

Date of Hearing: June 28, 2017

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT  
Cecilia Aguiar-Curry, Chair  
SB 277 (Bradford) – As Amended May 9, 2017

**SENATE VOTE:** 22-15

**SUBJECT:** Land use: zoning regulations.

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

- 1) Allows the legislative body of a city or county to adopt an ordinance that requires, as a condition of the development of residential rental units, that the development include a certain percentage of residential rental units affordable to, and occupied by, households with incomes that do not exceed the limits for moderate-income, lower-income, very low-income, or extremely low-income households, as specified.
- 2) Requires the ordinance to provide alternative means of compliance, which may include, but are not limited to, in-lieu fees, land dedication, offsite construction, or acquisition and rehabilitation of existing units.
- 3) Makes a number of other findings and declarations.

**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 a city or county to establish inclusionary housing requirements as a condition of the development of residential rental units, and also requires the ordinance adopted by the city or county to provide alternative means of compliance, which can include in-lieu fees, land dedication, offsite construction, or acquisition and rehabilitation of existing units. This bill is sponsored by the California State Conference of the National Association for the Advancement of Colored People (California State NAACP).
- 2) **Author's Statement.** According to the author, "SB 277 allows local government to enact inclusionary zoning ordinances. Inclusionary housing refers to housing that includes rental units that are affordable to moderate- and low-income households. Since the 1970s, more than 170 local jurisdictions have enacted inclusionary housing ordinances to meet their affordable housing needs. However, a 2009 appellate court held that the Costa-Hawkins Act prevents inclusionary zoning. This bill does not require a local government to enact inclusionary zoning ordinances. By codifying that local government MAY enact inclusionary zoning it allows each municipality to enact an inclusionary housing ordinance WITH input from local developers and constituents."
- 3) **Background.** California Constitution Article XI, Section 7, 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) **Related Legislation:**

- a) AB 1229 (Atkins) of 2013, would have expressly authorized cities and counties to establish inclusionary housing requirements as a condition of development. The bill further declared 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:

"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."

- b) AB 2502 (Mullin and Chiu) from 2016 is substantially similar to this bill. While AB 2502 passed out of both this Committee and the Housing and Community Development Committee, it did not move out of the Assembly.
- c) AB 1505 (Bloom) is substantially similar to this bill, and is currently pending on the Senate Floor.

- 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 despite the long track record of success of inclusionary policies, the Palmer decision cut off one crucial option for local governments: the ability to apply inclusionary policies to rental housing. Supporters argue that the Palmer court improperly conflated rent control, which is regulated by the state's Costa Hawkins Act, and deed-restricted affordable housing, which is not, creating uncertainty for the future viability of this important and well-established local land use tool. According to supporters, this bill simply restores the law to what it had been for decades prior to 2009, allowing the policies that have been effective at creating affordable housing for the last 40 years to continue without fear of litigation.

- 7) **Arguments in Opposition.** Opponents believe that this bill weakens the new construction exemption contained in “Costa-Hawkins” and will discourage the creation of new rental housing, exacerbating the housing affordability crisis in California.
- 8) **Double-Referral.** This bill is double-referred to the Housing and Community Development Committee.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

California State NAACP [SPONSOR]  
Cities of Santa Monica  
National Association of Social Workers, California Chapter  
Non-Profit Housing Association of Northern California  
Western Center on Law & Poverty

**Opposition**

California Association of Realtors

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