

Date of Hearing: April 5, 2017

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Evan Low, Chair

AB 890 (Medina) – As Amended March 28, 2017

SUBJECT: Local land use initiatives: environmental review.

SUMMARY: Prohibits projects that are subject to the California Environmental Quality Act (CEQA) from being considered or approved as part of the local initiative process, except when the project does not have the potential for a direct physical change to the environment or a reasonably foreseeable indirect physical change in the environment, as specified. Provides that a special election will be held for a local initiative measure only if the proponents of the measure fund that special election. Specifically, **this bill:**

- 1) Requires the proponent of a proposed local initiative measure to request an environmental review of the measure to be conducted, as specified, at the time that the measure is submitted to the local elections official for the preparation of a ballot title and summary. Requires the elections official to immediately transmit a copy of the measure to the planning department for the jurisdiction, which conducts the environmental review.
- 2) Requires the planning department of the local jurisdiction in which the measure is proposed to determine if the activity proposed by the measure is subject to CEQA within 30 days after the measure is filed. Requires the following actions to occur, depending on the result of the environmental review:
 - a) If the activity proposed by the measure is not subject to CEQA, the initiative measure may proceed;
 - b) If the activity proposed by the measure is subject to CEQA, and the planning department determines that the activity proposed by the measure does not have the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, then the governmental body shall prepare a negative declaration within 180 days;
 - c) If the activity proposed by the measure is subject to CEQA, and the planning department determines that the activity proposed by the measure has the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, then the governmental body shall notify the proponents within 30 days after the measure is filed that the measure cannot be adopted by the initiative process, but can receive a public hearing if a sufficient number of signatures are collected.
- 3) Requires the local elections official to furnish a copy of the environmental determination prepared by the planning department, as described above, to the proponents of the initiative measure. Prohibits the proponents of a local initiative measure from circulating petitions for that measure until the environmental determination has been received. Requires a copy of the environmental determination to be included on each section of the initiative petition.

- 4) Eliminates the ability of a local governing body to directly adopt an initiative measure for which sufficient signatures have been collected on an initiative petition if a negative declaration has been prepared for that measure, and instead requires that the measure appear on the ballot for consideration by the voters of the jurisdiction. Requires the negative declaration to be circulated for public review and comment for at least 20 days before the meeting at which the governing body considers certifying the petition, and requires the governing body to consider any public comments raised.
- 5) Requires, in the case of a petition for a proposed initiative measure that is signed by a sufficient number of voters to qualify, but which cannot appear on the ballot under this bill because it is subject to CEQA and a negative declaration has not been prepared for the measure, that the legislative body require an environmental impact report (EIR) or mitigated negative declaration to be prepared to analyze the impacts of the activity proposed by the initiative. Requires the legislative body, once the environmental document is complete, to hold a public hearing to either approve or deny the proposal.
- 6) Prohibits the initiative process in a charter city from precluding environmental review of an initiative under state law.
- 7) Requires the proponent of a local initiative measure to fund any special election that is held to vote on the measure. Provides that if the proponent declines to fund the special election, the initiative shall instead be submitted to voters at the next statewide election (in the case of a county measure) or the next regularly scheduled election (in the case of a city or district measure) occurring in the jurisdiction that is at least 88 days after the date of the order of the election.
- 8) Defines the term "project," for the purposes of CEQA, to include an activity that is proposed by a local initiative measure that, if passed and adopted, would be implemented by a public agency if that activity may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment.
- 9) Prohibits a development agreement from being approved by an ordinance adopted through the initiative process.
- 10) Makes various findings and declarations.
- 11) Makes corresponding and technical changes.

EXISTING LAW:

- 1) Provides that the initiative is the power of electors to propose statutes and amendments to the Constitution and to adopt or reject them.
- 2) Provides that initiative powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide.
- 3) 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.
- 4) Requires a special district, 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; or,
 - b) Submit the initiative to the voters, as specified.
- 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) Makes discretionary projects that are proposed to be carried out or approved by public agencies subject to CEQA, with certain exceptions. Requires the lead agency with the principal responsibility for carrying out or approving a proposed discretionary project, with respect to a project that is subject to CEQA, to determine whether the project may have a significant effect on the environment. Requires the lead agency to do the following, depending on the determination it makes regarding the project:
- a) Adopt a negative declaration, if it determines that there is no substantial evidence, in light of the record before the agency, that the project may have a significant effect on the environment;
 - b) Adopt a mitigated negative declaration, if it determines that the project will have potentially significant effects to the environment, but revisions in the project plans or proposals made by, or agreed to by, the applicant would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment; or,
 - c) Prepare an EIR for the project, if it determines that there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.

FISCAL EFFECT: Unknown. State-mandated local program; contains reimbursement direction.

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

[CEQA] is California's signature environmental protection statute that helps identify and feasibly mitigate significant environmental impacts of land use

developments. Unfortunately, the CEQA review process has been increasingly undermined by California's initiative process, a once highly regarded vital check on corporate influences over our government. Some developers are avoiding CEQA and other public review for proposed projects by qualifying a local measure for approval. Without a proper environmental review or mitigation plan, this results in significant, lasting negative impacts on communities.

This bill doesn't change the definition of a project subject to CEQA. The majority of projects subject to CEQA are approved via negative declaration. This bill seeks to strengthen local control with an understanding of cities tight budgets, their need for development, and desire not to see their air quality, public resources, and environment used in way that allows for only a certain set of developers to build and avoid environmental review and public scrutiny.

If we wish to reconcile the intent of CEQA regulation with that of the ballot initiatives, we must find a reasonable solution that strengthens and reaffirms California's commitment to both environmental protection and the spirit of the initiative process.

- 2) **CEQA Background:** CEQA provides a process for evaluating the environmental effects of applicable projects undertaken or approved by public agencies. If a project is not exempt from CEQA, an initial study is prepared to determine whether the project may have a significant effect on the environment.

If the initial study shows that there would not be a significant effect on the environment, the lead agency must prepare a negative declaration. If the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an EIR. Generally, an EIR must accurately describe the proposed project, identify and analyze each significant environmental impact expected to result from the proposed project, identify mitigation measures to reduce those impacts to the extent feasible, and evaluate a range of reasonable alternatives to the proposed project. Prior to approving any project that has received environmental review, an agency must make certain findings. If mitigation measures are required or incorporated into a project, the agency must adopt a reporting or monitoring program to ensure compliance with those measures.

- 3) **CEQA and the Initiative Process:** In 1911, California voters amended the state constitution to reserve to themselves the powers of initiative and referendum. While the basic procedures governing the *state* initiative process are found in the state constitution, Article II, Section 11 of the California Constitution generally tasks the state Legislature with establishing procedures that govern the local initiative process. Unlike the state initiative process, where there is no formal procedure for an initiative to be directly adopted by the Legislature, the local initiative process generally gives the local governing body the authority to adopt a proposed initiative measure without alteration, thereby avoiding the necessity of a public vote on the initiative.

When CEQA was enacted by the Legislature in 1970 through the passage of AB 2045 (Select Committee on Environmental Quality), Chapter 1433, Statutes of 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. In *Stein v. City of Santa Monica* (1980), 110 Cal. App. 3d 458, the California 2nd District Court of Appeals found that CEQA did not apply to a rent control charter amendment submitted to the voters of the City of Santa Monica through a voter-proposed initiative. In its decision, the court noted that the adoption of the measure "involved no discretionary activity directly undertaken by the city," but instead "was an activity undertaken by the electorate and did not require the approval of the governing body." The court further noted that "[t]he acts of placing the issue on the ballot and certifying the result as a charter amendment qualifies as a nondiscretionary ministerial act not contemplated by CEQA." Subsequent court decisions reached the same conclusion—namely that measures submitted to (and approved by) voters through a voter-proposed initiative are not subject to CEQA. In addition, CEQA guidelines specifically provide that voter-proposed initiatives are not subject to environmental review.

Even when a local governing body takes a discretionary action to approve a measure that was first proposed through an initiative, however, the California Supreme Court has ruled that the governing body is not first required to comply with CEQA. As noted above, when a local initiative petition is submitted that has a sufficient number of signatures, the local governing body generally has the option of adopting that initiative measure outright, rather than submitting the measure to the voters for their consideration. Notwithstanding the fact that the decision to adopt a voter-proposed initiative measure is a discretionary decision, rather than a ministerial one, the California Supreme Court ruled in *Tuolumne Jobs & Small Business Alliance v. The Superior Court of Tuolumne County* (2014), 59 Cal. 4th 1029, that when a city council adopts a voter-proposed initiative in accordance with the state law, rather than submitting that measure to the voters for their consideration, the city council does not need to comply with CEQA prior to adopting the measure. In reaching that conclusion, the court noted that the provisions of the Elections Code allowing for a local governing body to adopt a voter-proposed initiative and the timelines for taking such an action are inconsistent with the timelines and procedures for review of a proposed project under CEQA.

The fact that voter-proposed initiative measures are not subject to CEQA creates the potential that the initiative process could be used as a means to bypass environmental reviews that would otherwise be required under CEQA. In the case of initiative measures that are ultimately submitted to and approved by the voters, the fact that a proposed measure did not undergo CEQA review might be an issue considered by the voters during the campaign on the resulting ballot measure. The ability for a local governing body to directly adopt a proposed local initiative, however, also creates the potential for a project to bypass CEQA reviews even in a situation where the local voters are not asked to vote on the proposed initiative measure.

In fact, background materials submitted by the author's office suggest that such situations may already be occurring. A June 2016 article in the *New York Times* reported that one company that had "pioneered the use of ballot initiatives to speed construction over the last decade," had used proposed ballot measures in at least nine cities in the state since 2009. In eight of those cases, the local governing body approved the measures without submitting them to the voters for consideration. When the California Supreme Court reached its

decision in *Tuolumne Jobs & Small Business Alliance*, it acknowledged concerns that the initiative process could be used as a tool to evade CEQA review. Nonetheless, the Court declared that "those concerns are appropriately addressed to the Legislature."

- 4) **Exclusions from the Initiative Process:** Article II, Section 11 of the California Constitution tasks the Legislature with developing procedures for the exercise of initiative and referendum powers by voters in cities and counties. While that provision gives the Legislature a degree of discretion over how the local initiative process functions, it does not give the Legislature complete control over the scope of the local initiative process.

Generally, the procedures enacted by the Legislature to govern the local initiative process have not expressly excluded certain subjects from being considered by the voters as part of that process. By expressly excluding certain measures from the local initiative process based on the fact that those measures otherwise would be subject to CEQA, this bill represents a significant departure from existing local initiative procedures developed by the Legislature. As detailed below, the opponents of this bill have raised a question of whether this restriction unconstitutionally interferes with the voters' right to initiative and referendum.

- 5) **More Stringent CEQA Procedures for Initiative Measures and Proposed Amendments:** As currently written, this bill could be interpreted as imposing more stringent environmental review procedures under CEQA for initiative measures than for measures that are not submitted by voter-proposed initiative. Furthermore, this bill could be interpreted as making initiative measures subject to CEQA in circumstances where the same policy proposal would not be subject to CEQA if proposed and adopted outside the initiative process. Such a policy does not appear to be consistent with the author's or the sponsor's intent.

In an attempt to address this concern, the committee may wish to consider amending this bill to specify that when a local initiative is submitted for environmental review under this bill, the local entity conducting the review will determine whether the activity proposed by the measure may have a significant effect on the environment—the standard that lead agencies currently are required to follow when evaluating measures that are subject to CEQA.

- 6) **Costs of Special Elections & Possible Amendments:** Under existing law, the proponents of a local initiative measure have the ability to request that the measure be submitted to voters at a special election. By including a request for a special election in the initiative petition—and in most cases, by collecting a larger number of signatures—local initiative proponents can force the local government body to either adopt the initiative measure outright, or schedule a special election to vote on the measure, with certain exceptions.

This bill requires the proponents of a local initiative measure to fund any special election that is held to vote on the measure. If the proponent refuses to fund such a special election, this bill would provide that the measure instead would appear on the ballot at a future regularly scheduled election in the jurisdiction. One effect of this provision is that initiative proponents who have the financial resources to cover the costs of a special election would have the ability to force a special election to occur, while proponents without the financial resources to cover those costs would not have the option of a special election for their measure. The committee may wish to consider whether it is appropriate to condition the

potential for a special election on the proponents' ability to pay for such an election, and may wish to consider removing those provisions from the bill.

- 7) **Arguments in Support:** In support of this bill, the California League of Conservation Voters, on behalf of itself and seven other organizations, writes:

AB 890 (Medina)...closes a loophole in election law that allows developers to get projects approved without publicly disclosing or mitigating any environmental impacts of their projects. The most egregious example thus far is in Moreno Valley, where a proposed warehouse project will add 14,000 unmitigated truck trips a day. This is just the beginning of disastrous projects polluting California communities—many of whom are already burdened by effects of smog and diesel emissions, and is unconscionable to keep this loophole open.

[CEQA] requires projects to publicly disclose their impacts and provide mitigation. This keeps the public aware of changes to conditions around them, and ensures that polluters clean up their act and pay for their pollution, not taxpayers. These vital protections have made California a better and healthier place for all.

A recent court decision held that a developer loophole to bypass CEQA's protections for the community and the environment is legal. This allows developers to introduced unmitigated pollutants into communities, without communities knowing about them. The use of this loophole will degrade the public health of Californians throughout the state, and increase state costs to address new problems that should be paid for by the polluters.

AB 890 will close this loophole by removing the inconsistencies between CEQA and the Elections Code. This will allow for ballot proposals to still use the petition process to avoid a costly election where it is not needed, but prevent the use of that petition process to avoid crucial environmental review.

- 8) **Arguments in Opposition:** The California Chamber of Commerce and 15 other organizations submitted a letter of opposition to a prior version of this bill. The amendments subsequently taken to this bill do not appear to have addressed the concerns raised in that letter. In that letter of opposition, the California Chamber of Commerce writes:

AB 890 Outlaws Virtually All Local Initiatives and Is Therefore Unconstitutional

AB 890 prevents any initiative from appearing on a ballot that "has the potential for resulting in either a *direct* physical change in the environment, or a reasonably foreseeable *indirect* change in the environment" — even if that change is not detrimental. Under this standard, virtually any initiative measure would be subject to a costly and protracted CEQA review and litigation. This sweeping standard would subject most proposed initiatives to the prohibition from appearing on the ballot...

The California Constitution...cannot reasonably be interpreted to allow the Legislature to utterly deprive citizens from using the initiative power. Creating a procedure that at best eliminates entire categories of initiative subjects, using vague verbiage, is undoubtedly unconstitutional.

AB 890 Will Subject Virtually All Initiatives to Protracted CEQA Litigation

AB 890 amends CEQA to include all initiatives in the definition of a "project" subject to the statute. Since initiatives by definition require a discretionary approval, under AB 890 all initiatives are subject to this new CEQA review. Also, in practice, most initiatives are controversial. Therefore, any local government decision regarding the scope of environmental review of an initiative — whether an initiative proposal would not "indirectly change the environment" and may proceed or, in the alternative, is barred from the ballot — would undoubtedly be litigated just as virtually all controversial CEQA projects are today...

AB 890 Is a Significant Shift of Power from the People to Local Elected Officials

The types of projects that would be prohibited from going to the ballot under AB 890 include not only housing and commercial development projects but also open space and agricultural land preservation ordinances, urban growth boundaries, new environmental regulatory regimes, and possibly tax increases for new public programs. Any of these proposals may be deemed to result in a direct or indirect physical change in the environment. Removing the public from the equation is a fundamental shift of political power from the electorate to elected officials that is both unconstitutional and unwise.

- 9) **Technical Amendments:** In addition to the amendments detailed above, committee staff recommends the following technical amendments to this bill:

On page 5, line 1, the word "city" should be replaced by "county".

On page 5, line 2, the word "city" should be replaced by "county".

- 10) **Related Legislation:** AB 943 (Santiago), which is pending in the Assembly Local Government Committee, requires any ordinance that is submitted to the voters of a city that would curb, delay, or deter growth or development within the city, to be approved by at least two-thirds of the votes cast on it at the election in order to take effect. AB 943 has been double-referred to this committee, and thus would be considered in this committee upon approval by the Assembly Local Government Committee.

AB 765 (Low), which is pending in this committee, eliminates the ability of the proponents of a local initiative measure to require the local government to call a special election to vote on the measure, and instead generally requires that the measure appear on the ballot at a regularly scheduled election in the jurisdiction, as specified, unless the governing body

chooses to call a special election for the measure.

11) **Double-Referral:** This bill has been double-referred to the Assembly Committee on Natural Resources.

REGISTERED SUPPORT / OPPOSITION:

Support

State Building and Construction Trades Council, AFL-CIO (Sponsor) (prior version)
CalBike
California Environmental Justice Alliance
California Labor Federation
California League of Conservation Voters
Coalition for Clean Air
Environment California
Environmental Protection Information Center
National Parks Conservation Association
Sierra Club California

Opposition

African-American Farmers of California (prior version)
California Association of Realtors (prior version)
California Building Industry Association (prior version)
California Chamber of Commerce (prior version)
California Citrus Mutual (prior version)
California Dairies, Inc. (prior version)
California Fresh Fruit Association (prior version)
California Independent Petroleum Association (prior version)
California State Association of Counties
California Strawberry Commission (prior version)
California Taxpayers Association (prior version)
City of Indian Wells
Far West Equipment Dealers Association (prior version)
Greater San Fernando Valley Chamber of Commerce (prior version)
League of California Cities (prior version)
National Federation of Independent Business (prior version)
Nisei Farmers League (prior version)
Rural County Representatives of California
Santa Maria Valley Chamber of Commerce (prior version)
Southwest California Legislative Council
West Coast Lumber & Building Material Association (prior version)

Analysis Prepared by: Ethan Jones / E. & R. / (916) 319-2094