

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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Date of Hearing: June 28, 2017

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

David Chiu, Chair

SB 167 (Skinner) – As Amended May 23, 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) Increases the burden on local agencies from “substantial evidence” to “a preponderance of the evidence” when making findings as to the disapproval of a housing development project.
- 2) 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.
- 3) Requires every local agency to publish an analysis of the requirements of the HAA as part of its review of each application for a housing development project.
- 4) Imposes a minimum fine of \$1,000 per housing unit in the housing development project if a court finds a violation of the HAA. In determining the amount, the court shall consider the local agency’s progress in attaining its target allocation of the regional housing needs, the budget of the local jurisdiction, whether the jurisdiction complied fully with requirements to publish an analysis of the requirements in the HAA, and the ratio of the 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 agency’s ability to provide basic services to its residents.
- 5) Provides that 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.
- 6) Allows a court to impose punitive damages if it finds that the local agency acted in bad faith. If the court finds a local agency acted in bad faith, the court shall multiply the fine calculated in 4), above, by a factor of 10. Defines “bad faith” as including, but not limited to, an action that is frivolous or otherwise entirely without merit.
- 7) 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 plaintiff or petitioner, regardless of whether that plaintiff or petitioner proposed the housing development project or emergency shelter at issue.
- 8) 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.

- 9) Requires a petition to enforce the HAA to be filed and served no later than 90 days from the later of:
 - a) The withdrawal of the application by the applicant or the effective date of a decision of the local agency; or
 - b) The expiration of the time periods specified in the Permit Streamlining Act.
- 10) Makes technical, clarifying changes.

EXISTING LAW: Under the HAA:

- 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 as specified.
 - 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; or
 - b) Fails to comply with the required time period for approval or disapproval required by law.
- 3) 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.
- 4) Defines “very low-income” as persons and families whose income does not exceed 50% area median income (AMI).
- 5) Defines “low-income” as persons and families whose income does not exceed 80% AMI.
- 6) Defines “moderate-income” as persons and families whose income does not exceed 120% of AMI.
- 7) Defines “above moderate-income” as persons and families whose income exceeds 120% of AMI.

- 8) 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.
- 9) 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:
 - 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 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.
 - 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.
- 10) 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:
 - 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.

- 11) 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.
- 12) 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.
- 13) 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.
- 14) 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 who proposed an affordable housing development or emergency shelter, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of this section.
- 15) Provides that if the court finds that the local agency (1) acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of the HAA and (2) failed to carry out the court's order or judgment within 60 days the court, in addition to any other remedies provided by the HAA, may impose fines upon the local agency that the local agency shall be required to deposit into a housing trust fund.
 - a) Fines shall not be paid from funds that are already dedicated for affordable housing, including, but not limited to, redevelopment or low- and moderate-income housing funds and federal HOME and CDBG funds.
 - b) The local agency shall commit the money in the 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.
 - c) For purposes of this section, "bad faith" shall mean an action that is frivolous or otherwise entirely without merit.

(Govt. Code Section 65589.5)

FISCAL EFFECT: None

COMMENTS:

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. 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.

Need for this bill: According to the author, the HAA has been a tool used to ensure local jurisdictions build the housing our state desperately needs. Strengthening the HAA will make it more difficult for local governments to disapprove, prolong, or reject proposed housing developments. This bill addresses the severity of California's housing crisis by taking a critical look at cities' 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.

Staff comment: This bill is similar to AB 678 (Bocanegra), which was heard in this committee earlier this year. That bill is currently pending in the Senate Judiciary Committee.

This bill makes a number of changes to HAA law, including:

Burden of proof: Under the HAA, for affordable projects or emergency shelters, a local government may not disapprove the development or condition approval in a manner that renders the project infeasible unless it makes written findings, based upon substantial evidence in the record, as to at least one of five elements. For other types of housing projects, the local government may not deny the proposed housing development or condition its approval upon lower density unless it makes written findings, supported by substantial evidence on the record, that it is necessary to safeguard human health and safety. Substantial evidence, which is a relatively low threshold, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (*Richardson v. Perales* (1971) 402 U.S. 389.) This bill would require a local government to make these findings by a "preponderance of the evidence" rather than "substantial" evidence. 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.

Fines and punitive damages: Under existing law, a court may impose fines upon a local agency for acting in bad faith. This bill also requires a court to impose a minimum fine of \$1,000 per housing unit in the housing development project if the court finds a violation of the HAA. 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 needs, the budget of the local jurisdiction, whether the jurisdiction complied fully with requirements to publish an analysis of the requirements in the HAA, and the ratio of the 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 agency's ability to provide basic services to its residents. These fines cannot 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. A court may

also impose punitive damages if the court finds that the local jurisdiction acted in bad faith, and the fine shall be multiplied by a factor of 10.

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.

Attorney's fees: Existing law provides that a court may award attorney's fees and costs to a petitioner who proposed a housing development or emergency shelter. This bill would authorize a court to award attorney's fees and costs to a petitioner, including a housing organization, regardless of whether the petitioner proposed the project.

HAA analysis: This bill would require every local agency to publish an analysis of the requirements of the HAA as part of its review of each application for a housing development project.

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.

Arguments in support: Supporters argue that the current enforcement mechanisms of the HAA are inadequate to achieve compliance from local governments. The housing shortage, while felt regionally and statewide, is often created by the individual decisions of local jurisdictions. It is critical to prevent localities from saying no to housing at the expense of California as a whole. According to supporters, this bill will make critically needed changes to the HAA to ensure local governments cannot forestall housing projects that deserve approval. By clarifying existing provisions of the HAA and imposing additional penalties on local governments that violate it without sufficient evidence, this bill will help prevent NIMBY groups from posing barriers to the housing development the state critically needs.

Arguments in opposition: Opponents cite several issues with the bill, including: (1) The bill requires local decisions to be supported by sufficient findings supported by a preponderance of the evidence. Sufficient should be deleted since the court should only be considering whether the agency's decision is supported by a preponderance of the evidence, not reaching its own conclusion about whether the findings are sufficient; (2) This bill requires the court to consider the local agency's process in attaining its target allocation of the regional housing need in determining the amount of fine to impose on a local agency that has violated the HAA. The regional housing need is a planning tool and was not designed to be used as a production goal or target. Fines should only be assessed based on existing requirements in housing element law that local agencies are already required to meet by law; (3) Local agencies should have an opportunity to cure a violation of the HAA before fines are imposed; and (4) The bill should provide more clarity as to what should be included in the new requirement for a local agency to publish an analysis of the HAA for a housing development project.

Related legislation:

AB 678 (Bocanegra, 2017): Makes several changes to the HAA. *This bill is pending in the Senate Judiciary Committee.*

AB 1515 (Daly, 2017): Provides that, under the HAA, a housing development project or emergency shelter shall be 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. *This bill is pending in the Senate Transportation and Housing Committee.*

AB 2584 (Daly), Chapter 420, 2016: Authorized a "housing organization," as defined, to enforce specified provisions of the HAA.

Double referral: If SB 167 passes out of this committee, the bill will be referred to the Committee on Local Government.

REGISTERED SUPPORT / OPPOSITION:

Support

Abundant Housing LA
Bay Area Council
California Apartment Association
California Association of Realtors
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Community Builders
California Council for Affordable Housing
California Renters Legal Advocacy and Education Fund
Council of Infill Builders
East Bay Forward
East Bay Leadership Council
Hacienda
NHA Advisors
Non-Profit Housing Association of Northern California
North Bay Leadership Council
Oakland Chamber of Commerce
San Francisco Bay Area Planning and Urban Research Association
San Francisco Housing Action Coalition
Terner Center for Housing Innovation
YIMBY Action

Opposition

American Planning Association, California Chapter
California State Association of Counties
City of San Marcos

Marin County Council of Mayors and Councilmembers
Orange County Board of Supervisors
Rural County Representatives of California
Urban Counties of California

Analysis Prepared by: Rebecca Rabovsky / H. & C.D. / (916) 319-2085

THIRD READING

Bill No: SB 167
Author: Skinner (D), et al.
Amended: 5/23/17
Vote: 21

SENATE TRANS. & HOUSING COMMITTEE: 9-2, 4/18/17
AYES: Beall, Allen, Atkins, McGuire, Mendoza, Roth, Skinner, Wieckowski,
Wiener
NOES: Cannella, Morrell
NO VOTE RECORDED: Bates, Gaines

SENATE JUDICIARY COMMITTEE: 6-0, 5/2/17
AYES: Jackson, Anderson, Hertzberg, Monning, Stern, Wieckowski
NO VOTE RECORDED: Moorlach

SUBJECT: Housing Accountability Act

SOURCE: Author

DIGEST: This bill makes several changes to the Housing Accountability Act (HAA).

Senate Floor Amendments of 5/23/17 return two provisions to existing law, which do not prohibit local jurisdictions from imposing fees or exactions that are essential to provide necessary public services and facilities to the housing development project or emergency.

ANALYSIS:

Existing law, under the HAA:

- 1) Requires cities and counties, under existing planning and zoning law, to prepare and adopt a general plan, including a housing element, to guide the future growth of a community. The housing element shall consist of an

identification and analysis of existing and projected housing needs and a statement of goals, policies, objectives, financial resources and scheduled programs for the preservation, improvement, and development of housing.

- 2) Requires the local jurisdiction, to the extent that it does not have adequate sites within its existing inventory of residentially zoned land, to adopt a program to rezone land at appropriate densities to accommodate the community's housing need for all income groups.
- 3) Prohibits a local agency from disapproving a housing project containing units affordable to very low-, low- or moderate income renters, or conditioning the approval in a manner that renders the housing project infeasible, unless it makes one of the following findings, based upon substantial evidence in the record:
 - a) The jurisdiction has adopted an updated housing element in substantial compliance with the law, and the jurisdiction met its share of the regional housing need for that income category.
 - b) The project will have a specific, adverse impact on the public health or safety and there is no feasible method to mitigate or avoid the impact without rendering the housing development unaffordable to very low-, low- or moderate income renters.
 - c) The denial or imposition of conditions is required to comply with state or federal law.
 - d) The project is located on agricultural or resource preservation land that does not have adequate water or wastewater facilities.
 - e) The jurisdiction has identified sufficient and adequate sites to accommodate its share of the regional housing need and the project is inconsistent with both the general plan land use designation and the zoning ordinance.
- 4) Provides that if a locality denies approval or imposes restrictions, design changes, a reduction of allowable densities or 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 housing development for a very low-, low- or moderate-income households, and the denial of that development or the imposition of restrictions on the development is the subject of a court action which challenges the denial, then the burden of

proof shall be on the locality to show that its decision is consistent with its findings disapproving the development.

- 5) Provides “disapprove the housing development project” includes any instance in which the local jurisdiction does either of the following:
 - a) Votes on a proposed housing development project application and the application is disapproved.
 - b) Fails to comply with time periods for approving or disapproving of projects under existing law.
- 6) Defines “housing development project” as any of the following:
 - a) Residential units only.
 - b) Mixed-use developments consisting of residential and nonresidential uses in which nonresidential uses are limited to neighborhood commercial uses and to the first floor of the buildings that are two or more stories.
 - c) Transitional or supportive housing.
- 7) Provides “housing for very low-, low-, or moderate-income households” means that 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.
- 8) Defines “very low-income” as persons and families whose income does not exceed 50% area median income (AMI).
- 9) Defines “low-income” as persons and families whose income does not exceed 80% AMI.
- 10) Defines “moderate-income” as persons and families whose income does not exceed 120% of AMI.

This bill:

- 1) Increases the burden on local jurisdictions from “substantial evidence” to “a preponderance of the evidence” when making findings as to the disapproval of a housing development project.
- 2) 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.
- 3) 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.
- 4) Imposes a minimum fine of \$1,000 per housing unit in the housing development project if a court finds a violation of the HAA. In determining the amount, the court shall consider the local agency’s progress in attaining its target allocation of the regional housing needs, the budget of the local jurisdiction, whether the jurisdiction complied fully with existing requirements to publish an analysis of the requirements in the HAA, and the ratio of the 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 jurisdiction’s ability to provide basic services to its residents. 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. A court may also impose punitive damages if the court finds that the local jurisdiction acted in bad faith. If the court finds a local agency acted in bad faith, the court shall multiply the fine by a factor of 10. If a housing organization is the prevailing party, it shall be entitled to reasonable attorney’s fees.
- 5) Requires a petition to enforce the HAA shall be filed and served no later than 90 days from the later of:
 - a) The withdrawal of the application by the applicant or the effective date of a decision of the local agency, or
 - b) The expiration of the time periods specified in the Permit Streamlining Act.

Comments

- 1) *Purpose of the bill.* According to the author, this bill seeks to address the severity of California's housing crisis by taking a critical look at cities approval processes for development. State courts are often too deferential to localities in accepting any justification declaring a development infeasible. 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 general plan and zoning ordinance.
- 2) *HAA Background.* The purpose of the HAA 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. 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.
- 3) *Higher standard of proof.* This bill increases the burden on local jurisdictions from "substantial evidence" to "a preponderance of the evidence" when making findings as to the disapproval of a housing development project. According to the author, state courts are too deferential to local jurisdictions and accept "any justification" for failing to meet state housing goals.
- 4) *Fines, fees, and punitive damages.* Under existing law, a court may compel compliance with the HAA, including an order that the locality approve the housing development or emergency shelter. Additionally, a court may impose fines upon a local agency for acting in bad faith. This bill imposes a minimum fine of \$1,000 per housing unit in the housing development project if a court finds a violation of the HAA, and allows the court to evaluate a number of factors to impose a fine that has a deterrent effect without unreasonably impacting the local government's ability to provide basic services to its residents. These fines cannot 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. If a housing organization is the prevailing party, it shall be entitled to reasonable attorney's fees. A court may also impose punitive damages if the court finds that the local jurisdiction acted in bad faith, and the fine shall be multiplied by a factor of 10.

According to the author, when other entities such as businesses or people break the law, they often must pay fines, lose licenses, or face imprisonment. When municipalities violate the HAA, there are no repercussions. Imposing specific fees may not only punish bad actors, but may also serve as a deterrent for violating the HAA. As noted by the opposition, these fines could result in financial hardship for localities depending on the size of the project.

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

SUPPORT: (Verified 5/30/17)

Abundant Housing LA
Bay Area Council
California Apartment Association
California Building Industry Association
California Council for Affordable Housing
California Housing Consortium
California Renters Legal Advocacy and Education Fund
East Bay Forward
North Bay Leadership Council
San Francisco Housing Action Coalition
Turner Center for Housing Innovation
YIMBY Action

OPPOSITION: (Verified 5/23/17)

American Planning Association – California Chapter
California State Association of Counties
Rural County Representatives of California
Urban Counties of California

Prepared by: Alison Hughes / T. & H. / (916) 651-4121
5/30/17 12:02:12

**** END ****

SENATE COMMITTEE ON TRANSPORTATION AND HOUSING
Senator Jim Beall, Chair
2017 - 2018 Regular

Bill No: SB 167 **Hearing Date:** 4/18/2017
Author: Skinner
Version: 4/17/2017 Amended
Urgency: No **Fiscal:** No
Consultant: Alison Hughes

SUBJECT: Housing Accountability Act.

DIGEST: This bill makes several changes to the Housing Accountability Act (HAA).

ANALYSIS:

Existing law, under the Housing Accountability Act (HAA):

- 1) Requires cities and counties, under existing planning and zoning law, to prepare and adopt a general plan, including a housing element, to guide the future growth of a community. The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, objectives, financial resources and scheduled programs for the preservation, improvement, and development of housing.
- 2) Requires the local jurisdiction, to the extent that it does not have adequate sites within its existing inventory of residentially zoned land, to adopt a program to rezone land at appropriate densities to accommodate the community's housing need for all income groups.
- 3) Prohibits a local agency from disapproving a housing project containing units affordable to very low-, low- or moderate income renters, or conditioning the approval in a manner that renders the housing project infeasible, unless it makes one of the following findings, based upon substantial evidence in the record:
 - a) The jurisdiction has adopted an updated housing element in substantial compliance with the law, and the jurisdiction met its share of the regional housing need for that income category.

- b) The project will have a specific, adverse impact on the public health or safety and there is no feasible method to mitigate or avoid the impact without rendering the housing development unaffordable to very low-, low- or moderate income renters.
 - c) The denial or imposition of conditions is required to comply with state or federal law.
 - d) The project is located on agricultural or resource preservation land that does not have adequate water or wastewater facilities.
 - e) The jurisdiction has identified sufficient and adequate sites to accommodate its share of the regional housing need and the project is inconsistent with both the general plan land use designation and the zoning ordinance.
- 4) Provides that if a locality denies approval or imposes restrictions, design changes, a reduction of allowable densities or 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 housing development for a very low-, low- or moderate-income households, and the denial of that development or the imposition of restrictions on the development is the subject of a court action which challenges the denial, then the burden of proof shall be on the locality to show that its decision is consistent with its findings disapproving the development.
- 5) “Disapprove the housing development project” includes any instance in which the local jurisdiction does either of the following:
- a) Votes on a proposed housing development project application and the application is disapproved.
 - b) Fails to comply with time periods for approving or disapproving of projects under existing law.
- 6) Defines “housing development project” as any of the following:
- a) Residential units only.
 - b) Mixed-use developments consisting of residential and nonresidential uses in which nonresidential uses are limited to neighborhood commercial uses and to the first floor of the buildings that are two or more stories.
 - c) Transitional or supportive housing.

- 7) “Housing for very low-, low-, or moderate-income households” means that 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.
- 8) Defines “very low-income” as persons and families whose income does not exceed 50% area median income (AMI).
- 9) Defines “low-income” as persons and families whose income does not exceed 80% AMI.
- 10) Defines “moderate-income” as persons and families whose income does not exceed 120% of AMI.
- 11) Defines “above moderate-income” as persons and families whose income exceeds 120% of AMI.

This bill:

- 1) Broadens the application of the HAA to also include housing development projects with units affordable to above-moderate income households in several provisions.
- 2) Increases the burden on local jurisdictions from “substantial evidence” to “clear and convincing evidence” when making findings as to the disapproval of a housing development project.
- 3) 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.
- 4) 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.
- 5) Imposes a minimum fine 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. A court may also impose punitive damages if the court finds that the local jurisdiction acted in bad faith. If a housing organization is the prevailing party, it shall be entitled to reasonable attorney's fees.

- 6) Requires a petition to enforce the HAA shall be filed and served no later than 90 days from the later of:
 - a) The withdrawal of the application by the applicant or the effective date of a decision of the local agency, or
 - b) The expiration of the time periods specified in the Permit Streamlining Act.
- 7) Defines "very low-income" as persons and families whose income does not exceed 50% area median income (AMI).
- 8) Defines "low-income" as persons and families whose income does not exceed 80% AMI.
- 9) Defines "moderate-income" as persons and families whose income does not exceed 120% of AMI.
- 10) Defines "above moderate-income" as persons and families whose income exceeds 120% of AMI.

COMMENTS:

- 1) *Purpose of the bill.* According to the author, this bill seeks to address the severity of California's housing crisis by taking a critical look at cities approval processes for development. State courts are often too deferential to localities in accepting any justification declaring a development infeasible. 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 general plan and zoning ordinance.
- 2) *HAA Background.* The purpose of the HAA 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. 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.

- 3) *Broaden applicability of HAA to market rate housing.* Most of the provisions in the HAA, under existing law, apply to housing projects containing units affordable to very low-, low- or moderate-income renters. According to the Department of Housing and Community Development, California presently has a surplus of 300,000 units affordable to above moderate-income earners, a 61,000 unit shortfall for moderate-income earners, a 1 million unit shortfall for low-income earners, a 1.5 million unit shortfall for very low-income earners, and a 1 million unit shortfall for extremely low-income earners. While the housing crisis is now felt among moderate income earners, the most severely impacted are lower-income earners (*i.e.* 3.5 million unit shortfall). The HAA incentivizes developers to include affordable housing in their housing developments by providing a remedy for the denial of a project.

This bill would broaden some provisions of the HAA to apply to market rate housing. The expansion of this law to include market-rate development would remove an incentive for a market rate developer to include affordable housing in a project where the crisis is most acutely felt. **The author has agreed to remove the expansion of provisions of the HAA to above-moderate income renters.**

- 4) *Higher standard of proof.* This bill would increase the burden on local jurisdictions from “substantial evidence” to “clear and convincing evidence” when making findings as to the disapproval of a housing development project. “Clear and convincing” indicates that the thing to be proved is highly probably or reasonably certain. According to the author, state courts are too deferential to local jurisdictions and accept “any justification” for failing to meet state housing goals. By elevating the evidentiary standard to “clear and convincing,” localities will need to prove that denying proposed housing development projects or conditioning their approval upon lower density is necessary to safeguard human health and safety.
- 5) *Fines, fees, and punitive damages.* Under existing law, a court may compel compliance with the HAA, including an order that the locality approve the housing development or emergency shelter. Additionally, a court may impose fines upon a local agency for acting in bad faith. This bill would impose a minimum fine of \$100,000 per housing unit in the housing development project if a court finds a violation of the HAA. These fines cannot 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. If a housing organization is the prevailing party, it shall be entitled to reasonable attorney's fees. A court may also impose punitive damages if the court finds that the local jurisdiction acted in bad faith.

According to the author, when other entities such as businesses or people break the law, they often must pay fines, lose licenses, or face imprisonment. When municipalities violate the HAA, there are no repercussions. Imposing specific fees may not only punish bad actors, but may also serve as a deterrent for violating the HAA. As noted by the opposition, these fines could result in financial hardship for localities depending on the size of the project. The author has agreed that these fines may be too high, and will work on the appropriate fines in the Senate Judiciary Committee.

- 6) *Seeing double.* This bill is exactly the same as a bill that was introduced in the Assembly (see related legislation section below). The author states the reason for moving two bills that are exactly the same in two houses is to provide "two vehicles" for the same legislation.
- 7) *Opposition.* California State Association of Counties, Rural County Representatives of California, and the Urban Counties of California state that the court fines are too high and could bankrupt a city. These groups also contend that the higher standard of proof would be almost impossible for local governments to meet. The American Planning Association, California Chapter shares these concerns, and adds that expanding the HAA to include above moderate-income would remove any incentive to take advantage of the HAA by including affordable housing in a project.
- 8) *Double-referral.* This bill was double-referred to the Senate Judiciary Committee.

RELATED LEGISLATION:

AB 678 (Bocanegra, 2017)— would make several substantive changes to the HAA and is identical to this bill.

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

POSITIONS: (Communicated to the committee before noon on Wednesday, April 12, 2017.)

SUPPORT:

Abundant Housing LA
Bay Area Council
California Apartment Association
California Building Industry Association
California Renters Legal Advocacy and Education Fund
East Bay Forward
North Bay Leadership Council
San Francisco Housing Action Coalition
Terner Center for Housing Innovation
YIMBY Action

OPPOSITION:

American Planning Association – California Chapter
California State Association of Counties
Rural County Representatives of California
Urban Counties of California

-- END --