

Date of Hearing: September 12, 2017

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT
Cecilia Aguiar-Curry, Chair
AB 890 (Medina) – As Amended September 1, 2017

SUBJECT: Land use: planning and zoning: initiatives.

SUMMARY: Delegates exclusive authority to make certain land use approvals and designations to a city council or a board of supervisors.

The Senate amendments delete the Assembly version of this bill, and instead:

- 1) Add provisions to the general plan section and to the zoning regulations section of the Planning and Zoning law to specify that a city council of a city or a board of supervisors of a county shall have exclusive authority to adopt or amend the general plan, or to adopt or amend a specific plan, or to amend a zoning ordinance or any other similar document, that would do one of the following:
 - a) Convert any discretionary land use approval necessary for a project, as defined, to a ministerial approval;
 - b) Change the land use designation on a parcel or parcels to a more intensive land use designation; or,
 - c) Authorize more intensive land uses within an existing land use designation.
- 2) Specify which land uses are more intensive than others, as follows:
 - a) Industrial uses are considered to be the most intensive land use, followed by commercial uses, office uses, residential uses, and then agricultural or open-space uses;
 - b) Uses not specifically listed shall be considered to have the intensity of the most closely analogous use;
 - c) "More intensive land use" also includes, but is not limited to, increases in height or density for residential uses, increases in floor area ratio or square footage for mixed-use and commercial uses, and changes from light to heavy industrial uses; and,
 - d) Any change in uses must have the potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment.
- 3) Provide that the exclusive delegation in 1), above, does not apply to any legislative action that does any of the following:
 - a) Has the primary purpose or effect of either:
 - i) Increasing residential densities or building heights in order to incentivize or accommodate the construction or funding of affordable housing units; or,

- ii) Requiring a percentage of new residential construction to be affordable to households earning at or below moderate income levels;
 - b) Prohibits or otherwise mandates denial of any previously permissible land use;
 - c) Establishes an urban growth boundary or urban limit line; or,
 - d) Any other legislative action that does not come within the express terms of 1), above.
- 4) Provide that the exclusive delegation in 1), above, does not affect the referendum powers over any ordinance or resolution.
- 5) Provide that the exclusive delegation in 1), above, does not affect the authority of a city council or a board of supervisors to submit a ballot measure to the voters under either of the following circumstances:
- a) Voter approval is required pursuant to any provision of state or local law; or,
 - b) The city council or the board of supervisors conditionally approves a measure and exercises its discretion to submit the measure to the voters for either an advisory vote or for final approval.
- 6) Apply the exclusive delegation provisions to charter cities.
- 7) Specify the exclusive delegation in 1), above, does not apply to an initiative petition if the elections official has completed the certification process in existing law before January 1, 2018.
- 8) Provide that a development agreement cannot be approved or amended by an ordinance adopted through the initiative process, and apply this to a charter city.
- 9) State that the provisions of this bill are severable, and if any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.
- 10) Make a number of legislative findings and declarations, including the following:
- a) Legislative actions that change required discretionary approvals for local land use development projects into ministerial approvals or that establish more intensive land uses may significantly impact the environment;
 - b) In order to perform its substantive mandate to prevent significant environmental impacts under Section 21002 of the Public Resources Code, a local government needs discretionary authority over legislative actions that change required discretionary approvals for local land use development projects into ministerial approvals or that establish more intensive land uses;
 - c) It is the intent of the Legislature to prevent an initiative that allows for more intensive land uses than were previously analyzed and mitigated under the California Environmental Quality Act (CEQA), except as provided in the act;

- d) It is the intent of the Legislature to prevent a project applicant from avoiding enforceable environmental review by using the initiative process to remove the local government's discretionary authority over the project;
- e) It is the intent of the Legislature to preserve the use of the initiative process in order to encourage affordable residential development, along with other secondary community benefits, and to protect the environment through use of techniques that include, but are not limited to, urban growth boundaries, urban limit lines, and agricultural and open-space protection measures;
- f) It is the intent of the Legislature to exclusively delegate existing authority and not to grant any new authority to a local city council or board of supervisors;
- g) It is the intent of the Legislature to clarify that development agreements, which are negotiated contractual agreements between a legislative body and an individual or entity, are unsuitable for the initiative process; and,
- h) This act addresses a matter of statewide concern and therefore shall apply equally to all cities and counties, including charter cities.

EXISTING LAW:

- 1) Allows cities and counties to make and enforce within its limits, all local, police, sanitary and other ordinances and regulations not in conflict with general laws.
- 2) Provides, under the California Constitution, that initiative powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide.
- 3) Provides that the initiative power is generally coextensive with the powers of city councils and county boards of supervisors to enact ordinances, except where specific authorities are exclusively delegated to a city council or county board of supervisors.
- 4) Requires a county or a city, when it receives an initiative petition that is signed by a specified number of voters, to do one of the following:
 - a) Adopt the initiative without alteration;
 - b) Submit the initiative to the voters, as specified; or,
 - c) Order a report on the initiative, to be completed within 30 days, before deciding whether to adopt it or submit it to the voters.
- 5) Requires a local governing body that chooses to submit an initiative measure to the voters, rather than adopting the initiative without alteration, to call a special election for the voters to consider that initiative measure, if certain conditions are met.
- 6) Requires public agencies with principal responsibility for approving projects to analyze the environmental impacts of their decisions under the CEQA, with certain exceptions.

AS PASSED BY THE ASSEMBLY, this bill required projects, as defined by CEQA, which are proposed by local initiative, to be reviewed pursuant to CEQA prior to being placed on the ballot.

FISCAL EFFECT: According to the Senate Appropriations Committee, negligible state costs, pursuant to Rule 28.8.

COMMENTS:

- 1) **Bill Summary.** This bill provides that a city council of a city or a board of supervisors of a county shall have exclusive authority to adopt or amend the general plan, to adopt or amend a specific plan, or to amend a zoning ordinance or any other similar document, that would do one of the following:
 - a) Convert any discretionary land use approval necessary for a project, as defined, to a ministerial approval;
 - b) Change the land use designation on a parcel or parcels to a more intensive land use designation; or,
 - c) Authorize more intensive land uses within an existing land use designation.

The bill defines what constitutes "more intensive land uses" and also excludes certain legislative actions from the exclusive delegation, and prohibits a development agreement from being approved or amended by the initiative process. Additionally, the bill provides that it does not affect the referendum powers over any ordinance or resolution, and does not affect the authority of a city council or board of supervisors to submit a ballot measure to the voters for either an advisory vote or for final approval in specified circumstances. The bill will not apply to any initiative petition in which an elections official will certify the results of the petition before January 1, 2018. Provisions in the bill apply to charter cities and are severable.

This bill is sponsored by the State Building and Construction Trades Council of California and the Center for Community Action and Environmental Justice.

- 2) **Author's Statement.** According to the author, "Some developers are increasingly using the ballot initiative process for accelerated approval of large land use development projects. Using this non-traditional path for development bypasses public review of the significant environmental impacts of the project. Thus, the benefits to developers who use this loophole are clear: projects approved by ballot measures avoid legal challenges under CEQA. My district is a part of the trade and warehouse corridor, an important economic driver in California. But economic success should also consider the cost of our community's health. It is our duty to help protect communities when large project proposals purposely avoid environmental review. This is particularly important when the initiative process is used to cause significant environmental impacts that stretch beyond the community voting base. AB 890 returns discretion to local governments to review ordinances that facilitate development projects under the traditional planning process, which includes compliance with CEQA. We must do the right thing and protect our communities. AB 890 is a step in the right direction."

- 3) **Background on Local Initiative Process and CEQA.** The California Constitution provides that all political power is inherent in the people, and that the initiative is the power of electors to propose statutes and amendments to the Constitution and to adopt or reject them. Statewide initiatives require majority voter approval (Article II, Section 10). The Constitution also allows initiative and referendum powers to be exercised by the electors of each city or county under procedures developed by the Legislature. Charter cities and charter counties may adopt alternative procedures for initiatives.

State law requires a county or a city, when it receives an initiative petition that is signed by the required number of voters to qualify for the ballot, to do one of the following:

- a) Adopt the initiative without alteration;
- b) Immediately submit the initiative to the voters at a special election; or,
- c) Order a report on the effects of the initiative, to be completed within 30 days, before deciding whether to adopt it or submit it to the voters.

In general, if a majority of the voters voting on a proposed local ordinance vote in its favor, the ordinance becomes effective in that city or county.

When CEQA was enacted by the Legislature in 1970, it did not expressly address its applicability to measures proposed or adopted through the initiative process. Subsequent court cases, however, have held that the provisions of CEQA do not apply to initiatives proposed by voters and adopted at an election. Some developers have used this process to accelerate development approvals and avoid CEQA review. According to news reports, Walmart has qualified nine ballot measures across the state since 2009; eight of which were directly adopted by local legislative bodies. In addition, at least four other developments have been accelerated by the use of voter initiatives since 2014, including a warehouse complex in Riverside County, a shopping center in San Diego County, and two stadium projects.

A recent court case, *Tuolumne Jobs & Small Business Alliance v. The Superior Court of Tuolumne County (Wal-Mart Stores, Inc., et al., Real Parties In Interest)* (2014) 59 Cal.4th 1029, Case No. S207173) held that voter initiatives that are directly adopted by a city council or board of supervisors do not have to go through CEQA review. As a result, companies that want to build in a community but do not want to study and mitigate their impacts have begun to qualify initiatives with the goal of leveraging city councils and county boards of supervisors to directly adopt the ordinances. These local governments face a difficult choice: adopt the initiative outright without the full consideration of the impacts of the project that would be required under CEQA, or pony up the costs of a special election.

- 4) **Policy Considerations.** The Committee may wish to consider the following:
- a) **Closing the loophole.** A coalition of environmental groups, in support, argue that “developers of projects with large environmental impacts can ignore CEQA by simply gathering signatures for their project using the initiative process. With enough signatures, a petition for direct adoption can be filed to a local government leaving the county board of supervisors or city council with two unsavory options: a costly special

election with low turnout to decide the fate of the project, or adopting the initiative without amendment or any environmental review.”

According to the State Building Trades and Construction Council, “the CEQA review process has been increasingly undermined by the initiative process...several cases have held that CEQA provisions do not apply to land use initiatives proposed by voters due to the mismatch in timeline. The initiative process was meant to be quick, 10 to 40 days from the submission of a qualifying petition to the decision to adopt or hold an election. In contrast, the CEQA process can take more time because of the detailed reports and studies to mitigate the environmental and air quality impact for both residents and the environment. The focus of AB 890 is individual development projects that can and should use the local government’s traditional planning process, a process that includes compliance with CEQA.”

- b) **Power shift.** In its opposition letter, a coalition of business-related groups, including CalChamber, the California Building Industry Association, and many others (see opposition list below), argue that “removing the public from the equation is a fundamental shift of political power from the electorate to elected officials that is not only unconstitutional but unwise” and that the “government by initiative can be messy, but the system itself can always be improved....AB 890 proposes a radical path: removing voters utterly from their historic role in proposing laws as a backstop to the local legislative process.”
 - c) **Right to local initiatives.** The local electorate’s right to initiative is guaranteed by Article II, Section 11, subdivision (a) of the California Constitution and is coextensive with the local governing body’s legislative power. As such, the power of initiative is integral to California’s political process. AB 890 effectively prohibits several types of local voter initiatives in an effort to restrain some misuses of the initiative process that allow projects to escape CEQA review. As a reserved power, courts jealously guard the ability of voters to enact laws through initiative. Given the courts’ tendency to protect the power of initiative, it is unclear whether AB 890 would withstand a legal challenge.
 - d) **Municipal affair vs. statewide concern.** The California Constitution does allow the Legislature to designate local elected bodies as their sole agent, but only on matters of statewide importance. While this bill contains language specifying that the bill addresses a matter of statewide concern, it is unclear whether the courts would determine the bill as addressing a municipal affair or a matter of statewide concern. If AB 890 addresses a matter of statewide concern, it would not infringe upon the local electorate’s constitutional right to initiative.
- 5) **Arguments in Support.** Supporters argue that this bill will close a loophole by removing the inconsistencies between CEQA and the Elections Code, and prevent the use of the petition process to avoid crucial environmental review.
- 6) **Arguments in Opposition.** Opposition argues that this bill unconstitutionally eliminates citizens' right to local land use initiatives and contains a significant shift of power from the people to local elected officials.

REGISTERED SUPPORT / OPPOSITION:

Support

State Building and Construction Trades Council [SPONSOR]
Center for Community Action and Environmental Justice [SPONSOR]
American Lung Association in California
Audubon California
AZUL
CalBike
California Environmental Justice Alliance
California Labor Federation
California League of Conservation Voters
California Native Plant Society
Clean Water Action
Coalition for Clean Air
Earthjustice
Environment California
Environmental Protection Information Center
National Parks Conservation Association
Natural Resources Defense Council
Planning and Conservation League
Sierra Club California
United Food and Commercial Workers Union Western States Council
Wholly H2O

Opposition

African-American Farmers of California
Associated Builders and Contractors of California
California Chamber of Commerce
California Association of Realtors
California Building Industry Association
California Business Properties Association
California Citrus Mutual
California Dairies, Inc.
California Fresh Fruit Association
California Independent Petroleum Association
California Strawberry Commission
California Taxpayers Association
Cities of Indian Wells, La Mirada, Moreno Valley, Palm Desert, Thousand Oaks
Far West Equipment Dealers Association
National Federation of Independent Business
Greater San Fernando Valley Chamber of Commerce
Nisei Farmers League
Orange County Business Council
Santa Maria Valley Chamber of Commerce
West Coast Lumber & Building Material Association
Vacaville Chamber of Commerce
Western Electrical Contractors Association
Individual letters (272)

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