
SENATE COMMITTEE ON HOUSING
Senator Scott Wiener, Chair
2021 - 2022 Regular

Bill No: AB 989 **Hearing Date:** 7/8/2021
Author: Gabriel
Version: 7/5/2021 Amended
Urgency: No **Fiscal:** Yes
Consultant: Alison Hughes

SUBJECT: Housing Accountability Act: appeals: Office of Housing Appeals

DIGEST: This bill creates an Office of Housing Appeals (Office) within the Department of Housing and Community Development (HCD) to review allegations of violations of the Housing Accountability Act (HAA) for specified housing developments projects.

ANALYSIS:

Existing law:

- 1) 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.
- 2) Prohibits, under the HAA, a local agency from disapproving a proposed housing development project for very low-, low-, or moderate-income households or an emergency shelter, or conditioning approval in a manner that renders the project infeasible for development, unless it makes written findings based upon a preponderance of the evidence in the record, as specified.
- 3) Provides that when a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the housing development project’s application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its

decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record, as specified.

- 4) Requires the local government to provide the applicant with written documentation identifying the provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity, as specified.
- 5) Provides that if the local agency fails to provide specified documentation, the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision.
- 6) Provides that the court must issue an order of judgment compelling compliance with the HAA within 60 days, if it finds the local government violated the HAA, as specified.
- 7) Authorizes the court to issue an order or judgment directing the local agency to approve the housing development project or emergency shelter if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of the HAA.
- 8) Requires the court, if it finds a violation of the HAA, to award reasonable attorney's fees and costs of suit to the plaintiff or petitioner, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of the HAA.
- 9) Requires, if the court determines that the local agency has failed to comply with the order or judgment compelling compliance within 60 days, the court to impose fines on a local agency that has violated the HAA. 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;
- 10) Requires, if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter, and failed to carry out the court's order or judgment within 60 days, as specified, the court to multiply the fine specified above by a factor of five. Specifies that "bad faith" includes, but is not limited to, an action that is frivolous or otherwise entirely without merit.

- 11) Authorizes HCD to find a local government's housing element out of substantial compliance if HCD determines that the local government acts or fails to act in compliance with its housing element.
- 12) Requires HCD to notify the local government of a violation of law and authorizes HCD to refer a violation to the Office of the Attorney General (AG) if it finds that the city has violated the law taking an action in violation of the HAA.

This bill:

- 1) Creates within HCD an Office of Housing Appeals (Office) to review housing development projects that are alleged to have been denied or subjected to conditions in violation of the HAA.
- 2) Requires the HCD director to administer and direct the day-to-day operations of the Office, including, but not limited to, ensuring that each hearing is sufficiently staffed and that appeals hearings are heard and resolved in a timely and efficient manner. The Director shall not direct, oversee, supervise, or be otherwise involved in the decision-making process of the housing appeals panels.
- 3) Requires the Office to include housing appeals panels. Any appeal hearing shall be conducted by a panel of five administrative law judges (ALJs). Each ALJ shall be randomly assigned to an appeal hearing. The panel shall consider appeals pursuant to the provisions of the Administrative Procedures Act.
- 4) Authorizes HCD to adopt regulations to implement this section, as specified.
- 5) Authorizes a project applicant subject to a decision by a local government that alleges an HAA violation to appeal the decision of the local agency to a housing appeal panel. The appeal shall be limited to the issue of whether the local agency acted in violation of the HAA. Project applicants include those proposing a housing development in which at least 20% of the total units shall be sold or rented to lower income households, or 100% of the units shall be sold or rented to persons and families of moderate income.
- 6) Requires an applicant, within 30 days after the date of a final decision by a local agency, to file a written notice of intent with the local agency of the intent to file an appeal.

- 7) Provides that within 60 days of receipt of the notice of intent, if the local agency rescinds its action identified in the notice of intent and takes action to approve the project or revise the conditions identified in the notice of intent, an applicant shall not file an appeal with the Office.
- 8) Requires the applicant to file an appeal between 60 and 90 days following the delivery of the notice of intent to appeal, except as provided in (7). The Office shall notify the local agency of the filing within 10 days; the agency shall transmit a copy of the decision, its reasoning for that decision, and whether the agency will contest the appeal within 10 days. If the local agency does not transmit this information within 10 days, the Office shall vacate the decision of the local agency and direct the local agency to issue any necessary permits within 30 days of the order.
- 9) Requires the local agency to schedule an appeal hearing within 30 days if it receives transmitted documentation from the local agency under (8). The hearing shall take place no more than 60 days after the local agency receives the initial notice of the appeal.
- 10) Requires the panel to render a written decision with a majority vote of the panel. If the panel finds the local government violated the HAA, it shall vacate the decision and direct the local agency to comply within 30 days.
- 11) Require the order of the Office to be deemed the action of the local agency unless the applicant consents to a different decision by the local agency, and the applicant may enforce the orders in court.
- 12) Prohibits an applicant from bringing an action in court to enforce the HAA prior to a final decision of the Office.

COMMENTS:

- 1) *Author's statement.* "Despite California's well-documented affordable housing crisis, some local government officials have defied state law and denied affordable housing projects even when they are fully compliant with all local zoning and regulatory requirements. These officials understand that in most cases affordable housing proponents will have no practical means to challenge the unlawful denial as the current remedy, litigation in Superior Court, is almost always prohibitively expensive, time-consuming, and otherwise impractical. AB 989 would address this problem by creating an alternate appeal panel with specialized expertise. Modeled off an approach that has been successfully implemented in states such as Illinois, Massachusetts, Oregon, and Rhode

Island, this review panel would be able to resolve disputes around improper denials of affordable housing in a more expedited, less expensive, less confrontational, and more consistent manner. AB 989 simply provides a new procedural remedy to resolve disputes, it does not upzone, change any local zoning or land use policies, or otherwise change substantive state law around housing. Local jurisdictions that follow state law in good faith are highly unlikely to have any interaction with this new appeal panel, while those that have been actively and willfully violating the law will be encouraged to come into compliance.”

- 2) *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 (ie a developer), 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. In such a case, the local government bears the burden of proof that its decision has conformed to all of the requirements in the HAA, including, if applicable, any findings that the development was not consistent with general plan and zoning standards. Many provisions of the HAA are limited to lower-income housing developments.

If a local agency is found by a court to be in violation of the HAA, a court may issue an order or judgement compelling compliance with the HAA within 60 days. The HAA also allows a court, upon a determination that the locality has failed to comply with the order or judgment compelling compliance with the HAA within 60 days, to impose fines on a local agency that has violated the HAA and to deposit any fine into a local housing trust fund or elect to deposit the fine in a state account. The fine shall be a minimum of \$10,000 per unit. Additional fines may be imposed if the court finds that the locality acted in bad faith.

- 3) *HCD's Housing Accountability Unit*. AB 72 (Santiago) Chapter 370, Statutes of 2017, gave HCD additional authority to find a housing element out of compliance and a mechanism to enforce state housing law. During the eight year housing element planning period, HCD can revoke a finding that a local government's housing element complies with housing element law based on any action or failure to act that it finds is inconsistent with housing element law. If HCD finds a violation of law either in a local government's action or failure to act in regards to its housing element or a list of other state housing laws, it notifies the local government and refers a violation of housing element law as

well as a list of other state housing laws to the AG. The 2021-22 budget established the new Housing Law Unit at HCD to help local jurisdictions comply with housing element and other state housing laws.

- 4) *Office of Housing Appeals.* This bill would create a new Office at HCD made up of panels of ALJs who can review final decisions on certain housing developments. The ALJs' review is exclusively focused on allegations of HAA violations. According to the author, the benefit of this Office is that a developer could appeal a local decision and the panel would issue a decision much more quickly than if the developer were to file a lawsuit in civil court; it would also, likely result in fewer overall costs to the parties. Additionally, the bill provides that if the ALJ panel finds that the local agency violated the HAA, the local agency shall correct the violation within 30 days, and the order of the panel shall be deemed to be the action of the local agency. Because of the added complexity of projects containing units affordable to lower income families, this benefit is limited to developments containing at least 20% of the units that are affordable to lower income households or 100% for moderate-income households.
- 5) *Recent amendments and new concerns.* This bill was amended in the Governance and Finance Committee on July 1st to add complexity and potential barriers to eligible developers. Most notably, the amendments: (1) require developers that choose to challenge a local government decision to first use the process in this bill before seeking relief under the HAA in civil court; (2) adds new steps to the process, such as providing local governments with 60 days to cure the alleged HAA violations, which delay the overall process for a decision by the ALJ, and (3) provides a local government with the opportunity to cure, and prohibits a developer from suing, without assurances that the developers claims have been resolved. These amendments present several challenges and could potentially undermine the HAA, including the following:
 - a) A developer may want to sue in court, for any number of reasons, and not choose to pursue a decision by the ALJ. The process created by this bill adds time and costs to the developer and the local agency; it also takes away from the initial goal of the bill, which was to provide a benefit for projects with affordable units, and may even overburden these projects with costs and delays to the point they are no longer feasible.
 - b) A developer may want to file additional land use allegations, which are subject to a statute of limitations of 90 days under current law. Under this bill, a developer could risk losing out on filing other legitimate claims (such as a no net loss violation or a land use discrimination), or oddly, be forced the developer to file a lawsuit in civil court alleging these land use

violations, while simultaneously arguing the HAA violation before the new ALJ panel. Further, any other organizations with standing under the HAA that file law suits in court may be forced to stay their cases until the ALJ renders a decision on a developers claim through the Office, if the cases are related to the same housing project.

- c) The local agency could delay the removal of conditions on a project so that the developer is unable to challenge the decision by the local agency or get the necessary relief to proceed with the project.

In order to preserve the integrity of the HAA, this committee should amend the bill do to the following:

- **Reduce the timelines so the Office process does not burden a developer that ultimately wants to go to court. Further, the opportunity for a local government to correct the alleged violations should occur in tandem with the overall process for the Office. (Subject to agreement to Senate Governance and Finance)**
- **Provide that any statutes of limitations for additional alleged land use law violations by the local government by the developer should be tolled.**
- **If decision of the ALJ decision is appealed in civil court, a civil court judge shall review the local government's decision de novo review (instead of arbitrary and capricious) unless the developer opts in to an "arbitrary and capricious" standard when filing the appeal.**
- **Clarify that a developer making an allegation of an HAA violation shall determine if the local government has removed the action or any existing or new condition or conditions in the appeal. (Subject to agreement with Senate Governance and Finance)**
- **Limit application of the appeals board to 100% affordable projects.**
- **Clarify that the requirement to use the Office only applies to specified developers (ie not to other organization with standing under the HAA.)**
- **Authorize a developer to waive the Office process and proceed straight to civil court if: (a) the local government and developer certify in good faith that the board will not facilitate a resolution; or (2) when bringing an allegation against a "bad acting" local**

government, such as a local government that has not adopted a compliant housing element or has violated other state housing laws. (Subject to agreement with Senate Governance and Finance).

- 6) *Withdrawn support.* Because of the recent amendments and the concerns noted above, the committee has been notified that the following organizations have withdrawn their support: California Association of Realtors, Corporation for Supportive Housing, Housing California, Non-profit Housing Association of Northern California (NPH), Rural Community Assistance Corporation (RCAC), and Southern California Association of Non-Profit Housing (SCANPH).
- 7) *Opposition.* Several cities are opposed to the prior version of the bill because it would have allowed a state political committee to overturn a local land-use decision without any public review or comment. Recent amendments have brought opposition from the California Building Industry Association (CBIA), California Rural Legal Assistance Foundation, California YIMBY, Habitat for Humanity-California, Housing Action Coalition, Greenbelt Alliance, Public Interest Law Project, and Western Center on Law and Poverty for the reasons noted above in Comment 5.
- 8) *Triple Referral.* This bill was heard in the Senate Governance and Finance Committee on July 1st and passed on a vote of 5-0. It was also referred to the Senate Judiciary committee. The referral to the Senate Judiciary Committee was rescinded due to the ongoing COVID-19 pandemic. In order to fully vet the contents of this measure for the benefit of Senators and the public, this analysis includes information from the third committee included in the original referral, the Senate Judiciary Committee.

RELATED LEGISLATION:

SB 1410 (Gonzalez, 2020) -- would have established a similar Housing Accountability Committee. *This bill was gutted-and-amended in the Senate Housing Committee to create a COVID Rental Assistance Program.*

AB 72 (Santiago, Chapter 370, Statutes of 2017) -- requires the Department of Housing and Community Development (HCD) to review any action or inaction by a locality that it determines is inconsistent with an adopted housing element, permits HCD to find a locality's housing element out of substantial compliance, and permits HCD to notify the Attorney General (AG) of violations of the law.

SB 167 (Skinner, Chapter 368, Statutes of 2017) -- made a number of changes to the Housing Accountability Act (HAA).

AB 678 (Bocanegra, Chapter 373, Statutes of 2017) - made a number of changes to the Housing Accountability Act (HAA).

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

POSITIONS: (Communicated to the committee before 5 pm on Wednesday, July 7, 2021.)

SUPPORT:

California Apartment Association (Co-Sponsor)
California Housing Partnership (Co-Sponsor)
Abundant Housing LA
Bay Area Council
California Coalition for Rural Housing
California Housing Consortium
Danco Communities
Eden Housing
Linc Housing
Merritt Community Capital Corporation
Natural Resources Defense Council
Pacific Housing, INC.
Southern California Rental Housing Association
Valley Industry & Commerce Association

OPPOSITION:

California Building Industry Association
California Rural Legal Assistance Foundation
California Yimby
City of Camarillo
City of Lafayette
City of Laguna Niguel
City of Los Altos
City of Menifee
City of Novato
City of Rancho Palos Verdes
City of Santa Clarita
City of Thousand Oaks
County of Humboldt
Greenbelt Alliance
Habitat for Humanity California

Housing Action Coalition
South Bay Cities Council of Governments
The Public Interest Law Project
Western Center on Law & Poverty

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