

Date of Hearing: May 9, 2018

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

AB 3194 (Daly) – As Amended April 30, 2018

**SUBJECT:** Housing Accountability Act: project approval.

**SUMMARY:** Makes a number of changes to the Housing Accountability Act (HAA).

Specifically, **this bill:**

- 1) Declares the intent of the Legislature to establish a very high threshold for a local agency to justify denying or conditioning a housing project for health or safety reasons, that the conditions for denying a project under the HAA are very rare, and that regularly occurring planning issues do not rise to the level of a “specific, adverse impact upon the public health and safety.”
- 2) Provides, for purposes of the HAA, that a housing development shall not be found inconsistent with, not in compliance, or not in conformity, with the applicable zoning ordinance, and shall not require the site to be rezoned, if the existing zoning ordinance does not allow for the maximum allowable residential use, density and intensity for the site allowable under the housing element or the land use element of the general plan if it was adopted or updated within the previous 10 years. Specifies that if a conflict exists between the housing element and the land use element, that the housing element shall prevail, regardless of whether the housing element was adopted or updated at an earlier date.

**EXISTING LAW:**

- 1) Defines “housing development project” to mean a use consisting of any of the following:
  - a) Residential units only;
  - b) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use; or,
  - c) Transitional housing or supportive housing.
- 2) Defines “disapprove the development project” to include any instance in which a local agency either:
  - a) Votes on a proposed housing development project and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit; or,
  - b) Fails to comply with the required time period for approval or disapproval required by law.
- 3) Defines “lower density” to include any conditions that have the same effect or impact on the ability of the project to provide housing.

- 4) Defines “housing for very low-, low-, or moderate-income households” as either:
  - a) At least 20% of the total units shall be sold or rented to lower-income households; or,
  - b) 100% of the units shall be sold or rented to persons and families of moderate-income or middle-income.
- 5) Defines “very low-income” as persons and families whose income does not exceed 50% area median income (AMI).
- 6) Defines “low-income” as persons and families whose income does not exceed 80% AMI.
- 7) Defines “moderate-income” as persons and families whose income does not exceed 120% of AMI.
- 8) Defines “above moderate-income” as persons and families whose income exceeds 120% of AMI.
- 9) Defines “housing organization” as a trade or industry group whose local members are primarily engaged in the construction or management of housing units or a nonprofit organization whose mission includes providing or advocating for increased access to housing for low-income households and have filed written or oral comments with the local agency prior to action on the project. A housing organization may only file an action under the HAA to challenge the disapproval of a housing development by a local agency.
- 10) Prohibits a local agency from disapproving a proposed housing development project for very low-, low-, or moderate-income households or an emergency shelter, or conditioning approval in a manner that renders the project infeasible for development, unless it makes written findings based upon a preponderance of the evidence in the record, as to one of the following:
  - a) The jurisdiction has adopted and revised its housing element as required by law and has met its share of the regional housing need allocation;
  - b) The proposed development project or emergency shelter would have a specific, adverse impact upon public health or safety that cannot be mitigated without rendering the development unaffordable or shelter infeasible;
  - c) The denial of the proposed development project is required to comply with specific state or federal law and there is no feasible method to comply without rendering the development unaffordable or shelter infeasible;
  - d) The development project or emergency shelter is proposed on land that does not have adequate water or waste water facilities, or is zoned for agriculture or resource preservation, as specified; and,
  - e) The proposed development project or emergency shelter is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation, as specified, in any element of the general plan as it existed on the date the application was deemed complete.

- 11) Provides that when a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:
  - a) The housing development project would have a specific, adverse impact upon the public health or safety, unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete; and,
  - b) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to a), above, other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.
- 12) Provides that a change in a zoning ordinance or general plan land use designation subsequent to the date the application was deemed complete shall not constitute a valid basis to disapprove or condition approval of the housing development project or emergency shelter.
- 13) Provides that, for purposes of the HAA, the receipt of a density bonus shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision, as specified.
- 14) Requires, if the local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision, as specified, the agency to provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity, as follows:
  - a) Within 30 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains 150 or fewer housing units; and,
  - b) Within 60 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains more than 150 units.
- 15) Provides that if the local agency fails to provide the documentation described above in 14), the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision.

- 16) Authorizes the applicant, any person who would be eligible to apply for residency in the proposed development or emergency shelter, or a housing organization to bring an action to enforce the HAA.
- 17) Specifies that if a jurisdiction denies approval or imposes conditions, including design changes, lower density, or a reduction of the percentage of a lot that may be occupied by a building or structure under the applicable planning and zoning in force at the time the application is deemed complete, that have a substantial adverse effect on the viability or affordability of a housing development for very low-, low-, or moderate-income households and is the subject of a court action which challenges the denial, the burden of proof shall be on the local legislative body.
- 18) Specifies that in any action taken to challenge the validity of a decision by a jurisdiction to disapprove a project or approve a project upon the condition that it be developed at a lower density, the local government shall bear the burden of proof that its decision has conformed to all of the conditions specified in the HAA.
- 19) Provides that the court must issue an order of judgment compelling compliance with the HAA within 60 days, if it finds either of the following:
  - a) The local agency, in violation of subdivision (d) of the HAA, disapproved a housing development project or conditioned its approval in a manner rendering it infeasible for the development of an emergency shelter, or housing for very low-, low-, or moderate-income households, including farmworker housing, without making the findings required by the HAA or without making findings supported by a preponderance of the evidence; or
  - b) The local agency, in violation of subdivision (j) of the HAA, disapproved a housing development project complying with applicable, objective general plan and zoning standards and criteria, or imposed a condition that the project be developed at a lower density, without making the findings required by the HAA or without making findings supported by a preponderance of the evidence.
- 20) Authorizes the court to issue an order or judgment directing the local agency to approve the housing development project or emergency shelter if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of the HAA.
- 21) Requires the court, if it finds a violation of the HAA, to award reasonable attorney's fees and costs of suit to the plaintiff or petitioner, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of the HAA.
- 22) Requires, if the court determines that the local agency has failed to comply with the order or judgment compelling compliance within 60 days, the court to impose fines on a local agency that has violated the HAA.
  - a) Specifies that the fine shall be in a minimum amount of \$10,000 per housing unit in the housing development project on the date the application was deemed complete, as specified.

- b) Requires the local agency to deposit any fine levied into a local housing trust fund. Provides that the local agency may elect to instead deposit the fine into the Building Homes and Jobs Fund, or otherwise in the Housing Rehabilitation Local Fund.
  - c) Requires the court, in determining the amount of fine to impose, to consider the local agency's progress in attaining its target allocation of the regional housing need, as specified, and any prior violations of the HAA.
- 23) Prohibits fines from being paid out of funds already dedicated to affordable housing, as specified. Requires the local agency to commit and expend the money in the housing trust fund within five years for the sole purpose of financing newly constructed housing units affordable to extremely low-, very low-, or low-income households. After five years, if the funds have not been expended, the money shall revert to the state and be deposited into the Building Homes and Jobs Fund, or otherwise in the Housing Rehabilitation Loan Fund, for the sole purpose of financing newly constructed housing units affordable to extremely low-, very low-, or low-income households.
- 24) Provides that if any money derived from a fine imposed pursuant to the above provisions is deposited in the Housing Rehabilitation Loan Fund, then that money shall be available only upon appropriation by the Legislature.
- 25) Requires, if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter, and failed to carry out the court's order or judgment within 60 days, as specified, the court to multiply the fine specified above by a factor of five. Specifies that "bad faith" includes, but is not limited to, an action that is frivolous or otherwise entirely without merit.
- 26) Requires a petition to enforce the HAA to be filed and served no later than 90 days from the later of:
- a) The effective date of a decision of the local agency imposing conditions on, disapproving, or any other final action on a housing development project; or,
  - b) The expiration of the time periods specified in the Permit Streamlining Act.
- 27) Authorizes a party to appeal a trial court's judgment or order to the court of appeal pursuant to specified procedures.

**FISCAL EFFECT:** None

**COMMENTS:**

- 1) **Background on the HAA.** The HAA, also known as the "Anti-Nimby" legislation, was enacted in 1982, and restricts a local agency's ability to disapprove, or require density reductions in, certain types of residential projects. The purpose of the HAA is to help ensure that a city or county not reject or make infeasible housing developments, including emergency shelters, that contribute to meeting that housing need determined pursuant to Housing Element Law without a thorough analysis of the economic, social, and environmental effects of the action.

The HAA provides for a judicial remedy that allows a court to issue an order to compel a city to take action on a development project. An applicant, a person who would be eligible to apply for residency in the development or emergency shelter, or a housing organization, may bring an action to enforce the HAA. Many provisions of the HAA are limited to lower-income housing developments. In 2011 the California Court of Appeal in *Honchariw v. County of Stanislaus* (200 Cal.App.4th 1066) held that specified provisions of the HAA apply to all housing projects, not just affordable projects.

In 2017, the Legislature passed, and the Governor signed, three bills making significant changes to the HAA. Under identical measures, AB 678 (Bocanegra), Chapter 373, Statutes of 2017, and SB 167 (Skinner), Chapter 368, Statutes of 2017, the HAA was strengthened to increase the burden on local jurisdictions when denying a housing project, imposing fines for a violation of the HAA, and expanding judicial remedies for violations of the HAA. AB 1515 (Daly), Chapter 378, Statutes of 2017, changed the standard the court must use in reviewing the denial of a housing development by providing that a project is consistent with local planning and zoning laws if there is substantial evidence that would allow a reasonable person to find it consistent. This could expand the number of housing developments that are afforded the protections of the HAA.

- 2) **Bill Summary.** This bill would prohibit a local government from disapproving an eligible project or requiring a rezoning of a project site if the existing zoning ordinance does not allow the maximum residential use, density, and intensity allocable on the site by the housing element or land use element of the General Plan adopted or updated in the last 10 years. The bill also states the intent of the Legislature to establish a high threshold for local agencies to justify denying or conditioning a project for health and safety reasons and states that those reasons rarely occur, and states that the Legislature declares that regularly occurring planning issues do not meet the health and safety threshold required for denying or conditioning a project.

This bill is sponsored by the California Building Industry Association.

- 3) **Author's Statement.** According to the author, "Despite the important improvements made to the HAA in last year's bill package, it is still too easy for NIMBYs to oppose projects and avoid the HAA: (1) By citing debatable health and safety concerns; and, (2) By local governments changing zoning thereby rendering a project inconsistent. For example, classifying regularly occurring scenarios such as increasing traffic or a shortage of parks in a neighborhood as unmitigatable health and safety concerns is used as an excuse for rejecting a proposed housing development that complies with objective local planning rules. On the zoning front, according to a recent report by Berkeley Law School, of 152 housing projects processed in two of California's largest jurisdictions over the last three years, in fully 78 instances the jurisdiction required a rezoning or a variance – yet in only 6 instances did the project need a general plan amendment. Clearly there is more to be done to ensure that the HAA's protections be extended as intended so we can get about building the housing Californians so desperately need."
- 4) **General Plan and Housing Element.** Every city and county is required to develop a comprehensive, long-term general plan that outlines the community's vision of future development through a series of policy statements and goals. The general plan is the basis for all land use decisions. Zoning, subdivisions, and public works projects can only be approved

when they are consistent with the general plan. Each community must also adopt a housing element, which outlines a long-term plan for meeting the community's projected housing needs. Not only must all land use be consistent with the general plan, the general plan is required to be internally consistent. The land use element of the general plan must not conflict with the housing element.

The distribution of residential, commercial, and industrial and other zones must be based on the pattern of land uses established in the general plan. Zoning maps illustrate how all uses are distributed geographically. Zoning is adopted by ordinance and assigns each piece of property to a zone which describes the rules under which it can be used. A zoning ordinance identifies allowable uses and sets standards, such as minimum lot size, maximum building height, and minimum front yard depth. If a developer proposes a use that is not allowed in that zone, then a rezoning is required. A public hearing is required to rezone and a city council or zone board must deny requests when the proposed zone conflicts with the general plan.

The housing element must include a specific list of adequate sites to accommodate the city or county's housing needs at all income levels. Once the housing element is adopted, sites must be zoned via local ordinance to reflect the density and intensity of the housing element within three years. Because a local government is not required to rezone for three years, there may be a gap between when the housing element and zoning ordinance are consistent.

The general plan is a broad description of the policies and goals of the community's development goals. The housing element, which must be adopted every eight years (five years for some rural cities), is more detailed and includes a description of specific sites to meet the city or county's housing needs for all income levels. Three years after a housing element is adopted, the zoning ordinance must be updated to reflect any changes.

- 5) **HAA Compliance Provisions.** The HAA, in subdivision (j) of Section 65589.5, specifies two different outcomes: a) What happens when a local agency proposes to disapprove a housing development project when it complies with applicable, objective general plan, zoning, and subdivision standards and criteria; or, b) What happens when a local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision.

For instances in this second category the local agency is required to provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance or not in conformity, within 30 (or 60) days of the date that the application for the housing development project is determined to be complete if the project contains 150 or fewer, (or more than 150 housing units). Should the agency fail to provide the documentation, the housing project will be deemed consistent, complaint, and in conformity.

This bill adds in language about what cannot be deemed inconsistent, not in compliance, or not in conformity, for purposes of the above, thereby making it harder for the local agency to disapprove a housing development project. The bill's language says that "a housing project shall not be found inconsistent, not in compliance, or not in conformity with the applicable zoning ordinance, and the project shall not require a rezoning, if the existing ordinance does not allow the maximum residential use, density, and intensity allocable on the site by the

housing element or by the land use element of the general plan if it was adopted or updated within the previous 10 years.”

6) **Policy Considerations.** The Committee may wish to consider the following:

- a) **Intent Language.** This bill contains language specifying the intent of the Legislature to establish a “very high threshold” for a local agency to justify denying or conditioning a project for health or safety reasons, and further declares that “conditions necessary to satisfying [this section of the HAA] rarely arise,” and that “regularly occurring planning issues do not rise to the level of a ‘specific, adverse impact upon the public health and safety’.”
- i) **Definitions.** The Committee may wish to ask the author to better define what “very high threshold” means, especially in light of existing law that requires a local agency to make written findings, supported by a preponderance of the evidence on the record, should the local agency propose to disapprove the project or to impose a condition that the project be developed at a lower density. Does “very high threshold” mean a higher evidentiary standard?

Also, the bill uses the term “regularly occurring planning issues” but does not define what that means.

- ii) **Disapproval Under the HAA.** Should a local agency propose to disapprove the project or to impose a condition that the project be developed at a lower density, existing law requires that the local agency base its decision upon written findings that *both* of the following conditions exist:
- (1) The housing project would have a specific, adverse impact upon the public health or safety, unless the project is disapproved or approved upon the condition that the project be developed at a lower density. Existing law defines a “specific, adverse impact” to mean a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete; and,
  - (2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified, other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

The Committee may wish to ask the author for examples that illustrate why the above language is not sufficient.

- b) **Proposed Alternative to Compliance/Conformity Language.** The American Planning Association (California Chapter), League of California Cities, California State Association of Counties, Rural County Representatives of California, and the Urban Counties of California, in their “Oppose Unless Amended” letter, note that the bill “Represents a major change that would take away the whole purpose of the General Plan being *general* and would eliminate the long-standing relationship between the General Plan and zoning. This will result in either General Plans that allow high-density development to ‘sprawl’ into areas that do not yet have the requisite infrastructure and



services, or will alternatively induce local jurisdictions to remove such flexibility from the General Plan entirely, thereby undermining its function as a long-term planning document.”

They propose the following alternative approach, to address these issues:

Delete lines 5 through 16 on page 12, and replace with:

*(4) For purposes of paragraph (2), the density of a housing development project is not inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, or requirement if the housing development project is proposed on a site that is identified in the local agency’s housing element and is proposed to be developed at a density that is consistent with the density specified in the housing element for that site.*

- 7) **Arguments in Support.** Supporters argue that this bill will increase housing supply by reducing the number of housing projects to be rejected for spurious reasons, and that currently, local governments find loopholes in law to avoid extending the protections of the HAA to housing projects. Supporters argue that this bill will bring the HAA back to its original intent – to spur the development of housing.
- 8) **Arguments in Opposition.** Opponents argue that the bill represents a major change that would take away the whole purpose of the General Plan being general and would eliminate the long-standing relationship between the General Plan and zoning. Opponents argue that the bill will allow sprawl into areas that do not yet have the requisite infrastructure and services, or will induce local jurisdictions to remove such flexibility from the General Plan entirely, which will undermine the function of the General Plan.
- 9) **Double-referral.** This bill was heard in the Housing and Community Development Committee on April 25, 2018, and passed on a 7-0 vote.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

California Building Industry Association [SPONSOR]  
Bay Area Council  
California Apartment Association  
California Association of Winegrape Growers  
California Business Properties Association  
California Chamber of Commerce  
California Construction and Industrial Materials Association  
National Federation of Independent Business  
Non-profit Housing Association of Northern California

**Opposition**

American Planning Association, California Chapter (unless amended)  
California State Association of Counties (unless amended)  
League of California Cities (unless amended)  
Rural County Representatives of California (unless amended)  
Urban Counties of California (unless amended)

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