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Via Electronic Mail Only

Diane Griffiths
General Counsel to Senate President Pro Tem Toni Atkins
State Capitol, Room 205
Sacramento, CA 95814
email: diane.griffiths@sen.ca.gov

Re: Constitutionality of SB 10

Dear Ms. Griffiths:

I write to express my serious concerns about the constitutionality of SB 10, in the hope that this bill can be amended to avoid a constitutional challenge.

Section 1 of SB 10 purports to empower local legislative bodies (i.e., city councils and boards of supervisors) to override local initiative provisions adopted by the voters who elected them. A significant portion of my law practice is dedicated to the drafting, defense, and implementation of local land use initiatives, on behalf of local NGO's and public agencies. My partners and I have also litigated many of the seminal court cases in this area, including in the California Supreme Court. In my view and experience, SB 10 would conflict with and undermine the bedrock principle of the initiative power and, for that reason, is almost certain to be struck down by the courts as unconstitutional.

As the California Supreme Court has repeatedly affirmed, the initiative power is not a right granted to the people. Rather, it is a power "'***reserved by them'" in their Constitution.*** *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775. For this reason, the Court has explained, a fundamental aspect of the initiative power at the local level—as at the state level—is that it gives the voters the "final legislative word." *Rossi v. Brown* (1995) 9 Ca.4th 688, 704 ("This reservation of power by the people is, in the sense that it gives them the final legislative word, a limitation upon the power of the Legislature.").

SB 10 would turn this principle on its head by giving local legislative bodies the final legislative word over the voters. Specifically, proposed Government Code section 65913.5(a)(1) would authorize local city councils and boards of supervisors to increase the density on a specific parcel of land "[n]otwithstanding any restrictions… enacted by local initiative."

By authorizing hostile city councils and boards of supervisors to override local initiatives, this provision would subvert the bedrock principle noted above. In so doing, this provision would defeat the central purpose of the initiative power. After all, any initiative, "'to be effective, must limit the power of a hostile city council to evade or repeal the initiative.'" *DeVita,* 9 Cal.4th at 797 (quoting *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court* (1974) 13 Cal.3d 225, 230-31).

In my view, the Legislature does not have the constitutional power to allow city councils or boards of supervisors to overturn the will of the voters in this manner.[1] I urge you to bring the concerns expressed in this letter to the Speaker's attention in the hope that this bill can be amended to avoid a successful constitutional challenge.

I would also note that I share the many policy concerns that have been raised by a wide range of environmental justice, housing, open space, and local government groups that SB 10 is unlikely to advance its stated objectives and instead will have a host of unintended consequences.

I would welcome the opportunity to discuss those policy objections, as well as my constitutional concerns. I believe that SB 10 could be amended in ways that would both avoid a constitutional challenge and help ensure that the bill actually achieves its stated objectives. The current version of the bill does neither.

[1] The Legislature may have the power to preempt local legislation on land use matters altogether, or to exclusively delegate certain of those functions to local elected officials. But that is not what SB 10 does. Rather, the bill essentially allows the local government a veto over the people's voice after the fact.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Robert "Perl" Perlmutter

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