



## **SB 167 (2017)**

### **SB 167 (SKINNER, 2017) MAKES SIGNIFICANT CHANGES TO THE HOUSING ACCOUNTABILITY ACT (AKA THE “ANTI-NIMBY LAW,” GOV. CODE, § 65589.5)**

#### **OVERVIEW**

The Housing Accountability Act (Gov. Code, § 65589.5), also known as the “Anti-NIMBY Law,” was first adopted in 1982 to prevent local governments’—and local communities’—resistance to affordable housing from creating barriers to the development of affordable housing and emergency shelters. It limits local governments’ ability to disapprove applications for affordable housing projects and emergency shelters, allowing such disapprovals only in certain circumstances and based on very specific factual findings. The applicant (i.e., the developer), persons who would be eligible to live at the proposed development, and housing advocacy organizations, including trade associations, may bring lawsuits challenging local governments’ violations of the Act.

[SB 167](#)<sup>1</sup>, which went into effect January 1, 2018, enacted significant changes to the Housing Accountability Act. Perhaps most significantly, SB 167 requires local agencies to make the Act’s required findings based “the preponderance of the evidence” in the record, replacing earlier references to the more lenient “substantial evidence” standard. Along the same lines, SB 167 instructs local jurisdictions to deem housing development projects and emergency shelters compliant with all applicable plans, programs, policies, ordinances, and requirements so long as there is “substantial evidence that would allow a reasonable person to conclude” that the proposed project is in compliance. The Act also imposes harsher penalties on local governments who disapprove or conditionally approve projects in violation of the Act, including mandatory court-imposed fines which are paid into an affordable housing fund.

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<sup>1</sup> SB 167 had an identical companion bill, AB 678 (Bocanegra, 2017) in the Assembly, and AB 1515 (Daly, 2017) also contained language that duplicates SB 167’s changes to the Housing Accountability Act. For purposes of simplicity, this memo refers to SB 167 only.

But SB 167 also represents a shift in the focus of the Housing Accountability Act toward reducing barriers, not just to the development of affordable housing and emergency shelters, but to the development of market-rate housing as well. The Act has long applied to both affordable and market-rate housing, but with significantly stronger protections for affordable development. One of the stated purposes of SB 167 was to enhance the Act’s applicability to market-rate housing.<sup>2</sup> As such, it creates new requirements for the disapproval or conditional approval of housing development projects regardless of affordability, and it explicitly attaches both causes of action and penalties to those requirements. SB 167 maintains—and strengthens—the Act’s separate, more expansive protections for affordable housing, but it also makes clear that the Legislature intends the Act to afford significant protections to market-rate housing as well.

## **BILL SUMMARY**

SB 167 amends the Housing Accountability Act to:

1. Modify definitions of key terms, including broadening the definition of “mixed use developments” to include any development consisting of both residential and non-residential uses, where at least 2/3 of the square footage is designated for residential uses.
2. Strengthen the evidentiary standard for local agencies’ disapproval or conditional approval of housing development projects or emergency shelters under the Act from “substantial evidence” to “preponderance of the evidence”.
3. Clarify that a housing development project is deemed to comply with all applicable plans, programs, policies, ordinances, and requirements so long as there is “substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity.”
4. Clarify that a zoning or general plan change that is made after an application for an affordable housing development or emergency shelter is deemed complete cannot be used as a basis for disapproving the application.
5. Require a local agency that disapproves a housing development project on the basis that the project does not comply with a plan, ordinance, or policy, to provide the applicant with written documentation of the plan, ordinance or policy, and the reasons why the local agency believes the project does not comply; if the local agency does not provide such written documentation within a specified time period, then the project is deemed to be in compliance with all plans, ordinances, and policies. This requirement applies, not just to affordable housing and emergency shelters, but also to market-rate housing development projects.

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<sup>2</sup> See SB 167 (2017-2018) Bill Analysis, Senate Committee on Transportation and Housing (Apr. 4, 2017).

6. Impose additional penalties—both mandatory and discretionary—for local jurisdictions that are found by a court to have violated the Act. These penalties include a minimum \$10,000 fine against a jurisdiction that does not come into compliance with the Act within 60 days after being ordered to do so by the court. The jurisdiction must pay the fines either into a local affordable housing fund or into a state fund.

7. Clarify that the statute of limitations for lawsuits under the Act is 90 days from the action that the lawsuit is challenging, or 90 days from the jurisdiction’s statutory deadline for taking action on a particular housing development project proposal, whichever is later.

8. Expand the types of plaintiffs/petitioners who are entitled to attorneys’ fees under the Act to include, not only affordable housing developers whose projects are disapproved or conditionally approved, explicitly stating that any petitioner, including housing organizations, residents who would qualify to live in the disapproved project, and developers of market-rate housing are eligible for fee awards.

9. Allow for appeal of trial court decisions either (1) by filing a notice of appeal under Code of Civil Procedure section 904.1 or (2) by filing a writ petition in the Court of Appeal.

## **BILL DETAILS**

### **Purposes of the Act**

SB 167 adds extensive language to the Act regarding the legislature’s intent in passing and amending the Act,<sup>3</sup> including:

The Legislature’s intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval and construction of new housing for all economic segments of California’s communities by meaningfully and effectively curbing the capability of local governments to deny, reduce, the density for, or render infeasible housing development projects and emergency shelters. That intent has not been fulfilled.<sup>4</sup>

### **Definitions of Terms**

SB 167 modifies definitions for a variety of terms in the Act:

- **Mixed use developments.** SB 167 changes the definition to include any development consisting of both residential and non-residential uses, where at least 2/3 of the square footage is designated for residential uses.<sup>5</sup> Previously, the Act’s definition of mixed use

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<sup>3</sup> Gov. Code, § 65589.5, subd. (a)(2).

<sup>4</sup> Gov. Code, § 65589.5, subd. (a)(2)(K).

<sup>5</sup> Gov. Code, § 65589.5, subd. (h)(2)(B).

limited the non-residential uses to “neighborhood commercial” and limited such uses to the first floor of the building.

- **Disapprove the housing development project.** SB 167 clarifies that the term includes, not only a vote to disapprove the application for proposed housing development project, but also disapproval of “any required land use approvals or entitlements necessary for the issuance of a building permit.”<sup>6</sup> Under both the prior version of the Act and SB 167, disapproval also includes failure to approve the project within the timelines set forth in Government Code section 65950.
- **Lower density.** The definition now includes the imposition of “any conditions that have the same effect or impact on the ability of the project to provide housing” as requiring a housing development project to be developed at a lower density than originally proposed as a condition of approving the project.<sup>7</sup>
- **Bad faith.** SB 167 expands the definition with respect to local agencies’ disapprovals or conditional approvals of housing development projects and emergency shelter: “‘bad faith’ includes, but is not limited to, an action that is frivolous or entirely without merit.”<sup>8</sup>

### **Grounds for Disapproving or Conditionally Approving Housing Development Projects and Emergency Shelters**

The Housing Accountability Act sets forth procedures and required findings that local jurisdictions must make before they can disapprove or conditionally approve housing development projects and emergency shelters. While portions of the Act apply to all housing development projects regardless of affordability, the Act also sets forth separate, more stringent requirements for the disapproval or conditional approval of affordable housing and emergency shelters, as opposed to market-rate housing.

SB 167 makes only minor changes to the required findings for the disapproval or conditional approval of an affordable housing project or emergency shelter, but it significantly expands the Act’s more general requirements, which apply to both affordable and market-rate projects.

- **Affordable Housing and Emergency Shelters—Only Slight Changes**

Subdivision (d) of the Housing Accountability Act limits local jurisdictions’ ability to disapprove emergency shelters and housing development projects (including farmworker housing) **affordable to very low-, low-, and moderate-income households**. It also limits local

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<sup>6</sup> Gov. Code, § 65589.5, subd. (h)(5)(A).

<sup>7</sup> Gov. Code, § 65589.5, subd. (j)(4).

<sup>8</sup> Gov. Code, § 65589.5, subd. (l).

jurisdictions' ability to impose conditions on such projects that would render the projects infeasible. If a jurisdiction wants to disapprove such a project, or to condition its approval of the project on onerous requirements or modifications, the jurisdiction must make **very specific written findings** based on the evidence in the record.<sup>9</sup>

As before SB 167's passage, a local agency cannot disapprove or impose conditions on an affordable housing development project or emergency shelter unless it makes at least one of the following findings:

1. The jurisdiction has an adopted housing element that complies with Housing Element Law, and the jurisdiction has met or exceeded its RHNA for the income level the project is designed to serve. If the project is designed to serve a mix of income levels, then the jurisdiction must have met or exceeded its RHNA for each of the income levels in order to deny or conditionally approve on this basis. For denial or conditional approval of an emergency shelter, the jurisdiction must show that it has met the need for emergency shelter, as described in Gov. Code, § 65583, subd. (a)(7).<sup>10</sup>
2. "The housing development project or emergency shelter would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact. . . ." <sup>11</sup>
3. The denial or imposition of conditions is required by a specific state or federal law, "and there is no feasible method to comply. . . ." <sup>12</sup>
4. The land where the project is proposed to be located is zoned for agriculture or resource preservation, and is surrounded on at least 2 sides by land being used for agricultural or resource preservation, or does not have adequate water or wastewater facilities to serve the project.<sup>13</sup>

SB 167 clarifies that a jurisdiction cannot base its denial on a change in the zoning ordinance or general plan that occurred *after* the project application was deemed complete. And, as discussed below, SB 167 strengthens the evidentiary standard that local jurisdictions must apply when making these findings from "substantial evidence" to the stricter "preponderance of the evidence" standard.

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<sup>9</sup> Gov. Code, § 65589.5, subd. (d).

<sup>10</sup> Gov. Code, § 65589.5, subd. (d)(1).

<sup>11</sup> Gov. Code, § 65589.5, subd. (d)(2).

<sup>12</sup> Gov. Code, § 65589.5, subd. (d)(3).

<sup>13</sup> Gov. Code, § 65589.5, subd. (d)(4).

- **Housing Development Projects, Generally (Affordable & Market-Rate Housing)—Significant Expansion**

In addition to limiting local jurisdictions’ ability to disapprove or impose conditions on affordable housing and emergency shelters, subdivision (j) of the Housing Accountability Act sets forth requirements for the disapproval of imposition of conditions on housing development projects regardless of their affordability. SB 167 imposes additional requirements on such disapprovals and conditional approvals, and, as with affordable projects and emergency shelters, replaces the “substantial evidence” standard with the stricter “preponderance of the evidence” standard.

Prior to SB 167, the Housing Accountability Act required a jurisdiction to make both of the following written findings, based on substantial evidence in the record, before it disapproved a **housing development project that complied with the general plan and zoning**, or conditioned approval on development at a lower density than proposed in the project’s application:

1. That the project would have a “specific, adverse impact on the public health or safety;”<sup>14</sup> and
2. That there is “no feasible method to satisfactorily mitigate the adverse impact” of the project.<sup>15</sup>

SB 167 preserves these requirements but strengthens the evidentiary standard for the required findings from substantial evidence to preponderance of the evidence, as discussed below.

SB 167 adds requirements for the disapproval of a **housing development project that the local agency determines is *not* consistent with an “applicable plan, program, policy, ordinance, standard, requirement or other similar provision. . . .”**<sup>16</sup> Specifically, the local agency must provide the applicant with:

1. Written documentation that identifies the plan, program, ordinance, standard, or requirement on which the disapproval is based; and
2. An explanation of why the local agency believes the project would not comply with that plan, program, ordinance, or standard.<sup>17</sup>

If the project has more than 150 housing units, the jurisdiction must provide the documentation within 60 days of the application; if the project has 150 or fewer housing units,

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<sup>14</sup> Gov. Code, § 65589.5, subd. (j)(1)(A).

<sup>15</sup> Gov. Code, § 65589.5, subd. (j)(1)(B).

<sup>16</sup> Gov. Code, § 65589.5, subd. (j)(2).

<sup>17</sup> Gov. Code, § 65589.5, subd. (j)(2).

the jurisdiction must provide the documentation in 30 days.<sup>18</sup> If the local agency does not provide this documentation in the required time frame, then the housing development project is **deemed to be in compliance** with the applicable plan, program, policy, ordinance, or standard.<sup>19</sup>

SB 167 also clarifies that the receipt of a density bonus is not a valid basis on which to find a housing development project is inconsistent with any plan, program, policy, ordinance, standard, or requirement.<sup>20</sup>

### **Evidentiary Standards and Burdens of Proof**

SB 167 modifies the evidentiary standards that a local agency must apply when considering the disapproval or conditional approval of a housing development project under the Act, as well as the standards a court applies when reviewing the local agency's determination.

- **Substantial Evidence v. Preponderance of Evidence**

Previously, the Act incorporated a substantial evidence standard for local agencies' review of housing development project and emergency shelter applications—a disapproval violated the Act unless the local agency made specified written findings based on “substantial evidence in the record.” However, SB 167 replaces these references to “substantial evidence” with the stricter preponderance of the evidence standard; under the newly amended Act, the requisite findings for disapproving or conditionally approving a housing development project must be made based on the preponderance of the evidence.<sup>21</sup>

The **substantial evidence** standard of review, in the context of a court's review of an administrative agency's decision, is one in which the court defers to the administrative agency's findings of fact. The court reviews those findings “with a strong presumption as to their correctness and regularity.”<sup>22</sup> The reviewing court “must uphold administrative findings unless the findings are so lacking in evidentiary support as to render them unreasonable.”<sup>23</sup>

In contrast, when applying a **preponderance of the evidence** standard, a court or other finder of fact must consider all the evidence before it, assess the credibility of the evidence,

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<sup>18</sup> Gov. Code, § 65589.5, subd. (j)(2)(A).

<sup>19</sup> Gov. Code, § 65589.5, subd. (j)(2)(B).

<sup>20</sup> Gov. Code, § 65589.5, subd. (j)(3).

<sup>21</sup> Gov. Code, §§ 65589.5, subd. (d), (i), (j).

<sup>22</sup> See *Doe v. Regents of the University of California* (2016) 5 Cal.App.5<sup>th</sup> 1055, 1073.

<sup>23</sup> *Ibid.*

weigh the evidence accordingly, and decide, based on that assessment, whether a fact is more likely to be true or not.<sup>24</sup>

SB 167 makes clear that local agencies reviewing applications for housing development projects and emergency shelters must consider and weigh *all* the evidence in the record before them and must base any findings that would justify denial or conditional approval of the project on the preponderance of that evidence. Simply pointing to evidence that supports the local agency's desired outcome without consideration for other, potentially contradictory evidence, does not meet this standard.

- **Courts' Review of Affordable Housing and Emergency Shelter Disapprovals**

Additionally, SB 167 incorporates the preponderance of the evidence standard into courts' review of local agency decisions under the Act. In a lawsuit challenging a disapproval or conditional approval of an affordable housing development project or emergency shelter, the local agency bears the burden of proving that it made the requisite findings under the Act, that those findings "are supported by a preponderance of the evidence in the record," and that those findings support its decision.<sup>25</sup> As such, when a court reviews a disapproval or conditional approval of an affordable housing development project or emergency shelter under the Act, it does not defer to the factual determinations of the local agency. Instead, the local agency bears the burden of establishing that, based on all the facts in the record, its decision was based on the preponderance of the evidence. The Act is less clear as to whether the local agency bears this burden with respect to a challenged disapproval or conditional approval of a market-rate housing development project.

- **Sufficiency of Housing Element Site Inventory to Meet RHNA**

Under section 65589.5, subdivision (d)(5)(B) of the Act, a local agency may not disapprove or impose conditions on an *affordable* housing development project or emergency shelter on grounds that the proposed project is inconsistent with the jurisdiction's zoning or general plan if the jurisdiction's housing element fails to identify sufficient sites to meet the jurisdiction's Regional Housing Needs (RHNA) obligation. In a court challenge to the disapproval or conditional approval, the local agency bears the burden of proving that the housing element identifies adequate sites to accommodate the jurisdiction's lower-income RHNA.<sup>26</sup> Prior to the passage of SB 167, the local agency bore the burden of proving that the housing element identified sufficient sites to meet the very low- and low-income RHNA; SB 167 expands this burden to include the moderate-income RHNA as well.<sup>27</sup> I.e., if the local agency denies or

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<sup>24</sup> See BAJI No. 200.

<sup>25</sup> Gov. Code, § 65589.5, subd. (i).

<sup>26</sup> Gov. Code, § 65589.5, subd. (d)(5)(B).

<sup>27</sup> Gov. Code, § 65589.5, subd. (d)(5)(B).

conditionally approves an affordable housing development or emergency shelter based on findings that the project is inconsistent with the zoning ordinance or general plan, and that the jurisdiction has an adopted housing element that substantially complies with Housing Element Law, and that denial or conditional approval is challenged in court, the jurisdiction bears the burden of proving that its housing element identifies sites with sufficient capacity to meet its RHNA for very low-, low-, and moderate-income households.

- **Housing Development Projects and Emergency Shelters Deemed Compliant with Applicable Plans, Programs, Policies, Ordinances, and Requirements**

SB 167 adds language to subsection (f) to clarify that a housing development project (affordable or market-rate) or emergency shelter must be deemed by the local government—and by a reviewing court—to be compliant with all applicable plans, programs, policy, ordinance, or requirement so long as there is **“substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity.”**<sup>28</sup>

### **Enforcement and Remedies Strengthened and Expanded**

The Act authorizes “the applicant, a person who would be eligible to apply for residency in the development or emergency shelter, or a housing organization” to bring an action in court to enforce the Act’s requirements against a local agency.<sup>29</sup> SB 167 incorporates more detailed language regarding potential claims under and creates mandatory penalties on local jurisdictions that violate the Act.<sup>30</sup> Under SB 167, such penalties are required, not only for violations of subdivision (d)’s affordable housing and emergency shelter provisions, but also against jurisdictions that violate subdivision (j)’s more general provisions applicable to market-rate development. SB 167 also clarifies the statute of limitations, expands the availability of attorneys’ fees, and creates options for appealing a trial court’s decision.

- **Remedies and Fines**

**Mandatory Order to Comply with the Act.** Prior to the passage of SB 167, the Act required a court that found a jurisdiction had violated subdivision (d)’s requirements regarding affordable housing and emergency shelter to order the jurisdiction to come into compliance with the Act within 60 days, including an order that the local agency take action on the

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<sup>28</sup> Gov. Code, § 65589.5, subd. (f)(4).

<sup>29</sup> Gov. Code, § 65589.5, subd. (k)(1)(A).

<sup>30</sup> Gov. Code, § 65589.5, subd. (k)(1).

proposed project.<sup>31</sup> SB 167 expands that requirement to encompass violations of subdivision (j)'s more general provisions as well.<sup>32</sup>

**Discretionary Order to Approve the Project.** Prior to the passage of SB 167, a court was authorized to issue “further orders . . . including . . . an order to vacate the decision of the local agency, in which case the application for the project . . . shall be deemed approved.”<sup>33</sup> SB 167 further allows a court to order a local agency that acted in bad faith when disapproving or conditionally approving a housing development project or emergency shelter to approve the housing development project or emergency shelter.<sup>34</sup> SB 167 maintains this remedy but also allows the court to order the project deemed approved—without first ordering the local agency to come into compliance with the Act within 60 days—if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the project.<sup>35</sup>

**Mandatory Fines of At Least \$10,000/Unit.** SB 167 also requires the court to impose at least \$10,000 per unit in fines on a local agency that has not complied with the court’s earlier order to come into compliance with the Act within 60 days.<sup>36</sup> The local agency may choose to deposit the fees into a local housing trust fund or into the state housing trust fund created by [SB 2](#).<sup>37</sup> When determining the amount of the fine (i.e., the amount above the mandatory \$10,000), “the court shall consider the local agency’s progress in attaining its target allocation of the regional housing need pursuant to Section 65584 and any prior violations of [the Act].”<sup>38</sup> If the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the project, the court must multiply the fine by a factor of 5.<sup>39</sup>

- **Statute of Limitations**

SB 167 clarifies that the statute of limitations for bringing an action under the Act is “90 days from the later of (1) the effective date of a decision of the local agency imposing conditions on, disapproving, or any other final action on a housing development project or (2) the expiration of the time periods specified in [Government Code section 65589.5, subdivision (h)(5)(B)].”<sup>40</sup>

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<sup>31</sup> Gov. Code, § 65589.5, subd. (k)(1).

<sup>32</sup> Gov. Code, § 65589.5, subd. (k)(1)(A).

<sup>33</sup> Gov. Code, § 65589.5, subd. (k)(1).

<sup>34</sup> Gov. Code, § 65589.5, subd. (k)(1)(A). Prior to the passage of SB 167, the court had to first provide the local agency with 60 days to comply with its order issuing a further order to approve the project.

<sup>35</sup> Gov. Code, § 65589.5, subd. (k)(1)(A), (C).

<sup>36</sup> Gov. Code, § 65589.5, subd. (k)(1)(B).

<sup>37</sup> Gov. Code, § 65589.5, subd., (k)(1)(B).

<sup>38</sup> Gov. Code, § 65589.5, subd., (k)(1)(B).

<sup>39</sup> Gov. Code, § 65589.5, subd. (l).

<sup>40</sup> Gov. Code, § 65589.5, subd. (m).

- **Attorneys' Fees**

SB 167 expands the categories of plaintiffs/petitioners who are entitled to attorneys' fees to include, not only a developer of affordable housing whose project has been disapproved, but also potential occupants of the project, housing organizations, and market-rate developers who sue under the Act.<sup>41</sup> While housing organization or others who successfully sued in the public interest to enforce the Act's affordable housing requirements were already able to claim under Code of Civil Procedure section 1021.5, California's private attorney general statute, SB 167 provides an additional justification for fees in such situations. SB 167 also expands attorneys' fees eligibility to entities who were not previously entitled, e.g., developers who challenge disapprovals of market-rate developments under the Act.

Further, while subsection (k)(1)(A), authorizes a court to deny fees to a petitioner "under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of [the Act]," subsection (k)(2), which entitles a housing organization "to reasonable attorney's fees and costs if it is the prevailing party in an action to enforce this section," contains no such exception to the award of fees when such fees are claimed by a housing organization.

- **Appeals**

SB 167 adds language that allows a party to appeal the trial court's judgment or order regarding Housing Accountability Act claims pursuant to Code of Civil Procedure section 904.1 in lieu of filing a writ petition.<sup>42</sup> Previously the Act only allowed for appeal via a writ petition.

**Contact PILP!** The Public Interest Law Project provides technical assistance and advocacy support to local legal services organizations engaging in housing element advocacy. Address: 449 15<sup>th</sup> Street, Suite 301, Oakland, CA 94612; Telephone: 510-891-9794; Email: [admin@pilpca.org](mailto:admin@pilpca.org); Website: [www.pilpca.org](http://www.pilpca.org).

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<sup>41</sup> Gov. Code, § 65589.5, subd. (k)(1)(A), (k)(2). This change overturns the Court of Appeal's holding in *Honchariw v. County of Stanislaus* (2013) 218 Cal.App.4th 1019 that a developer who sued under the Act regarding the disapproval of a subdivision application for a project that did not include any affordable housing was not entitled to attorneys' fees.

<sup>42</sup> Gov. Code, § 65589.5, subd. (m). This change overturns the Court of Appeal's decision in *Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, 941-943, which dismissed a developer's appeal of its Housing Accountability Act claim because the developer had not timely filed a writ petition, instead incorporating the claim into an appeal of the entire judgment. The Court of Appeal held that a party seeking appellate review of a court's decision under the Act may only do so by filing a writ petition within 20 days of the trial court's order; the court may grant up to 20 additional days to file for good cause.