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**SENATE COMMITTEE ON HOUSING**  
**Senator Scott Wiener, Chair**  
**2021 - 2022 Regular**

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**Bill No:** SB 649 **Hearing Date:** 4/15/2021  
**Author:** Cortese  
**Version:** 2/19/2021  
**Urgency:** No **Fiscal:** No  
**Consultant:** Alison Hughes

**SUBJECT:** Local governments: affordable housing: local tenant preference

**DIGEST:** This bill (1) creates a state policy supporting local tenant preferences for lower income households, that are subject to displacement risk, and, (2) authorizes local governments and developers in receipt of specified affordable housing funds to restrict occupancy to those at risk of displacement.

**ANALYSIS:**

*Existing law:*

- 1) Pursuant to the Teacher Housing Act of 2016, creates a state policy supporting housing for teachers, school district employees, and other local public employees or members of the public to occupy teacher and local school employee housing. It further permits school districts and developers in receipt of local or state funds or tax credits designated for affordable rental housing to restrict occupancy to teachers and school district employees on land owned by school districts, so long as that housing does not violate any other applicable laws.
- 2) Enacts the Unruh Civil Rights Act, which specifically outlaws discrimination in California based on sex, race, color, religion, ancestry, national origin, age, disability, medical condition, genetic information, marital status, or sexual orientation.
- 3) Enacts the Fair Employment and Housing Act, which prohibits the existence of a restrictive covenant that makes housing opportunities unavailable based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income or ancestry.

**This bill:**

- 1) Creates a state policy supporting local tenant preferences for lower income households, that are subject to displacement risk, and, further, 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.
- 2) Permits a local government to allow a local tenant preference in an affordable housing 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.
- 3) Defines “displacement risk” as “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 5% in lower cost apartments, increased evictions, or other local factors leading to displacement as determined by a municipality.”
- 4) Defines “local tenant preference” as 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.

**COMMENTS**

- 1) *Author’s Statement.* “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) *Low Income Housing Tax Credits.* Most affordable housing created in the state is funded in part by federal and state low income housing tax credits (LIHTC). LIHTC are used to develop housing for households that make up to 80% of the

area median income. California receives an allocation of federal tax credits each year based on a per-resident formula. In 2020, the state was awarded \$1.06 billion in federal tax credits. In 1987, the Legislature authorized the creation of a state LIHTC program to augment the federal tax credit program. The state tax credit program has an ongoing annual statutory authorization of \$70 million. The 2019-20 and the 2020-2021 budgets authorized an additional \$500 million for state tax credits.

Generally, under federal Internal Revenue Service (IRS) rules, if a residential unit is provided only for a member of a social organization or provided by an employer for its employees, the unit is not for use by the general public and is not eligible for federal LIHTC. However, federal IRS law also states that a qualified LIHTC project does not violate fair housing laws solely because of occupancy restrictions or preferences that favor tenants (a) with special needs, (b) who are members of a specified group under a federal program or state program or policy that supports housing for such a specified group, or (c) who are involved in artistic or literary activities.

- 3) *Teacher Housing Act of 2016*. In 2016, SB 1413 (Leno, Chapter 732) established the Teacher Housing Act of 2016 to facilitate the acquisition, construction, rehabilitation, and preservation of affordable housing for teachers and school employees. School districts are authorized to establish and implement programs that address the housing needs of teachers and school district employees by leveraging funding sources including state, federal, local, public, private and resources available to housing developers, promoting public and private partnerships, and fostering innovative financing opportunities. SB 1413 also created a state policy supporting the use of federal and state LIHTC 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.

The intent of SB 1413 was to provide express state statutory authority to permit school districts to construct housing on their property and limit the occupancy to teachers and school district employees. As mentioned above, federal law creates an exemption to the "general use" requirement that allows the use of federal and state tax credits if a state establishes a policy or program that supports housing for such a specified group. SB 1413 established this policy by allowing school districts to restrict occupancy of affordable housing on school district land constructed with federal or state low-income housing tax credits to the teachers and school district employees.

By declaring a state policy supporting housing for teachers/school district employees, these housing projects could qualify under federal law as general public housing and therefore be eligible for both federal and state LIHTCs.

Last year in 2020, AB 3308 (Gabriel, Chapter 199) expanded the Teacher Housing Act of 2016 to further permit local public employees to occupy teacher and school district employee housing.

- 4) *Displacement.* According to the Urban Displacement Project out of UC Berkeley, between 2000 and 2015, the Bay Area experienced significant and uneven shifts in the neighborhoods where low-income residents of color lived. Some of these shifts were involuntary moves resulting from evictions, foreclosures, large rent increases, uninhabitable housing conditions, or other reasons beyond a household's control, otherwise known as "displacement." This phenomenon is not isolated to the Bay Area, however. Research has shown that involuntary moves like these, largely driven by rising housing prices, have adverse and destabilizing effects across many aspects of everyday life. Shifts in where low-income people of color live also have broader consequences for racial and economic inequality because where we live matters. Neighborhood-level factors such as poverty rates, schools, social capital, and exposure to environmental pollution have powerful and independent effects on child development, economic mobility, and health outcomes.
  
- 5) *Examples of enacted local tenant preference policies.* Generally, anyone who qualifies for an affordable housing program based on income guidelines has an equal chance of receiving assistance. In order to reduce the displacement of local residents, however, local governments across the country have adopted preference policies that increase the likelihood that certain applicants that meet specified criteria obtain that housing. "Tenant preference" or "community preference" policies refer to policies that prioritize affordable housing applicants with some connection to an affordable housing unit's location, and these policies have the potential to stabilize gentrifying areas and help residents vulnerable to displacement to remain in their neighborhoods. For example, these policies might give preference to a resident of the city where the housing is located, someone employed in the city, someone who has been displaced from the city under certain circumstances, or residents living in close proximity to the unit for which they are applying. This committee is aware of such policies adopted in California by the cities of San Francisco, Santa Monica, and Oakland.

6) *Authorizing tax credit projects for local tenants: San Jose Project.* One of the sponsors, City of San Jose, hopes to use the authorization for a local tenant preference contemplated in this bill for the establishment of a local tenant preference in San Jose and for a specific affordable housing development. The project is mixed-use and transit-oriented and will contain 28 units for persons who were formerly experiencing homelessness. The development also contains some much sought-after three-bedroom units for both extremely low-income and lower income families. The project to date has secured several state and local investments, including an award from Department of Housing and Community Development's Multifamily Housing Program and bonds from the City of San Jose. According to the sponsors, the bond counsel working with the city on this project is not comfortable taking a risk in funding a project providing the tenant preference without a state policy pronouncement authorizing a local tenant preference policy. In other words, bond counsel is concerned the project would be subject to a lawsuit alleging a fair housing violation absent state authorization of the policy. This bill contains a declaration that the state supports local tenant preference for lower-income households that are subject to displacement risks and authorizes local governments to restrict occupancy by creating a local tenant preference policy. This is intended to authorize TCAC to finance projects with a local tenant preference policy.

The author and sponsors have noted that their intent is to allow for local tenant protection policies to support both those lower-income populations at risk of displacement, as well as those that have already been displaced (*i.e.* experiencing homelessness). **The author has agreed to amend the bill to clarify that that the definition of displacement risk also includes those who have experienced displacement.**

7) *Statewide authorization.* This bill also contains authorization for local governments to enact a local tenant preference policy. The Urban Displacement Project notes that while these tenant preference policies are intended to promote diversity and assist residents of color, legislation could still be found to be in violation of the Fair Housing Act or other federal laws.<sup>1</sup> Cities must be cognizant of this legal and historical context when crafting affordable housing preference policies to ensure that these policies are compliant with applicable laws. For example, regardless of the city's intentions, a preference policy could risk three types of legal challenges: (1) Intentional discrimination claims under the Equal Protection Clause of the

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<sup>1</sup> Eli Kaplan, *Implementing a Community Preference Policy for Affordable Housing in Berkeley* (Urban Displacement Project, Spring 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)

Fourteenth Amendment; (2) Right to travel claims under the constitutional right to interstate travel and migration; and (3) Disparate impact claims under the Fair Housing Act. Additionally, cities that use federal funds are subject to rules issued by the Department of Housing and Urban Development (HUD), which dictates occupancy requirements and procedures that govern multifamily properties. In these cases, HUD must approve the tenant selection plan, marketing, and waitlist for these federally funded projects.

Cities and regions have differing needs, populations, and displacement risks. For this reason, an anti-displacement policy that is effective one year may change dramatically if populations shift, *i.e.* if an area becomes gentrified or if lower-income families are forced to move elsewhere for other reasons. Additionally, while one city or region may have the best intentions of preventing local displacement, other more exclusionary jurisdictions could use such policies to keep “others” from moving into a neighborhood.

**In order to address these concerns, the author has agreed to amend this bill to require a municipality that adopts a local tenant preference to adopt an ordinance that contains 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; and (d) detailed documentation of the strategies and policies enacted by the local government to address housing supply and housing equity, particularly for lower-income households. The author has also agreed to require a local tenant preference policy to be administered consistent with existing state and federal fair housing laws.**

- 8) *Department of Corrections*. The bill contains an incorrect cross reference to the federal internal revenue code. **The author will accept an amendment to make the following change on page 5, line 37:**

**~~Section 42(g)(2)~~ Section 42(g)(9) of the Internal Revenue Code (26 U.S.C Sec. ~~42(g)(2)), 42(g)(9)~~**

- 9) *Double-referral*. This bill was also referred the Senate Judiciary Committee.

**RELATED LEGISLATION:**

**AB 3308 (Gabriel, Chapter 199, Statutes of 2020)** — expanded the preferences in the Teacher Housing Act of 2016 to also allow local public employees to occupy teacher and school district employee housing.

**SB 1413 (Leno, Chapter 732, Statutes of 2016)** — established the Teacher Housing Act of 2016 and provided that a school district may establish and implement programs that address the housing needs of teachers and school district employees who face challenges in securing affordable housing.

**FISCAL EFFECT:** Appropriation: No    Fiscal Com.: No    Local: No

**POSITIONS:** (Communicated to the committee before noon on Friday, April 9, 2021.)

**SUPPORT:**

City of San Jose (Co-Sponsor)  
Housing Action Coalition (Co-Sponsor)  
Affordable Housing Network of Santa Clara County  
California Housing Consortium  
Greenbelt Alliance  
San Francisco Bay Area Planning and Urban Research Association (SPUR)  
Silicon Valley @ Home

**OPPOSITION:**

None received.

**-- END --**