Date of Hearing: July 10, 2019

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT
Cecilia Aguiar-Curry, Chair
SB 592 (Wiener) – As Amended July 3, 2019

SENATE VOTE: 38-0

SUBJECT: Housing Accountability Act.

SUMMARY: Extends protections of the Housing Accountability Act (HAA) to accessory dwelling units (ADUs) and certain ministerial decisions, and adds new provisions related to enforcement of the HAA. Specifically, **this bill**:

1) Applies the HAA to a housing development project regardless of whether the local agency's review of the project is a ministerial or use by right decision, or a discretionary approval.

2) Adds ADUs to the definition of "housing development project."

3) Defines "lower density" to include any conditions that have the same effect or impact on the ability of the housing development project to provide housing, *including a condition requiring a reduction in the number of bedrooms.*

4) Provides that if an applicant resubmits an application to a local agency after it has been determined to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement or other similar provision, then the local agency is required to provide an applicant written documentation explaining why the housing development is inconsistent, not in compliance or not in conformity within 30 days of the resubmittal.

5) Specifies, for any action brought to enforce the provisions of the HAA, that the enforcement provisions apply regardless of whether the action of the local agency was taken in a proceeding that legally requires a hearing.

6) Authorizes a plaintiff or petitioner who is the project applicant to seek compensatory damages in an HAA lawsuit.

7) Clarifies that a housing organization can be awarded attorney's fees in an HAA lawsuit.

8) Provides that no reimbursement is required because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by the bill's provisions, as specified.

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" includes 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:

   a) "Very low-income" as persons and families whose income does not exceed 50% area median income (AMI);

   b) "Low-income" as persons and families whose income does not exceed 80% AMI;

   c) "Moderate-income" as persons and families whose income does not exceed 120% of AMI; and,

   d) "Above moderate-income" as persons and families whose income exceeds 120% of AMI.

6) 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.

7) 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; or,

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.

8) 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.

9) 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.

10) 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.

11) 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.

12) Provides that if the local agency fails to provide specified documentation, 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.

13) 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.

14) 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.

15) 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.

16) 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.

17) 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.

18) 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.

19) 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; and,

    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.

20) 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.

21) 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.

22) 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.

23) 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.

24) Authorizes a party to appeal a trial court's judgment or order to the court of appeal pursuant to specified procedures.

FISCAL EFFECT: This bill is keyed fiscal and contains a state-mandated local program.

COMMENTS:

1) **Background on the HAA.** The purpose of the HAA, also known as the "Anti-NIMBY Act," is to limit the ability of local agencies to reject or make infeasible housing developments 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. If a local government fails to comply with a court order to take action on a project, then the court can issue fines of 10,000 or more per unit until the local government complies. 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.

   When a local agency rejects any housing development project that complies with objective general plan, zoning standards, or design review, or requires that it be developed at a lower density for it to be approved, the decision must be based on written findings supported by a preponderance of the evidence that the development would have a specific, adverse impact on the public health and safety, unless the project is developed at a lower density, and there is no way to mitigate the adverse impacts except to reduce the density or disprove the project. A "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact based on objective safety standards, polices, or conditions as they exist on the date the application is deemed complete.

   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. AB 3194 (Daly), Chapter 243, Statues of 2018, required approval of certain housing development projects that are inconsistent with zoning if the jurisdiction has not brought its zoning ordinance into compliance with the general plan.

2) **Bill Summary and Author's Statement.** This bill makes a number of changes to the HAA. It adds ADUs to the definition of "housing development project," thereby applying the HAA as protection for ADU development, and applies the HAA to a housing development project regardless of whether the local agency's review of the project is ministerial or use by right decision, or a discretionary approval. The bill specifies, for any action brought to enforce the

provisions of the HAA, that the enforcement provisions apply regardless of whether the action of the local agency was taken in a proceeding that legally requires a hearing. The bill defines "lower density" to include any conditions that have the same effect or impact on the ability of the housing development project to provide housing, *including a condition requiring a reduction in the number of bedrooms.* Additionally, the bill provides that if an applicant resubmits an application to a local agency after it has been determined to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement or other similar provision, then the local agency is required to provide an applicant written documentation explaining why the housing development is inconsistent, not in compliance or not in conformity within 30 days of the resubmittal.

This bill also authorizes a plaintiff or petitioner who is the project applicant to seek compensatory damages in an HAA lawsuit. This bill is sponsored by CA YIMBY and California Renters Legal Advocacy and Education Fund

According to the author, "California is experiencing a historic housing shortage. One of the causes of this shortage is a difficult, idiosyncratic, risky entitlement process. This leads to expensive and time consuming lawsuits between housing advocacy groups, developers, and cities. The act has several ambiguities that have arisen since the 2017 housing package, particularly related to how the Housing Accountability Act interacts with ministerial approval processes, such as the one created in SB 35. This law endeavors to reduce the opportunity for wasteful conflict by clarifying and strengthening existing law related to litigating housing disapprovals."

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

   a) **Compensatory Damages.** This bill allows a plaintiff or petitioner who is the project applicant to seek compensatory damages for a violation of the HAA. The American Planning Association, California Chapter (APA California), California State Association of Counties (CSAC), and Urban Counties of California (UCC) write the following:

      This new requirement would allow any applicant to be entitled to "compensatory damages" if a court were to find a violation of the law. What are "compensatory damages"? Costs of additional hearings? Lost profits? The HAA already exposes cities and counties to steep fiscal penalties for violating the HAA – a minimum fine of $10,000 per unit. The provision of compensatory damages subjects cities and counties to almost unlimited liability and will encourage extensive litigation, while there is no way for cities or counties to recover even litigation costs if they successfully defend themselves.

      Given that the Legislature significantly expanded, under AB 678 (Bocanegra), Chapter 373, Statutes of 2017, and SB 167 (Skinner), Chapter 368, Statutes of 2017, the fines that can be imposed for a violation of the HAA and the judicial remedies for violations, of the HAA, the Committee may wish to consider whether it is necessary to again increase penalties in a way that may lead to confusion about what "compensatory damages" may include.

b) **Addition of Ministerial Projects and Permits into HAA.** Provisions in the bill in subdivision (o) declare that "This section shall apply to a housing development project regardless of whether the local agency's review of the project is discretionary or ministerial." In subdivision (m), language states that "Any action brought to enforce the provisions of this section regardless of whether the action of the local agency was taken in a proceeding in which by law a hearing is required."

Related to the addition of ministerial projects and permits into the HAA, APA California, CSAC and UCC write the following:

> *The HAA was intended to apply to discretionary decisions, not ministerial. As noted, Code of Civil Procedure Section 1085 already authorizes mandamus actions for an entity that is failing to approve or is denying ministerial permits improperly, so the HAA does not need to be amended to duplicate this remedy while adding unnecessary extreme burdens for every local government in the state.*
>
> *There is no difference between a ministerial project and a project requiring ministerial permits. So, as written, it will still shoehorn all ministerial permits into the HAA, requiring extensive analysis on each permit for every project even though as ministerial permits they can only be evaluated through listed criteria. A sample list of ministerial permits: approval of final subdivision maps, demolition, grading, electrical, plumbing, mechanical, encroachment, roofing, sewer connection, water connection, septic system, hot water heaters, fire sprinklers, home occupations, ADUs, and zoning sign-off. Communities would need to prepare detailed analyses of every building permit, grading permit, and encroachment permit and other ministerial permit within 30 days, and if a code violation were missed, the project would be "deemed consistent" despite any health or code violations.*

4) **Committee Amendments.** In order to address the first issue raised above, the Committee may wish to consider deleting the language contained in the bill relating to compensatory damages.

5) **Arguments in Support.** Supporters argue that this bill will not change local rules, like zoning, but will instead ensure that the rules that exist are the rules that will be followed.

6) **Arguments in Opposition.** Opponents are concerned about language allowing "compensatory damages" to be imposed, which will encourage extensive litigation when there are already strict fiscal penalties in existing law for violating the HAA.

7) **Double-Referral.** This bill was heard in the Housing and Community Development Committee on July 3, 2019, and passed with a 6-0 vote.

REGISTERED SUPPORT / OPPOSITION:

Support

CA YIMBY [SPONSOR]
California Renters Legal Advocacy and Education Fund [SPONSOR]
Abundant Housing LA
Bay Area Council
California Apartment Association
California Association of Realtors
California Building Industry Association
California Rural Legal Assistance Foundation (if amended)
Facebook, Inc.
Grow The Richmond
Non-Profit Housing Association of Northern California
San Francisco Housing Action Coalition
Santa Cruz YIMBY
Silicon Valley at Home (Sv@Home)
South Bay YIMBY
TechNet
The Casita Coalition
Western Center on Law and Poverty (if amended)

Opposition

Aids Healthcare Foundation
American Planning Association, California Chapter (unless amended)
California State Association of Counties (unless amended)
Cities of: Beverly Hills, Concord, Cupertino, Diamond Bar, Los Altos, San Marcos, and Sunnyvale
City of Orinda (unless amended)
Coalition for San Francisco Neighborhoods
League of California Cities (unless amended)
Mission Economic Development Agency
San Francisco Tenants Union
San Gabriel Valley Council of Governments
Sherman Oaks Homeowners Association
South Bay Cities Council of Governments
Sunset-Parkside Education and Action Committee (SPEAK)
Sustainable Tamalmonte
Toluca Lake Homeowners Association
Urban Counties of California (unless amended)
79 individuals

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