

Date of Hearing: June 18, 2024

ASSEMBLY COMMITTEE ON JUDICIARY
Ash Kalra, Chair
SB 1037 (Wiener) – As Amended June 13, 2024

SENATE VOTE: 24-9

SUBJECT: PLANNING AND ZONING: HOUSING ELEMENT: ENFORCEMENT

KEY ISSUE: SHOULD THE ATTORNEY GENERAL BE AUTHORIZED TO SEEK CIVIL PENALTIES FROM LOCAL GOVERNMENTS THAT FAIL TO GRANT MINISTERIAL APPROVAL FOR OTHERWISE QUALIFIED PLANNING OR PERMITTING DECISIONS RELATED TO HOUSING DEVELOPMENT?

SYNOPSIS

Despite the Legislature's passage of dozens of pro-housing bills in recent years, California's housing shortage continues largely unabated. One critical driver of the lack of housing is local governments that are unwilling to approve new housing developments, particularly affordable housing developments, in the face of public pressure. The tension between the state and local governments regarding housing development is not new. Indeed, dating back to the early 1970s, when the Legislature significantly strengthened the mandates of the state's general plan law, local governments have sought to avoid state-directed housing mandates. As a result of local inaction, as early as the 1980s, the Legislature was forced to adopt legislation to compel local governments to meet their own housing development targets.

This measure seeks to provide the Attorney General with new tools to assist in the enforcement of state housing development laws. Specifically, this measure will authorize the imposition of civil penalties, range from \$10,000 to \$50,000 per violation per month, against local agencies that fail to grant ministerial approval for an otherwise qualified planning decision or permitting action related to a housing development project. This bill clarifies that these penalties are designed to be imposed when a local government is acting in a manner that is arbitrary, capricious, entirely lacking in evidentiary support, contrary to established public policy, unlawful, or procedurally unfair.

This measure is sponsored by Attorney General Rob Bonta and is supported by a coalition of housing developers and affordable housing advocates. The supporters highlight the success of recent lawsuits by the Department of Justice and the Department of Housing and Community Development to compel cities to build more housing. The supporters argue this bill is simply another tool to help the state enforce land use planning and housing development laws. The bill is opposed by more than two dozen individual local governments, the League of California Cities, and several neighborhood organizations. The opponents contend the bill adopts ambiguous legal standards and is needlessly punitive toward local governments. This measure was previously heard and approved by the Committee on Housing and Community Development by a vote of eight to one.

SUMMARY: Provides for the imposition of civil penalties against local agencies that fail to grant ministerial approval for an otherwise qualified planning decision or housing development project. Specifically, **this bill:**

- 1) Provides that in any action brought by the Attorney General, on behalf of the Department of Housing and Community Development or in an independent capacity, to enforce the adoption of housing element revisions or to enforce any state law that requires a city, county, or local agency to ministerially approve, without discretionary review, any planning or permitting application related to housing development project, the city, county, or local agency found to have violated the law is subject the following remedies:
 - a) A civil penalty of, at minimum, ten thousand dollars (\$10,000) per month, and not exceeding fifty thousand dollars (\$50,000) per month, for each violation, accrued from the date of the violation until the date the violation is cured;
 - b) All costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs, whenever the Attorney General prevails in a civil action to enforce any state laws; and
 - c) Other relief as the court deems appropriate, including equitable and injunctive relief, provisional or otherwise, as specified.
- 2) Requires any recovery pursuant to b) of 1) to be deposited in the Public Rights Law Enforcement Special Fund.
- 3) Provides that the penalties set forth in 1) are to apply only when the local agency's acts or omissions are arbitrary, capricious, entirely lacking in evidentiary support, contrary to established public policy, unlawful, or procedurally unfair.
- 4) Clarifies that the purpose of the bill is to ensure adequate remedies are available to ensure that state laws mandating streamlined, ministerial approvals related to housing development projects, and the timely adoption of housing element revisions, are promptly and faithfully followed.
- 5) Provides that all civil penalties levied pursuant to 1) are to be deposited into the Building Homes and Jobs Trust Fund for the sole purpose of supporting the development of affordable housing located in the affected jurisdiction.
- 6) Prohibits a local government from paying any civil penalties assessed in accordance with 1) by utilizing funds already dedicated to affordable housing, including, but not limited to, very low, low, and moderate-income households.
- 7) Authorizes, in the event a city, county, or local agency fails to pay civil penalties imposed by the court, the Controller to intercept any available state and local funds and direct those funds to the Building Homes and Jobs Trust Fund to correct the jurisdiction's failure to pay, as specified.
- 8) Clarifies that the liability, penalties, and remedies imposed by this bill are in addition to any other liability, penalties, and remedies imposed by any other law, and that the remedies available to the Attorney General pursuant to this bill do not affect the remedies available to any other party seeking to enforce compliance with housing element laws.
- 9) Adopts various findings and declarations related to California's ongoing housing shortages.

EXISTING LAW:

- 1) Requires all cities and counties to prepare, adopt, and amend general plans and elements of those general plans. (Government Code Section 65350.)
- 2) Requires a general plan to consist of a statement of development policies and include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals for the following elements:
 - a) A land use element that designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities, greenways, and other categories of public and private uses of land;
 - b) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, any military airports and ports, and other local public utilities and facilities, all correlated with the land use element of the plan;
 - c) A housing element, as specified;
 - d) A conservation element for the conservation, development, and utilization of natural resources, including water and its hydraulic force, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources;
 - e) An open-space element, as specified;
 - f) A noise element that identifies and appraises noise problems in the community;
 - g) A safety element for the protection of the community from any unreasonable risks associated with the effects of seismically induced surface rupture, ground shaking, ground failure, tsunamis, seiche, and dam failure; slope instability leading to mudslides and landslides; subsidence; liquefaction; and other geologic hazards known to the legislative body; flooding; and wildland and urban fires; and
 - h) An environmental justice element. (Government Code Section 65302.)
- 3) Requires the housing element of a general plan to consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing. (Government Code Section 65583.)
- 4) Requires the Department of Housing and Community Development to notify a local government, and permits the Department to notify the Attorney General, if the Department finds the following:
 - a) A housing element does not substantially comply with state law; and
 - b) The local government has taken an action in violation of specified laws relating to housing and planning. (Government Code Section 65585 (j).)

- 5) Authorizes the Attorney General to file a civil action related to a failure of a local government to comply with the housing element laws. (Government Code Section 65585 (k).)
- 6) In an action filed pursuant to 5) the Attorney General may seek the following remedies:
 - a) Upon a finding of the court that the housing element does not substantially comply with the requirements of existing law, that the court may issue an order or judgment directing the jurisdiction to bring its housing element into substantial compliance;
 - b) The imposition of fines ranging from \$10,000 to \$100,000 per month if, after a status conference, the court determines that the jurisdiction failed to comply with the order or judgment compelling substantial housing element compliance;
 - c) The imposition of fines three times the amount provided for in b) if the local government has not complied with the determination of the court within three months of the initial imposition of fines; and
 - d) The imposition of fines six times the amount provided for in b) if the local government has not complied with the determination of the court within six months of the initial imposition of fines. (Government Code Section 65585 (l).)
- 7) Requires the court, when determining fines pursuant to 6), to consider whether there are any mitigating circumstances delaying the jurisdiction from coming into compliance with state housing law when determining remedies, including but not limited to whether a city, county, or city and county is making a good faith effort to come into substantial compliance or is facing substantial undue hardships. (Government Code Section 65585 (m).)
- 8) Provides that the Department of Housing and Community Development and the Attorney General possess the unconditional right to intervene in any suit brought to enforce specified state laws related to housing. (Government Code Section 65585.01.)
- 9) Requires, if a local government's planning director or equivalent position determines that a development submitted pursuant to the existing law regarding streamlined housing project approvals is consistent with objective planning standards, the local government to approve the development. (Government Code Section 65913.4 (c)(1).)
- 10) Authorizes the issuance of a writ of mandate by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person. (Code of Civil Procedure Section 1085 (a).)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: California's General Plan Law requires local governments to adopt a housing element that identifies the jurisdiction's housing needs and identifies how the local agency intends to meet those needs. Despite these longstanding requirements, for decades local governments have regularly failed to meet their goals for new home development. As a result of

local government's inability to support the development of needed housing, California now faces a critical shortage of housing units. In recent year, new state laws have empowered the Department of Housing and Community Development as well as the Attorney General to begin taking legal action against local governments that willfully refuse to approve needed housing developments. This measure seeks to give the Attorney General an additional tool to enforce state housing laws by permitting the Attorney General to seek civil penalties from local agencies that refuse to grant ministerial approval, essentially project approvals that involve little or no personal judgment by public officials as to the wisdom or manner of carrying out the project, to otherwise qualified projects. In support of this bill the author states:

Senate Bill 1037 will enhance the Attorney General's ability to seek civil penalties against local governments that are found by a court to have violated state housing law. Currently, the Attorney General can bring an action for violation of a ministerial approval law, but even if the Attorney General prevails in court, the local government has sixty days to cure its violation and thus avoid all penalties. As a result, local governments have little incentive to comply with the law. Cities should face immediate consequences after entry of a court judgment for violating state housing laws, and SB 1037 accomplishes this goal. SB 1037 will allow the Attorney General to seek between \$10,000 and \$50,000 in civil penalties per violation each month as a remedy in legal actions against local governments for noncompliance with housing element law or violating state ministerial approval laws. Penalty funds would only be applicable when a jurisdiction has acted arbitrarily or capriciously and would be deposited into an affordable housing fund to be used by that jurisdiction.

California's General Plan law requires local governments to plan for and develop sufficient housing units to meet the jurisdiction's needs. Dating back to the 1920s, state law has required local agencies to engage in some degree of formal planning for the orderly development of cities and counties. (SB 585 (McKinley) Chap. 874, Stats. 1927.) However, until 1972, local general plans were considered mere advisory documents and did not obligate local governments to develop within the confines of their own planning documents. Once the Legislature required local agencies to adopt ordinances in a manner to effectuate the general plan's requirement, general plan documents became significant documents for guiding local development. (AB 1301 (McCarthy) Chap. 1446, Stats. 1971.) The general plan is now so critical to the development of local cities and counties, the California Supreme Court has referred to these documents as the "constitution for all future developments" within a jurisdiction. (*Goleta Valley v. Board of Supervisors of Santa Barbara Co.* (1990) 52 Cal. 3d 553, 570.)

One of the most critical elements of the general plan is the housing element. The housing element requires local governments to identify the amount of housing needed in the jurisdiction to keep pace with growth and then to subsequently identify areas within the jurisdiction where housing can be constructed. Due to the ever-changing nature of a community's housing needs, this element of a general plan must be updated every five years, while the rest of the plan must be updated every eight to ten years. Indeed, courts have held that the housing element now holds an "elevated" position within a general plan taking greater importance when compared to the other seven mandatory elements, including the safety element designed to prepare a city for natural disasters. (*Honchariw v. County of Stanislaus* (2011) 200 Cal. App 4th 1066, 1068.)

For decades state government has sought to force local agencies to meet their housing development goals. Despite the Legislature strengthening the state's general plan laws in the early 1970s, many local governments still operated as if the plans were merely advisory. As it

relates to the housing element, local government's lax attitude toward permitting new development resulted in significant housing shortages beginning to occur in parts of the state by the early 1980s. As a result, the Legislature enacted the Housing Accountability Act to help ensure that a city or county would not reject or make infeasible housing development projects that contribute to meeting the housing need determined in the housing element without a thorough analysis of the economic, social, and environmental effects of the action. (AB 2513 (Bosco) Chap. 1483, Stats. 1982.) The Housing Accountability Act restricted a locality's ability to disapprove, or require density reductions in, certain types of residential projects but still authorized the imposition of developer fees and locally mandated compliance with objective standards, conditions, and policies appropriate for regional housing needs. The Act also provided for a private right of action to challenge local agency decision making.

In 2017, the Housing Accountability Act was significantly strengthened with the passage of SB 167 (Skinner) Chap. 368, Stats. 2017, which strengthened the evidentiary standard a local government must meet to justify denying a housing project, added additional conditions on the denial of housing projects, and strengthened the remedies a court may utilize to compel a local agency to meet its housing goals. The updated version of the Housing Accountability Act was challenged as an unconstitutional infringement on local agency authority. However, the Act was upheld by a California appellate court which held that the lack of affordable housing was a "collective action" problem between local governments. In justifying the Legislature deeming the lack of housing a statewide concern necessitating overriding local control, a state appellate court held that given the, "extent and intractability of the housing shortfall, we see nothing improper in the Legislature addressing it on a statewide basis." (*California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal. App. 5th 820, 851.)

This bill provides the Attorney General a new tool to force cities to approve qualified housing projects. Building on recent reforms to strengthen state oversight of local decision making related to housing, and in light of state appellate courts ruling that the lack of housing units in the state is a matter of statewide concern, this bill would strengthen the Attorney General's ability to seek penalties against local governments that refuse to comply with the ministerial approval process for local planning decisions. First, the bill requires specific penalties to be imposed in any action brought by the Attorney General on behalf of Department of Housing and Community Development or in an independent capacity to enforce any state law that requires a local government to ministerially approve, without discretionary review, any planning decision or permitting application for a housing development project. The penalties are \$10,000 per month, not to exceed \$50,000 per month, for each violation and accrue from the date of the court order or judgement finding a violation until the date the violation is cured by the local jurisdiction. The bill states that the penalties are to apply only when the local agency's acts or omissions are arbitrary, capricious, entirely lacking in evidentiary support, contrary to established public policy, unlawful, or procedurally unfair. Secondly, the bill provides that all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs, are to be paid to the Attorney General whenever the Attorney General prevails on an action. Third, the bill authorizes the court to grant any other relief it deems appropriate, including equitable and injunctive relief, provisional, or otherwise. Additionally, the bill clarifies that the remedies provided in this bill do not preclude the imposition of other remedies authorized under existing law. Finally, this measure clarifies that the purpose of the bill is to ensure adequate remedies are available to ensure that state laws mandating streamlined, ministerial approvals related to housing development projects, and the timely adoption of housing element revisions, are promptly and faithfully followed.

Local governments argue this bill is ambiguous and will result in unnecessary litigation. The bill is opposed by more than two dozen local governments. While they generally contend the bill is too punitive towards local agencies, they also object that the bill lacks clarity. In objecting to subdivision (b) of the proposed Government Code Section 65009.1, describing what conduct the penalties are intended to apply to, the League of California Cities argues:

The language used to define when penalties apply is vague, particularly the use of the following terms "The penalties set forth in this section shall only apply when local land use decisions or actions are contrary to established public policy, unlawful, or procedurally unfair." These subjective standards can be interpreted in numerous ways, leading to inconsistent enforcement and unpredictable legal outcomes. This lack of clarity could result in frequent legal challenges as cities attempt to navigate the uncertain parameters set forth by the measure. Consequently, local governments may find themselves entangled in costly legal disputes...

The Attorney General's office, the sponsor of this measure, has countered to this Committee that this language reflects legal standards utilized by courts to evaluate the conduct of local agencies. Indeed, the language in this section is an amalgamation of various standards of review used by courts to review agency decision making, albeit a slightly awkward grouping of the terms. Even the "procedurally unfair" standard the League of Cities highlights as being particularly unclear is well established in the case law surrounding writs of mandate, the legal mechanism to force government to take an action it is legally obligated to take. (See, e.g. *Public Defender Association of San Diego County v. Board of Supervisors of San Diego County* (1999) 74 Cal. App. 4th 1327.) Accordingly, these terms are generally understood by courts and should be workable for local government's legal counsel.

Furthermore, it should be noted that the operative portions of this bill that trigger the actual imposition of civil penalties is not found in the disputed subdivision. Instead, subdivision (a) of the proposed Government Code Section 65009.1 appears to impose the penalties when a local government fails to "ministerially approve, without discretionary review, any planning decision or permitting application" related to a housing project. Accordingly, the inclusion of subdivision (b), while seeking to be informative to the courts, may instead muddle the bill's requirements. Accordingly, *in order to clarify the bill and seek consensus on the measure the author may wish to consider removing subdivision (b) of the proposed Government Code Section 65009.1.* Nonetheless, in discussions with this Committee, the author and the sponsor of this measure contend that the language is an important guide for interpreting the bill. Given that the sponsor of the measure, the Attorney General's Office, would be the very entity that must litigate these provisions, this Committee does not see the need to quibble with the judgment of the Attorney General's Office.

ARGUMENTS IN SUPPORT: This bill is sponsored by Attorney General Rob Bonta and is supported by a coalition of housing advocates and developers. In support of the bill the Attorney General writes:

California is facing a housing crisis of epic proportions. According to the California Department of Housing and Community Development (HCD), California will need an estimated 2.5 million new homes by 2030 in order to meet housing demand. Yet on average, only 100,000 new homes are built in California each year. The only way to solve this crisis is

for every city and county to do their part to address it, and following state housing laws is the bare minimum.

The Legislature has passed strong housing laws in recent years to help build new homes and make them more affordable and accessible to all Californians. These laws are designed to ensure that local governments are planning to meet their fair share of the regional and statewide housing needs, and use quick and clear processes to make decisions about housing proposals in accordance with those plans and state law. These important laws must be enforced, and local governments that refuse to comply with state law must be held accountable.

SB 1037 would enhance the Attorney General's ability to seek civil penalties in court against local governments that violate existing state housing laws, specifically housing element law and ministerial approval laws. Currently, when a court finds a local government in violation of these state housing laws, monetary penalties can only be imposed 60 days, or in some cases up to a year, after a court has ordered compliance and the violation continues. In the meantime, housing development projects are delayed, which often is enough to block a project from ever moving forward.

SB 1037 would allow the Attorney General to instead seek new penalties that are assessed from the date that the housing law violation began. This should deter violations in the first place and strengthen the State's hand when the Attorney General warns local governments that they are out of compliance. Penalty money would be earmarked to support the development of affordable housing located in the affected jurisdiction.

Additionally, Leading Age California notes:

California is in the depths of a housing crisis. Housing production has not kept pace with the state's population growth, resulting in skyrocketing costs, particularly for lower income individuals. California ranks 49th out of 50 states in per capita housing units. Various estimates, including the Legislative Analyst's Office, recommend the state produce an additional 100,000 units annually beyond the expected 100,000 to 140,000 units per year.

While the Legislature has attempted to address this issue by strengthening housing element law and passing various streamlined ministerial approval pathways for new housing - including SB 35 and its extension SB 423 by Sen. Wiener - some local governments have chosen to flout state law.

Cities should face immediate consequences for delaying and denying housing that is entitled to streamlined review under state law. By assessing monetary penalties from the date the violation began, this bill would strengthen the judicial remedies available to the Attorney General and more effectively deter local governments from violating these state housing laws at the outset.

ARGUMENTS IN OPPOSITION: This bill is opposed by a coalition of local governments and community organizations who contend the bill is overly punitive to local agencies. In opposition to this bill the League of California Cities states:

Unfortunately, as currently drafted, SB 1037 does not provide an opportunity for cities to correct an honest mistake or address a genuine difference in interpreting the law. Even those

jurisdictions acting in good faith could be subject to significant fines and be required to pay the Attorney General for all costs investigating and prosecuting the action, including expert witness fees and attorney's fees.

Instead of creating new fines and penalties, lawmakers and the Department of Housing and Community Development should provide cities with clear guidance and technical assistance to help them finalize their housing elements and put those plans to work so much-needed housing construction can occur.

Additionally, Save Lafayette writes:

This bill is intended to inflict punitive financial damages against cities for potentially not being able to meet their Housing Element requirements. None of the housing bills that have been passed are funded at all, and the committee members know full well that cities do not have the financial resources to build housing of any kind. So, to “add insult to injury”, this bill seeks to financially penalize cities who will not be able to meet their housing goals. And the money in fines that the cities could use to take care of the many services they pay for in the first place, under a democratic system, this bill seeks to take that money away from the cities. One should be asking the question, for what purpose?

The people of California are not “bad children” that need to be “punished” because the state is setting cities up for failure with unjustified and false RHNA numbers. When a government rules by fear and by force, by threats and untruths, THAT is most definitely NOT a working democracy, nor is it democratic. The issues of fairness and justification are completely removed from SB 1037, and all other “housing legislation.” When the people's rights to vote or to even to voice their opinions (i.e., “ministerial review”), you have completely dismissed the democratic process. There is no “representative government” when all that is being legislated are mandates (dictates). This kind of activity should NOT be happening in a “blue state” like California. The people of California did not elect Democratic legislators to serve only the wealthy special interest groups; yet, that is what this bill and many other “housing bills” actually do.

REGISTERED SUPPORT / OPPOSITION:

Support

Attorney General Rob Bonta (sponsor)
Abundant Housing LA
California Apartment Association
California Community Builders
California Housing Partnership Corporation
California YIMBY
CivicWell
East Bay for Everyone
Housing Action Coalition
Housing California
LeadingAge California
SPUR
The San Fernando Valley Young Democrats

The Two Hundred
YIMBY Action

Opposition

California Contract Cities Association
Catalyst for Local Control
City of Bell
City of Camarillo
City of Carlsbad
City of Chino Hills
City of Cloverdale
City of Colton
City of Concord
City of Corona
City of Cypress
City of Del Mar
City of Downey
City of Elk Grove
City of Fairfield
City of Fullerton
City of Garden Grove
City of Grass Valley
City of Grover Beach
City of Hesperia
City of Hidden Hills
City of Huntington Beach
City of La Mirada
City of Lakeport
City of Los Alamitos
City of Mendota
City of Merced
City of Mission Viejo
City of Moorpark
City of Murrieta
City of Norwalk
City of Oakdale
City of Oceanside
City of Palm Desert
City of Paramount
City of Pismo Beach
City of Placentia
City of Port Hueneme
City of Rancho Palos Verdes
City of Rancho Santa Margarita
City of Riverbank
City of San Luis Obispo
City of San Marcos
City of Santa Clarita

City of Santa Fe Springs
City of Santa Paula
City of Simi Valley
City of Stanton
City of Sunnyvale
City of Thousand Oaks
City of Tracy
City of Tustin (unless amended)
City of Walnut Creek
City of Wasco
City of Whittier
City of Yorba Linda
Councilmember Arianna Barrios, City of Orange
League of California Cities
Los Angeles County Division, League of California Cities
New Livable California dba Livable California
Save Lafayette
Town of Apple Valley
Town of Truckee
Ventura Council of Governments

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