
SENATE COMMITTEE ON APPROPRIATIONS

Senator Anthony Portantino, Chair
2021 - 2022 Regular Session

AB 989 (Gabriel) - Housing Accountability Act: appeals: Office of Housing Appeals

Version: August 18, 2021

Policy Vote: GOV. & F. 5 - 0, HOUSING 6
- 0

Urgency: No

Mandate: Yes

Hearing Date: August 23, 2021

Consultant: Mark McKenzie

Bill Summary: AB 989 would, until January 1, 2029, establish an Office of Housing Appeals (OHA) in the Department of Housing and Community Development (HCD), and authorize a developer to appeal a local agency's decision that resulted in the denial of a specified housing development project or subjected the project to conditions in violation of the Housing Accountability Act (HAA).

Fiscal Impact:

- HCD estimates ongoing costs of approximately \$3.7 million annually (General Fund) for 20.0 PY to establish and staff the new OHA, including 9 proposed administrative law judge (ALJ) positions for the housing appeals panels, and 2.0 PY of legal staff within the existing Legal Affairs Division. Actual costs would depend upon the number of appeals received by the OHA. Some costs would be partially offset by fees the OHA would charge for conducting hearings, but fee revenues are not likely to be sufficiently high to cover OHA costs. See staff comments for a discussion of estimated costs.
- Unknown local costs for cities and counties to participate in OHA proceedings in defense of local decisions on housing development projects. Local costs are not state-reimbursable because local agencies have the authority to levy service charges, fees, or assessments sufficient to cover their costs.
- Unknown potential court cost savings, to the extent developers appeal local decisions to the OHA in lieu of filing a lawsuit to compel compliance with the HAA. Staff notes that any savings would be indirect since the courts are not funded on a workload basis.

Background: Existing law, 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. Specifically, the HAA provides that when a proposed housing 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 or conditioning of the project. A project is deemed consistent, compliant, and in conformity with applicable standards if there is substantial

evidence that would allow a reasonable person to conclude that the project is consistent, compliant, or in conformity. The HAA also generally puts the burden of proof on the local agency to demonstrate that its decisions meet the HAA's requirements. For affordable housing projects, the HAA prohibits local agencies from denying or conditioning affordable housing projects or emergency shelters in a manner that renders the affordable units infeasible, even if the project does not comply with all objective standards, unless it makes a specified finding.

The HAA allows a project applicant, a person who would be eligible to reside in the proposed development, or a housing organization, as defined, to bring an action to enforce the HAA. If a court finds a local agency to be in violation of the HAA, it may issue an order or judgment compelling compliance 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 in violation 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. Litigants supporting affordable housing projects can also recover their attorney's fees.

Existing law, as enacted by AB 72 (Santiago, 2017), provides HCD with 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. HCD must notify the local government of a violation of law, and the department may also refer a violation to the Office of the Attorney General if it finds that the city has violated the law by acting contrary to its housing element, or that any city or county has taken an action in violation of specified housing laws, including the HAA.

Proposed Law: AB 989 would, until January 1, 2029, do the following:

- Establish the OHA within HCD to review housing development projects that are alleged to have been denied or subjected to conditions in violation of the HAA. The Director of HCD would administer and direct the day-to-day operations of the OHA, as specified, but must not direct, oversee, supervise, or be otherwise involved in the decision-making process of the housing appeals panels.
- Require the OHA to include housing appeals panels, and require each hearing to be conducted by a panel of three ALJs with knowledge and experience regarding the operation of the HAA that are randomly assigned to an appeal hearing.
- Authorize HCD to adopt emergency regulations to implement the bill that would be operational for two years, and to request approval from the Office of Administrative Law to amend the regulations, as specified.
- Authorize a project applicant to appeal a decision by a local agency that the applicant alleges to be in violation of the HAA to a housing appeal panel, and requires the applicant, within 30 days of the agency's final decision on the project, to file a specified written notice of intent with the local agency that the applicant intends to file an appeal.
- Provide that, within 30 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 OHA. If the local agency revises conditions, or imposes new conditions on the project, the applicant may allege that they are also in violation of the HAA for purposes of the appeal.

- Require the applicant to file an appeal between 30 and 60 days following the delivery of the notice of intent to appeal, and to notify the local agency of the filing on the same day it is submitted. The local agency must transmit a copy of its 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.
- Require the OHA, if the agency indicates it wishes to contest the appeal, to schedule an appeal hearing within 15 days, and require the hearing to take place between 30 and 45 days after the local agency receives the original notice, as specified, unless the parties agree to a later date.
- Require the applicant and local agency, if they reach a settlement prior to the panel rendering a decision, to notify the OHA of the settlement, and the OHA would take no further action.
- Require the panel to render a written decision by majority vote within 14 days following an appeal hearing, and make the decision available to the public and post it on the OHA website. If the panel finds that the local agency improperly disapproved of the housing development, the panel must vacate the decision and direct the local agency to issue necessary permits and approvals within 30 days. If the panel finds that the agency improperly imposed conditions on the project, the panel must identify those specific conditions and order their removal or modification within 30 days and issue any necessary approval, as specified.
- Specify that the decision of the panel is subject to review by the superior court, except the court must review the decision *ne novo*.
- Require the local agency to carry out the orders of the OHA within 30 days of its entry, unless judicial review is sought within that period. If judicial proceedings are not commenced within that timeframe, the order of the OHA shall be deemed the action of the local agency, unless the applicant agrees to a different decision or order, as specified.
- Authorize a court, to facilitate resolution of related claims, to stay any court proceeding related to an appeal filed with the OHA, a proceeding brought by a different plaintiff related to the same project, or any other proceeding concerning a proposed housing development under review by the OHA.
- Authorize HCD to charge a fee to an applicant in an amount not to exceed the reasonable cost to provide the hearing. If the OHA orders approval of the project, or modifies or removes any conditions or requirements imposed on the applicant, the local agency must reimburse the applicant for the hearing fee.
- Prohibit an applicant from bringing an action in court to enforce the HAA prior to the final decision of the OHA, except as provided:
 - If the applicant and local agency certify in good faith that the OHA is unlikely to resolve any alleged violations of the HAA.
 - If the local agency has failed to adopt a compliant housing element, failed to submit specified annual housing progress reports, or has been found by a court to have violated specified state housing laws within the preceding five years, including the HAA.

Related Legislation: SB 744 (Dunn), which was approved by the Senate and never heard in the Assembly in 2004, would have established a state Housing Accountability Committee within HCD, and allowed developers to appeal local government decisions that result in the denial of a project or conditions that render the project infeasible.

Staff Comments: This bill would require HCD to establish the new statewide OHA to review projects denied or modified by local agencies in a manner that allegedly violates the HAA. HCD estimates a need for 20.0 new positions for the OHA that would need to be isolated from current enforcement and accountability matters to avoid potential conflicts, and 2.0 additional legal staff positions within the Housing Policy Enforcement unit to evaluate and potentially intervene on HCD's behalf in cases before the housing appeals panels. HCD indicates that the following 20.0 positions would be requested to establish, operate, and administer the new OHA:

- 1.0 PY Presiding Administrative Law Judge
- 8.0 PY Administrative Law Judge III
- 1.0 PY Staff Services Manager I
- 3.0 PY Staff Services Analyst
- 1.0 PY Associate Governmental Programs Analyst
- 1.0 PY Legal Support Supervisor I
- 3.0 PY Legal Typists
- 2.0 PY Office Technicians

HCD estimates total state operations costs of approximately \$3.7 million annually for the 22.0 positions, but would likely incur additional costs for IT equipment and to provide hearing rooms to convene appeals panel hearings. The OHA costs and positions noted here assume approximately 30 appeals cases annually and that the workload will require two appeals panels to operate throughout the year. While each panel is comprised of three ALJs, the staffing levels noted here include position authority for two additional ALJs to accommodate for any vacancies and turnover and ensure proceedings can still occur should a judge be unable to serve in a particular case due to a conflict of interest. Actual staffing levels and costs could fluctuate, depending on caseload. In addition, the bill authorizes the OHA to charge a reasonable application fee for conducting hearings. Fee revenues would partially offset costs, but are unlikely to be set at a level that is sufficient to fully cover the costs of staffing and resources necessary to operate the OHA.

The 2021-22 Budget includes an augmentation for HCD in the amount of \$4.3 million in state operations funding for 16.0 ongoing positions to assist local jurisdictions in housing element and housing law compliance. According to the budget change proposal (BCP) submitted with the Governor's January budget proposal:

“...HCD's assistance and proactive enforcement activities can yield a significant return on the state's investment. Helping local governments comply with state housing laws, especially at the stage where housing developers are seeking project level approvals, is among the fastest ways the state can increase housing production. There are many tactics that local governments (both their elected officials and their residents) take to stall or block housing development, and when HCD can provide technical assistance about their obligations under State

Housing Law, proposed projects are more likely to get approved; often without escalating enforcement action to the Attorney General.”

The BCP also includes the following justification for the augmentation:

“While the state has undertaken several measures to boost housing production, increasing HCD’s assistance and proactive enforcement efforts will help bolster more and faster housing production. Local governments may be unaware or resistant to responsibilities under state planning law due to various factors. As a result, developments can be denied, delayed, or modified so that less housing will be available to Californians. More projects may be approved if local governments can look to HCD to provide third-party assistance for their actions or inactions.”

Staff notes that the recently approved budget actions appear to share the goals of this bill by enhancing enforcement efforts, increasing project approvals, and producing additional housing units in this time of crisis.

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