Chapter 758: Density Bonus Fast Track

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Code Sections Affected
AB 2501 (Bloom); 2016 STAT. Ch. 758.

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I. INTRODUCTION

On June 21, 2016, Encinitas City Councilwoman Catherine Blakespear stood before the Senate Transportation and Housing Committee in defense of her Southern California town.1 The Encinitas City Council sent Blakespear to testify

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in opposition to Assembly Bill 2501 (AB 2501), a bill with “major changes” to density bonus law. Density bonus law permits housing developers to build more units than otherwise permitted under local zoning ordinances in exchange for setting aside a certain number of units for lower income residents.

During the hearing, Blakespear expressed that her city was opposed to density “just for the sake of density,” and that “people who want urban living can live in downtown San Diego, but those who choose to live in Encinitas do so for a reason.” Other cities criticized AB 2501 as infringing on their “authority to interpret [their] own development standards.” Blakespear entreated the state senators not to tie her “city’s hands by prohibiting [the] planning department from requesting . . . developer[s] perform routine studies.”

In recent years, housing developers have sued Encinitas multiple times for the city’s interpretation of state density bonus law. In fact, the day before the senate hearing, Encinitas settled a lawsuit over its interpretation of state density bonus law. DCM Properties, an Encinitas developer, sued the city for rounding down when calculating the number of permitted units under density bonus law, rather than rounding up. In 2014, the Building Association of San Diego sued Encinitas for not complying with state density bonus law. Because Encinitas made it an official priority to “regain local control” over state density bonus

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4. CAL. GOV’T CODE § 65915(b)(1).
5. Senate Transportation and Housing Committee Hearing, supra note 1, at 2:20:00–2:20:10.
6. Id. at 2:20:30–2:20:45.
9. See Maya Srikrishnan, Encinitas Sued for Defying Affordable Housing Law, Again, VOICE OF SAN DIEGO (Mar. 9, 2016), http://www.voiceofsandiego.org/topics/government/years-of-defying-state-affordable-housing-law-gets-encinitas-sued-again/ (“[Encinitas] has been sued multiple times for manipulating the law on individual projects that tried to use it, and with citywide policies that would make it harder for developers to consider it as an option.”)
11. Id.
2017 / Government

law,\textsuperscript{13} some have described Encinitas as “the poster child for why density bonus law exists.”\textsuperscript{14}

Assemblymember Richard Bloom introduced AB 2501 (chaptered as Chapter 758) to remove barriers to the construction of more affordable housing.\textsuperscript{15} Chapter 758 establishes a “clear process and deadlines for local governments to approve or deny a density bonus application,”\textsuperscript{16} and limits “the ability of local governments to impose additional requirements to block density bonus projects.”\textsuperscript{17}

II. LEGAL BACKGROUND

Density bonus law permits housing developers to build more units than otherwise permitted under local zoning ordinances in exchange for setting aside a certain number of units for low-income residents, very low-income residents, or seniors.\textsuperscript{18} To qualify for a density bonus, a developer must set aside a certain percentage of units for affordable housing.\textsuperscript{19}

Density bonus law was first introduced in 1979.\textsuperscript{20} Before it was amended in 2004, state law provided a 25 percent density bonus for developments with 20 percent lower income housing, 10 percent very low income housing, 50 percent senior housing, and a 10 percent density bonus for condominiums with 20 percent moderate income housing.\textsuperscript{21} A developer could not increase the density bonus by increasing the units set aside.\textsuperscript{22}


\textsuperscript{14} Srikrishnan, supra note 9.

\textsuperscript{15} See Affordable Housing Bills Passed, SANTA MONICA MIRROR (Sept. 2, 2016), http://www.smmirror.com/articles/News/Affordable-Housing-Bills-Passed/45978 (Prior “law, however, contain[ed] a number of ambiguous provisions that discourage developers from utilizing it or are used by some local governments to prevent developers from accessing its benefits.”)

\textsuperscript{16} Senate Transportation and Housing Committee Hearing, supra note 1, at 2:12:15–2:12:25.

\textsuperscript{17} Id. at 2:12:40–2:12:55.


\textsuperscript{19} GOV’T § 65915(b)(1).


\textsuperscript{21} See Marc Brown & Christine Minnehan, SB 1818 - Density Bonus, CALIFORNIA HOUSING LAW PROJECT (2004), available at http://www.housingadvocates.org/facts/1818.pdf (“Existing law requires localities to grant a flat density bonus of 25% for developments with 20% lower income units, 10% very low, or 50% for seniors, and a flat 10% density bonus for condominiums with 20% moderate income units.”)

\textsuperscript{22} See id. (suggesting flat density bonus rates prevent developers from individually increasing density).
To illustrate how this works, consider a lot zoned for 100 residential units. Under density bonus law in 1979, a developer could build up to 125 units if the developer set aside 20 units for low income residents, 10 units for very low income residents, or 50 units for seniors. Under a density bonus, revenue from additional units can make the project profitable even if the affordable units are a net loss to a developer.

A. AB 1866: Development Standards

In 2002, the state legislature amended density bonus law with AB 1866. AB 1866 prohibited local governments from imposing development standards on density bonus projects to discourage developers from building at the minimum density permitted by density bonus law. Prior to AB 1866, local governments like Encinitas used setback requirements, minimum lot sizes, and height restrictions to prevent developers from taking advantage of the density bonus law. AB 1866 expressly required local governments to reduce development standards as needed in order to take advantage of density bonus law.

Additionally, AB 1866 sought to address situations where local governments failed to offer additional incentives and concessions when affordable housing projects were not economically feasible. Prior law required local governments to issue additional incentives and concessions as needed to make affordable housing projects economical, such as reductions in site development standards, zoning requirements, or architectural design requirements, but some local governments offered insufficient incentives and concessions to prevent density bonus projects. AB 1866 required local governments to grant concessions

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24. Id.
25. See id. (“The cost of building these affordable units is almost wholly subsidized by the profits earned on the additional market-rate units.”)
27. Id.
28. See Marc Brown & Christine Minnehan, Second Units & Density Bonuses, CALIFORNIA HOUSING LAW PROJECT (2002), http://www.housingadvocates.org/docs/secunits.pdf (on file with The University of the Pacific Law Review) (“In numerous cases, local governments . . . adopt development standards that make it impossible to build at the density provided for in the zoning plan.”)
30. See Brown & Minnehan, supra note 28 (indicating that “localities often do not offer concessions or incentives that are meaningful.”)
31. See id. (“Existing law requires local governments to grant an additional concession/incentive needed to make affordable housing projects feasible.”)
32. See id. (“In numerous cases, local governments . . . adopt development standards that make it impossible to build at the density provided for in the zoning plan.”)
unless the incentive or concession was not needed to make the affordable housing profitable for the developer.\textsuperscript{33}

Under existing law, local governments must provide one incentive or concession when a project: (1) sets aside 5 percent for very low income, 10 percent for low income, or 10 percent for moderate income residents, two incentives or concessions when a project sets aside 10 percent for very low income, 20 percent for low income, or 20 percent for moderate income residents; and, (2) three incentives or concessions when a project sets aside 15 percent for very low income, 30 percent for low income, or 30 percent for moderate income residents.\textsuperscript{34}

\subsection*{B. SB 1818: Density Bonus Ranges}

In 2004, SB 1818 expanded density bonus law by adding ranges of density bonuses for low income and very low income units.\textsuperscript{35} The density bonus ranges set in SB 1818 continue to apply today.\textsuperscript{36} Prior to SB 1818, density bonus law offered developers a 25 percent density bonus for housing developments with either 20 percent for low income residents, 10 percent for very low income residents, or 50 percent of units set aside for seniors.\textsuperscript{37} Instead of a flat 25 percent density bonus, SB 1818 created a range of density bonuses from 20 to 35 percent.\textsuperscript{38} As the percentage of units set aside increases, the density bonus increases.\textsuperscript{39}

SB 1818 also increased the number of incentives or concessions required under density bonus law, such as reduction in parking requirements, architectural standards, or site standards.\textsuperscript{40} The higher percentage of units developers set aside for affordable housing, the more incentives or concessions will be available.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{33} 2002 Cal. Stat. ch. 1062, § 3(e) (amending GOV’T § 65915).
\item \textsuperscript{35} 2004 Cal. Stat. ch. 928, § 1(g)(1) (amending GOV’T § 65915).
\item \textsuperscript{36} See Goetz & Sakai, supra note 34 (charting a range of density bonuses from 20 to 35 percent).
\item \textsuperscript{37} Brown & Minnehan, supra note 21.
\item \textsuperscript{38} 2004 Cal. Stat. ch. 928, § 1(g)(1) (amending GOV’T § 65915).
\item \textsuperscript{39} Brown & Minnehan, supra note 21. Density bonuses for low income units increase by 1.5 percent for every 1 percent increase in units. Id. Density bonuses for very low income units increase by 2.5 percent for every 1 percent increase in units. Id. Density bonuses for condominiums increase by 1 percent for each 1 percent increase in moderate income units. Id.
\item \textsuperscript{40} 2004 Cal. Stat. ch. 928, § 1(d)(2) (amending GOV’T § 65915).
\end{itemize}
C. **AB 2222: Replacing Existing Affordable Units**

Unlike AB 1866 and SB 1818, which sought to increase participation by developers by lowering development standards and providing ranges of density bonuses, the state legislature passed AB 2222 to exclude some redevelopment from density bonuses. Before AB 2222, if a developer tore down an existing building with affordable units, a new building could have less affordable units and still trigger a density bonus. AB 2222 required that developers replace existing affordable units in order to qualify for an incentive or concession under density bonus law.

### III. CHAPTER 758

Chapter 758 amends Section 65915 of the Government Code to streamline the density bonus application process for housing developers. “In order to provide for the expeditious processing of a density bonus application,” local governments must: (1) adopt procedures and timelines for processing applications; (2) provide applicants with a list of the documents required with the density bonus application; and, (3) notify applicants of whether applications are complete pursuant to the Permit Streamlining Act. The Permit Streamlining Act requires public agencies to notify applicants in writing whether applications are complete within 30 days of submission. If an application is incomplete, agencies must describe the information needed to make it complete. After receiving a complete application, local governments are prohibited from conditioning approval on additional studies or research, but local governments...
may require developers to “provide reasonable documentation to establish eligibility for a requested density bonus.”

In addition to expediting the application process, Chapter 758 changes when cities and counties may deny an application. Previously, local governments could deny a density bonus if the local government found, based on substantial evidence, that the developer did not require the requested density bonus in order to promote affordable housing in the community. Chapter 758 permits a local government to deny an application only upon substantial evidence that the requested density bonus would not reduce the cost of building affordable housing. If an application is denied and the applicant appeals, Chapter 758 shifts the burden of proof onto the local government to show that local government properly denied the density bonus application.

Chapter 758 also clarifies that existing law requires local governments to round up to the next whole unit when calculating density bonuses for redevelopment and new development.

Further, Chapter 758 expands Section 65915 to “mixed-use developments.” As introduced, AB 2501 defined “mixed-use developments” as buildings with both residential and commercial uses, such as buildings with housing on the upper stories and stores on the first floor. The enacted bill did, however, define “mixed-use.”

IV. ANALYSIS

As introduced, AB 2501 faced initial opposition from the League of California Cities and the California chapter of the American Planning Association. The League of California Cities expressed the need “to keep the developers honest” and “[tie] projects to affordable housing.” The American Planning Association suggested that AB 2501, as introduced, would have expanded density bonus law in a way “inconsistent with the original intent of the density bonus law” and that the changes “would eliminate any balance the

51. Id.
52. Id. § 65915(d)(1) (amended by Chapter 758).
53. Id. § 65915(d)(1) (prior to Chapter 758).
54. Id. § 65915(d)(1) (amended by Chapter 758).
55. Id. § 65915(d)(4) (enacted by Chapter 758).
56. GOV’T § 65915(q) (enacted by Chapter 758).
57. Id. § 65915(c)(3)(B)(i); Id. § 65915(f)(5).
58. Id. § 65915(i) (amended by Chapter 758).
60. GOV’T § 65915(i) (amended by Chapter 758).
existing statute had provided between the needs and concerns of the community” and the housing developer.63

Assemblymember Bloom worked with the League of Californian Cities and the American Planning Association to remove opposition from the bill.64 As amended, AB 2501 passed the State Senate on August 25.65 The Assembly concurred to the amendments on August 31,66 and the governor signed the bill into law as Chapter 758 on September 28, 2016.67

Part A examines how the changes to density bonus law will impact the affordable housing crisis in California.68 Part B discusses the balance between local communities and housing developers.69

A. Will Chapter 758 Help Address the Affordable Housing Crisis?

Section 1 addresses the extent of the affordable housing crisis in California.70 Section 2 considers the issues faced by density bonus law reform.71 Section 3 examines the scope of Chapter 758 and to what degree Chapter 758 will strengthen density bonus law.72

1. Affordable Housing in California

California is in an affordable housing crisis.73 The state has higher median home prices than any other state—more than twice the national average.74 The

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64. Senate Transportation and Housing Committee Hearing, supra note 1, at 1:53:35–1:54:20; Letter from John Terell, Vice President Policy and Legislation, Am. Planning Ass’n, Cal., to Senate Transp. & Hous. Comm. (June 24, 2016).
68. Infra Part IV.A.
69. Infra Part IV.B.
70. Infra Part IV.A.1.
71. Infra Part IV.A.2.
73. See Liam Dillon, California doesn’t have enough housing, and lawmakers aren’t doing much about it, L.A. TIMES (Apr. 14, 2016, 12:05 AM), available at http://www.latimes.com/politics/la-pol-sac-california-high-housing-prices-20160414-story.html (on file with The University of the Pacific Law Review) (“California finds itself in a deep housing hole, and residents are feeling the results.”)
average monthly rent in California is $1,240, which is nearly twice the national average.\(^{75}\) Even the least expensive markets in California are more expensive than the national average.\(^{76}\) Despite soaring prices, California builds housing much slower than other states.\(^{77}\) From 2008 to 2016, public investment in affordable housing dropped by more than 66 percent.\(^{78}\) This was largely due to the end of redevelopment, which previously provided as much as two billion dollars per year in public funds for low to moderate housing.\(^{79}\)

To provide affordable housing for California’s lowest income renters, the California Housing Partnership Corporation estimates that California needs an additional 1,540,000 affordable units.\(^{80}\) To meet this demand, the Legislative Analyst’s Office recommends offsetting high land costs with denser development.\(^{81}\) Particularly in developed areas along the coast, such as the Los Angeles metropolitan area and the San Francisco Bay Area, the Legislative Analyst’s Office suggests that even more dense housing may be necessary.\(^{82}\)

2. Increasing Participation by Developers

During a Senate Transportation and Housing Committee hearing, Brian Augusta of the California Rural Assistance Foundation, one of the bill’s sponsors, explained that California Rural Assistance Foundation pursued Chapter 758 to increase production of affordable units and increase participation by developers.\(^{83}\) Increasing developer participation in density bonus law works directly to increase production of affordable units under density bonus law.\(^{84}\)

In Los Angeles, a study by the Los Angeles Business Council found that developers took advantage of density bonus law in 187 market rate projects between 2008 and 2013—which accounted for only five percent of multifamily

\(^{75}\) Id.  
\(^{76}\) Id. at 7.  
\(^{77}\) Id. at 20. 
\(^{79}\) Id. (“Cuts in annual federal and state funding, including elimination of Redevelopment, have reduced California’s investment in affordable housing production and preservation by more than $1.7 billion annually since 2008.”)  
\(^{80}\) Id.  
\(^{81}\) Taylor, supra note 74, at 35.  
\(^{82}\) Id.  
\(^{83}\) Senate Transportation and Housing Committee Hearing, supra note 1, at 2:14:35–2:15:00.  
\(^{84}\) See Shane Phillips, Building a Better Density Bonus, Part 2: Reducing Thresholds, Increasing Participation, URBAN ONE (May 26, 2015), http://www.urbanone.com/building-better-density-bonus-los-angeles-part-2 (“Only about half of the density bonus units that could be built are actually getting built . . . and this is significantly reducing the supply of both affordable and market-rate units.”)
units built in Los Angeles. \(^85\) This is “roughly half of what we would expect with full participation.”\(^86\)

There are several reasons why developers choose not to participate in density bonus law. \(^87\) Resistance from local governments can be a factor, however, the most likely reason is that “the financials simply don’t work out.”\(^88\) When the cost of affordable units is more than the revenue from additional units, housing developers may lose money by participating. \(^89\)

Some economists criticize affordable housing policies for not giving enough consideration to the additional costs they impose. \(^90\) For instance, in developed areas along the coast, local zoning may already permit, and developers may already be taking advantage of, high density requirements. \(^91\) In this case, increased density may not be profitable for developers. \(^92\) Increased density may not increase the value of the project or may make the property harder to sell. Less square footage may make the housing unit less attractive to potential buyers or renters. \(^93\)

Additionally, increased density may require more expensive construction, which could offset any cost savings from increased density. \(^94\) Likewise, incentives and concessions under density bonus law could, under state law, require developers to meet prevailing wage requirements, cutting into any profits from increased density. \(^95\) Developers may also face public backlash from more

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86. Phillips, supra note 84.


88. Id. (“The additional cost of the affordable units exceeds the profit earned on the extra market-rate units, so the developer can earn a better return without the density bonus.”)


90. See id. (“Some developers cannot use a density bonus because their project already has a high number of units per acre.”)

91. See id. (“A density bonus is not applicable to certain types of developments . . . because a density bonus . . . may not be economically beneficial.”)

92. See id. (“Many developers do not seek to increase the density of their developments to maintain a level of density they believe is critical for the marketing of their development.”)

93. See id. (“In some instances, a higher density would require developers to change their buildings to a more expensive construction type, which can offset the per unit land cost savings.”)

94. See Powell & Stringham, supra note 90, at 30 (“Developers often find themselves . . . unable to take advantage . . . because State law also requires developers to pay prevailing wages to all subcontractors when they take advantage of these incentives.”)
controversial density bonus projects. Developers concerned with public image may wish to avoid protests from existing community members.

Faced with these challenges to developer participation, advocates of density bonus law contend that the critics miss the point of density bonus law. Research shows that density bonus law has encouraged the construction of affordable housing, to an extent. One study found that “two to four percent of [] residential units built in the state between 1980 and 1983 were affordable units under density bonus law.” The study described this as “significant output.” Similar to the study by the Los Angeles Business Council, however, two to four percent participation is lower than experts would expect with full participation.

Advocates for density bonus law agree that density bonus law has not solved the affordable housing crisis, but point out that density bonus law has made it possible for non-profit affordable housing developers to compete with market-rate housing developers. Policymakers like Assemblymember Bloom did not intend Chapter 758 to be a “cure-all” for the affordable housing crisis. Instead, Chapter 758, and density bonus law in general, is one “tool” in a “toolbox of funding, incentives and programs.” Nevertheless, advocates for density bonus law, like the California Rural Assistance Foundation, recognize that to “insure we get as much production of affordable housing as we can,” policymakers must “incentivize market rate developers to participate.”

3. Will Chapter 758 Increase Participation by Developers?

Before Assemblymember Bloom accepted amendments in the Senate Housing and Transportation Committee, Chapter 758 included several provisions

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96. See id. (‘‘Some existing community members may protest a higher density development in their neighborhood.’’)

97. Id. (‘‘Some existing community members may protest a higher density development in their neighborhood.’’)

98. See, e.g., Stephen Russell, State Density Bonus Law Hasn’t Solved the Housing Crisis, But it Is Working, VOICE OF SAN DIEGO (May 2, 2016), http://www.voiceofsandiego.org/topics/opinion/state-density-bonus-law-hasnt-solved-housing-crisis-working/ (responding to critics in an attempt to ‘‘set the record straight’’ as to why density bonus laws are needed).


100. Id.

101. Id.

102. Phillips, supra note 84.

103. Russell, supra note 98.


105. Russell, supra note 98.

106. Senate Transportation and Housing Committee Hearing, supra note 1, at 2:14:00–2:15:00.
that would have had a significant impact on the density bonus application process.\textsuperscript{107} As introduced, AB 2501 would have prohibited public hearings on applications and prevented local governments from requiring public notice.\textsuperscript{108} If local governments failed to make a decision on density bonus application within 60 days, state law would have deemed the application approved.\textsuperscript{109}

While AB 2501 was in the Senate Transportation & Housing Committee, Assemblymember Bloom accepted amendments that removed opposition from the American Planning Association,\textsuperscript{110} the Rural County Representatives of California,\textsuperscript{111} the California State Association of Counties,\textsuperscript{112} and the League of California Cities.\textsuperscript{113} The amendments made significant changes to the bill by striking the prohibition on public hearings,\textsuperscript{114} removing the requirement that local governments decide within 60 days,\textsuperscript{115} and reserving the right to require “reasonable documentation to establish eligibility for a requested density bonus.”\textsuperscript{116}

The provisions prohibiting public hearings and automatically approving density bonus applications in 60 days would have lessened the impact of public backlash on more controversial density bonus projects\textsuperscript{117} and resistance from local governments,\textsuperscript{118} but would not have addressed the other reasons developers choose not to take advantage of density bonus law.\textsuperscript{119} As amended, the author of AB 2501 removed opposition from the bill, but the amendments also took away some of its strongest provisions, such as the prohibition on public meetings and

\begin{itemize}
\item \textsuperscript{107} See AB 2501, 2015–2016 Reg. Sess. (Cal. 2016) (as introduced on Feb. 19, 2016) (“The local government shall not require public notice or hold a public hearing on the application . . . If a local government fails to act to approve or disapprove the application within 60 days, the application shall be deemed approved.”)
\item \textsuperscript{108} Id. (“The local government shall not require public notice or hold a public hearing on the application.”)
\item \textsuperscript{109} Id. (“The local government shall, within 60 days of determining an application is complete, act to approve or disapprove the density bonus, or inform the applicant in writing as to the reason for refusing to grant the request.”)
\item \textsuperscript{110} Letter from John Terell, Vice President Policy and Legislation, Am. Planning Ass’n, Cal., to Senate Transp. & Hous. Comm. (June 24, 2016).
\item \textsuperscript{111} Letter from Tracy Rhine, Legislative Advocate, Rural Cty. Representatives of Cal., to Assemblymember Bloom (June 23, 2016).
\item \textsuperscript{112} Kiana Valentine, HLT Bills of Interest, CALIFORNIA STATE ASSOCIATION OF COUNTIES (June 23, 2016), http://www.counties.org/csac-bulletin-article/hlt-bills-interest-3#nomobile.
\item \textsuperscript{113} Letter from Kendra Harris, Legislative Representative, League of Cal. Cities, to Assemblymember Bloom (Aug. 9, 2016) (on file with The University of the Pacific Law Review).
\item \textsuperscript{114} GOV’T § 65915(a)(1) (amended by Chapter 758).
\item \textsuperscript{115} Id. § 65915(a)(3) (amended by Chapter 758).
\item \textsuperscript{116} Id. § 65915(a)(2) (amended by Chapter 758).
\item \textsuperscript{117} Powell & Stringham, supra note 90, at 30 (“Some existing community members may protest a higher density development in their neighborhood.”)
\item \textsuperscript{118} Phillips, supra note 23.
\item \textsuperscript{119} Powell & Stringham, supra note 90, at 29 (“Even where density bonuses are made available, some of the most enthusiastic promoters of inclusionary zoning concede that they are not a panacea for addressing its substantial costs.”)
\end{itemize}
the automatic approval of density bonus applications. For many developers, the cost of affordable units will likely continue to exceed the revenue from additional units as before. For developers facing resistance from local governments, however, Chapter 758 will in fact give more certainty in the density bonus application process with a “clear process and deadlines for local governments to approve or deny a density bonus application.”

**B. Does Chapter 758 Strike the Right Balance Between Local Communities and Housing Developers?**

Since it was first enacted in 1979, density bonus law shifted from a tool intended to “encourage” developers to offer density bonuses to a law requiring local governments to reduce development standards as needed in order to take advantage of density bonus law. The state legislature shifted the balance back to local governments with AB 2222.

Part 1 examines when local governments are required to approve density bonus applications under Chapter 758. Part 2 considers the level of discretion local governments maintain over the application process. Part 3 discusses whether local governments have time to give notice and hold public hearings under the timelines and procedures imposed by Chapter 758.

1. **Does Chapter 758 Make Density Bonuses by Right?**

Shortly after Assemblymember Bloom introduced AB 2501, Nato Green of the San Francisco Examiner expressed concern that AB 2501 would give developers “unchallengeable approval” for density bonus projects. Other commentators suggested that AB 2501 would make density bonus law “as of right” and “essentially ... an entitlement.” If density bonus law is “as of

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121. Phillips, supra note 23 (“The additional cost of the affordable units exceeds the profit earned on the extra market-rate units, so the developer can earn a better return without the density bonus.”)

122. Id.

123. Senate Transportation and Housing Committee Hearing, supra note 1, at 2:12:15–2:12:25.

124. Waite & Fogg, supra note 20; Brown & Minnehan, supra note 28.

125. Hinks, supra note 43.


right,” developers will have a right to the benefits after they set aside a certain number of units for affordable housing, irrespective of the expectations of planning staff or local governments.  

Assemblymember Bloom intended Chapter 758 to clarify that existing law makes incentive and concessions under density bonus law available to developers “by right.” Relevant case law supports this reading of density bonus law. In Latinos Unidos del Valle de Napa y Solano v. County of Napa, the First District Court of Appeal found that existing state density bonus law “imposes a clear and unambiguous mandatory duty on municipalities to award a density bonus when a developer agrees to dedicate a certain percentage of the overall units in a development to affordable housing.” The First District Court of Appeal rejected the County of Napa’s argument that the requirements under state density bonus law were “discretionary and volitional, rather than mandatory.”

Although the First District Court of Appeal in Latinos Unidos Del Valle De Napa y Solano did not decide whether density bonuses are by right, the court did find a “clear and unambiguous mandatory duty” on the part of local governments. With provisions reserving the right for local governments to require “reasonable documentation to establish eligibility,” and to deny concessions or incentives, density bonus law continues to reserve some quality control for local governments.

Chapter 758 does not make approval of density bonus projects “unchallengeable,” but does require local governments to grant a density bonus if an applicant submits an application meeting all the requirements of density bonus law.

131. Senate Transportation and Housing Committee Hearing, supra note 1, at 2:18:20–2:19:10 (“By taking away that provision to evaluate the need, it essentially becomes an entitlement for value conferred irrespective of whether there is a need to meet the affordable housing standard.”)

132. Barmann, supra note 130.

133. Jason Islas, Santa Monica Lawmaker Takes Aim at California’s Housing Shortage, STREETSBLOG CALIFORNIA (March 16, 2016), http://cal.streetsblog.org/2016/03/16/santa-monica-lawmaker-takes-aim-at-californias-housing-shortage/ (“The intent of the law . . . that the incentives provided for in the law are available ‘by right,’ meaning they require no special approval by commissions or city councils, to developers who build affordable units.”)


135. Id.

136. Id.

137. Id.

138. GOV’T § 65915(a)(2) (amended by Chapter 758).

139. Id. § 65915(d)(1) (amended by Chapter 758).

140. See id. (permitting local governments to deny concessions or incentives when “the concessions or incentives do[ ] not result in identifiable and actual cost reductions” or “the concession or incentive would have a specific adverse impact”).

141. Contra Green, supra note 129 (“Assembly Bill 2501 . . . allow[s] unchallengeable approval for projects compliant with existing zoning and density restrictions.”)

142. GOV’T § 65915(b)(1) (amended by Chapter 758).
2. **What Control Do Local Governments Maintain Over Density Bonus Projects?**

The League of California Cities warned that AB 2501, as introduced, would have unduly limited the discretion local governments have in denying concessions and incentives under density bonus law. Existing density bonus law “imposes a clear and unambiguous mandatory duty on municipalities,” but what discretion does Chapter 758 leave to local governments? 

Chapter 758 permits governments to deny incentives or concessions under density bonus law “if the waiver or reduction would have a specific, adverse impact . . . upon health, safety, or the physical environment,” or if the incentive or concession would “not result in identifiable and actual cost reductions.”

Prior to Chapter 758, local governments could deny incentives or concessions when “the concession or incentive would have a specific, adverse impact,” similar to Chapter 758, but only required local governments to show that the incentive or concession was “not required in order to provide for affordable housing costs.”

The standard in prior law, “not required in order to provide for affordable housing costs,” gave local governments more discretion than the standard under Chapter 758, “not result in identifiable and actual cost reductions.” Under Chapter 758, a local government would need to prove that the incentives or concessions requested would not reduce the cost of the project or it could face judicial proceedings initiated by the denied applicant.

Given that most incentives or concessions under density bonus law are reductions to development standards, zoning, or architectural design requirements, there are few incentives...

143. LEAGUE OF CALIFORNIA CITIES, supra note 7.
144. Latinos Unidos, 217 Cal.App.4th at 1167.
145. Accord Senate Transportation and Housing Committee Hearing, supra note 1, at 2:19:50–2:20:00 (asking the Senate Transportation and Housing Committee to leave “some local control”).
146. GOV’T § 65915(e)(1) (“Nothing in this subdivision shall be interpreted to require a local government to waive or reduce development standards if the waiver or reduction would have a specific, adverse impact.”)
147. Id. § 65915(d)(1)(A) (amended by Chapter 758) (“The city, county, or city and county shall grant the concession or incentive requested by the applicant unless the city, county, or city and county makes a written finding, based upon substantial evidence . . . [that] the concession or incentive does not result in identifiable and actual cost reductions.”)
148. Id. § 65915(e)(1).
149. Id. § 65915(d)(1)(B).
150. Compare id. § 65915(d)(1)(A) (prior to Chapter 758) with id. § 65915(d)(1)(A) (amended by Chapter 758) (Prior law only required local governments to show, based on substantial evidence, that the incentive was not required to build more affordable housing, while Chapter 758 requires local governments to show, based on substantial evidence, that the incentive would not reduce costs for the developer).
151. GOV’T § 65915(d)(3) (“The applicant may initiate judicial proceedings if the city, county, or city and county refuses to grant a requested density bonus, incentive, or concession.”)
or concessions that would not reduce the cost of the project. On the other hand, prior law permitted local governments to consider whether the incentive or concession was actually needed for affordable housing. For this reason, Peter Cohen of the Council of Community Housing Organizations in San Francisco warned that “by taking away that provision to evaluate the need, it essentially becomes an entitlement for value conferred irrespective of whether there is a need to meet the affordable housing standard.”

In addition to the changes to the standard by which local governments may deny a requested incentive or concession, Chapter 758 shifts the “burden of proof for the denial of a requested concession or incentive” to the local government. Local governments maintain the authority to deny incentives or concessions when “the concession or incentive does not result in identifiable and actual cost reductions” and when “the concession or incentive would have a specific adverse impact,” but if the developer challenges the denial in court, the local government would have to prove that the denial was not in error or face “attorney’s fees and costs of suit.”

3. Does Chapter 758 Effectively Preclude Notice and Public Hearings on Density Bonus Projects?

Some commentators warned that AB 2501 would “wipe out the ability of local governments” to conduct design reviews of density bonus projects. As introduced, AB 2501 required local governments to process density bonus applications within 30 days, and decide on density bonus applications within 60 days. AB 2501 would have also forbade local governments from requiring public notice or from holding public hearings on density bonus applications.

As enacted, and “in order to provide for the expeditious processing of a density bonus application,” Chapter 758 requires local governments to notify

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152. See Goetz & Sakai, supra note 34 (“Other tools include reduced parking requirements, other incentives and concessions such as reduced setback and minimum square footage requirements, and the ability to donate land for the development of affordable housing to earn a density bonus.”)

153. Gov’t § 65915(d)(1)(A).


155. Id. § 65915(d)(4) (amended by Chapter 758).

156. Id. §65915(d)(1)(A) (amended by Chapter 758).

157. Id. § 65915(d)(1)(B).

158. Id. § 65915(d)(4) (amended by Chapter 758).

159. Id. § 65915(d)(3).

160. Barmann, supra note 130.

161. See AB 2501, 2015–2016 Reg. Sess. (Cal. 2016) (as introduced on Feb. 19, 2016) (“The local government shall, within 30 calendar days following receipt of the application, make a written determination of whether the application for a density bonus is complete and shall transmit that determination to the applicant.”)

162. Id.

applicants whether density bonus applications are complete “consistent with Section 65943,” the Permit Streamlining Act.\textsuperscript{164} As enacted, Chapter 758 does not require local governments to decide on density bonus applications within 60 days.\textsuperscript{165} Chapter 758 requires local governments to “adopt procedures and timelines for processing density bonus applications”\textsuperscript{166} and “provide a list of all documents and information required” prospectively to developers.\textsuperscript{167} Under Chapter 758, local governments will be able to give notice and hold public hearings.\textsuperscript{168}

V. CONCLUSION

State Senator Jim Beall, the chair of the Senate Transportation and Housing Committee, described Chapter 758 as a “significant piece of legislation” for density bonus law.\textsuperscript{169} Although the amendments removed the most extensive and contentious parts of Chapter 758,\textsuperscript{170} it is nonetheless a “major round of changes to Density Bonus law.”\textsuperscript{171}

Chapter 758 may increase participation by developers facing resistance from local governments,\textsuperscript{172} but for many developers, the costs of affordable units will likely continue to exceed the revenue from additional units.\textsuperscript{173} To increase production of affordable housing, policymakers must further “incentivize market rate developers to participate.”\textsuperscript{174}

Under Chapter 758, local governments may deny incentives or concessions “if the waiver or reduction would have a specific, adverse impact . . . upon the

\textsuperscript{164} \textit{Gov’t § 65915(a)(3)(C)} (enacted by Chapter 758); \textit{see generally Gov’t § 65943} (specifying that an agency’s determination will specifically include the information needed to finish all incomplete portions of an application).

\textsuperscript{165} \textit{Compare AB 2501, 2015–2016 Reg. Sess. (Cal. 2016)} (as introduced on Feb. 19, 2016) (“The local government shall, within 60 days of determining an application is complete, act to approve or disapprove the density bonus”), \textit{with Gov’t § 65915(a)(3)(C)} (enacted by Chapter 758) (As introduced, AB 2501 would have required local governments to act on density bonus applications within 60 days of accepting the application, while Chapter 758 has no such restriction).

\textsuperscript{166} \textit{Gov’t § 65915(a)(3)(A)} (enacted by Chapter 758).

\textsuperscript{167} \textit{Id. § 65915(a)(3)(B)} (enacted by Chapter 758).

\textsuperscript{168} \textit{Compare AB 2501, 2015–2016 Reg. Sess. (Cal. 2016)} (as introduced on Feb. 19, 2016) (“The local government shall not require public notice or hold a public hearing on the application”), \textit{with Gov’t § 65915(a)(1)} (amended by Chapter 758) (leaving open public notice and public hearings) (As introduced, AB 2501 would have forbade public notice and public hearings on density bonus applications, while Chapter 758 has no such restriction).

\textsuperscript{169} \textit{Senate Transportation and Housing Committee Hearing, supra note 1}, at 2:30:55–2:31:00.


\textsuperscript{171} Terell, \textit{supra note 3}.

\textsuperscript{172} Phillips, \textit{supra note 23}.

\textsuperscript{173} \textit{See id.} (“The additional cost of the affordable units exceeds the profit earned on the extra market-rate units, so the developer can earn a better return without the density bonus.”)

\textsuperscript{174} \textit{Senate Transportation and Housing Committee Hearing, supra note 1}, at 2:14:00–2:15:00.
health, safety, or the physical environment or if the incentive or concession would “not result in identifiable and actual cost reductions.” Local governments may also continue to give notice and hold public hearings on density bonus applications, but must now carry the “burden of proof for the denial of a requested concession or incentive” if challenged in court.

175. Gov’t § 65915(c)(1) (“Nothing in this subdivision shall be interpreted to require a local government to waive or reduce development standards if the waiver or reduction would have a specific, adverse impact.”)

176. Id. § 65915(d)(1)(A) (amended by Chapter 758) (“The city, county, or city and county shall grant the concession or incentive requested by the applicant unless the city, county, or city and county makes a written finding, based upon substantial evidence . . . [that] the concession or incentive does not result in identifiable and actual cost reductions.”)

177. Compare AB 2501, 2015–2016 Reg. Sess. (Cal. 2016) (as introduced on Feb. 19, 2016) (“The local government shall not require public notice or hold a public hearing on the application”), with Gov’t § 65915(a)(1) (amended by Chapter 758) (As introduced, AB 2501 would have forbade public notice and public hearings on density bonus applications, while Chapter 758 has no such restriction).

178. Gov’t § 65915(d)(4) (enacted by Chapter 758).