

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

SB 649 (Cortese)  
Version: April 19, 2021  
Hearing Date: May 4, 2021  
Fiscal: No  
Urgency: No  
JT

**SUBJECT**

Local governments: affordable housing: local tenant preference

**DIGEST**

This bill authorizes local governments to adopt affordable housing residency preferences for certain locals at risk of displacement or who have been displaced.

**EXECUTIVE SUMMARY**

“Historically, residency preference policies have been challenged and invalidated when they exclude minority applicants from affordable housing in majority white suburbs. As gentrification elevates housing prices, many low income and minority residents are displaced from their neighborhoods or even from their cities entirely. Cities, including San Francisco and New York, have offered residents preferred access to affordable housing in their own neighborhoods in an effort to mitigate population displacement.”<sup>1</sup>

Seizing on this trend, this bill declares a state policy in support of, and authorizes local governments to adopt and implement, affordable housing preferences for lower income local tenants at risk of displacement or who have been displaced. The bill would require the local government to take certain steps to ensure the preference complies with fair housing laws. The bill is co-sponsored by the City of San Jose and the Housing Action Coalition and is supported by several organizations, who argue it will unlock funding for affordable housing and ensure that such housing benefits local communities. The bill has no known opposition. The Senate Housing Committee passed the bill by a vote of 9-0.

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<sup>1</sup> Zachary C. Freund, Note, *Perpetuating Segregation or Turning Discrimination on its Head? Affordable Housing Residency Preferences as Anti-Displacement Measures* (2018) 118 Colum. L. Rev. 833, 834.

## PROPOSED CHANGES TO THE LAW

Existing federal law establishes the federal Fair Housing Act (42 U.S.C. § 3601 et seq.), which prohibits discriminatory housing practices based on certain protected characteristics.

Existing state law:

- 1) Establishes the California Fair Employment and Housing Act, which prohibits, and provides remedies for, discrimination in housing accommodations on the basis of specified characteristics. (Gov. Code § 12900 et seq.; §§ 12920, 12921(b).)
- 2) Establishes the Unruh Civil Rights Act (Civ. Code § 51 et seq.), which provides that all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. (*Id.* at § 51.)

This bill:

- 1) Finds and declares:
  - a) The changes made by the bill are necessary in order to provide affordable housing opportunities to lower income individuals residing in neighborhoods and communities experiencing significant displacement pressures and gentrification due to rapid growth and densification.
  - b) California law recognizes that the availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian is a priority of the highest order. The early attainment of this goal requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels.
  - c) Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.
  - d) California law recognizes that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state's housing goals and regional housing needs.
  - e) Almost all affordable housing developments require tax credit allocations for financial viability, and many also seek tax-exempt private activity

bond financing. Under income tax regulations, to qualify as an exempt facility, a facility must serve or be available on a regular basis for general public use. Section 42(g)(9) of the Internal Revenue Code provides that a project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants with special needs, or who are members of a specified group under a federal program or state program or policy that supports housing for such a specified group.

- f) Municipalities, especially those in urban areas, are significantly challenged to meet the demand for affordable housing for its lower income residents. Market forces continue to increase the cost of living through rising rents and increased home prices, while incomes for lower income residents continue to lag behind. This effect is magnified in areas of significant income inequality. While municipalities attempt to tackle these issues by targeted investment and zoning, these efforts can unintentionally lead to further housing displacement. Indeed, some of the main drivers for residential displacement are proximity to rail stations, proximity to job centers, historic housing stock, and location in a strong real estate market.
- g) Communities and their residents benefit from affordable, stable housing when they can maintain access and proximity to local institutions, services, schools, community business, centers, and health care providers, and familial and social networks. Students' educational attainment is higher when they move less and have more stability, the mental and physical health of the community is improved with stably housed residents' lowered stress levels and ability to afford medical visits, and the community's fiscal health is improved as residents' discretionary spending increases on nonhousing costs such as food, medications, and clothes.
- h) Studies have shown that negative effects for displaced lower income adults and children include their removal from their family, friends and community support networks, increased financial strain, decreased economic opportunities, increased and more costly commutes, unstable housing situations, worsened safety and environmental concerns, significant trauma, worsened educational outcomes, and for some, homelessness.
- i) Local tenant preferences to lower income households for new and existing affordable housing can help stabilize housing for those who are at greatest risk of displacement from their communities due to community growth and densification that has resulted in increased housing costs and housing cost burdens for existing residents.
- j) The bill and its implementation are intended to be consistent with the California Fair Employment and Housing Act and the Unruh Civil Rights Act.

- 2) Provides the following definitions:
  - a) “Affordable rental housing” means a rental housing development, as defined, with a majority of its rents restricted to levels that are affordable to persons and families of low or moderate income, as defined, but neither definition is restrictive to projects with only five or more units.
  - b) “Displacement risk” means certain conditions, when present, having the cumulative effect of causing displacement of lower income households, including, but not limited to, higher percentages of lower income rent-burdened residents, planned or occurring real estate development, rising rent levels, vacancy rates under five percent in lower cost apartments, increased evictions, or other local factors leading to displacement as determined by a municipality.
  - c) “Displacement risk” includes displacement due to conditions described in (b), above, other precipitating events, which may include, but are not limited to, closures of mobilehome parks, cessation of rental subsidies, fire or other physical disasters, or other events as determined by a municipality.
  - d) “Local tenant preference” means an affordable housing preference provided to lower income households subject to displacement risk for a percentage of deed-restricted affordable rental units in a residential property.
- 3) Provides that the purpose of the bill is to facilitate the acquisition, construction, rehabilitation, and preservation of affordable rental housing for lower income households to allow them to access and maintain housing stability in their communities.
- 4) Restricts programs authorized and implemented under the bill to lower income households subject to displacement risk.
- 5) Creates a state policy supporting local tenant preferences for lower income households, as defined, that are subject to displacement risk. Permits local governments and developers in receipt of local or state funds, federal or state tax credits, or an allocation of tax-exempt private activity bonds designated for affordable rental housing, to restrict occupancy by creating a local housing preference for lower income households subject to displacement risk.
- 6) Authorizes a local government to allow a local tenant preference in an affordable housing rental development to reduce displacement of lower income households with displacement risk beyond local government boundaries by adopting a program that allows preferences in affordable rental housing acquired, constructed, preserved, or funded with state or local funds or tax programs.

- 7) Requires a local government that elects to adopt a local tenant preference pursuant to the bill to enact an ordinance that includes all of the following:
  - a) A clearly defined population eligible for the tenant preference.
  - b) Detailed findings that support a valid, nondiscriminatory government interest for the local tenant preference.
  - c) A declaration that the ordinance has undergone fair housing review and comports with existing fair housing law.
  - d) A detailed summary of the strategies and policies enacted by the local government to address housing supply and equitable housing access, particularly for lower income households.
  
- 8) Requires a tenant preference adopted pursuant to the bill to be administered in a manner consistent with the duty to affirmatively further fair housing pursuant to the Fair Employment and Housing Act and the Unruh Civil Rights Act.

### COMMENTS

#### 1. Author's statement

The author writes:

Tenant Preferences are a necessary tool to help stabilize neighborhoods and keep people from being uprooted from their homes, families, and networks. Nobody deserves to be forced out of their community because they can't find stable and affordable housing, especially during a time when families are already facing extreme financial hardship due to the COVID-19 pandemic. Tenant preferences can help prioritize efficient use of scarce affordable housing resources to help mitigate problems caused by displacement in our communities. SB 649 will play a vital role in bolstering the state's efforts to protect our most vulnerable residents from displacement and addressing the homelessness crisis ravaging our cities.

#### 2. Local tenant preference for those at risk of displacement or who have been displaced

This bill creates a state policy supporting local tenant preferences for lower income households that are subject to "displacement risk," defined to include, among other things, actual displacement. The bill permits local governments and developers in receipt of local or state funds, federal or state tax credits, or an allocation of tax-exempt private activity bonds designated for affordable rental housing to restrict occupancy by creating a local housing preference for lower income households subject to displacement risk. The bill authorizes a local government to allow a local tenant preference in an affordable housing rental development to reduce displacement of lower income households with displacement risk beyond local government boundaries

by adopting a program that allows preferences in affordable rental housing acquired, constructed, preserved, or funded with state or local funds or tax programs.

The need to protect individuals at risk of displacement or who have been displaced hardly needs reiterating,<sup>2</sup> particularly following the economic fallout from the COVID-19 pandemic. The California Housing Consortium, which supports the bill, points out that California continues to face a shortfall of at least 1.3 million homes affordable to its lowest-income households, and more than 150,000 Californians are living on the streets. The City of San Jose, a co-sponsor of the bill, echoing sentiments expressed by several supporters, states:

We all know that California is in a housing crisis. COVID-19 has amplified the displacement pressures experienced by California's most vulnerable populations. Displacement causes lower-income residents, who are disproportionately people of color in many California communities, real and tangible problems: physical health problems, mental health issues, and educational deficiencies.

Along with the financial and health impacts of this crisis, displacement is detrimental to our environmental and climate goals. In cities like San Jose, increasing housing costs and the lack of accessible affordable housing are forcing families to commute long distances to work. This out-migration in search of affordable housing puts more cars on the road, increases traffic congestion and greenhouse gas emissions, and reduces the limited time that parents have to care for children and elderly parents.

Local Tenant Preferences are a critical tool many cities have used to help prioritize the efficient use of scarce affordable housing resources. They can help to stabilize neighborhoods and keep people from being uprooted from their homes and networks. Local tenant preferences can also help reduce opposition to affordable housing development and can enhance the predictability of development.

The bill is modeled after the Teacher Housing Act of 2016 (SB 1413, Leno, Ch. 732, Stats. 2016), which created a state policy supporting the use of federal and state low-income housing tax credits to fund housing for teachers and school district employees on land owned by the school district and permitting school districts to restrict occupancy to teachers and school district employees. Affordable housing is typically funded by state and federal low-income housing tax credits for households that make up to 80 percent

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<sup>2</sup> For further discussion, see Eli Kaplan, *Implementing a Community Preference Policy for Affordable Housing in Berkeley* (2019)

[https://www.urbandisplacement.org/sites/default/files/images/eli\\_kaplan\\_client\\_report.pdf](https://www.urbandisplacement.org/sites/default/files/images/eli_kaplan_client_report.pdf) (as of Apr. 28, 2021). The document contains case studies of housing preference programs implemented in the cities of Santa Monica, Cambridge, San Francisco, Portland, and Oakland.

of the area median income. Under federal law, an eligible project must generally be dedicated to a “public use,” but preferences are permitted for, among others, tenants who are members of a specified group under a state program or policy that supports housing for the group. (26 U.S.C. § 42(g)(9).) The California Housing Consortium, which supports the bill, writes that “the Legislature needs to make policy findings to allow for the use of tenant preferences in federal tax credit and bond-funded projects and to support the use of State funding in these developments.”

### 3. Requires local tenant preferences to comply with fair housing laws

Residency-based housing preferences, once the tool of segregationists, have been re-purposed to mitigate the effects of gentrification and other causes of displacement.<sup>3</sup> However, even well-intentioned residency preferences may be subject to challenges on a variety of bases,<sup>4</sup> most commonly as violations of the FHA, which prohibits discriminatory practices that make housing unavailable to persons because of race or color, religion, sex, disability, familial status, or national origin. (42 U.S.C. § 3604; 24 CFR § 100.5(a).) Liability may be established under the FHA based on intentional housing discrimination, in which a plaintiff must establish that the defendant had a discriminatory intent or motive, or “based on a specific policy’s or practice’s discriminatory effect on members of a protected class under the Fair Housing Act even if the specific practice was not motivated by a discriminatory intent.” (24 CFR § 100.500(a); *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.* (2015) 576 U.S. 519, 524-525.)

“Disparate impact claims have three elements: (i) identifying a housing policy or practice of defendant used to limit housing opportunities; (ii) showing through statistical evidence a sufficiently large disparity in how the policy or practice affects an FHA-protected class as compared with others; (iii) proving that the disparity is actually caused by defendant’s policy or practice.”<sup>5</sup> In 2015, the United States Supreme Court clarified that a disparate impact claim under the FHA only mandates the “removal of artificial, arbitrary, and unnecessary barriers, not the displacement of valid governmental policies.” (*Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., supra*, 576 U.S. at 540.) A mere statistical showing of harm of an FHA-protected class does “not, without more, establish a prima facie case of disparate impact.” (*Id.* at 542.) The claim must show a “robust” causal connection between the challenged practice and any statistical disparities. (*Id.*) Third, a policy or practice proven to have a disparate impact may still be justified with proof that the policy or practice is

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<sup>3</sup> Freund, *supra*, note 1 at 834.

<sup>4</sup> See Kaplan, *supra*, note 2 at 10-12 (discussing how housing preference policies may also violate the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, or specific state housing laws and regulations, such as the California Fair Employment and Housing Act and the Unruh Civil Rights Act).

<sup>5</sup> Jeffery D. Jones, *Workforce Housing and Housing Preference Policies under the Fair Housing Act* (2020) 24 Lewis & Clark L. Rev. 1413, 1423.

“necessary to achieve a valid interest.” (*Id.* at 541.) The Department of Housing and Urban Development (HUD), which administers and enforces the FHA, recently revised the regulation governing disparate impact liability to align the framework for analyzing disparate impact claims with the Supreme Court’s ruling. (24 CFR § 100.500(a); 85 FR 60288, Sept. 24, 2020.) In doing so, HUD indicated that the revised regulation continues to recognize a line of cases finding liability under the FHA based on practices or policies that have “segregative effects” by perpetuating existing segregated housing patterns. (*See* 85 FR at 60306.)<sup>6</sup>

With respect to preferences for housing developments receiving certain federal funds, existing HUD regulations establish occupancy requirements and procedures that govern multifamily properties.<sup>7</sup> HUD must approve the tenant selection plan, marketing, and waitlist for these projects.<sup>8</sup> Additionally, residency preferences must be developed, implemented, and executed in accordance with non-discrimination and equal opportunity requirements under HUD’s regulations, and must be approved by HUD before they are used.<sup>9</sup>

In November 2015, to protect against the displacement of African-Americans, San Francisco enacted a “resident housing preference” ordinance that provided for lotteries for up to 40 percent of new affordable housing units in order to give priority to applicants who reside in the supervisorial district, or within half a mile, of the property.<sup>10</sup> However, HUD denied San Francisco’s application to implement the policy for a new affordable housing development for senior citizens in a historically African-American neighborhood on the basis that it “could limit equal access to housing and perpetuate segregation” and “may also violate the Fair Housing Act.”<sup>11</sup> HUD later approved an alternative proposal for the development that instead applied to all income-eligible residents of at least five San Francisco neighborhoods undergoing extreme displacement pressures, as determined by census tract.<sup>12</sup>

Currently, New York City’s longstanding community preference policy is being challenged in a federal district court.<sup>13</sup> The policy, which was adopted to protect historical enclaves like Chinatown and Harlem, sets aside 50 percent of affordable housing units for a lottery for residents of local community districts.<sup>14</sup> Plaintiffs in the

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<sup>6</sup> For further discussion, see *id.* at 1424-1426.

<sup>7</sup> HUD Handbook 4350.3: *Occupancy Requirements of Subsidized Multifamily Housing Programs* (2013), <https://www.hud.gov/sites/documents/43503HSGH.PDF> (as of Apr. 28, 2021).

<sup>8</sup> *Id.* at 4-1.

<sup>9</sup> *Id.* at 4-15, 4-16.

<sup>10</sup> Freund, *supra*, note 1 at 849-851. See *Lottery Preference Programs*, San Francisco Mayor’s Office of Housing and Community Development, <https://sfmohcd.org/lottery-preference-programs#NRHP> (as of Apr. 28, 2021).

<sup>11</sup> Jones, *supra*, note 5 at 1432-1433.

<sup>12</sup> *Id.* at 1433.

<sup>13</sup> *Winfield v. City of New York*, No. 15-cv-05236 (S.D.N.Y. filed July 7, 2015).

<sup>14</sup> Jones, *supra*, note 5 at 1434-1435.



case contend that the policy has a disparate impact on racial and ethnic minorities outside of New York's affluent neighborhoods and perpetuates existing patterns of segregation.<sup>15</sup>

Thus, the validity of a local residency preference is a case-by-case determination that will depend on such factors as the composition of the community and surrounding communities whose exclusion might have the consequence of perpetuating historical inequities. (See e.g. *Langlois v. Abington Hous. Auth.* (D. Mass. 2002) 234 F.Supp.2d 33, 62 [stating that when a "community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants," a residency preference policy "cannot but work a disparate impact on minorities" (emphasis in original)]; *Dews v. Town of Sunnyvale, Texas* (N.D. Tex. 2000) 109 F.Supp.2d 526, 568 ["There is no question that Sunnyvale's planning and zoning practices as well as its preclusion of private construction of multifamily and less costly single-family housing perpetuate segregation in a town that is 97 percent white"].) "The reality is that in communities that already present identifiable patterns of residential segregation and/or little racial or ethnic diversity, local housing preference policies can very easily have disparate impacts, segregative effects or both, in violation of the FHA."<sup>16</sup>

Importantly, the bill requires a local government that elects to adopt a local tenant preference to enact an ordinance that includes all of the following:

- A clearly defined population eligible for the tenant preference.
- Detailed findings that support a valid, nondiscriminatory government interest for the local tenant preference.
- A declaration that the ordinance has undergone fair housing review and comports with existing fair housing law.
- A detailed summary of the strategies and policies enacted by the local government to address housing supply and equitable housing access, particularly for lower income households.

The bill also requires a local tenant preference to be administered in a manner consistent with the duty to affirmatively further fair housing pursuant to the Fair Employment and Housing Act and the Unruh Civil Rights Act.

As such, the bill leaves it to localities to demonstrate the need for and validity of a preference, and to ensure its proper implementation.

## SUPPORT

City of San Jose (co-sponsor)

Housing Action Coalition (co-sponsor)

Affordable Housing Network of Santa Clara County

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<sup>15</sup> *Id.*

<sup>16</sup> Jones, *supra*, note 5 at 1432.

Build Affordable Housing CA  
California Housing Consortium  
County of Santa Clara  
Greenbelt Alliance  
Housing and Action Coalition  
San Francisco Bay Area Planning and Urban Research Association  
Silicon Valley at Home

**OPPOSITION**

None known

**RELATED LEGISLATION**

Pending Legislation: None known.

Prior Legislation: *See* Comment 2.

**PRIOR VOTES:**

Senate Housing Committee (Ayes 9, Noes 0)

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