

Date of Hearing: April 25, 2018

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

David Chiu, Chair

AB 3194 (Daly) – As Amended April 16, 2018

**SUBJECT:** Housing Accountability Act: project approval

**SUMMARY:** Makes changes to the Housing Accountability Act (HAA). Specifically, **this bill:**

- 1) Declares the intent of the Legislature to establish a very high threshold for a local agency to justify denying or conditioning a housing project for health or safety reasons, that the conditions for denying a project under the HAA are very rare, and that regularly occurring planning issues do not rise to the level of a "specific, adverse impact upon the public health and safety."
- 2) Provides that a housing development shall not be found inconsistent with and not in compliance or not in conformity with the applicable zoning ordinance and shall not require the site to be rezoned, if the zoning ordinance does not allow for the maximum allowable density and intensity for the site allowable under the housing element or the general plan.

**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 with at least two-thirds of the square footage designated for residential use.
  - c) Transitional housing or supportive housing.
- 2) Defines "disapprove the development project" to include any instance in which a local agency either:
  - a) Votes on a proposed housing development project and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit; or
  - b) Fails to comply with the required time period for approval or disapproval required by law.
- 3) Defines "lower density" includes any conditions that have the same effect or impact on the ability of the project to provide housing.
- 4) Defines "housing for very low-, low-, or moderate-income households" as either:
  - a) At least 20% of the total units shall be sold or rented to lower-income households; or
  - b) 100% of the units shall be sold or rented to persons and families of moderate-income or middle-income.

- 5) Defines “very low-income” as persons and families whose income does not exceed 50% area median income (AMI).
- 6) Defines “low-income” as persons and families whose income does not exceed 80% AMI.
- 7) Defines “moderate-income” as persons and families whose income does not exceed 120% of AMI.
- 8) Defines “above moderate-income” as persons and families whose income exceeds 120% of AMI.
- 9) 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.
- 10) Prohibits a local agency from disapproving a proposed housing development project for very low-, low-, or moderate-income households or an emergency shelter, or conditioning approval in a manner that renders the project infeasible for development, unless it makes written findings based upon a preponderance of the evidence in the record, as to one of the following:
  - a) The jurisdiction has adopted and revised its housing element as required by law and has met its share of the regional housing need allocation.
  - b) The proposed development project or emergency shelter would have a specific, adverse impact upon public health or safety that cannot be mitigated without rendering the development unaffordable or shelter infeasible.
  - c) The denial of the proposed development project is required to comply with specific state or federal law and there is no feasible method to comply without rendering the development unaffordable or shelter infeasible.
  - d) The development project or emergency shelter is proposed on land that does not have adequate water or waste water facilities, or is zoned for agriculture or resource preservation as specified.
  - 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.
- 11) Provides that when a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the housing development project’s application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local

agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:

- a) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a “specific, adverse impact” means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete; and
  - b) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to a), above, other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.
- 12) 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.
- 13) Provides that, for purposes of the HAA, the receipt of a density bonus shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision, as specified.
- 14) Requires, if the local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision as specified, the agency to provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity as follows:
- a) Within 30 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains 150 or fewer housing units.
  - b) Within 60 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains more than 150 units.
- 15) Provides that if the local agency fails to provide the documentation described above in 14), 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.
- 16) 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.

- 17) Specifies that if a jurisdiction denies approval or imposes conditions, including design changes, lower density, or a reduction of the percentage of a lot that may be occupied by a building or structure under the applicable planning and zoning in force at the time the application is deemed complete, that have a substantial adverse effect on the viability or affordability of a housing development for very low-, low-, or moderate-income households and is the subject of a court action which challenges the denial, the burden of proof shall be on the local legislative body.
- 18) Specifies that in any action taken to challenge the validity of a decision by a jurisdiction to disapprove a project or approve a project upon the condition that it be developed at a lower density, the local government shall bear the burden of proof that its decision has conformed to all of the conditions specified in the HAA.
- 19) Provides that the court must issue an order of judgment compelling compliance with the HAA within 60 days, if it finds either of the following:
  - a) The local agency, in violation of subdivision (d) of the HAA, disapproved a housing development project or conditioned its approval in a manner rendering it infeasible for the development of an emergency shelter, or housing for very low-, low-, or moderate-income households, including farmworker housing, without making the findings required by the HAA or without making findings supported by a preponderance of the evidence; or
  - b) The local agency, in violation of subdivision (j) of the HAA, disapproved a housing development project complying with applicable, objective general plan and zoning standards and criteria, or imposed a condition that the project be developed at a lower density, without making the findings required by the HAA or without making findings supported by a preponderance of the evidence.
- 20) 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.
- 21) 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.
- 22) Requires, if the court determines that the local agency has failed to comply with the order or judgment compelling compliance within 60 days, the court to impose fines on a local agency that has violated the HAA.
  - a) Specifies that the fine shall be in a minimum amount of \$10,000 per housing unit in the housing development project on the date the application was deemed complete, as specified.
  - b) Requires the local agency to deposit any fine levied into a local housing trust fund. Provides that the local agency may elect to instead deposit the fine into the Building Homes and Jobs Fund, or otherwise in the Housing Rehabilitation Local Fund.

- c) Requires the court, in determining the amount of fine to impose, to consider the local agency's progress in attaining its target allocation of the regional housing need, as specified, and any prior violations of the HAA.
- 23) Prohibits fines from being paid out of funds already dedicated to affordable housing, as specified. Requires the local agency to commit and expend the money in the housing trust fund within five years for the sole purpose of financing newly constructed housing units affordable to extremely low-, very low-, or low-income households. After five years, if the funds have not been expended, the money shall revert to the state and be deposited into the Building Homes and Jobs Fund, or otherwise in the Housing Rehabilitation Loan Fund, for the sole purpose of financing newly constructed housing units affordable to extremely low-, very low-, or low-income households.
- 24) Provides that if any money derived from a fine imposed pursuant to the above provisions is deposited in the Housing Rehabilitation Loan Fund, then that money shall be available only upon appropriation by the Legislature.
- 25) 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.
- 26) Requires a petition to enforce the HAA to be filed and served no later than 90 days from the later of:
- a) The effective date of a decision of the local agency imposing conditions on, disapproving, or any other final action on a housing development project; or,
  - b) The expiration of the time periods specified in the Permit Streamlining Act.
- 27) Authorizes a party to appeal a trial court's judgment or order to the court of appeal pursuant to specified procedures.(Govt. Code Section 65589.5)

**FISCAL EFFECT:** Unknown.**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.

In 2017, the Legislature passed, and the Governor signed, three bills making significant changes to the HAA. Under identical measures AB 678 (Bocanegra), Chapter 373, Statutes of 2017 and

SB 167 (Skinner), Chapter 368, Statutes of 2017, increased the burden on local jurisdictions when denying a housing project, imposed fines for a violation of the HAA, and expanded judicial remedies for violations of the HAA. AB 1515 (Daly), Chapter 378, Statutes of 2017, changed the standard the court must use in reviewing the denial of a housing development by providing that a project is consistent with local planning and zoning laws if there is substantial evidence that would allow a reasonable person to find it consistent. This could expand the number of housing developments that are afforded the protections of the HAA.

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

This bill would declare that it is the Legislature's intent to establish a "very high threshold" for the conditions to deny a project for health and safety concerns and that these conditions rarely arise. Further, the bill makes findings that "regularly occurring planning issues" do not arise to the level of "specific, adverse impact upon the public health and safety." The committee may wish to consider if these terms need further definition and if they could lead to confusion on the part of both developers and cities in implementing the HAA.

Planning mechanisms: Every city and county is required to develop a comprehensive, long-term general plan that outlines the community's vision of future development through a series of policy statements and goals. The general plan is the basis for all land use decisions. Zoning, subdivisions, and public works projects can only be approved when they are consistent with the general plan. Each community's must also adopt a housing element, which outlines a long-term plan for meeting the community's projected housing needs. Not only must all land use be consistent with the general plan, the general plan is required to be internally consistent. The land use element of the general plan must not conflict with the housing element.

The distribution of residential, commercial, and industrial and other zones must be based on the pattern of land uses established in the general plan. Zoning maps illustrate how all uses are distributed geographically. Zoning is adopted by ordinance and assigns each piece of property to a zone which describes the rules under which it can be used. A zoning ordinance identifies allowable uses and sets standards such as minimum lot size, maximum building height, and minimum front yard depth. If a developer proposes a use that is not allowed in that zone, then a rezoning is required. A public hearing is required to rezone and a city council or zone board must deny requests when the proposed zone conflicts with the general plan.

The housing element must include a specific list of adequate sites to accommodate the city or county's housing needs at all income levels. Once the housing element is adopted, sites must be zoned via local ordinance to reflect the density and intensity of the housing element within three years. Because a local government is not required to rezone for three years, there may be a gap between when the housing element and zoning ordinance are consistent.

According to a UC Berkeley Law School, of 152 housing projects processed in San Jose and San Francisco, over the last three years, in 78 instances the jurisdiction required a rezoning or a zoning variance. Even though in fully 72 instances the project was consistent with the general plan's housing policies and standards.

The HAA is intended to prevent a local government from denying a housing development project unless it is found to be inconsistent, or not in conformity with an applicable plan, program, policy, ordinance, or standard, unless it makes specific findings as noted above. This bill would define the maximum density and intensity standard that a housing development must comply with to the density standard in the zoning ordinance, housing element, or the general plan. In addition, a housing development would not be subject to rezoning if the existing zoning ordinance does not allow for the maximum residential use and density as allowable on the site according to the housing element or general plan. As noted above, the general plan is by definition a broad description of the policies and goals of the community's development goals. The housing element, which must be adopted every 8 years (5 years for some rural cities), is more detailed and includes a description of specific sites to meet the city or county's housing needs for all income levels. Three years after a housing element is adopted, the zoning ordinance must be updated to reflect any changes.

Purpose of this bill: According to the author, "the HAA provides that when a project complies with objective local planning rules, the local government cannot deny the project or reduce the density unless it makes a finding, supported by a preponderance of the evidence, that the project would have a specific adverse impact on public health or safety and there is no other feasible method to mitigate or avoid the impact. Despite the important improvements made to the HAA in last year's bill package, locals can still avoid the HAA by citing questionable health and safety concerns, or by requiring project-by-project re-zonings or zoning variances even where a housing project is consistent with the housing allowed by the general plan, thus rendering housing projects beyond the scope of the HAA's protections because they are technically 'inconsistent' with the zoning for the site. With respect to the health and safety loophole, the danger exists for locals to classify regularly occurring issues, such as increasing traffic or a shortage of parks in a neighborhood, as unmitigatable health and safety concerns that warrant rejecting a proposed housing development that complies with objective local planning rules. On the zoning front, the concern is evading the HAA entirely through requiring project-by-project re-zonings or zoning variances."

Arguments in support: According to the Bay Area Council, "AB 3194 would strengthen the provisions of the HAA by closing loopholes that undermine the HAA applicability and effectiveness. As with a number of other related bills enacted into law in recent years, AB 3194 would reaffirm the intent of the HAA, but further clarifying the Act's provisions pertaining to health and safety impacts and zoning consistency."

Arguments in opposition: According to the American Planning Association (APA), "AB 3194 would prohibit a local government from requiring a rezoning of a project site if the existing zoning ordinance does not allow the maximum residential use density, [and] intensity, allocable on the site by the land use or housing element of the General Plan. The General Plan and the land use element were never intended to be as specific as the zoning ordinance – it covers different areas of the city with general categories. This major change would take away the whole purpose of the General Plan being general and would eliminate the long-standing relationship between the General Plan and zoning, forcing the General Plan map to be like the much more specific

zoning map. If the Legislature intends to make such a fundamental change to a very general document after it has been approved it should give cities and counties time to update the General plan and land use element to take into account this new, zoning function. However, if the bill is amended to instead allow the developer to use the density specified in the housing element or zoning ordinance for a specific site, whichever is higher, APA would support that change. The housing element is the most detailed element in the General Plan and includes site-specific density information certified by HCD. The zoning is required to be updated within three years to reflect the housing element densities if there are not enough sites zoned at those densities within the jurisdiction. But if that rezoning has not [been] completed, using the more updated housing element densities makes sense."

Committee amendments: A local government is required to identify housing sites in their housing element and update the zoning ordinance within three years to reflect the density and use in the housing element. There may be a gap between when the housing element is adopted and when the zoning ordinance is updated. There may be cases in which the zoning ordinance does not allow the maximum density and intensity allowable in the general plan. As a result the site must be rezoned which means it does not receive the protections provided by the HAA. The committee may wish to allow sites where the zoning ordinance is not consistent with either a housing element or the land use element of the general plan, *if it has been updated in the last 10 years*, to receive the protections offered by the HAA and not require the site to be rezoned.

Related legislation:

AB 678 (Bocanegra), Chapter 373, Statutes of 2017: Made several changes to the HAA, including increasing the burden on local jurisdictions when denying a housing project, imposing fines for a violation of the HAA, and expanding judicial remedies for violations of the HAA.

SB 167 (Skinner), Chapter 368, Statutes of 2017: Identical to AB 678 (Bocanegra), above.

AB 1515 (Daly), Chapter 378, Statutes of 2017: Provided 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.

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

*Double-referred:* This bill was also referred to the Committee on Local Government where it will be heard should it pass out of this committee

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

California Building Industry Association (sponsor)  
Bay Area Council  
California Apartment Association  
California Association of Winegrape Growers

California Business Properties Association  
California Chamber of Commerce  
California Construction and Industrial Materials Association  
National Federation of Independent Business  
Non-Profit Housing Association of Northern California

**Opposition**

American Planning Association  
California State Association of Counties (unless amended)  
Rural County Representatives of California (unless amended)  
Urban Counties of California (unless amended)

**Analysis Prepared by:** Lisa Engel / H. & C.D. / (916) 319-2085