SENATE COMMITTEE ON GOVERNANCE AND FINANCE

Senator Mike McGuire, Chair

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HOUSING ACCOUNTABILITY ACT: APPEALS: HOUSING ACCOUNTABILITY COMMITTEE

Establishes a state Housing Accountability Committee (HAC) and allows developers of affordable housing to appeal certain local land use decisions alleged to violate the Housing Accountability Act.

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.

Planning and Zoning Law. State law provides additional powers and duties for cities and counties regarding land use. The Planning and Zoning Law requires every county and city to adopt a general plan that sets out planned uses for all of the area covered by the plan. A general plan must include specified mandatory "elements," including a housing element that establishes the locations and densities of housing, and a land use element that describes the general categories of uses (such as multifamily residential, single family residential, retail commercial, and open space) that are allowed in specific portions of a jurisdiction. Cities' and counties' major land use decisions—including zoning ordinances and other aspects of development permitting—must be consistent with their general plans.

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.

Housing element. A city or county's housing element must identify adequate sites for housing at all income levels—very low, low, moderate, and above moderate income—and must include rental housing, factory-built housing, mobile homes, and emergency shelters. Each local jurisdiction must also ensure that its housing element makes enough sites available to accommodate its share of the regional housing need assessment. Cities and counties must

generally update their housing element every eight years and must identify an adequate number of sites throughout its entire planning period. The Department of Housing and Community Development (HCD) certifies housing elements for compliance with state housing law and may find a local government's housing element out of substantial compliance if HCD determines that the local government takes action inconsistent with its housing element.

Housing Accountability Act. The Legislature has enacted a variety of statutes to facilitate and encourage the provision of housing, particularly affordable housing and housing to support individuals with disabilities or other needs. Among them is the Housing Accountability Act (HAA), enacted in 1982 in response to concerns over a growing rejection of housing development by local governments due to not-in-my-backyard (NIMBY) sentiments among local residents. 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.

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.

The HAA includes stronger prohibitions for affordable housing projects that include either:

- At least 20 percent of the units sold or rented to lower-income households, with monthly housing costs limited to 30 percent of 60 percent of the area median income; or
- 100 percent of the units sold or rented to moderate income households, with monthly housing costs limited to 30 percent of the area median income.

Specifically, 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 one of the following findings, based on a preponderance of the evidence:

- The jurisdiction has a compliant housing element and met or exceeded its share of regional housing need in all income categories;
- 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.

- The denial or conditions are required to comply with state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households.
- The project is inconsistent with the jurisdiction's zoning ordinance and general plan land use designation when the application was deemed complete, and the jurisdiction has a compliant housing element.

Similar provisions of the HAA apply to emergency shelters.

Remedies under the HAA. The HAA allows a project applicant, a person who would be eligible to reside in the proposed development, or an 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 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. Litigants supporting affordable housing projects can also recover their attorney's fees.

HCD enforcement authority. AB 72 (Santiago, 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. For 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 Regional Housing Needs Allocation, HCD could make findings to revoke their original finding of substantial compliance. HCD must also notify the local government of a violation of law. It also can 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 any of the following:

- The HAA;
- No-net-loss-in zoning density law limiting downzoning and density reductions;
- Density Bonus Law; and
- Prohibiting discrimination against affordable housing.

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

Proposed Law

Assembly Bill 989 establishes a state Housing Accountability Committee (HAC) and allows developers of affordable housing to appeal certain local land use decisions they allege violate the HAA. To be eligible for an appeal, a project must qualify as an affordable housing project under

the HAA. AB 989 specifies that in any appeal before the committee, the burdens of proof and standards of review are those established under the HAA.

Committee composition. The Housing Accountability Committee (HAC) consists of eight members, including HCD's director, the director of the Governor's Office of Planning and Research (OPR), and the following members appointed by the Governor and confirmed by the Senate for two-year terms:

- Two members that are members of a board of supervisors or city council, notwithstanding state laws prohibiting holding incompatible offices. This includes one member from a county with a population of less than 250,000 as of January 1, 2019, or any city within that county, and one member from any other city or county;
- Two members with extensive experience in development of affordable housing; and
- Two members of the public.

Members of the committee cannot receive compensation for their service but can be reimbursed for their costs in performing their duties. HCD's director designates a chairperson of the committee and the department must provide space and clerical and other assistance to the committee.

Appeal process. AB 989 allows an applicant who proposes an eligible project and whose application is subject to a decision by a local agency that the applicant alleges violates the HAA can appeal the decision to a five-member panel of the HAC. Both the HCD and OPR directors sit on all panels, along with one member from each of the other categories (developers, local governments, and members of the public). Panelists must be randomly assigned to cases except where there is a conflict of interest or scheduling conflict.

An applicant must file an appeal to the HAC within 30 days after the date of the decision by the local agency. The HAC must notify the local agency of the filing of an appeal within 10 days, and the local agency must, within 10 days of the receipt of that notice, transmit a copy of its decision and its reasoning for that decision to the committee, and notify the committee if it will contest the appeal. If the local agency fails to transmit a copy of its decision and reasoning within 10 days, the committee vacates the decision of the local agency and directs the local agency to issue any necessary approval for the development to the applicant within 30 days.

However, if the local agency transmits a copy of its decision and reasoning within 10 days, the HAC must schedule an appeal hearing within 30 days. The hearing must take place no more than 60 days after the local agency receives the initial notice, unless all parties to the hearing agree to a later date. Following the appeal hearing, the panel must render a written decision, based upon a majority vote, as follows:

- If the panel finds that the local agency disapproved the project in violation of the HAA, it must vacate the decision and direct the local agency to issue any necessary approval or permit for the development to the applicant within 30 days of the panel's decision.
- If the panel finds that the local agency conditioned its approval in a manner that violates the HAA, the panel must identify the conditions or requirements that violate the HAA in its decision and order the local agency to modify or remove any such conditions or requirements within 30 days, and to issue any necessary approval.

A local agency must carry out the order of the HAC within 30 days. If it doesn't, the order of the HAC is deemed to be the action of the local agency unless the applicant agrees to a different action by the local agency. The applicant may enforce HAC's orders of in court, and if the applicant prevails, the court can grant attorney's fees to the applicant and fine the local agency consistent with the HAA's penalties.

Other provisions. Except where specifically stated otherwise, the panel must consider appeals pursuant to the administrative adjudication provisions of the Administrative Procedure Act. HCD may adopt regulations to implement the bill, and the initial adoption of regulations can be emergency regulations valid for two years, as specified. HCD can impose fees on an applicant to recover the reasonable cost of the committee to provide the hearing. The local agency must reimburse the applicant if the committee rules in the applicant's favor.

AB 989 defines its terms and includes findings and declarations to support its purposes.

State Revenue Impact

No estimate.

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. Home rule. Local governments must balance competing priorities when considering approval of, and determining the conditions attached to, affordable housing developments. Cities must look at the potential impacts on the community that result from these units: impaired neighborhood character, spillover effects on nearby homes and businesses due to inadequate parking, increased traffic, and environmental impacts. Local officials already face powerful incentives to make these decisions in good faith because they know that if their decisions aren't firmly supported by the evidence and compliant with the HAA, courts must impose stiff penalties. But sometimes disputes over local ordinances or development conditions arise that developers feel violate the HAA, and developers can currently ask a court to review, similar to other laws. 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. Supporters of the bill argue that similar appeals panels have accelerated affordable housing development in other states and note that when Massachusetts established a similar appeals panel, only about one-quarter of local land use decisions were appealed, so they say that relatively few local decisions will be affected and that the threat is more important to ensuring good faith decisions than the actual appeal. They also state that an administrative process may take less time and cost less money than court. 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 HAC. Additionally, local governments may be likely to appeal the HAC's decisions to court because they must already be very sure of the legality of their actions or face significant consequences. Litigation of HAC decisions could end up lengthening the development timeline for projects. AB 989 would set a precedent by allowing developers to appeal local agency land use decisions to a state-created panel, To provide an opportunity to review the effects of the bill on housing production and local government decisions, the Committee may wish to consider amending AB 989 to contain a sunset.

3. Who's next? AB 989 allows affordable housing developers to ask a state agency to overturn local decisions that deny or render infeasible their projects. Implicit in this bill is the policy that affordable housing merits special consideration because it provides public benefits: housing individuals that otherwise might not be able to afford it. While AB 989 is currently limited to affordable housing projects, the next step is to extend the ability to appeal decisions on market-rate projects to the HAC, even though these projects do not provide the clear public benefits that affordable housing projects do. AB 989 sets a precedent for future legislation to further erode local land use decision-making without the promise of more affordable housing.

4. Who decides? The HAA is a complicated statute, running almost 6,000 words, many of which have been picked over numerous times. Embedded in the HAA are a variety of legal terms and standards, such as "preponderance of the evidence," "reasonable person," and "bad faith." Land use lawyers can't even agree on whether the HAA applies to single-unit projects or ministerial projects. The HAA also requires fact-specific determinations where disputes may turn on minutiae of development projects. AB 989 proposes to grant the power to resolve HAA disputes to a body comprising political appointees that may have no legal training or technical knowledge of either the development process or of local zoning decisions. Furthermore, the composition of the HAC may raise concerns about legitimacy of the appeals process. Local agencies are concerned that HCD, OPR, local officials, and housing developers may each have certain perspectives on housing that they look to advance through rulings. As a result, they worry that the HAC will make decisions based on overarching policy considerations regarding the development of housing, even if their decisions are couched in the terms of the HAA. If so, it is unlikely to promulgate rulings that can be safely used as precedent to guide future local agency actions. Other state agencies that hear administrative appeals often employ administrative law judges, including the Public Utilities Commission, the Office of Tax Appeals, the State Personnel Board, and various licensing entities. These judges are designed to be independent of the agency and are tasked with applying a body of law to a specific set of facts. The Committee may wish to consider amending AB 989 to delete the committee and instead establish panels of administrative law judges within HCD to hear appeals under AB 989 that must meet qualifications for experience, expertise, and requirements to maintain independence.

5. Time to cure. AB 989 establishes a rapid process for appealing local decisions, for legitimate reasons: the bill is intended to streamline the appeals process and reduce the time it takes to get affordable housing built. In doing so, however, it provides local agencies limited time to revisit their decisions before landing at an appeals hearing. The Committee may wish to consider amending AB 989 to require an applicant to send a notice to the local agency that they intend to appeal and to provide the local agency with additional time to revisit their action before an appeal may actually be filed.

6. Getting exhausted. In the land use arena, claimants regarding local decisions must generally exhaust all their administrative remedies prior to litigating. For example, a developer must appeal decisions to the planning commission or the legislative body of the local agency, as applicable, to receive a "final decision" prior to bringing action in court. According to Curtin's California Land Use and Planning Law, "a court has no power to make a land use decision in the first instance; it can act only to review a decision made by a local agency. Accordingly, a court generally cannot consider a claim regarding a land use decision unless the petitioner presented that claim to the agency and pursued all available appeals before bringing suit. This requirement is called the exhaustion of administrative remedies doctrine… However, court decisions have differed as to which administrative remedies must be exhausted or what constitutes a 'remedy.'" AB 989 offers an administrative alternative to litigation under the HAA. However, the bill provides that the remedies it offers are in addition to any other remedy provided by law. This provision allows litigants of local agency decisions to choose to appeal to court or to the HAC, effectively allowing a developer to choose the venue for the challenge that they consider most advantageous. Additionally, the bill allows an applicant to appeal to the committee within 30 days after the date of decision by the local agency. However, it is unclear whether this is a "final decision" by the local agency or if a developer could shortcut appeals at the local agency level. To more closely adhere to the principle of exhaustion of administrative remedies, the Committee may wish to consider amending AB 989 to (1) allow appeals to the HAC only after receiving a "final decision" by the local agency, (2) require applicants to receive a decision from the HAC prior to bringing an action in court, and (3) clarify the legal procedures for challenging the HAC's decisions.

7. Double-referred. The Senate Rules Committee has ordered a triple referral of AB 989: first to the Senate Governance and Finance Committee to hear issues of local authority; second to the Senate Housing Committee; and finally to the Senate Judiciary Committee. However, the referral to the Senate Judiciary Committee was rescinded due to the ongoing COVID-19 pandemic.

8. Charter city. The California Constitution allows cities that adopt charters to control their own "municipal affairs." In all other matters, charter cities must follow the general, statewide laws. Because the Constitution doesn't define "municipal affairs," the courts determine whether a topic is a municipal affair or whether it's an issue of statewide concern. AB 989 says that its statutory provisions apply to charter cities. To support this assertion, the bill includes a legislative finding that it addresses a matter of statewide concern but does not include any reasoning behind the statement. The Committee may wish to consider amending AB 989 to state that expediting the construction of affordable housing is a matter of statewide concern.

9. Mandate. The California Constitution requires the state to reimburse local governments for the costs of new or expanded state mandated local programs. Because AB 989 adds to the duties of local officials, Legislative Counsel says that the bill imposes a new state mandate. AB 989

disclaims the state's responsibility for providing reimbursement by citing local governments' authority to charge for the costs of implementing the bill's provisions.

10. Prior legislation. SB 1410 (Gonzalez, 2020) would have established a similar Housing Accountability Committee. Key differences between SB 1410 and AB 989 include that AB 1410 would have applied to all projects of ten units or larger, including market rate projects, and SB 1410's committee comprised five members and was housed within HCD. The author amended SB 1410 to remove these provisions prior to being heard in any committees. SB 744 (Dunn, 2003) was similar to SB 1410 but applied only to specified affordable projects. SB 744 died in the Assembly Local Government Committee.

Assembly Actions

Assembly Housing and Community Development Committee:	6-0
Assembly Local Government Committee:	8-0
Assembly Appropriations Committee:	13-3
Assembly Floor:	66-9

Support and Opposition (6/28/21)

Support: California Apartment Association (Co-Sponsor); California Housing Partnership (Co-Sponsor); Abundant Housing LA; Bay Area Council; Bridge Housing Corporation; California Association of Realtors; California Building Industry Association; California Coalition for Rural Housing; California Council for Affordable Housing; California Housing Consortium; Corporation for Supportive Housing; Danco Communities; Eah Housing; Eden Housing; House Farm Workers!; Housing Authority of The City of San Buenaventura; Housing California; Linc Housing; Los Angeles Area Chamber of Commerce; Merritt Community Capital Corporation; Midpen Housing Corporation; Natural Resources Defense Council; Non-profit Housing Association of Northern California; Office of Sacramento Mayor Darrell Steinberg; Pacific Housing, INC.; People's Self-help Housing Corporation; Rural Community Assistance Corporation; Sacramento Housing Alliance; San Diego Housing Federation; Southern California Association of Non-profit Housing; Southern California Rental Housing Association; St. Paul's Senior Homes and Services; Sv@home Action Fund; The San Francisco Housing Accelerator Fund; United Way Bay Area; Valley Industry & Commerce Association; Ventura Farm Worker Housing Committee; Wakeland Housing and Development Corporation

Opposition: California Cities for Local Control; California State Association of Counties; City of Camarillo; City of Chino Hills; City of Fountain Valley; City of Lafayette; City of Laguna Niguel; City of Los Altos; City of Menifee; City of Moorpark; City of Novato; City of Rancho Palos Verdes; City of Santa Clarita; City of Thousand Oaks; City of Torrance; County of Humboldt; League of California Cities; Livable California; Rural County Representatives of California; South Bay Cities Council of Governments; Urban Counties of California; Ventura Council of Governments

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