

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 1037 (Wiener)
Version: March 19, 2024
Hearing Date: April 23, 2024
Fiscal: Yes
Urgency: No
AM

SUBJECT

Planning and zoning: housing element: enforcement

DIGEST

This bill requires specific penalties to be imposed in any action brought by the Attorney General (AG) to enforce the adoption of housing element revisions, as specified, or to enforce any state law that requires a local government to ministerially approve, without discretionary review, any land use decision or permitting application for a housing development project. The bill also specifies that any injunction, provisional or otherwise, ordered by the court under the bill's provisions is deemed to be prohibitory, and not affirmative.

EXECUTIVE SUMMARY

This bill is brought in response to the housing crisis and affordability crisis California is currently facing. According to the author and sponsor, it has been found that local governments have little incentive to comply with existing state housing law until a court orders compliance and the consequences of noncompliance are clear and contemporaneous. This bill seeks to enact civil penalties for violation of the adoption of housing element revisions or any law requiring ministerial approval, without discretionary review, in order to disincentive local jurisdictions from violating state housing laws. This bill is sponsored by the Attorney General, Rob Bonta, and supported by various housing advocacy organizations and YIMBY organizations. The bill is opposed by various associations representing cities and advocating for local control. This bill passed the Senate Housing Committee on a vote of 7 to 2.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Requires the California Department of Housing and Community Development (HCD) to notify a local government, and allows HCD to notify the office of the Attorney General (AG), if HCD finds that: (1) a housing element does not substantially comply with state law; and, (2) any local government has taken an action in violation of specified laws relating to housing and planning. (Gov. Code § 65585(j.))
- 2) Authorizes the Attorney General to bring suit for violation of housing element compliance and seek available remedies in an independent capacity. (*Id.* at subd. (k.))
 - a) Authorizes the AG to request, upon a finding of the court that the housing element does not substantially comply with the requirements of existing law, that the court issue an order or judgment directing the jurisdiction to bring its housing element into substantial compliance. (*Id.* at subd. (l).)
 - b) If the jurisdiction has not complied with the order or judgment after 12 months, the court must conduct a status conference. (*Id.* at para. (1).)
 - c) The court is required to impose fines if, after the status conference, the court determines that the jurisdiction failed to comply with the order or judgment compelling substantial housing element compliance. (*Ibid.*)
 - d) Fines imposed are to be a minimum of \$10,000 per month, but not to exceed \$100,000 per month. If the jurisdiction fails to pay the imposed fines, the court may require the Controller to intercept any available state and local funds. (*Ibid.*)
 - e) If the jurisdiction has not complied with the court order within three months from the imposition of fines, the court is to conduct another status conference and may multiply the fines already imposed by a factor of three if the court finds that the initial imposition of fines is insufficient to bring the jurisdiction into compliance. (*Id.* at para. (2).)
 - f) If the jurisdiction has not complied with the court order within six months from the imposition of fines, the court is to conduct another status conference. The court may multiply the fines already imposed by a factor of six if the court finds that the initial imposition of fines is insufficient to bring the jurisdiction into compliance, and a court may appoint a receiver pursuant to Section 564 of the Code of Civil Procedure. (*Id.* at para. (3).)
- 3) Provides the court is to consider whether there are any mitigating circumstances delaying the jurisdiction from coming into compliance with state housing law when determining remedies under 2), above. Additionally, the court may consider 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. (*Id.* at subd. (m).)

- 4) Specifies that nothing limits the authority of the office of the Attorney General to bring a suit to enforce state law in an independent capacity, and that the Attorney General may seek all remedies available under existing law. (*Id.* at subd. (n).)
- 5) Specifies that HCD and the AG have the unconditional right to intervene in any suit brought to enforce specified state laws related to housing. The AG has this right whether intervening in an independent capacity or pursuant to a notice or referral from HCD. (Gov. Code § 65585.01.)
- 6) Provides that the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but authorizes the trial court to proceed upon any other matter embraced in the action and not affected by the judgment or order, except as specified. (Code of Civ. Proc. § 916(a).)

This bill:

- 1) Requires specific penalties to be imposed in any action brought by the AG on behalf of HCD or in an independent capacity to enforce any state law that requires a local government to ministerially approve, without discretionary review, any land use decision or permitting application for a housing development project, including all of the following:
 - a) A civil penalty of \$10,000 per month, not to exceeding \$50,000 per month, for each violation accrued from the date of the order or judgement finding a violation until the date the violation is cured.
 - b) All costs of investigating and prosecuting this action, including expert fees, reasonable attorney's fees, and costs, whenever the AG prevails.
 - c) Other relief as the court deems appropriate, including equitable and injunctive relief, provisional, or otherwise.
 - d) Any injunction, provisional or otherwise, ordered by the court is to be deemed to be prohibitory, and not affirmative.
- 2) Specifies that these provisions are intended to ensure that, where local land use decisions or actions are arbitrary, capricious, entirely lacking in evidentiary support, contrary to established public policy, unlawful, or procedurally unfair, adequate remedies are available to ensure that state laws are followed.
- 3) Provides that any fine levied is to be deposited in the Building Homes and Jobs Fund for the purpose of supporting the development of affordable housing located in the affected jurisdiction.
 - a) Any penalty imposed is prohibited from being paid out of funds already dedicated to affordable housing, including, but not limited to, very low-, low-, and moderate-income households.

- b) To the extent permitted under the California Constitution, in the event a city, county, or local agency fails to pay civil penalties imposed by the court, the court may require 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.
 - c) If the funds are not used within five years, the penalty funds shall revert to financing newly constructed affordable housing units in the state without any geographic restrictions.
- 4) Specifies that any liability, penalties, and remedies authorized to be imposed by this bill are in addition to any other liability, penalty, or remedy that may be imposed under any other law.
- 5) Makes various findings and declarations of the Legislature.

COMMENTS

1. Stated need for the bill

The author writes:

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 since the law affords them ample opportunity to cure their violation even after a lawsuit has been filed and court judgment entered. 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.

The Attorney General, Rob Bonta, the sponsor of the bill 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. [...]

2. This bill seeks to bolster the power of the AG to enforce state housing law against local jurisdictions that are in violation

Over the past several years the Legislature has passed numerous bills to address the housing crisis the state currently faces, including strengthening the state's housing element law to ensure that local governments plan to meet their fair share of the housing needs in their jurisdiction, and various ministerial approval laws with the goal of streamlining and expediting housing development throughout the state. (See Prior Legislation below.) Existing law allows the AG to enforce state housing laws in the AG's independent capacity and upon behalf of other entities, such as the California Department of Housing and Community Development (HCD). The AG has recently brought several actions against local jurisdictions for violating state housing laws, such as the City of Elk Grove for failure to approve a housing proposal that would create 66 apartments for lower-income households at risk of homelessness.¹ Additionally, the

¹ Attorney General Bonta Issues Statement on City of Elk Grove's Failure to Approve Affordable Housing Proposal, Cal. Dept. of Justice, (Sept. 28, 2023), available at <https://oag.ca.gov/news/press-releases/attorney-general-bonta-issues-statement-city-elk-groves-failure-approve>.

Attorney General and HCD have sued Huntington Beach for failure to adopt a housing plan compliant with state law.²

According to the author and sponsor, it has been found that local governments' professional staff are cooperative; however, local governments themselves have little incentive to comply with existing state housing law until a court orders compliance and the consequences of noncompliance are clear and contemporaneous. For example, under existing law a local jurisdiction that fails to adopt a housing element in compliance with state law has an entire year after a court order or judgment to comply before a court can even consider imposing civil penalties. (Gov. Code § 65585(1)(1).) For violation of a ministerial approval law, local jurisdictions have 60 days after a court order or judgment to comply before any civil penalties can be imposed. (Gov. Code 65589.5(k)(1)(B).)

This bill seeks to provide stronger enforcement and incentives for local jurisdictions to comply with existing state housing law. First, the bill requires specific penalties to be imposed in any action brought by the AG on behalf of HCD or in an independent capacity to enforce any state law that requires a local government to ministerially approve, without discretionary review, any land use 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. Second, all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs, are to be paid to the AG whenever the AG prevails on an action. Third, it authorizes the court to grant any other relief it deems appropriate, including equitable and injunctive relief, provisional, or otherwise.

Lastly, the bill provides that any injunction, provisional or otherwise, ordered by the court is to be deemed to be prohibitory, and not affirmative. Section 916 of the Code of Civil Procedure provides a default rule that matters embraced upon an appeal of a trial court order are to be stayed during the pendency of the appeal, except as specified in Sections 917.1 through 917.9, and Section 116.810. The California Supreme Court has held that if the "statutory conditions have been met and a stay on appeal is prescribed, the courts lack discretion to deny it except as other statutes may authorize."³ The Court observed that there is no specific statute in the Code of Civil Procedure relating to the stay of an injunction on appeal; however, it noted that based upon common law principles the courts have found that prohibitory injunctions (ones that prohibit an action) are not stayed pending an appeal versus affirmative injunctions, which mandates an affirmative action.⁴ However, the Court recognized that the "mandatory-prohibitory distinction can prove challenging to apply" and expounded that "[g]iven

² *People of California v. City of Huntington Beach* (Super. Ct. County of Orange, 2024, No. 30-2023-01312235-CU-WM-CJC).

³ *Ibid.*

⁴ *Id.* at 1040.

the essentially equitable nature of the stay pending appeal, it would seem to make sense for both trial and appellate courts to have the same authority to order, when justice demands it, that a mandatory injunction take effect notwithstanding the filing of an appeal from the injunctive order.”⁵ The Court concluded that “the Legislature may always, if it chooses, reexamine California's statutory law governing stays pending appeal and decide whether the law would be better served by an approach that permits courts to take account of a wider array of equitable considerations than does present law.”⁶

This bill takes the Court up on its proposal, and expressly provides that any injunction ordered by the court relating to an order or judgment 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 land use decision or permitting application for a housing development project will be deemed to be prohibitory, and therefore will not be automatically stayed upon an appeal. The author and sponsor argue this is necessary to ensure that a local jurisdiction will not be able to continue violating existing state housing laws during the pendency of an appeal, potentially exacerbating the existing housing crisis.

3. Proposed amendment

The bill expressly provides that its provisions are intended to ensure that, where local land use decisions or actions are arbitrary, capricious, entirely lacking in evidentiary support, contrary to established public policy, unlawful, or procedurally unfair, adequate remedies are available to ensure that state laws are followed. However, the bill does not specifically provide that if a court finds that a local jurisdiction is attempting to comply in good faith with existing state housing laws regarding the adoption of housing element revisions the court can choose not to assess the civil penalties under the bill.

This specific issue was noted in the League of California Cities letter in opposition stating:

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.

⁵ *Id.* at 1052 -54.

⁶ *Id.* at 1054.

In light of this the author has agreed to amend the bill to provide that local jurisdictions that are attempting to comply in good faith are not to be penalized under the bill's provisions. The specific amendment is:

Amendment⁷

Section 65009.1 as added to the Government Code is amended, to read:

65009.1.

(a) 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 pursuant to the schedule set forth in subdivision (e) of Section 65588, or to enforce any state law that requires a city, county, or local agency to ministerially approve, without discretionary review, any land use decision or permitting application for a housing development project, the city, county, or local agency shall be subject to the following remedies:

(1) 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.

(2) (A) All costs of investigating and prosecuting this action, including expert fees, reasonable attorney's fees, and costs, whenever the Attorney General prevails in a civil action to enforce any state laws under this section.

(B) Awards imposed pursuant to this paragraph shall be paid to the Public Rights Law Enforcement Special Fund established by Section 12530.

(3) (A) Other relief as the court deems appropriate, including equitable and injunctive relief, provisional or otherwise.

(B) Any injunction, provisional or otherwise, ordered by the court pursuant to this paragraph shall be deemed to be prohibitory, and not affirmative.

(b) ~~The purpose of this section is to ensure that, where penalties set forth in this section shall only apply when~~ local land use decisions or actions are arbitrary, capricious, entirely lacking in evidentiary support, contrary to established public policy, unlawful, or procedurally ~~unfair~~, *unfair*. *The purpose of this section 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.*

(c) (1) Any civil penalty levied pursuant to this section shall 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. Expenditure

⁷ The amendments may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

of any penalty moneys deposited into the Building Homes and Jobs Trust Fund pursuant to this subdivision shall be subject to appropriation by the Legislature.

(2) Any penalty imposed pursuant to this section shall not be paid out of funds already dedicated to affordable housing, including, but not limited to, very low, low-, and moderate-income households.

(3) To the extent permitted under the California Constitution, in the event a city, county, or local agency fails to pay civil penalties imposed by the court, the court may require 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.

(4) Notwithstanding paragraph (1), if the penalty moneys have not been expended five years after deposit, the penalty moneys may be used, upon appropriation, to finance newly constructed affordable housing units in the state without any geographic restrictions.

(d) The liability, penalties, and remedies imposed by this section are in addition to any other liability, penalties, and remedies imposed by any other law.

4. Statements in support

A coalition of supporters, including California YIMBY, California Building Alliance, and the Housing Action Coalition, write in support stating:

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.

Although the Attorney General can take action to correct these violations, current law only allows for monetary penalties to be imposed after 60 days of the issuance of a court order if the violation has not been cured by that point. This timeframe results in local governments having little incentive to comply with the law given the ample opportunity to cure their violation before any monetary penalties accrue.

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.

5. Statements in opposition

The California Contract Cities Association (CCCA) writes in opposition stating:

[...]As California's Housing Element law has expanded over recent years, its rules and requirements have become increasingly complex. The burden of complying with the Law falls on local governments. While some large cities and counties may have the resources and capacity necessary to stay apprised of the latest State housing laws, other, smaller localities struggle to stay on top of the policies, and consistently look for increased help from the State to better understand and adhere to the requirements. SB 1037 offers no such support, and instead threatens to financially penalize cities that are out of compliance with catastrophic fines. CCCA finds this approach disheartening, as such a step places extreme and undue hardships on local governments as they work to adopt complaint housing elements.[...]

SUPPORT

Attorney General, Rob Bonta (sponsor)
Abundant Housing LA
California Community Builders
California YIMBY
CivicWell
East Bay for Everyone
Housing Action Coalition
LeadingAge California
SPUR
State of California Attorney General
The Two Hundred for Homeownership
YIMBY Action

OPPOSITION

California Contract Cities Association
Catalyst for Local Control
League of California Cities
Save Lafayette

RELATED LEGISLATION

Pending Legislation:

AB 1886 (Alvarez, 2024) among other things, provides that a housing element or amendment is considered substantially compliant when the local agency has adopted a housing element or amendments and HCD or a court of competent jurisdiction determines it is in substantial compliance. This bill is currently pending in the Assembly Local Government Committee.

Prior Legislation:

AB 1485 (Haney, Ch. 763, Stats. 2023), among other things, granted HCD and the AG the unconditional right to intervene in any suit brought to enforce specified housing laws, and made changes to the ministerial approval process for urban infill projects that are multi-family or mixed use where at least two-thirds of the square footage is for residential use, as provided.

AB 215 (Chiu, Ch. 342, Stats. 2021) specified that the AG has the authority to bring a suit to enforce state law in an independent capacity and can seek all remedies available under existing law.

AB 101 (Committee on Budget, Ch. 159, Stats. 2019) authorized the AG to bring suit for a violation of specified housing laws related to housing element compliance, authorized the court to issue an order or judgment directing the jurisdiction to bring its housing element into compliance, and authorized the court to assess specified civil penalties as a result of failure to comply with that order or judgment.

AB 2162 (Chiu, Ch. 753, Stats. 2018), among other things, required that affordable housing projects with a supportive housing component be permitted through a ministerial process in zones where multifamily and mixed uses are permitted, including nonresidential zones permitting multifamily uses.

AB 72 (Santiago, Ch. 370, Stats. 2017) authorized HCD to find a local government's housing element is out of substantial compliance if it determines that the local government acts, or fails to act, in compliance with its housing element, and authorized HCD to refer violations to the AG.

SB 167 (Skinner, Ch. 368, Stats. 2017) amended the Housing Accountability Act by increasing the burden of proof on localities when denying a housing project and imposing fines on those localities that violate state law.

PRIOR VOTES

Senate Housing Committee (7 Ayes, 2 Noes)
