

Date of Hearing: April 5, 2017

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

David Chiu, Chair

AB 686 (Santiago) – As Amended March 15, 2017

AS PROPOSED TO BE AMENDED

SUBJECT: Housing discrimination: affirmatively further fair housing

SUMMARY: This bill would require a public agency to administer its programs and activities relating to housing and community development in a manner to affirmatively further fair housing. Specifically, **this bill:**

- 1) Requires a public agency to administer its programs and activities relating to housing and community development in a manner to affirmatively further fair housing, and to not take any action that is inconsistent with this obligation.
- 2) Provides that if a public agency fails to meet its obligation to affirmatively further fair housing, then that failure would constitute housing discrimination under the California Fair Employment and Housing Act (FEHA).
- 3) Provides that the director of the Department of Fair Employment and Housing (DFEH) may exercise his or her discretion to investigate, or to bring a civil action, based on a verified complaint that alleges a violation of the duty to affirmatively further fair housing.
- 4) Requires a public agency that completes an assessment of fair housing pursuant to specified provisions of the federal Fair Housing Act (FHA) to also submit a copy of that assessment to the Department of Housing and Community Development (HCD). Requires HCD to post the assessment on its Internet Web site within a reasonable period of time.
- 5) Requires any public agency required to adopt a housing element or a sustainable communities strategy to include in those plans an analysis of barriers that restrict access to opportunity and a commitment to specific meaningful actions to affirmatively further fair housing.
- 6) Provides that, if a public agency completes or revises an assessment of fair housing pursuant to the federal FHA, the public agency may incorporate relevant portions of that assessment into its housing element or sustainable communities strategy to fulfill the requirement in 5).
- 7) Defines "affirmatively furthering fair housing" to mean taking meaningful actions, in addition to combating discrimination, that: overcome patterns of segregation; address disparities in housing needs and in access to opportunity based on protected characteristics; promote fair housing choice both within and outside of areas of concentrated poverty; foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics; and that transform racially and

ethnically concentrated areas of poverty into areas of opportunity, while protecting existing residents from displacement.

- 8) Defines “programs and activities relating to housing and community development” as any action, inaction, policy, regulation, program, practice, decision, activity, or investment by the public agency that affects where a person may live, a person’s ability to remain in their current housing, and the degree of access that person, based on where they live, has to opportunity, including education, jobs, health care, social services, features of a healthy environment including clean water and air, and secure and affordable housing and community conditions.
- 9) Defines “meaningful actions” as significant actions that are designed and can be reasonably expected to achieve materially positive change that affirmatively furthers fair housing. Meaningful actions must eliminate or materially ameliorate within a reasonable period of time the impact of significant barriers that restrict access to opportunity, and must be commensurate with the scale of those barriers.
- 10) Defines “barriers that restrict access to opportunity” to mean barriers that are specific to the type of neighborhood or jurisdiction, such as whether it is an area of high opportunity, a gentrifying neighborhood, or a segregated area of concentrated poverty, and may include: inadequate supply of affordable housing or poorly maintained affordable housing; segregated housing; housing that is inaccessible to persons with disabilities; zoning restrictions, development limitations, and other actions, inactions, policies, regulations, programs, practices, decisions or investments that restrict access to high-quality education, transportation, jobs, health care, recreation, features of a healthy environment including clean water and air, safe neighborhoods, social services, cultural institutions, and other opportunities based on protected characteristics.
- 11) Defines "local agency" as a city or county, including a charter city or county, a city and county, a special district, a redevelopment successor agency, a joint powers authority, a public housing authority, a public housing agency, or any political subdivision of the state not otherwise listed.
- 12) Defines “public agency” as any state or local agency, regional transportation agency, or council of governments.
- 13) Defines "state agency” as every state office, officer, department, division, bureau, board, and commission, including the California State University.
- 14) Provides that if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to state law.

EXISTING LAW:

- 1) Pursuant to federal law, requires all executive branch departments and agencies administering housing and urban development programs and activities to administer these programs in a manner that affirmatively furthers fair housing (42 U.S.C. § 3608).

- 2) Pursuant to federal law, requires that United States Department of Housing and Urban Development (HUD) programs and activities be administered in a manner affirmatively furthering the policies of the FHA (42 U.S.C. § 3608).
- 3) Pursuant to federal law, requires specified state and local agencies that contract with, or receive funding from, HUD to certify that they will affirmatively further fair housing by completing an assessment of fair housing and submitting that assessment to HUD.
- 4) Declares it to be against public policy the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information; and that every person has a civil right to be given the opportunity to seek, obtain, or hold employment and housing without facing discrimination based on these protected classes (Govt. Code Sections 12920-12921).
- 5) Declares it unlawful, pursuant to FEHA, for any housing accommodation owner to inquire about; make known any preference or limitation as to; discriminate; or harass a person based on the person's race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information (Govt. Code Section 12955).
- 6) Prohibits discrimination through public or private land use practices, decisions, and authorizations because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, genetic information, national origin, source of income, or ancestry. Discrimination includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law that make housing opportunities unavailable (Govt. Code Section 12955).
- 7) Establishes DFEH in the Business, Consumer Services, and Housing Agency with the powers and duties to, among other things, receive, investigate, and conciliate complaints relating to housing discrimination.
- 8) Requires every city and county to prepare and adopt a general plan containing seven mandatory elements, including a housing element (Govt. Code Sections 65300 and 65302).
- 9) Requires a jurisdiction's housing element to identify and analyze existing and projected housing needs, identify adequate sites with appropriate zoning to meet the housing needs of all income segments of the community, and ensure that regulatory systems provide opportunities for, and do not unduly constrain, housing development (Govt. Code Section 65583).
- 10) Requires a Metropolitan Planning Organization to include, within its Regional Transportation Plan, a Sustainable Communities Strategy designed to achieve specific targets for greenhouse gas reduction (Govt. Code Section 65080).

FISCAL EFFECT: Unknown

COMMENTS:

Affirmatively furthering fair housing (AFFH): Since its enactment in 1968, the federal FHA has directed HUD and its program participants to affirmatively further the FHA's goals of promoting fair housing and equal opportunity. To that end, subsequent federal laws required HUD grantees to certify that they are taking steps to affirmatively further fair housing in their jurisdictions, such as measures to reduce patterns of segregated housing. In 2010, the U.S. Government Accountability Office issued a report critical of HUD's requirements and oversight of this process.

In 2015, the Obama administration issued regulations on AFFH. According to HUD, the federal agency charged with writing the rules for the FHA, the purpose of the AFFH rule is to "set out a framework for local governments, States and Insular Areas, and public housing agencies (PHAs) to take meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination. The rule is designed to help program participants better understand what they are required to do to meet their AFFH duties and enables them to assess fair housing issues in their communities and then to make informed policy decisions." The AFFH rule incorporates an "Assessment of Fair Housing" (AFH) process into broader existing planning processes, including the Consolidated Plan and the PHA Five-Year Plan.

Under the AFFH rule, HUD grantees must use the AFH process to examine barriers to fair housing choices and access to opportunity within their jurisdictions. The AFH Assessment Tool, which includes instructions and data provided by HUD, consists of a series of questions designed to help program participants identify issues such as fair housing issues pertaining to patterns of integration and segregation; racially and ethnically concentrated areas of poverty; disparities in access to opportunity; and disproportionate housing needs, as well as the contributing factors for those issues. Grantees must engage residents and organizations in the community and region by convening at least one public hearing about the AFH and accepting public comments on the draft AFH.

HUD grantees must submit their AFHs to HUD for review and acceptance. Completion of the AFH process does not automatically mean that the grantee has met its obligation to affirmatively further fair housing under the FHA. Rather, completion of the AFH means that the grantee has met its obligations under the AFFH rule. Failure to submit an AFH that is accepted by HUD could impact the receipt of HUD funds, including the loss of funding.

Pending federal legislation: In January, Representative Paul Gosar (R-AZ) introduced H.R. 482 and Senator Mike Lee (R-UT) introduced a companion bill, S. 103. Both bills are titled the "Local Zoning Decisions Protection Act of 2017." The bills would nullify the AFFH rule and the Assessment Tools associated with the rule. The bills would also prohibit federal funds from being used for the HUD database containing geospatial information regarding community racial disparities and disparities in access to affordable housing. The bills would also require the HUD Secretary to consult with state, local government, and public housing agency officials to develop recommendations to further the purposes of the FHA by means other than through regulations. The HUD Secretary would be required to draft a report based on the consultation, and the recommendations in the report could only be those reached by consensus.

FEHA: California's FEHA prohibits employment and housing discrimination based on the protected classes of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability,

or genetic information. FEHA further provides that it is a civil right to be able to pursue and maintain housing or employment without facing discrimination.

While FEHA does not explicitly include an AFFH obligation, it does prohibit discrimination through public or private land use practices, decisions, and authorizations because of membership in a protected class. Discrimination includes restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law that make housing opportunities unavailable.

DFEH is the state agency tasked with receiving, investigating, and conciliating complaints relating to housing discrimination. If a dispute is not resolved, DFEH may take legal action if evidence supports a finding of discrimination. In housing discrimination cases, an individual also has the right to file a lawsuit on his or her own behalf. It is not necessary to file a complaint with DFEH before filing a lawsuit or to get a “right-to-sue” letter.

Need for the bill:

According to the author,

"Historically, the AFFH obligation—which requires active government efforts to dismantle segregation and create equal housing opportunities—was largely overlooked. This contributed to the perpetuation of patterns of segregation and of disinvestment in communities of color – issues the FHA was meant to address.

"In 2015, the Obama administration reinvigorated the AFFH obligation through a new Affirmatively Furthering Fair Housing regulation (“AFFH Rule”)...Unfortunately, the current HUD Secretary, Ben Carson, has derided the AFFH Rule as “social-engineering,” and members of Congress recently introduced legislation—H.R. 482 and S. 103—to nullify the rule.

"Given the threats to fair housing from both the Trump Administration and Congress, AB 686 reinforces California’s commitment to fair housing by amending FEHA to explicitly include a state AFFH obligation.

"Actions taken under this bill to affirmatively further fair housing can help overcome patterns of segregation, promote fair housing choice, address environmental justice, foster inclusive communities free from barriers that restrict access to opportunities, and protect residents from displacement.

"This bill comes at a time when the affordable housing crisis is particularly acute statewide—particularly for our communities of color. African-American households are nearly twice as likely to spend more than 50% of their income on housing compared to white households. Similarly, Latino households are over-paying at dramatic rates. For example, in Sacramento, 33% of African-American families pay more than 50% of their income on housing, in Modesto 39%, in Fresno 32%, in Los Angeles 34%, and in Stockton 38%....This leaves them vulnerable to homelessness and unable to afford necessities like food, healthcare, and transportation. Communities of color also face more burdens from environmental pollutants: “On average, neighborhoods with a facility that emitted localized GHGs within 2.5 miles have a 22 percent higher proportion of residents of color and 21 percent higher proportion of residents living in poverty than neighborhoods that are not within 2.5 miles of such a facility.” (*A Preliminary Environmental Equity Assessment of California’s Cap-and-Trade Program, 2016*)

http://dornsife.usc.edu/assets/sites/242/docs/Climate_Equity_Brief_CA_Cap_and_Trade_Sept2016_FINAL2.pdf

Staff comment: As noted above, since 1968 federal law has required federal executive departments and agencies to administer their programs relating to housing and urban development in a manner affirmatively to further the purposes of the FHA. The federal AFFH rule created a fair housing planning process intended to assist HUD grantees in assessing their compliance with the longstanding obligation to affirmatively further fair housing. This bill places the AFFH duty in state antidiscrimination law and frames the failure to affirmatively further fair housing as a new category of housing discrimination under state law. While the federal AFFH rule applies to HUD grantees, this bill would apply to any state, regional, or local agency that administers programs and activities relating to housing and community development. In this bill, definitions of key terms are clarified in certain respects. For example, the federal AFFH rule does not define “barriers that restrict access to opportunity” or “programs and activities relating to housing and community development,” while this bill includes definitions for each of these terms.

The American Planning Association, California Chapter (APA), has a support if amended position due to how the bill differs from the federal AFFH rule. In APA's view, the bill "allows an AFFH claim to be made for virtually every land use decision." APA contends this bill should direct cities to prepare an AFFH plan consistent with the federal requirements and to ensure their general plans and housing elements are consistent with that plan. APA also contends that the state would have to supply all of the data agencies would need to develop the AFFH plan because, if the federal AFFH rule is repealed, the data that local agencies would have relied upon will no longer be available from HUD and local agencies won't receive any HUD dollars for the effort.

Supporters point to the necessity of the bill in light of the uncertainty around the federal AFFH rule. The Public Interest Law Project contends that this bill is "crucial as communities confront a perfect storm of skyrocketing housing prices, displacement, burgeoning homelessness, and an all-out assault on social programs in Washington." Supporters argue that, in contrast to threats to fair housing and civil rights on the national level, California must reaffirm its commitment to inclusive communities and access to opportunity for all of its residents. In supporters' view, California still has a long way to go in fulfilling the promise of AFFH. Historic patterns of segregation persist and many people of color live in neighborhoods with severe environmental health burdens. Displacement and disinvestment threaten the stability of low-income communities. Incorporating an AFFH obligation in state law would play a key role in tackling these issues.

Committee amendments:

This bill is analyzed as proposed to be amended. The Committee amendments make the following changes:

1. Provide that DFEH has the option of investigating or enforcing a verified complaint based on the failure to affirmatively further fair housing.

2. Delete the list of examples of "meaningful actions" and "programs and activities relating to housing and community development." This amendment is intended for brevity. It is not intended to exclude any examples provided in the previous versions of the bill.

3. Provide that public agencies already required to complete a housing element or a sustainable communities strategy must include in those plans an analysis of barriers that restrict access to opportunity and a commitment to specific meaningful actions to affirmatively further fair housing. Public agencies already required to undertake a federal fair housing assessment may incorporate relevant portions of that assessment into its housing element or sustainable communities strategy to fulfill this requirement.

4. Make technical, clarifying changes.

Below are the committee amendments:

1. In the title, in line 1, strike out "Section 12955" and insert:

Sections 12955, 65080, and 65583

2. On page 5, line 37, after the period insert:

Notwithstanding Section 12980, subdivision (a) of Section 12981, or Section 12981.1, the director may exercise his or her discretion to investigate, or to bring a civil action, based on a verified complaint that alleges a violation of this subdivision.

3. On page 8, strike out lines 6 through 17, inclusive, in line 18, strike out "(c)" and insert:

(b)

4. On page 8, in line 21, strike out "that" and insert:

that:

5. On page 8, in line 22, strike out "segregation" and insert:

segregation;

6. On page 8, in line 23, strike out "opportunity and insert:

opportunity based on characteristics protected by this part;

7. On page 8, in lines 23 and 24, strike out " choice, and" and insert:

choice, both within and outside of areas of concentrated poverty;

8. On page 8, line 32, strike out "but" and insert

and

9. On page 8, in line 33, strike out "include" and insert:

include:

10. On page 8, in line 34, strike out the first "housing," and insert:

housing:

11. On page 8, in line 34, strike out the second "housing," and insert:

housing:

12. On page 8, in line 35, strike out "disabilities," and insert:

disabilities:

13. On page 8, in line 39, after the second comma insert:

features of a healthy environment including

14. On page 9, in line 13, strike out "a"

15. On page 9, in line 18, strike out "Meaningful actions may include the following activities:" and strike out lines 19 to 35, inclusive.

16. On page 9, in line 39, strike out "impacts" and insert:

affects

17. On page 9, in line 39, strike out "live" and insert:

live, a person's ability to remain in their current housing

18. On page 10, in line 1, after the fourth comma insert:

features of a healthy environment including clean water, air,

19. On page 10, strike out lines 2 to 5, inclusive, and insert:

and affordable housing and community conditions.

20. On page 10, strike out lines 6 to 18, inclusive.

21. On page 10, between lines 23 and 24 insert:

(c)(1) Any public agency required to adopt a housing element, pursuant to Article 10.6 (commencing with Section 65580) of Chapter 3 of Division 1 of Title 7, or a sustainable communities strategy, pursuant to Section 65080, shall include in that element or strategy an

analysis of barriers that restrict access to opportunity and a commitment to specific meaningful actions to affirmatively further fair housing.

(2) If the public agency completes or revises an assessment of fair housing pursuant to Section 3608(d) and (e)(5) of Title 42 of the United States Code, and any regulation implementing that requirement, including Subpart A (commencing with Section 5.150) of Part 5 of Subtitle A of Title 24 of the Code of Federal Regulations, as published on July 16, 2015, on page 42272 of Volume 80 of the Federal Register, the public agency may incorporate relevant portions of that assessment of fair housing or revised assessment of fair housing into its housing element or sustainable communities strategy to fulfill the requirement in paragraph (1).

(3) A public agency that completes or revises an assessment of fair housing pursuant to Section 3608(d) and (e)(5) of Title 42 of the United States Code, and any regulation implementing that requirement, including Subpart A (commencing with Section 5.150) of Part 5 of Subtitle A of Title 24 of the Code of Federal Regulations, as published on July 16, 2015, on page 42272 of Volume 80 of the Federal Register, shall submit a copy of that assessment or revised assessment to the department at the same time that agency submits the assessment or the revised assessment to the United States Department of Housing and Urban Development. The department shall post the assessment on its Internet Web site within a reasonable period of time.

22. Add the following section to the bill:

SEC. 3: Government Code Section 65080(b)2(B) is amended to read:

(B) Each metropolitan planning organization shall prepare a sustainable communities strategy, subject to the requirements of Part 450 of Title 23 of, and Part 93 of Title 40 of, the Code of Federal Regulations, including the requirement to utilize the most recent planning assumptions considering local general plans and other factors. The sustainable communities strategy shall (i) identify the general location of uses, residential densities, and building intensities within the region, (ii) identify areas within the region sufficient to house all the population of the region, including all economic segments of the population, over the course of the planning period of the regional transportation plan taking into account net migration into the region, population growth, household formation and employment growth, (iii) identify areas within the region sufficient to house an eight-year projection of the regional housing need for the region pursuant to Section 65584, (iv) identify a transportation network to service the transportation needs of the region, (v) gather and consider the best practically available scientific information regarding resource areas and farmland in the region as defined in subdivisions (a) and (b) of Section 65080.01, (vi) consider the state housing goals specified in Sections 65580 and 65581, (vii) set forth a forecasted development pattern for the region, which, when integrated with the transportation network, and other transportation measures and policies, will reduce the greenhouse gas emissions from automobiles and light trucks to achieve, if there is a feasible way to do so, the greenhouse gas emission reduction targets approved by the state board, ~~and~~ (viii) allow the regional transportation plan to comply with Section 176 of the federal Clean Air Act (42 U.S.C. Sec. 7506,) and (ix) analyze barriers that restrict access to opportunity and include a commitment to specific meaningful actions to affirmatively further fair housing pursuant to Section 12958.

23. Add the following section to the bill:

SEC. 4: Add subsection (10) to Government Code Section 65583(a):

(10) An analysis of barriers that restrict access to opportunity and a commitment to specific meaningful actions to affirmatively further fair housing pursuant to Section 12958.

Related legislation:

SB 1053 (Leno, 2016): Would have increased the protections against housing discrimination on the basis of one's source of income under FEHA by revising the definition of "source of income" to include lawful, verifiable income paid to a housing owner or landlord on behalf of a tenant, including federal, state, or local public assistance or housing subsidies, including, but not limited to, federal housing assistance vouchers under Section 8 of the United States Housing Act of 1937, as specified. *This bill was placed on suspense in the Senate Committee on Appropriations.*

AB 396 (Jones-Sawyer, 2015): Would have provided that it is an unlawful housing practice under FEHA for the owner of rental housing to inquire about, or to require an applicant for rental housing to disclose, a criminal record during the initial application assessment phase, unless otherwise required by state or federal law. *This bill died in the Assembly Committee on Appropriations.*

AB 559 (Padilla), Chapter 261, Statutes of 2011: Expanded the prohibited bases of discrimination under the Unruh Civil Rights Act and the California Fair Employment and Housing Act to include genetic information.

AB 887 (Atkins), Chapter 719, Statutes of 2011: Clarifies the definition of gender in certain anti-discrimination laws to expressly include the terms "gender identity" and "gender expression" where only the term "gender" previously appeared.

AB 2244 (Polanco), Chapter 1217, Statutes of 1993: Among other things, provided that discriminatory land use regulations, zoning laws and restrictive covenants are unlawful acts.

Double-referred: This bill was also referred to the Judiciary Committee where it will be heard should it pass out of this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

National Housing Law Project (co-sponsor)

Public Advocates (co-sponsor)

Western Center on Law & Poverty (co-sponsor)

ACCE

American Planning Association, California Chapter (Support if amended)

Bay Area Legal Aid

California Environmental Justice Alliance

California Housing Partnership Corporation

California Reinvestment Coalition

Communities for a Better Environment

Courage Campaign

Disability Rights California

Enterprise Community Partners
Equal Justice Society
Fair Housing Advocates of Northern California
Fair Housing Council of Orange County
Grounded Solutions Network
HELP
HERA
Law Foundation of Silicon Valley
Lawyers' Committee for Civil Rights Under Law
Legal Aid Association of California
Legal Aid Foundation of Los Angeles
Legal Aid Society of San Diego
Legal Services of Northern California
Little Tokyo Service Center
Mission Economic Development Agency
Non-Profit Housing Association of Northern California
Peace and Freedom Party of California
Policy Link
Project Sentinel
Public Counsel
Public Interest Law Project
Tenants Together, California

Opposition

None on file

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