

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

AB 1304 (Santiago)
Version: June 21, 2021
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Fiscal: Yes
Urgency: No
TSG

SUBJECT

Affirmatively further fair housing: housing element: inventory of land

DIGEST

This bill reaffirms that the state, local jurisdictions, and public agencies involved in housing-related matters have a mandatory duty to take meaningful affirmative steps to overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. The bill also provides additional details regarding what these entities must take into account when carrying out that duty.

EXECUTIVE SUMMARY

The federal Fair Housing Act (FHA) has prohibited discrimination in the provision of housing and housing-related services throughout the United States since 1968. In recognition that merely prohibiting future discrimination would not unwind the effects of decades of legal and government-backed exclusion, the FHA also includes a provision obligating federally funded housing agencies to take proactive steps to expand housing opportunity to all. This mandate is known as affirmatively furthering fair housing. In 2018, California adopted an affirmatively furthering fair housing requirement into state law. At a bare minimum, that requirement means that local governments' planning documents for housing must assess whether and how the plan responds to the duty to affirmatively further fair housing. According to the author and sponsors of this bill, however, at least some covered entities are treating this assessment as an option, rather than the legal obligation that it is. In response, this bill reaffirms that the duty to affirmatively further fair housing is mandatory. At the same time, the bill offers additional details about what exactly must be taken into account when carrying out that duty.

The bill is sponsored by California Rural Legal Assistance Foundation, National Housing Law Project, Public Advocates, Public Interest Law Project, and Western Center on Law and Poverty. Support comes from fair housing advocates. There is no known opposition. The bill passed out of the Senate Housing Committee by a 6-1 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Requires all executive branch departments and agencies administering housing and urban development programs and activities to administer these programs in a manner that affirmatively furthers fair housing. (42 U.S.C. § 3608(d).)
- 2) Requires that United States Department of Housing and Urban Development (HUD) programs and activities be administered in a manner that affirmatively furthers fair housing. (42 U.S.C. § 3608(e)(5).)
- 3) Declares the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information to be against public policy; and that every person has a civil right to be given the opportunity to seek, obtain, or hold employment and housing without facing discrimination based on these protected classes. (Gov. Code §§ 12920 and 12921.)
- 4) Declares it unlawful, pursuant to FEHA, for any housing accommodation owner to inquire about; make known any preference or limitation as to; discriminate; or harass a person based on the person's race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information. (Gov. Code § 12955(a) to (c).)
- 5) Prohibits discrimination through public or private land use practices, decisions, and authorizations because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, genetic information, national origin, source of income, or ancestry. Such discrimination includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law that make housing opportunities unavailable. (Gov. Code § 12955(l).)
- 6) Requires every city and county to prepare and adopt a general plan containing seven mandatory elements, including a housing element. (Gov. Code §§ 65300 and 65302.)
- 7) Requires a jurisdiction's housing element to identify and analyze existing and projected housing needs, identify adequate sites with appropriate zoning to meet the housing needs of all income segments of the community, and ensure that regulatory systems provide opportunities for, and do not unduly constrain, housing development. (Gov. Code § 65583.)

- 8) Requires a Metropolitan Planning Organization to include, within its Regional Transportation Plan, a Sustainable Communities Strategy designed to achieve specific targets for greenhouse gas reduction. (Gov. Code § 65080.)

This bill:

- 1) Clarifies that public agencies have a mandatory duty to comply with AFFH requirements.
- 2) Requires a housing element's inventory of sites that are suitable for housing development to include an analysis of the relationship of the sites to the jurisdiction's AFFH duty, and whether the inventory affirmatively furthers fair housing.
- 3) Specifies that a housing element must include a statement of the community's goals, quantified objectives, and policies relative to AFFH.
- 4) Specifies that a housing element's program of action must identify sites as needed to meet the AFFH requirement.
- 5) Specifies that a housing element's assessment of fair housing in the jurisdiction must include trends both within the jurisdiction and of the jurisdiction compared to the region. Specifies that the assessment of factors contributing to fair housing issues must include the local and regional historical origins as well as current policies and practices.

COMMENTS

1. Background on Affirmatively Furthering Fair Housing

The federal Fair Housing Act (FHA), enacted in 1968, prohibits discrimination in the provision of housing and housing-related services throughout the United States. (42 U.S.C. 3601 *et seq.*) The FHA directed realtors and landlords to sell and rent to all people regardless of their race and ethnicity. It also created an infrastructure through which tenants and homebuyers could submit complaints about discrimination for investigation and enforcement.

The drafters of the FHA also recognized, however, that the residual effects of longstanding legalized housing discrimination would continue to influence where people lived even once such discrimination became unlawful. When housing segregation was legal, governments disproportionately invested in the schools, parks, and other public amenities in white neighborhoods, while communities of color were left marginalized. Not coincidentally, the property values of homes in white communities grew far more quickly than those in other neighborhoods, meaning that white homeowners built greater equity than their counterparts. The built-in economic

advantage these white homeowners received, coupled with the ongoing access to better schools and other public amenities, led to entrenched cycles of wealth and opportunity for white folks. The inverse effect drove cycles of poverty in many communities of color. In essence, housing segregation and differences in access to opportunity arose from the laws, but ultimately became baked into financial, social, and geographic disparities that reproduced themselves independently of the law. Merely making housing discrimination unlawful, therefore, would not result in true housing equality or integration.

The drafters of the FHA therefore also included a provision obligating federal government agencies involved in housing and urban development to administer their programs and activities “in a manner that affirmatively furthers fair housing.” (42 U.S.C. Sec. 3608.) In doing so, the FHA recognized that “where a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions.” (114 Cong. Rec. 2276-2707 (1968).)

Though the “affirmatively furthering fair housing” obligation has been around for decades, housing segregation remains highly prevalent throughout the United States.¹ California, with its tremendous diversity, has done a little better according to some studies, but significant housing segregation remains here.²

2. Federal efforts to implement the affirmatively furthering fair housing mandate

In an apparent attempt to breathe new life into the FHA’s duty to affirmatively further fair housing and increase its impact, in 2015 the Obama Administration promulgated a set of federal regulations that more fully fleshed out the meaning of that obligation and federal expectations about how it should be carried out. (80 Fed. Reg. 42,272.) In place of the Analysis of Impediments to Fair Housing Choice that state and local agencies previously had to submit in order to receive U.S. Department of Housing and Urban Development (HUD) funds, the new Affirmatively Furthering Fair Housing Rule required covered entities to complete an Assessment of Fair Housing. (24. C.F.R. Sec. 5.154(b).) The Assessment is a planning document based on housing data, an assessment of fair housing issues and contributing factors, and an identification of fair housing priorities and goals. HUD made a special online Assessment Tool, featuring data and mapping capabilities to help local jurisdictions undertake the required assessment.³

¹ Williams, *Segregation's Legacy* (Apr. 20, 2018) U.S. News & World Report <https://www.usnews.com/news/the-report/articles/2018-04-20/us-is-still-segregated-even-after-fair-housing-act> (as of Jun. 26, 2021).

² Sandoval, Johnson, Tofoya, *Who’s Your Neighbor? Residential Segregation and Diversity in California* (2002) Public Policy Institute of California http://www.ppic.org/content/pubs/cacounts/CC_802JSCC.pdf (as of Jun. 26, 2021.)

³ The Assessment Tool can still be accessed at <https://egis.hud.gov/affht/> .

The Affirmatively Furthering Fair Housing Rule also contained an obligation for the covered entities to take “meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.” (24 C.F.R. § 5.152.)

On January 5, 2018, the Trump Administration largely suspended the obligation to submit an Assessment, effectively postponing implementation of the Affirmatively Furthering Fair Housing Rule until 2025. Then, in May of 2018, the Trump Administration put the Affirmatively Furthering Fair Housing Rule on hold indefinitely. (83 FR 23928.) Finally, in July 2020, the 2015 Affirmatively Furthering Fair Housing Rule was repealed. Then-HUD Secretary Carson stated that “[a]fter reviewing thousands of comments on the proposed changes to the Affirmatively Furthering Fair Housing (AFFH) regulation, we found it to be unworkable and ultimately a waste of time for localities to comply with, too often resulting in funds being steered away from communities that need them most.”⁴

With the inauguration of a new presidential administration in 2021, however, the federal affirmatively furthering fair housing pendulum has begun to swing back. On January 26, 2021, President Biden issued a memorandum directing HUD to examine the effect of the previous Administration’s actions against the Affirmatively Furthering Fair Housing Rule and the effect that it has had on HUD’s statutory duty to both ensure compliance with the Fair Housing Act and to affirmatively further fair housing. The memo also ordered HUD to take the necessary steps to implement the Fair Housing Act’s Affirmatively Furthering Fair Housing requirements and to prevent practices that have a disparate impact. On June 10, 2021, HUD published an interim final rule, which will go into effect on July 31, to restore implementation of the Affirmatively Furthering Fair Housing Rule.

3. California adopts and implements the affirmatively furthering fair housing rule

Meanwhile, in anticipation of the Trump Administration’s repeal of the federal Affirmatively Furthering Fair Housing Rule, California enacted its own version of the duty in 2018. (AB 686, Santiago, Ch. 958, Stats. 2018.) In April 2021, HCD published guidance to help public agencies and local governments meet their AB 686 requirements. The guidance elaborates on what exactly these entities must do to comply with their duty to affirmatively further fair housing. It sets forth the components that must be included in the housing element assessment of fair housing, such as: fair housing enforcement and outreach capacity, integration and segregation patterns in the jurisdiction and its surroundings, trends related to people with protected characteristics and lower incomes, racially and ethnically concentrated areas of poverty, disparities in

⁴ Northwest HUDLines Quote to Note (Aug. 2020) U.S. Dept. of Housing & Urban Development <https://www.hud.gov/states/shared/working/r10/newsletters/newsaug20> (as of Jun. 30, 2021).

opportunity; and disproportionate housing needs, including displacement. The guide provides examples for local entities to use as model for their assessment.

4. Impetus for the bill

In contrast to this progress on the implementation of the state affirmatively furthering fair housing mandate, the author and sponsors of this bill report two problems related to enforcement.

First, some entities have treated their affirmatively furthering fair housing obligation as something optional, rather than the mandatory duty that the Legislature intended. At least one court has enabled this approach by interpreting the absence of a private right of action associated with the affirmatively furthering fair housing duty as an indication that covered entities are free to ignore that duty. In the case *Comunidades Unidas por un Cambio vs. County of Fresno* (Fresno County Superior Court, Case No. 18CECG04586), a community organization sued Fresno County for failing to complete its housing element rezoning obligations. Among other things, the community group sought relief on the grounds that the County's omission violated its duty to affirmatively further fair housing. Though the community organization prevailed on most of its causes of action, the judge declined to entertain the affirmatively furthering fair housing claim. According to the judge, because the statute establishing the duty to affirmatively further fair housing does not include a private right of action, there was no remedy available for Fresno County's failure to carry out the duty. The author and sponsors – who were intimately involved in legislative negotiations over AB 686 – contend that the judge's ruling misinterprets the intent behind that legislation. The primary purpose of this bill is to ensure that courts do not make the same mistake in the future, by emphasizing that the duty to affirmatively further fair housing is mandatory and enforceable in the courts.

Second, the proponents of the bill report that some of the entities under a duty to affirmatively further fair housing have sidestepped their obligations when preparing their housing elements. The proponents give as an example the City of Encinitas, which submitted a draft housing element that, according to a July 2020 HCD review “entirely equates affordability with affirmatively furthering fair housing.” Since affirmatively furthering fair housing means taking meaningful actions to combat discrimination, segregation, and to foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics, HCD wrote, Encinitas's draft was insufficient and had to be revised.

To help ensure that entities more fully and comprehensively integrate affirmatively furthering fair housing into their housing elements, this bill elaborates on some of the details that they must include there. In particular, the bill adds four main considerations that must be addressed. First, when a local jurisdiction provides its inventory of land available for residential development, the jurisdiction should include an evaluation of

how the sites identified relate to the jurisdiction's duty to affirmatively further fair housing. Second, when evaluating the causes of barrier to fair housing in the jurisdiction, the jurisdiction should take into account historical context. Third, the jurisdiction's housing element program should include explicit goals, objectives, and policies related to affirmatively furthering fair housing. Lastly, when analyzing data about fair housing in the jurisdiction, the jurisdiction should include a comparison to the region surrounding the jurisdiction as well.

5. Arguments in support of the bill

According to the author:

In 2018, I authored AB 686 to ensure local governments develop and implement their housing plans in a manner that affirmatively furthers fair housing. As local governments have begun to implement these requirements, recent incidents have revealed that a number of jurisdictions across the state are either in non-compliance or superficial compliance with the original law. AB 1304 will ensure local governments have no excuses—they must affirmatively further fair housing in their jurisdictions.

As sponsor of the bill, California Rural Legal Assistance Foundation, the National Housing Law Project, Public Advocates, Public Interest Law Project, and the Western Center on Law and Poverty jointly write:

AFFH policy is designed to address [...] ongoing housing challenges that limit choice and opportunity for low-income families and members of protected classes. However, since the enactment of AB 686, it has become clear that there is a need for more explicit language related to AFFH requirements in Housing Element Law to ensure that the requirements are meaningfully implemented. AB 1304 clarifies these requirements in a number of ways, including explicitly requiring that a jurisdiction's inventory of housing sites be consistent with the AFFH obligation, requiring jurisdictions to look at fair housing issues through both a local and regional lens, requiring jurisdictions to take into account historical context when assessing contributing factors for fair housing issues, and requiring jurisdictions to state explicit goals, objectives, and policies related to AFFH. These changes will help ensure that all local governments are thoroughly examining fair housing issues and committing to concrete actions to remedy them.

In support, the California Housing Consortium writes:

California's segregation patterns and the corresponding disparities in wealth, income, and opportunity based on race and ethnicity are a legacy of government action. AB 1304 builds on efforts to ensure that the state, cities, and counties are part of the solution. The bill ensures that each city and county, both in its housing funding and zoning activities, analyzes patterns of segregation and develops policies and actions to affirmatively further fair housing.

SUPPORT

California Rural Legal Assistance Foundation (sponsor)
National Housing Law Project (sponsor)
Public Advocates (sponsor)
Public Interest Law Project (sponsor)
Western Center on Law and Poverty (sponsor)
Bay Area Regional Health Inequities Initiative
California Housing Consortium
California Housing Partnership Corporation
Disability Rights California
Eden Housing
Housing California
Inner City Law Center
Legal Aid of Sonoma County
San Diego Housing Federation

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

AB 948 (Holden, 2021) prohibits discrimination in the appraisal of real property and establishes notice and professional training requirements to back that prohibition. AB 948 is currently pending consideration before the Senate Judiciary Committee.

AB 1466 (McCarty, 2021) requires the identification and redaction of discriminatory restrictive housing covenants in California property records as part any real estate transaction. AB 1466 is currently pending consideration before the Senate Insurance Committee.

Prior Legislation: AB 686 (Santiago, Ch. 958, Stats. 2018) required state departments and agencies, cities, counties, public housing authorities, and other public entities to affirmatively further fair housing in all of their housing and community development-related activities. In addition, the bill required cities and counties to undertake an AFFH analysis and meet other related requirements as part of the development of their housing elements.

PRIOR VOTES:

Senate Housing Committee (Ayes 6, Noes 1)

Assembly Floor (Ayes 56, Noes 13)

Assembly Appropriations Committee (Ayes 12, Noes 3)

Assembly Local Government Committee (Ayes 7, Noes 1)

Assembly Housing and Community Development Committee (Ayes 6, Noes 0)
