June 13, 2024

Senator Dave Min, Chair
Senate Natural Resources and Water Committee
1021 O Street, Suite 6710
Sacramento, CA 95814

RE: AB 2560 (Alvarez) Oppose Unless Amended

Dear Chair Min and Committee members:

The undersigned organizations represent statewide and national constituencies committed to protecting coastal and ocean resources and upholding California's landmark coastal protection law: the California

Coastal Act of 1976 (Coastal Act). The Coastal Act protects public access guarantees, low-cost recreational opportunities, sea level rise preparedness efforts, wetlands, sensitive habitats, and the biological productivity of ocean waters. It requires new development to minimize energy use, reduce vehicle miles traveled, and avoid hazardous areas such as unstable bluffs and tsunami runup zones. The Coastal Act also provides that the Coastal Zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem,[1] and it is the paramount concern of the state to protect it at all costs.[2] Fifty years of Coastal Act implementation is the reason the California Coast belongs to all.

We submit an oppose unless amended letter rather than holding a straight oppose position, because we firmly and genuinely believe the Density Bonus Law can co-exist with public access and coastal resource protection. Also, we submit an oppose unless amended letter, because the proposed bill aims to exempt Coastal Zone developments from all California Coastal Commission (Coastal Commission) review. While it attempts to solve the underlying issue of a statewide lack of affordable housing, the proposed bill is not the right approach to solving that agreed-upon challenge. As discussed below, AB 2560 aims at the wrong target, because it exempts all Coastal Commission review for pending or additional development projects. The Coastal Commission is not preventing affordable housing on the coast by conducting the proper review.

While we appreciate the author's acceptance of amendments, we remain opposed to AB 2560, because it is a Coastal Act exemption bill. Even if we were amenable to the April 24th amendments, the amendments do not go far enough and leave key gaps. After discussing our concern with the proposed bill exempting the Coastal Act, we will discuss our specific concerns with the amendments later in the letter.

Unintended Consequences of a Coastal Act Exemption

An exemption from the Coastal Act does not simply shorten the review period for a project. **An exemption obliterates the ability of the Coastal Commission to enforce public access guarantees and mitigate impacts on coastal resources.** A Coastal Act exemption should be treated with the same consideration as an exemption to an analogous law such as the Porter-Cologne Act or State Lands Act.
Each of these aforementioned acts empowers a state body to exercise jurisdiction over an area of public concern. The Porter-Cologne Act, for example, defines the role of the State Water Resources Control Board. The State Lands Act defines the role of the State Lands Commission. By the same token, the Coastal Act defines the role of the Coastal Commission. Each of these entities was created to manage and balance competing interests over shared resources.

For the Coastal Commission, the duty is to manage development with coastal resources and public access guarantees across a physically dynamic environment. **The Coastal Commission has demonstrated a remarkable ability to balance competing priorities, including the urgent need for affordable**

[1] CAL. PUB. RES. CODE § 30001(a).
[2] CAL. PUB. RES. CODE § 30001(b).

housing. However, as provided under the Coastal Act, it is also the ultimate intent of the Coastal Commission to safeguard the permanent protection of the state's natural and scenic resources that are of paramount concern to present and future residents of the state,[3] along with the necessity of protecting the ecological balance of the Coastal Zone by preventing its deterioration and destruction.[4]

Exempting the Coastal Act removes a substantial law that gives the Coastal Commission the ability to mitigate impacts to public access guarantees,[5] lower-cost recreation opportunities,[6] critical habitats such as wetlands,[7] and sea level rise preparedness efforts.[8] Simply because an area has been zoned for residential development does not mean that the zoned parcel is devoid of natural resources or public access opportunities. It also does not mean that such a zoned parcel may avoid the impacts of climate change such as the inevitable rise in sea levels. If a development already exists on such a parcel, it means that development presumably has had its impacts mitigated. The removal of mitigation requirements for *additional* development on that same site is illogical because of the potential cumulative impacts of such further development that it inherently poses.

After all, the Coastal Act purports that sound and timely scientific recommendations are necessary for coastal planning and development decisions and that the Coastal Commission should, in addition to its own expertise in significant applicable fields of science, interact with members of the scientific and academic communities, especially with regard to issues such as the cumulative impact of Coastal Zone development.[9] By essentially exempting the Coastal Commission from the further review of future Coastal Zone developments, along with additional developments on established sites, the author of the proposed bill fails to give the Coastal Commission the legally mandated opportunity to utilize scientific information to analyze the potential cumulative impacts that future and additional Coastal Zone developments pose. In this way, **the proposed bill directly usurps the letter and intent of state law.**

AB 2560 is Different than SB 423

Even with the additional amendments, we oppose the proposed bill, because it seeks to exempt Coastal Zone development projects from review by the Coastal Commission. As opposed to SB 423 (2023), which sought to streamline Coastal Zone development projects, the proposed AB 2560 seeks to exempt *all* Coastal Zone development projects from Coastal Commission review entirely, so long as an applicant seeks a density bonus for a given housing development within the Coastal Zone. Contrary to SB 423, which still requires potential developments to obtain a Coastal Development Permit (CDP) to ensure that any development within the Coastal Zone is consistent with all local coastal program policies, along with the public access and public recreation policies of the Coastal Act, *AB 2560 does no such thing*. Rather, the proposed bill attempts to surpass *any* review by the Coastal Commission, including

[3] CAL. PUB. RES. CODE § 30001(b).
[4] CAL. PUB. RES. CODE § 30001(c).
[5] CAL. PUB. RES. CODE §§ 30210-30214; 30252.
[6] CAL. PUB. RES. CODE §§ 30210; 30213; 30220-30224.
[7] CAL. PUB. RES. CODE §§ 30230-30237; 30240.
[8] CAL. PUB. RES. CODE § 30270.
[9] CAL. PUB. RES. CODE § 30006.5.

the preclusion of CDPs, as a way to encourage new and additional developments within the Coastal Zone. In this way, AB 2560 is categorically different from the previously passed SB 423.

While we fully support affordable housing, we are opposed to developments that are sited in areas that prove to be more harmful than beneficial without the proper review–from ecological, recreational, and anthropogenic standpoints including development in hazardous locations. The proposed bill would do exactly that–that is, provide for scientifically unregarded developments in areas that either deplete sensitive natural resources of the coast, reduce recreational access, or place prospective residents in danger due to factors such as rising sea levels and soil erosion through being exempt from the review process. Contrary to the streamlined review process under SB 423, AB 2560 aims to surpass *any* Coastal Commission review, including the inevitable sea level rise that is required to be evaluated under the CDP review process. The two bills are simply not the same, and the outcome of AB 2560 will nevertheless prove to be more socially and environmentally problematic than that of SB 423.

The potential permitting conflict between SB 423 which streamlined multi-family housing permitting and AB 2560 may also raise issues. This will likely cause more uncertainty for developers, rather than less, which is one of the goals of AB 2560.

At the very least, some sort of review by the Coastal Commission should be conducted in the name of the safety, health, welfare, and recreational public access, as well as in the name of protecting the ecological integrity of the natural environment. Furthermore, the potential developers along the coastal areas have a moral obligation to, at the very least, provide the proper review for potential environmental dangers that may be exposed to prospective residents. To allow exemptions for such potential developments within the Coastal Zone without any proper review would not only put the safety and welfare of the people at risk; it would also prove to be inconsistent with the intent of the California voters who enacted Proposition 20.

Moreover, impact mitigation is not a prohibition on development. Guaranteeing public access through a review process is not frivolous. Public access is not always an 8-foot-wide cement walkway with hand railings. **Access varies as the conditions along our coast vary, which is why project-based review is critical.** Without the proper project-based review, the proposed bill would essentially pose as a generalized, blanketed "solution" to developing coastal areas that have site-specific problems with distinct intricacies and variables related to public access points. By surpassing the process of project-based review with regard to public access, the proposed bill would not only ignore the provisions of the Coastal Act,[10] but it would also ignore the provisions of the California Constitution.[11] **Therefore, the proper project-based review and impact mitigation is necessary to uphold the letter and intent of state law, along with that of our state's Constitution.**

[10] CAL PUB. RES. CODE §§ 30210-30214.

[11] CA Constitution Art. X § 4 ("No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.").

April 24th Amendments

We have several issues with the amendments to section (m) including,

A. their failure to account for the protection of Environmentally Sensitive Habitat Areas (ESHAs), which is distinct from "sensitive coastal resource areas" under 30603(a)(3) or the Coastal Act,
B. their failure to adequately address Coastal Zone development in relation to sea level rise, and
C. their failure to address Coastal Zone development related to equitable public access to California's ocean and beaches.

A. Failure to Account for the Protection of ESHAs

Under the amended section (m)(1) of the proposed bill, the bill states that development shall not be located on "[a]n area of the coastal zone [*sic*] subject to paragraph (1), (2), or (3) of subdivision (a) of Section 30603 of the Public Resources Code."[12] Looking to paragraph (3) of subdivision (a) of Section 30603 of the Public Resources Code, an action taken by a local government may be appealed for developments not mentioned in paragraphs (1) or (2) that are located in a *sensitive coastal resource area*.[13] The amended section of the bill therefore only takes into account sensitive resource coastal areas, and fails to account for Environmentally Sensitive Habitat Areas. A "sensitive coastal resource area" is defined differently than an Environmentally Sensitive Habitat Area (ESHA) under the Coastal Act.

A "sensitive coastal resource area" is defined under the Coastal Act as "those identifiable and geographically bounded land and water areas within the coastal zone of vital interest and sensitivity."[14] Subsections (a) through (g) of that definition fail to account for areas that could be easily disturbed by human activity or development. On the other hand, under the Coastal Act, an ESHA–or as the terminology that is used therein, "environmentally sensitive areas"--is properly defined as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which *could be easily disturbed or degraded by human activities and developments*."[15] The Coastal Act provides that ESHAs "shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas."[16] Furthermore, the Coastal Act states that developments in areas adjacent to ESHAs "shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas."[17]

The gap in the amended section (m)(1) of the proposed bill is that it covers "sensitive coastal resource areas," but fails to include "environmentally sensitive areas." This is one of our major issues with this amended section of the proposed bill as the two definitions are *not* synonymous. In failing to integrate ESHAs–or "environmentally sensitive areas" as the Coastal Act defines them–into the language, the

[12] CAL. GOV. CODE § 65915(m)(1).
[13] CAL. PUB. RES. CODE § 30603(a)(3).
[14] CAL. PUB. RES. CODE § 30116.
[15] CAL. PUB. RES. CODE § 30107.5 [emphasis added].
[16] CAL. PUB. RES. CODE § 30240(a).
[17] CAL. PUB. RES. CODE § 30240(b).

proposed bill fails to account for those areas that could be easily disturbed by human activities and developments. On the contrary, the bill as amended solely focuses on protecting areas "of vital interest and sensitivity"-- a vague definition that ultimately fails to account for areas that could be easily disturbed or degraded by human activities and developments. Though it may account for sensitive coastal resource areas, **the proposed bill's failure to also account for ESHAs proves to be a substantial gap, as ESHAs are required to be protected under the Coastal Act.**

B. Failure to Adequately Address Coastal Zone Development in Relation to Sea Level Rise

Under the amended section (m)(3) of the proposed bill, the author states that no development shall occur in "an area of the coastal zone that is vulnerable to five feet of sea level rise, as determined by the National Oceanic and Atmospheric Administration, the Ocean Protection Council, the United States Geological Survey, the University of California, or a local government's coastal hazards vulnerability assessment."[18] There are two crucial gaps in this amended section. First, **five feet is an arbitrary number for sea level rise**, as the entire state could face up to 6.6 feet of rise on average by 2100, according to the Ocean Protection Council's latest Sea Level Rise Guidance.[19] Regional, local, and even site-specific sea level rise is highly variable and some areas of the state are estimated to have sea level rise that surpasses five feet within just a few decades, including the Humboldt area, amongst others. Second, **the amended section (m)(3) of the proposed bill fails to provide a timeframe within which five feet of sea level rise is estimated to occur**. It simply provides the arbitrary number of five feet without indicating any scientific estimates as to *when* such a sea level rise of five feet is projected to occur. Under the Coastal Act, sea level rise impacts on coastal resources and planning management policies must be taken into account to identify, assess, avoid, and mitigate the adverse effects of sea level rise.[20] Furthermore, as mandated by the Coastal Act, such an account of sea level rise in relation to coastal planning and development within the Coastal Zone should be based on "sound and timely scientific recommendations" made by the Coastal Commission, not merely arbitrary speculations as the proposed bill currently offers.[21]

As indicated in the most recent report by the Intergovernmental Panel on Climate Change (IPCC), global mean sea levels are rising with virtual certainty, and sea level rise is accelerating with high confidence.[22] With global temperatures being projected to rise *at least* 1.5 degrees Celsius above pre-industrial levels by 2050, it is virtually uncertain how much sea levels may rise, despite knowing that they are inevitably bound to rise nonetheless.[23] Thus, it is important to take a precautionary approach to coastal planning.

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[18] CAL. GOV. CODE § 65915(m)(3).
[19] California OPC, *State of California Sea Level Rise Guidance, 2024 Science and Policy Update*, available at https://opc.ca.gov/wp-content/uploads/2024/05/Item-4-Exhibit-A-Final-Draft-Sea-Level-Rise-Guidance-Update-2024-508.pdf.
[20] CAL. PUB. RES. CODE § 30270.
[21] CAL. PUB. RES. CODE § 30006.5.
[22] IPCC, 2023: *Climate Change 2023: Synthesis Report.* Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 35-115, doi: 10.59327/IPCC/AR6-9789291691647.
[23] *Id.*

Overall, we take issue with the amended section (m)(3) of the proposed bill because the indicated number of five feet for sea level rise is an arbitrary number based merely on speculation, not science. The amended section also fails to provide a timeframe within which five feet of sea level rise is expected to occur and, thus, when it would be expected to impact potential Coastal Zone developments.

C. Failure to Address Coastal Zone Development in Relation to Equitable Public Access

Furthermore, under amended section (m), the proposed bill fails to address Coastal Zone development in relation to the equitable public access of California's ocean and beaches. Under the Coastal Act, public access is a legislatively mandated requirement to ensure that all citizens may use and enjoy the state's oceans and beaches for their recreational benefit. As a navigable water, the Pacific Ocean falls within the public trust and is subject to the public trust doctrine. Moreover, the Coastal Act requires that "[d]evelopment shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization…"[24] **Nowhere in the amended bill as it is currently proposed provides how developers will comply with the state law requiring that development shall not interfere with the public's right of access to the sea and beaches.** Rather, the proposed bill ignores the constitutionally guaranteed aspect[25] of public access to the sea and beaches entirely. **The amended section (m) of the proposed bill fails to indicate therein how developments in the Coastal Zone will avoid usurping the rights of citizens to access the sea and beaches through open and equitable public access.**

As discussed below, we would consider supporting amendments to further harmonize the Coastal Act and Density Bonus Law including through Local Coastal Programs (LCPs). Some jurisdictions have already adopted more specific LCPs. **We continue to be open to further discussions with the author's office to find a way to achieve our common goal of more affordable housing at the coast and also protecting our natural resources and public access.**

The author of AB 2560 claims the Coastal Act has "played a pivotal role in preventing the development of enough housing to meet the demand on the coast."[26] As discussed below, existing statutory and case law demonstrates that this assertion is misguided**.**

Applicable Statutory Law

Coastal Act policies are implemented through CDPs issued by the Coastal Commission or local governments with certified LCPs. In the Coastal Zone, density bonus concessions, incentives, and waivers are still fully available to the applicant so long as those concessions, incentives, and waivers are incorporated into the project in a manner that is consistent with the Coastal Act.[27]

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[24] CAL. PUB. RES. CODE § 30211.
[25] CA Constitution, Art. X, Section 4.
[26] Assm. David Alvarez, *AB 2560 (Alvarez): Expanding Coastal Housing Access,* available at https://a80.asmdc.org/sites/a80.asmdc.org/files/2024-03/AD80_AB2560_FactSheet.pdf.
[27] CAL. GOV'T CODE § 65915(m).

The legislative intent of existing law makes *clear* the Density Bonus Law is required to be accommodated in a manner that harmonizes the Density Bonus Law and the Coastal Act.[28] All laws must be interpreted in a manner consistent with legislative intent.[29] Legislative intent requires that the Coastal Commission or local agency implementing the Coastal Act approve a developer's request for density, concessions, and incentives regardless of a conflict with the LCP.[30] As a result, the Density Bonus Law "shall be accommodated" even when implementing the Coastal Act.[31]

Harmonizing the Density Bonus Law and the Coastal Act is already achievable. Similar to the goal of the Density Bonus Law, the Coastal Act requires:

> "[when] reviewing residential development applications . . . . the issuing agency or the commission, on appeal, may not require measures that reduce residential densities below the density sought by an applicant if the density sought is within the permitted density or range of density established by local zoning *plus the additional density permitted under Section 65915 of the Government Code*."[32]

Existing law applied with legislative intent requires the following components of the Density Bonus Law be considered when balancing mitigation of impacts by the Coastal Act:[33]

- the Density Bonus Law "shall be interpreted liberally in favor of producing the maximum number of total housing units;"[34]
- density bonuses are granted without amending any LCP;[35]
- concessions or incentives must be granted without requiring discretionary approval;[36] and
- additional density bonuses must be granted upon meeting certain requirements.[37]

In addition, the Coastal Act recognizes "it is important for the commission to encourage the protection of existing and the provision of new affordable housing opportunities for persons of low and moderate-

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[28] A.B. 2797 (Bloom), Chapter 904, Statutes of 2019 ("[t]his bill would require that any density bonus, concessions, incentives, waivers or reductions of development standards, and parking ratios to which an applicant is entitled under the Density Bonus Law be permitted in a manner that is consistent with that law and the California Coastal Act of 1976.").
[29] *Foster v. United States*, 303 U.S. 118, 120 (1938) at 303; *see also People v. Christianson* (2023) 97 Cal. App. 5th 300 at 396 ("court does not interpret statute as to contravene apparent legislative intent"); *see also People v. Rhodius* 97 Cal. App. 5th 38 at 46 and *People v. Gonzalez* (2008) 43 Cal. 4th 1118 quoting *People v. Shabazz* (2006) 38 Cal. 4th 55 at 67 ("literal construction should not prevail if it is contrary to the legislative intent apparent in the statute").
[30] ASSEMBLY COMM. HOUSING AND COMMUNITY DEVELOPMENT, A.B. 1287 ANALYSIS (Apr. 10, 2023) at 9 (heard on Apr. 12, 2023) available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB1287.
[31] *Id.*
[32] CAL. PUB. RES. CODE § 30604(f) [emphasis added]; *see also* SB 619 (Ducheny), Chapter 793, Statutes of 2003.
[33] A.B. 2797 *supra* note 7.
[34] CAL. GOV'T CODE § 65915(r).
[35] CAL. GOV'T CODE §§ 65915(f)(5); (j)(1).
[36] CAL. GOV'T CODE § 65915(j)(1).
[37] CAL. GOV'T CODE § 65915(v).

income in the coastal zone."[38] **The Coastal Act already requires that the Coastal Commission "*shall* encourage housing opportunities for persons of low and moderate income."[39]**

Applicable Case Law

In *Kalnel Gardens, LLC v. City of Los Angeles*, an appellate court reviewed the City of Los Angeles' Planning Commission and City Council's decision to deny a density bonus project. This superseded case is often given as an example of the Coastal Act undermining the proliferation of density bonuses.[40]

However, the Coastal Commission did not deny this project. It was the local jurisdiction, not the Coastal Commission, which denied the density bonus. Here, the trial court found granting *the density bonus was proper and consistent with the Coastal Commission-approved Land Use Plan*.[41]

Recently, two appellate court cases outside the Coastal Zone have strengthened the Density Bonus Law. *Schreiber v. City of Los Angeles* held that housing applicants no longer need to document why the requested incentives will reduce affordable housing costs. Instead, the locality must make its own affirmative evidentiary finding to rebut the presumption that reducing development standards reduces costs.[42] Similarly, *Bankers Hill 150 v. City of San Diego* held that a locality "could *not* demand" a housing project adhere to design restrictions.[43]

None of these cases involved a denial of a density bonus by the Coastal Commission. It is now the Coastal Commission's responsibility to ensure LCPs incorporate the *Schreiber* and *Bankers Hill 150* decisions as required by existing legislative intent and existing statutes within the Coastal Act.[44]

Conclusion

Ultimately, this bill aims at the wrong target, because it exempts *all* Coastal Zone developments from the proper Coastal Commission review. The Coastal Commission has never denied a fully affordable housing project in its 50-year history; it has approved numerous density bonus projects over the last decade; and it has worked with several local governments to incorporate density bonus policies into their LCPs. It has maximized the use of its authority to preserve density and championed the application of the "no net loss" policy to new construction. **All AB 2560 guarantees is the removal of coastal resource and public access protections in attempting to supersede the proper review process.**

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[38] CAL. PUB. RES. CODE § 30604(h).
[39] CAL. PUB. RES. CODE § 30604(f) [emphasis added].
[40] The decision in *Kalnel Gardens* is superseded by the duly adopted AB 2797 (Bloom), Chapter 904 which struck a balance between the Density Bonus Law and the Coastal Act on this issue. A.B. 2797 *supra* note 3.
[41] *Kalnel Gardens, LLC v. City of Los Angeles*, 3 Cal. App. 5th 927 (2016) at 937.
[42] *Scheiber v. City of Los Angeles*, 69 Cal. App. 5th 549 (2021) [emphasis added]; *see also* S.B. 713 (Padilla), Chapter 784, Statutes of 2023 (this bill also removed "incentives or concessions" and "waivers or reductions of development standards" from the list of items for which a locality may require reasonable documentation.").
[43] *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal. App. 5th 755, review denied (May 11, 2022) [emphasis added].
[44] A.B. 2797 *supra* note 7; CAL. PUB. RES. CODE § 30604(f), (g).

The answer is to *restore* the original Coastal Act policy *protecting* and *providing* for affordable housing in the Coastal Zone just as the Coastal Commission was empowered to do between 1976 and 1981. The repeal of these provisions by the Mello Act wrongfully precludes the Coastal Commission from requiring affordable housing in the Coastal Zone.[45]

We are happy to work with the author to develop legislation that utilizes the Coastal Act and Coastal Commission to further affordable housing ***not*** as an obstacle.

Sincerely,

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[45] *See* CAL. GOV'T CODE § 65590; Joseph D. Smith AICP *supra* note 27.

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cc: Assemblymember Alvarez, District 80