

Date of Hearing: May 10, 2017

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 943 (Santiago) – As Amended May 4, 2017

AS PROPOSED TO BE AMENDED

SUBJECT: Land use regulations: local initiatives: voter approval.

SUMMARY: Requires an ordinance or amendment to an ordinance that is proposed by an initiative measure and that is submitted to the voters of a city, county, or city and county that would reduce density or stop development or construction to be approved by 55 percent of the votes cast in order to take effect. Specifically, **this bill:**

- 1) Requires, if a proposed ordinance or amendment to an ordinance that reduces density or stops development or construction is submitted to voters of a city, county, or city and county as an initiative measure pursuant to existing law or pursuant to procedures adopted as part of a city or county charter, that the ordinance or amendment must be approved by 55 percent of the votes cast on it at the election.
- 2) Provides that the 55 percent vote requirement does not apply to measures that are proposed by the legislative body of a city, county, or city and county, or to the adoption or amendment of a city, county, or city and county charter.
- 3) Makes the county elections official responsible for determining whether an ordinance or amendment to an ordinance would "reduce density or stop construction or development," for the purposes of this bill, in the following instances:
 - a) For any ordinance or amendment that would apply in the county or city and county of that elections official; and,
 - b) For any ordinance or amendment that would apply in a city that is included in the territorial boundaries of the county of that elections official.
- 4) Finds and declares that this bill's provisions address a matter of statewide concern, and therefore apply equally to all cities and counties, including charter cities and charter counties.

EXISTING LAW:

- 1) Permits a county or a city to provide for its own governance through the adoption of a charter by a majority vote of its electors voting on the question.
- 2) Provides that a legally adopted city charter supersedes all laws inconsistent with that charter with respect to municipal affairs.
- 3) Provides that the people of California reserve to themselves the powers of initiative and referendum. Provides that the initiative is the power of electors to propose statutes and amendments to the Constitution and to adopt or reject them.

- 4) Provides that initiative powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. Provides that this provision does not affect a city having a charter.
- 5) 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.
- 6) Generally requires a majority of the voters voting on a proposed county or city ordinance to vote in its favor in order for the ordinance to go into effect. Provides, pursuant to state statute, that a local government or district measure that imposes a special tax requires a two-thirds vote of the voters voting in an election on the issue. Provides, pursuant to the California Constitution, that the following types of local ballot measures require approval by greater than a majority of voters in order to go into effect:
 - a) Measures that impose ad valorem taxes or special assessments to pay the interest and redemption charges on local government bonds to buy or improve real property. These measures generally require a two-thirds vote of the qualified electors of the jurisdiction, though certain school bonds can be approved with 55 percent of the vote if specified accountability requirements are met;
 - b) County, city, and special district measures that impose a special tax, which require a two-thirds vote of the qualified electors of the jurisdiction. Special taxes are taxes that are levied for a specific purpose or purposes, including parcel taxes; and,
 - c) A measure proposed by a local government that imposes or increases a property-related fee or charge, except for certain specified fees or charges, if the local agency chooses to submit the measure for approval of the electorate residing in the affected area, in which case a two-thirds vote of the electorate is required. The local agency alternately can submit the measure for approval to the property owners of the property subject to the fee or charge, in which case a majority vote of the property owners is required.

FISCAL EFFECT: Unknown. State-mandated local program; contains reimbursement direction. Although this bill is keyed fiscal by the Legislative Counsel, and although the deadline for policy committees to hear and report fiscal bills introduced in their house to the appropriate fiscal committee has passed, this bill nonetheless is eligible to be heard in this committee today pursuant to Joint Rule 61(d), because the Legislative Counsel's digest was changed to indicate reference to a fiscal committee after the relevant deadline had passed.

COMMENTS:

1) **Author's Amendments:** After the committee's deadline for pre-committee author's amendments, the author proposed amendments to change the trigger for the types of local initiative measures that would be subject a 55 percent vote requirement. With these author's amendments, initiative measures that would "reduce density or stop construction or development" would require a 55 percent vote in order to pass, instead of making the 55 percent vote requirement applicable to local initiative measures that would "expressly stop construction or development," as proposed by the version of the bill that is currently in print. This analysis reflects those proposed author's amendments.

2) **Purpose of the Bill:** According to the author:

A March 2015 report by the state's non-partisan Legislative Analyst's Office concludes that the state would need to build millions more homes – including more than a million in Los Angeles County alone – to keep housing prices in line with the rest of the country. Those million construction starts would only just meet the population's demands for housing. An additional, compounded problem is that of housing for families. A report in *Governing* magazine from November 2015 found that in California's largest urban areas, less than 5% of rental units being constructed consist of 3 or more bedrooms.

In many cities, vacancy rates have dropped dramatically due to the lack of new construction, making it difficult for individuals, students, seniors, and families to find a place to live close to their schools or jobs. In fact, according to CoStar Property Data Systems, the average vacancy rate statewide is 3.8%; a normal vacancy rate is considered to be 5-6%.

While many local governments are devoting large amounts of energy and attention to the issue of increasing housing production, there are others who been unable to do so – due to either a lack of will by the local legislative body or by constituent groups within those localities. In some areas, attempts have even been made to block future housing developments of various kinds.

A recent article in the *Los Angeles Times* noted that "in some ways, state lawmakers' hands are tied on boosting housing supply because cities and counties primarily control building and permitting." AB 943 attempts to loosen those binds on legislators some by establishing a statewide concern for the development of housing. In doing so, the measure will limit the abilities of those at the local level to implement development moratoriums or to further stymie statewide efforts to lift Californians out of poverty and into better socio-economic circumstances.

There is precedent in California for a different vote threshold for local measures on issues where the State, as a whole, has developed a specified interest. These issue areas include education bonds, parcel taxes, and general taxes levied by school districts and special districts.

- 3) **Initiatives vs. Ballot Measures:** Although the terms "initiative" and "ballot measure" are sometimes used interchangeably, the two terms are not synonymous. An "initiative" is a proposed law that qualifies to appear on the ballot through the presentation of petitions containing the signatures of a specified number of voters. All initiatives that appear on the ballot are "ballot measures." However, the term "ballot measure" includes not only initiatives, but also includes referenda, recall measures, and measures proposed and placed on the ballot by the Legislature or by the governing body of a local agency. The provisions of this bill that require a 55 percent vote for approval of local measures that reduce density or stop development or construction applies only to initiatives; a measure that reduces density or stops development or construction that is placed on the ballot by the governing body of a local agency generally would still require a simple majority vote for approval.
- 4) **Existing Supermajority Vote Requirements:** Currently, all state ballot measures require a simple majority to be approved by the voters, regardless of the changes to state law made by the measure. As detailed above, local ballot measures generally also require a majority vote for approval, though certain local measures that impose taxes or that authorize bonded indebtedness require approval by greater than a majority of voters in order to take effect.

The reason that certain local ballot measures require a supermajority vote for approval is that various state ballot measures have required voter approval before local governments could take certain actions, and in some cases, those measures required more than a majority of voters to approve certain actions before they could take effect. Specifically, Proposition 13 of 1978, an initiative constitutional amendment which is best known for setting a maximum property tax rate, also amended the California Constitution to require counties, cities, and special districts to receive the approval of two-thirds of voters in order to impose any special taxes. Proposition 46 of 1986, a legislative constitutional amendment, allowed local governments to raise property tax rates above the limit otherwise imposed by Proposition 13, with the approval of two-thirds of voters, in order to pay the interest and redemption charges on local government bonds to buy or improve real property. Proposition 62 of 1986, an initiative statute, required a local government or district measure that imposes a special tax to receive a two-thirds vote of the voters voting in an election on the issue in order to be approved, among other provisions. Because Proposition 13 already required special taxes levied by counties, cities, and special districts to receive a two-thirds vote for approval, however, the extent to which Proposition 62 imposed a new supermajority vote requirement is unclear. Proposition 218 of 1996, an initiative constitutional amendment, required certain property-related fees and charges to be approved by property owners prior to being imposed, among other provisions, but also allowed local governments to impose those property-related fees and charges upon approval by two-thirds of voters. Finally, Proposition 39 of 2000, an initiative constitutional amendment, lowered the vote requirement needed to raise property tax rates to pay for certain school facilities bonds from a two-thirds vote to a 55 percent vote requirement.

The existing supermajority vote requirements apply equally regardless of whether those actions were initiated by the governing body of a local agency or by an initiative petition. In other words, there is no precedent for having a different vote threshold apply to a measure based on whether that measure was initiated by a governing body of a local agency or by an initiative petition. Furthermore, the existing supermajority vote requirements all were

imposed as the result of ballot measures that were approved by the voters of the state; there is no precedent for the Legislature to create a supermajority vote requirement in state statute.

In fact, it is unclear whether it is constitutional for a state statute to impose a supermajority vote requirement for the approval of an initiative measure, given that the imposition of a supermajority vote requirement could serve as a significant limitation on the power of the initiative that is reserved to the voters under the California Constitution. In fact, in at least one instance, a California appellate court found that a requirement that certain local initiatives must receive a supermajority vote in order to be approved was an impermissible limitation on the voters' initiative powers.

In *Newport Beach Fire & Police Protective League v. City Council of Newport Beach* (1961), 189 Cal. App. 2d 17, the California Court of Appeals for the Fourth Appellate District concluded that "the adoption of an initiative measure by a majority of the voters is an integral part of the constitutionally reserved power to act through the initiative; that any regulation requiring a greater number of votes to adopt an initiative ordinance is a limitation upon that power; and that a charter provision requiring a two-thirds vote is ineffective." The specific question at issue in that case was whether a city charter could require a supermajority requirement for approval of city initiatives, and the city charter provision in question required a two-thirds vote to approve certain city initiative measures, rather than the 55 percent requirement that is imposed by this bill. In light of those facts, the policy proposed by this bill is distinguishable from the policy considered by the court in the *Newport Beach Fire & Policy Protective League* case. Nonetheless, the rationale that the court used to reach its conclusion in that case could apply to efforts by the Legislature to require a supermajority vote for the approval of certain local initiative measures, as proposed by this bill.

- 5) **Measure S in Los Angeles.** The author points to several examples of local initiatives that would limit growth, including the recent Measure S in Los Angeles, which appeared on the ballot at the City of Los Angeles' municipal primary election on March 7, 2017. This initiative, known as the Neighborhood Integrity Initiative, would have imposed a moratorium on construction that increases development density for up to two years, prohibited project-specific amendments to the city's general plan, required a public review of the city's general plan every five years, and required city staff, not developers or project applicants, to perform environmental impact reports. Opponents of Measure S argued that the proposed moratorium and restrictions on project approval would have put a stop to most development projects in the city, resulting in an even greater housing shortage, economic decline, the loss of thousands of jobs, and the loss of millions in tax revenue for education, parks and other city services. Measure S failed passage, with more than 70 percent of voters voting against the measure.
- 6) **Determination of Whether a Measure Reduces Density or Stops Construction or Development and Suggested Amendments:** This bill requires the county elections official to make a determination about whether a proposed initiative measure would "reduce density or stop development or construction," and therefore needs to be approved by 55 percent of the votes cast in order to take effect. It is not clear, however, whether the county elections official is the most appropriate person to make this determination. For one thing, with

respect to city initiative measures, the county elections official doesn't necessarily conduct the election for such a measure. While counties often conduct elections on behalf of cities, there are circumstances in which cities run their own elections; in such a situation, the county elections official would have only limited involvement with the conduct of an election for a city initiative measure.

Furthermore, under existing law, county elections officials typically are not required to exercise judgment in evaluating the content of proposed initiative measures, as would be required if the elections official were to make a determination about whether an initiative measure reduces density or stops development or construction. By contrast, there are local officials who already are tasked with the responsibility under existing law of exercising judgment in evaluating the content of proposed local initiative measures. Specifically, existing law requires the county counsel (in the case of a county initiative measure) or the city attorney (in the case of a city initiative measure) to prepare the title and summary of a proposed initiative measure. The title and summary of a local initiative measure is required to be a "true and impartial statement of the purpose of the proposed measure in such language that...shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure."

In fact, the California State Association of Counties (CSAC) sent a letter of "concerns" about the requirement in the current version of the bill that the county elections official make the determination of whether an initiative meets the requirements to be subject to the 55 percent threshold for approval. In its letter, CSAC wrote:

We are currently reviewing the amendments dated May 4, 2017, that now apply the provisions of the bill to counties and look forward to reviewing this measure in greater detail. However, we have some immediate concerns in regards to the responsibilities assigned to county elections officials.

Specifically, AB 943 would require a county elections official to determine whether an initiative submitted by petition expressly stops development and therefore is subject to a 55% voter approval threshold. We believe this is beyond the scope of the county elections officials' duties. The determination would be more a suitable assignment for the county counsel, who is already tasked with reviewing ballot initiatives and providing title and summary language as well as an impartial analysis to elections officials to be made available for voters.

In light of these facts, committee staff recommends that this bill be amended to require the county counsel or city attorney to make the determination of whether a proposed initiative measure reduces density or stops development or construction, and to require that determination to be made as part of the preparation of the title and summary of the measure.

- 7) **Charter Amendments:** While this bill generally applies to most local initiative measures, an initiative measure that amends a city or county charter still would require a simple majority vote in order to pass, even if the charter amendment reduces density or stops development or construction. That's because the California Constitution expressly provides that a charter may be adopted, amended, revised, or repealed by a majority vote of electors

voting on the question, and the Constitution further expressly permits charter amendments or the repeal of a charter to be proposed by an initiative measure. In light of this fact, proponents of an initiative that would reduce density or stop development or construction may be able to circumvent the supermajority vote requirements imposed by this bill in charter counties or charter cities by drafting their measure as a charter amendment.

- 8) **Arguments in Support:** In support of the prior version of this bill, the California Chamber of Commerce wrote:

As you know, California is in the midst of an unprecedented housing crisis caused by a severe lack of new housing construction at all levels of affordability. One of the most significant barriers to the construction of new housing is unjustified local resistance from NIMBY (not in my backyard) groups. Using unreasonable arguments and tactics, "no growth advocates" and NIMBYs have significantly curtailed housing construction, which has worsened the jobs-housing imbalance in our communities. This imbalance causes hardship for many people, especially low-income families in need of housing close to their jobs.

By increasing the vote required to pass an ordinance seeking to curb, delay, or deter growth or development ... AB 943 directly limits the impact of NIMBY and "no growth advocates" with regard to development and housing construction. AB 943 will ensure that cities do not unfairly hinder the development of new housing projects within their boundaries, and will assist with the development of new housing construction during crises like the one California faces today.

- 9) **Arguments in Opposition:** The League of California Cities, which had an "oppose unless amended" position on the prior version of this bill, requested that the author consider amendments to: (1) Restore the principle of majority vote; (2) Limit the bill to voter-initiated measures; (3) Avoid legal debates over terms such as curb, delay, or deter growth or development, and use more neutral language such as "affecting land use;" (4) Consider why the bill is limited to cities; and, (5) Consider directing such measures to be placed on a general election ballot where more voters have an opportunity to weigh in. The most recent amendments to this bill include some of the amendments requested by the League of California Cities, but not all. Perhaps most notably, this bill still requires a greater-than-majority vote on certain local initiative measures. In its letter opposing the prior version of this bill, the League of California Cities expressed the following opposition to the new supermajority vote requirement proposed by this bill:

Cities are democratic forums that rely on majority rule. City officials are elected and can be recalled with a majority vote. They adopt their ordinances and pass their budgets with majority vote. Occasionally, on controversial issues such as whether or not to approve a big-box grocery store, whether to shift to district elections, whether to protect open space or farmland, a matter can be submitted to the voters for their final determination. We are concerned that inserting a two-thirds voter requirement on selected issues conflicts with the principle of majority rule...

Many legislators, no doubt, maintain that the voter's decision to reduce the vote threshold to pass a state budget from two-thirds to a majority was a good thing. Supporters of public school construction appreciate the voter's decisions to reduce the vote threshold for local school construction bonds from two-thirds to fifty-five percent. This measure appears contrary to the philosophy behind other measures pending in the Legislature, and supported by the League, that seek to obtain voter approval to reduce the vote requirement from two-thirds to fifty-five percent for local measures to invest in infrastructure, affordable housing and libraries.

- 10) **Related Legislation:** AB 765 (Low), which is also being heard in this committee today, eliminates the requirement that a special election be held to vote on a local initiative measure if certain conditions are met, and instead generally provides for the measure to be submitted to voters at a regularly scheduled election.

AB 890 (Medina), which was approved by this committee on a 5-2 vote and is pending in the Assembly Appropriations Committee, prohibits projects that are subject to the California Environmental Quality Act from being considered or approved as part of the local initiative process, except when there is no substantial evidence that the project may have a significant effect on the environment, as specified.

- 11) **Double-Referral:** On May 3, 2017, this bill was approved by the Assembly Local Government Committee on an 8-0 vote. While the author agreed to accept amendments that were suggested by the Local Government Committee, due to timing issues, those amendments were not adopted until the bill reached this committee. Because those amendments came so close to this committee's hearing date on the bill, most of the letters of support or opposition reflected in this analysis are to the prior version of the bill.

REGISTERED SUPPORT / OPPOSITION:

Support

California Apartment Association (sponsor) (prior version)
 Anaheim Chamber of Commerce (prior version)
 Building Owners and Managers Association of Greater Los Angeles (prior version)
 California Association of REALTORS (prior version)
 California Building Industry Association (prior version)
 California Chamber of Commerce (prior version)
 California Council for Affordable Housing
 California Housing Consortium (prior version)
 Engineering Contractors' Association (prior version)
 Los Angeles County Business Federation (prior version)
 Orange County Business Council (prior version)

Opposition

League of California Cities (unless amended) (prior version)

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