

Date of Hearing: April 28, 2021

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, 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 local government takes an action on a housing development project that is prohibited by the Housing Accountability Act (HAA). Specifically, **this bill:**

- 1) Provides that 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; and,
  - 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.
- 2) Allows a project applicant to appeal the decision of a local agency to the HAC if their project is a housing development project that meets or exceeds any of the following affordability :
  - 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; or,
  - c) One hundred percent of the total housing units of the development are available at an affordable housing cost to moderate-income households.
- 3) Requires the HAC to hear appeals from project applicants alleging that a local government denied a housing development project or imposed conditions on a housing development project in violation of the HAA.
- 4) Requires the HAC to hear appeals at least every quarter and more often if necessary.
- 5) Establishes the following process for initiating an appeal:
  - 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, within 10 days of receiving the notice, to 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, the appeal must be heard within 30 days of receipt of the appeal.
- 6) Sets out the following process for conducting an appeal hearing:
- a) Allows a hearing to be conducted by the entire HAC, a subcommittee of 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 HAA 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.
- 7) Requires the HAC, at its next meeting following the hearing, to render a written decision stating its findings.
- 8) Provides that the hearings are subject to guidelines developed by HCD and that the action to adopt the guidelines is exempt from the Administrative Procedures Act (APA).
- 9) Provides that, if the HAC finds that a local agency disapproved the housing development in violation of the HAA, it shall vacate the decision and require the local agency to issue an approval within 30 days.
- 10) Provides that an applicant has the initial burden of proof to show that the local agency issued a decision that violated the HAA. 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 HAA.
- 11) 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.
- 12) Provides that 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 HAA.
- 13) Authorizes HCD to charge a fee to the applicant that does not exceed the cost of the hearing.
- 14) Provides that no reimbursement is required by this bill, pursuant to Section 6 of Article XIII B of the California Constitution, because a local agency or school district has the

authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this bill.

**EXISTING LAW:**

- 1) Establishes the HAA, which provides, among other requirements, that a local government shall not disapprove or impose conditions that render a project infeasible on a housing development project that sets aside at least 20 percent of unit for lower income households or 100 percent of units for moderate income households unless the local government makes specified written findings based upon a preponderance of the evidence.
- 2) Provides 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 HAA
  - b) No-net-loss-in zoning density law limiting downzoning and density reductions
  - c) Density Bonus Law; and
  - d) Prohibiting discrimination against affordable housing (GOV Section 65008).
- 4) Establishes the APA, which provides administrative standards for rulemaking procedures and for the conduct of informal and formal administrative hearings conducted by state agencies in California. The requirements set forth in the APA are generally applicable to all state agencies unless the agency or the action are statutorily exempt. The requirements in the APA are designed to provide the public with a meaningful opportunity to participate in the adoption of state regulations, the conduct of hearings, and other actions, to ensure that proceedings are clear, necessary and legally valid.

**FISCAL EFFECT:** This bill is keyed fiscal and contains a state-mandated local program.

**COMMENTS:**

- 1) **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.”

- 2) **Bill Summary.** This bill creates the HAC to hear appeals related to low income housing development projects protected under the HAA. Under this bill, if a developer believes that a local agency took an action to deny a protected housing development project, or impose on that project a condition that renders the project infeasible, the developer can appeal the local agency’s decision to the HAC. This bill establishes a new administrative remedy for HAA violations in addition to existing judicial remedies in statute.

This bill is sponsored by the California Housing Partnership Corporation and the California Apartment Association.

- 3) **Housing Accountability Act (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 a housing 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.

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.

- 4) **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 including the HAA, it notifies the local government and may refer a violation 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.

- 5) **The APA.** The APA establishes standard provisions that apply to rulemaking proceedings as well as the adjudicative procedures related to administrative hearings. Similar to other laws with broad application, such as the Fair Political Practices Act or the Brown Act, the APA is structured in a way that it can be applied broadly to a the wide universe of public entities, officials, or actions. The APA applies broadly to state agencies unless a statute specifically exempts an agency or action from the APA.

a) **Rulemaking Actions Under the APA.** The Office of Administrative Law (OAL) administers the rulemaking provisions of the APA and reviews rulemaking proceedings prepared by state agencies. The APA establishes procedures that all agencies must follow when developing regulations that implement or make clear statutory provisions. While the specific scope of an agency's authority to implement a particular statute is typically embedded in that statute, the APA establishes uniform procedures that agencies must comply with when adopting regulations. This includes, but is not limited to, the following requirements for rulemaking agencies proposing to add, amend or repeal regulations:

- i) Requirements for rulemaking agencies to prepare an initial statement of reasons (ISOR) explaining the specific purpose and necessity of each section of the regulation;
- ii) Requirements for rulemaking agencies to prepare an estimate of the economic impact of the proposed regulations;
- iii) Requirements for rulemaking agencies to hold an initial 45-day comment period on the initial draft of the regulations and subsequent 15-day comment periods on any proposed changes to the initial regulations that occur during the rulemaking period;
- iv) Requirements for rulemaking agencies to hold a public hearing if requested by interested parties;
- v) Requirements for rulemaking agencies to prepare written responses to written comments received during the 45-day or any subsequent 15-day comment period as well as any oral comments received at a public hearing;
- vi) Requirements to prepare a final statement of reasons (FSOR) recognizing changes made throughout the rulemaking process and deviations from the ISOR; and,

- vii) Requirements to complete the rulemaking and submit the rulemaking record to OAL for review and approval within one year.

OAL reviews rulemaking proceedings to ensure compliance with the APA, such as whether the agency has sufficiently demonstrated that specific provisions of the regulations are necessary to implement the statute, whether the agency has complied with the timelines and disclosure requirements of the APA, and whether the agency responded to all germane comments submitted to the agency regarding the rulemaking proceeding.

- b) **Hearings Under the APA.** The APA additionally establishes standards for informal and formal hearings conducted either directly by state agencies and commissions or by the Office of Administrative Hearings (OAH) on their behalf. The statute provides a standard process and code of procedures that govern hearings and ensure the rights of parties to the hearing are protected. The statute governs hearing procedures for more than 1,500 state and local agencies. The statute is written broadly enough to be applicable to and govern the array of state administrative hearings on a variety of subjects. For example, APA hearing requirements apply to hearings related to appeals of penalties issued for violations of environmental regulations, actions to suspend or revoke a medical license, actions related to financial audits of local education agencies, administrative fines assessed by the Department of Corrections, and many more.

The adjudicative procedures embedded in the APA include requirements for the conduct of informal and formal administrative hearings. These include, but are not limited to, the following:

- i) Requirements for the hearing to provide an opportunity for the subject of the action to be heard to present and rebut evidence;
  - ii) Requirements for parties to the hearing to receive a copy of the governing procedures related to the action;
  - iii) Requirements for allowing public observation of a hearing;
  - iv) Requirements governing disqualification of hearing officers due to conflicts of interest;
  - v) Requirements governing ex parte communications;
  - vi) Requirements for providing language assistance; and,
  - vii) Requirements specifying the time, form and manner for which decisions shall be issued.
- c) **APA Exemptions.** This bill exempts the implementing guidelines governing the hearing procedure from the APA. While this bill does not explicitly exempt the hearings conducted by the panel from the APA hearing procedures, it is unclear if the APA would apply given the rulemaking exemption for the guidelines governing the hearing.

As the APA applies broadly to guidance, decisions, and other actions issued or taken by state and local agencies, it is not uncommon for specific statutes to include an APA

exemption. For example guidelines related to the administration of grant programs are commonly exempt from the APA. Additionally, situations of great urgency can be subject to an emergency rulemaking process, which includes many of the standard rulemaking requirements but allows a rulemaking to be completed in an expedited fashion but subjects the emergency regulations to expiration.

This bill creates a new state committee vested with the ability to supersede local land-use decisions and to substitute the judgement of local elected officials with its own. While this bill does not expand the scope of the HAA or establish a new violation, it creates a new administrative authority capable of taking significant punitive action against local agencies. Agencies with substantially less drastic enforcement authority (e.g., fines of no more than \$1,000 per violation) are subject to the APA for both their rulemaking detailing violations, and hearings governing appeals of those violations. The APA ensures due process in administrative proceedings of great consequence. The Committee may wish to consider whether it is appropriate to exempt such significant penalties levied by a newly created and untested state entity from the due process protections afforded by the APA.

- 6) **Additional Policy Considerations.** In addition to the items raised above, the committee may wish to consider the following:
- a) As currently structured, it is unclear how the HAC would take up a hearing in the event one of the HAC members has a conflict of interest (e.g., the city or county representative on the committee is a member of a council or board with a decision before the committee). The Committee may wish to consider establishing a process for alternate or rotating members to serve on the HAC in such instances;
  - b) The bill currently restates several sections of the HAA, and several stakeholders have interpreted the language as expanding the scope of the HAA. In order to avoid confusion, the Committee may wish to amend the bill to specifically cross-reference relevant aspects of the HAA;
  - c) The bill currently allows an applicant to file an appeal within 45 days. The Committee may wish to consider if this timing should be aligned with time limits in other statutes that impact land-use and appeals of local decisions, such as CEQA (30 days);
  - d) The bill requires all members of a council or board of a local agency subject to an appeal to certify certain actions within 10 days in order to participate in a hearing. The Committee may wish to consider if this requirement can be delegated to city or county staff rather than requiring signatures of all elected members of a local governing body; and,
  - e) The bill requires hearings to be held within 30 days of the filing. The Committee may wish to consider if this timeframe may be too short to arrange a hearing involving at least three distinct parties (applicant, hearing panel, and local agency).

- 7) **Committee Amendments.** In order to address the considerations noted above the Committee may wish to consider the following amendments:
- a) Subject the hearings of the HAC to the APA;
  - b) Allow the initial regulations to be adopted as emergency regulations and be valid for a period of two years, at which point subsequent regulations must be adopted pursuant to the normal APA rulemaking process;
  - c) Expand the HAC to include a total of eight members, to avoid conflicts of interest and hear appeals on a rotating basis. Specifically, in addition to the two ex-officio members, establish the following composition of the HAC:
    - i) One member of a city council or county board of supervisors from a jurisdiction located in a county with a population of more than 250,000;
    - ii) One member of a city council or county board of supervisors from a jurisdiction located in a county with a population of less than 250,000;
    - iii) Two members with extensive experience in the development of affordable housing; and,
    - iv) Two at-large members.
  - d) Require each appeal to be heard by a panel of five committee members, and establish that each hearing panel shall include the two ex-officio members, or their designee, and one member from each of the other categories (local agency, affordable housing developer, and at-large member);
  - e) Remove duplicative language restating the HAA and replace with cross-references to existing law;
  - f) Require an applicant to file an appeal within 30 days of a decision by a local agency;
  - g) Replace requirements for council members and board members subject to an appeal to certify that their initial denial was lawful within 10 days of notice of an appeal with a requirement that a city or county notify the committee of its intent to contest an appeal within 10 days;
  - h) Require the HAC to schedule a hearing no more than 60 days from the filing date unless all parties to the hearing agree to a later date;
  - i) Make clarifying changes regarding the issuance of a decision by the HAC; and,
  - j) Align the standards of review with existing standards embedded in the HAA.
- 8) **Arguments in Support.** The California Apartment Association writes in support, “AB 989 creates a state Housing Accountability Committee to adjudicate violations of the HAA and gives it the authority to overturn denials or conditions of approval that are not consistent with the Act. This provides a quicker, less expensive, less confrontational, and more consistent alternative to enforcing state housing laws in court. Massachusetts has a similar appeals



committee authorized by Chapter 40B, which has been successful in balancing the need for affordable housing with legitimate local concerns and, ultimately, increasing the development of affordable homes. In Massachusetts, the mere existence of the appeal option has resulted in localities being more willing to work with developers to find a path forward lest the city or county lose local control.”

- 9) **Arguments in Opposition.** The League of California Cities writes in opposition, “We are cognizant of the time it takes to resolve a dispute through the courts. The HAA addresses this issue in Section 65589.5(m) and (n). Adding a hearing by the Executive Branch of the State Government to the process of resolving the dispute will not get housing built faster. In fact, doing so will only slow development, increasing conflict and add time to the process. AB 989 will do nothing to bridge the gap between the time a city or county approves a housing project and when a developer actually begins construction.”
- 10) **Double-Referral.** This bill was heard in the Housing and Community Development Committee, where it passed on a 6-0 vote on April 15, 2021.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

California Apartment Association [SPONSOR]  
 California Housing Partnership Corporation [SPONSOR]  
 Abundant Housing LA  
 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  
 Merritt Community Capital Corporation  
 Non-profit Housing Association of Northern California  
 Office of Sacramento Mayor Darrell Steinberg  
 Sacramento Housing Alliance  
 San Diego Housing Federation  
 Southern California Rental Housing Association  
 Sv@home Action Fund

### **Oppose Unless Amended**

American Planning Association, California Chapter

### **Opposition**

California Cities for Local Control  
 California State Association of Counties  
 City of Moorpark  
 League of California Cities  
 New Livable California Db a Livable California

Rural County Representatives of California  
Urban Counties of California

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