

Legislature Seeks To Prevent Local Voters From Enacting Many Types of Pro-Development Initiatives

The California Legislature just sent another "stop me before I vote again" bill to the Governor. [Assembly Bill 890](#) proposes to limit severely the scope of voter-sponsored, pro-development land use initiatives. The Governor has until October 15th to decide whether to sign the bill into law. The actual effect of AB 890, if enacted, may need to be resolved in litigation.

***** Update: On October 15th, Governor Brown vetoed AB 890 *****

The bill would enact new provisions of the Government Code that delegate exclusive authority to city councils and boards of supervisors to determine certain general plan, specific plan and zoning decisions. Courts have determined that when the legislature delegates authority over an issue exclusively to councils and boards, voter action regarding those issues is precluded. However, AB 890 also purports to preserve to the voters their power of referendum, and to allow councils and boards of supervisors to place pro-development measures on the ballot. AB 890 also proposes to prohibit the approval or amendment of a development agreement by initiative, while retaining provisions of existing law which state that a development agreement is a legislative act subject to referendum. AB 890 states that it applies to charter cities as well as general law cities.



The general plan, specific plan and zoning decisions that would be exclusively delegated under AB 890 (and therefore could not be pursued in a voter-sponsored initiative) are those that would:

- Convert a discretionary land use approval necessary for a project to a ministerial approval.
- Change a land use designation or zoning district to a more intensive designation or district, with the most intense use defined as industrial uses, followed by commercial uses, office uses, residential uses, and then agricultural or open-space uses.
- Authorize more intensive land uses within an existing designation or district.

The local actions that are not affected by the bill (and hence could be the subject of a voter-sponsored initiative) are those that would:

- Have "the primary purpose or effect" of increasing residential densities or building heights "in order to incentivize or accommodate the construction or funding of affordable housing units."
- Have "the primary purpose or effect" of requiring a percentage of new residential construction to be affordable to moderate income households.
- Prohibit or otherwise mandate denial of any previously permissible land use.
- Establish an urban growth boundary or urban limit line.
- Any other legislative action that does not come within the listed actions that are exclusively delegated.

The questions the bill leaves unanswered provide substantial fodder for litigation. Among these are:

- Whether the bill can constitutionally be applied to charter cities.
- Whether the bill can constitutionally delegate exclusive authority for purposes of initiative but not referendum.
- Whether the statewide purpose of the bill will be upheld as sufficient to usurp local voter rights. One of the statewide purposes articulated in the bill is to "prevent an initiative that allows for more intensive land uses than were previously analyzed and mitigated under [CEQA]." This stated purpose, however, is difficult to reconcile with the fact that an initiative that allows less intensive uses (such as rezoning from commercial to office uses), or that proposes more intensive land uses that have the primary purpose or effect of encouraging affordable housing, could be pursued without CEQA review.
- How to determine whether the effect of an initiative is an increase in density that has a purpose to incentivize or accommodate affordable housing units. This provision is especially perplexing in light of the common sense fact that increasing density or heights will usually result in lower per-unit housing costs and therefore prices.
- What it means to convert a "discretionary land use approval needed for a project" into a ministerial approval.
- How the provision stating the bill does not apply to initiatives that mandate denial of any previously permissible land uses is to be interpreted, given that many of the prohibited initiatives – ones that change land uses to more intensive designations – would result in a mandate to deny the previously-allowed uses.
- How the proposal to vest discretion exclusively in councils and boards can be reconciled with other legislative proposals that would divest cities and counties of discretion to deny certain housing projects.

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