Senate Bill 902: Undertaking Housing Projects, Overriding Voter Proposals

Yevgeniy P. Pislar

Follow this and additional works at: https://scholarlycommons.pacific.edu/uoplawreview

Recommended Citation
Available at: https://scholarlycommons.pacific.edu/uoplawreview/vol52/iss2/11

This Legislative Review is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in University of the Pacific Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.
Senate Bill 902: Undertaking Housing Projects, Overriding Voter Propositions

Yevgeniy P. Pislar*

Code Section Affected
Government Code § 65913.3 (new)
SB 902 (Wiener); Inactive.

TABLE OF CONTENTS

I. INTRODUCTION .................................................................................................................. 368

II. LEGAL BACKGROUND ...................................................................................................... 369
   A. Land Use Planning in California .................................................................................... 369
      1. Amending the General Plan through Local Initiative .............................................. 371
      2. Challenging Zoning Ordinances through Local Referendum ................................ 372
   B. California Environmental Quality Act .......................................................................... 373
   C. Tackling the Housing Shortage Through Upzoning ................................................... 375

III. SENATE BILL 902 ............................................................................................................ 375

IV. ANALYSIS ....................................................................................................................... 376
   A. Housing Shortage in California .................................................................................... 377
   B. Senate Bill 902’s Impact on Local Voters .................................................................. 378
      1. Senate Bill 902 Would Have Unconstitutionally Undermined Local Voter Initiatives .............................................................................................................. 379
      2. Senate Bill 902 may Have Increased the Number of Local Referenda .................. 380
   C. CEQA Exemptions will Limit Valuable Information ................................................... 382
   D. Negative Impact of Upzoning ....................................................................................... 383

V. CONCLUSION ..................................................................................................................... 384

* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred December 2021; B.A. Public Policy, William Jessup University, 2014. First of all, I extend my utmost gratitude to my friends and family for their continued guidance, support, and encouragement. I would also like to express my gratitude to the staff at the Rural County Representatives of California (RCRC), especially Arthur Wylene, for his immeasurable input and guidance on this research project. Last, but not least, thank you to the entire Law Review staff for helping me edit this article.
I. INTRODUCTION

Sheila James begins her daily eighty-mile commute at 4:00 a.m.\(^1\) Ms. James is a 62-year-old public health adviser who lives in Stockton, yet she works for the United States Department of Health and Human Services in San Francisco.\(^2\) She begins her commute this early because she cannot afford to live near where she works.\(^3\) San Francisco is one of the most expensive metropolitan areas in the United States.\(^4\) Ms. James exchanged cheaper housing for a lengthy commute.\(^5\) However, this exchange requires her to take two trains and a bus to commute the eighty miles from Stockton to San Francisco.\(^6\)

Ms. James did not always have such a long commute—she used to live in Alameda, which is only fifteen miles from her work in San Francisco.\(^7\) However, when a developer repurposed Ms. James’ apartment building and evicted her, she moved to Stockton.\(^8\) She was able to find a three-bedroom house for $1,000 per month in Stockton, whereas her one-bedroom apartment in Alameda cost $1,600.\(^9\)

Many people desire to live in California because of its temperate climate, beautiful coastline, and well-established economic centers.\(^10\) The majority of Californians live in coastal areas.\(^11\) These factors, combined with an insufficient amount of housing, result in an increase in housing prices.\(^12\) The increased housing prices in the coastal areas led many people, like Ms. James, to move inland—unintentionally increasing the inland housing prices as well.\(^13\)

Senate Bill (“SB”) 902 focused on increasing housing units per parcel to tackle California’s housing shortage.\(^14\) It would have granted local government the power to enact zoning ordinances rezoning any parcel and increasing the amount of housing units allowed per individual parcel.\(^15\) However, local government can enact these zoning ordinances even if there are local initiatives expressly

---

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
11. Id.
12. Id.
14. Senate Committee on Housing, Committee Analysis of SB 902, at 1 (May 21, 2020).
15. Id., at 3.
prohibiting them from enacting such ordinances.\textsuperscript{16} Although SB 902 sought to increase the supply of housing, it would have unconstitutionally undermined local initiatives, limited the information obtained from environmental reports, and would have failed to address the housing affordability crisis.\textsuperscript{17}

II. LEGAL BACKGROUND

Land shortage in certain regions of California has long contributed to high housing costs.\textsuperscript{18} This shortage is most evident in the coastal metropolitan areas.\textsuperscript{19} In these coastal areas, the relatively low rate of housing construction further aggravates the housing crisis.\textsuperscript{20} Between 1980 and 2010, the amount of housing in California’s coastal metropolitan regions increased by 32\%, while the amount of housing on the national level increased by 54\% on average.\textsuperscript{21} Moreover, in Los Angeles and San Francisco, the amount of housing units only increased by 20\%.\textsuperscript{22} There are three major issues that constrain new housing construction: local resistance, environmental concerns, and land shortages.\textsuperscript{23} Various cases and statutes add to the legal complexities of tackling the housing shortage.\textsuperscript{24} Section A explains the local control of land use planning.\textsuperscript{25} Section B discusses the environmental reporting requirements involved with developments.\textsuperscript{26} Section C evaluates the means of increasing housing density to increase the number of housing units with a limited amount land.\textsuperscript{27}

A. Land Use Planning in California

The California Legislature delegates the responsibility of creating a general plan to cities and counties.\textsuperscript{28} A city or county planning commission creates a general plan, and the city council or county board of supervisors enacts that plan.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{16} Id., at 6.
\item \textsuperscript{17} Compare CAL. CONST. art. II, § 1. (establishing all political power as “inherent in the people”), and CAL. CONST. art. II, § 11 (extending the right to initiative to the voters of cities), with SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (allowing local governments to make local initiatives a nullity by disregarding them); Senate Committee on Housing, Committee Analysis of SB 902, at 6–7 (May 21, 2020).
\item \textsuperscript{18} TAYLOR, supra note 10, at 12–13.
\item \textsuperscript{19} Id. at 12.
\item \textsuperscript{20} Id. at 10–11.
\item \textsuperscript{21} Id. at 10.
\item \textsuperscript{22} Id. at 10–11.
\item \textsuperscript{23} Id. at 15.
\item \textsuperscript{24} See infra Section II.A–C (discussing how local and state government seek to alleviate the housing shortage).
\item \textsuperscript{25} Infra Section II.A.
\item \textsuperscript{26} Infra Section II.B.
\item \textsuperscript{27} Infra Section II.C.
\item \textsuperscript{28} CAL. GOV’T CODE § 65300 (West 2020).
\item \textsuperscript{29} Id.
\end{itemize}
The plan creates a policy that helps local officials develop and preserve resources for the future. The land use element of a general plan determines and administers the uses of land. To implement the land use element of a general plan, cities and counties also adopt various zoning ordinances, laws, and regulations governing land use and intensity. These zoning ordinances divide the city or county into various zones and districts while also regulating the specific details of the buildings and land in these zones.

Land use planning is a function of local government under the California Constitution’s police powers. However, the requirement of adopting a general plan is a matter of statewide concern. Courts allocate jurisdictional sovereignty and authority between the Legislature and charter cities by distinguishing between a “municipal affair” and a matter of “statewide concern.” Matters of statewide concern primarily have regional impacts rather than truly being statewide. In matters of statewide concern, state law supersedes charter cities. However, in matters of municipal affairs, the city charter preempts conflicting state law.

The Sixth District Court of Appeal considered the meaning of statewide concern in Anderson v. City of San Jose. In this case, two low-income individuals along with two housing advocacy groups challenged the City of San Jose, after it enacted Policy 7-13 (“Policy”). The Policy was an ordinance to sell surplus land. However, the Policy departed from the requirements of the Surplus Lands Act by creating an exemption from the affordable housing restrictions for developers. The Policy also allowed the City of San Jose to approve a sale of land for purposes other than affordable housing and increased the income requirement for affordable housing. The court held the shortage of land for developing

30. Id. § 65302.
31. Id. § 65302.
32. Id. § 65800.
33. See id. § 65850 (listing aspects of land use cities and counties may regulate); see also Gov’t § 65800 (“It is the Legislature’s intention to provide only a minimum of limitations in order that counties and cities may exercise the maximum degree of control over local zoning matters.”).
35. See Gov’t § 65700 (requiring charter cities to adopt a general plan).
36. Anderson v. City of San Jose, 42 Cal. App. 5th 683, 702 (6th Dist. 2019); see Gov’t §§ 34100–34102 (describing how the California Constitution distinguishes between two types of cities—“chartered cities” and “general law cities”—and how city charters grant charter cities its authority while the Legislature grants general law cities its authority).
37. See Anderson, 42 Cal. App. 5th at 711 (describing a statewide concern as having regional effects).
39. See Cal. Const. art. XI, § 5 (establishing city charters as supreme over all laws regarding municipal affairs); see also DeVita, 9 Cal. 4th at 784 (establishing that the process of amending a general plan is not a statewide concern).
40. 42 Cal. App. 5th at 702.
41. Id. at 695.
42. Id.
43. Id.
44. Id.
affordable housing is a statewide concern. The court reasoned the land shortage was a statewide concern because it had an effect beyond an individual municipality’s jurisdiction.

To better understand the relationship of local voters to land use planning, Subsection 1 describes voters’ right to amend a general plan through local initiatives. Subsection 2 discusses how a local referendum is available to challenge zoning laws.

1. Amending the General Plan through Local Initiative

In DeVita v. County of Napa, the California Supreme Court contemplated voters’ right to amend a general plan through a local initiative. In the November 1990 election, voters in Napa County approved Measure J. To preserve agricultural land, Measure J amended the land use element of Napa County’s general plan until 2021. Furthermore, Measure J stipulated that only the voters could amend the restrictions the initiative added. In response, a handful of Napa County residents filed a complaint against the County of Napa and its board of supervisors, seeking to overturn the initiative. The two issues in the complaint were: (1) voters could not amend the general plan through an initiative; and (2) the initiative could not limit future boards of supervisors in their power to amend the general plan.

The Court first upheld the principle that the process of adopting and amending a general plan is a municipal affair. The Court also reaffirmed that the California Constitution guarantees the people’s power to a referendum and initiative. The extent of the people’s power to an initiative is equivalent to the power granted to the local legislative body in enacting legislative acts. The Legislature also established the means by which a board of supervisors could obtain information

---

46. Id. at 711.
47. Infra Subsection II.A.1; see CAL. ELEC. CODE § 9201 (West 2020) (describing local initiatives as the process by which local voters may propose municipal ordinances).
48. Infra Subsection II.A.2; see ELEC. § 9237 (describing the process of a local referendum as the ability of local voters to suspend any municipal ordinance by petition).
49. 9 Cal. 4th 763, 771 (1995).
50. Id.
51. Id.
52. Id.
53. Id.
54. DeVita, 9 Cal. 4th at 772.
55. Id. at 774.
56. Id. at 775 (“Initiative and referendum powers may be exercised by the electors of each city and county under procedures that the Legislature shall provide. This section does not affect a city having a charter.”) (citing CAL. CONST. art. II, § 11).
57. Id. at 776.
2021 / Undertaking Housing Projects, Overriding Voter Proposals

on amendments to the general plan. Consequently, the Court concluded that by establishing these statutes by which the supervisors could obtain this information, the Legislature granted voters the power to amend a general plan through an initiative. Since Measure J amended the general plan, the DeVita Court only discussed amendments to general plans and not voter initiatives or referenda on zoning ordinances.

2. Challenging Zoning Ordinances through Local Referendum

In City of Morgan Hill v. Bushey, the California Supreme Court considered whether a local referendum could challenge a zoning amendment. In November 2014, the City of Morgan Hill amended its general plan. This amendment changed the land use designation of a vacant lot from “industrial” to “commercial.” Although the Legislature grants cities and counties maximum control over local zoning matters, it requires the local governing body to adopt zoning ordinances consistent with the general plan.

The zoning designation of the vacant lot was “IL-Light Industrial.” Consequently, this zoning designation was inconsistent with the “commercial” land use designation found in the general plan. To make the zoning designation consistent with the general plan, the city approved a zoning ordinance—changing the zoning designation to “CG-General Commercial.” Due to opposition to building a hotel on the lot, the Morgan Hill Hotel Coalition sent a request for a referendum on this ordinance. The city council approved the referendum and

---

58. See id. at 777 (“[D]uring the circulation of the petition . . . the board of supervisors may refer the proposed initiative measure to a county agency or agencies for a report on any or all of the following: . . . [its] effect on the internal consistency of the county’s general and specific plans . . . .”) (citing CAL. ELEC. CODE § 9111 (2020)).
59. DeVita, 9 Cal. 4th at 772.
60. Id. at 771.
61. 5 Cal. 5th 1068, 1075 (2018).
62. Id. at 1076.
63. Id.
64. See CAL. GOV’T CODE § 65800 (West 2020) (“[I]t is [the Legislature’s] intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.”); see also GOV’T § 65860 (West 2020) (“County or city zoning ordinances shall be consistent with the general plan of the county or city.”).
66. Id. at 1076.
67. Id. at 1077.
The City of Morgan Hill initiated legal proceedings to strike the referendum from the ballot and confirm the zoning ordinance to avoid a zoning designation inconsistent with the general plan. 70

The Court reaffirmed the California Constitution reserves the power of the referendum to the people. 71 The voters of the various cities and counties have the same power of referendum to approve or deny local ordinances. 72 Further, the Court concluded that the people can challenge a zoning ordinance amendment that changes the zoning of a parcel to comply with a general plan amendment. 73

Also, the Court held challenges to zoning ordinances are permissible where there are other means available to make zoning consistent with a general plan. 74 A successful referendum that challenges a zoning amendment prevents the zoning amendment from going into effect—despite the previous zoning designation not complying with the amended general plan. 75

B. California Environmental Quality Act

In 1970, California enacted the California Environmental Quality Act ("CEQA"). 76 As part of this law, the Legislature established that maintaining the environment “is a matter of statewide concern.” 77 Since maintaining environmental quality was of paramount importance, the Legislature mandated that a “project” have a minimal effect on the environment. 78 Alternatively, the proponents of a project must propose strategies to mitigate the environmental impacts before a local agency could approve the project. 79

To accomplish this goal, the CEQA mandates that an agency prepare an Environmental Impact Report (“EIR”) to assess the environmental impact the

69.  
70.  
71.  
72.  
73.  
74.  
75.  
76.  
77.  
78.  
79.  

City of Morgan Hill, 5 Cal. 5th at 1077.
Id.
Id. at 1078 (citing CAL CONST. art. IV, § 1).
Id. at 1078 (citing CAL. CONST. art. II, § 11, subdiv. (a)).
City of Morgan Hill, 5 Cal. 5th at 1081.
Id.
Id.
CAL. PUB. RES. CODE § 21050 (West 2020).
PUB. RES. § 21000.
See PUB. RES. § 21002 (establishing that projects must have minimal effect on the environment prior to approval); see also PUB. RES. § 21065.
"Project" means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:
(a) An activity directly undertaken by any public agency.
(b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.
Id.
PUB. RES. § 21002.
A project will impose on the environment.\textsuperscript{80} An EIR identifies the environmental impact of a project, any alternatives to the proposed project, and strategies for avoiding or mitigating impacts.\textsuperscript{81} CEQA requires every lead agency complete an EIR for a project that agency will approve or undertake.\textsuperscript{82} Developers must report a broad range of environmental impacts in an EIR.\textsuperscript{83} Some of the impacts an EIR must take into account include impacts on air quality, aesthetics, biological resources, traffic, population, land use, and water quality.\textsuperscript{84} Thus, an EIR informs government officials about environmental concerns and consequences of a project before an agency takes action.\textsuperscript{85} An EIR provides information that protects both the environment and allows for informed governmental decisions.\textsuperscript{86}

In June 2019, the City of Berkeley filed a lawsuit against the University of California Berkeley (“UC Berkeley”) claiming the university’s EIR inadequately calculated the increase in student enrollment.\textsuperscript{87} The lawsuit claims that the inadequate calculation resulted in a cost of $21 million per year to provide services to UC Berkeley, while the cost was $11 million in 2003.\textsuperscript{88} Also, the requested amount of $21 million represents an increase of over 1,000\% of what the City of Berkeley currently receives.\textsuperscript{89} Calls from UC Berkeley’s campus also account for 19\% of all police calls, which increased from 14\% in 2011.\textsuperscript{90} Likewise, calls for firefighter responses make up 37\% of all calls.\textsuperscript{91} Additionally, there was an increase in the effects of environmental and noise pollution, strain on the sewer and storm drain system, and increased prices in the housing market.\textsuperscript{92}

\begin{flushright}
\textsuperscript{80} PUB. RES. § 21002.1.  \\
\textsuperscript{81} Id.  \\
\textsuperscript{82} See PUB. RES. § 21100 (requiring lead agency to draft an environmental impact report “on any project which they propose to carry out or approve”).  \\
\textsuperscript{86} Id.  \\
\textsuperscript{87} Frances Dinkelspiel, City Sues UC Berkeley for Not Studying Impacts of 30\% Student Enrollment Hike, BERKELEYSD (June 17, 2019, 6:00 AM), https://www.berkeleyside.com/2019/06/17/city-sues-uc-berkeley-for-not-studying-impacts-of-34-student-enrollment-increase (on file with the University of the Pacific Law Review).  \\
\textsuperscript{88} Id.  \\
\textsuperscript{89} Id.  \\
\textsuperscript{90} Id.  \\
\textsuperscript{91} Id.  \\
\textsuperscript{92} Id.
\end{flushright}
C. Tackling the Housing Shortage Through Upzoning

One attempt by the Legislature to combat the housing shortage was to allow for and codify increased housing density through upzoning.93 The practice of upzoning is the rezoning of a parcel to allow for higher density and/or allow for taller buildings, usually housing.94 This practice increases the supply of housing by allowing developers and builders to construct more housing units on the same parcel.95

To tackle the housing shortage through upzoning, Senator Scott Wiener introduced SB 50.96 That bill would have required local governments to grant developers equitable community incentives in exchange for increased housing density.97 These incentives granted developers waivers from density and parking requirements.98 Additionally, if the new development was near a transit stop, the developers would receive waivers from the height, floor area ratio, and minimum parking requirements.99 However, SB 50 did not advance beyond the Senate because it targeted local governments and lacked protection from displacement.100

III. SENATE BILL 902

In response to SB 50’s failure, Senator Wiener introduced SB 902.101 SB 902 did not have any of the incentives found in SB 50.102 Rather, it sought to increase housing density by streamlining the zoning process.103 SB 902 represented the Legislature’s attempt to alleviate the housing shortage by allowing for streamlined rezoning.104 This bill would have granted local

---

94. Id.
95. Id.
98. Id.
99. Id.
103. Senate Committee on Housing, Committee Analysis of SB 902, at 3 (May 21, 2020).
104. Id.
governments the authority to increase the density of residential parcels. It would have authorized a local government to enact an ordinance that would increase residential density of any parcel up to ten units per parcel. However, the parcel must be in a “transit-rich area,” a “jobs-rich area,” or an “urban infill site.”

SB 902 would have granted local governments the ability to enact zoning ordinances. These ordinances would be valid despite any voter-enacted initiatives prohibiting the local government from enacting zoning ordinances. Further, the bill would have granted these ordinances an exemption from CEQA environmental review.

IV. ANALYSIS

During his campaign to become the Governor of California, Gavin Newsom called for creating 3.5 million new housing units by 2025. He called for such a development in hopes of tackling the housing affordability crisis. However, SB 902 did not address the affordability crisis and instead may have been costly to
low-income earners.\textsuperscript{113}

Section A explains the extent of the housing shortage.\textsuperscript{114} Section B analyzes SB 902’s impact on local voters.\textsuperscript{115} Section C addresses how the CEQA exemption could have affected local government.\textsuperscript{116} Section D explores the concerns of the negative effects of upzoning.\textsuperscript{117}

A. Housing Shortage in California

SB 902 sought to alleviate the housing shortage in California through increased housing density.\textsuperscript{118} According to a McKinsey Report, California ranks 49th in per capita housing—California has 358 homes for every 1,000 people.\textsuperscript{119} Only Utah has fewer homes with 347 per 1,000 people.\textsuperscript{120} California “has 14 million homes for 39 million people,”; therefore, to attain the national average of 419 homes for every 1,000 people, California would need an additional 2 million homes.\textsuperscript{121}

The housing shortage creates a highly competitive housing market that increases housing prices; however, this competitive housing market is somewhat limited to the coastal metropolitan areas.\textsuperscript{122} The increased prices price out many people in the coastal areas.\textsuperscript{123} Consequently, the residents of the coastal areas move...
inland, which increases the housing prices in the inland metropolitan areas as well.\textsuperscript{124} This is the situation in which Ms. James and many other workers like her find themselves.\textsuperscript{125} The increased housing prices have had a ripple effect far into California’s inland suburbs.\textsuperscript{126} Further, the high cost of living undoubtedly contributes to California’s poverty rate which is the highest in the United States.\textsuperscript{127}

In introducing SB 902, Senator Wiener sought to grant local government officials the ability to lessen the severe housing shortage in California through upzoning.\textsuperscript{128} However, increasing density does not always lead to increased supply.\textsuperscript{129} In 2013 and 2015, Chicago enacted policies that allowed for upzoning.\textsuperscript{130} However, these policies increased land values without increasing supply.\textsuperscript{131} Consequently, SB 902 may not have led to an increase in the supply of new housing units.\textsuperscript{132}

B. Senate Bill 902’s Impact on Local Voters

SB 902 would have granted local governments the authority to override local voter initiatives that prevent local government from enacting zoning ordinances.\textsuperscript{133} This grant of authority undoubtedly raises concerns of whether local officials should have such power.\textsuperscript{134} Any concern involving local voter initiatives will also include local referenda because the California Constitution grants voters the power of both.\textsuperscript{135} Subsection 1 discusses the effects of SB 902 on local initiatives.\textsuperscript{136} Subsection 2 evaluates the effects of SB 902 on local referenda.\textsuperscript{137}

\begin{itemize}
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} See Dougherty & Burton, supra note 1 (describing how incomes did not increase with the increase in housing prices, forcing many workers to move inland).
  \item \textsuperscript{126} Dougherty & Burton, supra note 1.
  \item \textsuperscript{127} See TAYLOR, supra note 10, at 28 (attributing the high poverty rate in California to the high cost of living, primarily the high cost of housing).
  \item \textsuperscript{128} Senate Committee on Housing, Committee Analysis of SB 902, at 3 (May 21, 2020).
  \item \textsuperscript{129} See Budds, supra note 93 (discussing a study in Chicago in which allowing for upzoning did not increase the supply of housing units).
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Compare SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (allowing for upzoning of parcels), with Yonah Freemark, Upzoning Chicago: Impacts of a Zoning Reform on Property Values and Housing Construction, 56 URB. AFF. REV. 758, 779 (2019) (discussing how Chicago’s upzoning reforms did not increase new construction and permitting).
  \item \textsuperscript{133} SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted).
  \item \textsuperscript{134} Senate Committee on Housing, Committee Analysis of SB 902, at 6 (May 21, 2020).
  \item \textsuperscript{135} See CAL. CONST. art. II, § 11 (granting power of initiative and referendum to electors of counties and cities); see also CAL. CONST. art. IV, § 1 (reserving power of initiative and referendum with the people).
  \item \textsuperscript{136} Infra Subsection IV.A.1.
  \item \textsuperscript{137} Infra Subsection IV.A.2.
\end{itemize}
1. Senate Bill 902 Would Have Unconstitutionally Undermined Local Voter Initiatives

SB 902 specified that a local legislative body could pass a zoning ordinance, even if a local voter initiative prohibits the body from doing so. This grant of authority to a local legislative body renders local voter-enacted initiatives null. Consequently, SB 902 would have violated the California Constitution because the Constitution expressly guarantees the people the right to enact or reject ballot initiatives.

In DeVita, the California Supreme Court held that in certain cases the Legislature could preclude the voters’ right of initiative. The Court employed two factors in determining whether the Legislature precludes voter initiatives. The first is whether the Legislature granted the power to enact legislation to a specific “city council” or “board of supervisors” or if the grant was to a generic “legislative body.” The second is if the law pertains to a statewide concern or a municipal affair.

Under the first factor, references to a specific body like city council or board of supervisors carry a greater inference toward excluding ballot measures by the local voters. However, references to a generic legislative body may include the electorate. SB 902 only referenced local government and legislative body and not city council or board of supervisors. This absence of a direct grant to a specific legislative body creates an inference that the Legislature did not intend preclusion of initiatives. Even if the “notwithstanding any local restrictions” language negates the first factor, there is still the second factor to consider.

Under the second factor, courts determine whether a matter is of statewide concern. In Anderson, the court established that an issue with regional effects is more likely a statewide concern. The court further established that the shortage

---

139. See SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (allowing local governing bodies to disregard local voter initiatives limiting its power).
140. CAL. CONST. art. II, § 11.
142. Id.
143. Id.
144. Id.
145. Id.
146. DeVita, 9 Cal. 4th at 776.
148. DeVita, 9 Cal. 4th at 776.
149. See SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (granting local governing bodies authority to enact zoning ordinances “notwithstanding any local restriction”); see also DeVita, 9 Cal. 4th at 776 (providing the two factors both of which a court evaluates).
151. Id. at 711.
of lots for **affordable** housing is a matter of statewide concern.\(^{152}\) The dispositive question in determining if SB 902 pertained to a statewide concern is whether increasing housing density affects housing affordability.\(^{153}\)

SB 902 had a provision stating, “ensuring the adequate production of affordable housing is a matter of statewide concern and is not a municipal affair.”\(^{154}\) However, the Legislature adds such boilerplate language to many bills and statutes.\(^{155}\) The court in *Anderson* reasoned a declaration by the Legislature that a matter is a statewide concern does not mean the matter is in fact a statewide concern.\(^{156}\) Courts decide whether something is a statewide concern or a municipal affair.\(^{157}\) Beside the boilerplate language, SB 902 did not mention affordability or low- and moderate-income housing as a requirement for the new housing developments.\(^{158}\)

Since SB 902 would have granted a local government the right to upzone and the bill pertains to a municipal affair, it unlawfully overrides the voters’ right to enact a municipal initiative.\(^{159}\) By overriding this right of the initiative, SB 902 would have violated the California Constitution.\(^{160}\)

### 2. Senate Bill 902 may Have Increased the Number of Local Referenda

SB 902 would have allowed local government officials to disregard voter-enacted ordinances expressly prohibiting the local government from enacting zoning ordinances.\(^{161}\) By ignoring the vote of the populace, SB 902 may have increased the amount of local referenda challenging zoning ordinances.\(^{162}\) The

\(^{152}\) *Id.* at 718.

\(^{153}\) Compare SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (allowing local government to increase housing density), *with Anderson*, 42 Cal. App. 5th at 718 (establishing sites for affordable housing as a statewide concern).


\(^{155}\) CAL. GOV’T CODE §§ 65850.01, 65850.5, 65850.55, 65850.6, 65850.7, 65860.1 (West 2020).

\(^{156}\) 42 Cal. App. 5th at 703.

\(^{157}\) *Id.*

\(^{158}\) SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted); *see also* Senate Committee on Housing, Committee Analysis of SB 902, at 6 (May 21, 2020) (describing how the opposition are concerned with the absence of an affordability requirement).

\(^{159}\) Compare CAL. CONST. art. II, § 11 (granting electors in cities the power to exercise the right of initiative), and CAL. CONST. art. XI, § 5 (granting charter cities supremacy in municipal affairs), *with SB 902, 2020 Leg.*, 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (allowing local government to increase housing density), *and Anderson*, 42 Cal. App. 5th at 718 (establishing sites for affordable housing as a statewide concern).


\(^{161}\) *See* SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (allowing local governing bodies enact zoning ordinances despite local initiatives to the contrary).

\(^{162}\) Compare SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (allowing local governing bodies to disregard local voter initiatives limiting its power), *with Panwala*, supra note 68 (describing how local voters use referendum to overturn zoning ordinances they oppose).
second power the people reserve to themselves is the power of the referendum.\textsuperscript{163} This power grants voters the right to either “approve or reject statutes or parts of statutes.”\textsuperscript{164} This right extends to the local level as well.\textsuperscript{165}

In \textit{City of Morgan Hill v. Bushey}, the Supreme Court of California upheld the right of local voters to challenge zoning ordinances through a referendum.\textsuperscript{166} During oral argument, one of the Justices inquired whether the facts would lead to an increase in zoning ordinance referenda.\textsuperscript{167} After the Court ruled against the City of Morgan Hill, city officials repealed the zoning ordinance fearing an overwhelming repudiation at the ballot box.\textsuperscript{168}

The County of San Benito presents another example where voters overturned a local government’s decision due to widespread opposition.\textsuperscript{169} There, county supervisors enacted a zoning ordinance rezoning four parcels to residential and commercial designations.\textsuperscript{170} Subsequently, the local voters rejected this ordinance by a large majority.\textsuperscript{171} The supervisors then adopted a similar ordinance rezoning one of those parcels.\textsuperscript{172} After this second ordinance, the voters began collecting petitions for a second referendum.\textsuperscript{173} However, the Coronavirus pandemic in 2020 and the resulting stay-at-home order stalled that referendum.\textsuperscript{174} If locals disagree with a zoning ordinance, they may overturn it with a referendum—as evidenced in San Benito and Morgan Hill.\textsuperscript{175} Similarly, by allowing local governments to disregard the will of the voters, SB 902 may have increased local referenda over zoning ordinances.\textsuperscript{176}

\begin{itemize}
\item \textsuperscript{163} CAL. CONST. art. IV, § 1.
\item \textsuperscript{164} City of Morgan Hill v. Bushey, 5 Cal. 5th 1068, 1078 (2018) (citing CAL. CONST. art. II, § 9(a)).
\item \textsuperscript{165} Id. (citing CAL. CONST. art. II, § 11(a)).
\item \textsuperscript{166} Id. at 1091.
\item \textsuperscript{167} Panwala, supra note 68.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Erik Chalhoub, Judge Grants Temporary Suspension of Rezoning, SAN BENITO.COM (May 20, 2020), https://sanbenito.com/judge-grants-temporary-suspension-of-rezoning/ (on file with the University of the Pacific Law Review).
\item \textsuperscript{174} See id. (describing the stay-at-home orders effect on the vote gathering along with a lawsuit “contending that the board violated election code by superseding the voters’ March rejection of Measure K through the zoning change approval”).
\item \textsuperscript{175} Panwala, supra note 68.
\item \textsuperscript{176} Compare SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (allowing local government to increase housing density despite local opposition), with Panwala, supra note 68 (describing how local voters overturn zoning ordinances they oppose).
\end{itemize}
C. CEQA Exemptions will Limit Valuable Information

SB 902 would have granted an exemption from CEQA environmental review for any zoning ordinance that complies with this law. This exemption would have allowed a developer and the local agency to forego an EIR for a high-density housing development.

A lead governmental agency prepares an EIR based on an assessment of the environmental impacts a project will impose. The EIR must contain any environmental impacts the project may have—including traffic, aesthetics, parking, congestion, etc. This information is valuable because it ensures local government officials would be able to make decisions that would cause the least environmental harm.

In June 2019, the City of Berkeley filed a lawsuit against UC Berkeley claiming the University’s EIR inadequately calculated the increase in student enrollment. The inaccurate EIR resulted in increased costs of servicing the campus. Additionally, the inadequate EIR increased strain on the services that first responders provide. Further, there was an increase in the effects of environmental and noise pollution, strain on the sewer and storm drain system, and increased prices in the housing market.

SB 902 would have granted an exemption from CEQA review. This exemption would have allowed developers and agencies to bypass filing an EIR on rezoned parcels. By exempting new developments from CEQA, SB 902 would have eliminated the information local officials receive regarding the future impacts of a new development from an EIR. This lack of information would have possibly hindered the local government officials from accurately projecting future service needs and impacts. Consequently, the absence of the information

---

178. See SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (providing that parcel upzoned by local government is not a project for purposes of CEQA).
179. CAL. PUB. RES. CODE § 21157.1 (West 2020).
180. CTY. OF SAN DIEGO, supra note 84.
182. Dinkelspiel, supra note 87.
183. Id.
184. Id.
185. Id.
188. Compare SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (granting a rezoned parcel is not a project for CEQA review), with CTY. OF SAN DIEGO, supra note 84 (describing the various areas that an EIR must evaluate).
189. Compare SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (granting a rezoned parcel is not a project for CEQA review), with CTY. OF SAN DIEGO, supra note 84
provided in an EIR could make it difficult to foresee and project the amount of
strain on existing services a proposed development could have.190 By limiting the
amount of information provided to municipal agencies, SB 902 may have caused
unforeseen impacts on city services and the surrounding environment.191

D. Negative Impact of Upzoning

Some legislators have proposed upzoning as a fix for the housing shortage.192
SB 902 was one such proposal, as it would have allowed up to ten housing units
on an individual parcel.193 One of the major arguments in favor of upzoning is that
building more units on one parcel increases supply and lowers costs.194 However,
the ability to build multiple units on the same amount of land leads to an increase
in the value of that land.195 When Chicago implemented upzoning reforms in 2013
and 2015, the price of housing units increased between 12.2% and 13.2%.196
Further, these upzoning reforms did not increase the amount of new units.197
Similarly, SB 902 may not have led to an increase in the supply of new housing
units.198 SB 902 may have even led to an increase in housing prices that would
displace local low-income tenants.199

The media has criticized SB 902 referring to it as “SB 50 Lite.”200 This
estimation is fair because SB 902, like SB 50, focuses on increasing housing
density.201 Although increasing housing density was optional under SB 902, the
bill could still have led many Californians to face displacement from upzoning.202

[Raw text not shown]
Since upzoning allows for multiple units on one parcel, this leads to an increase in the value of that land as developers gain a larger profit from constructing multiple housing units.\textsuperscript{203} These more expensive lots lead to increased housing prices, which prices people out of the housing market.\textsuperscript{204} This fear of gentrification and displacement is one of the reasons SB 50 failed.\textsuperscript{205} Since SB 902 did not contain a housing affordability requirement, the bill induces the same fear of displacement that SB 50 induced.\textsuperscript{206}

V. CONCLUSION

SB 902 would have allowed for upzoning parcels.\textsuperscript{207} It would have granted local government the authority to increase the amount of permitted housing units in any parcel to ten.\textsuperscript{208} However, increasing the amount of housing units allowed in a parcel also increases the value of that parcel.\textsuperscript{209} Due to the high cost of land, the subsequent cost of housing increases.\textsuperscript{210} The new market-rate housing displaces existing tenants without providing any affordable housing.\textsuperscript{211} This displacement results in an exodus of people from the coastal metropolitan areas to other regions of the state—usually the Central Valley.\textsuperscript{212} Subsequently, people move from coastal regions either because housing prices price them out of the market, or, like Ms. James, they are able to buy better housing at a lower cost elsewhere.\textsuperscript{213}

SB 902 would have also granted an exemption from CEQA review.\textsuperscript{214} However, this exemption would have undermined local government officials by limiting the valuable information they receive from an EIR.\textsuperscript{215} Furthermore, this lack of information would have inhibited local officials from making accurate decisions.
projections for the future.\textsuperscript{216} Relying on limited information may increase the unforeseen costs, strain municipal services, and have negative impacts on the environment.\textsuperscript{217}

SB 902 likewise would have allowed local government to enact ordinances despite local voter opposition.\textsuperscript{218} By ignoring the desire of voters, SB 902 may have increased local referenda challenging the zoning ordinances local governments will attempt to enact.\textsuperscript{219} More importantly, SB 902 would have permitted local government to enact legislation “notwithstanding any local restrictions.”\textsuperscript{220} Such blatant disregard for local initiatives would render local initiatives meaningless.\textsuperscript{221} Finally, and most importantly, SB 902 would have overridden the voters’ right to enact local restrictions on local government—undermining the constitutional right to initiative.\textsuperscript{222} This Constitutional violation strikes at the very heart of California’s form of government: direct democracy.\textsuperscript{223}

\begin{itemize}
  \item \textsuperscript{216} See Dinkelspiel, \textit{supra} note 87 (detailing UC Berkeley’s inaccurate EIR and the unanticipated subsequent financial, economic, and environmental impact).
  \item \textsuperscript{217} \textit{Compare} SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (granting an exemption from CEQA environmental review to proposed developments with). \textit{with} Dinkelspiel, \textit{supra} note 87 (detailing UC Berkeley’s inadequate EIR and the unforeseen financial, economic, and environmental impact).
  \item \textsuperscript{218} SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted).
  \item \textsuperscript{219} \textit{Compare} SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (allowing local governing bodies to disregard local voter initiatives limiting its power). \textit{with} Panwala, \textit{supra} note 68 (describing how local voters overturn zoning ordinances they oppose).
  \item \textsuperscript{220} SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted).
  \item \textsuperscript{221} \textit{See id.} (allowing local governing bodies to disregard local voter initiatives limiting its power to enact zoning ordinances).
  \item \textsuperscript{222} \textit{Compare \textit{CAL. CONST.} art. II, § 1.} (establishing all political power as “inherent in the people”), \textit{and} \textit{CAL. CONST.} art. II, § 11 (extending the right to initiative to the voters of cities). \textit{with} SB 902, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on May 21, 2020, but not enacted) (allowing local governments to make local initiatives a nullity by disregarding them).
  \item \textsuperscript{223} \textit{See \textit{CAL. CONST.} art. II, § 1;} (finding that all the political power resides with the people).
\end{itemize}