

Removing Road Blocks to New Infill Housing



Panelists

- **Barbara Kautz** - Partner, Goldfarb & Lipman LLP
- **Trudi Ryan** - Community Development Director, City of Sunnyvale
- **Jennifer Hernandez** - Partner, Holland & Knight, LLP

Agenda

- Infill Housing Streamlining Overview
- Case Study – Butcher's Corner
- Streamlining Opportunities
- Q&A

INTERSECTION OF PLANNING & CEQA

REMOVING ROADBLOCKS TO NEW INFILL HOUSING

AEP CONFERENCE – SATURDAY, MAY 20, 2017

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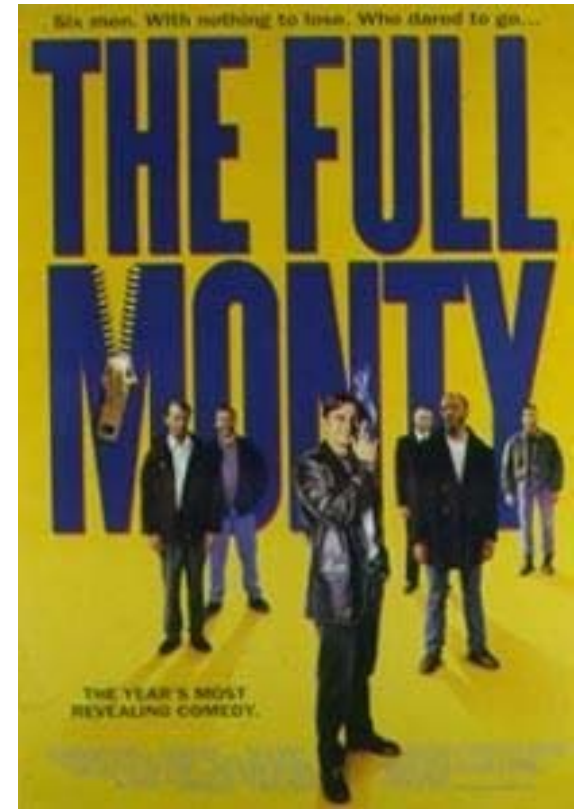
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STREAMLINING: AVOIDING THE FULL MONTY

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- ❑ **Exempt from CEQA**
- ❑ **Negative Declaration**
- ❑ **EIR**
- ❑ **Use Existing EIR**
- ❑ **Ministerial Approval**



CATEGORIES OF EXEMPTIONS

6

□ Categorical

- ▣ Created by the Resources Agency
- ▣ Inapplicable if *Actual* Impacts

□ Statutory

- ▣ Created by the Legislature
- ▣ Applicable *Regardless* of Actual Impacts

INFILL CATEGORICAL EXEMPTION

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- Site surrounded by urban uses *in city limits*
- 5 acres max (no limit on uses)
- Consistent with General Plan & zoning
- No value for endangered species
- Adequately served by utilities
- No significant effects on traffic, noise, air quality & water

No need for previous EIR (Guidelines Section 15332)

WHO IS USING THIS?

8

2007 Planners' Book of Lists

- 112 out of 536 jurisdictions have used the Urban Infill Categorical Exemption

And the winners are...

■ Bakersfield:	225/year
■ Fresno:	200/year
■ Fontana:	100/year
■ Pasadena:	44/year
■ Rancho Cucamonga:	43/year

- 103 jurisdictions considered, but project did not meet the criteria

ASHBY LOFTS, OAKLAND (53 DUS)



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ASHBY LOFTS



SAN RAFAEL – 83 UNITS

33 San Pablo



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SAN RAFAEL

33 San Pablo



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STATUTORY EXEMPTIONS

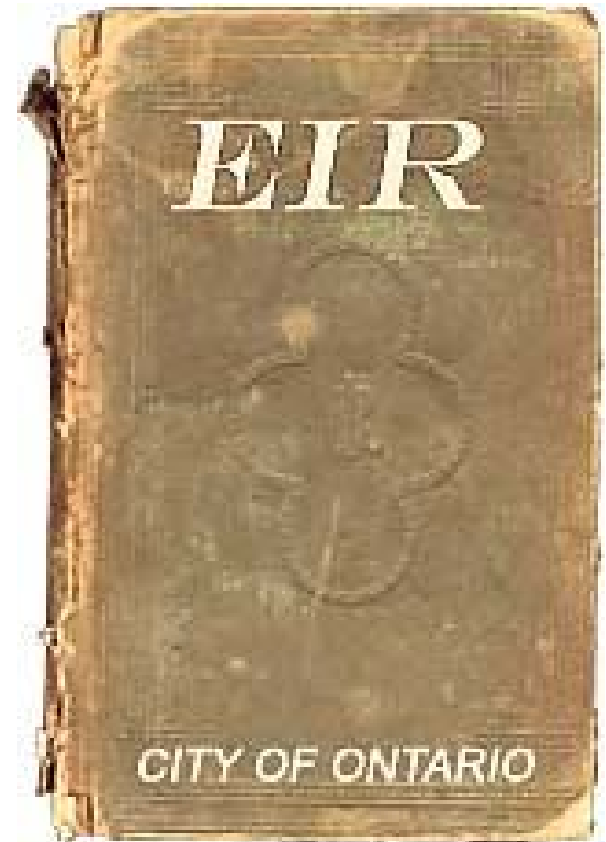
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- Farmworker Housing (PRC 21159.22)
- Affordable Housing (PRC 21159.23)
- Residential *Infill** (PRC 21159.24)
 - ▣ 4 acres, 100 units max
 - ▣ 5 – 10% affordable; 20 du/acre
 - ▣ Within ½ mile of major transit stop [etc.]

EXISTING EIRS

14

Always look for existing
environmental
documentation



GENERAL RULE FOR SUBSEQUENT EIR

15

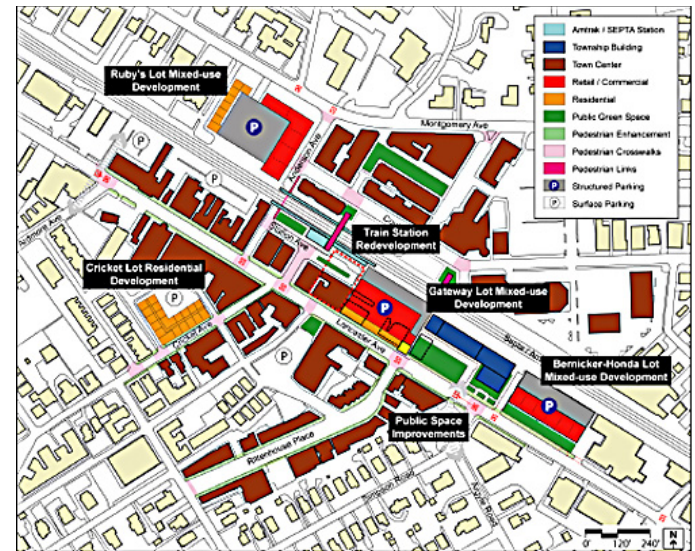
Not needed unless (*Guidelines 15162*):

- *Substantial changes in project, or in circumstances, or involving new information*
- *New or substantially increased effects or new mitigations or alternatives*

*Substantial evidence; **NOT** fair argument*

PROGRAM EIRS (GUIDELINES 15168)

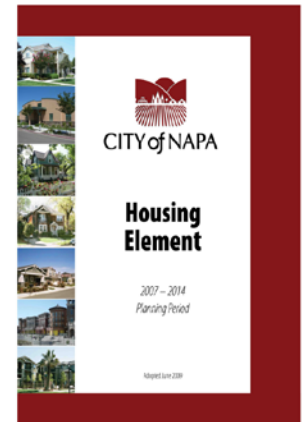
- General Plans, Specific Plans
- Determine If Effects Covered in the Program EIR
- Review Site-Specific Impacts



PROGRAM EIRS: EXAMPLES

□ Projects Upheld:

- 30-story, 450-room hotel in San Diego approved 2002 relying on 1992 and 1999 redevelopment plan EIRS
 - *Citizens for Responsible Equitable Environmental Development v. City of San Diego (2005)*
- Housing Element approved in 2009 relying on 1998 G.P. program EIR
 - *Latinos Unidos de Napa v. City of Napa (2013)*



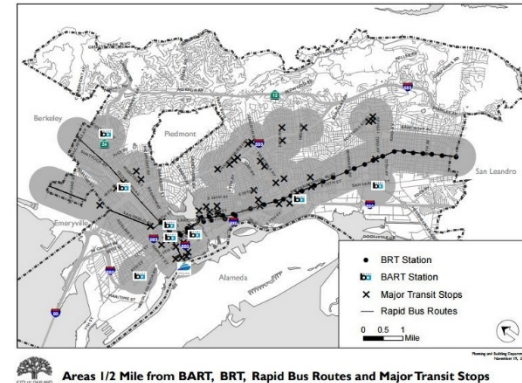
RESIDENTIAL PROJECTS CONSISTENT WITH A SPECIFIC PLAN

- Residential Projects Consistent With a Specific Plan (G.C. 65457; Guidelines 15182)
 - ▣ EIR Done on the Specific Plan
 - ▣ Exempt Unless Supplemental EIR Needed

- *May v. City of Milpitas* (2013)
 - ▣ Special 30-day statute of limitations

COMMERCIAL & MIXED-USE PROJECTS CONSISTENT WITH A SPECIFIC PLAN

- Employment Center (PRC 21099(a)(1): Commercially Zoned Property with FAR Of 0.75+
- Eligible Employment Center & Mixed Use Projects (PRC 21155.4):
 - Transit Priority Area (1/2 Mile of Major Transit Stop) (PRC 21099(a)(7)) & Consistent with SCS
 - EIR Done on the Specific Plan
 - Exempt Unless Supplemental EIR Needed
 - Aesthetics & Parking Not CEQA Impacts (21099(d)(1))



DIFFERENT APPROVALS FOR THE SAME OR MODIFIED PROJECT

- One Project Often Requires Many Approvals
- Projects May Change Over Time
- ***Even with Changes,*** Can Usually Rely on the Original EIR
- Use Addendum

EXAMPLE

□ **Project Largely Upheld:**

- ▣ Original project 1989: 2.7 million sf LA project, including offices, hotel, retail, 36-story building
- ▣ Revised project 2005: 3.2 million sq. ft., including 620-ft. building, 836 residences, 1M sf offices

■ *Mani Bros. Real Estate Group v. City of Los Angeles*

- ***Followed by:*** 2007 supplement; **four** additional addenda. 2014 project: 2.4 million sf, including hotel, minor retail, 1,560 units, 671-ft. building, no office.

METROPOLIS, LOS ANGELES



goldfarb lipman attorneys

PROJECTS CONSISTENT WITH GENERAL PLAN OR ZONING

- Projects Consistent With General Plan or Zoning (Guidelines 15183) Where EIR Was Done
 - ▣ Project Consistent With Density in General Plan or Zoning
 - ▣ Exempt from CEQA Except for Effects “Peculiar” to the Project or Not Analyzed



SB 226: INFILL PROJECTS CONSISTENT WITH GENERAL PLAN

- **More Elaborate Version of Section 15183 for Infill Projects (Guidelines Section 15183.3)**
 - ▣ Project on Infill Site Meeting GHG Performance Standards Where EIR Done for “Planning Level” Decision
 - ▣ No Further Review If No New Effects or All Can Be Mitigated by Adopted Standards; or
 - ▣ MND or Infill EIR

MINISTERIAL, 'BY RIGHT' APPROVAL

- **CEQA Can Be Avoided Entirely by Making Approvals Ministerial**
- **Examples:**
 - ▣ Vineyard Permits in Sonoma County
 - ▣ Lot Line Adjustments in Napa County
 - ▣ Waterfront Redevelopment Project (later permits evaluated only for consistency with established design guidelines; 2.9M sq. ft.)

APPLICATION TO *YOUR* PROJECT

- Does the project meet the criteria for an exemption?
 - ▣ *Document eligibility.*
- Was an EIR already prepared for the *project*?
 - ▣ *Explore whether an addendum can be used.*
- Has an EIR been prepared for a specific plan that applies to the property?
 - ▣ *Use specific plan exemptions or program EIR provisions.*
- Has an EIR been prepared for another planning document that applies to the property?
 - ▣ *Use program EIR or 'consistency with adopted plan' provisions.*

REMOVING ROADBLOCKS TO NEW INFILL HOUSING

SATURDAY, MAY 20, 1017

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Case Study – Butcher's Corner

- Project Description
 - Mixed-use development on 5.23-acre lot; 30 units per acre density
 - 153 residential units – 114 two-story apartments, 39 three-story townhomes
 - 7,000 square feet of office/retail on first floor of apartments
 - Underground parking garages

Case Study – Butcher's Corner

- Project Location and Site Characteristics
 - Urbanized area, bounded by three main arterials, incl. major commercial corridor
 - High traffic volumes, multi-family residential, community-serving and neighborhood-serving commercial retail, medical offices
 - Developed with two single-family homes, small remnant orchard
 - Flat topography, ornamental landscaping, on-site non-orchard, protected trees, street trees on site frontages

Case Study – Butcher's Corner

Criteria	Maximum Allowed	Proposed	Conformance (Y/N)
Project Use And Density (BASE)	45 Du/Ac	30 Du/Ac	Y
City General Plan	45 Du/Ac	30 Du/Ac	Y
Design Guidelines			N
Zoning District	24 Du/Ac	30 Du/Ac	N
Area Plan			Y
TOD Initiative			Y
Parking			Y
Plan Bay Area			Y

Case Study – Butcher's Corner

- Project Benefits to Community
 - Variety of housing options: for-sale and rental, of various sizes.
 - High-quality, architecturally-distinctive, positively contribute to transportation corridor.
 - Amenities that promote well-being and health - outdoor pool and spa, outdoor dining and fireplace, seating areas, athletic club.
 - Adequate open space and landscaping.
 - New orchard as a reminder of community's agricultural heritage.
 - Provide for alternative forms of transportation, encourages exploration of site and its outdoor spaces and features on foot.
 - Provide adequate pedestrian access to future development along the transportation corridor.
 - Provide a pedestrian scale and encourage pedestrian activity.

Case Study – Butcher's Corner

- Community Concerns

- Site is in a highly impacted elementary school attendance area.
- Closest intersection already operates at LOS F.
- There would be a significant loss of mature trees, and six of the trees should be designated as Historic Resources.
- Recent new development along the commercial corridor is too tall and too close to the street.
- General NIMBY concerns: parks, traffic, privacy, visual impacts, renters.
- City needs more housing, especially more affordable housing, and commercial corridors are good locations.

Case Study – Butcher's Corner

- Which CEQA streamlining provisions would apply?
- How would you modify the project to allow for a streamlining provision?

Case Study – Butcher's Corner

- Completed EIR with Significant Unavoidable Impact
 - Unacceptable operation at one project intersection
- Two years to obtain project approval

Case Study – Butcher's Corner

- Project modifications
 - Developer
 - Inclusion of the corner office property as private common open space
 - Reduction of 15 residential units
 - Reduction of height for portions of the apartment buildings
 - Preservation of additional Oak trees
 - City Council
 - Reduction in building height
 - Heritage Resource designation of four Oak trees, preserved and incorporated into the project.



Case Study – Butcher's Corner



4 EAST ELEVATION

STAIR D C LOBBY STAIR B A



4 EL CAMINO ELEVATION

D D D D LOBBY D D D



BUILDING C FRONT ELEVATION



BUILDING D REAR ELEVATION



BUILDING E FRONT ELEVATION

IDEAS?

Opportunities for Streamlining

- How can CEQA facilitate an efficient and meaningful local review process, helping jurisdictions achieve regional housing goals?

Holland & Knight

IN THE NAME OF THE ENVIRONMENT

How Litigation Abuse Under the California Environmental Quality Act Undermines California's Environmental, Social Equity and Economic Priorities – and Proposed Reforms to Protect the Environment from CEQA Litigation Abuse

Jennifer Hernandez, David Friedman and Stephanie DeHerrera | Holland & Knight



CEQA is Great – CEQA Litigation Abuse Is Not

Why CEQA Lawsuits Are An Unusually Powerful Leverage Tool

- » Anonymous Lawsuits Are Fine!
- » Judges “like” deciding these cases
- » Most common judicial remedy is reversal of project approval
 - Most money waits for lawsuit outcome (3+ years)
- » Bottom Line: lawsuit stops project!

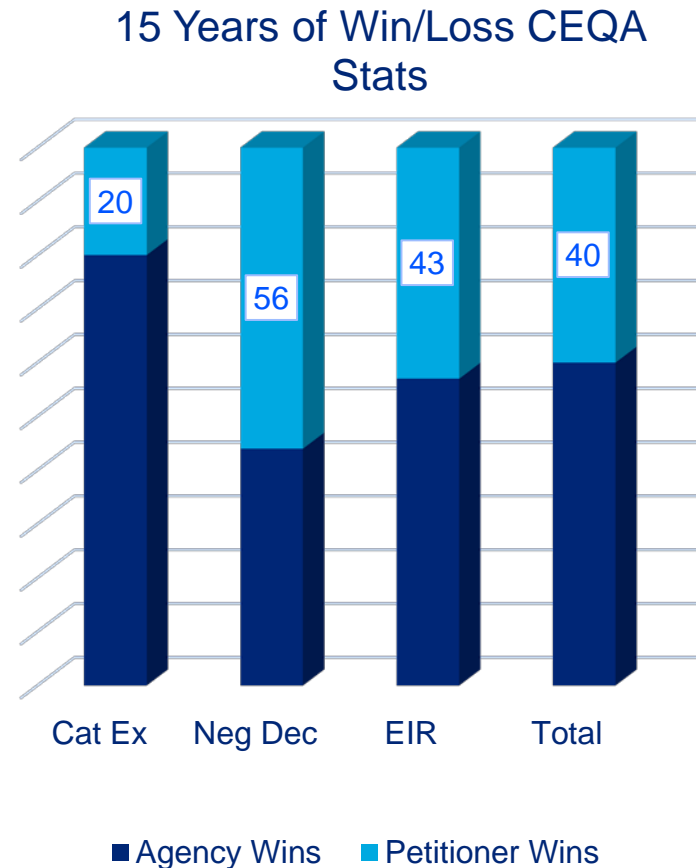
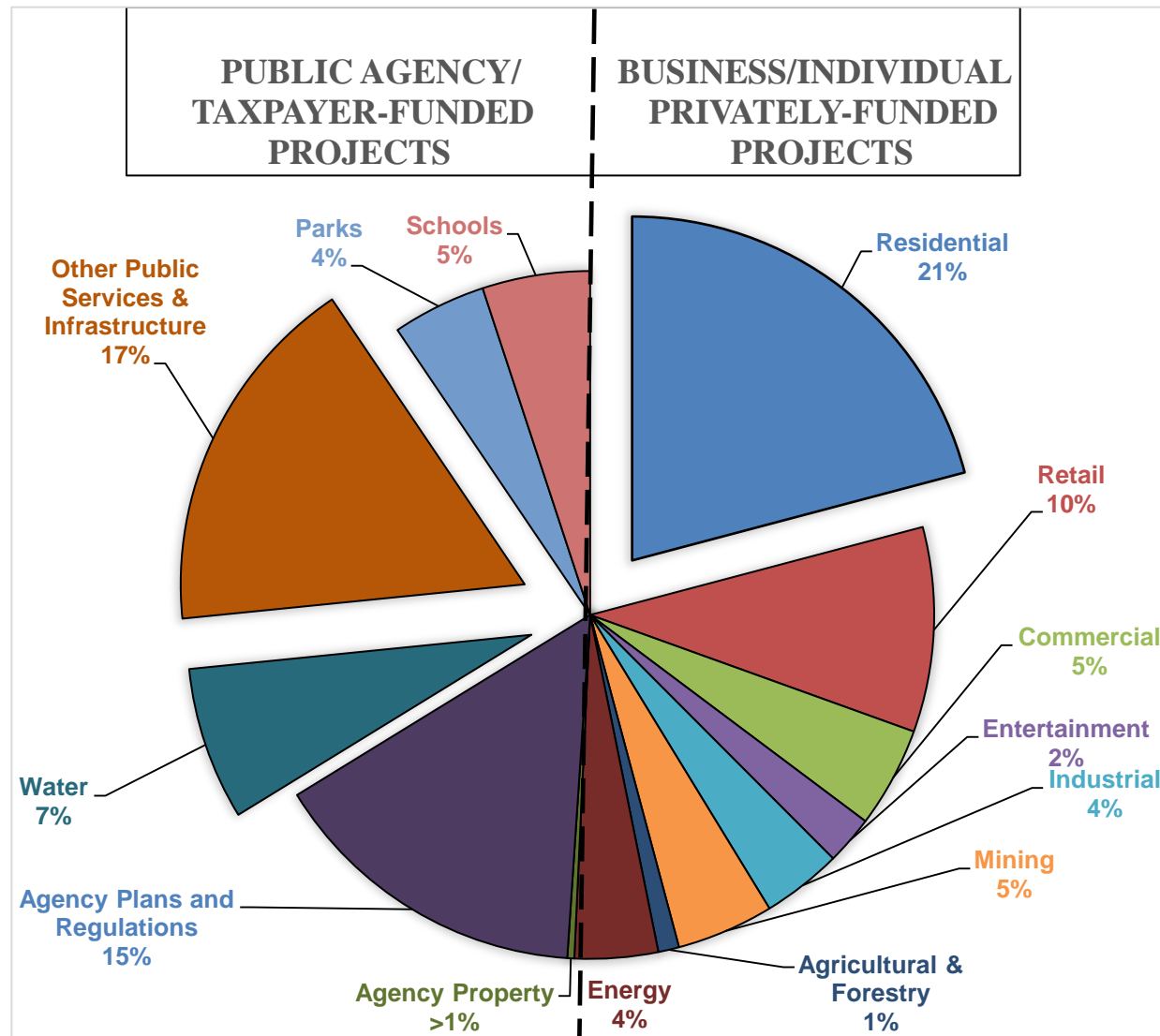
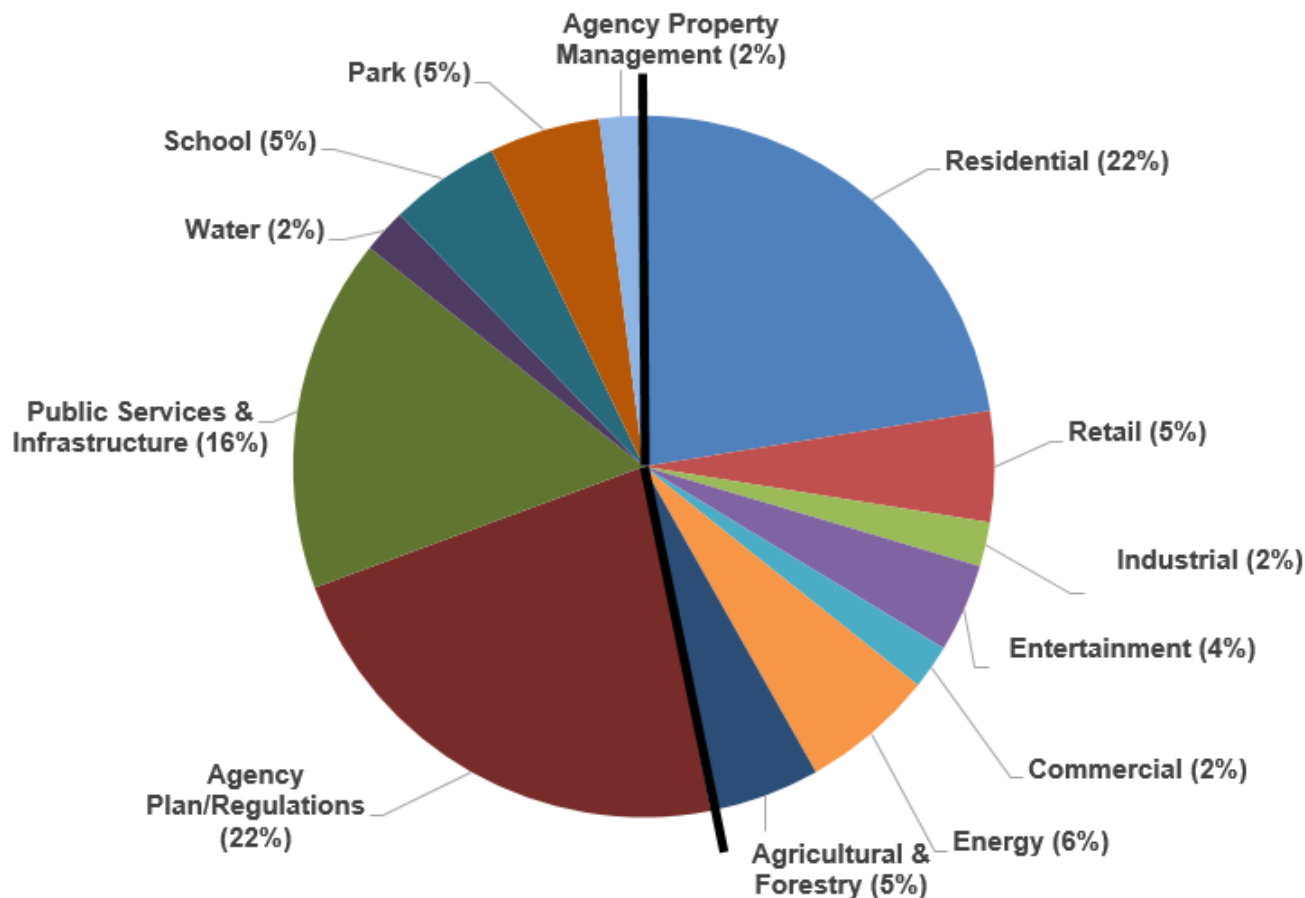


Figure 1B: Statewide CEQA Lawsuits Targeting Taxpayer-Funded and Privately-Funded Projects: Housing, Transit, Renewable Energy Most Frequent Targets

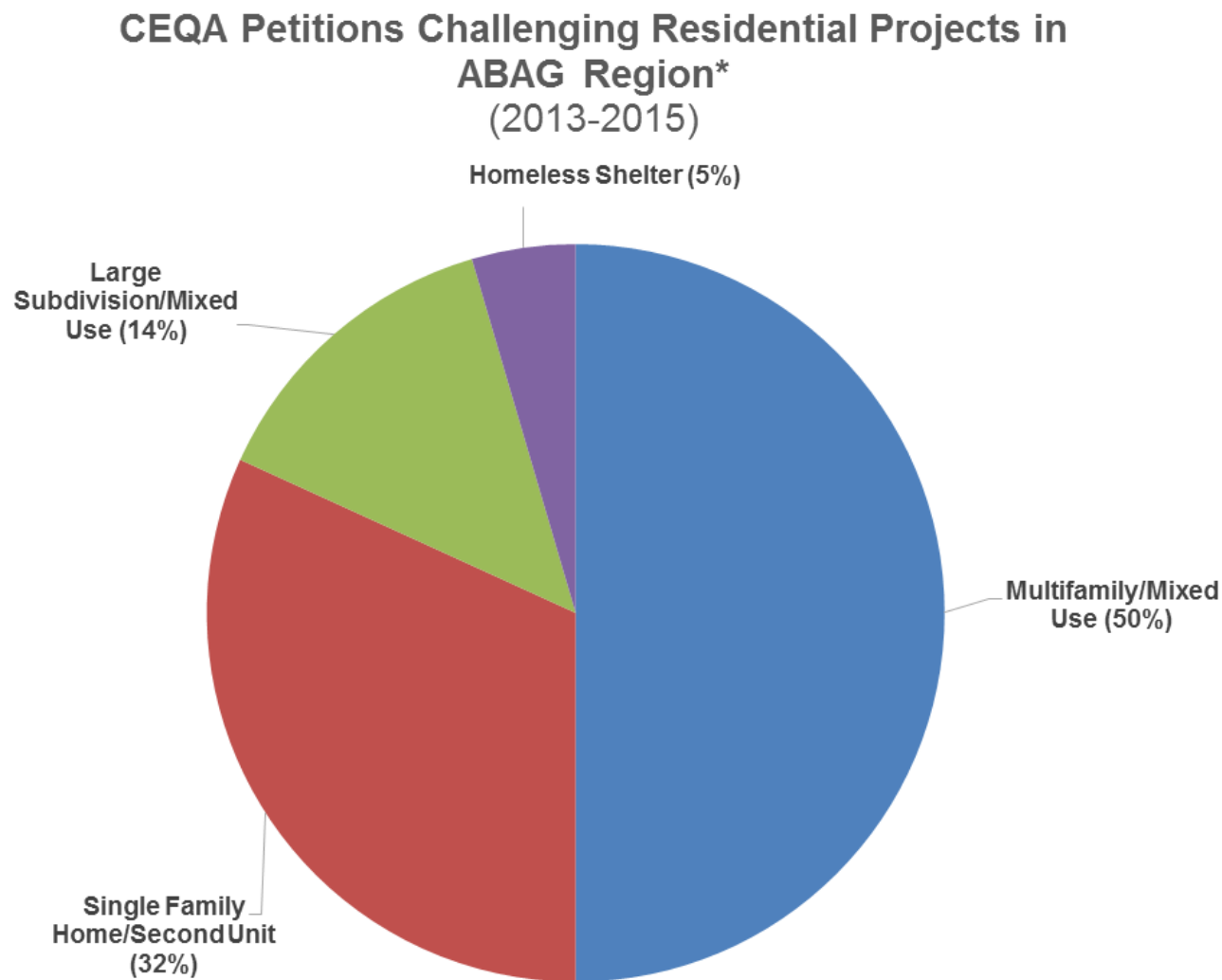


ABAG Regional CEQA Update (2013-2015)

52% of CEQA Lawsuits Targeted Taxpayer-Funded Projects in ABAG Region; 46% Privately-Funded* (2013-2015)

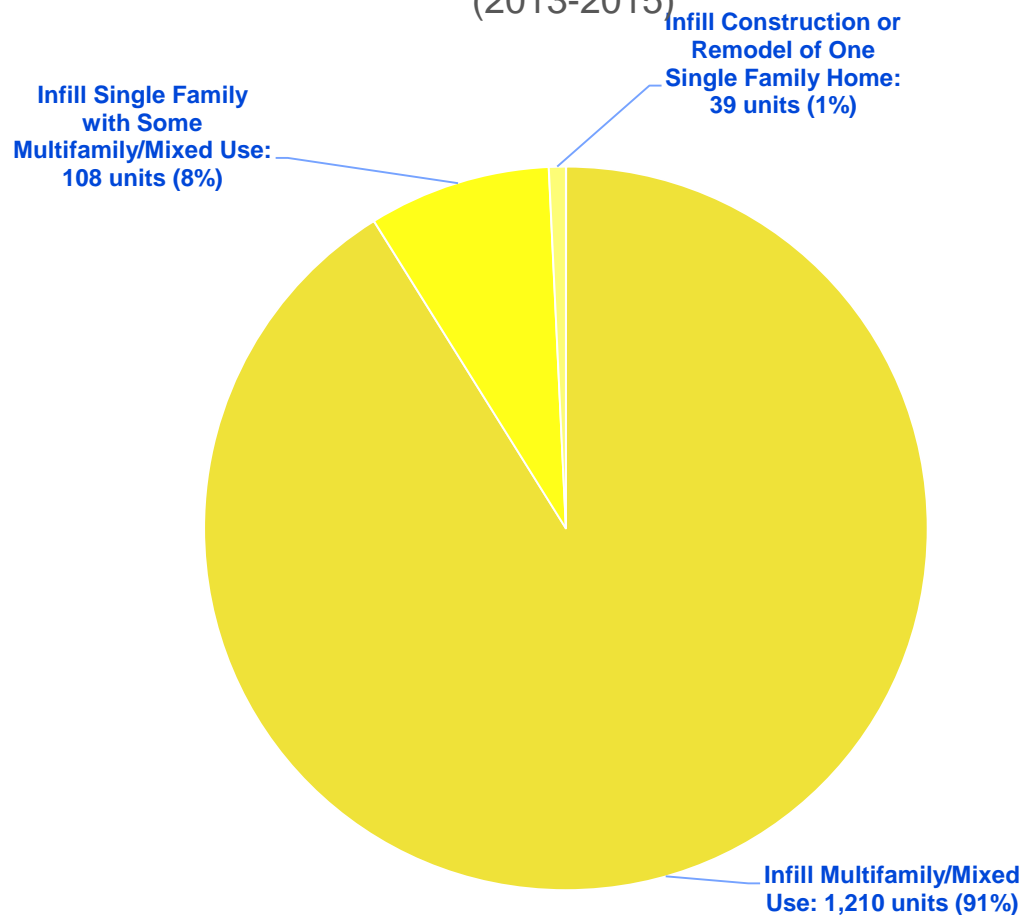


ABAG Regional CEQA Update (2013-2015)



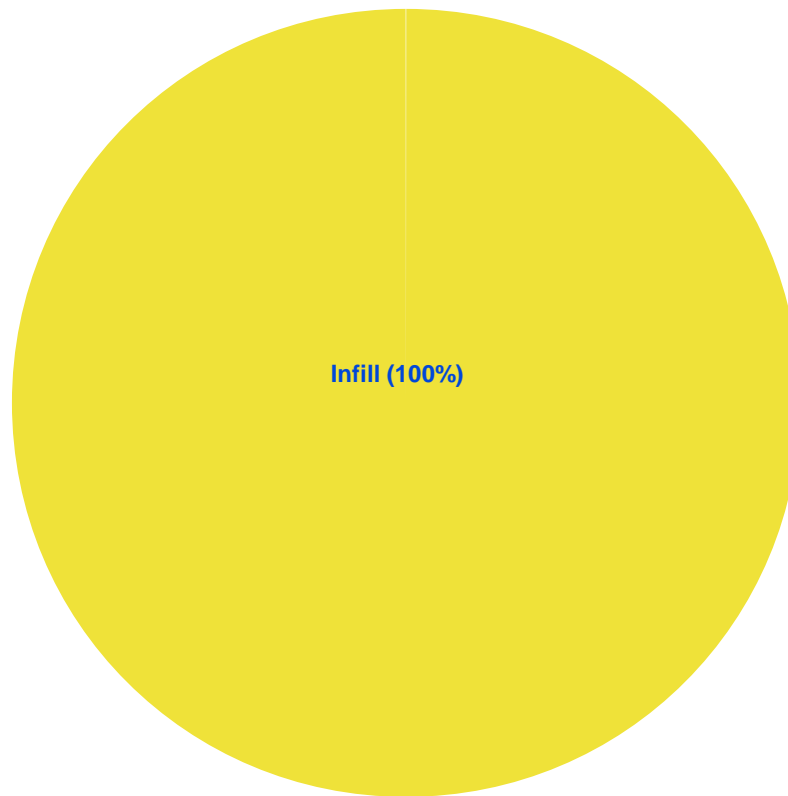
ABAG Regional CEQA Update (2013-2015)

**1,328 Infill Housing Units - and a 63-Bed Homeless Shelter -
Targeted by CEQA Lawsuit in ABAG Region; No Greenfield
Units
(2013-2015)**

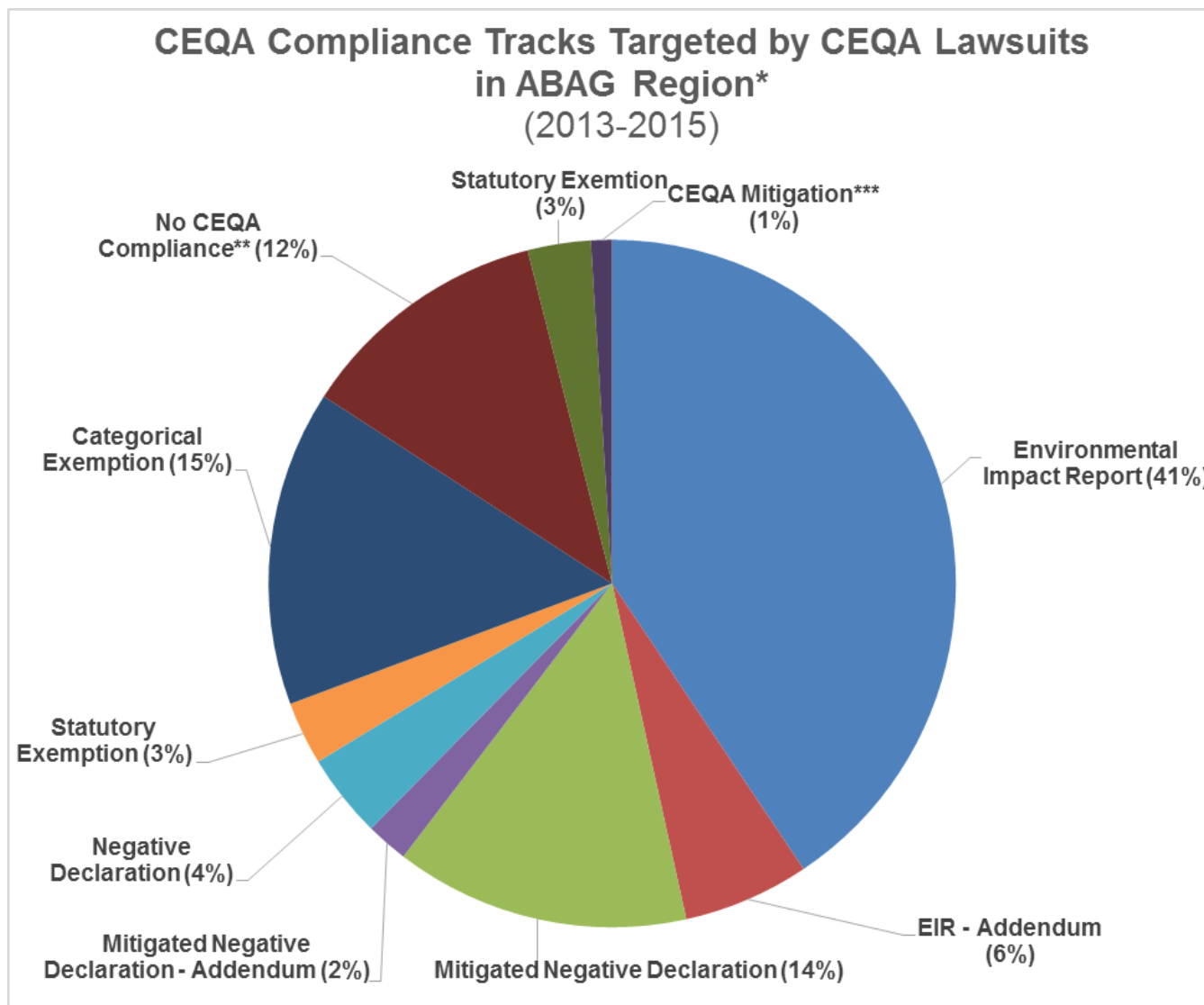


ABAG Regional CEQA Update (2013-2015)

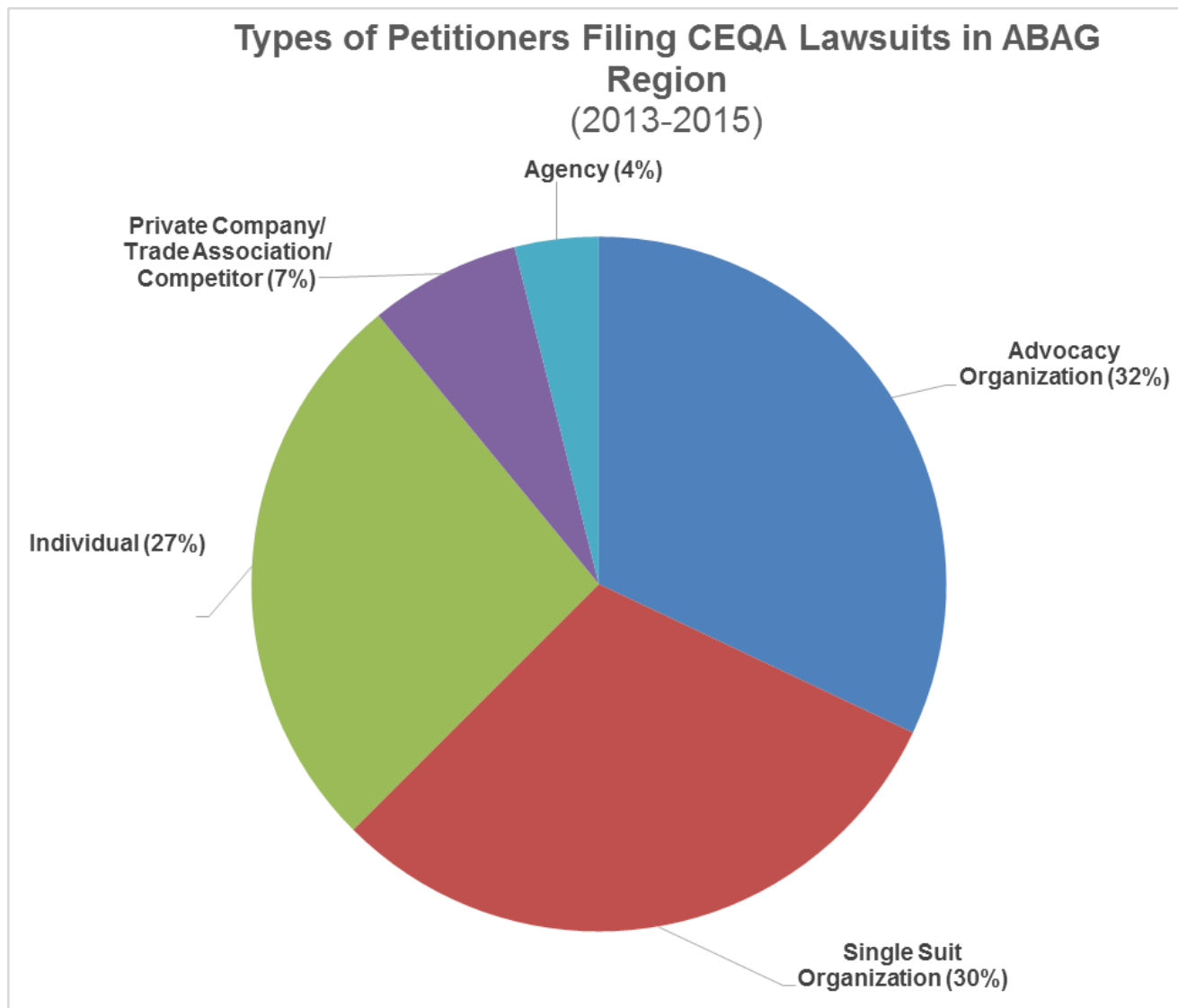
**100% of Projects Challenged in ABAG Region are Located
in Infill Areas
(2013-2015)**



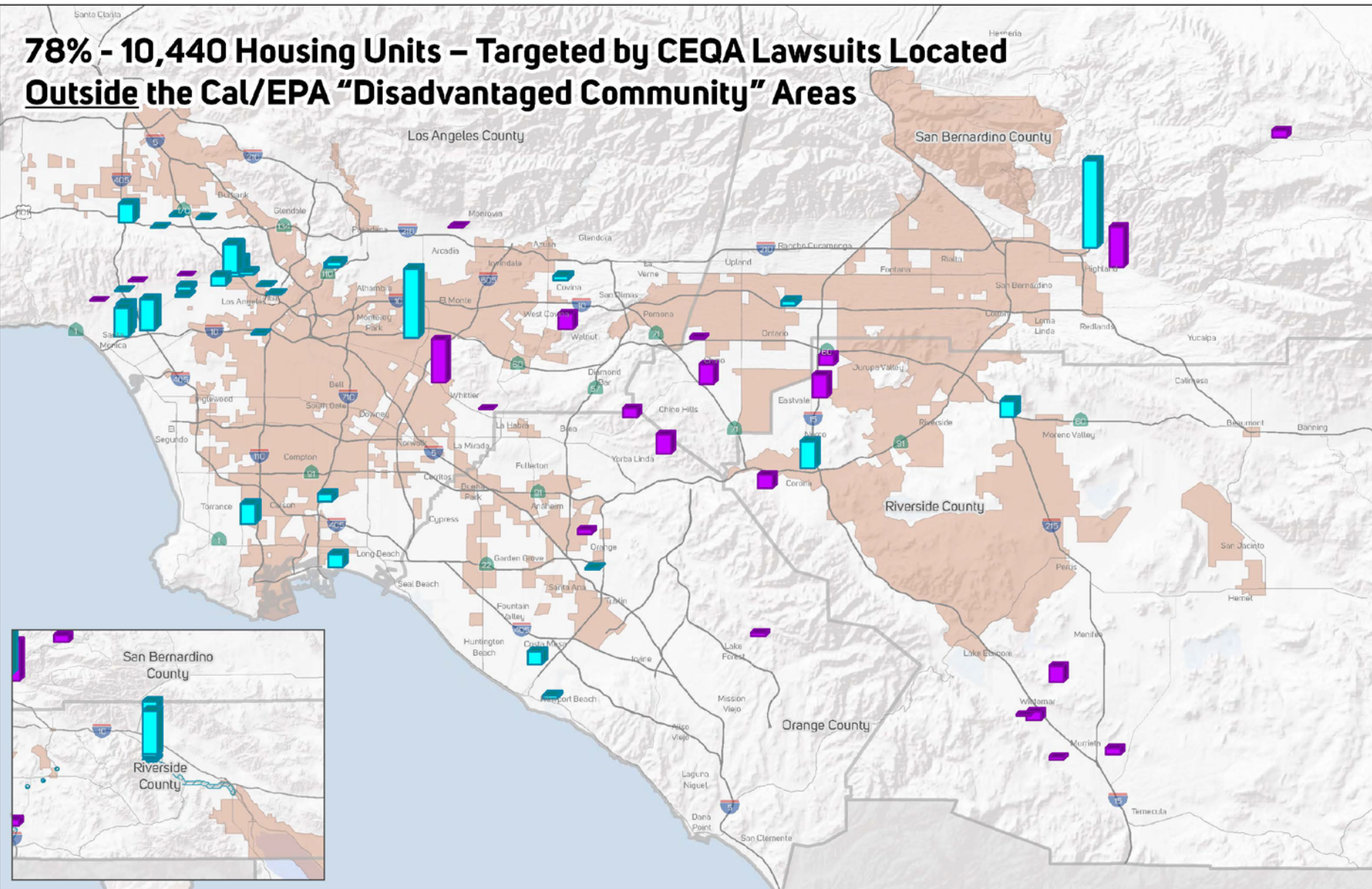
ABAG Regional CEQA Update (2013-2015)



ABAG Regional CEQA Update (2013-2015)



78% - 10,440 Housing Units – Targeted by CEQA Lawsuits Located Outside the Cal/EPA “Disadvantaged Community” Areas



Housing Projects Targeted by Recent CEQA Lawsuits

■ Inside the 2040 TPAs/HQTAs ■ Outside the 2040 TPAs/HQTAs

Cal/EPA Disadvantaged Communities (SB 535)



The Hamptons – Infill Redevelopment Project



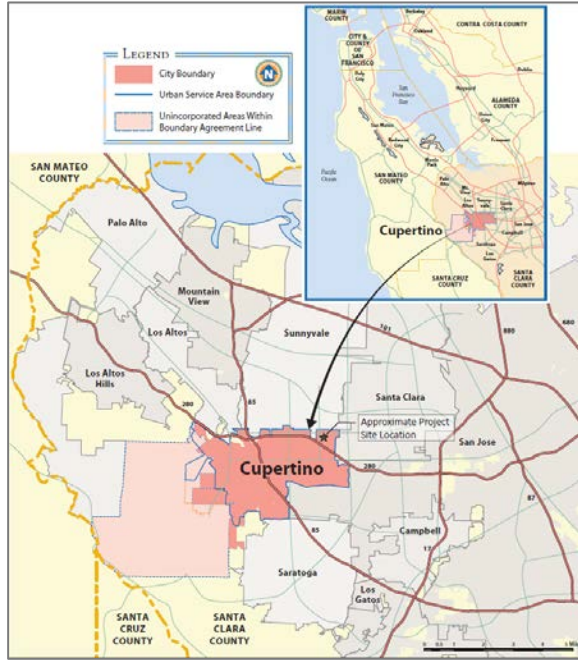
THE HAMPTONS REDEVELOPMENT

CITY OF CUPERTINO
CITY COUNCIL
JUNE 21, 2016

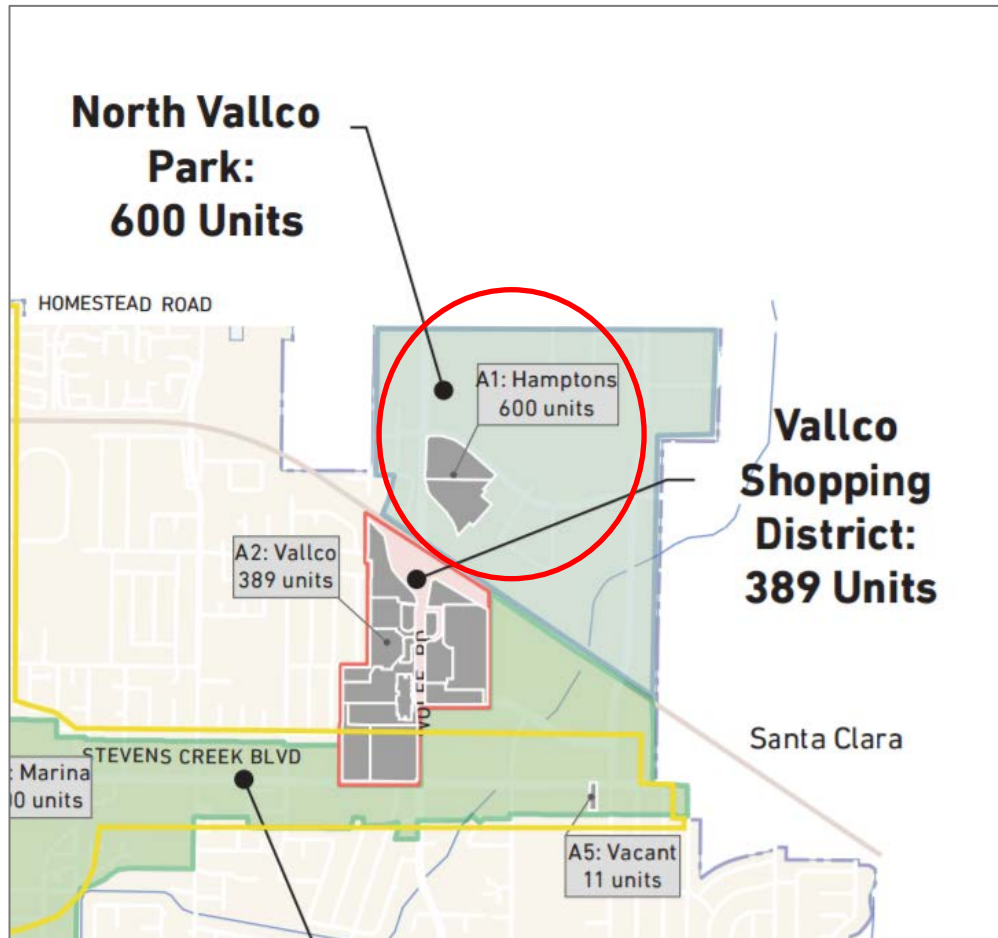
The Hamptons – Infill Redevelopment Project



The Hamptons Redevelopment Project - Cupertino



Irvine Company Worked to Have Project Included in Housing Element Update



CEQA coverage: GP Update EIR

- » One of five Priority Housing Element sites in the City's adopted Housing Element.
- » The Hamptons would increase the number of units by 600 for a total of 942 units.
- » General Plan EIR analyzed maximum theoretical buildout: increase of 820 units for a total of 1,162 units.

Project Specific CEQA Analysis: Tiered IS/MND



April 15, 2016 | Initial Study and Mitigated Negative Declaration



The Hamptons Redevelopment Project
for the City of Cupertino

Image Credit: ARQUITECTONICA International, 2015.

Tiered from GP EIR under 15162 and 15168

- » Consistent with General Plan and Zoning
- » Includes 71 BMR units
 - 34 existing units
 - Additional 37 when redeveloped
- » General Plan EIR mitigation measures incorporated into the IS/MND
- » New mitigation measures added
 - Air Quality (BAAQMD BMPs)
 - Cultural (monitoring)
 - Geology & Soils (adhere to seismic design criteria & consult re: corrosion protection)

CEQA Litigation Threats/Lawsuits Increasing for Infill Projects: Community Character/Congestion v Higher Density Transit Vision

No Legislative Leadership on CEQA Reform in Sight

Governor Brown before 2015: CEQA Reform is “the Lord’s work” – CEQA is a “blob” and a “vampire” requiring a “stake through the heart”

Governor Brown report to ULI in 2015: The Lord’s work doesn’t always get done.

Strong Currents of Political Opposition to Plans and Projects to Achieve Higher Density/Transit Oriented Changes to Community Character

Local lead agencies are left to pick up the pieces

- Comply with ambitious and transformational new housing and transportation imperatives (and mandates)
- Comply with CEQA

Practical and “Feasible” Multiple Layer, Low Cost CEQA Defensibility Improvements: Belt, Suspenders, Umbrella and Galoshes Compliance Track

- Give courts multiple options for finding CEQA compliance
- Force petitioners to challenge each and every layer of armor

The “Belt” – Use Statutory and Categorical Exemptions

Exemptions for Infill Projects: Real and Illusory

» Useful Exemptions

- Statutory Exemptions

- Redevelopment Plan: Projects Identified in Plan
- Community Plan: Projects Identified in Plan
- Specific Plan: Residential Projects Identified in Plan; Commercial and Mixed Use Projects in Transit Priority Areas Meeting 0.75 FAR

- Categorical Exemptions

- Infill Exemption

» “Unicorn” Statutory Exemptions: Much Discussed, Never Seen

- SB 375 exemption for qualifying projects in qualifying locations
- Affordable housing/farmworker exemptions
- Infill Exemption

» **Public Outreach can be required and structured to provide disclosure/comment process similar to Negative Declaration**

- » Ongoing evolution of urban areas, especially as envisioned by land use plans, is not a “changed circumstance”
- » Complete checklist initial study, with common narrative text for frequently challenged CEQA topics, for administrative record and/or optional public outreach process
- » Exemptions are upheld by courts in about 48% of reported appellate court cases over a 15-year study period; NDs/MNDs are upheld only about 44% of the time, and EIRs are upheld in 47% of cases – about the same the court success rate for EIRs

The “Suspenders” – Tier from Prior CEQA Documents and Plans

Use CEQA’s “Consistency with Plans” Analysis to Create Tiered CEQA Framework for Project Approval

- » Blowing past Tiering myths:
 - Fine to Tier from Older Plans: No Legal Expiration Date
 - CEQA documents for land use plans
 - CEQA documents for ordinances
 - Fine to Tier from CEQA documents prepared by other agencies (e.g., SCAG)
- » Fine to Tier for Projects that Deviate from Plans
 - Expanded site, larger/different project, still qualify for tiering
- » **Tiering Documentation Options: Addendum, Findings, MND, EIR**
 - No limit on number or age of Addendums
 - Use Initial Study checklist format, but add narrative describing how project conforms to/deviates from plan or ordinance for which CEQA compliance has already been completed (include cites/links to plans/ordinances and accompanying CEQA documents)
 - Fine to add mitigation measures to Addenda to assure project will not cause any new/worse significant impact than identified in prior CEQA document
 - Also fine for applicant to avoid new/worse significant impacts with project design features, but implementation of these should also be required as enforceable conditions of project approval
 - New/worse significant impact than what was “known or could have been known” at time earlier CEQA document was prepared
- » Great caselaw showing judicial impatience for multiple rounds of CEQA lawsuits

The “Suspenders,” Cont.

Practical tips on documenting a tiered CEQA framework for project

- » EIRs that conclude that there are significant unavoidable adverse impacts from increasing density and growth are most useful tiering document
 - **SCAG Program RTP/SCS EIR (2016) is excellent tiering tool**
- » Any CEQA EIRs/NDs/MNDs that were not sued (or survived lawsuit) are easier to tier from, although tiering works with pending lawsuits too
 - For pending lawsuits, CEQA presumption of lawfulness applies – but do extra documentation including project approval conditions that address potential for adverse CEQA lawsuit outcome
- » Excellent practice to tier from multiple CEQA documents: full armor
 - SCAG PEIR, Redevelopment Plan EIR, Community Plan ND, Ordinance MND can all be “stacked” for tiered analysis
 - Project-level question: does project result in any new/worse significant impacts than previously identified?
- » Tiered legal framework established with short text explanation and citations to prior plans/ordinances/CEQA documents: simple text explanation, no new forms required

Belt/Suspenders Combo: Document Multiple Compliance Paths

» Step 1: Business as Usual CEQA Compliance Steps:

- Disclose existing project setting and project impacts in relation to existing setting
 - Address all impacts even Ballona and excluded parking/aesthetics as informational
- Use current CEQA significance thresholds
- Complete usual range of technical studies to address political/technical concerns: traffic report, AQ/GHG and noise, etc.

» Step 2: Armoring Up Compliance Steps:

- Findings/Addenda compliance track: Use staff report and CEQA Initial Study to document project eligibility for applicable statutory and categorical exemptions
 - Convert traditional Mitigation Measures into Project Design Features or Conditions of Approval (using City police powers, not CEQA)
- MND/EIR compliance track: Introduce prior certified EIR(s) that included changed uses/increased density on project site and briefly explain tiering – **this project implements previously studied and approved plan**
 - Use applicable Mitigations from prior EIR(s); use and/o or modify as applicable
 - Significance conclusion: no “new/worse significant impact” than those in prior EIR(s): project and cumulative – more detailed information does not equate to significant new impact
 - Document all compliance pathways (e.g., statutory/categorical exemptions)
 - Tiered EIR compliance track: **Call it an “EIR” on Title Page!**

The “Umbrella” – Integrate Flexibility into CEQA documents to Minimize CEQA Re-Opener Litigation Risks

- » Recognize that not all engineering design/construction details are known when CEQA compliance process is completed
 - 3,421 retail customer trips and excavation of 16,231 cubic yards of soil are both guaranteed to be – wrong. Include and acknowledge estimates on the higher side.
 - High side estimates rarely trigger a brand new mitigation requirement or significance finding
 - Mitigation can be structured to meter down to “actual” levels, or allow recalibration to more precise estimates at building permit level, to avoid “over-mitigating”
- » Some very fundamental living patterns are evolving; allow for change with performance standard/menu of non-exclusive mitigation measures
 - Transportation provides most dramatic examples, along with water and energy
- » Project “variants” – e.g., precise mix of residential versus non-residential uses – can be included in Project Description and analyzed (with different mitigation as warranted) to respond to evolving market conditions

The “Galoshes” – Use CEQA BMPs to Avoid Circular Firing Squad

Avoiding Naked Negative Declarations in EIR Country – and Managing the “My Last Project” Epidemic of CEQA Practitioners

» Three examples of the CEQA Circular Firing Squad Syndrome:

- EIRs are not the “most protective” form of CEQA documentation, and ND/MNDs are not the only CEQA compliance path for non-exempt projects:
 - A much higher proportion of EIRs get challenged than NDs/CEs, and there more than a hundred arguments to be made against EIRs (all of which must be won), and only 2 arguments to win for a CE
 - Urban projects generally have at least 2-3 approved plans with prior CEQA documents; at minimum NDs should be “armored” with consistent tiering on a neighborhood/jurisdictional scale
- Once a General Plan or similar land use project concludes that Plan implementation will cause one or more significant plan-level of cumulative unavoidable impacts, NDs for development projects are at extreme litigation risk (“running naked”) and simply gambling that no one sues. Only relevant legal test for doing an EIR: will the project be sued.
- EIRs and NDs prepared by different staff members and/or consultants that use different methodologies/reach different significance conclusions for common and litigious topics at the project or cumulative level (e.g., GHG, water supply, traffic congestion, construction noise), or reach different “feasibility” mitigation conclusions for similar projects (e.g., noise, air quality, traffic improvements) are setups for litigation losses

» Solution: **Use BMPs not MLPs** in CEQA documents at a jurisdictional level

- Take advantage by citing/stating agency position to use available legal defense tools (parking/aesthetics exclusions for SB 743), Supreme Court *BAAQMD* decision re “reverse CEQA impacts”) even if agency practice is to include all topics
- Get from consultants/law firms their views as to “BMP” approach for common topics (AQ, GHG, noise, water, stormwater, seismic, contaminated dirt/hazards, public services, etc.) along with 2-page outline summaries
 - Decide which you like, and provide as model/templates to be followed by future teams

Protecting the Environment Against CEQA Litigation Abuse

CEQA protects the status quo – which in turn protects the interests of those who are already here, and makes it much harder to implement even environmentally critical (higher density transit-oriented land use patterns) change

- » “Armoring Up” CEQA documents to make it much harder for opponents to win lawsuits is critical for public and private sector projects
- » “Armoring Up” is about using more words, not doing more costly studies or processes
- » This presentation focused on project-level “armoring up” – there are more tools available when preparing or updating land use and mobility plans
- » Don’t get discouraged or bullied – we are on mission to protect the environment by timely completing infill TOD projects!
- » Support CEQA modernization – make it a policy priority, and raise it with your Sacramento electeds!
- » And the new CEQA Guideline proposals re VMT increase CEQA compliance costs and litigation risks – exclude LOS from CEQA in infill locations, don’t add VMT to LOS!

Today's Urban Infill CEQA Lawsuits are not Properly "Justiciable" as then-Mayor Brown Wrote in an Amicus Brief to the California Supreme Court

Litigation Abuse CEQA Reforms: Mend It, Don't End It

1. Require Litigation Transparency
2. End Duplicative Lawsuits
3. Align the Judicial Remedy with the Harm: Vacating Project Approvals Reserved for Health/Environmental Harms (Kings Arena/Legislative Office Remodel Examples)



Should Voters and Elected Officials Shape Non-Polluting, Infill Policy Choices (e.g., Climate-based Transit-Oriented High Density) . . . Or Should CEQA Petitioners and Judges?

Holland & Knight

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Q&A