Date of Hearing: July 3, 2019

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT
David Chiu, Chair
SB 592 (Wiener) – As Amended June 13, 2019

SENATE VOTE: 38-0

SUBJECT: Housing Accountability Act

SUMMARY: Makes various changes to the Housing Accountability Act (HAA). Specifically, **this bill**:

1) Applies the HAA to any land use decision by a local agency including any including, but not limited to, a ministerial or use by right decision or a discretionary approval.

2) Adds the following to the definition of "housing development project":

   a) A single unit;

   b) An accessory dwelling unit (ADU); and,

   c) The addition of one or more bedrooms to an existing residential unit.

3) Defines "conditions that have the same effect or impact on the ability of the housing development project to provide housing" including but are not limited it:

   a) A reduction in the number of bedrooms or normal residential features such as the living room or kitchen; and

   b) The substantial impairment of the housing development project's economic viability.

4) Provides that when a local housing development project complies with "applicable" objective general plan, zoning and subdivision standards and criteria and the project is denied, a general plan, zoning or subdivision standard or criterion is not "applicable" if its applicability to a housing development project is discretionary or if the project could be approved without the standard or criterion being met.

5) Provides that if an applicant resubmits an application to a local agency after it has been determined to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement or other similar provision, then the local agency is required to provide an applicant written documentation explaining why the housing development is inconsistent, not in compliance or not in conformity within 30 days of the resubmittal.

6) Authorizes a development applicant to seek compensatory damages in an HAA lawsuit.

7) Clarifies that a housing organization can be awarded attorney's fees in an HAA lawsuit.

8) Provides that an application under the Permit Streamlining Act is deemed complete at the time the application is submitted to the local agency.

EXISTING LAW:

1) Defines "housing development project" to mean a use consisting of any of the following:

    a) Residential units only.

    b) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use.

    c) Transitional housing or supportive housing.

2) Defines "disapprove the development project" to include any instance in which a local agency either:

    a) Votes on a proposed housing development project and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit; or

    b) Fails to comply with the required time period for approval or disapproval required by law.

3) Defines "lower density" includes any conditions that have the same effect or impact on the ability of the project to provide housing.

4) Defines "housing for very low-, low-, or moderate-income households" as either:

    a) At least 20% of the total units shall be sold or rented to lower-income households; or

    b) 100% of the units shall be sold or rented to persons and families of moderate-income or middle-income.

5) Defines "very low-income" as persons and families whose income does not exceed 50% area median income (AMI).

6) Defines "low-income" as persons and families whose income does not exceed 80% AMI.

7) Defines "moderate-income" as persons and families whose income does not exceed 120% of AMI.

8) Defines "above moderate-income" as persons and families whose income exceeds 120% of AMI.

9) Defines "housing organization" as a trade or industry group whose local members are primarily engaged in the construction or management of housing units or a nonprofit organization whose mission includes providing or advocating for increased access to housing for low-income households and have filed written or oral comments with the local agency prior to action on the project. A housing organization may only file an action under the HAA to challenge the disapproval of a housing development by a local agency.

10) Prohibits a local agency from disapproving a proposed housing development project for very low-, low-, or moderate-income households or an emergency shelter, or conditioning approval in a manner that renders the project infeasible for development, unless it makes written findings based upon a preponderance of the evidence in the record, as to one of the following:

    a) The jurisdiction has adopted and revised its housing element as required by law and has met its share of the regional housing need allocation.

    b) The proposed development project or emergency shelter would have a specific, adverse impact upon public health or safety that cannot be mitigated without rendering the development unaffordable or shelter infeasible.

    c) The denial of the proposed development project is required to comply with specific state or federal law and there is no feasible method to comply without rendering the development unaffordable or shelter infeasible.

    d) The development project or emergency shelter is proposed on land that does not have adequate water or waste water facilities, or is zoned for agriculture or resource preservation as specified.

    e) The proposed development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete.

11) Provides that when a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:

    a) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete; and

    b) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to a), above, other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

12) Provides that a change in a zoning ordinance or general plan land use designation subsequent to the date the application was deemed complete shall not constitute a valid basis to disapprove or condition approval of the housing development project or emergency shelter.

13) Provides that, for purposes of the HAA, the receipt of a density bonus shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision, as specified.

14) Requires, if the local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision as specified, the agency to provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity as follows:

    a) Within 30 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains 150 or fewer housing units.

    b) Within 60 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains more than 150 units.

15) Provides that if the local agency fails to provide the documentation described above in 14), the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision.

16) Authorizes the applicant, any person who would be eligible to apply for residency in the proposed development or emergency shelter, or a housing organization to bring an action to enforce the HAA.

17) Specifies that if a jurisdiction denies approval or imposes conditions, including design changes, lower density, or a reduction of the percentage of a lot that may be occupied by a building or structure under the applicable planning and zoning in force at the time the application is deemed complete, that have a substantial adverse effect on the viability or affordability of a housing development for very low-, low-, or moderate-income households and is the subject of a court action which challenges the denial, the burden of proof shall be on the local legislative body.

18) Specifies that in any action taken to challenge the validity of a decision by a jurisdiction to disapprove a project or approve a project upon the condition that it be developed at a lower density, the local government shall bear the burden of proof that its decision has conformed to all of the conditions specified in the HAA.

19) Provides that the court must issue an order of judgment compelling compliance with the HAA within 60 days, if it finds either of the following:

    a) The local agency, in violation of subdivision (d) of the HAA, disapproved a housing development project or conditioned its approval in a manner rendering it infeasible for the development of an emergency shelter, or housing for very low-, low-, or moderate-income households, including farmworker housing, without making the findings required

by the HAA or without making findings supported by a preponderance of the evidence; or

b) The local agency, in violation of subdivision (j) of the HAA, disapproved a housing development project complying with applicable, objective general plan and zoning standards and criteria, or imposed a condition that the project be developed at a lower density, without making the findings required by the HAA or without making findings supported by a preponderance of the evidence.

20) Authorizes the court to issue an order or judgment directing the local agency to approve the housing development project or emergency shelter if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of the HAA.

21) Requires the court, if it finds a violation of the HAA, to award reasonable attorney's fees and costs of suit to the plaintiff or petitioner, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of the HAA.

22) Requires, if the court determines that the local agency has failed to comply with the order or judgment compelling compliance within 60 days, the court to impose fines on a local agency that has violated the HAA.

a) Specifies that the fine shall be in a minimum amount of $10,000 per housing unit in the housing development project on the date the application was deemed complete, as specified.

b) Requires the local agency to deposit any fine levied into a local housing trust fund. Provides that the local agency may elect to instead deposit the fine into the Building Homes and Jobs Fund, or otherwise in the Housing Rehabilitation Local Fund.

c) Requires the court, in determining the amount of fine to impose, to consider the local agency's progress in attaining its target allocation of the regional housing need, as specified, and any prior violations of the HAA.

23) Prohibits fines from being paid out of funds already dedicated to affordable housing, as specified. Requires the local agency to commit and expend the money in the housing trust fund within five years for the sole purpose of financing newly constructed housing units affordable to extremely low-, very low-, or low-income households. After five years, if the funds have not been expended, the money shall revert to the state and be deposited into the Building Homes and Jobs Fund, or otherwise in the Housing Rehabilitation Loan Fund, for the sole purpose of financing newly constructed housing units affordable to extremely low-, very low-, or low-income households.

24) Provides that if any money derived from a fine imposed pursuant to the above provisions is deposited in the Housing Rehabilitation Loan Fund, then that money shall be available only upon appropriation by the Legislature.

25) Requires, if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter, and failed to carry out the court's order or judgment within 60 days, as specified, the court to multiply the fine

specified above by a factor of five. Specifies that "bad faith" includes, but is not limited to, an action that is frivolous or otherwise entirely without merit.

26) Requires a petition to enforce the HAA to be filed and served no later than 90 days from the later of:

   a) The effective date of a decision of the local agency imposing conditions on, disapproving, or any other final action on a housing development project; or,

   b) The expiration of the time periods specified in the Permit Streamlining Act.

27) Authorizes a party to appeal a trial court's judgment or order to the court of appeal pursuant to specified procedures.(Govt. Code Section 65589.5)

FISCAL EFFECT: Unknown.

COMMENTS:

The HAA: The purpose of the HAA, also known as the "Anti-NIMBY Act," is to limit 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. The HAA provides for a judicial remedy that allows a court to issue an order to compel a city to take action on a development project. If a local government fails to comply with a court order to take action on a project then the court can issue fines of 10,000 or more per unit until the local government complies. An applicant, a person who would be eligible to apply for residency in the development or emergency shelter, or a housing organization, may bring an action to enforce the HAA. Many provisions of the HAA are limited to lower-income housing developments. In 2011 the California Court of Appeal in *Honchariw v. County of Stanislaus* (200 Cal.App.4th 1066) held that specified provisions of the HAA apply to all housing projects, not just affordable projects.

When a local agency rejects any housing development project that complies with objective general plan, zoning standards, or design review, or requires that it be developed at a lower density for it to be approved, the decision must be based on written findings supported by a preponderance of the evidence that the development would have a specific, adverse impact on the public health and safety unless the project is developed at a lower density, and there is no way to mitigate the adverse impacts except to reduce the density or disprove the project. A "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact based on objective safety standards, polices, or conditions as they exist on the date the application is deemed complete.

In 2017, the Legislature passed, and the Governor signed, three bills making significant changes to the HAA. Under identical measures, AB 678 (Bocanegra), Chapter 373, Statutes of 2017, and SB 167 (Skinner), Chapter 368, Statutes of 2017, the HAA was strengthened to increase the burden on local jurisdictions when denying a housing project, imposing fines for a violation of the HAA, and expanding judicial remedies for violations of the HAA. AB 1515 (Daly), Chapter 378, Statutes of 2017, changed the standard the court must use in reviewing the denial of a housing development by providing that a project is consistent with local planning and zoning laws if there is substantial evidence that would allow a reasonable person to find it consistent. This could expand the number of housing developments that are afforded the protections of the HAA. AB 3194 (Daly), Chapter 243, Statues of 2018 required approval of certain housing

development projects that are inconsistent with zoning if the jurisdiction has not brought its zoning ordinance into compliance with the general plan

Expansion to of definition of housing development: The HAA defines a housing development project as residential units only, mixed use housing where two-thirds are residential, or transitional and supportive housing. This bill would add ADUs, single family homes, and the addition of one or more bedrooms to an existing residential unit to the types of housing developments protected by the HAA.

The HAA is intended to prevent local governments from applying constraints like lower density that reduce the viability of a development. It's unclear why this protection is needed in the case of a single unit except to maximize the square footage of that single unit – it would not result in more density. Should an individual adding a bedroom to their home have the ability to sue a city under the HAA? ADUs are added to existing lot with a single-family home and there do result in additional density. ADUs are also typically naturally more affordable because they are smaller in size. The committee may wish to consider deleting single unit and the addition of a bedroom to an existing residential unit to the definition of housing development but leaving in ADUs.

Ministerial approvals: Local governments approve many permits ministerally, including building permits, solar permits, demolition permits, grading permits. This bill would extend the HAA to all ministerial approvals. The author has indicated the intent of the bill is to extend the protections of the HAA to housing developments that are approved via a ministerial process. Over the last few years, the Legislature has created several ministerial approval options for developments. Developers can apply for ministerial approval for housing developments that include a percentage of affordable housing, pay prevailing wage, and are not located on sensitive sites through SB 35 (Wiener), Chapter 366, Statutes of 2017. SB 35 requires local governments to respond to an application for streamlining within a specified period of time. AB 2162 (Chiu), Chapter 753, Statutes of 2018 creates a by right process for affordable housing developments that include a percentage of supportive housing units.

This bill goes beyond ministerial approvals for housing developments and applies the HAA to all ministerial approvals of a local government. This change would impact many actions of a local government and could result in local governments making those actions discretionary. The committee may wish to consider if this change is necessary since ministerial processes already have no or very limited discretion. The committee may wish to narrow the bill to only apply to housing developments that are approved through a ministerial process and not to every ministerial approval by a local government.

Conditions that impair a development: If a local government applies conditions including design changes, lower density, or a reduction in the percentage of lot that has a substantial adverse effect on the viability or affordability of a housing development for very low, low or moderate income housing and the denial is challenged in court, the burden of proof is on the local government to prove why the conditions were applied or the project was denied. This bill would define a "conditions that have the same effect or impact on the ability of the housing development project to provide housing" as reduction in the number of bedrooms, living rooms, or kitchens and the substantial impairment of the housing development project's economic viability. "Substantial impairment of the housing development project's economic viability" is not defined in the bill and there is not metrics for the court to determine impairment of economic viability. It's unclear what economic viability means and how the court would assess it.

The statute already requires that if a local government denies or adds conditions to a housing development project it must identify "specific adverse effects" which is defined as "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." The committee may wish to consider deleting this section entirely. The committee also may wish to consider adding "reduction of bedrooms in a housing development project" to the definition of lower density throughout the HAA. This will accomplish the author's goal within the existing structure of the Act.

Applying objective standards: If a housing development project complies with "applicable" objective, general plan, zoning, and subdivision standard and criteria and a local government denies or places conditions on the project that lower the density, the HAA requires the local government to make written findings that both of the following: the housing development would have an adverse impact public health and safety and there is no feasible method to satisfactory mitigate the effect. This bill would make any general plan, zoning, or subdivision standard or criteria not "applicable" if its applicability is discretionary or if the project could be approved without the standard or criteria being met. Significant concerns have been raised with this clause and that it would eliminate all planning and zoning regulations, since applicants can always request ordinance amendments or variances. The committee may wish to consider deleting this language.

Other issues raised by the opposition: The American Planning Association, California State Association of Counties, and Urban Counties of California are oppose to SB 592 unless it is amended to address the following additional issues:

1) Page 13, S. 65589.5 (j)(2)(B):

   (B) If an applicant elects to revise the application in response to any comments, and the local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision as specified in this subdivision, the local agency shall provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity within 30 days of the date that the revisions are submitted.

   This requires cities to re-do their initial consistency analysis every time a developer submits a change in their application "in response to any comments." Comments from whom? "Any comments" is very broad. Requiring a redo of the analysis multiple times for a project will be a huge burden. At most, there should be a fixed amount of time before a decision is made where the developer is given notice of inconsistencies due to changes, which could allow changes to accumulate over time and only require one response from the agency.

2) Page 15, S. 65589.5 (K)(1)(A):

   A plaintiff or petitioner who is the project applicant may seek compensatory damages for a violation of this section.

   This new requirement would allow any applicant to be entitled to "compensatory damages" if a court were to find a violation of the law. What are "compensatory damages"? Costs of

additional hearings? Lost profits? The HAA already exposes cities and counties to steep fiscal penalties for violating the HAA – a minimum fine of $10,000 per unit. The provision of compensatory damages subjects cities and counties to almost unlimited liability and will encourage extensive litigation, while there is no way for cities or counties to recover even litigation costs if they successfully defend themselves. Further, SB 330 already significantly decreases the responsibilities of developers while adding many obligations to cities and counties.

Committee amendments: To address the issues raised in the analysis the committee may wish to consider the following amendments

1) Delete the following language from the definition of "housing development

   project:" (iv) Accessory dwelling unit as defined in Section 65852.2

   ~~(B)~~ ~~*A "housing development project" may solely be, or may include, a single unit, including an accessory dwelling unit as defined in Section 65852.2.*~~

   ~~(C)~~ ~~*A "housing development project" may solely be, or may include, the addition of one or more bedrooms to an existing residential unit.*~~

2) Delete the following language and incorporate reduction in the number of bedrooms into the definition of "lower density" throughout the HAA:

   (B) Fails to comply with the time periods specified in subdivision (a) of Section 65950 ~~65950.~~ ~~*65950 or, in the case of a ministerial project, the time period specified in the applicable law authorizing that ministerial project.*~~ An extension of time pursuant to Article 5 (commencing with Section 65950) ~~*or the time period specified in the applicable law authorizing that ministerial project*~~ shall be deemed *or determined* to be ~~*to be*~~ an extension of time pursuant to this paragraph.

   ~~*(6) "Conditions that have the same effect or impact on the ability of the housing development project to provide housing" shall include, but are not limited to, each of the following:*~~

   ~~(A)~~ ~~*Reduction in the number of bedrooms or other normal residential features, such as a living room or kitchen.*~~

   ~~(B)~~ ~~*The substantial impairment of the housing development project's economic viability*~~

   (i) If any city, county, or city and county denies approval or imposes conditions, including design changes, lower density, or a reduction of the percentage of a lot that may be occupied by a building or structure under the applicable planning and zoning in force at the time the application is deemed *or determined to be* complete pursuant to Section 65943, that have a substantial adverse effect on the viability or affordability of a housing development for very low, low-, or moderate-income households, and the denial of the development or the imposition of conditions on the development is the subject of a court action which challenges the denial or the imposition of conditions, then the burden of proof shall be on the local legislative body to show that its decision is consistent with the findings as described in subdivision (d) and that the findings are supported by a

preponderance of the evidence in the record. For purposes of this section, "lower density" includes any conditions that have the same effect or impact on the ability of the project to provide housing *including a condition requiring a reduction in the number of bedrooms.*

3) Delete the "applicable" definition below:

(j) (1) *(A)* When a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the housing development project's application is *deemed or* determined to be 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 written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:

~~(A)~~ *(i)* The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed *or determined to be* complete.

~~(B)~~ *(ii)* There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

~~*(B) For purposes of this section, a general plan, zoning, or subdivision standard or criterion is not "applicable" if its applicability to a housing development project is discretionary or if the project could be approved without the standard or criterion being met.*~~

4) Make a technical changes as follows:

~~(m) *Irrespective of whether the local agency's action was made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken in any action brought to enforce the provisions of this section and discretion in the determination of facts is vested in an inferior tribunal, corporation, board, or officer.*~~ Any action brought to enforce the provisions of this section *regardless of whether the action of the local agency was taken in a proceeding in which by law a hearing is required,* shall be brought pursuant to Section 1094.5 of the Code of Civil Procedure, and the local agency shall prepare and certify the record of proceedings in accordance with subdivision (c) of Section 1094.6 of the Code of Civil Procedure no later than 30 days after the petition is served, provided that the cost of preparation of the record shall be borne by the local agency, unless the petitioner elects to prepare the record as provided in subdivision (n) of this section. A petition to enforce the provisions of this section shall be filed and served no later than 90 days from the later of (1) the effective date of a decision of the local agency imposing conditions on, disapproving, or any other final action on a housing development project or (2) the expiration of the time

periods specified in subparagraph (B) of paragraph (5) of subdivision (h). Upon entry of the trial court's order, a party may, in order to obtain appellate review of the order, file a petition within 20 days after service upon it of a written notice of the entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow, or may appeal the judgment or order of the trial court under Section 904.1 of the Code of Civil Procedure. If the local agency appeals the judgment of the trial court, the local agency shall post a bond, in an amount to be determined by the court, to the benefit of the plaintiff if the plaintiff is the project applicant.

5) Delete the language below and make clear that the below and make clear that the HAA applies to ministerially approved housing development projects:

(o) ~~*For purposes of this section, an application that is not subject to Chapter 4.5 of Division 1 of Title 7 (commencing with Section 65920) shall be deemed or determined to be complete at the time the application is submitted to the local agency.*~~

(p) This section shall apply to a housing development projects regardless of whether the local agency's review of the project is discretionary or ministerial.

~~*to any form of land use decision by a local agency, including, but not limited to, a ministerial or use by right decision or a discretionary approval.*~~

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 Association of Realtors (Sponsor)
Abundant Housing LA
Bay Area Council
California Apartment Association
California Building Industry Association
California Renters Legal Advocacy and Education Fund
California YIMBY
Grow the Richmond
Non-Profit Housing Association of Northern California
San Francisco Housing Action Coalition
Santa Cruz YIMBY
Silicon Valley at Home (Sv@Home)
South Bay YIMBY
The Casita Coalition

Support if Amended

California Rural Legal Assistance Foundation
Western Center on Law and Poverty

Opposition

AIDS Healthcare Foundation
City of Beverly Hills
City of Cupertino
City of Diamond Bar
City of San Marcos
City of Sunnyvale
Coalition for San Francisco Neighborhoods
Mission Economic Development Agency
Sherman Oaks Homeowners Association
Individuals (134)

Oppose Unless Amended

American Planning Association, California Chapter
California State Association of Counties
League of California Cities
Urban Counties of California

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