American Planning Association
California Chapter

Making Great Communities Happen

March 28, 2017

Senator Nancy Skinner
Room 2059
State Capitol
Sacramento, California 95814

SUBJECT: **SB 167 (Skinner) – Notice of Opposition Unless Amended** – Changes to the Housing Accountability Act - In Senate Transportation & Housing Committee – Tuesday, April 4th

Dear Senator Skinner:

APA California has reviewed the amendments to SB 167. APA does not object to broadening the Housing Accountability Act as proposed in the bill. However, the bill as amended would include sweeping changes to the HAA, with new terms and definitions, that we think are unworkable at the local level, are an invitation to lawsuits, and appear to suggest that any reasonable conditions imposed by a local agency are unwarranted.

APA respectfully recommends that instead of the approach included in the draft language in the bill, you consider much simpler, but still effective, options. Below are several alternatives for your review:

- Apply, to housing of any income level, the findings required in subsection (d) to disapprove affordable housing. That would make it very hard to disapprove any housing project.

- Make it easier to qualify for the subsection (d) findings by reducing the affordability requirement, for instance, down to density bonus levels (5%/10%/10%) or letting 20% moderate qualify (to be considered "affordable".)

- Subsection (j), which applies to all-income housing, now does not allow denial or reduction of density in housing developments that conform with "objective" development standards. This could be made more effective by defining what an "objective" standard is.

Unfortunately, we cannot support the bill as drafted. Below are APA's specific concerns:

1. S. 65589.5 (d) expands the findings needed to deny an affordable project (which are very difficult to make) to all housing development projects. A project is considered 'affordable' with 20% low income. While APA would not oppose this change, it should be noted that this change would remove any incentive to take advantage of the HAA by including affordable housing in a project. A compromise position may be to make it easier for a project to qualify as "affordable."

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2. Also in (d), and throughout the bill, the standard of review of any local decision has been changed from "substantial evidence" to "clear and convincing evidence". The substantial evidence standard is widely used throughout land use law and is well-understood by local governments and applicants. The requirement for 'clear and convincing evidence' for a finding of feasibility would be impossible for a city to meet because all determinations of feasibility, by both applicants and agencies, are based on numerous assumptions about future economic conditions and costs that cannot be determined with any degree of certainty. The existing standard of review has been used successfully to demonstrate infeasibility. Of greatest concern, though, is that It is unlikely that the feasibility of **any** fee, exaction or condition could be justified by "clear and convincing" evidence.

3. In (d)(5), the bill states that "a change to the 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." The statute already prohibits general plan or zoning changes from being applied if they are adopted after the date the application is deemed complete, for both affordable and market-rate projects -- see the existing language in (d)(5) and (j).

4. Existing (e), states, among other things, that 'nothing in this section shall be construed to relieve the local agency from …making one or more of the required CEQA findings or complying with CEQA.' But the bill in (f)(3) would add a new provision prohibiting a local agency from imposing fees or other exactions if the fees or other exactions "render the proposed housing development project or emergency shelter infeasible". If there is no CEQA exemption, and if these projects do not pay mitigation fees, etc., because the developer decides they render the project "infeasible", the projects will have unavoidable adverse impacts and communities can refuse to override. Also, the requirement that fees could not be imposed if the developer believes they would make the project infeasible would create a state mandate that would need to be reimbursed to local governments. Local governments would be happy to waive fees if they would be reimbursed by the state, or if the state provided funding for local infrastructure.

5. (h) (1) adds a new definition of "infeasible": a housing development project is rendered "infeasible" if, among other things, the applicant's ability to earn an economic rate of return comparable to that of other projects that are similar to the proposed housing development is diminished. This new definition raises many questions. What are the "among other things" that would render a project infeasible? What does "diminished" mean? How is the calculation of "the applicant's ability to earn an economic rate of return comparable to that of other projects that are similar to the proposed housing development" to be calculated? What are "projects that are similar" and what does "comparable" mean? Who decides these issues? This provision alone will substantially increase litigation to define its meaning.

6. In response to the new finding in (h)(5)(C) regarding restrictions if a local agency approves another project with lower density, subsection (j) already prohibits a city from reducing the density of a project that conforms with all objective zoning standards. As mentioned above in our alternatives, it might be helpful however to define 'objective'.

7. The new (h)(6) adds a new finding related to "substantial adverse effects on the viability or affordability of a housing development project", stating that this "includes, but is not limited to, the diminished ability of an applicant to earn an economic rate of return comparable to that of other projects that are similar to the proposed housing development project". The revised definition of 'infeasible' in (h)(1) noted above and the new finding in (h)(6) are impractical since local agencies have no way of knowing what the economic return of comparable projects is, nor can the economic return of the specific project be accurately known when entitlements are requested, nor do agencies have access to the proprietary information relevant to each project to determine its rate of return, nor does the bill require the applicant to provide the necessary data to establish their case regarding feasibility. Under the current law, it is not difficult for applicants to present evidence of infeasibility. For instance, in one case a developer presented evidence that the increased construction costs caused by a proposed condition would cause the home costs to exceed even fair market value and that there was no way to fund the additional gap created, based

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on letters from the various funding agencies. The city did hire an outside consultant to review the numbers and concluded they were correct. Claims of infeasibility should be subject to the same tests that agencies routinely applied in redevelopment matters, with some independent, third party analysis of the proforma to determine feasibility.

8. (h)(7) adds a new definition of "impose conditions", which includes "any instance in which a local agency requires conditions, either with or without legislative action, or in which an applicant proposes conditions in response to pressure or opposition from a local agency". The 'response to pressure' language would allow every developer to assert that he or she proposed a condition 'in response to pressure.' So, the developer would be allowed to propose conditions, get the project approved with those conditions, and then just not comply with the conditions if he or she states it was taken under pressure? What is 'pressure'? Would it include a city's insistence that the developer conform with zoning?

9. In (k)(1)(B), the bill would require a court to impose fines at the minimum amount of $100,000 per housing unit on a local agency that has "violated" these new provisions, and requires the fines to be deposited in a housing trust fund. The proposed fines are exorbitant and could result in financial hardship for the local agency depending on the size of the project, and would be particularly difficult for smaller agencies to pay. What happens if a city cannot pay the fine? The fines per unit also have no relationship proportionally to the nature or severity of violation by the agency. In addition, it allows the court to impose additional fines based on the local agency's "progress in attaining its target allocation of the regional housing need". Cities and counties are not required to produce or build housing to meet the RHNA. The RHNA is a planning goal. The existing statute allowing the court to require the local agency to fix any violations solves this issue without imposing excessive fines – this is specifically important because the bill is so difficult to understand and therefor easy to unknowingly "violate".

10. (o) imposes a new mandate that every local agency publish "an analysis of the requirements of this section as part of its review of each application for a housing development project". Given how difficult the amendments in the bill are to understand, this requirement is infeasible and would set a precedent that other laws would also have to be analyzed in a similar manner.

11. (m) Finally, allowing applicants to go to court to attack a local decision that is not even final would leave the courts in a position of not even knowing what they are reviewing. The fact sheet cites this is needed to address "delay in certifying the final EIR and labyrinthine review processes." Often communities must delay certifying the final EIR to respond to additional public comments and to ensure that the EIR is adequate and can stand up to a challenge. Lengthy review processes are restricted by the Permit Streamlining Act, which now prescribes a "deemed approved" penalty for delays.

Given the above concerns, APA California cannot support the bill as written. However, we would be happy to meet with you to discuss the alternatives we have offered.

For information, please contact Sande George, Stefan/George Associates, APA California's lobbyist, at 443-5301, sgeorge@stefangeorge.com.

Sincerely,

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cc: Members of the Senate Transportation & Housing Committee,
The Governor, OPR
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