



Housing Advisory Commission

CONSENT CALENDAR  
September 10, 2013

To: Honorable Mayor and Members of the City Council  
 From: Housing Advisory Commission  
 Submitted by: Stephen Murphy, Chairperson, Housing Advisory Commission  
 Subject: Support AB 1229 (Atkins), A Bill to Affirm Local Control of Inclusionary Housing

RECOMMENDATION

Adopt a Resolution supporting AB 1229, a Bill to Affirm Local Control of Inclusionary Housing, and approving transmission of the Resolution to the offices of State Assembly Members Toni Atkins and Nancy Skinner and State Senator Loni Hancock.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

The appellate court decision *Palmer/Sixth Street Properties L.P. v. City of Los Angeles* (2009) has put inclusionary housing laws affecting rental housing in jeopardy and has effectively invalidated them, since rents now cannot be restricted beyond initial occupancy. Cities such as Berkeley have instead been required to assess an affordable housing impact fee on new rental developments based on the affordable housing need generated by the new units, which requires a nexus study to demonstrate that (1) the proposed development is in fact creating an impact on affordable housing and (2) the fee imposed on new market rental housing is proportional to the impact.<sup>1</sup>

At the meeting of July 11, 2013, the Housing Advisory Commission moved unanimously to recommend that City Council adopt a Resolution supporting AB1229 (M/S/C: Tregub/Wolfe. Ayes: Casalaina, Kingeter, Murphy, Sawicki, Skjerpung, Soto-Vigil, Tregub, Wolfe, Feller. Noes: None. Absent: None.).

BACKGROUND

Inclusionary zoning is a local land use ordinance that requires a fractional portion of units in new housing developments to be rented or sold at costs that are affordable to low-income and moderate-income families. Inclusionary units can be rentals or homeownership units. Nearly 170 cities and counties have some form of inclusionary housing policy in place. In the past decade, inclusionary programs have produced

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<sup>1</sup> *San Remo Hotel vs. City and County of San Francisco* (1991) and the California Mitigation Fee Act

approximately 30,000 units of new housing affordable to lower-income households in California. In 1986, the City of Berkeley adopted its Inclusionary Ordinance, which required that developers set aside 20% of the units in a project of 5 units or more as affordable to low and very low income individuals.<sup>2</sup>

The 2009 *Palmer* decision held for the first time that the California Costa-Hawkins Act of 1995 prohibits local governments from creating affordable rental housing through local inclusionary housing programs. This has jeopardized a policy that has been in place for nearly 40 years and provided quality affordable housing to more than 80,000 Californians.

#### RATIONALE FOR RECOMMENDATION

AB 1229 would restore local control over important land use decisions and clarify that cities are allowed to establish inclusionary zoning laws covering both ownership and rental housing. Local inclusionary housing programs in California have been one of the more effective tools in California for producing new units that are affordable to working families and for creating economically diverse communities with a range of housing options. These programs have also been an important part of overall housing strategies available to local governments to meet their respective Climate Action Plan goals, by allowing low-wage workers to live closer to where they work.

In November 2009, the Council unanimously approved Resolution No. 64,687-N.S., urging the California State Legislature to amend the Costa-Hawkins Rental Housing Act to clarify that it does not preempt inclusionary zoning requirements (Attachment 4).

#### ALTERNATIVE ACTIONS CONSIDERED

No alternative actions were considered.

#### CITY MANAGER

The City Manager takes no position on the content and recommendations of the Commission's Report.

#### CONTACT PERSON

Kristen Lee, Community Services Specialist III, HHCS, 981-5427  
Igor Tregub, Commissioner, Housing Advisory Commission, 295-8798

#### Attachments:

1. Resolution
2. AB 1229 Fact Sheet
3. AB 1229 Bill Text
4. Council Report and draft City of Berkeley Resolution No. 64,687–N.S. Adopted November 10, 2009

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<sup>2</sup> City of Berkeley Resolution No. 64,687–N.S. Adopted November 10, 2009.

RESOLUTION NO. ##,###-N.S.

SUPPORT OF ASSEMBLY BILL 1229, A BILL TO AFFIRM LOCAL CONTROL OF  
INCLUSIONARY HOUSING

WHEREAS, the appellate court decision, *Palmer/Sixth Street Properties L.P. v. City of Los Angeles* (2009) has effectively invalidated inclusionary housing laws affecting rental housing, since rents now cannot be restricted at initial occupancy; and

WHEREAS, the current Affordable Housing Mitigation Fee yields the equivalent of less than a 10% affordability requirement for lower income households (defined as households making 80% Area Median Income (AMI) or below); and

WHEREAS, the Berkeley Inclusionary Housing Ordinance, which was adopted in 1986 and was partially invalidated in 2009 following the *Palmer* decision, provided for 20% affordability at 80% AMI; and

WHEREAS, AB 1229 would restore local control over important land use decisions and clarify that cities are allowed to establish inclusionary zoning laws covering both ownership and rental housing; and

WHEREAS, local inclusionary housing programs in California have been one of the more effective tools in California for producing new units that are affordable to working families and for creating economically diverse communities with a range of housing options; and

WHEREAS, these programs have also been an important part of overall housing strategies available to local governments to meet their respective Climate Action Plan goals, by allowing low-wage workers to live closer to where they work; and

WHEREAS, in November 2009, the Berkeley City Council unanimously approved Resolution No. 64,687-N.S., urging the California State Legislature to amend the Costa-Hawkins Rental Housing Act to clarify that it does not preempt inclusionary zoning requirements.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the Council expresses its support for AB 1229, a Bill to Affirm Local Control of Inclusionary Housing.

BE IT FURTHER RESOLVED that upon adoption, this resolution shall be transmitted to the offices of State Assembly Members Toni Atkins and Nancy Skinner and State Senator Loni Hancock.



## Assemblymember Toni Atkins, 78<sup>th</sup> Assembly District

### AB 1229 – Affirming Local Control of Affordable Housing: Inclusionary Zoning

#### **IN BRIEF**

AB 1229 would re-authorize cities and counties to adopt ordinances with inclusionary rental housing requirements for lower income households.

The purpose of the bill is to return local control to local governments to adopt and/or continue to implement their own inclusionary housing policies. This ability is restored by overturning a 2009 appellate court decision.

#### **BACKGROUND**

Inclusionary zoning (IZ) describes local land use ordinances that require a fractional portion of units in a new housing development to be offered at affordable levels to low-income and moderate-income families. Inclusionary units can be rental or homeownership units.

Inclusionary zoning policies have existed in California for nearly 40 years as a way to establish economically diverse communities with housing that is affordable to a range of income groups.

They help ensure that, as we build communities, there are places for workers to live near their jobs. They allow lower-income families to benefit from better schools and better services. These policies have also proven to reduce opposition to affordable housing by ensuring it's included at the beginning as the new community is developed.

Nearly 170 cities and counties have some form of inclusionary housing policy in place as a complement to other local, state, and federal programs to help address California's affordable housing shortage, combat discrimination, and reduce pollution and greenhouse gas emissions.

In the past decade alone, inclusionary programs have produced approximately 30,000 units of new housing affordable to lower-income households.

#### **THE ISSUE**

Local inclusionary housing programs have been successfully implemented in California for decades until very recently.

A recent appellate court decision, *Palmer/Sixth Street Properties L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009), has created uncertainty and confusion for local governments about the availability of this important local land use tool.

The *Palmer* decision held for the first time that the state's Costa-Hawkins rent control law (*Civil Code* §§ 1954.50-1954.535) prohibits local governments from creating affordable rental housing through local inclusionary housing programs.

Now, this well-established policy that has provided quality affordable housing to over 80,000 Californians is in jeopardy.

#### **THE SOLUTION**

Local inclusionary housing programs in California have proven to be one of the most effective tools for producing new homes that are affordable to working families and for creating strong, economically diverse communities with a range of housing options.

Inclusionary housing policies have also allowed low-wage workers to live closer to their jobs, thereby reducing the state's pollution and greenhouse gas emissions. It is one of the best tools available to promote sustainable and greener communities.

AB 1229 would restore local control over these important land use decisions back to local governments.

#### **FOR MORE INFORMATION**

Cody Naylor, Office of Asm. Toni Atkins  
916 319 2078 | [cody.naylor@asm.ca.gov](mailto:cody.naylor@asm.ca.gov)

Brian Augusta, Western Center on Law and Poverty  
916 282 5103 | [baugusta@wcdp.org](mailto:baugusta@wcdp.org)

Tyrone Buckley, California Rural Legal Assistance Foundation  
916 446 9241 | [tbuckley@crlaf.org](mailto:tbuckley@crlaf.org)



*California*  
LEGISLATIVE INFORMATION

**AB-1229 Land use: zoning regulations.** (2013-2014)

CALIFORNIA LEGISLATURE— 2013-2014 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1229**

**Introduced by Assembly Member Atkins  
(Principal Coauthor(s): Assembly Member Mullin)  
(Principal Coauthor(s): Senator Leno)**

**February 22, 2013**

**An act to amend Section 65850 of the Government Code, relating to land use.**

LEGISLATIVE COUNSEL'S DIGEST

AB 1229, as introduced, Atkins. Land use: zoning regulations.

The Planning and Zoning Law authorizes the legislative body of any city or county to adopt ordinances regulating zoning within its jurisdiction, as specified.

This bill would additionally authorize the legislative body of any city or county to adopt ordinances to establish, as a condition of development, inclusionary housing requirements, as specified, and would declare the intent of the Legislature in adding this provision. The bill would also make a technical, nonsubstantive change.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** Section 65850 of the Government Code is amended to read:

**65850.** The legislative body of any county or city may, pursuant to this chapter, 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:
  - (1) The location, height, bulk, number of stories, and size of buildings and structures.
  - (2) The size and use of lots, yards, courts, and other open spaces.
  - (3) The percentage of a lot which may be occupied by a building or structure.

(4) The intensity of land use.

(d) Establish requirements for ~~off-street~~ off-street 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.

*(g) Establish, as a condition of development, inclusionary housing requirements, which may require the provision of residential units affordable to, and occupied by, owners or tenants whose household incomes do not exceed the limits for lower income, very low income, or extremely low income households specified in Sections 50079.5, 50105, and 50106 of the Health and Safety Code.*

**SEC. 2.** The Legislature finds and declares all of the following:

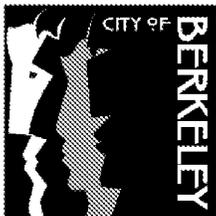
(a) Inclusionary housing ordinances have provided quality affordable housing to over 80,000 Californians, including the production of an estimated 30,000 units of affordable housing in the last decade alone.

(b) Since the 1970s, 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, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396, has created uncertainty and confusion for local governments regarding the future viability of this important local land use tool.

(d) It is the intent of the Legislature to reaffirm the authority of local jurisdictions to enact and enforce these ordinances.

(e) The Legislature declares its intent in adding subdivision (g) to Section 65850 of the Government Code, pursuant to Section 1 of this act, 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 that subdivision. This act shall not otherwise be construed to enlarge or diminish the authority of a jurisdiction beyond those powers that existed as of July 21, 2009.



Berkeley City Council

**22**

CONSENT CALENDAR  
November 10, 2009

To: Honorable Mayor and Members of the City Council

From: Councilmembers Jesse Arreguín, Laurie Capitelli and Linda Maio

Subject: Urging the California State Legislature to Amend the Costa-Hawkins Rental Housing Act to Clarify That It Does Not Preempt Inclusionary Zoning Requirements

**RECOMMENDATION:**

Adopt a Resolution urging the California State Legislature to amend the Costa-Hawkins Rental Housing Act to clarify that it does not pre-empt inclusionary zoning requirements.

**BACKGROUND:**

In 1995, the California State Legislature adopted the Costa-Hawkins Rental Housing Act (California Civil Code Section 1954.50-1954.535), which among other things prohibits permanent rent limits on residential rental units.

The purpose of the act was to end “strong rent control” policies, whereby cities adopted rent ceilings which could not be increased when a new tenant moved in. The act was not intended to pre-empt inclusionary requirements, which many cities in California already had in place at the time.

Berkeley adopted its Inclusionary Ordinance in 1986. Since then it is created hundreds of new permanently affordable rental units in new projects helping address the critical need for affordable housing in our community and promoting economically diverse neighborhoods.

Inclusionary zoning has also been a powerful tool in creating affordable housing in 150 other jurisdictions throughout California.

On October 22, 2009, the California State Supreme Court denied review of the 2<sup>nd</sup> Appellate District Court’s decision in *Palmer/Sixth Street Properties v. City of Los Angeles (Palmer)* which held that the Costa-Hawkins Act’s pre-emption of permanent rent ceilings on rental units made inclusionary policies for rental housing projects throughout the state unenforceable.

This decision not only severely challenges our ability to provide affordable housing at a time when people need it the most, but it also goes against the legislative intent of the Costa-Hawkins Act.

Because the Palmer decision is now the law in the State of California, it is important that the State Legislature amend the Costa-Hawkins Act to clarify that it does not pre-empt inclusionary zoning requirements.

FINANCIAL IMPLICATIONS:

NONE.

CONTACT PERSON:

Jesse Arreguín, Councilmember, District 4	981-7140
Laurie Capitelli, Councilmember, District 5	981-7150

Attachments:

1. Resolution

RESOLUTION NO.

URGING THE CALIFORNIA STATE LEGISLATURE TO AMEND THE COSTA-HAWKINS RENTAL HOUSING ACT TO CLARIFY THAT IT DOES NOT PRE-EMPT INCLUSIONARY ZONING REQUIREMENTS

WHEREAS, In 1986, the City of Berkeley adopted its Inclusionary Ordinance, which requires that developers set aside 20% of the units in a project of 5 units or more as affordable to low and very low income individuals; and

WHEREAS, Since its adoption, the Inclusionary Ordinance has created hundreds of permanently affordable units in new projects not only addressing the critical need for affordable housing in Berkeley, but also creating economically diverse neighborhoods; and

WHEREAS, Inclusionary zoning has also been a powerful tool in creating affordable housing in 150 other jurisdictions throughout California; and

WHEREAS, On October 22, 2009, the California State Supreme Court denied review of the 2<sup>nd</sup> Appellate District Court's decision in *Palmer/Sixth Street Properties v. City of Los Angeles (Palmer)*; and

WHEREAS, The decision finds that because the Costa-Hawkins Rental Housing Act (California Civil Code Section 1954.50-1954.535) prohibits permanent rent restrictions on residential rental units, that inclusionary zoning policies are unenforceable since they permanently control rent levels for inclusionary units so that they are affordable to low income individuals; and

WHEREAS, The Costa-Hawkins Rental Housing Act, adopted by the State Legislature in 1995, was according to its sponsors written to address "strong rent control" policies, and was not intended to prohibit inclusionary zoning requirements, which many jurisdictions had already adopted at the time; and

WHEREAS, The *Palmer* decision not only severely challenges our ability to provide needed affordable housing to people throughout the state but also goes against the legislative intent of the Costa-Hawkins Rental Housing Act; and

WHEREAS, Because the *Palmer* decision is now the law in the State of California it is important that the California State Legislature amend the Costa-Hawkins Rental Housing Act to clarify that inclusionary zoning requirements are not pre-empted by the law.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that it hereby urges the California State Legislature to amend the Costa-Hawkins Rental Housing Act (California Civil Code Section 1954.50-1954.535) to clarify that it does not pre-empt inclusionary zoning requirements; and

BE IT FURTHER RESOLVED that copies of this resolution be sent to California State Senate President Pro Tem Darrell Steinberg; Speaker of the Assembly Karen Bass; State Senator Loni Hancock and Assemblymember Nancy Skinner with the request that they sponsor and support legislation to amend the Costa-Hawkins Act to enable jurisdictions throughout California to continue to use inclusionary zoning to create needed affordable housing for people in our state.