

- 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.
- 5) Defines “disapprove the housing development project” as any instance in which a local agency does either of the following:
- a) Votes on a proposed housing development project application and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building project.
 - b) Fails to comply with specified time periods for approving or disapproving development projects.

This bill:

- 1) Adds that the following actions by a local agency also apply to the definition of “disapprove the housing development project”:
 - a) Denies an exemption from CEQA for which the project is eligible. The determination shall be based on the record before the local agency.
 - b) Requires further environmental study to adopt a negative declaration or addendum for the project or to certify an environmental impact report for the project, as required by CEQA, notwithstanding a legally sufficient basis in the record before the local agency to adopt a negative declaration or addendum or to certify an environmental impact report without further study.

COMMENTS:

- 1) *Author’s statement.* “The Legislature first passed the Housing Accountability Act (HAA) in 1982 to limit the ability of local agencies to deny qualifying

housing projects from being built in their jurisdiction. Over the past several years, the Legislature has strengthened the HAA and, in response, some cities resorted to far-fetched arguments to deny valid CEQA clearances to projects the HAA protects. For example, agencies have used redundant environmental review to indefinitely delay projects or to pressure developers into agreeing to a reduction in density. AB 2656 clarifies that the wrongful denial or withholding of a CEQA clearance to which a housing development is legally entitled to violates the HAA.”

- 2) *HAA*. In 1982, in response to the housing crisis, which was viewed as threatening the economic, environmental, and social quality of life in California, the Legislature enacted the Housing Accountability Act (HAA), commonly referred to as the Anti-NIMBY Law. The purpose of the HAA is to help ensure that a city does not reject or make infeasible housing development projects that contribute to meeting the housing need determined pursuant to the Housing Element Law without a thorough analysis of the economic, social, and environmental effects of the action and without complying with the HAA. The HAA restricts a city’s ability to disapprove, or require density reductions in, certain types of residential projects. The HAA does not preclude a locality from imposing developer fees necessary to provide public services or requiring a housing development project to comply with objective standards, conditions, and policies appropriate to the localities share of the regional housing needs assessment.

If a locality denies approval or imposes conditions that have a substantial adverse effect on the viability or affordability of a housing development for very low-, low-, or moderate income households, and the denial or imposition of conditions is subject to a court challenge, the burden is on the local government to show that its decision is consistent with specified written findings.

If a court finds that a locality violated the HAA, a court must issue an order or judgment compelling compliance with the HAA within 60 days, including but not limited to, an order that the locality take action on the housing development project or shelter. The plaintiff shall be entitled to attorney’s fees unless the court find that awarding fees would not further the purposes of the HAA. If a locality fails to comply within 60 days, the court shall impose fines, a minimum of \$10,000 per housing unit in the housing development project, which shall be deposited in a local housing trust fund. The court may also approve the housing development project. If the court finds the locality acted in bad faith, in addition to other remedies, the court shall multiply the fine by a factor of five.

- 3) *CEQA, exemptions, and ministerial approvals.* CEQA applies when a development project requires discretionary approval from a local government agency. When a local agency has the discretion to approve a project, its CEQA evaluation begins with deciding whether an activity qualifies as a project subject to CEQA review. If an activity is deemed a “project,” the agency decides whether it is exempt from compliance with CEQA under either a statutory or a categorical exemption. Statutory exemptions are activities the Legislature has excluded from CEQA despite potential environmental impacts. If a project is statutorily exempt, it can be implemented without a CEQA evaluation.

In addition to statutory exemptions, the Legislature specifically directed the Secretary of the California Natural Resources Agency to designate categorical exemptions from CEQA. Categorical exemptions include projects that the Secretary deems do not have a significant impact on the environment. The CEQA Guidelines, found in Title 14 of the California Code of Regulations, set forth more than two dozen categorical exemptions covering a wide range of projects, from minor alterations of existing facilities to construction of certain types of buildings. As with statutory exemptions, if the project is categorically exempt, no formal evaluation is required, and the project can be implemented without a CEQA evaluation. Despite the creation of new by-right and development streamlining measures that bypass the CEQA process, if a city chooses not to grant the permits – in violation of state law – a developer’s only recourse is to sue.

Cities and counties enact zoning ordinances to implement their general plans. Zoning determines the type of housing that can be built. In addition, before building new housing, housing developers must obtain one or more permits from local planning departments and must also obtain approval from local planning commissions, city councils, or county board of supervisors. Some housing projects can be permitted by city or county planning staff ministerially or without further approval from elected officials. Projects reviewed ministerially, or by-right, require only an administrative review designed to ensure they are consistent with existing general plan and zoning rules, as well as meet standards for building quality, health, and safety. Most large housing projects are not allowed ministerial review. Instead, these projects are vetted through both public hearings and administrative review. Most housing projects that require discretionary review and approval are subject to review under the CEQA, while projects permitted ministerially generally are not.

- 4) *Ambiguities in the HAA related to CEQA.* The HAA requires that a local government cannot disapprove a housing development project that is consistent

with the jurisdiction's zoning ordinance and general plan designation, unless the preponderance of evidence shows that certain conditions are met, such as the project would cause health and safety issues. However, it is unclear what happens when a local government does not directly deny a project, but instead effectively renders it infeasible by requiring CEQA analysis beyond what the courts may consider sufficient to make a reasonable determination of the environmental implications of a project.

Such was the case in 2021 in San Francisco, where the Board of Supervisors (BOS) required a 500-unit downtown project on a parking lot near multiple major transit stops to undertake additional studies related to the project's environmental impact report (EIR). According to a November 2021 letter from HCD to the local government, "the BOS cited various vague concerns about EIR deficiencies, including seismic concerns, effects (e.g., shadowing) on historic resources, and gentrification. It appears that the BOS has tasked city planners to prepare a new environmental study and recirculate the EIR or portions of the EIR. To date, no written findings have been published or provided to the project applicant nor has any substantial evidence in support of these findings been identified."¹ However, the letter stopped short of stating that San Francisco was definitively in violation of the HAA.

This bill attempts to provide clarity to a situation in which a local government requires CEQA analysis beyond what the courts may consider sufficient to make a reasonable determination of the environmental implications of a project. It does so by adding, to the definition of what it means to "disapprove the housing development project," the following two instances:

- a) When a local agency denies an exemption from CEQA for which the project is eligible; and
- b) When a local agency requires further environmental study, pursuant to CEQA, to adopt a negative declaration or addendum for the project or to certify an environmental impact report (EIR) for the project, notwithstanding a legally sufficient basis in the record to make such a decision without further study.

By adding these two situations to the HAA, plaintiffs could utilize the legal remedies in the HAA to sue local agencies that utilize CEQA delays as a means to disapprove or downsize a project without having actually voted to do so.

¹ <https://www.hcd.ca.gov/community-development/housing-element/docs/sfrsanfrancisco-loi-ta-112221.pdf>

- 5) *Opposition.* One of the opponents of the bill, the State Building and Construction Trades Council, argues that this bill undermines CEQA in numerous ways, leading to hazardous conditions for workers. This includes that the bill puts “additional pressure on the local agency to limit the environmental review under CEQA for the housing development project,” that it “encourages the application of more CEQA exemptions to housing development projects,” and that “expanding the definition of ‘disapproval’ under the HAA to include actions that do not actually reject or deny the project is illogical and creates confusion with regards to other provisions of the HAA where ‘disapprove the housing development project’ is referenced since the project may not have been rejected by the local agency.”
- 6) *Triple-referral.* Due to the COVID-19 Pandemic and the unprecedented nature of the 2022 Legislative Session, all Senate Policy Committees are working under a compressed timeline. This timeline does not allow this bill to be referred and heard by more than two committees as a typical timeline would allow. In order to fully vet the contents of this measure for the benefit of Senators and the public, this analysis includes information from the other committees included in the original referral. This bill was also referred to the Senate Governance and Finance Committee and Senate Environmental Quality Committee.

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

POSITIONS: (Communicated to the committee before noon on Wednesday, June 8, 2022.)

SUPPORT:

San Francisco Bay Area Planning and Urban Research Association (SPUR)
 (Sponsor)
 Abundant Housing LA
 Bay Area Council
 California Building Industry Association (CBIA)
 California Hispanic Chamber of Commerce
 California Housing Consortium
 California Housing Partnership Corporation
 California YIMBY
 CivicWell
 East Bay YIMBY
 Grow the Richmond
 Habitat for Humanity California

Housing Action Coalition
Mountain View YIMBY
Northern Neighbors
People for Housing - Orange County
San Francisco YIMBY
San Luis Obispo YIMBY
Sand Hill Property Company
Santa Cruz YIMBY
SV@home Action Fund
The Two Hundred
Urban Environmentalists
YIMBY Action

OPPOSITION:

City of Chino
State Building and Construction Trades Council of CA

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