Revisiting *City of Morgan Hill*: Fixing California's Direct Democracy Preemption Test

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California has a housing crisis. Despite the state government's best efforts to build more homes, local governments and local voters are finding new ways to circumvent those requirements. One such loophole allows California voters to propose non-compliant housing plans through the ballot initiative process or effectively veto their local governments' housing allocation decisions through a referendum. Although voters rarely use this loophole, the California Supreme Court should step in and prevent it from growing in popularity. The court can do so by simply making a small change to a legal test that determines when local initiatives and referenda are preempted by state law.

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INTRODUCTION

California is in the midst of a decades-long housing crisis caused in part by a drastic housing shortage.[1] It is abundantly clear that the cost of renting or owning a home in California is too expensive and continues to increase.[2] The high cost of housing directly contributes to California's high rate of homelessness.[3] And even for folks who can afford housing, high costs cause overcrowding and longer commutes for Golden State residents.[4]

To respond to this housing crisis, California has to build a lot of housing. A 2015 legislative report indicated that California might need to build 200,000 to 240,000 new homes to "seriously mitigate its problems with housing affordability."[5] And while the exact amount of housing needed is "a moving

1. *See, e.g.*, MAC TAYLOR, LEGIS. ANALYST'S OFF., CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 20–21 (2015), https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf [https://perma.cc/DYZ6-TM6U] (describing California's housing shortage as attributable, at least in part, to the slow rate of housing development in California as compared to other states); Conor Dougherty, *Twilight of the NIMBY*, N.Y. TIMES (June 5, 2022), https://www.nytimes.com/2022/06/05/business/economy/california-housing-crisis-nimby.html [https://perma.cc/YPV3-HHSX] (explaining how local politics contributes to the housing shortage in California).

2. *See, e.g.*, Travis Schlepp, *Median Home Price Hits 15-Month High in California*, KTLA 5 (Sept. 18, 2023), https://ktla.com/news/california/median-home-price-hits-15-month-high-in-california/ [https://perma.cc/6Z3T-RKZ4] (reporting that housing prices in California have continued to rise as affordability has continued to drop with the average price of a single-family home reaching $858,800 in August 2023); Lynn La, *Rent Drives up California's Cost of Living*, CALMATTERS (Aug. 2, 2024), https://calmatters.org/newsletter/california-cost-of-living-rent-increases/ [https://perma.cc/9H73-J8YU] ("36% of California adults surveyed said that the cost of living, economy and inflation are the state's most pressing issues . . . ."); *see also* Ben Christopher & Manuela Tobias, *Californians: Here's Why Your Housing Costs Are So High*, CALMATTERS (Jan. 16, 2024), https://calmatters.org/explainers/california-housing-costs-explainer/ [https://perma.cc/YZP7-XWLF] (summarizing the reasons behind California housing costs being so high, including the housing shortage, low wages, high rent, expensive land, and more).

3. *See, e.g.*, Sam Levin, *Who's Unhoused in California? Largest Study in Decades Upends Myths*, GUARDIAN (June 20, 2023), https://www.theguardian.com/us-news/2023/jun/20/california-affordable-housing-crisis-homelessness-study-myths-older-black-residents [https://perma.cc/BD3L-QDDW] (characterizing the homelessness crisis as a "public health catastrophe" directly caused by high rent and housing costs).

4. *See, e.g.*, TAYLOR, *supra* note 1, at 29–33 (finding that "a 10 percent increase in a metro's median rent is associated with a 4.5 percent increase in individual commute times" and that California households are four times more likely to be considered "crowded," which housing experts define as more than one adult per room in a household).

5. *Id.* at 4.

target," California is "nowhere close to closing" the gap between production and demand.[6] To close that gap, California passed a flurry of bills to encourage housing production.[7] Most importantly for this Note, the legislature enacted a number of statutes that limit the power of local governments to prevent or delay the construction of housing.[8] The state now requires every local government[9] to adopt a "general plan" that describes the municipality's "development policies and objectives" relating to the urban environment.[10] General plans have a few constituent elements, one of which is the "housing element."[11] Housing elements require cities to plan for a certain amount of housing.[12] Housing elements are also the subject of numerous high-profile political fights between the state and local governments, as California increasingly tries to "compel local governments to approve more housing."[13] Even if local governments don't resist, their voters sometimes act independently to stop new developments.[14] Housing element laws, as well as other pro-development policies, show that there is a clear and growing consensus from the state government that it disfavors localism in housing development and planning.

Although the courts have largely upheld the legislature's efforts to set housing policy,[15] the judiciary is very protective of voters' rights to exercise their direct democracy powers of initiative and referendum on planning issues.[16] This creates tension between the state government's desire to increase housing and

6. Christopher & Tobias, *supra* note 2.

7. *Id.*

8. *Id.*

9. A local government, for the purposes of housing elements, is defined as a city, city and county, or county. CAL. GOV'T CODE § 65582(d) (West 2025). I use the term in the same way in this Note.

10. Lesher Commc'ns, Inc. v. City of Walnut Creek, 802 P.2d 317, 319 (Cal. 1990).

11. GOV'T § 65582(d).

12. *Id.* § 65583.

13. Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 283 Cal. Rptr. 3d 877, 886 (Ct. App. 2021); *see*, *e.g.*, Dan Walters, *California's Housing Duel Between State and Local Governments Intensifies*, CALMATTERS (Feb. 12, 2023), https://calmatters.org/commentary/2023/02/california-housing-element-government/ [https://perma.cc/FUB4-HFG2] (reporting on a longstanding duel between California's state and local governments related to state-imposed quotas for facilitating housing construction); *see also* Jon Healey, *State Wins a Round in Fight with Huntington Beach to Build More Housing*, L.A. TIMES (Jan. 19, 2024), https://www.latimes.com/california/story/2024-01-19/state-wins-a-round-in-fight-with-huntington-beach-to-build-more-housing [https://perma.cc/8QFM-ZF2Q] (reporting on California's lawsuit against Huntington Beach claiming that the City defied state efforts to develop more housing).

14. *See, e.g.*, Ben Christopher, *Ballot Battles, Lawsuits and a Ticked Off Millionaire: What's Behind Eureka's Parking Lot War?*, CALMATTERS (July 25, 2024), https://calmatters.org/housing/2024/07/eureka-affordable-housing-parking/ [https://perma.cc/FC3W-M3DQ] (explaining the "parking lot-to-affordable-housing" plan that the City of Eureka, California intended to execute and the growing pushback from locals).

15. *See, e.g.*, *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d at 883 (holding that that the legislature's efforts to set housing policy were constitutional).

16. *See* City of Morgan Hill v. Bushey, 423 P.3d 960, 965 (Cal. 2018) (holding that it is the duty of the court to "jealously guard" and liberally construe the referendum and initiative powers of the people).

local electorates who wish to exercise their direct democracy powers to effectively veto state-mandated housing in their own backyards. Permitting these functional vetoes raises housing prices for everyone.[17] If the state legislature's goal is indeed to preempt localism from blocking the development of new housing, then the local initiative and referendum powers provide a loophole through which voters can circumvent this goal. The slew of new housing bills from the state legislature show that it clearly prefers that housing planning be done at the regional and statewide levels, and that preference should be given judicial deference. Just as courts have allowed the state legislature to curb local governments' power to plan for housing, they should revisit the precedent that allows local electorates to stall the implementation of housing mandates.

Fortunately, such a change in the doctrine is possible. The current preemption test, which the California Supreme Court articulated in *City of Morgan Hill*, allows the state to impliedly preempt local direct democracy if (1) the state statute deals with a statewide concern and (2) there is a "definite indication" or "clear showing" that the legislature intended to preempt the initiative or referendum power.[18] That "definite indication" exists when either (a) the legislature has created a system of regulation so pervasive that the local government's action is considered administrative or (b) the state's legislative authority is delegated "exclusively to the local legislative body," as shown by the statutory text.[19] To resolve the issue of local governments stalling development, all the California Supreme Court would have to do is combine both parts of the "definite indication" prong into one comprehensive test. In essence, this means that the court should (1) look for a statewide concern and (2) consider the size and scope of the state regulation. This is not a particularly novel approach: The late California Supreme Court Justice Armand Arabian contemplated a more expansive exclusive delegation test while dissenting in *DeVita v. County of Napa*.[20] Following Justice Arabian's model, my proposed test eliminates the administrative-legislative inquiry and instead incorporates a new procedural component into the exclusive delegation test.

In Part I, this Note gives a background explanation of the relevant parts of California constitutional law. Part II gives a brief explanation of housing elements and examines *City of Encinitas*, a recent decision that upheld local direct democracy as applied to housing elements. Part III first examines how applying the administrative-legislative test to housing elements would result in a different outcome and then uses Justice Arabian's dissent in *DeVita* as inspiration for how the court can create a more straightforward test. Part IV addresses other potential avenues for change, concluding that my proposed

17. *See, e.g.*, Christopher, *supra* note 14 (explaining that a Eureka, California ballot initiative significantly restricts housing development).

18. 423 P.3d at 965–66.

19. *Id.* at 966.

20. 889 P.2d 1019, 1044–48 (Cal. 1995) (Arabian, J., dissenting).

doctrinal fix is the best option. The Note then concludes by explaining why this change will yield beneficial results in the future.

I.
CONSTITUTIONAL BACKGROUND

A. Constitutional Sources of Power

"All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."[21]

From the premise that political power originates from the people of California, the state constitution endows the government with the legislative, executive, and judicial powers.[22] The legislature has, among other powers, the responsibility to "prescribe uniform procedure for city formation and provide for city powers."[23] Cities formed pursuant to the legislature's requirements and bound by the state's general laws are called "general law cities."[24] They possess "only those powers expressly conferred upon [them] by the Legislature, together with such powers as are 'necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation.'"[25] Thus, while general law cities have police powers within their borders, their power flows directly from, and is proscribed by, the state's own plenary police powers.[26] The state constitution provides that if there is a conflict between state and local law, state law takes precedence.[27]

The California Constitution also contemplates, and perhaps encourages, a different municipal entity known as a charter city.[28] Instead of being organized and empowered by the state, as general law cities are, charter cities are created and granted powers by the majority of a city's residents.[29] Think of city charters as constitutions for cities. Indeed, the charters "are the law of the State and have the force and effect of legislative enactments."[30] The California Constitution grants charter cities some enumerated powers and plenary police powers.[31] While state law preempts general law cities' local ordinances if there is a conflict, charter cities actually win out over the State so long as the legislation concerns

21. CAL. CONST. art. II, § 1.
22. *Id.*; *Id.* art. III, § 3.
23. *Id.* art. XI, § 2.
24. *See* City of Orange v. San Diego Cnty. Emps. Ret. Ass'n, 126 Cal. Rptr. 2d 405, 410 (Ct. App. 2002).
25. *Id.* (quoting G.L. Mezzetta, Inc. v. City of Am. Canyon, 93 Cal. Rptr. 2d 292, 295 (Ct. App. 2000)).
26. *See id.*; CAL. CONST. art. XI, § 7.
27. CAL. CONST. art. XI, § 7.
28. *Id.* art. XI, § 3.
29. *Id.*
30. *Id.*
31. *Id.* art. XI, § 5.

a municipal affair.[32] However, if the matter is a statewide concern, then state statutes can preempt charter city ordinances.[33] The determination of whether an issue is a municipal affair or a statewide concern is a complicated area of law that remains in flux,[34] but the important takeaway is that the State has the power to preempt charter cities on matters of statewide concern, as ambiguous of a term as that may be.[35] In sum, the State can preempt general and charter cities alike on all matters of statewide concern.[36]

One last complication: the people's right of initiative and referendum. The people's initiative power is "generally co-extensive with the legislative power of the local governing body"[37] and is the power of the local electorate to pass ordinances.[38] Similarly, the local electorate's referendum power is generally co-extensive with the local legislative body's power.[39] This means that, like the local legislative body's power, the local initiative and referendum powers can be preempted by the state government's proper exercise of its plenary police power over statewide concerns.[40]

Of course, the State can only preempt local governments or voters if state law and a local ordinance or initiative conflict. The California Supreme Court has generally recognized three instances where these conflicts occur: if local legislation "duplicates, contradicts, or enters an area fully occupied by general law."[41] Preemption through the state's full occupation of an area of law, which can be either express or implied, is the focus of this Note.[42] Specifically, this Note looks at implied preemption of the local initiative and referendum powers.[43]

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32. *Id.* art. XI, §§ 5, 7.

33. State Bldg. & Constr. Trades Council of Cal. v. City of Vista, 279 P.3d 1022, 1027 (Cal. 2012).

34. *See generally* Darien Shanske & David A. Carrillo, *A Proportionality Analysis Should Govern Home Rule Disputes*, 44 CARDOZO L. REV. 1843 (2023) (discussing the various approaches California has taken to determining whether a state statute should prevail over a charter city ordinance and proposing a new way to conduct that analysis).

35. *State Bldg. & Constr. Trades Council of Cal.*, 279 P.3d at 1027.

36. *See id.*; CAL. CONST. art. XI, § 7.

37. DeVita v. Cnty. of Napa, 889 P.2d 1019, 1026 (Cal. 1995).

38. *See* CAL. ELEC. CODE § 9200 (West 2024).

39. *DeVita*, 889 P.2d at 1026.

40. *See id.*; Rossi v. Brown, 889 P.2d 557, 562 n.4 (Cal. 1995) ("The scope of the initiative and referendum powers, even in charter cities, is limited to control over municipal affairs. The state has plenary authority over matters of statewide concern and . . . may bar exercise of either referendum or initiative.").

41. Chevron U.S.A. Inc. v. Cnty. of Monterey, 532 P.3d 1120, 1123–24 (Cal. 2023).

42. *Id.*

43. Again, this Note will focus on *implied* preemption through full occupation of an area of law. For a discussion of express preemption in the context of housing law, please feel free to check out a blog post that I and a few other (now former) Berkeley Law students put out on this topic. Ben LaZebnik, Ben Pearce & Eric Wright, *California's Legislature Can Prevent Costly Conflicts Between State Housing Laws and Local Voters*, SCOCABLOG (May 11, 2024), https://scocablog.com/californias-legislature-can-prevent-costly-conflicts-between-state-housing-laws-and-local-voters/ [https://perma.cc/TTF8-73Y8].

The following sections outline the caselaw on implied preemption of local direct democracy.

B. The Administrative-Legislative Distinction

Understanding the history of the preemption doctrine is important to understanding the current iteration of the preemption test.[44] The California Supreme Court originally barred the use of the local initiative and referendum to override municipal action only if the municipality's acts were "legislative in character" as opposed to "executive or administrative."[45] The quintessential administrative versus legislative case, *Simpson v. Hite*, illustrates this concept.[46] In *Simpson*, the relevant state law required county boards of supervisors to provide "suitable quarters" for local courts.[47] Although the State set that overarching policy, the law gave boards of supervisors discretion to determine "what is required to constitute 'suitable quarters.'"[48] In Los Angeles, the Board of Supervisors set a location for a courthouse, the planning commission affirmed it, and the county solicited bids.[49] At that point, disgruntled citizens started circulating an initiative petition to force the County to choose a different site for the courthouse.[50] The California Supreme Court removed the initiative from the ballot and held that the Board of Supervisors was acting as an administrative agent of the state.[51] The State had "acted to establish the basic policy" of creating suitable quarters for courthouses across the state and had "vested the responsibility for carrying out that policy" with the county boards of supervisors.[52] Thus, despite holding legislative power, the Los Angeles Board of Supervisors was performing an administrative function "specifically imposed by the state."[53] The court deemed this function beyond the scope of the people's initiative power.[54]

A more modern definition of the administrative-legislative test appears in *Yost v. Thomas*.[55] In *Yost*, the court explained that:

> Acts of a local governing body which, in a purely local context, would otherwise be legislative and subject to referendum may, however, become administrative "in a situation in which the state's system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the

44. *See* City of Morgan Hill v. Bushey, 423 P.3d 960, 965–66 (Cal. 2018).
45. Simpson v. Hite, 222 P.2d 225, 228 (Cal. 1950).
46. *Id.*
47. *Id.* at 226–27.
48. *Id.* at 227.
49. *Id.*
50. *Id.*
51. *Id.* at 228–29.
52. *Id.* at 228.
53. *Id.* at 229.
54. *Id.*
55. 685 P.2d 1152, 1157 (Cal. 1984).

state."[56]

Using this definition of the administrative-legislative test, the *Yost* court held that the adoption or amendment of a general plan element was properly subject to local voters' referendum powers.[57] Unlike *Simpson*, where the state's policy of constructing new courthouses rendered the Board of Supervisors' acts administrative, the Coast Act in *Yost* left too much discretion to local governments in their planning decisions for the court to deem their actions administrative.[58] Because the court found that the local governments' actions were legislative, it also found that they were subject to the electorate's referendum powers.[59]

C. The COST *Factors*

In 1988, in *Committee of Seven Thousand v. Superior Court* (*COST*), the California Supreme Court declared *Yost*'s administrative-legislative distinction "an unnecessary fiction."[60] The court held that the "state's plenary power over matters of statewide concern is sufficient authorization for legislation barring local exercise of initiative and referendum as to matters which have been specifically and exclusively delegated to a local legislative body."[61] The new exclusive delegation test outlined two primary factors for finding implied preemption: (1) the language of the statute and (2) the presence of a statewide concern.[62] The court also acknowledged that other indicia of legislative intent to preempt—such as reference to similar statutes, legislative history, and "other pertinent matters"[63]—might be relevant, but it deemed statutory language and statewide affairs the most important.[64] Furthermore, the court noted that the "strength of the inference [of the legislature's intent to preempt local law] varies according to the precise language used in the statute[,]" with references to localities using "generic language such as 'governing body' or 'legislative body' supporting a weaker inference" than specific references to local legislative bodies, such as boards of supervisors.[65]

Seven years later, in *DeVita*, the court used the *COST* "exclusive delegation" factors to uphold the amendment of a general plan by local initiative.[66] In doing so, the court clarified that the question of whether the legislature has signaled its intent to exclusively delegate authority focuses on

56. *Id.* (quoting Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 480 n.14 (Cal. 1976)).
57. *Id.* at 1160.
58. *Id.*
59. *Id.*
60. 754 P.2d 708, 720 (Cal. 1988).
61. *Id.* at 720–21.
62. *Id.* at 713.
63. *Id.* at 719.
64. DeVita v. Cnty. of Napa, 889 P.2d 1019, 1027 (Cal. 1995).
65. *COST*, 754 P.2d at 713.
66. *DeVita*, 889 P.2d at 1029.

"whether and to what extent the statute or statutory scheme in question pertains to matters of statewide concern."[67] Courts' readiness to infer preemption of the local direct democracy powers thus varies directly with the extent of the state interest.[68]

D. City of Morgan Hill*: Bringing It All Together*

The California Supreme Court last revised this line of case law in 2017 in *City of Morgan Hill*, which articulated the modern test for implied preemption.[69] There, the California Supreme Court held that a city's adoption of a zoning ordinance to conform with the state-mandated general plan was properly subjected to a local referendum.[70] In doing so, the court combined the administrative-legislative test from *Simpson* and *Yost* with the *COST* factors.[71] Under *Morgan Hill*, courts can infer that the state legislature has preempted local direct democracy powers when (1) the statute pertains to a matter of statewide concern and (2) there is a definite indication of preemptive intent.[72] That definite indication can come either from the administrative-legislative test or from the *COST* exclusive delegation factors.[73] This is an awkward end result! The court in *COST* derided the administrative-legislative distinction as "an unnecessary fiction" and replaced it with the exclusive delegation factors.[74] Now, the *COST* factors are situated alongside the administrative-legislative inquiry as equal partners in determining legislative intent.[75] Furthermore, this new test over-emphasizes statewide concern by double counting it: once in the first prong and again in the second prong's showing of exclusive delegation.[76] The *COST* factors and the administrative-legislative test were never meant to coexist, and yet that is what the *City of Morgan Hill* test does. The result is a convoluted test that can, and should, be improved.

Despite these problems, the *City of Morgan Hill* test is the current test for finding implied preemption in California.[77] As discussed later, there is a real opportunity to clarify the law and create better policy outcomes.

67. *Id.*
68. *See id.*
69. City of Morgan Hill v. Bushey, 423 P.3d 960, 965–66 (Cal. 2018).
70. *Id.* at 967.
71. *See id.*
72. *Id.* at 965.
73. *Id.* at 966.
74. Comm. of Seven Thousand v. Superior Ct., 754 P.2d 708, 720–21 (Cal. 1988).
75. *City of Morgan Hill*, 423 P.3d at 965–66.
76. *See id.*
77. *See id.*

II.
HOUSING LAW

A. Housing Elements

With that backdrop of state constitutional law in mind, this Note turns to California housing law. California requires that all cities adopt a general plan, which outlines "a statement of the city's development policies and objectives, and include[s] specific elements,"[78] among them a housing element.[79] The general plan is considered the "'constitution' for future planning," and local zoning ordinances are required to be consistent with it.[80] This rule applies to general law cities and charter cities, both of which are required to enact general plans with all the constituent elements.[81] Although charter cities, unlike general law cities, do not always have to be consistent with their general plans,[82] there are limited statutory exceptions, including Article 10.6 of the Government Code, which contains the housing element.[83] Both general law cities and charter cities must plan for housing and enact zoning ordinances consistent with their general plans.[84]

Housing plays a special role in statewide planning. The state legislature has declared the "availability of housing" to be a matter of "vital statewide importance" and has enacted several policies specific to local planning around housing.[85] One of those is the Regional Housing Needs Allocation (RHNA), which dictates how much housing a municipality has to plan for.[86] RHNA allocations work as follows: The California Department of Housing and Community Development (HCD) determines how much housing a region needs to plan for and then delegates to a group of municipalities (known as a Council of Governments or COG) the power to divide the required amount of housing amongst their constituent local governments.[87] Local governments must then adopt or amend housing elements to comply with their RHNA allocation, subject to HCD approval.[88]

Take, for example, the recently concluded 2023–2031 San Francisco Bay Area RHNA process.[89] HCD told the local COG, the Association of Bay Area

78. Lesher Commc'ns, Inc. v. City of Walnut Creek, 802 P.2d 317, 319 (Cal. 1990).
79. CAL. GOV'T CODE § 65302 (West 2025).
80. *Lesher Commc'ns, Inc.*, 802 P.2d at 319, 321.
81. DeVita v. Cnty. of Napa, 889 P.2d 1019, 1024 (Cal. 1995).
82. Garat v. City of Riverside, 3 Cal. Rptr. 2d 504, 516 (Ct. App. 1991).
83. CAL. GOV'T CODE § 65700.
84. *Id.* § 65860.
85. *Id.* § 65580.
86. *Id.* § 65584.
87. City of Irvine v. S. Cal. Ass'n of Gov'ts, 96 Cal. Rptr. 3d 78, 82–84 (Ct. App. 2009).
88. *See* Martinez v. City of Clovis, 307 Cal. Rptr. 3d 64, 76–81 (Ct. App. 2023).
89. *See generally* ASS'N OF BAY AREA GOV'TS, FINAL REGIONAL HOUSING NEEDS ALLOCATION (RHNA) PLAN: SAN FRANCISCO BAY AREA, 2023-2031 (2022),

Governments (ABAG), that the San Francisco Bay Area needed to plan for 441,176 units of housing for the next RHNA cycle.[90] ABAG, through proper procedure, divided those units among all local governments in the San Francisco Bay Area.[91] Then local cities updated their housing elements[92] and submitted them for review to HCD.[93] While the "Government Code favors simultaneous modification of the general plan and the relevant zoning provisions," municipalities can amend their zoning ordinances after changing the housing elements.[94] Local governments that only update their housing elements in response to the RHNA allocation must amend their zoning ordinances shortly thereafter so that their zoning laws reflect the updated housing element.[95]

B. City of Encinitas

This unique intersection of constitutional and housing law brings us squarely to the problem posed by the City of Encinitas. In 2013, the City of Encinitas passed Proposition A.[96] Proposition A was a voter initiative that subjected any "Major Amendment" to the city's "land use and planning documents" that increased density or upzoned land to a mandatory referendum.[97] Basically, Proposition A empowered voters to reject new development by referendum. Passed by a small majority of voters, Proposition A soon came into conflict with state housing laws.[98] The City of Encinitas, as required by the RHNA allocation process, attempted to update its housing element in 2016 and again in 2018, and both times voters rejected those measures in elections prescribed by Proposition A.[99] After several years of stalemate, a court suspended Proposition A to allow the City of Encinitas to enact a valid housing

https://abag.ca.gov/sites/default/files/documents/2021-12/Final_RHNA_Allocation_Report_2023-2031-approved_0.pdf [https://perma.cc/PJ5Z-ASF3].

90. *Id.* at 7.

91. *Id.*

92. *See, e.g.*, CITY OF BERKELEY, HOUSING ELEMENT UPDATE 2023-2031 8–11 (2023), https://berkeleyca.gov/sites/default/files/documents/Berkeley_2023-2031%20Housing%20Element_02-17-2023v2_0.pdf [https://perma.cc/9AJZ-TGMS] (updating the City of Berkeley's Housing Element to conform with the 2023-2031 RHNA plan update cycle).

93. *See, e.g.*, Letter from Paul McDougall, Senior Program Manager, Cal. Dep't of Hous. & Cmty. Dev., to Dee Williams-Ridley, City Manager, City of Berkeley 1 (Feb. 28, 2023), https://berkeleyca.gov/sites/default/files/documents/alaBerkeleyAdoptIn022823.pdf [https://perma.cc/4E7K-FLAL] (noting that Berkeley's housing element had been submitted to HCD and found to be in substantial compliance).

94. City of Morgan Hill v. Bushey, 423 P.3d 960, 966–67 (Cal. 2018).

95. *Id.*

96. City of Encinitas v. Cal. Dep't of Hous. & Cmty. Dev., No. 37-2019-00047963-CU-OR-NC, 2022 Cal. Super. LEXIS 1969, at *2 (Super. Ct. Jan. 25, 2022).

97. *Id.* at *3.

98. *Id.* at *2, *4–5.

99. *Id.* at *5.

element, which it did in 2019.[100] The City then sued to carve out density increases related to housing supply from Proposition A.[101]

The trial court ruled that Proposition A was not preempted by state housing law.[102] I, alongside two others, have written about how the court got the right result via the wrong method, but I will summarize our analysis here only briefly.[103] Under the *City of Morgan Hill* test, there are two inquiries.[104] First, the court looks at whether housing is a matter of statewide concern.[105] This is a topic that could be the subject of its own Note (or even Article!), but take for granted that courts routinely find housing to be a matter of statewide concern.[106] Second, *City of Morgan Hill* dictates that the court find a definite indication of legislative intent to preempt, which can come from either the administrative-legislative test or the *COST* factors.[107] Housing element statutes can meet neither: Such statutes declare the amendment or adoption of a housing element to be a legislative act, and their text is generally not sufficient to meet *COST*'s exclusive delegation test.[108] Thus, under *City of Morgan Hill*, local initiatives trump statewide housing policy.[109]

If this seems frustrating, that is because it is. The housing element statute, and particularly the RHNA allocation process, is a detailed statutory document.[110] It lists how each COG is given a specific allocation, the timelines for getting the allocations to those COGs, and the timelines for the COGs to give local governments their respective requirements.[111] The statute contemplates public input for these sorts of determinations,[112] as well as the publication of draft allocations and an appeals process.[113] This is all to say that the RHNA process, as a complex system that the State has created to require local governments to adequately plan for new housing, seems to impliedly preempt

100. San Diego Tenants United v. City of Encinitas, No. 37-2017-00013257-CU-WM-NC, 2019 Cal. Super. LEXIS 21227, at *2 (Super. Ct. Mar. 13, 2019); Barbara Henry, *Encinitas Finally Wins State Certification for New Housing Plan*, SAN DIEGO UNION–TRIB. (Aug. 7, 2021) https://www.sandiegouniontribune.com/communities/north-county/encinitas/story/2021-08-07/encinitas-finally-wins-state-certification-for-new-housing-plan [https://perma.cc/G8K5-XW2W].

101. *Cal. Dep't of Hous. & Cmty. Dev.*, 2022 Cal. Super. LEXIS 1969, at *4.

102. *See id.* at *14–15.

103. *See generally* LaZebnik, Pearce & Wright, *supra* note 43.

104. City of Morgan Hill v. Bushey, 423 P.3d 960, 965–66 (Cal. 2018).

105. *Id.*

106. *See, e.g.*, Aids Healthcare Found. v. Bonta, 320 Cal. Rptr. 3d 39, 48 (Ct. App. 2024) (holding that the "the shortage of housing in California . . . is a matter of statewide concern").

107. *City of Morgan Hill*, 423 P.3d at 965–66.

108. CAL. GOV'T CODE § 65301.5 (West 2025); DeVita v. Cnty. of Napa, 889 P.2d 1019, 1029 (Cal. 1995) ("As an initial matter, there is no question that a general plan amendment is a legislative act, for the planning law itself declares as much." (citing CAL. GOV'T CODE § 65301.5)); *see* LaZebnik, Pearce & Wright, *supra* note 43.

109. *City of Morgan Hill*, 423 P.3d at 965–66.

110. *See* CAL. GOV'T CODE § 65584.

111. *Id.* § 65584.04.

112. *Id.*

113. *Id.* § 65584.05.

the exercise of the local direct democracy powers in this process. But courts will not likely find implied preemption because housing acts are defined by statute as legislative acts and the statutes do not use the correct magic words.

It does not have to be this way. The *City of Morgan Hill* test is judicially created and can be judicially altered. The next section offers one proposal: folding the administrative-legislative test into the *COST* factors as a procedural inquiry. This would more accurately reflect the State's ability to preempt local direct democracy through the imposition of complex schemes—even if the scheme is declared legislative.

III.
ANALYSIS

This Note now turns to the future. First, this Note looks at Justice Arabian's dissent in *DeVita* as inspiration for fixing the confusing state of preemption caselaw. Next, this Note proposes combining the administrative-legislative test with the *COST* factors. Finally, this Note examines the local initiative and referendum powers to show that, under the proposed test, the housing element statutes would preempt local direct democracy.

A. DeVita *2.0: Justice Arabian Vindicated*

This Note's proposal, which combines the administrative-legislative test with the *COST* factors, is not a novel one. Dissenting in *DeVita*, which held that the adoption or amendment of a general plan element was subject to the initiative powers, Justice Arabian argued that the process of adopting or amending a general plan was inconsistent with the exercise of the local initiative power and thus preempted.[114] While *COST* looked at statutory text and degree of statewide concern, Justice Arabian wanted to focus on the "overall statutory scheme" to determine whether the legislature intended to preempt local direct democracy.[115] He reasoned that general plans consist of a number of specific elements, which should be "carefully correlated with one another" to create a cohesive guidebook for the local government to follow.[116] He further concluded, based on the general plan amendment process, that the legislature's express intention for the public to be involved during the preparation and review stages necessarily meant that the local legislative body had the exclusive authority to implement the proposed amendment or adoption.[117] Allowing the public to use its initiative power to block implementation would defeat "the statutory requirement of periodic review and revision to achieve the Legislature's goal of an integrated, internally consistent general plan."[118] This part of Justice Arabian's reasoning looked at

114. *See* DeVita v. Cnty. of Napa, 889 P.2d 1019, 1044 (Cal. 1995) (Arabian, J., dissenting).
115. *Id.* at 1045.
116. *Id.*
117. *See id.* at 1045–46.
118. *Id.* at 1046.

the process with more granularity, acknowledging the State's overall goals while also honing in on how the statutory scheme was intended to work.[119]

There is precedent for Justice Arabian's dissent. In *Simpson v. Hite*, the California high court pointed out similar procedural concerns while holding that use of an initiative to block selection of a new courthouse site was impermissible.[120] The court noted that the then-existing planning laws had a specific process to allow amendments to the county's master plan.[121] That process contemplated public hearings for both the planning commission and the legislative body.[122] Because the board of supervisors had to follow that procedure to amend the master plan, there was "no machinery provided for the electors as a whole to comply with the planning commission procedure."[123] Consequently, the "board would encounter further difficulty and delay" if it tried to shoehorn the initiative process into that amendment framework.[124] Although *Simpson v. Hite* was couched in the administrative-legislative test, its justification for holding that the courthouse location could not be subject to the local initiative power was all about procedural inconsistencies.[125] Justice Arabian's dissent in *DeVita* is consistent with this understanding of the preemption power.[126]

Altering the *City of Morgan Hill* test to combine the administrative-legislative test with the *COST* factors would simplify matters without causing a jurisprudential sea change. There is strong language from these quintessential administrative-legislative cases supporting this procedural inquiry, and Justice Arabian's dissent provides an example of how those ideas could be incorporated into the *COST* exclusive delegation factors. The result would be a more fulsome way of evaluating legislative intent beyond just textual references to specific agencies.

Folding the administrative-legislative test into *COST* means that the new preemption test would look as follows: Local direct democracy is preempted when there is (1) a matter of statewide concern and (2) exclusive delegation established through (a) the statutory text and (b) the statute's procedural requirements. This new (and improved!) test would dispense with the "unnecessary fiction" that is the administrative-legislative test, while keeping cases decided under that test as good law and acknowledging that the legislature does not have to use the right magic words to bar the use of local direct democracy in complex governmental schemes.[127] It would also add clarity by

119. *See id.* at 1044–46.
120. *See* 222 P.2d 225, 230 (Cal. 1950).
121. *Id.* at 231.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *See* DeVita v. Cnty. of Napa, 889 P.2d 1019, 1044 (Cal. 1995) (Arabian, J., dissenting).
127. *See* Comm. of Seven Thousand v. Superior Ct., 754 P.2d 708, 720 (Cal. 1988).

removing the vague legislative-administrative distinction, which *COST* sought to get rid of.[128] Lastly, it would incorporate Justice Arabian's analysis of the statutory procedure to augment the administrative-legislative case law.

Having proposed the amended preemption test, this Note applies it to existing case law and to the statutory requirements of the local initiative and referendum powers for general law cities.[129]

B. The Local Initiative Power

Applying the proposed test to the local initiative power shows that the housing element adoption process and local initiatives are procedurally incompatible.[130] The local initiative power—which the California Constitution reserves to the people in article II, section 11—is codified in the California Election Code beginning at section 9200, which states that local ordinances may be enacted through the initiative procedure.[131] After listing some of the procedural requirements for getting an initiative on the ballot,[132] the statute allows local legislative bodies to request that city agencies report on the potential effects of the initiative.[133] Most relevantly, the statute specifies that an agency may be requested to issue a report on how an initiative will affect "the internal consistency of the city's general and specific plans, including the housing element."[134]

Since this Note's proposed test incorporates existing administrative-legislative case law, albeit less formalistically, that line of case law is a good starting point for analyzing the preemption of the local initiative power. Under *Simpson v. Hite*, which discussed the validity of a local initiative—not a referendum as is commonly thought—the inquiry is whether the state legislature sets a basic policy and vests "the responsibility for carrying out that policy" in the local legislative body.[135] With respect to the housing element statute, that is easily answered in the affirmative. Like in *Simpson*, where the legislature told

128. *See id.*

129. The analyses of the initiative and referendum powers have to be separate because the powers are distinct and have different limitations. *See* Rossi v. Brown, 889 P.2d 557, 559 (Cal. 1995) (holding that an express limitation on the referendum power did not impose the same limitation on the initiative power). Similarly, *DeVita* and *Yost*, which allowed the use of the initiative and referendum on the amendment and adoption of general plan elements, respectively, each confined their analysis to the specific direct democracy power in question. *See DeVita*, 889 P.2d at 1040; Yost v. Thomas, 685 P.2d 1152, 1160–61(Cal. 1984).

130. Charter cities may have more expansive initiative powers than general law cities, but because those vary city by city, this Note focuses on general law initiative powers for the sake of convenience. *See* Hous. Auth. of Eureka v. Superior Ct., 219 P.2d 457, 461 (Cal. 1950) (overruled on other grounds). Despite this distinction, the initiative power of charter cities would still be preempted with regard to housing element laws under this Note's proposed test.

131. CAL. ELEC. CODE § 9200 (West 2024).

132. *Id.* §§ 9201–9211.

133. *Id.* § 9212.

134. *Id.*

135. 222 P.2d 225, 228 (Cal. 1950).

local governments to create "suitable quarters" for courthouses, the housing element statute ensures that local governments "prepare and implement housing elements" that will "move toward attainment of the state housing goal."[136] Likewise, as in *Simpson*, where the State left the determination of suitable quarters up to local governments, the housing statute expressly states that localities are the "best capable" entities to determine how to meet those state housing goals.[137] The similarities between *Simpson* and the housing element statute are hard to ignore: Under the administrative-legislative test, the exercise of local direct democracy would be preempted.[138]

Adding Justice Arabian's process-based analysis supports this conclusion. The statewide RHNA process is plainly incompatible with the exercise of local direct democracy powers. From the outset, the entire RHNA process takes two years to complete: HCD tells the COGs how much housing they need to plan for two years before the housing elements are due, and the COGs are required to tell local governments their respective allocations no later than a year before the housing elements are due.[139] This allows at most a year for an initiative to pass and even less for a referendum to reject a proposed housing element. The initiative process takes significant time: an unspecified amount of time to prepare the petition, 15 days after submission to receive a title and summary from the city attorney,[140] no more than 180 days to collect signatures,[141] and an additional 30 days (excluding weekends and holidays) for the local elections official to certify that the petition had sufficient signatures.[142] In sum, that is 225 days just to get a viable petition. From there, the city council has 10 days to adopt the petition, order a report (which could add 30 more days), or submit the petition to a vote.[143] That is a maximum of 265 days after the petition was submitted before voters even get a look at the initiative.[144] It is hard to reconcile the time required to submit a petition to vote with the year-long deadline the State has imposed upon local governments to adopt a housing element.[145]

Although there's an argument to be made that the initiative can be passed *after* the initial RHNA process and is not constrained by the statutory adoption deadline, that argument ignores the HCD review process. As mentioned above, when a petition with sufficient signatures is presented to a local legislative body, the legislative body can either adopt the amendment or put it to a vote.[146] The

136. *Id.* at 226–27; CAL. GOV'T CODE § 65581 (West 2025).
137. 222 P.2d at 227; CAL. GOV'T CODE§ 65581.
138. *See* 222 P.2d at 227.
139. CAL. GOV'T CODE § 65584.
140. CAL. ELEC. CODE § 9203 (West 2024).
141. *Id.* § 9208.
142. *Id.* §§ 9114, 9211.
143. *Id.* § 9215.
144. That calculation also assumes the hypothetical initiative would be completely viable the day that the COG tells the local government the housing allocation, a reality that is unlikely.
145. CAL. GOV'T CODE § 65584 (West 2025).
146. CAL. ELEC. CODE § 9215.

HCD review process requires the local planning agency to submit a draft to HCD prior to the adoption of the housing element, and the statute lists a number of measures to deal with noncompliance.[147] The Elections Code, by its terms, precludes HCD from reviewing drafts by limiting the legislative body's options for responding to citizen petitions.[148] While such limitations generally help prevent the legislative body from circumventing the will of the people, in this specific instance, they deny legislative bodies the flexibility to adopt citizen-led housing element amendments and preclude election results from being contingent upon HCD review. Between the timing of housing element requirements and the HCD review process, the housing element adoption process and the local initiative process are procedurally incompatible.

C. The Local Referendum Power

While different than the local initiative power, the local referendum power would also be preempted by state housing statutes under the proposed test. Unlike the local initiative statute, the section of the California Election Code codifying the referendum power begins by saying that, with limited exceptions, municipal ordinances do not take effect until 30 days after their final passage.[149] This delay is meant "to preserve the right of referendum."[150] After all, the referendum, which approves or rejects a legislatively passed ordinance, is effectively useless if the ordinance takes effect immediately.[151]

Again, under the new procedural prong of this Note's proposed test, a court would first look to existing administrative-legislative case law for guidance. The *Simpson v. Hite* administrative-legislative analysis done above is equally applicable here. But while *DeVita*, which allowed the use of the initiative for the adoption or amendment of a general plan, was decided under the *COST* factors, the court in *Yost*, which held that the use of the *referendum* was appropriate, concluded so under the administrative-legislative test.[152] Thus, it is necessary to distinguish *Yost* from the present case.

In *Yost*, the court held that a general plan amendment was properly subject to a referendum despite the California Coastal Commission's approval of the land use plan.[153] Under the 1976 Coastal Act, the state legislature required the Coastal Commission to approve land use plans, an element of a local government's general plan, to ensure compliance with the State's objective of preserving the California coast.[154] The City of Santa Barbara claimed that

147. CAL. GOV'T CODE § 65585.
148. *See* CAL. ELEC. CODE § 9215.
149. *Id.* § 9235.
150. Norlund v. Thorpe, 110 Cal. Rptr. 246, 249 (Ct. App. 1973).
151. *See id.*
152. *See* DeVita v. Cnty. of Napa, 889 P.2d 1019, 1032 (Cal. 1995); Yost v. Thomas, 685 P.2d 1152, 1160 (Cal. 1984).
153. 685 P.2d at 1160.
154. *Id.* at 1154–55.

because the Coastal Commission is required to approve local land use plans, this put the City's general plan amendment within the *Simpson v. Hite* holding and rendered a formerly legislative act administrative.[155] The court rejected that argument, reasoning that the State only "sets minimum standards and policies" but that local legislative bodies have wide discretion to "determine the contents of its land use plans" and to "choose how to implement" those land use plans.[156]

Given the similarities between the Coastal Commission's approval of land use plans and the RHNA process, including HCD certification of housing elements, *Yost* seems to suggest that a court would classify the adoption of housing elements as legislative, even without the statutory definition.[157] Nonetheless, the court's holding in *Yost* confirms that housing elements would be considered administrative.[158] The court distinguished *Yost* from *Simpson v. Hite* by saying that, in *Simpson*, the only discretion in the hands of a local government was "the choice of a site" for a courthouse.[159] In contrast, local governments under the Coastal Act had discretion over what to build, so long as their decisions complied with the State's "specific policies" outlined in the Coastal Act.[160] In the present case, the adoption of a housing element requires cities to plan for a specific amount of housing,[161] unlike the Coastal Act's broad land use oversight.[162] The Coastal Act did not "dictate that a local government must build a hotel and conference center,"[163] but RHNA laws *do* dictate that a local government must plan for a specific amount of housing.[164] Despite the factual similarities to *Yost*, the adoption and amendment of a housing element fall into the *Simpson v. Hite* category because they both entail a legislative mandate to plan for a specific outcome, with cities afforded discretion only to choose site locations.[165] Under the administrative-legislative case law, the exercise of local referenda relating to housing elements would be preempted.

Under the procedural inquiry, however, the local referendum power is facially consistent with the housing element adoption process. There is less of a timing issue with local referenda than with the initiative. Unlike the lengthy initiative process, the referendum petition signing process lasts only thirty days after the passage of the housing element.[166] Instead of being hemmed in by the statutory housing element deadline, the local referendum process occurs after that time runs out. And, under the holding in *City of Morgan Hill*, a referendum

155. *Id.* at 1158.
156. *Id.* at 1158–60.
157. *See id.* at 1160.
158. *See id.* at 1157, 1160.
159. *Id.* at 1160.
160. *Id.*
161. *See, e.g.*, CAL. GOV'T CODE § 65584 (West 2025).
162. *See Yost*, 685 P.2d at 1160.
163. *Id.*
164. *See* CAL. GOV'T CODE § 65584.
165. *See Yost*, 685 P.2d at 1160.
166. CAL. ELEC. CODE § 9237 (West 2024).

rejecting a housing element is not the same as a noncompliant housing element; therefore, a referendum rejecting the housing element would be allowed.[167] The HCD review process also does not apply because a referendum rejecting a housing element does not trigger HCD review the way that an initiative would.

However, even if the local referendum power poses fewer timing conflicts, that is not the end of the analysis. Referenda may prevent cities from timely adopting housing elements, for which the statute would impose consequences.[168] The legislature allows courts to fine jurisdictions with noncompliant housing elements up to $100,000 per month.[169] Also, the Housing Accountability Act (HAA) allows "developers to sue cities that were unreasonably blocking . . . housing projects" in "cities which were not in compliance with their RHNA."[170] The legislature recently strengthened the HAA by giving the Attorney General enforcement powers as an alternative to "relying solely on developer lawsuits."[171] Thus, referenda that prevent cities from submitting housing elements for HCD approval would conflict with the statutory scheme beyond mere timing issues.

The California Supreme Court has been wary of allowing local referenda to circumvent state mandates. In *Simpson v. Hite*, the court was concerned that the electorate would be able to "nullify every determination of the board of supervisors to erect buildings for the courts and thereby nullify the legislative policy and prevent execution of the duty imposed upon the board of supervisors."[172] Similarly, in *Housing Authority of Eureka v. Superior Court*, the court worried that allowing referenda on administrative actions "would place municipal government in a straight-jacket and make it impossible for the city's officers to carry on the public business."[173] In other words, there are valid policy reasons to allow the state to preempt the local referendum power in order to implement its policy. Cases like *City of Encinitas* show what happens when the State does not have this power—the regular planning process gets thrown into chaos.[174]

Although housing laws are more procedurally compatible with local referenda than with initiatives, the severe penalties associated with the failure to enact a valid housing element and the California Supreme Court's

167. *See* City of Morgan Hill v. Bushey, 423 P.3d 960, 967 (Cal. 2018).

168. LaZebnik, Pearce & Wright, *supra* note 43.

169. ASS'N OF BAY AREA GOV'TS, GROWING LIST OF PENALTIES FOR LOCAL GOVERNMENTS FAILING TO MEET STATE HOUSING LAW (2021), https://abag.ca.gov/sites/default/files/documents/2021-06/Consequences%20of%20Non-Compliance%20with%20Housing%20Laws.pdf [https://perma.cc/A6P4-PSDF].

170. Jeff Clare, *Because Housing Is What? Fundamental. California's RHNA System as a Tool for Equitable Housing Growth*, 46 ECOLOGY L.Q. 373, 395 (2019).

171. *Id.* at 401.

172. 222 P.2d 225, 230 (Cal. 1950).

173. 219 P.2d 457, 461 (Cal. 1950) (overruled on other grounds).

174. *See generally* City of Encinitas v. Cal. Dep't of Hous. & Cmty. Dev., No. 37-2019-00047963-CU-OR-NC, 2022 Cal. Super. LEXIS 1969 (Super. Ct. Jan. 25, 2022).

acknowledgement that referenda should not be allowed to constrain statewide goals are sufficient to satisfy the proposed test's procedural inquiry. Coupled with the guidance that administrative-legislative case law offers, state housing statutes would preempt the local referendum power under this Note's test.

IV.
IMPLICATIONS

A. Who Cares?

At this point, it is reasonable to ask why the California Supreme Court should go through all this trouble just to streamline housing planning. The legislature could choose to expressly preempt the initiative and referendum power, or it could simply repeal the statute that makes the amendment or adoption of a housing element a legislative act. Both are valid options! In fact, as some colleagues and I have separately written, the legislature should do the former.[175] Nevertheless, there remain two valid reasons why the court should rework this test.

The first is that the current test is unwieldy. Per *City of Morgan Hill*, to show implied intent to preempt the statute has to (1) be about a statewide concern and (2) evince a definite indication of the legislature's intent to preempt, as shown by either (a) the administrative-legislative test or (b) the exclusive delegation factors, which in turn is comprised of (i) the statutory text and (ii) the degree of statewide concern.[176] Consolidating the administrative-legislative test and the *COST* exclusive delegation factors simplifies the analysis and better reflects the state's power to preempt local direct democracy.[177]

The second, and far more important, reason is that the adoption of housing elements, which is statutorily classified as a "legislative act," receives a favorable level of judicial review.[178] "Usually, quasi-legislative acts are reviewed by ordinary mandate and quasi-judicial acts are reviewed by administrative mandate."[179] The writ of mandate "is a method for compelling a

175. *See* LaZebnik, Pearce & Wright, *supra* note 43. This is the last time I quote myself, I promise.

176. City of Morgan Hill v. Bushey, 423 P.3d 960, 965–66 (Cal. 2018).

177. There is also some inherent awkwardness from double counting statewide concern: In *City of Morgan Hill*, the importance of the statewide concern component is to show that the legislature has the ability to preempt, whereas in the *COST* exclusive delegation factors, the degree of statewide concern acts as a sliding scale, alongside the specificity of the statutory text, measuring the legislature's intent to preempt. If I were to presume to make further edits to the test, I would remove consideration of statewide concern from the intent prong. *Id.*; Comm. of Seven Thousand v. Superior Ct., 754 P.2d 708, 713 (Cal. 1988).

178. *See* Rachel Thompson, *Master the Distinctions Between Mandamus and Mandate*, SCOCABLOG (Mar. 22, 2022), https://scocablog.com/master-the-distinctions-between-mandamus-and-mandate/ [https://perma.cc/7UJA-JCRF].

179. Dep't. of Health Care Servs. v. Off. of Admin. Hearings, 210 Cal. Rptr. 3d 790, 803 (Cal. Ct. App. 2016).

public entity to perform a legal and usually ministerial duty."[180] In contrast, the writ of administrative mandamus is the reviewal of "the final adjudicative action of an administrative body."[181] The statute declaring the adoption or amendment of a general plan element to be legislative expressly says that it is reviewable by the ordinary writ of mandate.[182] This fits with the understanding that the adoption of a general plan is a "mandatory duty" that the statute imposes upon local governments.[183] In imposing that duty, the legislature decided that courts reviewing the adoption or amendment of a general plan should ask only whether the local government substantially complied with state law.[184] If the court finds that the local government did not substantially comply with general plan law, then the remedy is to compel the local government to adopt or amend the requisite general plan elements as necessary.[185]

The alternative would be to allow judicial review of the final action itself under the writ of administrative mandamus.[186] Since administrative mandamus reviews the final decision, that would mean that courts would be reviewing the actual amendment under either the substantial-evidence standard or through their independent judgment.[187] Either way, the court would be undertaking a more substantial review of the merits of the amendment, as opposed to compelling a city to comply with its statutory obligations.[188] Given that the writ of administrative mandate is a more substantive review, it is no surprise that opponents of building more housing would seek to have the court review it under that standard instead of the writ of mandate.[189] Likewise, it is no surprise that the state legislature, eager for localities to adopt general plans, wants to avoid that level of review.

This creates a sort of double bind under the administrative-legislative test. On the one hand, the statute forecloses the possibility of preempting local direct democracy.[190] On the other hand, it also prevents more searching judicial review of housing elements.[191] Changing the *City of Morgan Hill* test to fold the administrative-legislative test into the *COST* exclusive delegation factors, and thus focusing more on the process and procedures of the statutory scheme instead

180. Westsiders Opposed to Overdevelopment v. City of Los Angeles, 238 Cal. Rptr. 3d 712, 718 (Cal. Ct. App. 2018).

181. Vernon Fire Fighters v. City of Vernon, 165 Cal. Rptr. 908, 912 (Cal. Ct. App. 1980).

182. CAL. GOV'T CODE § 65301.5 (West 2024).

183. Concerned Citizens of Calaveras Cnty. v. Bd. of Supervisors, 212 Cal. Rptr. 273, 276 (Cal. Ct. App. 1985).

184. *Id.* at 276–77.

185. *See* Great W. Sav. & Loan Ass'n. v. City of L, 107 Cal. Rptr. 359, 366 (Cal. Ct. App. 1973).

186. *See* Westsiders Opposed to Overdevelopment v. City of Los Angeles, 238 Cal. Rptr. 3d 712, 718 (Ct. App. 2018).

187. Stanford Vina Ranch Irrigation Co. v. State, 264 Cal. Rptr. 3d 509, 524 (Ct. App. 2020).

188. *See id.*

189. *See Westsiders*, 238 Cal. Rptr. 3d at 718.

190. CAL. GOV'T CODE § 65301.5 (West 2025).

191. *Westsiders*, 238 Cal. Rptr. 3d at 718.

of the label assigned to the type of action, allows the State to both preempt local initiatives and referenda and maintain favorable judicial review. Otherwise, the State is forced to choose between one or the other.

B. Implications Beyond Housing?

Revising the *City of Morgan Hill* test could have implications beyond the housing realm. Initiatives and referenda do not just occur in housing contexts; indeed, the *COST* factors developed from a case dealing with the construction of new roads.[192] Since this Note's proposal is to fold in the administrative-legislative test as a *COST* factor, it would retain both case law using the administrative-legislative test and caselaw using the *COST* factors. The impact of this Note's proposal would be to preempt local direct democracy in scenarios, housing or otherwise, where there is an expansive yet textually vague set of state regulations on a given issue that the statute deems legislative.

That is a pretty specific set of criteria! Interestingly, no other statutory scheme that cites to Section 1085, which outlines writ of mandate review, specifically defines the action as legislative.[193] Similarly, there are no other statutes that use the language of Section 65301.5, which declares the adoption or amendment of a general plan element to be a "legislative act which shall be reviewable pursuant to Section 1085 of the Code of Civil Procedure."[194] Accordingly, while this Note's proposal would not limit itself to changing housing laws, it appears as if only housing elements fall within the (extremely) narrow set of cases that would be affected by this change.

CONCLUSION

Although the electorate's local direct democracy powers of initiative and referendum are far from the biggest hurdle the state must overcome to reduce the cost of housing, the *City of Encinitas* offers a terrifying vision of a future where unhappy residents are able to nullify the effects of state housing law.[195] It is not just Encinitas, either: There was recently an election on an initiative in the City of Santa Cruz that would have required voter approval for any increase in height or density limits.[196] Although voters soundly defeated this proposal at the polls, it shows the potential for other local jurisdictions to subvert housing laws in ways that the court in *City of Encinitas* condoned.[197] To stop this before it even starts

192. *See* Comm. of Seven Thousand v. Superior Ct., 754 P.2d 708, 709 (Cal. 1988).

193. At least according to a Westlaw search of citing statutes.

194. CAL. GOV'T CODE § 65301.5. Again, this is from a Westlaw search, and I am happy to show my math.

195. City of Encinitas v. Cal. Dep't of Hous. & Cmty. Dev., No. 37-2019-00047963-CU-OR-NC, 2022 Cal. Super. LEXIS 1969, at *2–4 (Super. Ct. Jan. 25, 2022).

196. *Measure M in Santa Cruz*, SANTA CRUZ LOC., https://santacruzlocal.org/election/2024-mar-05/measures/m-housing-for-people/ [https://perma.cc/T2S6-2BDC].

197. *See California Presidential Primary March 5, 2024 Santa Cruz County –Official Results–*, SANTA CRUZ CNTY. ELECTIONS DEP'T (Mar. 6, 2024),

(excluding the past few years in Encinitas), the California Supreme Court should revisit the *City of Morgan Hill* test and incorporate the old administrative-legislative test as part of the *COST* exclusive delegation factors. This action would clear up some of the inherent contradictions between the two tests. It would also be entirely consistent with precedent, thereby avoiding an additional burden on courts to sort out what is and is not preempted anymore.[198] Furthermore, amending this test would allow the state to preempt local initiatives and referenda for the housing element adoption process with minimal effects, if any, on other areas of the law. In short: The proposed test is clearer, more justiciable, easy to adopt, and leads to good policy results. Why not adopt it?

https://votescount.santacruzcountyca.gov/Portals/16/mar24/Official%20Results.pdf [https://perma.cc/92Y4-4VEA].

198. Take, for instance, *Yost v. Thomas*, 685 P.2d 1152 (Cal. 1984), and *DeVita v. County of Napa*, 889 P.2d 1019 (Cal. 1995). *Yost* relied upon the administrative-legislative test, while *DeVita* relied upon the *COST* exclusive delegation test. Changing the *COST* test to incorporate the administrative-legislative test allows for both the *Yost* and *DeVita* holdings to stand, avoiding even more litigation about whether those two cases (and their progeny) are still good law.