

Date of Hearing: April 27, 2016

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

David Chiu, Chair

AB 2502 (Mullin) – As Amended April 18, 2016

SUBJECT: Land use: zoning regulations

SUMMARY: Authorizes the legislative body of a city or county to establish inclusionary housing requirements as a condition of development. Specifically, **this bill**:

- 1) Authorizes the legislative body of a city or county to establish, as a condition of development, inclusionary housing requirements, which may require the provision of residential units affordable to and occupied by moderate income, lower-income, very low-income, or extremely low-income households, as specified.
- 2) States the Legislature's intent to supersede any holding or dicta in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396, to the extent that the opinion in that case conflicts with the authority of local governments to adopt inclusionary housing requirements, and specifies that the bill does not otherwise enlarge or diminish the authority of a jurisdiction beyond those powers that existed as of July 21, 2009.
- 3) States that the Legislature finds and declares all of the following:
 - a) Inclusionary housing ordinances have provided quality affordable housing to over 80,000 Californians, including the production of an estimated 30,000 units of affordable housing in the last decade alone;
 - b) Since the 1970's, over 170 jurisdictions have enacted inclusionary housing ordinances to meet their affordable housing needs;
 - c) While many of these local programs have been in place for decades, the recent decision in *Palmer/Sixth Street Properties v. City of Los Angeles*, has created uncertainty and confusion for local governments regarding the future viability of this important local land use tool; and,
 - d) It is the intent of the Legislature to reaffirm the authority of local jurisdictions to enact and enforce these ordinances.
- 4) States that it is the intent of the Legislature to reaffirm that existing law requires that the action of any legislative body of any city, county, or city and county to adopt a new inclusionary housing ordinance be taken openly and that their deliberations be conducted openly consistent with the requirements of the Ralph M. Brown Act.

EXISTING LAW:

- 1) Grants cities and counties the power to make and enforce within their limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

- 2) Declares the Legislature's intent to provide only a minimum of limitation with respect to zoning in order that counties and cities may exercise the maximum degree of control over local zoning matters.
- 3) Specifically authorizes the legislative body of any county or city to adopt ordinances that do any of the following:
 - a) Regulate the use of buildings, structures, and land as between industry, business, residences, open space, agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes;
 - b) Regulate signs and billboards;
 - c) Regulate all of the following:
 - i) The location, height, bulk, number of stories, and size of buildings and structures;
 - ii) The size and use of lots, yards, courts, and other open spaces;
 - iii) The percentage of a lot that may be occupied by a building or structure; and,
 - iv) The intensity of land use.
 - d) Establish requirements for offstreet parking and loading;
 - e) Establish and maintain building setback lines; and,
 - f) Create civic districts around civic centers, public parks, public buildings, or public grounds, and establish regulations for those civic districts.
- 4) Limits, pursuant to the Costa-Hawkins Rental Housing Act, the permissible scope of local rent control ordinances and generally gives the owner of residential real property the right to establish the initial rental rate for a dwelling or unit.

FISCAL EFFECT: None

COMMENTS:

Article XI, Section 7 of the California Constitution grants each city and county the power “to make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” This is generally referred to as the police power of local governments. The Planning and Zoning Law is a general law that sets forth minimum standards for cities and counties to follow in land use regulation, but the law also establishes the Legislature’s intent to “provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.”

Using this police power, many cities and counties have adopted ordinances, commonly called "inclusionary zoning" or "inclusionary housing" ordinances, that require developers to ensure that a certain percentage of housing units in a new development be affordable to lower-income

households. These ordinances vary widely in the percentage of affordable units required, the depth of affordability required, and the options through which a developer may choose to comply. Most, if not all, of such ordinances apply to both rental and ownership housing. In 2009, in the case of *Palmer v. City of Los Angeles*, the Second District California Court of Appeal opined that the city's affordable housing requirements associated with a particular specific plan (which was similar to an inclusionary zoning ordinance), as it applied to rental housing, conflicted with and was preempted by a state law known as the Costa-Hawkins Rental Housing Act. The Costa-Hawkins Act limits the permissible scope of local rent control ordinances. Among its various provisions is the right for a rental housing owner generally to set the initial rent level at the start of a tenancy, even if the local rent control ordinance would otherwise limit rent levels across tenancies. This provision is known as vacancy decontrol because the rent level is temporarily decontrolled after a voluntary vacancy. The act also gives rental housing owners the right to set the initial and all subsequent rental rates for a unit built after February 1, 1995. The court opined that "forcing Palmer to provide affordable housing units at regulated rents in order to obtain project approval is clearly hostile to the right afforded under the Costa-Hawkins Act to establish the initial rental rate for a dwelling or unit."

The Legislature enacted the Costa-Hawkins Rental Housing Act in 1995 with the passage of AB 1164 (Hawkins), Chapter 331. The various analyses for this bill exclusively discuss rent control ordinances and do not once mention inclusionary zoning ordinances, of which approximately 64 existed in the state at that time. The Assembly concurrence analysis of AB 1164, which is very similar to the other analyses, states that the bill "establishes a comprehensive scheme to regulate local residential rent control." The analysis includes a table of jurisdictions that would be affected by the bill, and the table exclusively includes cities with rent control ordinances and does not include any cities that had inclusionary zoning ordinances affecting rental housing. The analysis also states, "Proponents view this bill as a moderate approach to overturn extreme vacancy control ordinances which unduly and unfairly interfere into the free market." The analysis further describes strict rent control ordinances as those that impose vacancy control and states, "Proponents contend that a statewide new construction exemption is necessary to encourage construction of much needed housing units, which is discouraged by strict local rent controls." This legislative history provides no indication that the Legislature intended to affect inclusionary zoning with the passage of AB 1164.

California Building Industry Association (CBIA) v. City of San Jose. The City of San Jose's inclusionary housing ordinance passed in 2010 and required all new residential development projects of 20 or more units to sell at least 15% of the for-sale units at a price that is affordable to low- or moderate-income households. The ordinance allowed developers to opt out of the 15% requirements by dedicating land elsewhere or by paying "in-lieu" fees to the city. Shortly before the ordinance took effect, CBIA filed a lawsuit in superior court, maintaining that the ordinance was invalid on its face on the ground that the city, in enacting the ordinance, failed to provide a sufficient evidentiary basis "to demonstrate a reasonable relationship between any adverse public impacts or needs for additional subsidized housing units in the City ostensibly caused by or reasonably attributed to the development of new residential developments of 20 units or more and the new affordable housing exactions and conditions imposed on residential development by the Ordinance."

The superior court agreed with CBIA's contention and issued a judgment enjoining the city from enforcing the challenged ordinance. The Court of Appeal then reversed the superior court

judgment, and concluded that the matter should be remanded to the trial court. CBIA then sought review of the Court of Appeal decision in the Supreme Court which granted review.

The Supreme Court in June of 2015 concluded that the Court of Appeal decision should be upheld, and that “contrary to CBIA’s contention, the conditions the San Jose ordinance imposes upon future development do not impose ‘exactions’ upon the developers’ property so as to bring into play the unconstitutional conditions doctrine under the takings clause of the federal or state Constitution.” The ruling also noted that enforcing these limits to address a growing housing problem is “constitutionally legitimate” and cited the severe scarcity of affordable housing in California in its decision.

This bill authorizes the legislative body of any city or county to adopt ordinances to establish, as a condition of development, inclusionary housing requirements and makes a number of legislative findings and declarations to supersede any holding or dicta in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009).

Purpose of this bill: According to the author, “AB 2502 restores local governments’ ability to enact inclusionary housing policies by clarifying that the Costa-Hawkins rent control law does not apply to inclusionary housing policies. This bill amends the state’s Planning and Zoning law to indicate that inclusionary zoning is an allowable land use power. Article XI, Section 7 of the California Constitution grants counties and cities the exercise of police power, which allows them ‘to make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.’ Many cities and counties have implemented inclusionary housing ordinances as a land use regulation under their police power. Inclusionary housing ordinances require that developers allocate a certain percentage of housing units in a new development to be affordable to low- and moderate-income households.

“Nearly 170 cities and counties in California have implemented inclusionary housing policies to address the shortage of affordable housing across the state. These ordinances vary in the inclusionary housing unit requirements, depth of affordability, and alternative methods of compliance for developers. Since 2003, inclusionary programs have produced more than 30,000 affordable housing units to working households, seniors, and special needs populations. AB 2502 restores local governments’ ability to enact inclusionary housing policies by clarifying that the Costa-Hawkins rent control law does not apply to inclusionary housing policies.

“In 2009, a state appellate court ruling in the *Palmer v. City of Los Angeles* case indicated that the state’s Costa-Hawkins Rental Housing Act prohibits local governments from creating affordable rental housing through local inclusionary programs.

“AB 2502 is identical to AB 1229 (Atkins), which Governor Brown vetoed in 2013. In his veto message, the Governor indicated that prior to making a legislative change regarding inclusionary housing, he wanted to wait for the California Supreme Court to issue its decision on the *California Building Industry Association (CBIA) v. City of San Jose* case.

In this case, CBIA argued that San Jose’s 15% inclusionary housing ordinance is unconstitutional on the basis of the Fifth Amendment, which indicates that private property should not be taken for public use without just compensation. In June 2015, the Supreme Court unanimously upheld San Jose’s inclusionary housing ordinance and ruled that the ordinance is an exercise of the city’s police power.”

Prior Legislation: AB 1229 (Atkins, 2013) would have expressly authorized cities and counties to establish inclusionary housing requirements as a condition of development. The bill further declares the intent of the Legislature to supersede any holding or dicta in *Palmer v. City of Los Angeles* that conflicts with this authority.

AB 1229 was vetoed with the following message:

“This bill would supersede the holding of *Palmer v. City of Los Angeles* and allow local governments to require inclusionary housing in new residential development projects. As Mayor of Oakland, I saw how difficult it can be to attract development to low and middle income communities. Requiring developers to include below-market units in their projects can exacerbate these challenges, even while not meaningfully increasing the amount of affordable housing in a given community. The California Supreme Court is currently considering when a city may insist on inclusionary housing in new developments. I would like the benefit of the Supreme Court's thinking before we make legislative adjustments in this area.”

Arguments in Support: According to supporters, "AB 2502 clarifies state law and allows jurisdictions to choose the affordable housing policies that fit the development context in their communities. Local inclusionary housing programs have provide one of the most effective tools for producing new homes affordable to working families and creating strong, diverse neighborhoods with a range of housing choices. Nearly 170 cities and counties in California have adopted inclusionary housing polices as a complement to other local, state, and federal strategies to address the state's ongoing affordable housing shortage. "

Arguments in Opposition: According to opponents, "this bill does more than respond to *Palmer* by expressly authorizing local governments to condition all market-rate development on the provision of below market-rate affordable housing, not limited to rental development which was the subject of the *Palmer* case. Furthermore this measure mandates prices controls on market-rate housing projects, which will manifest as a tax on new homebuyers and renters. The net result would be a damper on housing production and negative impacts to local economies and employment centers."

REGISTERED SUPPORT / OPPOSITION:

Support

Non-Profit Housing Association of Northern California (sponsor)
Alameda County Board of Supervisors
Alliance for Community Transit – Los Angeles (ACT-LA)
American Planning Association, California Chapter
Asian Pacific Environmental Network
Bay Area Regional Health Inequities Initiative
Burbank Housing Development Corporation
California Coalition for Rural Housing
California Housing Consortium
California Housing Partnership Corporation
California Pan-Ethnic Health Network
California Rural Legal Assistance Foundation
California State Association of Counties

Century Housing
Chinatown Community Development Center
Cities Association of Santa Clara County
City and County of San Francisco
City of Belmont
City of Fremont
City of Napa
City of San Jose
City of Sunnyvale
City of Walnut Creek
City of West Hollywood
Community Housing Opportunities Corporation
Community Housing Partnership
Community Legal Services in East Palo Alto
Contra Costa County Board of Supervisors
East Bay Housing Organizations
East LA Community Corporation
Every One Home
Faith in Action Bay Area
Greenbelt Alliance
Greenlining Institute
Grounded Solutions Network
HIP Housing
Housing California
Koreatown Immigrant Workers Alliance (KIWA)
Law Foundation of Silicon Valley
League of California Cities
League of Women Voters of California
Little Tokyo Service Center
Los Angeles County Board of Supervisors
Marin County Board of Supervisors
MidPen Housing Corporation
Multicultural Communities for Mobility
National Association of Social Workers, California Chapter
Northern California Community Loan Fund
Peer Advocated SRHT
People's Self-Help Housing
Physicians for Social Responsibility-LA (PSR-LA)
Planning and Conservation League
Public Advocates, Inc.
Public Counsel
San Diego Housing Federation
San Francisco Council of Community Housing Organizations
Sonoma County Board of Supervisors
Southeast Asian Community Alliance
St. Mary's Center
Strategic Actions for a Just Economy (SAJE)
T.R.U.S.T. South LA
Tenants Together

Thai Community Development Center
Western Center on Law and Poverty

Opposition

Apartment Association California Southern Cities
Apartment Association of Greater Los Angeles
Apartment Association of Orange County
California Apartment Association
California Association of Realtors
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
East Bay Rental Housing Association
GH Palmer Associates
North Valley Property Owner Association
San Diego County Apartment Association
Santa Barbara Rental Property Association
Southwest California Legislative Council

Analysis Prepared by: Lisa Engel / H. & C.D. / (961) 319-2085