California's Housing Accountability Act

Christopher S. Elmendorf
Martin Luther King, Jr. Professor of Law
UC Davis School of Law

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I. The HAA's Evolution

1.1 (1982) Origins

65589.5. When a proposed housing development project complies with the applicable general plan, zoning, and development policies 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 substantial 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.

(b) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to subdivision (a), 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.

1.2 (1990) BMR housing

San Francisco Chronicle
August 22, 1990

Bill to Force Cities to Build Low-Income Housing Gets OK

By Vlae Kershner
Chronicle Sacramento Bureau

Sacramento

A powerful bill designed to bludgeon exclusive suburban communities into accepting low-income housing projects sailed through a major Assembly committee test yesterday on its way to becoming one of the biggest legislative surprises of the current session.

Under the measure, local communities that are not building their state-mandated "fair share" of low-income housing units could be forced to approve less costly housing presented to them by developers, even if it is inconsistent with zoning rules or general plans.

By a 15-to-3 vote, the Ways and Means Committee sent the bill to the Assembly floor, where passage appears likely, lobbyists said. It has already been approved by the Senate. Governor Deukmejian has not stated his views on the measure.

The bill by Senator Leroy Greene, D-Carmichael, is supported by an odd coalition of liberal housing advocates and conservative business groups who agree that the state needs more affordable housing.

It is especially aimed at 116 communities statewide — including 18 in the Bay Area — that proponents say have built no lower income housing in recent years.

"It's an anti-NIMBY bill," said Thomas Cook of the Bay Area Council, a proponent of the measure, referring to the acronym for the "not-in-my-back-yard" syndrome, in which local residents almost reflexively oppose projects such as high-density housing that they believe jeopardize tranquility and property values.

The bill could force city councils to accept high-density developments in the middle of single-family residential areas. But Cook said it probably would never get that far because cities threatened with losing local zoning control would quickly get serious about meeting their low-income housing targets.

"Atherton's share is 24 units — they could easily do it without using more than 30 percent of their incomes.

The bill would not guarantee that developers would propose projects in an area. For example, officials in Moraga — which the report said has built only 6 percent of its low-income housing target — insist they have been unable to persuade developers to build the projects because high land values make low-income housing an unattractive investment.

But Cook said the threat of loss of control will make town officials promote the projects more actively. In Moraga's case, he said, the bill's passage could mean second-story apartments in the downtown commercial area.

The legislation is opposed by some Republicans, who say it is wrong to take away local control.

"The bill doesn't let cities and counties have much to say about what kind of housing they have in their communities and where they're going to have it," said Assemblyman Bill Baker, R-Danville. "Local governments should be the ones who decide what they want to do, not the state of California."

1.2 (1990) BMR housing

“Builder’s Remedy”

New subd. (d) enumerates exclusive (?) grounds for denying or “rendering infeasible” an affordable housing project; original HAA recodified as subd. (j)

Subd. (d) grounds:

1. City is in compliance with Housing Element Law & has met its affordable-housing target (“RHNA”)
2. Health / safety (redundant with (j))
3. Project not compliant w/ “specific state or federal law”
4. Project site is “zoned for agriculture or resource preservation” or lacks “adequate water or wastewater facilities”
5. Project site is inconsistent with zoning / GP and city is in compliance with Housing Element Law

1.3 (2016-?) Becoming a “Super-statute”

Ramped-Up Protections for Housing of All Types

- Subdivision (j) is dramatically strengthened
  - “Reasonable person” definition of compliance w/ general plan, zoning & development standards
  - “Objective standards” defined (stringently)
  - City must give notice of noncompliance w/in 30-60 days, on pain of project being “deemed to comply” as matter of law
  - Health/safety exception limited w/ “preponderance of evidence” standard
- Remedies are strengthened
  - Attorneys fees, fines, bonds, more
- New procedure to lock applicable standards through filing of preliminary application (vested rights)

1.3 (2016-?) Becoming a "Super-statute"

Codified interpretive instructions

- "The Legislature's intent in enacting [the HAA] … was to … effectively curb[] the capability of local governments to deny, reduce the density for, or render infeasible housing development projects.... That intent has not been fulfilled." GC § 65589.5(a)(2)(K).
- "It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of … housing." GC § 65589.5(a)(2)(L).
- "It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health and safety [within the meaning of the HAA] arise infrequently." GC § 65589.5(a)(3).

2. Administrative Law, Turned on Its Head

2.1 Deference to local agencies

Is Over

- Traditional rules:
  - a local agency's decision (approval, denial, conditional approval) is consistent with GP & zoning if there's substantial evidence in record that would *allow* a reasonable person to deem it to be consistent
  - courts give great weight to cities' interpretations of their ordinances
- HAA rules:
  - a project is consistent with general plan and zoning if a reasonable person *could* deem it to be consistent. GC 65589.5(f)(4)
  - courts give no weight to cities' interpretations of own ordinances (*Cal. Renters v. City of San Mateo* (2021), 68 Cal. App. 5th 820)

2.2 Remedies

Courts take over

- Traditional rule
  - Remand for a do-over; court may not substitute its judgment for the agency's
- HAA rules
  - Order compliance w/in 60 days; fine city if it misses deadline. GC § 65589.5(k)(1)(A)(ii)
  - Order project approved if city was in bad faith. GC § 65589.5(k)(1)(A)(ii).
  - City must post bond if it appeals. (see Los Altos Hills fold)

2.3 Bad Faith

Motive matters

- Traditional rule
  - Court reviews municipal decision on basis of the reasons stated by the agency at time of decision, w/o asking about *real* reasons
- HAA rule
  - Court determines whether agency decision was in bad faith, defined to include (w/o being limited to) actions that are "frivolous or otherwise entirely without merit." GC § 65589.5(l).
  - Bad faith → fines, approval orders

3. Major Questions

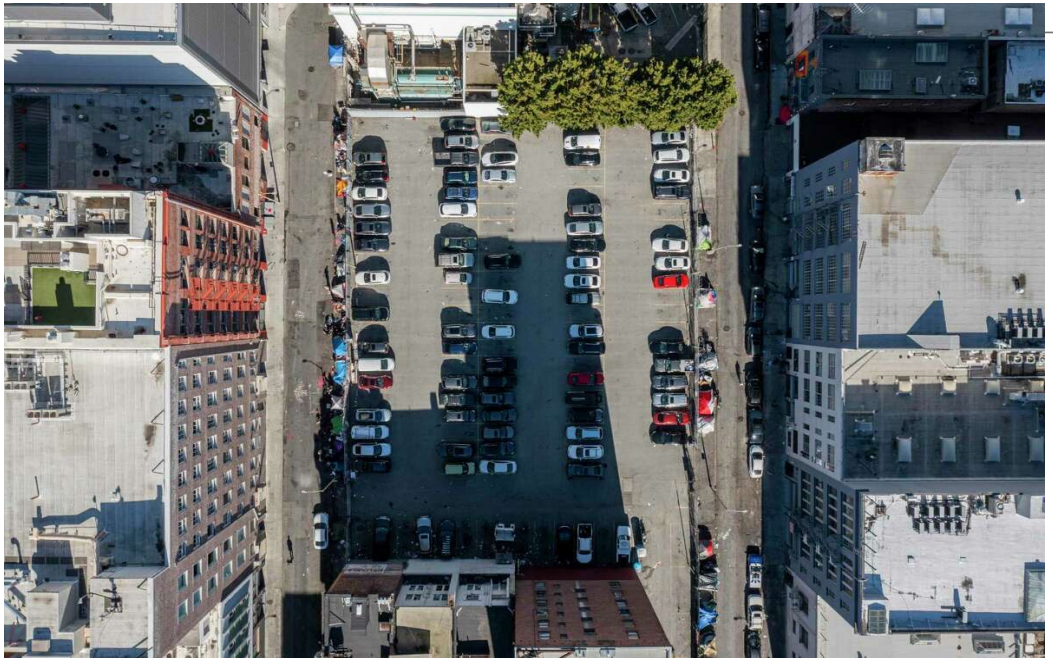
3.1 CEQA v. HAA

BAY AREA // SAN FRANCISCO

State investigating S.F.'s decision to reject turning parking lot into 500 housing units

J.K. Dineen

Oct. 28, 2021 | Updated: Oct. 29, 2021 2:41 p.m.



3.1 CEQA v. HAA

The Issues

- Does a city's bad-faith demand for additional enviro study constitute "disapproval" of the project within meaning of HAA?
  - HCD says maybe
  - Elmendorf & Duncheon (2023) say yes
  - AB 1633 will be a gamechanger if it passes

- What is the proper scope of environmental review for an HAA-protected project?
  - Must city analyze and mitigate effects of project as a whole relative to current enviro conditions nearby, or only marginal effect of city's exercise of discretion to reshape project w/o reducing density? (Elmendorf & Duncheon propose the latter, but answer depends on HAA exerting gravitational pull on CEQA.)

3.2 Discretionary “Bonuses”?

Must local criteria for waivers be objective?

- HAA says cities may use only “objective” standards to deny or reduce density of project. GC § 65589.5(j).
- How does this work w/ zoning code that allows X du/acre as the “normal” maximum density, but (X + Y) du/acre if developer secures a special permit for which they have to provide special benefits?
  - May cities use discretionary criteria for the bonus density (+ Y), or not? How is this different from a discretionary variance?
  - A San Francisco project is likely to become a test case

3.3 General Plan & Zoning Consistency

(When) Does the general plan trump zoning?

5353 Del Moreno Dr,
Los Angeles

- Zoned SFH-only
- GP allows multi-family +
- Developer proposes 60-unit apartment project
- Project denied
- YIMBY Law sues…and wins

3.3 General Plan & Zoning Consistency

(When) Does the general plan trump zoning?

- Since 2018, HAA has stipulated that if project is consistent with GP, but zoning is not, then project is HAA-protected & must be approved w/o rezoning. GC § 65589.5(j)(4).

- Leg history arguably implies that HAA "gamechanger" reasonable-person standard may be used to address GP-zoning consistency.
  - I.e., if reasonable person could deem project consistent with GP, and zoning inconsistent, then project doesn't have to comply w/zoning

- Two pending cases in L.A. are testing the theory

3.4 The Builder's Remedy

easyreadernews.com

Pustilnikov files for 2,320 housing units, hotel, office complex, park at AES

Redondo Beach, CA

- City out of compliance w/ Housing Element Law
- Owner of defunct power plant files preliminary app. to build 2300 homes on site zoned industrial
- May city deny project for noncompliance with zoning or general plan?

"2,300 housing units? No way," said Todd Loewenstein, District One city councilman. "No way."

3.4 The Builder's Remedy

Three big questions

Issue 1: vesting date

- May a city apply its zoning code to project if it was out of compliance w/ Housing Element Law at time of developer's "preliminary application," but achieves compliance before making final decision on project?

Issue 2: "development standards"

- Subd. (d)(5) of the HAA, which makes municipal authority to deny affordable projects on basis of zoning & GP conditional on compliance w/ Housing Element Law, is in tension with…
- Subd. (f)(1) of the HAA, a savings clause for development standards "appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need"

3.4 The Builder's Remedy

Is this zoning bypass for real?

Issue 3: what is required for a city to "substantially comply" w/ Housing Element Law?

- May developers reasonably rely on HCD's determination that a city is out of compliance with the Housing Element Law?
- Some older Court of Appeal cases treat "substantial compliance" as a box-checking exercise. Are they still good law? Elmendorf et al. (2021) argue that they're not, but answer is up in the air. *Martinez v. City of Clovis* (2023) is helpful.