
SENATE COMMITTEE ON HOUSING
Senator Scott Wiener, Chair
2023 - 2024 Regular

Bill No: AB 1633 **Hearing Date:** 6/20/2023
Author: Ting
Version: 4/27/2023
Urgency: No **Fiscal:** Yes
Consultant: Alison Hughes

SUBJECT: Housing Accountability Act: disapprovals: California Environmental Quality Act

DIGEST: This bill provides that a disapproval under the Housing Accountability Act (HAA) includes a local agency's failure to make a determination of whether a project is exempt from the California Environmental Quality Act (CEQA), abuse of discretion, or failure to adopt certain environmental documents under specified circumstances, and makes several other changes.

ANALYSIS:

Existing law:

- 1) Requires a local jurisdiction to give public notice of a hearing whenever a person applies for a zoning variance, special use permit, conditional use permit, zoning ordinance amendment, or general or specific plan amendment.
- 2) Requires the board of zoning adjustment or zoning administrator to hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefore and establishes criteria for determining those matters, and applications for variances from the terms of the zoning ordinance.
- 3) Establishes CEQA, which generally requires state and local government agencies to inform decision makers and the public about the potential environmental impacts of proposed projects, and to reduce those impacts to the extent feasible. CEQA applies when a development project requires discretionary approval from a local government.
- 4) Prohibits a local agency, pursuant to the HAA, 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.
- 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 to the definition of “disapprove the housing development project” the following situations:
 - a) Fails to meet timelines specified for the issuance of post-entitlement permits;
 - b) Fails to make a determination of whether the project is exempt from CEQA or commits an “abuse of discretion,” as specified, if all the following conditions are satisfied:
 - i) There is substantial evidence that the housing development is not located on specified environmentally sensitive sites;
 - ii) The housing development project is located within an urbanized area, as defined;

- iii) The density of the housing development project meets or exceeds 15 units per acre;
 - iv) There is substantial evidence in the record before the local agency that the housing development project is eligible for an exemption sought by the applicant, and if the exception is subject to a CEQA exception, there is substantial evidence in the record that the application of that categorical exemption is not barred by one of the specified exceptions.
 - v) The applicant has given timely written notice to the local agency of the action or inaction that the applicant believes constitutes a failure to make a determination or an abuse of discretion and the local agency did not make a lawful determination within 90 days of the applicant's written notice.
 - (1) The agency may extend the time period to make a lawful determination by no more than 90 days if the extension is necessary to determine if there is a substantial evidence that the housing development is eligible for the exemption sought by the applicant.
 - (2) If the local agency has voted to deny the exemption, the applicant's notice shall be deemed timely if and only if it is given within 35 days of being notified of the agency's decision.
 - (3) If the local agency has not taken action on the exemption, the applicant's notice shall be deemed timely if given after 60 days from the date on which the project application has been received and accepted as complete by the lead agency or 60 days from the date on which the project was deemed complete.
- c) Fails to adopt a negative declaration or addendum for the project to certify an environmental impact report for the project or to approve another comparable environmental document, as required under CEQA, if all of the following conditions are satisfied:
- i) There is substantial evidence that the housing development is not located on specified environmentally sensitive sites;
 - ii) The housing development project is located within an urbanized area, as defined;
 - iii) The density of the housing development project meets or exceeds 15 units per acre;
 - iv) There has been prepared a negative declaration, addendum, environmental impact report, or comparable environmental review document, that if duly adopted, approved, or certified by the local agency, would satisfy the requirements of CEQA.

- v) The local agency which has the authority to adopt, approve, or certify the relevant environmental review document has held a meeting at which adoption, approval, or certification of the environmental review document was on the agenda and the document could have been adopted, approved, or certified, as applicable, but the agency committed an abuse of discretion or failed to decide whether to further study or to adopt, approve, or certify the environmental document.
 - vi) The applicant has given timely written to the local agency of the action or inaction that the applicant believes constitutes a failure to decide or an abuse of discretion, and the local agency did not make a lawful determination about whether to adopt, approve, or certify the environmental review document within 90 days of the applicant's written notice. The applicants notice shall identify the evidence in the record before the local agency, and if the applicant asserts that the local agency committed an abuse of discretion, shall state the reasons why the agency's action as an abuse of discretion.
 - (1) If the local agency has voted to require further study, rather than adopting, approving or certifying the appropriate environmental review document, the applicants notice shall be deemed timely if and only if it was given 35 days of being notified of the agency's decision.
 - (2) If the local agency has not voted to require further study, rather than adopting, approving, or certifying the appropriate environmental document, the applicants notice shall be deemed timely if given after the specified review for specified documents has passed.
- 2) Limits the ability of a court to award attorney's fees in cases concerning disapprovals within the meaning of 1) or 2) if the court finds that the local agency acted in good faith and had reasonable cause to disapprove the project due to the existence of a controlling question of law about the application of CEQA or implementing guidelines as to which there was a substantial ground for difference of opinion at the time of the disapproval.
- 3) Provides that, upon any motion for an award of attorney's fees pursuant to specified law, in a case challenging a local agency's approval of a housing development project, a court, in weighing whether a significant benefit has been conferred on the general public or a large class of persons and whether the necessity of private enforcement makes the award appropriate, must give due weight to the degree to which the local agency's approval furthers specified policies of the HAA.
- 4) Makes the provisions of the HAA severable.

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 delay a project from being built to the point that the project is no longer economically feasible. AB 1633 requires local agencies to exercise their responsibilities to approve housing projects under CEQA in good faith or be in violation of 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, set forth in 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 extended environmental analysis beyond what the courts may consider sufficient to make a reasonable determination of the environmental implications of a project.
- 5) *469 Stevenson Street.* In 2021 in San Francisco, 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 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." However, the letter stopped short of stating that San Francisco was in violation of the HAA.

This bill attempts to settle the law regarding what happens when 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" in the HAA, the following two instances:

- a) When a local agency fails to make a determination of whether a project is exempt from CEQA, or commits an abuse of discretion in that determination; and
- b) When a local agency fails to either require further study or adopt a negative declaration or addendum for the project, certify an EIR, or approve another environmental document for the project, or commits an abuse of discretion in that instance.

By adding these two criteria 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, render financially infeasible, or downsize a project without having actually voted to do so.

The bill only applies to projects that meet the environmental criteria that projects under SB 35 (Wiener), Chapter 366, Statutes of 2017 must meet, which eliminates many of the state's most environmentally sensitive areas: the coastal zone, prime farmland, wetlands, hazardous waste sites, flood hazard areas, habitat for protected species, and others. It further exempts projects in high or very high fire hazard severity zones. The bill is also limited to specified urbanized areas, and only applies to projects with a density of at least 15 units/acre, meaning low-density sprawl developments would not be covered by these enhanced HAA protections. These provisions are narrowly tailored to ensure the new disapproval criteria only applies to environmentally beneficial projects that are in the right locations, at the right densities, and where local governments have specifically acted counter to California's statewide housing production needs.

The bill also provides some additional protections for local governments who have been sued by neighbors or interest groups for approving a housing development project. In certain circumstances where plaintiffs in such a suit challenging a housing approval are seeking the award of attorney's fees, the court would be charged with carefully considering various priorities in the HAA, the suitability of the site for housing, and the reasonableness of the local agency. The bill states the intent of the Legislature is that attorney's fees and costs rarely, if ever, be awarded to plaintiffs if the local agency acted in good faith to approve a housing development that is in the areas and at the densities mentioned above.

- 6) *Opposition.* The State Building and Construction Trades Council are opposed to a prior version of the bill, stating the bill gives developers a shortcut to court. They are also concerned that this bill will “undermines the ability of Californians to have a voice in the environmental outcome and decision-making process of projects that impact their health and their communities by violating basic public participation mandates.
- 7) *Double referral.* This bill was also referred to the Senate Environmental Quality Committee.

RELATED LEGISLATION:

AB 2656 (Ting, 2022) — was substantially similar to this bill. *This bill was held in the Senate Appropriations Committee suspense file.*

SB 167 (Skinner, Chapter 368, Statutes of 2017) — made a number of changes to the HAA to ensure local agency compliance during the approval process for proposed housing developments. The measure also clarified existing provisions of the HAA and imposed added penalties on agencies that violate the HAA without proper findings.

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

POSITIONS: (Communicated to the committee before noon on Wednesday, June 14, 2023.)

SUPPORT:

Bay Area Council (Co-Sponsor)
California Housing Partnership Corporation (Co-Sponsor)
California YIMBY (Co-Sponsor)
Housing Action Coalition (Co-Sponsor)
San Francisco Bay Area Planning and Urban Research Association (SPUR) (Co-Sponsor)
Abundant Housing LA
California Apartment Association
California Building Industry Association (CBIA)
California Community Builders
California Housing Consortium
Civicwell
Council of Infill Builders
East Bay for Everyone
East Bay YIMBY
Fieldstead and Company, INC.
Grow the Richmond
Habitat for Humanity California
How to ADU
Los Angeles Area Chamber of Commerce
Midpen Housing
Mountain View YIMBY
Napa-Solano for Everyone
Northern Neighbors
Peninsula for Everyone
People for Housing Orange County
Progress Noe Valley
San Francisco YIMBY

San Luis Obispo YIMBY
Santa Cruz YIMBY
Santa Rosa YIMBY
Silicon Valley Leadership Group
South Bay YIMBY
Southside Forward
Urban Environmentalists
Ventura County YIMBY
Westside for Everyone
YIMBY Action

OPPOSITION:

State Building and Construction Trades Council of California

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