
THIRD READING

Bill No: AB 989
Author: Gabriel (D), et al.
Amended: 8/18/21 in Senate
Vote: 21

SENATE GOVERNANCE & FIN. COMMITTEE: 5-0, 7/1/21
AYES: McGuire, Nielsen, Durazo, Hertzberg, Wiener

SENATE HOUSING COMMITTEE: 6-0, 7/8/21
AYES: Cortese, Caballero, Eggman, McGuire, Skinner, Wieckowski
NO VOTE RECORDED: Bates, Ochoa Bogh, Umberg

SENATE APPROPRIATIONS COMMITTEE: 5-2, 8/26/21
AYES: Portantino, Bradford, Kamlager, Laird, McGuire
NOES: Bates, Jones

ASSEMBLY FLOOR: 66-9, 6/1/21 - See last page for vote

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

SOURCE: California Apartment Association
California Housing Partnership

DIGEST: This bill establishes, until January 1, 2029, an Office of Housing Appeals (OHA) within the Department of Housing and Community Development (HCD).

ANALYSIS:

Existing law:

- 1) Establishes the Housing Accountability Act (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.
- 4) Establishes the Administrative Procedures Act (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.

This bill:

- 1) Establishes, until January 1, 2029, within HCD an OHA to review affordable housing development projects that are alleged to have been denied or subjected to conditions in violation of the HAA, as follows:
 - a) Establishes housing appeals panels within the office, each comprising three administrative law judges (ALJs) that are randomly assigned to an appeal hearing and possess specified qualifications.
- 2) Requires the HCD director to administer the operations of the office, as specified, including:
 - a) Requires HCD to provide the office adequate space, staffing, and assistance.

- b) Allows HCD to adopt regulations to implement the bill, as specified.
 - c) Prohibits the HCD director from directing, overseeing, supervising, or being otherwise involved in the decision making process of the housing appeals panels.
- 3) Allows an applicant who proposes an affordable housing development project to appeal to the office a local agency decision that the applicant believes violates the HAA, as follows:
- a) Within 30 days after the date of a final decision by the local agency, an applicant that seeks to appeal a decision by a local agency to the office must file a written notice of intent with the local agency that the applicant intends to file an appeal, containing a description of the project and the specific decision the applicant intends to appeal, including the specific denial or list of conditions imposed in violation of the HAA.
 - b) If, within 30 days of receipt of the notice of intent, the local agency rescinds its action to deny or impose conditions 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 regarding the denial or conditions identified in the notice of intent. If the local agency revises the imposed conditions or imposes any new conditions on the project, an applicant may allege that the revised or new conditions are in violation of the HAA in an appeal.
 - c) An applicant shall file an appeal to the office no sooner than 30 days, and no later than 60 days, following the delivery of a notice of intent. The applicant shall notify the local agency of the filing of the appeal on the same day that the appeal is filed with the office.
 - d) The local agency shall, within 10 days of the receipt of the notification of appeal, transmit a copy of its decision and its reasoning for that decision to the office, and notify the office if it will contest the appeal.
 - e) If the local agency transmits a copy of its decision and reasoning within 10 days, the office shall schedule an appeal hearing within 15 days. The hearing shall take place no sooner than 30 days, and no later than 45 days, after the local agency receives the initial notice required by this paragraph, unless all parties to the hearing agree to a later date.
 - f) Following the appeal hearing, the panel shall render a written decision within 14 days based upon a majority vote of the panel. If the panel finds

that the local agency disapproved an affordable housing development in violation of the HAA, or if the local agency does not respond to the notice of appeal, the office shall vacate the decision and shall direct the local agency to issue any necessary approval or permit for the development to the applicant within 30 days. If the panel finds that the local agency conditioned its approval in a manner that violates the HAA, the panel shall identify the conditions or requirements in its decision and shall order the local agency to modify or remove any such conditions or requirements within 30 days and to issue any necessary approval.

- g) Written decisions shall be posted immediately on the office's internet website and be made available to the public.
 - h) If the applicant and the local agency reach a settlement on the issues contained in an appeal filed with the office before the panel renders a written decision, the applicant and local agency shall notify the office of the settlement and the office shall take no further action on the appeal.
- 4) Requires the local agency to carry out the order of the office within 30 days of a decision, unless judicial review is sought or if the applicant consents to a different action by the local agency.
 - 5) Allows the applicant to enforce the office's decision in court and entitles the applicant to attorney's fees and costs if it prevails in an enforcement action.
 - 6) Allows the court to impose fines on the local agency consistent with existing fines allowed under the HAA.
 - 7) Requires the burdens of proof and standards of review for the appeals to be those established under the HAA.
 - 8) Requires, generally, an applicant to appeal to the OHA before bringing an action in court to enforce the provisions of the HAA, except as follows:
 - a) An applicant may bring an action to enforce the HAA if the local agency and the applicant mutually agree that the office process is unlikely to facilitate a resolution; and
 - b) An applicant cannot use the office appeals process and must file an action in court to enforce the HAA if the local agency does not have an applicable council of governments, as specified, and meets any of the following conditions:

- i) The local agency has failed to adopt a housing element that the HCD has determined to be in substantial compliance.
 - ii) The local agency has failed to submit an annual progress report to HCD in three or more of the preceding five years.
 - iii) The local agency has been found by a court to have violated state housing law within the preceding five years, including, but not limited to, specified housing laws.
- 9) Provides that the statute of limitations for applicants enjoined from bringing an action shall not begin until the date of the final decision of the office for either:
- a) Any claim under the HAA; or
 - b) Any claim based on any other section of law relating to an action of the local agency on the housing project at issue.
- 10) Specifies that judicial review of the panel's decision must be de novo and allows a court, in addition to the courts discretion to stay a proceeding generally, to stay any court proceeding related to:
- a) An appeal filed with the office;
 - b) A proceeding initiated by a different plaintiff alleging a violation of the HAA on the same project under review by the office;
 - c) Any other proceeding concerning a proposed housing project under review with the office.
- 11) Allows the department to charge a fee to the applicant for the reasonable cost to the office, and requires a local agency to reimburse the applicant for the fee if the applicant prevails.
- 12) Includes other technical provisions and findings and declarations to support its purposes.

Background

The California Constitution allows cities and counties to “make and enforce within its limits, all local, police, sanitary and other ordinances and regulations not in conflict with general laws.” It is from this fundamental power (commonly called the police power) that cities and counties derive their authority to regulate behavior

to preserve the health, safety, and welfare of the public—including land use authority.

Local governments use their police power to enact zoning ordinances that establish the types of land uses that are allowed or authorized in an area. Zoning ordinances also contain provisions to physically shape development and impose other requirements, such as setting maximum heights and densities for housing units, minimum numbers of required parking spaces, setbacks, and lot coverage ratios. These ordinances can also include conditions on development to address aesthetics, community impacts, or other particular site-specific considerations.

Denials or conditions under the HAA. The HAA limits the ability of local governments to deny or condition projects in a manner that renders them economically infeasible. 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.

Litigation is the current means by which a developer may compel compliance with the HAA. Some housing advocates want the Legislature to provide an alternative venue for resolving alleged violations of the HAA.

Comments

- 1) *Purpose of the bill.* 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 Illinois,

Massachusetts, Oregon, and Rhode Island. 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) *Better, faster, stronger?* Developers can currently ask a court to review local agency decisions that they feel violate the HAA, similar to the way other laws are enforced. AB 989 allows a state agency, rather than the judicial branch, to overturn local land use decisions on the premise that it will accelerate housing decisions and reduce the expense of litigation. However, just making a process administrative doesn’t mean lawyers won’t be involved: applicants and local governments will still need to spend significant time and resources to fight over appeals at the office. Additionally, litigation of the office’s decisions could end up lengthening the development timeline for projects because applicants must use this process prior to going to court, and the court must review those claims *de novo*. Additionally, some housing advocates are concerned that AB 989 weakens the HAA because HAA claims might not be enforceable while the office is being staffed up and because delays while the office appeal process proceeds could hold up related housing claims.

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

According to the Senate Appropriations Committee:

- 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 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.
- 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.

SUPPORT: (Verified 8/27/21)

California Apartment Association (co-source)

California Housing Partnership (co-source)

OPPOSITION: (Verified 8/27/21)

Association of California Cities - Orange County

California Building Industry Association

California Cities for Local Control

California Rural Legal Assistance Foundation, INC.

California State Association of Counties

California YIMBY

Cities of Beverly Hills, Camarillo, Chino Hills, Downey, Fountain Valley, Hidden Hills, Lafayette, Laguna Niguel, Los Altos, Menifee, Moorpark, Newport Beach, Novato, Orinda, Pleasanton, Rancho Palos Verdes, Santa Clarita, Thousand Oaks, and Torrance

County of Humboldt

County of San Bernardino

Greenbelt Alliance

Habitat for Humanity California

Housing Action Coalition

League of California Cities

Livable California

Rural County Representatives of California

South Bay Cities Council of Governments

The Public Interest Law Project

Urban Counties of California

Ventura Council of Governments

Western Center on Law & Poverty, INC.

YIMBY Action

YIMBY Law

ASSEMBLY FLOOR: 66-9, 6/1/21

AYES: Aguiar-Curry, Arambula, Bennett, Berman, Bloom, Bryan, Burke, Calderon, Carrillo, Cervantes, Chau, Chen, Chiu, Cooley, Cooper, Cunningham,

Daly, Fong, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kiley, Lackey, Lee, Levine, Low, Mathis, Mayes, McCarty, Medina, Mullin, Nazarian, O'Donnell, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Stone, Ting, Valladares, Villapudua, Voepel, Waldron, Ward, Akilah Weber, Wicks, Wood, Rendon

NOES: Bigelow, Boerner Horvath, Choi, Megan Dahle, Davies, Flora, Nguyen, Seyarto, Smith

NO VOTE RECORDED: Bauer-Kahan, Maienschein, Muratsuchi, Patterson

Prepared by: Anton Favorini-Csorba / GOV. & F. / (916) 651-4119
8/28/21 11:19:20

**** END ****