

Date of Hearing: July 12, 2017

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT
Cecilia Aguiar-Curry, Chair
SB 167 (Skinner) – As Amended July 3, 2017

SENATE VOTE: 30-10

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 a “preponderance of the” 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) Adds, to the section in HAA about the burden of proof being on the local legislative body to show that its decision is consistent with the findings required in HAA to disapprove the project, that this additionally includes the imposition of conditions or lowering density by the local agency, as specified.
 - d) Requires, if a local agency proposes to deny or reduce the density of a housing development project or emergency shelter or impose restrictions or conditions, including design review standards, that render the housing development project infeasible for very low-, low-, or moderate-income housing or for an emergency shelter, the local agency to publish an analysis of the requirements as part of its review of the application for the housing development project. Requires the analysis to include a finding whether this section does or does not apply to the project, and, if applicable, requires the local agency to make the findings that apply to the project, as specified, if it is a housing development project for very low-, low-, or moderate-income households, as specified.
 - e) Adds several additional situations after which the court shall issue an order of judgment compelling compliance, including the following:
 - i) The local agency, in violation of a specified provision in the HAA, disapproved a housing development project complying with applicable, objective general plan and zoning standards and criteria; or,
 - ii) The local agency imposed a condition that the project be developed at a lower density without making the findings or without making findings supported by a preponderance of the evidence.

- f) Requires 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.
- g) 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.
- h) Requires, if the court determines that its order or judgment has not been carried out within 60 days, the court to impose fines on a local agency that has violated the HAA. Requires the local agency to deposit any fine levied into a housing trust fund. 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. 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, any prior violations of the HAA, the budget of the local jurisdiction, whether the jurisdiction has complied fully with d), above, and the ratio of median home price to median household income within the jurisdiction, with the aim of imposing a fine that has a deterrent effect without unreasonably impacting the local government's ability to provide basic services to its residents.
- i) Prohibits fines from being paid out of funds already dedicated to affordable housing, as specified. Requires the local agency to commit 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.
- j) 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 5. Requires the increased fine to be paid, and the proceeds to be committed in the same manner as the base fine.
- k) Allows the petitioner to elect to prepare the record as provided in the HAA, as specified.
- l) Requires a petition to enforce the HAA to be filed and served no later than 90 days from the later of:
 - i) 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,
 - ii) The expiration of the time periods specified in the Permit Streamlining Act.
- m) 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 a further order to ensure that the law is upheld, which can include vacating the local agency's decision, deeming the project approved, and imposing fines if the court finds that the city acted in bad faith.

- 2) **Bill Summary.** This bill is sponsored by the California Renters Legal Advocacy and Education Fund and the California Apartment Association, 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 "a preponderance of" 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) **Additional Analysis Requirement.** Provisions in the bill require, if a local agency proposes to deny or reduce the density of a housing development or emergency shelter or impose restrictions or conditions, including design review standards, that would render the development infeasible for very low-, low-, or moderate-income housing, the local agency to publish the analysis of the requirements of the HAA as part of its review of the application for the project.
 - n) **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, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of this section. Additionally, the bill 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.
 - o) **Court Fines per Unit.** The bill requires a court to impose a fine in a minimum amount of \$10,000 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, any prior violations of the HAA, the budget of the jurisdiction, whether the jurisdiction complied with other specified provisions of the HAA, and the ratio of median home price to median household income with the jurisdiction, with the aim of imposing a fine that has a deterrent effect without unreasonably impacting the local government's ability to provide basic services. The bill also requires additional fines in certain instances, multiplied by a factor of 5, and paid, and proceeds committed, in the same manner as the base fine.

- 2) **Author's Statement.** According to the author, "SB 167 seeks to address the severity of California's housing crisis by taking a critical look at city's approval process for development. State courts are often too deferential to localities in accepting any justification to deny a good housing project, that otherwise meets all development requirements. Although there is an evident lack of funding, space, and construction, there are solutions the state can implement to ensure development is taking place in conjunction with a city's local laws."
- 3) **Related Legislation.** This bill is substantially similar to AB 678 (Bocanegra), which is currently pending in the Senate.
- 4) **Policy Considerations.** The American Planning Association, California Chapter (APA), raises several outstanding issues in their "Oppose Unless Amended" letter, as follows:
 - a) **RHNA Target.** The bill requires the court to determine the amount of the fine based on a number of considerations, including the local agency's progress in attaining its target allocation of the RHNA. APA suggests alternative language that would allow the judge to compare the number of housing project applications submitted to a city or county, to the number of projects actually entitled and approved by the city and county.
 - b) **Compliance with CEQA.** APA argues that more time is needed beyond the 60 days specified in the bill to comply with the judge's order to approve a project that was the subject of a court challenge.
 - c) **Clarification regarding Subdivision Map Act.** APA suggests that language in the bill should be clarified so that Subdivision Map Act findings, which may be subjective in nature, run contrary to the objective reasons required for denial in the HAA. This is because of the recent court case in *Eden Housing v. the Town of Los Gatos*.
- 5) **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.
- 7) **Arguments in Opposition.** The City of San Marcos, in opposition, writes that "penalizing cities that have been trying hard to create affordable housing will not spur additional development."
- 8) **Double-referral.** This bill was heard in the Housing and Community Development Committee on June 28, 2017, where it passed with a 6-1 vote.

REGISTERED SUPPORT / OPPOSITION:

Support

California Renters Legal Advocacy and Education Fund [SPONSOR]
California Apartment Association [SPONSOR]
California Association of Realtors
California Council for Affordable Housing
SV@Home

Opposition

American Planning Association, California Chapter (unless amended)
City of San Marcos

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