

Date of Hearing: May 1, 2013

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

Norma Torres, Chair

AB 1229 (Atkins) – As Introduced: February 22, 2013

SUBJECT: Land use: zoning regulations.

SUMMARY: Expressly 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 lower-income, very low-income, or extremely low-income owners or tenants.
- 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.

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 (California Constitution, Article XI, Section 7).
- 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 (Government Code Section 65800).
- 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, including 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.

- iv) The intensity of land use.
- d) Establish requirements for offstreet parking and loading.
- e) Establish and maintain building setback lines.
- f) Create civic districts around civic centers, public parks, public buildings, or public grounds, and establish regulations for those civic districts.

(Government Code Section 65850)

- 4) Pursuant to the Costa-Hawkins Rental Housing Act, limits 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 (Civil Code Section 1954.50, et seq.).

FISCAL EFFECT: None

COMMENTS:

Background

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 within state statute 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 clear 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. According to the California Rural Housing Coalition’s database, 140 jurisdictions in California currently have mandatory inclusionary zoning ordinances. 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 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 statute 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.”

Purpose of the bill: AB 1229 expressly authorizes cities and counties to establish inclusionary housing requirements as a condition of development, which may require the provision of affordable residential units for low-, very low-, or extremely low-income owners or tenants. 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.

The inclusionary zoning debate: The purposes of inclusionary zoning ordinances are twofold. First, inclusionary zoning ordinances are intended to increase the production of affordable housing by leveraging additional resources and opportunities. While developers often do not build the mandated affordable units themselves or pay their full cost, inclusionary zoning ordinances generally place the burden on the developer to ensure construction of the affordable units. To fulfill this obligation, developers often donate land or make a financial contribution, or both, towards development costs. Many ordinances also allow a developer to fulfill his or her obligation by paying an in-lieu fee, which the city or county uses to help finance its own development. In exchange, developers generally receive various concessions and incentives from the local government, such as the ability to build more densely, fast-track permit processing, increases in allowable floor area ratios, and other

The second purpose of inclusionary zoning ordinances is to achieve “inclusion” in new neighborhoods. Over the past few decades, development in California has generally resulted in single-product neighborhoods, often single-family home subdivisions. In many cases, the prices of these new homes are affordable only to the upper end of the market. Because inclusionary zoning results in some homes being sold at below-market rates or in a greater mix of housing products (duplexes, townhomes, condos, apartments) that come at a greater variety of prices, it increases economic diversity within neighborhoods and meets a greater range of the community’s housing needs.

In summing up the inclusionary zoning experience in California in a 2007 report, the California Coalition for Rural Housing states, “The single most important conclusion is that inclusionary programs are putting roofs over the heads of tens of thousands of Californians. These homes, in turn, are building mixed-income neighborhoods where houses considered ‘affordable’ are often indistinguishable from those at market-rate.”

While market-rate housing developers generally do not argue with the “inclusionary” aspect of inclusionary zoning, they often do take issue with having to contribute their resources for a societal benefit. They believe that if a jurisdiction wants to promote greater affordable housing, it should spend public resources for this purpose rather than require a private entity to do so. Developers also point out that theirs is one of the few industries that is asked to provide its product at below-market prices to some of those who cannot afford the full price.

History of the Costa-Hawkins Act: 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 and its predecessor, SB 1257 (Costa), exclusively discuss local 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 similarly 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 local inclusionary zoning ordinances with the passage of AB 1164.

Arguments in support: According to the sponsors, local inclusionary housing programs have proven to be 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. Inclusionary ordinances have provided quality affordable housing to over 80,000 Californians, including the production of an estimated 30,000 units in the last decade alone. While many of these local programs have been in place for decades, the recent *Palmer* decision has created uncertainty and confusion for local governments and housing advocates regarding the future viability of this important local land use tool. According to the author, this bill resolves a conflict between local inclusionary zoning ordinances and the state’s Costa-Hawkins Rental Housing Act, thereby restoring the ability of local governments to use one of the most effective tools at their disposal to promote the production of both ownership and rental homes that are affordable to California’s lower income working families.

Arguments in opposition: Opponents argue that inclusionary zoning is akin to rent control and that this bill therefore allows local governments to enact and enforce rent control on newly constructed rental housing units by pre-empting the Costa-Hawkins Act. They believe that the Costa-Hawkins protections for new construction are appropriate and should be maintained. Moreover, they believe that the bill will seriously hurt the construction industry. They additionally argue that inclusionary units are difficult to own and manage because landlords do not set the tenant qualification standards.

Double referred: If AB 1229 passes this committee, the bill will be referred to the Committee on Local Government.

REGISTERED SUPPORT / OPPOSITION:

Support

California Rural Legal Assistance Foundation (co-sponsor)
Non-Profit Housing Association of Northern California (co-sponsor)
San Diego Housing Federation (co-sponsor)
Western Center on Law and Poverty (co-sponsor)
American Planning Association, California Chapter
BRIDGE Housing
Cabrillo Economic Development Corporation
California State Association of Counties
Cities Association of Santa Clara County

Cities of Burbank, Chico, Cloverdale, Danville, Davis, Emeryville, Fort Bragg, Lathrop,
Pasadena, San Jose, San Mateo, Santa Monica, and Wasco
City and County of San Francisco
Council of Community Housing Organizations
EAH Housing
East Bay Housing Organizations
First Place for Youth
Greenbelt Alliance
Housing Leadership Council of San Mateo County
Law Foundation of Silicon Valley
LeadingAge California
League of California Cities
League of Women Voters of California
League of Women Voters of Marin County
Los Angeles County Division, League of California Cities
Marin Partnership to End Homelessness
Marin Workforce Housing Trust
MidPen Housing
Mercy Housing
Move LA
Sacramento Housing Alliance
One individual letter

Opposition

Apartment Association, California Southern Cities
Apartment Association of Greater Los Angeles
Apartment Association of Orange County
California Association of Realtors
California Building Industry Association
East Bay Rental Housing Association
GH Palmer Associates
NorCal Rental Property Association
San Diego County Apartment Association
San Francisco Association of Realtors
Santa Barbara Rental Property Association

Analysis Prepared by: Anya Lawler / H. & C.D. / (916) 319-2085