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Governor Brown Signs Three Bills Amending the Housing Accountability Act that Further Restrict a Local Public Agency's Ability to Reject Housing Projects

By: Alan Fenstermacher

On September 29, 2017, Governor Brown signed SB 167, AB 1515, and AB 678, which collectively amend the Housing Accountability Act ("HAA") (Government Code § 65589.5), sometimes referred to as the Anti-NIMBY Act, to further limit a local agency's ability to disapprove or reduce the density of residential projects, effective January 1, 2018.

The HAA previously placed a number of restrictions on a local agency's ability to disprove both affordable housing and market rate housing projects. In particular, in order for a local agency to disapprove (or lower the density of) any housing project that complies with applicable general plan/zoning designations and objective standards and criteria, existing law requires a local agency to make findings, supported by substantial evidence, that (1) the project would have a specific, adverse impact upon the public health or safety, and (2) there is no feasible method to mitigate that adverse impact. (Government Code § 65589.5(j).)

The amendments are designed to further restrict a local agency's ability to disapprove housing projects. With respect to subsection (j) – which applies to all housing projects, not just affordable housing – a local agency will now be required to base its above-discussed findings on a preponderance of the evidence rather than substantial evidence, thereby increasing the public agency's burden to show that a housing project would have a specific, adverse impact upon the public health or safety to justify its disapproval. Additionally, if a local agency believes any housing project does not comply with applicable general plan, zoning or subdivision standards and criteria, it must provide the applicant with a written explanation describing why the housing development does not comply (including citation to the specific, objective general plan/zoning/subdivision provision) within 30 or 60 days of the application being deemed complete, depending on the size of the development. Without this documentation, a proposed housing development is automatically deemed consistent with all applicable general plan, zoning and subdivision plans, programs, policies, ordinances, standards, requirements, or other similar provisions.

In sum, for a local agency to disprove any housing project or require reduced density, it must now either determine the proposed project does not comply with objective general plan, zoning or subdivision criteria or standards within one or two months of a completed application, or find that a preponderance of the evidence shows that the project would have a specific adverse impact of public health or safety and that the impact cannot be mitigated.

However, it is important to note that the HAA still does not circumvent or override the requirements of the California Environmental Quality Act ("CEQA"), per section 65589.5(e). (*See also Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal. App. 4th 1245.) Additional relevant amendments to the HAA include the following:

- The definition of "housing development projects" now includes all developments consisting of residential and nonresidential uses where at least two-thirds of the square footage is designated for residential use.

- If a court finds that a local agency disapproved or lowered the density of a housing project in violation of the HAA, including subsection (j), it is required to issue an order compelling compliance within 60 days and even has the power to direct the local agency to approve the housing project if the local agency acted in bad faith. This provision previously only applied to affordable housing projects. The court is also now required to impose fines in the minimum amount of $10,000 per housing unit proposed by the disapproved project if it finds such a violation. The fine is multiplied by a factor of five if the court finds that the local agency acted in bad faith.

- Added a provision stating that a housing development project shall be deemed consistent, compliant, and in conformity with any of the local agency's applicable plans, programs, policies, ordinances, standards, requirements, or other similar provisions if there is substantial evidence that would allow a reasonable person to make such a conclusion.

- Added a provision stating that amendments to the general plan or zoning code after an application for a housing development project was deemed complete is not a valid basis to disapprove the project or reduce its density.

- All previously existing substantial evidence standards have been amended to require preponderance of the evidence.

- Added a provision that sets forth a specific 90 day statute of limitations for actions to enforce the HAA.

- Added a provision that specifies that a housing organization that prevails in an action to enforce the provisions of the HAA is entitled to reasonable attorney's fees and costs.

These three bills impose a number of new specific requirements that all public agencies must be aware of and provide another potential arrow in a developer's quiver when facing resistance to a proposed housing development project. However, these amendments are not necessarily a "silver bullet" for developers, nor have local agencies lost all discretion, particularly in light of the fact that the requirement to comply with CEQA remains unaffected by these amendments.

Please contact your Rutan & Tucker attorney to discuss further.