

Date of Hearing: April 15, 2021

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

David Chiu, Chair

AB 989 (Gabriel) – As Amended March 25, 2021

SUBJECT: Housing: local development decisions: appeals

SUMMARY: Creates an appeals board, the Housing Accountability Committee (HAC) at the Department of Housing and Community Development (HCD), to receive appeals from developers when a housing development is denied by a local government, and to approve the development if the denial violates the provisions of the Housing Accountability Act. Specifically, **this bill:**

- 1) Requires the HAC to receive appeals from applicants when a local government denies a multifamily housing projects of ten units or more or emergency shelters, or approves the development subject to conditions that the applicant's judgment render the project economically infeasible.
- 2) Requires that the HAC be made up of five members, including:
 - a) The Director of HCD, as an ex officio member;
 - b) The Director of the Office of Planning and Research, as an ex officio member;
 - c) Three members appointed by the Governor. One member must have extensive experience in affordable housing and one member must be a member of a city council or board of supervisors.
- 3) Requires the HAC to hear appeals at least every quarter and more often if necessary.
- 4) Provides that the hearings are subject to guidelines developed by HCD that are exempt from the Administrative Procedure Act.
- 5) Applies to housing developments that meet or exceed the following affordability requirements:
 - a) Ten percent of the units are available at an affordable housing cost to extremely low income households;
 - b) Twenty percent of the units are available at an affordable housing cost to very low and low-income households; and
 - c) One hundred percent of the total housing units of the development are available at an affordable housing cost to moderate-income households.
- 6) Applies to a development in which either of the following criteria are met:
 - a) A city, county, or city and county has adopted a housing element that HCD has determined is in substantial compliance with the law and the development is consistent with the density allowed by the jurisdiction's zoning ordinance and general plan as

specified in the housing element as of the date the application was deemed complete, exclusive of any density bonus granted, except that consistency must not be required if the general plan or zoning ordinance have not been updated to conform to the housing element; or

- b) A city, county, or city and county, has not adopted a housing element that HCD has determined is in substantial compliance with the law and the development is on a site designated for residential or commercial uses in the general plan as of the date the application is deemed complete.

7) Sets out the following appeals process:

- a) Allows an applicant to file an appeal with the HAC within 45 days of denial of a project by a local agency;
- b) Requires the HAC to inform the local agency within 10 days of receiving an appeal, and requires the local agency to within 10 days of receiving the notice provide a copy of the decision and reasons for the project denial to the HAC;
- c) Requires all governing members of a local agency to certify in writing under penalty of perjury that their decision to deny a project was not made for any unlawful or improper purpose;
- d) Provides that if the local agency does not provide the certification, the HAC must vacate the decision of the local agency to deny the development and direct the local agency to issue any necessary approval or permit for the development within 30 days; and
- e) Provides that if the local agency responds within the deadline to the HAC's request then the appeal must be heard within 30 days of receipt of the appeal.

8) Sets out the following process for appeals hearings:

- a) Allows a hearing to be conducted by the entire HAC, a subcommittee or two or more members of the committee, or a hearing officer appointed by the chairperson of the committee;
- b) Requires a record to be kept of the hearing; and
- c) Limits the hearing to the issue of whether the local agency violated the Housing Accountability Act by disapproving a housing development project or by conditioning its approval in a manner that made it infeasible for the development of housing for very low, low- or moderate income households, including farmworker housing, without making the findings required supported by a preponderance of the evidence.

9) Requires the HAC at its next meeting following the hearing to render a written decision stating its findings.

10) Provides that if the HAC finds that a local agency disapproved the housing development in violation of the Housing Accountability Act, it shall vacate the decision and require the local agency to issue an approval within 30 days.

- 11) Provides that if the HAC finds that a local agency conditioned the project in a way that made it infeasible in violation of the Housing Accountability Act, it shall order the local agency to modify the decision and require the local agency to issue an approval and permit for the development within 30 days.
- 12) Provides that an applicant has the initial burden of proof to show that the project was unfairly denied or modified to make it infeasible by a local agency. If the burden of proof is met the local agency shall have the burden of proof to show that its actions were consistent with the Housing Accountability Act.
- 13) Requires the city or county to carry out the order of the HAC within 30 days and, if it fails to do so, the order shall be deemed to be an action of the local agency unless the applicant consents to a different order by the local agency.
- 14) An applicant may enforce the order in court, recover attorney's fees, and the court may impose fines on the city or county as allowed under the Housing Accountability Act.
- 15) Authorizes HCD to charge a fee to the applicant that does not exceed the cost of the hearing.

EXISTING LAW:

- 1) Establishes the HAA, which provides that when a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria in effect at the time that the housing development project's application is complete, but the local agency proposes to disapprove the project or to impose a condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon specified written findings.
- 2) Gives the Department of Housing and Community Development (HCD) authority 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.
- 3) Requires HCD to notify the local government of a violation of law and gives HCD authority to refer a violation to the Office of the Attorney General (AG) if it finds that the city has violated the law by taking any action contrary to the housing element or an amendment to the element, or any action or failure to act pursuant to 1) or that any city or county has taken an action in violation of the following:
 - a) The Housing Accountability Act (Government Code (GOV) Section 65589.5);
 - b) No-net-loss-in zoning density law limiting downzoning and density reductions (GOV Section 65863);
 - c) Density Bonus Law (GOV Section 65915); and
 - d) Prohibiting discrimination against affordable housing (GOV Section 65008).

FISCAL EFFECT: Unknown.

COMMENTS:

Author's statement: According to the author, "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 Connecticut, Illinois, Massachusetts, and Rhode Island, this review panel would include representatives of both local government and affordable housing. The panel would be able to resolve disputes around improper and unlawful denials of affordable housing in a more expedited, less expensive, less confrontational, and more consistent manner. To be clear, 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."

Housing Accountability Act (HAA): If a housing development is denied by a local government or the local government places conditions on the project that make it infeasible, the developer can sue the city under the HAA. The HAA, also known as the "Anti-NIMBY" law, limits 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, as defined, may bring an action to enforce the HAA. Specifically, when a proposed development complies with objective general plan and zoning standards, including design review standards, a local agency that intends to disapprove the project, or approve it on the condition that it be developed at a lower density, must make written findings based on a preponderance of the evidence that the project would have a specific, adverse impact on the public health or safety and that there are no feasible methods to mitigate or avoid those impacts other than disapproval of the project. 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.

This bill would give the HAC the authority of the court to hear appeals under the HAA and determine if a local government denied a project that complies with the underlying zoning or land use conditions or applied conditions to a development that make it unfeasible and thus stop the development from advancing. If the HAC found that a local government violated the HAA it could order it to approve a project or approve a project with changes to make it feasible.

The HAA provides a remedy for affordable housing and market rate housing developments to appeal a local government's denial or conditioning of a project. This bill would only allow for appeals from affordable housing developers that include a percentage of affordable housing as allowed under the HAA.

Anecdotal evidence suggests that developers use the HAA infrequently. Developers are reticent to sue cities in which they want to build housing. The challenge many developers face is not with an outright denial of a project but rather with the conditions that cities place on a project to get to the approval stage.

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. As an example, if HCD found that a local government downzoned a site listed in the housing element inventory of sites and the site can no longer accommodate the level of housing needed to meet the local government's RNHA, HCD could make findings to revoke their original finding of substantial compliance. 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 Governor's January budget proposes to add additional staff to HCD's accountability unit to enhance the state's capacity to enforce existing state housing laws.

HCD has the authority to enforce the HAA by referring a case to the AG who would then be required to sue the city on behalf of the developer in court. This bill would give the HAC the authority of the court to find a city in violation of the HAA and order a city to approve a project or modify in compliance with the HAA.

Staff comments: This bill gives a developer the option to enforce the HAA through a state appeals body rather than the court. The committee may wish to clarify that nothing in this bill prevents a developer from choosing the remedy of the court rather the state appeals body.

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

REGISTERED SUPPORT / OPPOSITION:

Support

California Apartment Association (Co-Sponsor)
 California Housing Partnership Corporation (Co-Sponsor)
 Bridge Housing Corporation
 California Association of Realtors
 California Building Industry Association
 California Coalition for Rural Housing
 California Housing Consortium
 Housing California
 Los Angeles Area Chamber of Commerce

Office of Sacramento Mayor Darrell Steinberg
Sacramento Housing Alliance
San Diego Housing Federation
SV@Home Action Fund

Opposition

Livable California

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