in detail below), the City's Housing Element would have required voter approval based on Measure DD.

C. Preemption and the Home Rule

Relevant Legal Authority

Petitioners concedes in their opening brief that for a charter city like Redondo Beach, the charter is "the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law." (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170.) Although not discussed in detail by either party, the Court finds the issue of preemption to be squarely relevant in the analysis of this Petition.

State preemption of local legislation is established by article XI, section 7 of the California Constitution. An ordinance or regulation contradicts state law when it is inimical to or cannot be reconciled with state law. (*O'Connell v. City of Stockton*, (2007) 41 Cal.4th 1061, 1068.) A contradiction does not exist when the state law provides a general concept, and the local ordinance or regulation reasonably interprets or defines the general concept. (*County of Tulare v. Nunes*, (2013) 215 Cal.App.4th 1188, 1202.) Even if the state law and the ordinance apply to similar subject areas, there is no contradiction so long as the regulation "does not prohibit what the statute commands or command what it prohibits." (*Sherwin-Williams*, *supra*, 4 Cal.4th at 902.) However, when a state law contains a specific provision, the regulation or ordinance may not contradict that provision in any way. (*Ex Parte Daniels*, (1920) 183 Cal. 636, 641–48.) "The power of the initiative may be preempted in [any of] three ways: (1) the Legislature may so completely occupy the field in a matter of statewide concern that all, or conflicting, local legislation is precluded; (2) the Legislature may delegate exclusive authority to a city council or board of supervisors to exercise a particular power over matters of statewide concern, or (3) the exercise of the initiative power would impermissibly interfere with an essential governmental function." (*Citizens for Planning Responsibly v. County of San Luis Obispo*, ("*Citizens*") (2009) 176 Cal.App.4th 357, 371.

Further, charter cities such as Redondo Beach are governed by Article XI, section 5, subdivision (a) of the California Constitution, which authorizes charter cities to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs. Article XI, section 5, subdivision (a) provides: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." (Article XI, section 5, subdivision (a).)

The California Supreme Court in *California Federal Savings and Loan Association v. City of Los Angeles* ("*California Fed. Savings*") (1991) 54 Cal.3d 1, set forth an analytical framework

for resolving whether or not a matter falls within the home rule authority for charter cities. (*State Building & Construction Trades Council of California v. City of Vista* ("*Vista*"), 54 Cal.4th 547, 556.) The four-part test in *Vista* applies to determine whether the Housing Element violates the municipal affairs doctrine. The four factors include: (1) whether the subject of regulation is a municipal affair; (2) whether there is an actual conflict between the local measure and the state law; (3) whether the state law addresses a matter of statewide concern; and (4) whether the state law is reasonably related to addressing the matter and narrowly tailored not to unduly interfere with local control. (*Vista*, 54 Cal.4th at 556.)

1. Whether the Subject of Regulation is Municipal Affair

Whether a subject of regulation is a municipal affair is determined by reference to both: (1) Article XI, section 5(b), which has an express, non-exhaustive list of municipal affairs (*Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 700 ("*Anderson*"); and (2) "the historical circumstances presented" (*California Fed. Savings*, 54 Cal.3d at 1), which may illuminate the meaning of the term "municipal affair" in article XI, section 5(b). (*Vista*, 54 Cal.4th at 557-58.) This Court notes that courts and legislatures long have recognized and repeatedly affirmed land use and zoning quintessentially municipal affairs. (*Miller v. Board of Public Works* (1925) 195 Cal. 477, 495; *Schad v. Mt. Ephraim* (1981) 452 U.S. 61, 68; *DeVita v. County of Napa*, ("*DeVita*") (1995) 9 Cal. 4th 763, 782.)

2. Whether there is an Actual Conflict

If the subject of regulation is a municipal affair, then the court considers whether there is an actual, inimical conflict between the pertinent city charter provision, ordinance, or regulation, on one hand, and the state law in question, on the other hand. (*Vista*, 54 Cal.4th at 556.) A conflict is inimical if it would be impossible to comply with both the local measure and the state law at the same time. (*Lanier v. City of El Centro* (2016) 245 Cal.App.4th 1494, 1505.)

To address issues of local governments yielding to neighborhood pressure and lowering site density, in 2002 the Legislature passed AB 2292 (the "No Net Loss Law"), which prohibits a local jurisdiction from reducing residential density below the figures used in its housing element unless certain conditions are met. §65863 (added by Stats. 2002, c. 706 (AB 2292, §1)). AB 2292 requires a city to ensure that its housing element inventory can accommodate its share of the RHNA throughout the planning period. Section 65863 provides that a city may not allow development of a parcel of land with fewer units by income category than the share allocated in a city's housing element unless the city makes written findings supported by substantial evidence that the reduction in density is consistent with the locality's general plan and housing element, and that the remaining sites identified in the housing element are adequate to accommodate the jurisdiction's share of the regional housing need. (Gov. Code § 65863(b)(1)(A), (B).)

In 2017, the Legislature passed SB 166 to strengthen the No Net Loss Law by closing loopholes, including a city's ability to approve "high-end market-rate housing" or commercial uses on sites identified in their housing elements for lower income households. As amended by SB 166, section 65863 requires that once a site is identified in a city's RHNA allocation, that site must remain available or, if built upon, the city must within 180 days identify a new site to accommodate

its RHNA allocation. Essentially, SB 166 requires a city to maintain adequate sites for low-cost housing development at all times, not just at the beginning of the eight-year RHNA cycle. SB 166 did not amend section 65700, and therefore SB 166 did not apply to charter cities. However, in 2018, in order to address further loopholes identified in cases such as *Kennedy Commission v. City of Huntington Beach* (2017) 16 Cal.App.5th 841 (analyzed below) and its failure to amend section 65700, the legislature passed SB 1333. SB 1333 expressly made section 65863, the No New Loss Law, applicable to charter cities and amended section 65700 to extend the applicability of sections 65300.5, 65301.5, 65359, 65450, 65454, 65455, 65460.8, 65590, 65590.1, and Article 10.6 (commencing with section 65580) to charter cities.

Here, the Court believes that an actual conflict exists between the Housing Element law, SB 1333, and Measure DD. An example of such a conflict is present in one of the driving forces of the enactment of SB 1333. Specifically, in 2017, an appellate court decision, *Kennedy Commission, supra,* challenged whether charter cities were required to comply with state laws regarding the adoption of specific plans even where an adopted specific plan results in development approvals that are inconsistent with a housing element that is approved by the Department of Housing and Community Development (HCD) as providing adequate lower-income housing. Relevant to *Kennedy Commission*, in 2013, the City of Huntington Beach adopted an HCD-approved housing element that provided for affordable housing adequate to accommodate its RHNA. The housing element also referenced a specific plan that would contain some of the lower-income housing that would allow the City to meet its RHNA goals. However, responding to citizen concerns, in 2015, the City amended its plan to provide fewer units of lower-income housing. The HCD notified the City that because it had amended the specific plan in this manner, its housing element was no longer in compliance with state law. Several plaintiffs also sued over the adoption of the specific plan, seeking to invalidate it on the bases that state law provides that "no specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan." The appellate court found that this consistency requirement did not apply to charter cities because Government Code § 65700 specifically provided that certain portions of the Planning and Zoning law did not apply to charter cities, and the city had not adopted an ordinance or charter amendment requiring consistency. As such, the city of Huntington Beach was able to adopt a specific plan with zoning rules that were inconsistent with its adopted housing element, eliminating sites that were intended to accommodate affordable housing when originally approved by HCD.

Based on the above, SB 1333 was enacted as to not allow charter cities to use loopholes to evade the requirements of housing element law. Here, this Court finds that Measure DD offers a similar, if not more immediate risk that the City of Redondo Beach may run afoul of the housing element law as amended. Although not per se an issue in this case, the Court notes that Measure DD may bar Redondo Beach from complying with state law so long if City voters continue to vote against substantial changes in affordable housing uses in the city. The Court recognizes that a similar argument was made in *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, where the Fist District found that a local measure requiring a supermajority vote of the Board of Supervisors and a vote of the electorate to amend the San Mateo County Local Coastal Program did not prevent updating of the county's housing element, despite arguments that such a requirement would make future periodic review and updating of the County's housing element "virtually impossible." (38 Cal.App.4th at 542.) However, the

difference between *San Mateo County Coastal* and the case at bar is that Housing Element Laws have been amended multiple times since Measure DD was enacted, and the statewide law cannot be followed at the same time as Measure DD, and thus is subject to conflict preemption.

For example, Government Code section 65584.04 states that when at least two years prior to a scheduled revision required by section 65588, each council of governments, or delegate subregion as applicable, shall develop a proposed methodology for distributing the existing and projected regional housing need. Section 65584.04 further states that the following factor, amongst others, shall be included to develop the methodology that allocates regional housing needs: "(B) The availability of land suitable for urban development or for conversion to residential use, the availability of underutilized land, and opportunities for infill development and increased residential densities. The council of governments may not limit its consideration of suitable housing sites or land suitable for urban development to existing zoning ordinances and land use restrictions of a locality, but shall consider the potential for increased residential development under alternative zoning ordinances and land use restrictions." (Gov. Code § 65584.04(d)(2)(B).) This suggests that Petitioner's argument that City should have received voter approval prior to including the subject sites in its submitted housing element plan fails as section 65584.04(d)(2)(B) does not allow for local governments to disregard its consideration of suitable housing sites or land suitable for urban development based on existing zoning ordinances or land use restrictions in which voting pursuant to Measure DD would identify.

Further, if, as the City argues, Measure DD were to be applied to allow voting on the plan after HCD approval of the housing element, Government Code § 65589.5(d)(5)(A), would also trigger conflict preemption. As noted above, section 65589.5 will allow for disapproval of a local agency "if the housing development project...is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with section 65588 that is in substantial compliance with this article." (Gov. Code § 65589.5(d)(5).) However, this section specifies that the above "paragraph cannot be cannot be utilized to disapprove or conditionally approve a housing development project if the housing development project is proposed on a site that is identified as suitable or available for very low, low- , or moderate-income households in the jurisdiction's housing element, and consistent with the density specified in the housing element, even though it is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation." (Gov. Code § 65589.5(d)(5)(A).) Thus, so long as the proposed sites are identified as suitable or available for very low, low- , or moderate-income households, a vote pursuant to Measure DD could not disapprove of the submitted plan, even if the accepted proposed project is inconsistent with both the City's jurisdiction's zoning ordinance and general plan land use designation.

Thus, the Court finds an actual conflict between Measure DD and the Housing Element Laws.

3. Whether the Housing Bill addresses a Matter of Statewide Concern

Whether a state law addresses a matter of statewide concern hinges on "how the state constitution allocates governmental authority between charter cities and the state." (*Vista*, *supra*, 54 Cal.4th at 557.) The phrase "statewide concern" is an ultimate legal conclusion that requires courts to allocate powers between local and state legislative bodies in the most sensible and appropriate fashion. (*California Fed. Savings*, *supra,* 54 Cal.3d at 17.) "In other words, for state law to control, there must be something more than an abstract state interest, as it is always possible to articulate some state interest in even the most local of matters." (*Vista*, *supra*, 54 Cal. 4th at 560 (quoting *California Fed. Savings*, *supra*, 54 Cal. 3d at 18).) If the state law does not address a matter of statewide concern, then the state law does not prevail over the conflicting city measure. (*Vista*, *supra*, 54 Cal.4th at 556.) A subject of regulation can be both a municipal affair and a matter of statewide concern. (*Anderson*, *supra*, 42 Cal.App.5th at 702; *Codding Enterprises v. City of Merced* (1974) 42 Cal.App.3d 375, 377.)

The outcome can depend, at least in part, on whether the subject of regulation has extraterritorial dimensions or effects, meaning that it does not obey city boundaries but rather spills over and beyond them, and therefore is appropriately addressed on a statewide basis. (*Vista*, *supra*, 54 Cal.4th at 557-58.) This determination is made based on case law, historical circumstances presented in the trial court, and legislative declarations, findings, and history, which are entitled to great weight, but are not controlling. (*California Fed. Savings*, *supra*, 54 Cal. at 18, 20, n. 16; *Vista*, *supra*, 54 Cal.4th at 558.) The court is required to defer to legislative estimates regarding the significance of a given problem and the responsive measures that should be taken toward its resolution." (*California Fed. Savings*, *supra,* 54 Cal.3d at 24.) Any fair, reasonable and substantial doubt whether a matter is a municipal affair or broader state concern must be resolved in favor of the legislative authority of the state. (*City of Los Angeles v. Tesoro Refining and Marketing Co.* (2010) 188 Cal.App.4th 840, 848-49.) If the Legislature has established a comprehensive regulatory scheme for a subject, then the express or implied goal of uniformity suffices to preclude local action that would disrupt that uniformity. (*Fiscal v. City and County of San Francisco*, (2008) 158 Cal.App.4th 895, 919 (firearms regulations) (*citing Long Beach Police Officers Assn. v. City of Long Beach*, (1976) 61 Cal.App.3d 364).)

In SB 166 and SB 1333, the Legislature declared that the lack of affordable housing is a matter of statewide concern. The author of SB 166 stated that it focuses on one of the biggest barriers to increasing affordable housing supply: a lack of appropriately zoned land for the construction of new housing in many localities. Consistent with the author's statement, the Legislature declared in SB 166 that the No Net Loss Law is a reform to facilitate and expedite the construction of affordable housing. Similarly, the Legislature declared for SB 1333 that "the serious shortage of decent, safe, and sanitary housing for low- and moderate-income households that was first identified in 1979 continues," and that it enacted SB 1333 "to address the lack of affordable housing in the state, which is of vital statewide importance, and that ensuring the location, development, approval, and access to housing for all income levels in all jurisdiction in the state is a matter of statewide concern. As noted above, the author of SB 1333 asserted that it was necessary because the *Huntington Beach* decision threatened to undermine California's Housing Element Law and SB 1333 would ensure that charter cities do not inappropriately subvert the goals stated in required general plan policies, including approved housing elements. Thus, the Legislature has repeatedly and expressly declared lack of adequate housing to be a matter of

statewide concern. (*Buena Vista Gardens Apartments Ass'n. v. San Diego Planning Dep't*, ("*Buena Vista*") (1985) 175 Cal.App.3d 289, 306.)

Further, over the past fifty (50) years, numerous case decisions have upheld statewide housing and land-use statutes and regulations as overriding conflicting charter-city local measures like Measure DD, notwithstanding the home-rule doctrine. In 2019, *Anderson* upheld the Surplus Land Act ("SLA") (§54220 *et seq.*) against a charter city's home-rule challenge. 42 Cal.App.5th at 683. The court held that the shortage of sites available for affordable housing development was a matter of statewide concern in the context of the charter city's challenge to the application of SLA section 54220, which required municipalities disposing of surplus land to give first priority to affordable housing development. The *Anderson* court held that the SLA advances state land use policy objectives by mandating a uniform approach to the disposition of local government land that is no longer needed for government use. By requiring municipalities to prioritize surplus land for the development of low- and moderate-income housing, the statute addresses the shortage of sites available for affordable housing development as a matter of statewide concern. (42 Cal.App.5th at 693.)

The *Anderson* court found that while City had a readily identifiable interest in affordable housing and the regional spillover effects of insufficient housing demonstrate extramunicipal concerns justifying statewide application of the Act's affordable housing priorities. (*Anderson, supra*, 42 Cal.App.5th at 711.) Judicial decisions have consistently recognized the statewide dimension of the affordable housing shortage in relation to various impositions by the state into the realm of local affairs. (*Id.* at 709.) *Anderson* quoted the California Supreme Court in *California Building Industry Assn. v. City of San Jose*, (2015) 61 Cal.5th 435, 441 ("*California Building*") as follows: "It will come as no surprise to anyone familiar with California's current housing market that the significant problems arising from a scarcity of affordable housing have [...] become more severe and have reached what might be described as epic proportions in many of the state's localities." (*Id.* at 708-09.)

The *Anderson* Court relied on four appellate decisions issued over the last five and half decades holding unequivocally that the provision of sufficient housing for Californians is a matter of statewide concern:

> "Judicial decisions predating *California Building* have recognized the statewide dimension of the affordable housing shortage in relation to various impositions by the state into the realm of local affairs. (See *Green v. Superior Court*, (1974) 10 Cal.3d 616, 625...[citing "enormous transformation in the contemporary housing market, creating a scarcity of adequate low-cost housing in virtually every urban setting"]; *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept.*, (1985) 175 Cal.App.3d 289, 306] [finding "need to provide adequate housing" is a statewide concern and rejecting home rule challenge to state provision that mandated charter city to include certain actionable components in its "housing element"]; *Bruce v. City of Alameda*, (1985) 166 Cal.App.3d 18, 22...["locally unrestricted development of low-cost housing is a matter of vital state concern"]; *Coalition Advocating Legal Housing Options v. City of Santa*

Monica, (2001) 88 Cal.App.4th 451, 458…[noting the Legislature and courts have declared housing to be a matter of statewide concern]."

(*Anderson*, *supra*, 42 Cal.App.5th at 709-10.)

The *Anderson* court concluded that "the well-documented shortage of sites for low- and moderate-income housing and the regional spillover effects of insufficient housing demonstrate 'extramunicipal concerns' justifying statewide application of the [SLA's] affordable housing priorities." (*Id.* at 711.) Although the Court acknowledges that *Anderson* primarily concerned procedural state law, the Housing Element Laws are expressly designed to remedy the failure of California cities to comply with the Housing Element Law and RHNA zoning laws such that low-cost housing remains unavailable and a housing "crisis". This lack of low-cost housing in concededly a matter of statewide concern.

4. Whether the Housing Element Laws are Reasonably Related and Narrowly Tailored.

If the state law is not reasonably related to a matter of statewide concern, it cannot prevail over the conflicting city measure. (*Vista*, *supra*, 54 Cal.4th at 556.) If the state law is reasonably related to addressing a matter of statewide concern, but it unnecessarily interferes with local control, then the state law still cannot prevail over the city measure. (*Ibid.*) Only where the state law both is reasonably related to a matter of statewide concern and does not unnecessarily interfere with local control will the state law prevail. (*Ibid.*) A state law passes this test if it legitimately addresses the matter of statewide concern and does not thwart local control. (*Huntington Beach*, *supra*, 44 Cal.App.5th at 278-79.) Here, the Court finds that the statutes and bills relating to the Housing Element are reasonably related to the statewide concern of providing low-cost housing as they make it simpler for housing developments to be built by removing local obstacles to the development of sites where affordable housing can be added. Further, the statutes are tailored to address each of their specific purposes.

5. Section Conclusion

Based on the above, the Court holds that City was not required to seek voter approval of the Draft Housing Element because Measure DD, which purports to require voter approval of a draft housing element or a zoning change that would result in, for example, "oversaturated" traffic circulation, is preempted by California State Housing Element Law.

D. Whether the Zoning Proposed by the Housing Element Satisfies the Requirements of Low-Income Housing

Next, the Petitioner has argued that the zoning proposed by the Housing Element fails to satisfy the requirements for low-income housing. If a "jurisdiction is unable to identify adequate sites to accommodate its current planning period's RHNA for lower income households . . . then the jurisdiction must include a program in its housing element that identifies developable sites that complies with section 65583.2(h) and includes all the components specified in section 65583.2." (*Martinez v. City of Clovis* ("*Clovis*") (2023) 90 Cal.App.5th 193, 241.) Petitioner

notes that section 65583.2(h) requires that the program accommodate 100 percent of the "very low and low-income" units allocated to the city, and allow the development of those units by right. Further, the sites identified to accommodate such housing "shall be zoned with minimum density and development standards that permit at least 16 units per site at a density of . . . at least 20 units per acre" in jurisdictions like the City. (Id.) Section 65583.2(h) further provides:

> At least 50 percent of the very low and low-income housing need shall be accommodated on sites designated for residential use and for which nonresidential uses or mixed uses are not permitted, except that a city or county may accommodate all of the very low and low-income housing need on sites designated for mixed use if those sites allow 100 percent residential use and require that residential use occupy 50 percent of the total floor area of a mixed use project.

(Gov. Code, § 65583.2(h).)

As discussed in previous hearings, the parties in this case have very divergent interpretations of the statute. Petitioner has drawn an analogy to the facts in *Clovis*, noting that there, the respondent city attempted to satisfy its obligation to accommodate low-income housing by means of an overlay zone that was itself consistent with the density standards specified in section 65583.2(h), but which left the city's base zoning in place. (*Id.* at 238.) Petitioner went on to explain that in an exhaustive discussion of subdivision (h), the Court of Appeal explained that because the "the statute's language plainly requires zoning of these sites at a minimum density of at least 20 units per acre," imposing an overlay zone does not satisfy the statute, where the base zoning permits development at a lower density. (*Id.* at 240.) The *Clovis* Court concluded the city had failed to comply with the Housing Element Law:

> In sum, section 65583.2(h) clearly imposes a minimum density requirement when a jurisdiction is required to rezone sites to accommodate a shortfall for the current planning period or the carryover from the prior planning period. While the [overlay] complies with this minimum density requirement, the base zoning does not. Because development may occur at a density that is lower than the statutory minimum, the [overlay] sites do not comply with section 65583.2(h)

(*Id.* at 244.) The Court went on to find that HCD's approval of the overlay was "clearly erroneous," and thus, that the city's housing element did not substantially comply with the Housing Element Law, despite the rebuttable presumption of validity created by HCD's approval. (*Id.* at 243.)

Petitioner argued that the City's housing element relies on the same zoning strategy rejected by the Court of Appeal in *Clovis.* The City's RHNA allocation includes 936 very low-income units and 508 low-income units. (AR 7937.) After accounting for entitled projects and projected ADUs, and adding a 10 percent buffer, the City determined it needed to accommodate another 1,395 very low and low-income units. (AR 7939.) Instead of redesignating sites to meet the requirements of 65583.2(h), however, the City's Housing Element relies largely on a "Residential Overlay" that will "allow either the underlying use, the residential use at a gross

calculation of density, or both as a mixed-use site." (AR 7862-7863, emph. added; see also AR 7940-7953, 7967.) Petitioner submits that 1,223 units of the 1,413 units the City claims it will accommodate rely on the Residential Overlay. (AR 7953.) Under *Clovis*, Petitioner argues that none of those units can be counted toward the City's obligation to accommodate low-income housing. Moreover, Petitioner contends that nearly all of the properties included in the overlay are currently zoned commercial or industrial, meaning development can occur on all of these cites without any residential component.

Further, Petitioner notes that in addition to the minimum density requirement, Section 65583.2(h) also requires that the City: (1) accommodate 50 percent of its low-income housing need on sites designated exclusively for residential use; or (2) accommodate all of its low-income need on sites designated as mixed-use that (a) allow 100 percent residential use and (b) require a minimum of 50 percent residential use. (Gov. Code, § 65583.2(h); *Clovis* at 242-43 ["Section 65583.2(h)'s requirement that at least 50 percent of the very low and low income housing need be accommodated on sites designated for exclusively residential uses, and the exception for sites designated as mixed use when those sites allow 100 percent residential use and require residential use to occupy 50 percent of the total floor area of a mixed-use project, are in addition to the minimum density and development standards set forth in the prior sentence."], emph. added.) However, Petitioner contends that City's housing element fails to comply with that aspect of 65583.2(h), since the City relies on sites that do not require any residential development to satisfy the vast majority of its low-income housing allocation.

In opposition, Respondent City correctly distinguishes the overlay in the City of Redondo from that in *Clovis* because City's "is applied to existing older industrial and commercial uses that are ripe for redevelopment." (AR 7942.) City also asserted that the housing element did not apply the overlay to properties already zoned for residential uses, as was the case in *Clovis*, and thus there are no "overlapping" densities for residential uses. City posits that the concern in *Clovis* – that residential development could occur at a density lower than the statutory minimum, due to the underlying residential zoning on properties in the overlay – is not present in this case because the overlay sites are not in lower density residential zones.

Next, City notes that Petitioners incorrectly assert that Section 65583.2(h) requires that the designated sites either accommodate 50 percent of the (unmet) lower income housing need on exclusively residential sites, or accommodate all of the lower income housing need on mixed use sites that require a minimum of 50 percent residential use. (POB at 20:6-16.) On the contrary, City contends nothing in Section 65583.2(h) says that a city must require any residential development. City clarifies that the statute requires a local government to allow 100 percent residential and must require 50 percent residential use "of a mixed-use project" if the agency is relying on sites that are not exclusively zoned for residential uses for more than 50 percent of the unmet lower income RHNA. (See Gov't Code § 65583.2(h).)

This Court first looks to the plain language of the disputed portion of Section 65583.2(h): "...**except** that a city to county may accommodate **all** of the very low and low-income housing need on sites designated for mixed use if those sites allow 100 percent residential use and require that residential use occupy 50 percent of the total floor area of a mixed-use project." The Court reads this as the exception; it appears to be based on the fact that the second half of the sentence

starts with "except" and states that ***all*** of the very low and low-income housing, that the statute was referencing prior to this exception, may be accommodated on sites that are designated for mixed use if those sites allow 100 percent residential use and require that residential use occupy 50 percent of the total floor area of a mixed-use project. Looking at an Assembly Analysis concurring with amendments adopted by the State Senate, it appears to the Court that the fact that the amendment to the statute -- added to require the mixed-use sites that allow for 100% residential use -- assuages the State Senate's fear that commercial development would occupy all or large portions of sites needed for affordable housing. If the "mixed-use" locations could be 100% occupied by residential use, than the commercial development will not be occupying all or a large part of that space, when 50% of that space is required to actually be used for residential use. Further, this fear is assuaged by the rest of the subsection requirement preceding the sentence in question, of 20 residential units per acre, as all developments must meet the minimum density requirement.

As such, the Court agrees with the City's "plain language" interpretation of section 65583.2(h) and does not find, on its face, any issues with the City's Housing Element relying largely on a "Residential Overlay" that "allow[s] either the underlying use, the residential use at a gross calculation of density, or both as a mixed-use site," or that 1,223 units of the 1,413 units the City claims it will accommodate rely on the Residential Overlay so long as the units comply with the minimum density requirement and are eligible for 100% residential use, but require 50% residential use.

Next, this Court acknowledges that on July 10, 2023, Petitioner filed a Request for Judicial Notice in support of the reply brief. The RFJN sought to submit evidence of the legislative intent of Government Code § 65583.2. The Court grants the RFJN but analyzes it as bearing on the Petition differently than Petitioner contends. Petitioner argues that the legislative history of section 65583.2 is contrary to City's interpretation of subdivision (h). Petitioner notes the original version of section 65583.2(h), adopted in 2004, did not include the second option, and instead, required 50% of the low-income housing need to be accommodated on sites designated solely for residential use. (Petitioner's Exhibit L, p. 17.) Petitioner went on to explain that in 2014, the Legislature considered amendments to make the provision more flexible, and during that proves, the bill (AB 1690) was amended for the express purpose of ensuring that sites designated for low-income housing could not be redeveloped without including a minimum amount of residential development. Petitioner contends that as explained in an Assembly Analysis concurring with amendments adopter by the State Senate:

> The Senate amendments address concerns surrounding the likelihood that affordable housing will actually be developed on mixed-use sites. While many cities and counties have adopted mixed-use zones, these sites do not necessarily require mixed uses or the inclusion of housing on a site. As a result, allowing a city or county to count mixed-use sites towards accommodating its affordable housing needs could result in commercial development occupying all or large portions of sites needed for affordable housing. As the rezoning program only applies if a local government fails to identify adequate sites to accommodate its RHNA share, it is especially important to encourage the actual development of affordable housing in these localities. With this in mind, the Senate amendments narrow the bill's original

mixed-use zoning provision by only permitting mixed-use sites that allow 100% residential use and require at least 50% residential floor area.

(Petitioner's Exhibit O, p. 36.)

Despite Petitioner's efforts to use the legislative history, the Court still is not persuaded by their reading of the statute or the Assembly Analysis. The 2014 amendment added the mixed-use option, and instead of leaving it as is, AB 1690 appears to this Court to narrow the new addition as to ensure that this new amendment still maintains the goal of actual development of affordable housing in these localities. Even taking the statute as read by City, the Court believes that such a reading supports the Assembly Analysis in that the original concern involved mixed-use zones not necessarily being required to implement mixed-uses or the inclusion of housing on the site. However, even reading the statute as an exception, the amendment requiring these mixed-use sites to allow for 100% residential use and ***require*** 50% residential floor area ensures that affordable housing will actually be developed on the mixed-use sites. Based on this, the Court DENIES the writ of mandate as to this issue.

E. Whether the City's Reliance on Nonvacant Sites to Accommodate More Than 1,000 Low-Income Units is Supported by Substantial Evidence

Petitioner contends that City's reliance on nonvacant sites to accommodate more than 1,000 low-income units is not supported by substantial evidence. In an action taken to challenge the validity of a housing element, there shall be a rebuttable presumption of the validity of the element or amendment if, pursuant to section 65585, the department has found that the element or amendment substantially complies with the requirements of this article. (Gov. Code § 65589.3.)

The standards for inventory of land, and the methodology required are as follows, and will each be considered by this Court in analyzing the subject sites: Pursuant to Government Code 65583(a)(3), "[a]n inventory of land suitable and available for residential development, including vacant sites and sites having realistic and demonstrated potential for redevelopment during the planning period to meet the locality's housing need for a designated income level, and an analysis of the relationship of zoning and public facilities and services to these sites, and an analysis of the relationship of the sites identified in the land inventory to the jurisdiction's duty to affirmatively further fair housing." For nonvacant sites, the inventory of land shall include a description of the existing use of each property, and if a site is owned by the city or county, the description shall also include whether there are any plans to dispose of the property during the planning period and how the city of county will comply. (Gov. Code § 65583.2(b)(3).) Further, for these nonvacant site, the city or county shall specify the additional development potential for each site within the planning period and shall provide an explanation of the methodology used to determine the development potential. (Gov. Code § 65583.2(g)(1).) The methodology shall consider factors including the extent to which existing uses may constitute an impediment to additional residential development, the city's or county's past exercise with converting existing uses to higher density residential development, the current market demand for the existing use, and analysis of any existing leases or other contracts that would perpetuate the existing use or prevent redevelopment of the site for additional residential development, development trends,

market conditions, and regulatory or other incentives or standards to encourage additional residential development on these sites. (*Ibid.*) Lastly, when a city or county is relying on nonvacant sites to accommodate 50 percent or more of its housing need for lower income households, the methodology used to determine additional development potential shall demonstrate that the existing use identified does not constitute an impediment to additional residential development during the period covered by the housing element. (Gov. Code § 65583.2(g)(2).) An existing use shall be presumed to impede additional residential development, absent findings based on substantial evidence that the use is likely to be discontinued during the planning period. (*Ibid.*)

4001 and 4051 Inglewood Avenue (North Tech District; Redondo Beach Plaza including Tenant Von's Parking Lot)

City indicates that this site currently includes a mix of single-story commercial, retail, auto-related uses, and restaurants, with large surface parking areas and outdoor storage. The City notes it determined the existing conditions are ripe for redevelopment and planned for 55 dwelling units per acre, with 35 lower income units and 140 above moderate-income units. As part of the methodology offered by City in coming to this determination, they offered that the property owners of the North Tech District and Redondo Beach Plaza (largest shopping center within the North Tech District) have both communicated a strong interest and experience with introducing high density residential uses or mixed uses to their commercial centers. Although Petitioner argues that the Vons' tenant has an absolute right to veto any potential plan to add housing to the center, City contends that this argument ignores other portions of the lease. City claims that the lease states that the tenant's consent to changes regarding the "size and arrangement of the Common Area (including parking areas and traffic circulation and flow patterns)... shall not be unreasonably withheld, delayed or conditioned." Further, City contends that a residential development that would provide a large group of potential walk-in customers weighs in favor of future residential development or mixed-use development of the site, reducing the need for as many parking spaces to accommodate customers.

Here, the City and the HCD by virtue of its substantial compliance declaration have raised the statutory presumption. While approval or consent by the Vons' tenants is not a certainty, the Court finds substantial evidence to support the proper inclusion of this development site in the HCD-approved Housing Element. Petitioner has not rebutted the presumption on the record presented.

South Bay Market Place (Parking Field for Retail Stores, 486 Low-Income Units or 1/3 of total RHNA demand)

Here, Petitioner contends that this site includes four separate parcels, which indicates to have two different owners under the "South Bay Marketplace" designation. One aims to accommodate 114 low-income units, another aims to accommodate 157 lower-income units, the third aims to accommodate 62 lower-income units, and the fourth aims to accommodate 153 low-income units. Petitioner notes that the Draft Housing Element acknowledges that these properties are currently used for commercial purposes, but claims that the residential

development on the parking lots would not require displacement of existing uses on sites. However, Petitioner argues that the Draft Housing Element fails to back this contention up with any actual evidence, and instead suggests City has not yet even attempted to contact the property owners, stating it "will engage the Waterfront and Economics Development Department to facilitate direct and targeted communications with property owners" about potential development.

In opposition, City argues that it retained an expert to evaluate the feasibility of developing affordable housing on a parking field that currently serves retail tenants, and that the expert's report concluded that "the development of the Project on the Site is feasible from a physical perspective, as well as from a financial perspective..." (Respondent's AR 10426-10428.) The Court acknowledges that City submitted some evidence to support this site, however, pursuant to Government Code § 65583.2(g)(2), when a city or county is relying on nonvacant sites to accommodate 50 percent or more of its housing need for lower income households, the methodology used to determine additional development potential shall demonstrate that the existing use identified does not constitute an impediment to additional residential development during the period covered by the housing element. The Court finds substantial evidence to support the City's contention that the existing use identified does not constitute an impediment to additional residential development during the period covered by the housing element in a physical and financial sense. The Court acknowledges that the City has failed to provide evidence as to the leases on the property or communications with the owners of the property, but the feasibility report by the City's expert satisfied the Court as supporting HCD's approval and its concomitant presumption. Thus, Petitioner has not overcome the rebuttable presumption as to this site.

Industrial Flex South of proposed new Green Line Station and Transit Center (Near South Bay Galleria, 273 Low-Income Units)

For these sites, Petitioner has claimed that the City did not contact the property owner to see if they were amenable to residential development. However, City argues that South Bay Galleria has already been entitled for 300 units, including 30 very low-income units and that the CEQA review for that project also evaluated the project with an additional 350 units, 70 of which would be affordable. City also indicates that the owner has expressed a willingness to provide the additional housing and pursue the necessary entitlements as a second phase to the project, which can occur within the planning period of the Housing Element. Based on the evidence presented by the City, the Court finds substantial evidence to support the inclusion of this site and finds that Petitioner has failed to overcome the statutory HCD presumption.

Six Sites Grouped Together at PCH, 190th St, and Meyer Lane (238 Low-Income Units)

Lastly, with all of these sites, Petitioner again relies on the argument that for all six of these sites, City did not contact the property owners to see if they would be amenable to residential redevelopment. In opposition, City argues that the first three sites are identified as MU-1 sites. City notes the first site includes an older (closed) commercial use with a large surface parking lot and the latter two sites are composed of older commercial buildings with low existing "floor area ratios," meaning the sites have large surface parking lots or unused space.

Further, City has provided land-to-value ratios for each of the parcels, the construction dates of the existing buildings, and the anticipated units on the various parcels. Further, the final three sites are identified as sites included in the 190th Street Residential Overlay. City suggests that staff confirmed in the housing element itself that property owners continued to "express interest in and support for rezoning the areas as proposed." The Court finds substantial evidence to support the inclusion of this site and finds that Petitioner has failed to overcome the statutory HCD presumption.

F. City's Adoption of the Draft Housing Element Prior to HCD's Review

Lastly, Petitioner has argued that even if the Housing Element was effectively adopted and is substantially compliant, the City was out-of-compliance until at least September 1, 2022. Petitioner contends that City failed to meet its deadline because the July 5, 2022 Draft Housing element was not submitted to HCD before the element was adopted, and thus the Element was not effective until September 1, 2022 when HCD completed its review. Under the statewide law, a city shall consider HCD-adopted guidelines in preparation of the housing element. (Gov. Code § 65585(a).) At least 90 days before the city adopts a housing element, or at least 60 before adoption of an amendment to the housing element, it must be submitted to HCD to review whether it complies with the Housing Element Law. (Gov. Code § 65585(b)(1).) The City shall consider HCD's findings in adopting its housing element. (Gov. Code § 65585(e).) In their reply, Petitioners assert that even if this Court were to determine that the Draft Housing Element was effectively adopted and is compliant with law, which this Court does, Petitioners assert that the date of such compliance is still relevant to determining the City's obligations going forward.

The administrative record demonstrates an interactive process between the City and HCD concerning this cycle of the housing element process. During the course of a drawn-out submittal and approval process, HCD periodically indicated its conditional approval of the City's earlier submittals prior to the adoption of the Draft Housing Element in the July 5, 2022 Resolution No. CC-2207-048. Because that resolution contained and satisfied the conditions HCD had previously indicated were its requirements for final, formal approval of the Draft Housing Element, and because HCD ratified the City Council's Draft Housing Element in its September 1, 2022 determination, the Court finds that the City substantially complied with the Housing Element Law and that its Housing Element was effectively adopted as of the July 5, 2022 date of the Council Resolution. Because the Court finds that Measure DD is preempted by the statewide law and thus no future vote of City's residents is required as a precondition of the Draft Housing Element being adopted, the Petition is denied.

The City is to submit a proposed Judgment with citations to the record of the key factual elements of this Ruling.