

Date of Hearing: May 10, 2017

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

AB 678 (Bocanegra) – As Amended May 1, 2017

**SUBJECT:** Housing Accountability Act.

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

Specifically, **this bill:**

1) Makes a number of changes to the HAA, as follows:

- a) Changes the evidentiary standard for a local agency to disapprove a housing development project from “substantial” evidence in the record to “clear and convincing” evidence in the record, as specified, and changes other references in the HAA to this standard for consistency.
- b) 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.
- c) Specifies that the HAA does not prohibit a local agency from imposing fees and other exactions otherwise authorized by law that are essential to provide necessary public services and facilities to the housing development project or emergency shelter, *provided the project remains feasible*.
- d) Requires the local jurisdiction to publish an analysis of the requirements of the HAA as part of its review of each application for a housing development project.
- e) Expands the HAA's attorney's fees provision by providing that the court shall award reasonable attorney's fees and costs of suit to the petitioner, in cases involving market rate or affordable housing, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of this section.
- f) Provides that a housing organization shall be entitled to reasonable attorney's fees and costs if it is the prevailing party in an action to enforce this section.
- g) Requires a court to impose a fine in a minimum amount of \$100,000 per housing unit in the housing development project if a court finds a violation of the HAA. Fines shall not be paid out of funds already dedicated to affordable housing, and shall be committed to a 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. In determining the amount of fine to impose, the court shall consider the local agency's progress in attaining its target allocation of the regional housing need and any prior violations of the HAA.
- h) Authorizes a court to impose punitive damages if the court finds that the local jurisdiction acted in bad faith.

- i) Provides that if the court determines that its order or judgment has not been carried out within 60 days, the court may issue further orders as provided by law to ensure that the purposes and policies of the HAA are fulfilled, including, but not limited to, an order to vacate the decision of the local agency, in which case the application for the project, as constituted at the time the local agency took the initial action determined to be in violation of this section, along with any standard conditions determined by the court to be generally imposed by the local agency on similar projects, shall be deemed approved unless the applicant consents to a different decision or action by the local agency.
- j) Requires a petition to enforce the HAA to be filed and served no later than 90 days from the later of:
  - i) The withdrawal of the application by the applicant or the effective date of a decision of the local agency; or,
  - ii) The expiration of the time periods specified in the Permit Streamlining Act.
- k) Makes other technical, clarifying changes.

**EXISTING LAW:**

- 1) Provides, pursuant to the HAA, the following:
  - a) Defines “housing development project” to mean a use consisting of any of the following:
    - i) Residential units only;
    - ii) Mixed-use developments consisting of residential and nonresidential uses as specified; and,
    - iii) Transitional housing or supportive housing.
  - b) Defines “disapprove the development project” to include any instance in which a local agency either:
    - i) Votes on a proposed housing development project and the application is disapproved; or,
    - ii) Fails to comply with the required time period for approval or disapproval required by law.
  - c) Defines “housing for very low-, low-, or moderate-income households” as either:
    - i) At least 20% of the total units shall be sold or rented to lower-income households; or,
    - ii) 100% of the units shall be sold or rented to persons and families of moderate-income or middle-income.

- d) Defines “very low-income” as persons and families whose income does not exceed 50% area median income (AMI).
- e) Defines “low-income” as persons and families whose income does not exceed 80% AMI.
- f) Defines “moderate-income” as persons and families whose income does not exceed 120% of AMI.
- g) Defines “above moderate-income” as persons and families whose income exceeds 120% of AMI.
- h) 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 substantial evidence in the record, as to one of the following:
  - i) The jurisdiction has adopted and revised its housing element as required by law and has met its share of the regional housing need allocation;
  - ii) The proposed development project would have a specific adverse impact upon public health or safety that cannot be mitigated without rendering the development unaffordable or shelter infeasible;
  - iii) 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;
  - iv) 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,
  - v) 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.
- i) Provides that when a proposed housing development project complies with applicable, objective general plan and zoning 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 substantial evidence on the record that both of the following conditions exist:
  - i) 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,

- ii) 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.
- j) Requires, if a jurisdiction denies approval or imposes restrictions 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 to be on the local legislative body.
- k) Requires, 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.
- l) 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.

**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.

Under the HAA, a jurisdiction may not disapprove a housing development project, including farmworker housing, as specified, that is affordable to very low-, low-, or moderate-income households, or emergency shelters, or condition approval of such a project in a manner that makes the project infeasible, unless it finds, based on substantial evidence, one of the following:

- a) The jurisdiction has adopted a housing element that has been revised in accordance with Government Code section 65588, is in substantial compliance with the Housing Element law, and the city has met or exceeded its share of the regional housing need for the income category proposed for the housing development project;
- b) The project as proposed would have a specific adverse impact upon the public health and safety that cannot be satisfactorily mitigated without rendering the housing development project unaffordable, or development of the emergency shelter financially infeasible (inconsistency with the zoning ordinance or general plan land use designation shall not constitute a specific, adverse impact upon public health and safety);

- c) The denial of the project or imposition of conditions is required in order to comply with state or federal law, and there is no feasible method to comply without rendering the housing development project unaffordable or development of the emergency shelter financially infeasible;
- d) The project is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agriculture or preservation purposes, or the site does not have an adequate water or wastewater facility to serve the project; or,
- e) The project is inconsistent with both the city's zoning ordinance and general plan land use designation as specified in the general plan as it existed on the date the application was deemed complete and the city has adopted a revised housing element in accordance with section 65588 that is in substantial compliance with the Housing Element law.

To qualify for protections provided by the HAA, an affordable housing project must propose development of housing for very low-, low-, or moderate-income households which includes: (1) Projects in which at least 20% of the total units shall be sold or rented to lower-income households; (2) Projects in which 100% of the units shall be sold or rented to moderate-income households, or to middle-income households; and, (3) Supportive housing, transitional housing, and certain mixed use projects, as specified.

The HAA also specifies that there is no prohibition on local agencies imposing fees and other exactions otherwise authorized by law that are essential to provide necessary public services and facilities to the development project or emergency shelter. The HAA is applicable to all cities, including charter cities.

The applicant for the housing development project, any person eligible for residency in the development, or any housing organization can bring action to enforce the HAA. For such legal action, the burden of proof falls on the local agency to show that its decision is consistent with the findings and supported by *substantial* evidence. Should the local agency not meet this burden, then the court can issue an order compelling compliance within 60 days, including, without limitation, an order to take action on the proposed project. The court retains jurisdiction to ensure that its order or judgment is carried out, and awards reasonable attorneys' fees and costs of the suit to the petitioner, except in specified circumstances. Should the court determine that its order has not been carried out within 60 days, the court may issue further order to ensure that the law is upheld, which can include vacating the local agency's decision, deeming the project approved, and imposing finds if the court finds that the city acted in bad faith.

- 2) **Bill Summary.** This bill is sponsored by the author and makes a number of changes to the HAA, as follows:
  - a) **Burden of Proof.** The bill changes the evidentiary standard for a local agency to disapprove a housing development project from "substantial" evidence in the record to "clear and convincing" evidence in the record, as specified, and changes other references in the HAA to this standard for consistency.
  - b) **Change in Zoning or Land Use Designation not Valid for Disapproval.** The bill 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.

- c) **Local Fees and Feasibility of the Project.** This bill specifies that the HAA does not prohibit a local agency from imposing fees and other exactions otherwise authorized by law that are essential to provide necessary public services and facilities to the housing development project or emergency shelter, *provided the project remains feasible.*
- d) **Additional Analysis Requirement.** Provisions in the bill require the local jurisdiction to publish an analysis of the requirements of the HAA as part of its review of each application for a housing development project.
- l) **Attorney's Fees.** This bill expands the HAA's attorney's fees provision by providing that the court shall award reasonable attorney's fees and costs of suit to the petitioner, in cases involving market rate or affordable housing, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of this section. Provides that a housing organization shall be entitled to reasonable attorney's fees and costs if it is the prevailing party in an action to enforce this section.
- m) **Court Fines per Unit.** The bill requires a court to impose a fine in a minimum amount of \$100,000 per housing unit in the housing development project if a court finds a violation of the HAA. Fines shall not be paid out of funds already dedicated to affordable housing, and shall be committed to a 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. In determining the amount of fine to impose, the court shall consider the local agency's progress in attaining its target allocation of the regional housing need and any prior violations of the HAA.
- n) **Punitive Damages for Jurisdictions that Act in Bad Faith.** This bill authorizes a court to impose punitive damages if the court finds that the local jurisdiction acted in bad faith.
- o) **Court Authority and Ability of Local Agency to Cure.** This bill provides that if the court determines that its order or judgment has not been carried out within 60 days, the court may issue further orders as provided by law to ensure that the purposes and policies of the HAA are fulfilled, including, but not limited to, an order to vacate the decision of the local agency, in which case the application for the project, as constituted at the time the local agency took the initial action determined to be in violation of this section, along with any standard conditions determined by the court to be generally imposed by the local agency on similar projects, shall be deemed approved, unless the applicant consents to a different decision or action by the local agency.
- p) **Petition to Enforce.** Requires a petition to enforce the HAA to be filed and served no later than 90 days from the later of (1) The withdrawal of the application by the applicant or the effective date of a decision of the local agency; or, (2) The expiration of the time periods specified in the Permit Streamlining Act.

- 3) **Author's Statement.** According to the author, "California is in the midst of an unprecedented housing crisis caused by a severe lack of new housing construction at all levels of affordability. Passed in 1982, the Housing Accountability Act (HAA) has served for more 30 years as a tool to ensure that municipalities do not unfairly hinder the development of new housing projects, and to ensure new housing construction during crises like the one California faces today.

"Under the HAA, local governments must follow certain legal mandates before denying a housing development application that complies with their general plan and zoning rules. Unfortunately, the current enforcement mechanisms of the HAA are inadequate to achieve compliance in many cases.

"One of the most significant barriers to the construction of new housing is unjustified local resistance from NIMBY (Not in My Backyard) groups. In a recent report, the Legislative Analyst's Office confirmed that new housing construction faces community opposition, *"because it often is perceived as bringing negative changes to a community's quality or character."*

Using these types of unreasonable arguments, "no growth advocates" and NIMBYs have significantly curtailed housing construction, which significantly worsens the jobs-housing imbalance in our communities, in contravention to state law. This imbalance causes hardship for many people, especially low-income families in need of housing close to their jobs. Building more infill housing and reducing lengthy commute times are also necessary for California to achieve its ambitious 2030 greenhouse gas reduction target, as enumerated in SB 32.

- 4) **Policy Considerations.** The Committee may wish to consider the following:
- a) **Standard of Proof.** This bill would increase the standard of proof required for a local agency to justify its denial of low-to-moderate-income housing development projects, from "substantial" evidence on the record, to "clear and convincing" evidence on the record. "Standard of proof" refers to how strong the evidence must be for a party to prevail in a legal case.

Under existing law contained in the HAA, if a local agency disapproves an affordable housing development project and someone disputes that decision in court, the local agency bears the burden of convincing the judge that it had "substantial evidence" in the record to support its decision. Substantial evidence is a relatively low threshold. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (*Richardson v. Perales* (1971) 402 U.S. 389.) The substantial evidence standard is lower than the "preponderance of the evidence" standard, in which the evidence provided has to convince the decision maker that it is "more likely than not." The preponderance of the evidence standard is the one employed in most civil legal cases and is sometimes expressed in statistical terms as 50% plus one.

This bill would make local agencies work harder to justify disapproving a housing development project. They would have to have "clear and convincing evidence" supporting the basis for their decision. "Clear and convincing" means the evidence is highly and substantially more likely to be true than untrue; the trier of fact must have an

abiding conviction that the truth of the factual contention is highly probable. (*Colorado v. New Mexico* (1984) 467 U.S. 310.) The clear and convincing standard is higher than the preponderance of the evidence standard. Expressed in mathematical terms, it means substantially more than 50 percent, perhaps something closer to 75 percent.

- b) **Imposition of Fines.** Under the existing HAA, local jurisdictions do not incur fines for violations unless they are found to have acted in bad faith. In its current form, this bill changes that dynamic by imposing a very substantial fine on local agencies that are unable to justify their disapproval of a housing development project, regardless of whether or not the local agency acted in bad faith. The fine would be, at a minimum, \$100,000 per housing unit in the complex and could go up from there.

The risk of a fine is intended to dissuade and the higher the fine, the greater the disincentive will ordinarily be. In the case of this bill, the intention is to make local agencies think very carefully before they disapprove a housing development project. The proposed fines also do not take into account the size of the local agency making the decision. If a small municipality is subject to at least \$100,000 in fines, that sum may represent a significant fraction of a small municipality's budget.

- c) **Ability to Cure.** Pursuant to existing law, if a city or county fails to make the necessary findings to deny a project, the court would then send the project back to the local agency accompanied by an order to comply with the law – either approve the project or deny it with adequate findings. The League of California Cities notes that this bill “further violates the separation of powers clause by allowing the court to order the city council to approve the project whether or not the evidence in the record supports the approval.” This bill would allow the court to penalize a jurisdiction before the jurisdiction has had a chance to “cure” the problem.
- d) **Fees and Exactions.** The California Association of Counties, Urban Counties of California, and the Rural County Representatives of California, in opposition, write that “AB 678 requires that any fees or other exactions for essential services to be provided to the development provided that the project remains feasible. Under existing law feasible means ‘capable of being accomplished in a reasonable manner within a reasonable period of time, taking into account economic, environmental, social and technological factors.’ Local governments’ ability to enact fees has never been tied to this type of standard which could limit our ability to charge fees for projects depending on how this definition is interpreted. This language also fails to consider that some of the fees necessary to provide essential services to a development may be imposed by special districts that are not under the control of the city or county.”

- 5) **Committee Amendments.** To address the policy considerations raised previously, the Committee may wish to amend the bill as follows:
- a) Change the standard of proof from “clear and convincing” to “preponderance of the evidence.”
  - b) Allow a local agency the ability to cure before automatic fines are imposed, and remove the provision in the bill that allows a court to approve a project without the jurisdiction having the ability to cure within 60 days following the court order.
  - c) Strike provisions related to the project remaining “feasible,” with respect to the ability of a local agency to impose fees and other exactions authorized by law that are essential to provide necessary public services and facilities to the development.
  - d) Allow enhanced fines to be imposed by the court for jurisdictions that act in bad faith and fail to carry out the court’s order.
  - e) Remove the \$100,000 fine and replace with a base fine of \$10,000.
- 6) **Related Legislation:**
- a) SB 167 (Skinner) was introduced with substantially similar language to this bill. SB 167 has been amended since introduction and was heard in the Senate Transportation and Housing Committee on April 18, 2017, where it passed on a 9-2 vote, and was heard in Senate Judiciary Committee on May 2, 2017, where it passed on a 6-0 vote.
  - b) AB 1515 (Daly) specifies that a housing development project or emergency shelter is deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity, pursuant to the HAA. The bill is currently pending in this Committee.
- 7) **Arguments in Support.** Supporters argue that this bill will strengthen the HAA and ensure that local agencies cannot disapprove housing projects without clear and convincing evidence proving that the project adversely impacts public health or safety.
- 8) **Arguments in Opposition.** Opponents argue that this bill makes significant changes to the HAA with new terms and definitions, broadens the ability to sue local governments, and increases fines on local governments. They are specifically concerned with provisions that restrict local governments’ lawful fee authority, the court fines in the bill, the increased standard of review, and the expansion of the ability to file lawsuits.
- 9) **Double-Referral.** This bill was heard in the Housing and Community Development Committee on April 26, 2017, and passed on a 5-2 vote.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Abundant Housing LA  
California Apartment Association  
California Association of Realtors  
California Building Industry Association  
California Council for Affordable Housing  
California Renters Legal Advocacy and Education Fund  
East Bay Forward  
San Francisco Housing Action Coalition

**Opposition**

American Planning Association, California Chapter  
California State Association of Counties  
League of California Cities  
Rural County Representatives of California  
Urban Counties of California

**Analysis Prepared by:** Debbie Michel / L. GOV. / (916) 319-3958