

Date of Hearing: April 13, 2016

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT  
Susan Talamantes Eggman, Chair  
AB 2502 (Mullin and Chiu) – As Amended March 30, 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.

**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:**

- 1) **Bill Summary.** 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).

This bill is sponsored by the author.

- 2) **Author's Statement.** 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.”

- 3) **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 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.

- 4) **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 message that “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.”
- 5) **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.

- 6) **Arguments in Support.** Supporters argue that the bill restores the authority of local agencies to adopt effective inclusionary policies, which have been effective at creating affordable housing for the last 40 years, without fear of litigation.
- 7) **Arguments in Opposition.** Opponents argue that this bill makes inclusionary zoning profoundly unfair and would seriously discourage new multifamily development, and that the bill is an overreaction to one lawsuit.
- 8) **Committee Amendment.** The Committee may wish to ask the authors to accept an amendment that would clarify that any city adopting a new inclusionary housing ordinance after the effective date of the bill shall hold a public hearing and require a public vote of the legislative body.
- 9) **Double-Referral.** This bill is double-referred to the Housing and Community Development Committee.

**REGISTERED SUPPORT / OPPOSITION:****Support**

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 Pan-Ethnic Health Network  
California Rural Legal Assistance Foundation  
California State Association of Counties  
Century Housing  
Chinatown Community Development Center  
Cities of Belmont, Napa, Sunnyvale, and Walnut Creek  
City and County of San Francisco  
Counties of Contra Costa, Los Angeles, Marin, and Sonoma  
Community Housing Opportunities Corporation  
Community Housing Partnership  
Community Legal Services in East Palo Alto  
East Bay Housing Organizations  
East LA Community Corporation  
Every One Home  
Grounded Solutions Network  
HIP Housing  
Housing California  
Koreatown Immigrant Workers Alliance (KIWA)  
Law Foundation of Silicon Valley  
League of Women Voters of California  
Little Tokyo Service Center  
MidPen Housing Corporation  
Multicultural Communities for Mobility  
National Association of Social Workers, California Chapter  
Non-Profit Housing Association of Northern California  
Northern California Community Loan Fund  
Peer Advocated SRHT  
Public Advocates, Inc.  
Strategic Actions for a Just Economy (SAJE)  
San Diego Housing Federation  
San Francisco Council of Community Housing Organizations  
Southeast Asian Community Alliance  
St. Mary's Center  
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

Santa Barbara Rental Property Association

San Diego County Apartment Association

Southwest California Legislative Council

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