

Date of Hearing: April 14, 2021

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

AB 1322 (Bonta) – As Amended April 5, 2021

**SUBJECT:** Land use: local measures: conflicts.

**SUMMARY:** Creates a process for the governing body of a city or county to seek judicial validation that a local measure approved by the voters is in conflict with state housing law.

Specifically, **this bill:**

- 1) Allows the governing body of a city or county to commence proceedings to determine whether any provision of the charter, general plan, or local ordinance that has been approved by voters' conflicts with state housing law.
- 2) Requires a governing body that elects to commence proceedings to hold a public hearing to consider whether a conflict exists, as specified.
- 3) Provides that following a public hearing the governing body may adopt a resolution declaring that a provision of the charter, general plan, or local ordinance approved by voters conflicts with state law pertaining to housing and therefore the city or county does not have a duty to defend or enforce the measure in whole or in part.
- 4) States that the act of acknowledging a conflict with state law is not a discretionary action of the governing body for the purposes of the California Environmental Quality Act.
- 5) Authorizes the governing body of a city or county to bring an action to superior court to determine the validity of a resolution adopted under the provisions of this bill.
- 6) Specifies that in an action to determine the validity of, or to otherwise attack, review, set aside, void or annul a resolution adopted under this bill:
  - a) The issues raised are limited to those presented to the governing body prior to the close of the public hearing held on the resolution;
  - b) The governing body shall not have a duty to defend, enforce or otherwise assert the validity of the charter, general plan, or local ordinance that is the subject of the resolution;
  - c) Any factual determinations of the governing body shall be considered conclusive by the court unless the court finds that the factual determination is arbitrary and capricious or substantially unsupported by the evidence; and,
  - d) Attorney's fees shall not be awarded against a city, county, or city and county.
- 7) Provides that if a local governing body does not adopt a resolution as authorized under this bill, the governing body's proceedings have no legal effect and do not affect the accrual of time for bringing an action arising from an alleged conflict.

- 8) Exempts certain local voter approved measures from the provisions of the bill. Specifically, the bill exempts voter approved measures that restrict the conversion of the following types of land to nonagricultural uses:
  - a) Lands preserved or protected from urban development under existing federal or state programs designed to protect open space, farmland, environmental habitats and natural resources on a long-term basis including land zoned or designated for agricultural use; and,
  - b) Lands preserved or protected pursuant to county policies to preserve prime agricultural land within specified unincorporated areas.
- 9) Declares that the establishment of the procedures authorized under this bill constitutes an issue of statewide concern and states legislative intent that the procedures created by this act apply to all local agencies including charter cities.
- 10) States that if any provision of this bill or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.
- 11) Makes a number of findings and declarations related to the state's housing crisis and the purposes and intent of this bill, and provides applicable definitions.

**EXISTING LAW:**

- 1) Establishes Planning and Zoning Law which requires every city and county to adopt a general plan that sets out planned uses for all of the area covered by the plan, and requires the general plan to include seven mandatory elements, including a housing element. Additionally requires major land use decisions by cities and counties, such as development permitting and subdivisions of land, to be consistent with their adopted general plans.
- 2) Establishes Housing Element Law, which:
  - a) Provides that each community's fair share of housing is determined through the regional housing needs allocation (RHNA) process, which is composed of three main stages: (a) the Department of Finance and the Department of Housing and Community Development (HCD) develop regional housing needs estimates; (b) councils of government (COGs) allocate housing within each region based on these estimates (where a COG does not exist, HCD makes the determinations); and (c) cities and counties incorporate their allocations into their housing elements.
  - b) Requires that cities and counties produce, and HCD certify, a housing element to help fulfill the state's housing goals. In metropolitan areas, these housing elements are required every eight years. Each housing element must contain:
    - i) An assessment of housing needs and an inventory of resources and constraints relevant to meeting those needs;
    - ii) A statement of the community's goals, quantified objectives, and policies relative to the maintenance, preservation, improvement, and development of housing;

- iii) An implementation plan that identifies any particular programs or strategies being undertaken to meet their goals and objectives, including their RHNA target;
  - iv) An inventory of land suitable and available for residential development, including vacant sites and sites having realistic and demonstrated potential for redevelopment during the planning period; and,
  - v) Where the inventory of sites does not identify adequate sites to accommodate the need for groups of all household income levels, plans for rezoning of those sites by a specified deadline.
- 3) Establishes the Housing and Accountability Act (HAA), which provides that when a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria in effect at the time that the housing development project's application is complete, but the local agency proposes to disapprove the project or to impose a condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon specified written findings.
- 4) Establishes under the Code of Civil Procedures a set of accelerated procedures (validation procedures) that allow public agencies to file an action to promptly determine the validity or certain decisions made by the agency. These statutes also allow an "interested person" to bring an action challenging the validity of local decisions subject to the validation procedures.

**FISCAL EFFECT:** None.

**COMMENTS:**

- 1) **Bill Summary.** This bill authorizes the governing body of a city or county to adopt a resolution declaring that a local measure approved by the electorate is unenforceable due to a conflict with state housing law. Upon adoption of a resolution the city or county is relieved of its duty to enforce or defend the conflicting provision. The bill subjects the resolution to the validation procedures which authorizes the adopting governing body, or any interested party to seek a judicial determination regarding the validity of their resolution.

This bill is sponsored by San Francisco Bay Area Planning and Urban Research Association (SPUR).

- 2) **Author's Statement.** According to the author, "AB 1322 honors local control by putting city councils in the driver's seat. It gives city councils flexibility to address current local needs. Whether a city uses its new authority to suspend entrenched constraints or obtain expedited judicial rulings on the constraint's validity would be up to the city council."
- 3) **Housing Element Law.** Every local government is required to prepare a housing element as part of its general plan. The housing element process starts when HCD determines the number of new housing units a region is projected to need at all income levels (very low-, low-, moderate-, and above-moderate income) over the course of the next housing element planning period to accommodate population growth and overcome existing deficiencies in the housing supply. This number is known as the RHNA. The COG for the region, or HCD

for areas with no COG, then assigns a share of the RHNA number to every city and county in the region based on a variety of factors.

In preparing its housing element, a local government must show how it plans to accommodate its share of the RHNA. The housing element must include an inventory of sites already zoned for housing. If a community does not have enough sites within its existing inventory of residentially zoned land to accommodate its entire RHNA, then the community must adopt a program to rezone land within the first three years of the planning period.

- 4) **Local Housing Restrictions.** California has a long history of local voter initiatives focused on land use and housing. A 1987 research article in the *UCLA Journal of Environmental Law* documented a substantial increase in the number of local ballot measures impacting land-use and growth that qualified for the ballot in the 1970s and early 1980s. Researchers noted that while only ten local measures related to housing qualified for the ballot between 1971 and 1975, that number increased to 64 measures in the period from 1976 to 1982 and reached 53 measures in 1986 alone. Researchers found that growth control measures proposed during this period enjoyed high success rates (as high as 76% of all measures in 1986), while pro-growth measures faced more modest approval rates. Local growth control measures take various forms, and place direct as well as indirect controls on new development. For example:
  - a) **City of Alameda.** In 1973, Alameda voters amended the city charter to prohibit the construction of multi-family housing within the city. The voters amended the measure in 1991 to limit the maximum density of any residential development to one unit per 2,000 square feet of land (approximately 22 units per acre). In November of 2020 Alameda residents rejected Measure Z which would have repealed the restrictions.
  - b) **City of San Mateo.** In 1991, San Mateo voters approved Measure H which amended the general plan to lower limits on building heights and residential density. In 2004, voters approved Measure P which extended the Measure H limitations through 2020 with limited modifications. In November of 2020, San Mateo voters extended the Measure P restrictions through December 31, 2030.
  - c) **City of Monterey Park.** In 1982, Monterey Park voters approved Proposition L and Proposition K. Proposition L requires voter approval on certain zoning changes approved by the city. Proposition K, as approved, limited new residential construction to 100 units per year from 1983-1992. Note that both measures were litigated, see: *Lee v. City of Monterey Park*, 173 Cal. App. 3d 798.
  - d) **City of Corte Madera.** In 1985, Corte Madera voters approved Measure G which placed a two year moratorium on new developments with exceptions for single family housing and small projects.

While certain local voter approved measures may not have conflicted with state housing law at the time of their adoption, as state housing law evolves these initiatives may create a conflict that renders it impossible for the local governing body to comply with the local measure and state housing law.

- 5) **Conflicts with State Housing Law.** While city councils and county boards must implement local voter initiatives, they are also bound to comply with applicable state housing laws. If a local voter approved measure conflicts with state housing law, either at the time of the measure's adoption, or as a result of newly adopted state housing laws, the local government is placed in a perilous legal position. Failure to comply with certain aspects of state housing law can result in HCD referring the jurisdiction to the Attorney General for prosecution. Failure to implement the local measure may invite litigation from local proponents of the initiative.

While a city or county may find that a local voter approved growth control measure is patently in conflict with a variety of state housing laws and thus unenforceable, the decision not to enforce the local measure could be adjudicated for several years at the local level. Conversely, implementation of conflicting local measures could compromise a local government's ability to comply with provisions of state housing law, including aspects that are subject to strict timelines such as approving a compliant housing element and completing any necessary rezoning associated with the approved housing element. This may invite prosecution from the Attorney General and place any prospective development in limbo for years as the state's housing crisis persist.

*This bill* does not define which measures or types of measures are in conflict with state housing law. Rather, the bill proposes to provide local governments charged with implementing state housing laws as well as their local measures the ability to recognize a conflict between the two and take appropriate action. Once a conflict is recognized by the government charged with implementing the local measure, this bill allows the local government to resolve the conflict with certainty by promptly subjecting measures to the validation procedures provided in statute.

- 6) **Validation Procedures.** The Legislature has long recognized that certain actions taken by state and local agencies would suffer or be rendered ineffective if subject to protracted adjudication. The current validation procedures were adopted by the Legislature in 1961 and provide a set of accelerated procedures for determining the validity of certain state and local actions. The statute allows a public agency to file an action in court to promptly determine the validity of acts that are subject to the validation procedures. The statute also allow any interested person to bring an action challenging the validity of acts subject to the validation procedures (these suits are commonly referred to as reverse or inverse validation actions). Given the time sensitive nature of actions subject to the validation procedures, the law includes a range of relatively short statutes of limitations for challenging an action subject to the validation statutes.
- 7) **Actions Subject to Validation.** Validation procedures have long enabled public entities to confirm the legality of various actions, including contractual agreements and the issuance of public debt. From time to time the Legislature identifies activities that should be subject to validation procedures due to the potential for delay to impair the public agency's ability to operate. While validation proceedings are typically reserved for financial matters, they also extend to actions under the Cortese-Knox-Hertzberg Local Government Reorganization Act related to changes in the organization, reorganization and sphere of influence of local governments.

This bill will add resolutions that recognize an existing conflict between state housing law and a local measure approved by the voters to the suite of actions that are subject to validation. Prompt validation either confirming a conflict, or finding that a conflict does not exist, carries potentially significant planning and financial consequences for the jurisdiction, its residents, potential residents, and any developers seeking to build housing in the jurisdiction. While this matter is not strictly financial, the short timelines for compliance with various provisions of state housing law create an urgency that benefits from prompt resolution.

- 8) **Clarifying Amendments and Authorship Change.** The Committee may wish to consider the following amendments:
- a) Amend the bill to make Assemblymember Robert Rivas the author of AB 1322 at the request of Assemblymember Bonta;
  - b) Amending finding (a)(15) which cites findings in the Housing Crisis Act of 2019 but uses slightly different language. The Committee may wish to align the text of (a)(15) with the findings in the Housing Crisis Act;
  - c) Revising in various places in the bill “state housing law” to read “state law pertaining to housing;”
  - d) Clarifying that, prior to a local governing body holding a public hearing, it may request comments from the local planning commission; and,
  - e) Amending the finding of statewide concern to replace the word “merely” with “solely.”
- 9) **Arguments in Support.** According to the California Housing Partnership, “AB 1322 honors local control by putting city councils in the driver’s seat and enabling them to meet the requirements of state housing law. This bill will prevent needless litigation and help cities throughout the state attain a state-certified housing element.”
- 10) **Arguments in Opposition.** According to Livable California, “This bill puts city councils in the position of Supreme Court justices, a role for which they are obviously entirely unsuited. Specifically, AB 1322 would empower them to ‘commence proceedings’ to determine whether a local voter-approved initiative ‘conflicts’ with state law.”
- 11) **Double-Referral.** This bill is double-referred to the Housing and Community Development Committee.

## REGISTERED SUPPORT / OPPOSITION:

### Support

SPUR [SPONSOR]  
 Bay Area Council  
 California Association of Realtors  
 California Housing Partnership Corporation  
 California YIMBY  
 Casita Coalition

Council of Infill Builders  
East Bay for Everyone  
Habitat for Humanity California  
Hello Housing  
Midpen Housing  
Non-profit Housing Association of Northern California  
Piedmont Racial Equity Campaign  
Terner Center for Housing Innovation at the University of California, Berkeley  
The Two Hundred  
Tmg Partners

**Oppose**

Livable California  
City of Torrance (based on a previous version)

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