# AB 2923 is Constitutional, but Cities Will Find Ways Combat Dense Zoning

## Overview

Assembly
Bill 2923, which took effect on September 30, 2018, requires the Bay Area Rapid Transit District to impose transit-oriented development (TOD) zoning guidelines near BART stations. These guidelines empower BART to create higher density residential
areas than city zoning plans otherwise allow. The Senate analysis of AB 2923 stated the bill "upends" traditional city and county land use power, concluding that "granting land use authority to a local government that isn't a municipality sets a significant precedent."[1] This article
examines the constitutional issues AB 2923 raises and the range of legal and policy responses available to its opponents, and concludes that the California Supreme Court would likely uphold AB 2923 against city and county challenges. Local
governments may struggle to completely invalidate AB 2923, but potentially can limit
its implementation through policy responses.

## Under AB 2923, BART Guidelines Supersede Local Zoning

AB
2923 requires BART to issue TOD zoning guidelines that set "minimum local zoning requirements for height, density, parking and floor area ratio" for certain BART stations and their immediate surroundings.[2] After
the BART board adopts TOD guidelines, local jurisdictions have to adjust their local zoning plans to align with BART guidelines. If local zoning plans are inconsistent with BART's TOD guidelines on July 1, 2022, BART's standards become the operative zoning plan for all BART-owned land near its stations.[3] Local

zoning plans consistent with
BART's standards will remain in effect.

## Courts View BART as an Extension of the State Legislature

BART,
a statutorily-created regional entity, has the authority to override the
policies of cities (even those with constitutional charter powers) because BART
is considered an extension of the legislature. Government Code sections 53090 and
53091 exempt
regional transit agencies from the contrary zoning policies of cities and
counties. Courts have upheld these exemptions — empowering
agencies to build lines that conflict with city or county general plans — because
the availability of regional transit implicates statewide concerns.[4]

AB 2923's opponents likely cannot invalidate, as a general category, all statutes that exempt transit agencies from charter city zoning power. In *Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist.*, the court held that the Southern California Rapid Transit District (SCRTD) need not comply with city or county general plans. The court held that the legislature's declared interest in supporting rapid movement of people and goods in the Los Angeles region implicated statewide concerns.[5] The court characterized SCRTD as a "regional governmental body with statewide concerns" and "virtual autonomy in self-governance," thus upholding its plan that conflicted with the city general plan.[6] BART functions in a similar regional manner as SCRTD, and BART's extra-municipal, regional effect is more apparent than the regional nature of SCRTD at issue in *Rapid Transit Advocates.* BART already operates across multiple cities, while in *Rapid Transit Advocates* the court found a regional effect even though the rail in question there was only being built within the borders of the city of Los Angeles.[7] Just as the court in *Rapid Transit Advocates* held a rapid transit district in Southern California could override city zoning policies, a different court would likely find that BART is not categorically forbidden from overriding city zoning policies.[8] Opponents of AB 2923 are more likely to succeed arguing either that no statewide concern is implicated by the particular policy elements of AB 2923, or that the solution to these statewide conerns is not

reasonably tailored.[9]

## The Municipal Affairs Test Governs Zoning Disputes Between BART and Cities

AB 2923's opponents could challenge BART-enacted dense zoning by arguing that it invades municipal affairs, but such a challenge would likely fail. California's constitution empowers charter cities to "make and enforce" ordinances concerning municipal affairs, subject to the restrictions of their "charters" and "general laws."[10] Cities and counties can similarly "make and enforce" ordinances that are "not in conflict with general laws."[11] These constitutional provisions allow charter cities, general law cities, and counties to exercise substantial control over local zoning, particularly in housing construction. But the state may override local policy when the issue transcends purely local concerns.[12]

The California Supreme Court articulated a four-part, "municipal affairs test" to resolve conflicts between charter cities and the state.[13] A court must first determine whether a charter city's initiative implicates a municipal affair, then determine whether there is an actual conflict between the city's initiative and a state initiative.[14] Next, the court must analyze whether the statute implicates matters of "statewide concern."[15] A charter city's initiative will prevail if the statute does not implicate statewide concerns.[16] Finally, the court must determine whether the statute is "reasonably related" and "narrowly tailored" to the resolution of the statewide issue.[17] This necessarily is a fact-intensive inquiry, requiring a holistic examination of the disputed ordinance's circumstances.[18] Even court decisions that reference a more categorical approach still end up engaging in fact-specific anlaysis.[19]

## AB 2923 Satisfies the Municipal Affairs Test

A court would likely find that BART's inherently regional (as opposed to municipal) operation means that AB 2923 directly implicates regional and statewide concerns, which takes the zoning power in question out of a city's exclusive control. Accordingly, the court would conclude that AB 2923 trumps local zoning ordinances.

1. AB 2923 implicates matters of statewide concern.

As an initial matter, a local ordinance that conflicts with BART-imposed zoning would satisfy the first two factors of the municipal affairs test: the conflicting ordinance would concern a municipal affair and a create actual conflict between city and state initiatives. The analysis below addresses whether AB 2923 covers issues of statewide concern and whether the legislative solutions are narrowly tailored and reasonably related to the resolution of the matter of statewide concern. This fact-specific analysis likely results in upholding AB 2923, because of the demonstrated extra-municipal effects of inadequate housing near BART and BART's extra-municipal operation.

2. Key factors in determining if an issue is statewide.

Although no single factor is determinative in characterizing an issue as either "municipal" or "statewide," courts have identified several factors that guide the analysis. Demonstrated *regional* (as opposed to municipal) effects implicate statewide concerns.[20] Courts require more than "indirect" claims of extra-municipal concerns.[21] Instead, courts require the state to identify an extra-municipal dimension that "demonstrably transcend[s] identifiable municipal interests."[22] Statewide action can be justified on the grounds of inadequate coordination among local authorities.[23] Finally, expansive local ordinances that would otherwise be within local authority may be invalidated if they cause substantial extra-municipal harms.[24]

Several
examples show how courts apply this analysis, generally finding in the state's favor:

- In *People ex rel. Younger*, the court held that the state may override typical local zoning control to address regional problems.[25] The Tahoe Regional Planning Agency could override local zoning priorities because "only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole."[26] The court explicitly held that lack of collaboration between cities and counties could justify state action in the realm of zoning powers typically reserved for cities.[27]
- In *California Federal Savings & Loan Assn.*, thecourt found that an otherwise municipal concern that affects an economic sector of statewide importance may become a matter of statewide concern.[28] The charter city of Los Angeles imposed a tax on financial corporations that conflicted with the statewide rate.[29] The court struck down this municipal business tax, even though business tax rates were typically within charter cities' powers.[30] A fact-intensive analysis led the court to conclude that there was sufficient "statewide concern" regarding financial association tax rates and the statewide tax policy was "reasonably related" to addressing this policy issue.[31]
- In *City of Vista*, a union sought to require a charter city to comply with a statewide prevailing wage law.[32] The court held that state intrusion in areas typically reserved for charter cities requires more than the identification of "indirect" extra-municipal interests.[33] The court found the union's claims about the regional impact of city wage levels lacked the requisite specificity and directness.[34] The court held that allowing "indirect" claims about statewide effects to suffice would "eviscerate" charter city rule.[35]
- In *Associated Home Builders*, the court held that city housing policies that affect "regional welfare" beyond city boundaries may fall outside of the constitutional grant of police powers to cities.[36] Livermore voters passed an initiative to stop issuing residential building permits until certain local

infrastructure and education standards were met.[37] The court acknowledged a general "regional welfare" limit on city police power in the context of housing, such that certain housing restrictions could so imperil regional standards as to be impermissible.[38] The court found that this particular plaintiff did not include sufficient evidence of regional harm to overturn the initiative.[39]

3. Applying these statewide factors to AB 2923

A
court would likely uphold AB 2923 because the effects of inadequate housing
near BART and BART's operation extend beyond cities. AB 2923 compares favorably
to the permissible state override in *California*
*Federal* and *Younger*, and it is
distinguishable from *Vista* because of
the demonstrable extra-municipal effects of inadequate housing near BART and BART's
regional operation.

AB 2923 satisfies the matters of statewide concern element because BART zoning guidelines implicate state housing and environmental policies. More housing near BART stations could help the state achieve its environmental goals by reducing vehicle travel. Arguably, AB 2923 helps address the statewide affordable housing crisis, which is particularly acute in the Bay Area. In *California Federal*, the court found a generally-stated claim about the statewide importance of a single policy issue satisfied the threshold for statewide concern.[40] AB 2923 addresses multiple areas of statewide concern, including environmental and housing policy.

AB 2923 is distinguishable from the disfavored "indirect" claims the court found insufficient in *Vista* because BART already operates as a regional, not municipal, entity. In *Vista*, the immediate policy effects were constrained to a city because the wage levels would only apply within the city and any regional effects were incidental to the primary municipal goal.[41] In contrast, BART is designed, governed, and used with regional goals in mind. BART's purpose is to address regional problems and create regional opportunities. BART's physical infrastructure spans the entire Bay Area, and BART users commute across the entire region. In 2017, BART

transported millions of passengers through 4 counties, 46 stations, and 112 route miles.[42]

Due to BART's operations differing from municipally-operated transit agencies (which are confined to single cities) BART's management of 46 stations across a large, densely-populated region of California "demonstrably transcends" municipal interests.[43]

BART likely will argue that state interests are apparent because the state is acting through an established regional transit board that serves one of the state's largest regions. This is distinguishable from the state imposing a new requirement on cities based on speculative claims about the growing interconnectedness of the state. In supplementing BART housing, the state is not imposing a new regionalism that does not currently exist. Instead, the state is reacting to actual regional behavior, as BART stations and users by definition transcend purely municipal concerns. Given the California Supreme Court's previous receptiveness to similar arguments, BART is likely to prevail here.

In addition to framing AB 2923 as a proactive and forward-thinking new policy to address statewide concerns, AB 2923's supporters could also frame it as a *response* to city policies with harmful extra-municipal effects. Those proponents could analogize to the conclusion in *Associated Home Builders* that certain restrictive housing policies could have such harmful regional effects that they no longer fall within the "municipal affairs" protection.[44] The proponents could identify similar findings in the legislative reports of AB 2923, which point to the region-wide effects of a series of city and county decisions that led to inadequate housing and transit networks.

4. AB 2923 is narrowly-tailored and reasonably related to statewide concerns about housing.

AB

2923 is reasonably-related and narrowly tailored to resolve a statewide concern because the bill is limited in scope.

AB 2923 allows BART to implement TOD only in areas immediately surrounding BART stations. And AB 2923 only empowers BART to build housing at slightly higher levels than local zoning would otherwise allow. Although AB 2923 guidelines replace local zoning guidelines, these standards are limited in that they can only add one story or 15 feet to what had previously been the "highest approved height." In *California Federal* the court found that a limitation on a city's power to set tax rates for one type of financial institution did not completely undermine city taxing power.[45] Here, a court is likely to similarly find that granting BART limited power to zone for slightly higher buildings in areas immediately surrounding BART stations would not completely undermine city zoning power.

AB 2923 proponents could argue in the alternative that even a factual finding that the zoning power in question significantly limits city power would not be legally determinative. The *California Federal* court compared the statewide benefits with the minimal city burdens, yet explicitly declined to adopt the view that municipal affairs questions require a "comparative 'weighing.'"[46] AB 2923 proponents would only have to establish a sufficient statewide interest and a well-tailored solution, as opposed to proving that the state benefit clearly outweighs the city burden.

AB 2923 would likely survive a challenge under a fact-intensive municipal affairs inquiry.[47] The state can show that AB 2923 addresses policy issues that extend beyond municipalities. It can also show BART operates in a genuinely regional capacity, as measured by its governance and physical infrastructure. That is likely sufficient to support state preemption.

## Local Policy Measures Can Limit AB 2923

Although AB 2923 likely survives municipal affairs review, local officials can limit the law's effectiveness through mitigation policies. For example, cities could charge regulatory fees designed to address the perceived negative impacts of the additional dense housing built near transit. Officials may also attempt to pass measures that discourage implementing AB 2923, like taxes on all new housing projects or annual housing limits. Alternatively, cities and counties may encourage developers to build everywhere except near BART stations. Charter cities can enact high prevailing wage levels to discourage development near BART stations. Finally, cities and counties may impose new requirements in the building code that discourage all new housing construction.

Such mitigation policies, however, cannot purposefully thwart AB 2923's goal of bolstering transit-oriented development.[48] Policy responses framed as mitigation measures must be narrowly tailored to address proven causal effects of AB 2923 (as opposed to addressing effects of other city policies or economic trends) or risk being struck down as preempted.[49] If the state challenged a local mitigation ordinance, the court would return to the municipal affairs test and determine whether there is an actual conflict between state and local laws.[50] Next, the court would turn to a preemption analysis. There are three situations where a state law preempts a local ordinance: a local ordinance duplicates a state law; the local ordinance enters an area fully occupied by general law; or the local ordinance contradicts the state law.[51]

A court would likely analyze aggressive local efforts to thwart AB 2923's purposes under that last preemption category: contradiction. AB 2923's supporters could argue a city ordinance that effectively prevents the implementation of AB 2923's housing goals contradicts the purpose of AB 2923. In those situations, the most analogous set of city–state housing policy preemption cases involve conflicts over tenant and landlord

protections, where city officials frustrated with statewide landlord protections passed tenant protection measures.[52]

For example, in *Coyne v. City and County of San Francisco*, the court held that city policies contradict state law when the policies impose prohibitive prices on the asserted state policy goal.[53] There, the court examined San Francisco's attempts to mitigate effects of the Ellis Act, which empowered landlords to stop renting certain properties.[54] In response to the state legislation, San Francisco passed a series of laws to support displaced tenants — including one that required landlords to make relocation payments for up to two years.[55] The court analyzed San Francisco's ordinance under the "prohibitive prices" standard, which required the challenging landlords to show that the tenant displacement payments were so high as to effectively bar them from exiting the market.[56] The court concluded that the tenant displacement fees were so exorbitant and extended over such a long time period they effectively prohibited landlord exit.[57]

The *Coyne* case shows that courts will not always defer to conclusory city claims about the need to mitigate a state action's effects.[58] San Francisco defended the high price of the tenant eviction payments as a necessary response to the effects of spiraling rents.[59] The city argued that the state action (allowing more evictions) was the primary factor causing these spiraling rents.[60] Instead, the court found that the city's comprehensive rent control program, not the state action, was the more likely causal factor in displaced tenants facing higher rents.[61]

Shrewd local officials could likely craft policies that limit the effectiveness of AB 2923's housing goals while still complying with the *Coyne* standards for contradiction preemption. The prohibitive price standard would still allow cities or counties to pass a range of fees or regulatory measures that increase the price for developers to build housing without creating a "prohibitive price." The *Coyne* court did not articulate bright line rules about what percentage of cost created a disfavored "ransom." Consequently, a city is free to argue a 10% developer fee for the enhanced infrastructure costs and congestion associated with more housing falls well short of the *Coyne*

"ransom" standard.[62]
Similarly, a county may impose new permit restrictions or fees or building codes that either directly or indirectly increase costs by 5%, which is easily distinguishable from *Coyne's* "ransom" standard.

In defending any policies that increase the costs of fulfilling AB 2923's housing goals, cities or counties could rely on local tenant protections that survived state law preemption analysis. Courts have found a wide range of city housing policies did not contradict state landlord protection laws, including a payment of $13,500 to tenants, the provision of temporary replacement housing, and the delay of no-fault evictions.[63] Cities and counties could therefore impose a variety of fees and cost-increasing regulations. Courts might consider smaller fees more analogous to the permissible displacement fees in *Pieri* and the replacement requirements in *Lincoln Place* than the impermissible "ransom" level fee in *Coyne.*

Any mitigation policies would need to be framed in a manner that identifies the causal connection between AB 2923 zoning requirements and the enacted policy measures. The *Coyne* court found the city failed to show that tenant displacement fees were necessary to mitigate the effects of the state's Ellis Act, as opposed to mitigating the effects of other city policies.[64] This requires local officials to explicitly identify the necessary connection between the fees or other cost-increasing measures and the effects of denser housing near BART. For example, city officials chould calculate any development impact fees based on the difference between pre-AB 2923 development and the expanded development allowed by AB 2923, as opposed to unrelated city-wide changes in development patterns.

The ideal scenario for local officials seeking to mitigate AB 2923 would be a range of different local government entities independently enacting fees or regulations that indirectly increased the cost of building housing in compliance with AB 2923. In this

scenario, no single fee or regulation would create the a dramatic price increase the *Coyne* decision disapproved.[65] Yet in the aggregate these discrete programs by cities, counties, and BART officials would collectively increase the costs of housing near BART so much that it would discourage private housing construction.

For example, a charter city could raise the prevailing wage for projects involving city funds, which may indirectly implicate certain infrastructure or affordable housing projects near BART stations. Another city could impose building code inspection or aesthetic standards that limit the desirability of new construction, or devote more staff time to investigating potential health impacts associated with TOD projects. A county could increase the cost of housing by limiting the number of permits it issues every year. A neighboring county might create an expedited permit approval process for housing not near transit. Collectively, these independent actions may raise both the actual and perceived costs of construction near BART to a point that seriously discourages private developers from implementing the AB 2923's housing goals. Although developers and government entities that support AB 2923 could attempt to stop obstructionist local government entities in a single lawsuit, the diffuse nature of the actions would make it more difficult to identify and to remedy the obstructionist tactics. Courts may struggle to parse the various motives: some local governments may have acted pretextually, while others may have acted with genuine and permissible mitigation motives.

Even if a court finds that a statewide interest in TOD near BART trumps local autonomy in a general challenge to AB 2923, local entities can still exert their interests by controlling aspects of zoning. These officials, alongside effective legal counsel, can craft policies that limit AB 2923 in a way that falls short of impermissible obstruction of state law.

## Conclusion

Given BART's regional effects and operation, AB 2923 would likely survive a constitutional challenge under the

municipal
affairs test. But local officials opposed to AB 2923 can still pass a range of laws that limit the effects of AB 2923. These opposing strategies probably will require the courts to analyze the interplay between AB 2923 and municipal affairs for years to come. For AB 2923's opponents, even a defeat in the initial legal challenge will yield valuable insights that can be applied in future litigation. These insights will help local officials craft policies that fit their local preferences for development without impermissibly obstructing AB 2923. Regardless of the outcome in any particular dispute, courts will continue to face the difficult task of balancing the constitutional guarantee of local autonomy with the need for regional and statewide action.

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[1] Sen.
Rules Com., Off. Of Sen Floor Analyses, 3d reading analysis of AB 2923 as amended August 17, 2018.

[2] 2017 Bill Text CA A.B. 2923,
Legislative Counsel's Digest. All subsequent references to AB 2923 are also from this source, accessible at the California Legislative Information Website (https://leginfo.legislature.ca.gov).

[3] The BART
TOD zoning guidelines become binding on "any BART-owned parcels that are at least 75% within ½ mile of any existing or planned BART station entrance."

[4] *Rapid*
*Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist. (1986)* at 1000–01 (holding that the
Southern California Rapid Transit District need not comply with city or county general plans).

[5] *Id.* at 1002.

[6] *Id.* at 1000.

[7] *Id*. at 1000.

[8] *Id.* at 1002.

[9] See *California Federal Savings & Loan Assn. v. City of Los Angeles (1991)* at 17, 24 [hereafter *California Federal*].

[10] Cal. Const., Art. XI, § 5

[11] Cal. Const., Art. XI, § 7

[12] See *California Federal, supra* note 9,at 17 (holding that state legislative action requires a "dimension demonstrably transcending identifiable municipal interests").

[13] *Id.* at 16–17.

[14] *Ibid.*

[15] *Id.* at 17.

[16] *Ibid.*

[17] *Ibid.*

[18] *Id.* at 17 (stating that resolving municipal affairs questions requires "ad hoc intuition informed by pragmatic common sense rather than a rigid fidelity to some theoretical mode").

[19] See *State Building & Construction Trades Council of California v. City of Vista*(2012) [hereafter *Vista*] at 557.The court

insisted on a category-driven legal analysis, yet also engaged in factual analogizing and distinguishing, holding that the "inquiry is not wholly removed from historical, and hence factual, realities."

[20] *People ex rel. Younger v. County of El Dorado* (1971); *Committee of Seven Thousand v. Superior Court* (1988) at 505 (holding that in the context of a dispute over city development fees, "s*tatewide* refers to all matters of more than local concern and thus includes matters the impact of which is *primarily regional rather than truly statewide.*").

[21] *Vista*, *supra* note 19,at 562.

[22] See *California Federal*, *supra* note 9 at 17.

[23] *Younger*, *supra* note 20, at 497–98.

[24] See *Associated Home Builders etc., Inc. v. City of Livermore (*1976) at 601 (holding that "if a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region.").

[25] *Younger*, *supra* note 20, at 493–94.

[26] *Ibid*.

[27] *Ibid*.

[28] *California Federal*, *supra* note 9, at 7.

[29] *Id.* at 6.

[30] *Id.* at 7.

[31] *Id.* at 17.

[32] *Vista*, *supra* note 19, at 532.

[33] *Id.* at 562.

[34] *Id.* at 562.

[35] *Ibid*.

[36] *Associated Home Builders*, *supra* note 24, at 607.

[37] *Id.* at 588.

[38] *Id.* at 601.

[39] *Id.* at 610.

[40] *California Federal*, *supra* note 9, at 23–24.

[41] *Vista*, *supra* note 19, at 562.

[42] BART
2018 Factsheet,
https://www.bart.gov/sites/default/files/docs/2018_BART%20Factsheet.pdf

[43] *See California Federal*, *supra* note 9, at 17.

[44] *Associated Home Builders*, *supra* note 24, at 601.

[45] See *California Federal*, *supra* note 9, at 24–25.

[46] *Ibid*.

[47] Even if a court engaged in a
category-driven analysis, as articulated in *Vista*,
AB 2923 opponents could show that zoning and housing are not purely municipal concerns. Case law supports limits on city powers to control zoning when city zoning policies also affect regional or statewide concerns. See *Younger*, *supra* note

20, at 493–94 (upholding state-created regional agency's authority to implement zoning guidelines that would control over county and city zoning); See *Associated Home Builders*, *supra* note 24 (holding that city housing policies may be overturned if they have significant negative regional impacts). More recently, the court of appeal invalidated a charter city housing ordinance that conflicted with state policy. *See Coyne v. City and County of San Francisco (2017)* (holding that state law concerning rent control procedures overrides conflicting city tenant protection policies.)

[48] See *American Financial Services Assn. v. City of Oakland* (2005) at 1272 (holding that "municipal ordinances that have been found to be preempted have been seen as subverting, in some tangible way, the purpose and intent of the state statute.")

[49] See *Coyne v. City and County of San Francisco (2017)* at 1230–31 (striking down a tenant displacement mitigation policy for failing to show a clear causal connection between the need for the policy and state eviction legislation.)

[50] See *California Federal*, *supra* note 9, at 16–17.

[51] *Sherwin-Williams Co. v. City of Los Angeles* (1993) at 897.

[52] See *Coyne*, *supra* note 49, at 1227 (holding that a court should use contradiction preemption analysis to analyze the legality of a city's enhanced tenant protections in relation to statewide landlord protections).

[53] *Ibid.*

[54] *Id.* at 1215; Cal. Gov. Code, § 7060, subd. (a).

[55] *Coyne*, *supra* note 49, at 1219–20.

[56] *Ibid.*

[57] *Id.* at 1227.

[58] *Coyne*, *supra* note 49, at 1230–31.

[59] *Ibid*.

[60] *Ibid*.

[61] *Ibid*.

[62] See *Coyne*, *supra* note 49, at 1230.

[63] See *Pieri v. City and County of San Francisco* (2006) at 894 (upholding city policy requiring landlords to make payment of $13,500 to tenants); *Lincoln Place Tenants Assn. v. City of Los Angeles*(2007) at 451 (upholding city policy that required developers to provide replacement housing in limited circumstances.); *San Francisco Apartment Association v. City and County of San Francisco*(2018) at 513 (upholding city policy preventing no-fault evictions during the school year for apartments in which children or teachers resided.)

[64] *Coyne*, *supra* note 49, at 1230–31.

[65] *Coyne, supra* note 49, at 1227.