



Saving CEQA

The Promise and Perils of Efforts at Reform

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Greta Brownlow, PhD
Jennifer Hernandez
Antero Rivasplata, AICP
Erin Efner
Darin Ranelletti

Panel Participants

Greta Brownlow, PhD – Senior Manager, ICF

Jennifer Hernandez – Partner, Holland & Knight

Terry Rivasplata, AICP – Technical Director, ICF

Darin Ranelletti – Interim Director, City of Oakland Planning & Building

Erin Efner, AICP – Principal, ICF



Objectives

- 1. Explore the necessity of CEQA reform, given divergent perspectives on CEQA's effectiveness**
- 2. Provide participants with a historical perspective on CEQA reform – and explore why there's been limited success at driving reform efforts out of Sacramento**
- 3. Orient participants to the types of streamlining efforts that are being employed on-the-ground and how applicable/scalable such approaches may be more broadly**

2016 Presidential Election – presented very divergent implications for the environment



It could've gone one way...

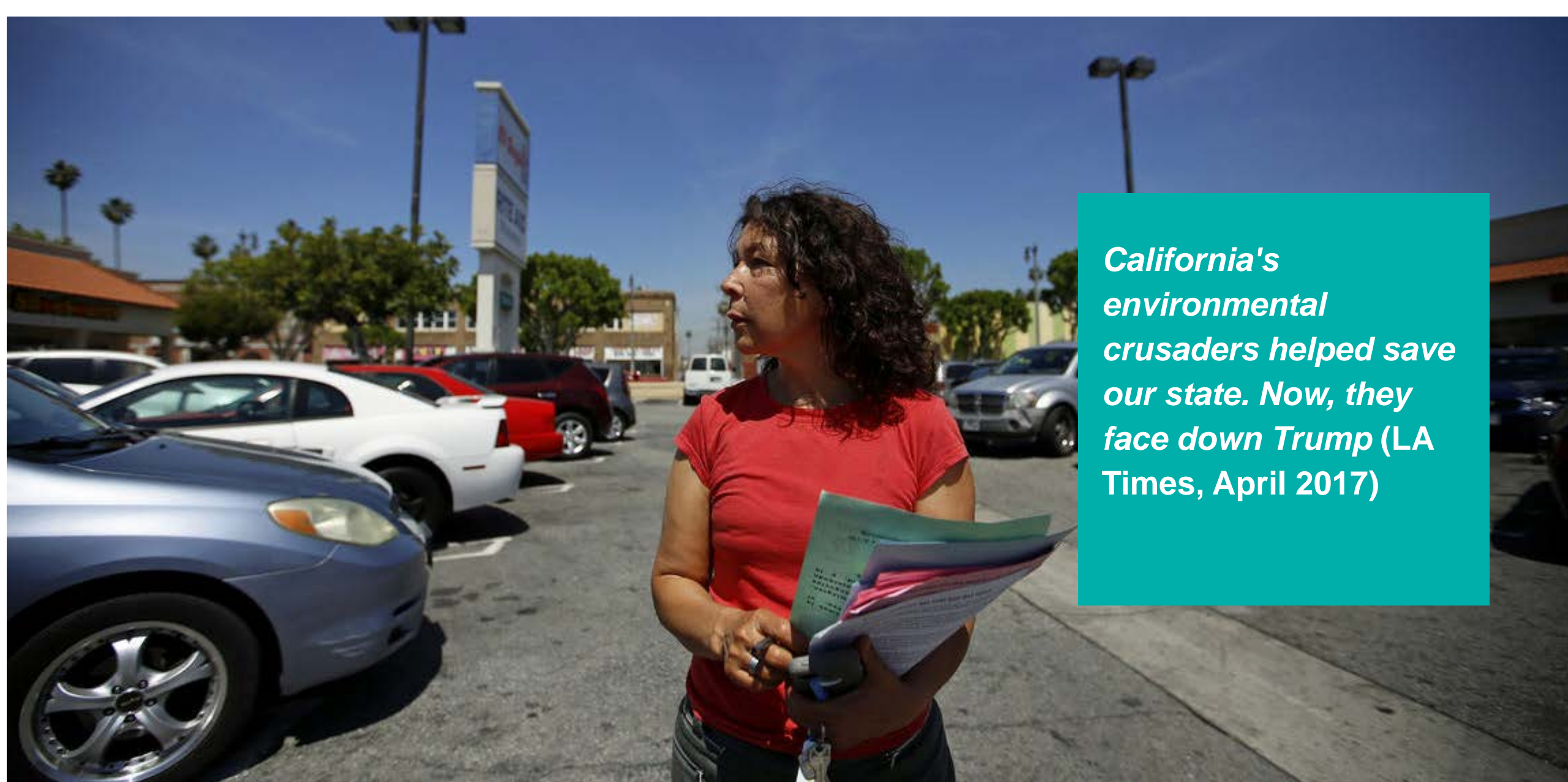


But, instead went another.



The Aftermath...





***California's
environmental
crusaders helped save
our state. Now, they
face down Trump (LA
Times, April 2017)***

***Trump stumbled
on healthcare and
immigration, but
he's been 'a
wrecking ball' on
the environment
(LA Times, April
2017)***





***Trump aims at
California in his
first 100 days
(Sacramento
Bee, April 2017)***



***Analysis: Trump's
top environmental
win is in cutting
protections (SF
Chronicle, April
2017)***



Forging Ahead in California

- **In the wake of these looming threats to California's dominant policy agenda, it's a good time to revisit what is and isn't working in our approach to CEQA implementation:**
 - How do we preserve our state's environmental quality through enforcement of our flagship environmental law while accommodating the continued growth and development needed to best serve all of California's residents?

CEQA's Purpose

- **Inform government decision makers and the public about the potential significant environmental impacts of proposed activities**
- **Identify ways that environmental impact(s) can be avoided or significantly reduced**
- **Prevent significant avoidable damage to the environment by requiring changes in the project through the use of alternatives and mitigation**

If CEQA's so great, why are we still fighting about it?



Tensions Surrounding CEQA Reform

Point

- CEQA's effectiveness sometimes depends on litigation by private parties acting in the public interest.

Counterpoint

- CEQA litigation can hinder development of “good” projects – e.g., higher density, TOD

Point

- CEQA provides a process crucial for daylighting environmental concerns for the public and decision makers.

Counterpoint

- The CEQA process is frequently abused by litigants whose motives have no relation to environmental protection.

Point

- CEQA can be a powerful tool for communities subjected to environmental injustices in that it helps ensure that public health is protected by evaluating and mitigating project impacts.

Counterpoint

- CEQA may be constraining physical and economic development in California in ways that are detrimental to environmental justice communities.

CEQA Litigation: Enforcement vs Abuse

Jennifer Hernandez



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!

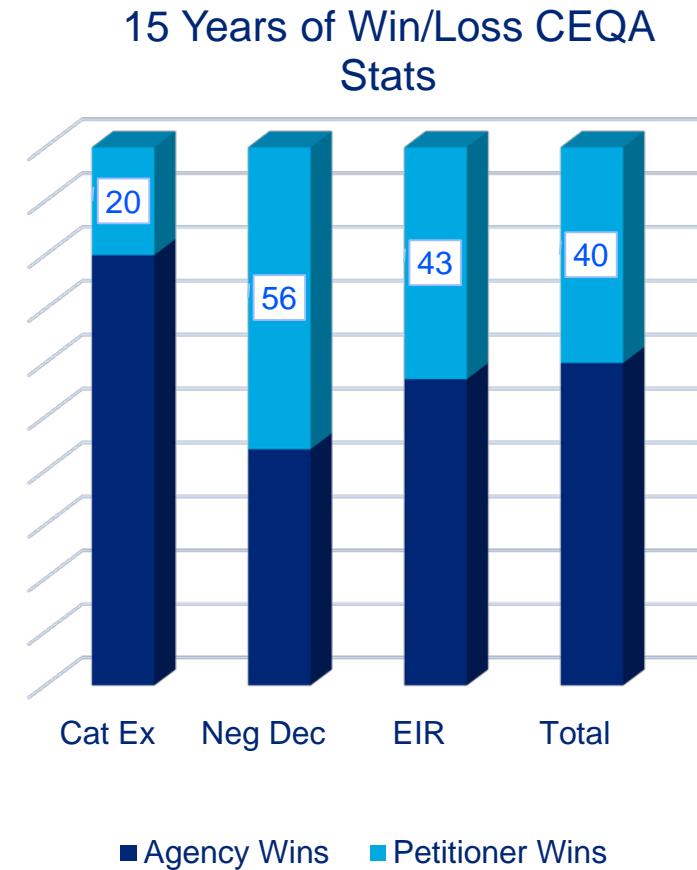


Figure 1: Statewide (2010-2012)
CEQA Lawsuits Targeting Taxpayer-Funded and Privately-Funded Projects

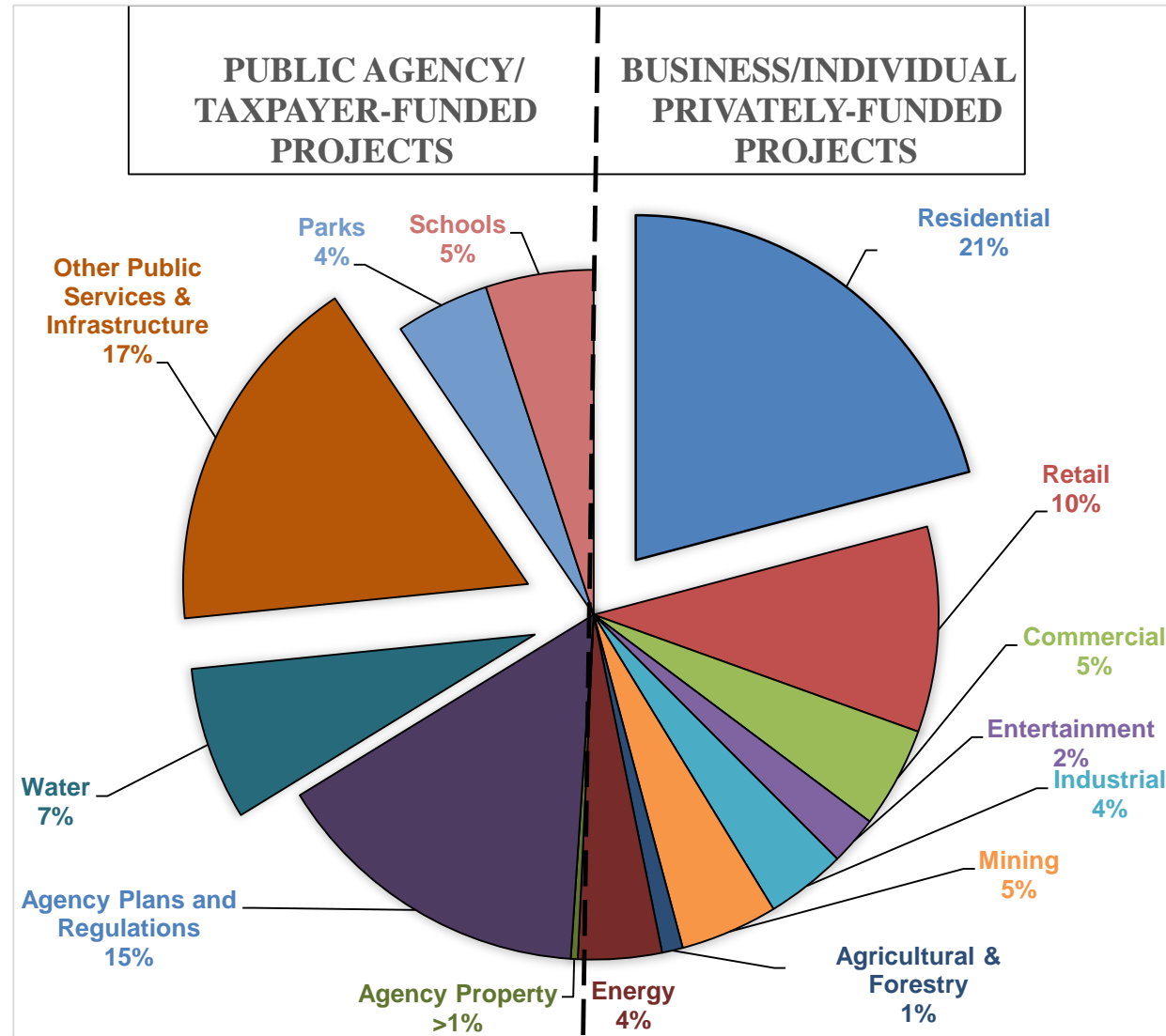


Figure 1B: SCAG Regional CEQA Update (2013-2015)

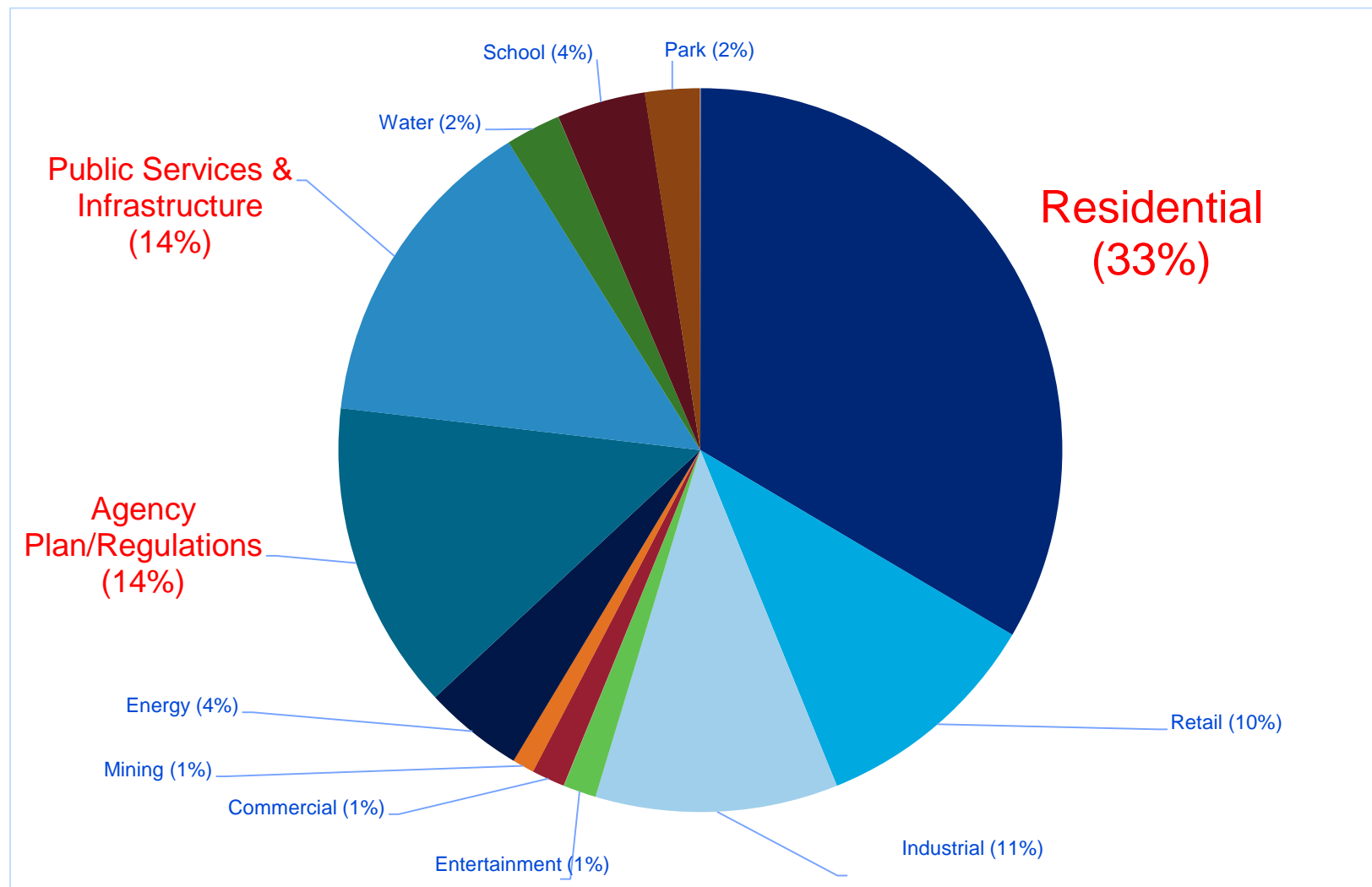


Figure 2: Statewide (2010-2012) – CEQA Infrequently Used To Fight “Sprawl”
CEQA Lawsuits Targeting Greenfield Versus Infill Projects
(Select Project Types Shown – See Tables 2B through 2D for all Project Types)

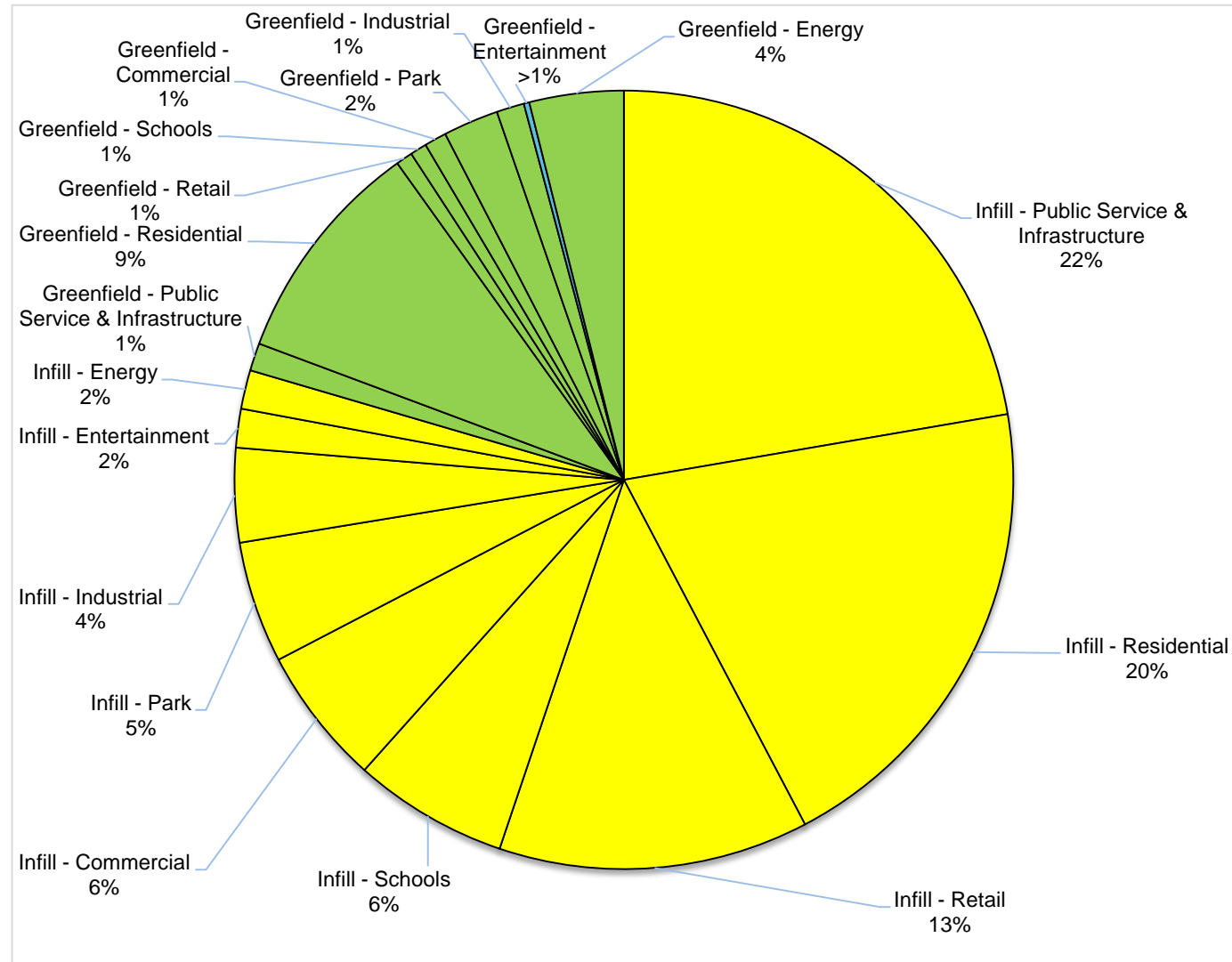
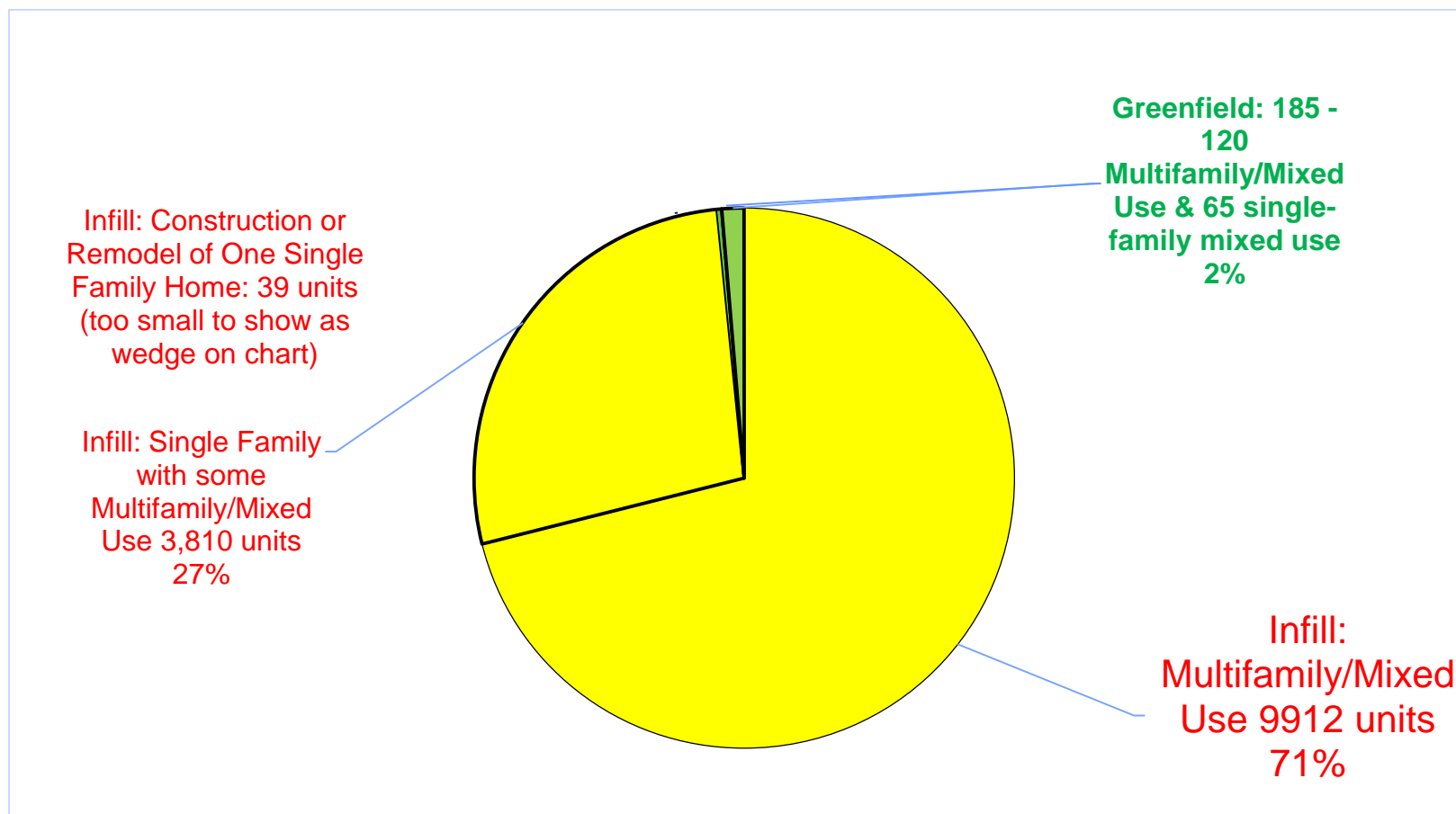
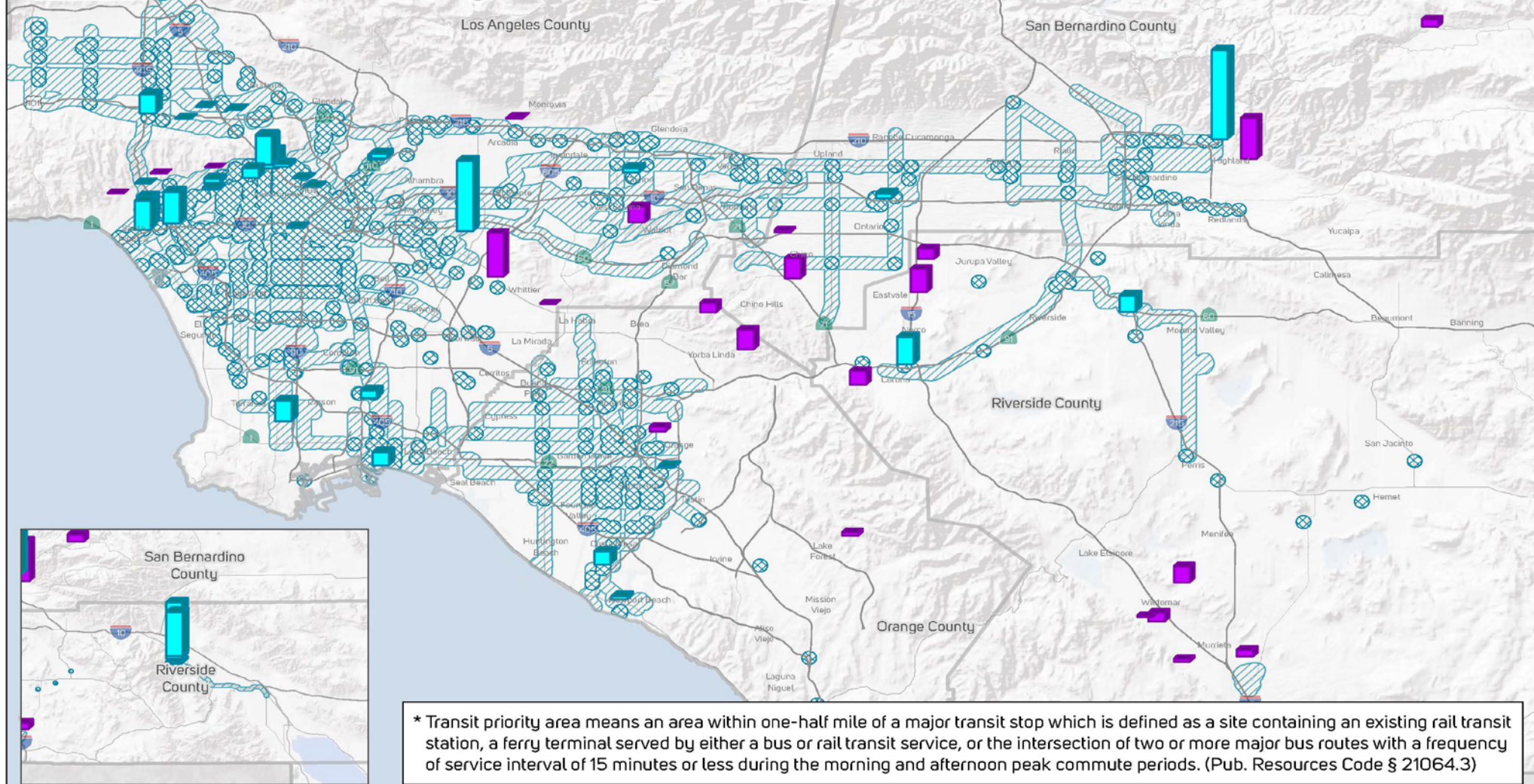


Figure 2b: SCAG Regional CEQA Update (2013-2015)

98% of Challenged Housing Units were in “Infill” Locations – OPR “Infill” Definition (99% under US Census Bureau “Urbanized Area” Definition)



70% - 10,188 Housing Units - Targeted by CEQA Lawsuits Were Located Inside SCAG Transit Priority Areas/High Quality Transit Corridors



Housing Projects Targeted by Recent CEQA Lawsuits



Inside the 2040 TPAs/HQTAs



Outside the 2040 TPAs/HQTAs



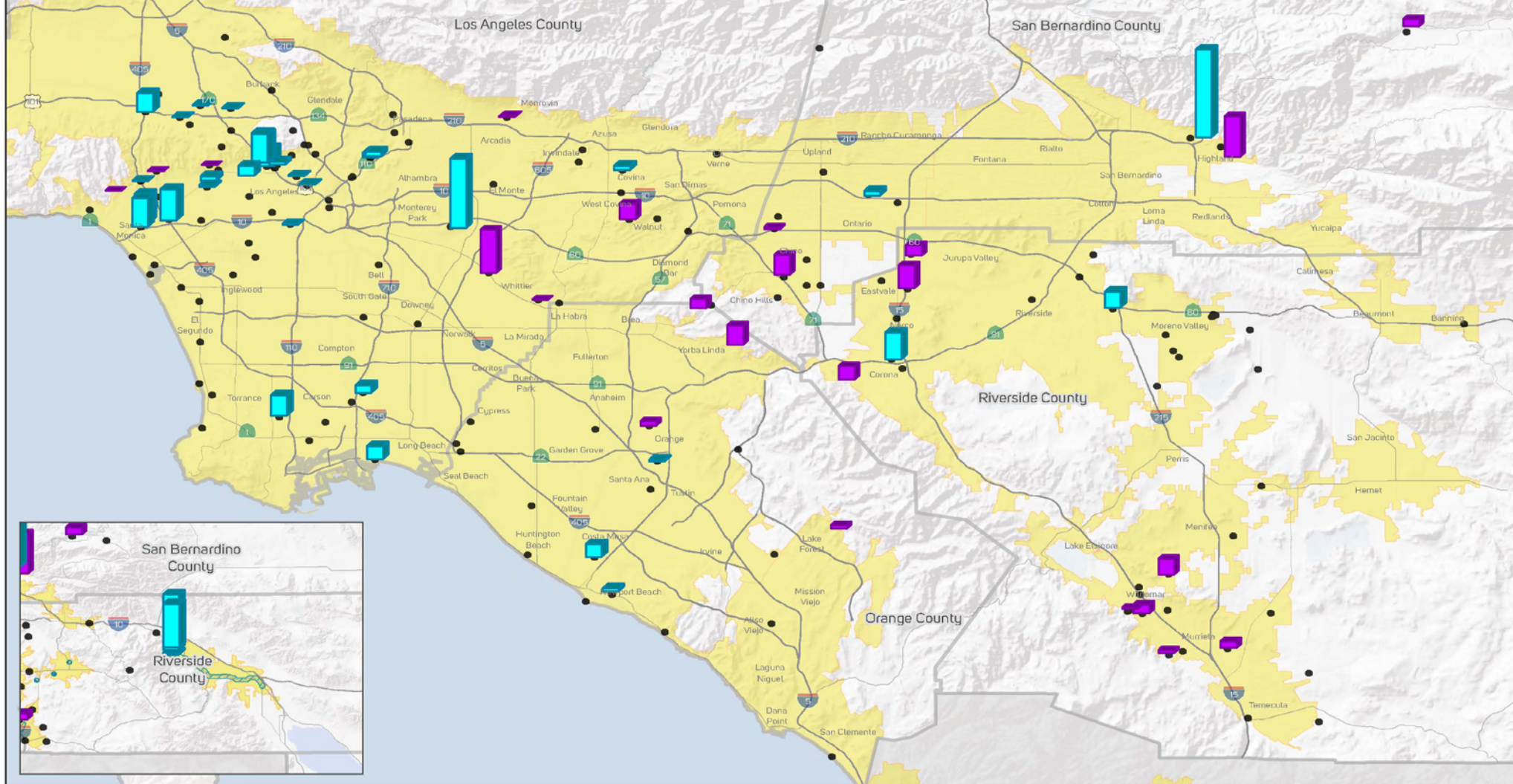
2040 Transit Priority Areas (TPAs)*



2040 High Quality Transit Areas (HQTAs)



99% of Housing Units Targeted by CEQA Lawsuits Located Inside US Census Bureau "Urbanized Areas" – Already Most Dense in US



Housing Projects Targeted by Recent CEQA Lawsuits



Inside the 2040 TPAs/HQTAs



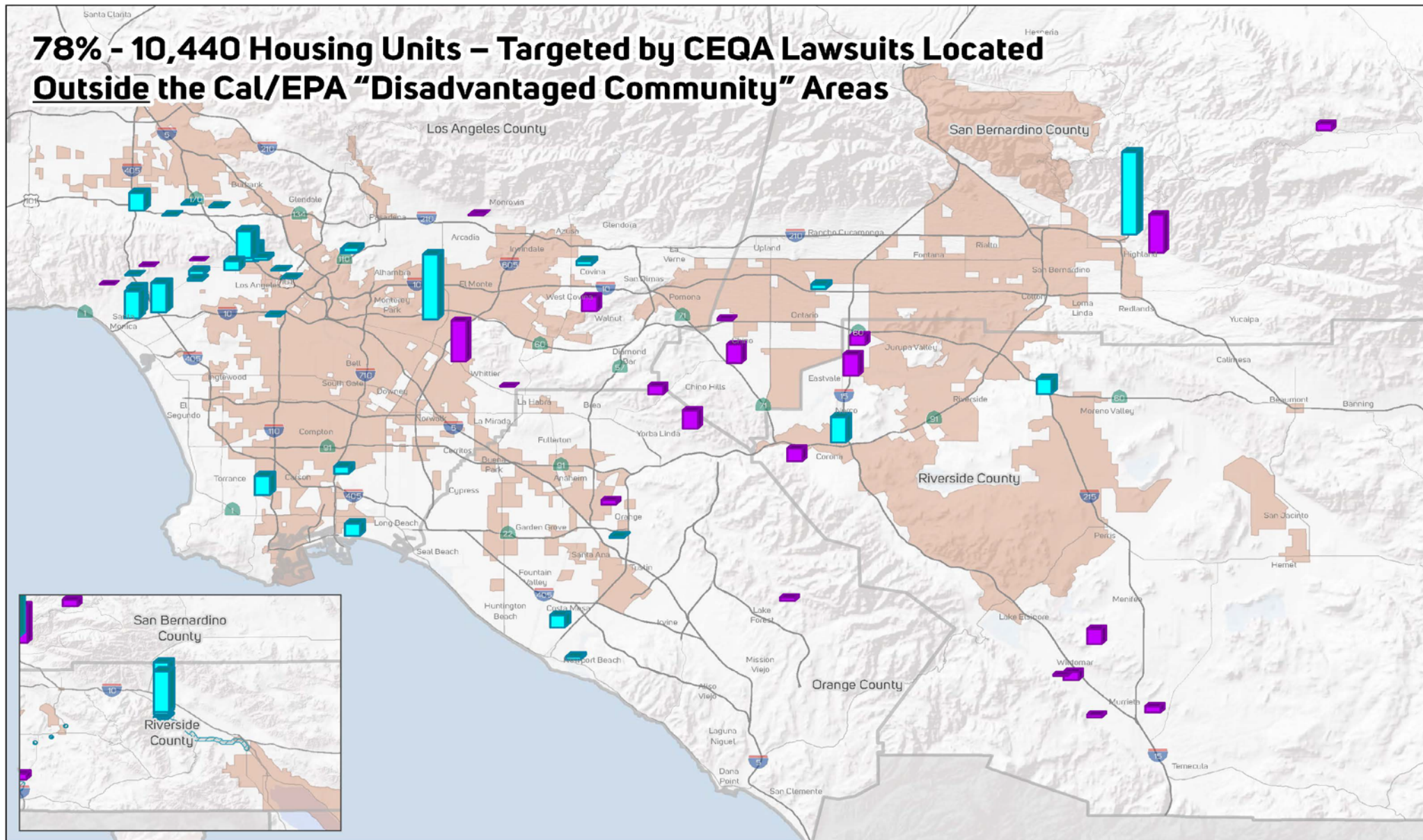
Outside the 2040 TPAs/HQTAs



US Census Bureau Urbanized Areas



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



Housing Projects Targeted by Recent CEQA Lawsuits



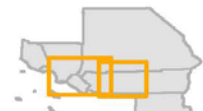
Inside the 2040 TPAs/HQTAs



Outside the 2040 TPAs/HQTAs



Cal/EPA Disadvantaged Communities (SB 535)



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

CONTACTS



Jennifer L. Hernandez
Holland & Knight LLP
Partner
Leader, West Coast Land Use and
Environmental Group
Co-Chair, National Environmental Team
415.743.6927 | San Francisco
213.896.2400 | Los Angeles
jennifer.hernandez@hklaw.com



David Friedman
Holland & Knight LLP
Of Counsel
213.896.2431 | Los Angeles
david.friedman@hklaw.com



Stephanie DeHerrera
Holland & Knight LLP
Associate
213.896.2523 | Los Angeles
stephanie.deherrera@hklaw.com



CEQA Streamlining: A Historical Perspective

Terry Rivasplata, AICP



A Brief Legislative History



Streamlining is Nothing New

- **1970s-style streamlining**
- **PRC 21166 and Guidelines Sections 15162-15164:**
 - Subsequent/supplemental/addendum EIR
- **Guidelines Section 15168:**
 - Program EIR
- **Guidelines Section 15183:**
 - Focus on impacts “peculiar to the project”
- **Gov. Code 65454:**
 - Apply 15162 to residential projects under a specific plan



The 1980s – A Quiet Time

- **No legislation of note**
- **Early court cases upholding Section 15162:**
 - Clarifying that the “fair argument” doesn’t apply to the subsequent EIR question

The 1990s – The Legislature Awakens

- **Business begins to focus on CEQA “reform”**
- **Environmental groups begin to play defense**
- **One result: Master EIR:**
 - Like a program EIR, with an expiration date
- **Another: a definition of “substantial evidence”:**
 - Slightly less ambiguity over fair argument
- **Statutory exemptions for infill:**
 - Lots of qualifiers – seldom used
- **More changes suggested, but never reached the Governor**

The 21st Century

- **More pressure to reform CEQA:**

- Multiple bills to reduce potential for litigation, limit the fair argument standard, and limit analysis to resources not covered by other regulations
- Senator Rubio proposes fundamental change in late 2012, but resigns in 2013 and it goes nowhere

- **No success in passing these changes:**

- Countervailing forces of development/business and environmental lobbies

The Favorite Approaches - SCS

- **SB 375:**
 - Streamlined review for transit priority projects
 - Exemption for sustainable communities projects
- **SB 226:**
 - Streamlined review for infill projects
- **SB 743:**
 - Streamlined review for certain projects with a specific plan
- **All of the above:**
 - Require consistency with a Sustainable Communities Strategy
 - Are complicated to understand

The Favorite Approaches – Streamlined Litigation

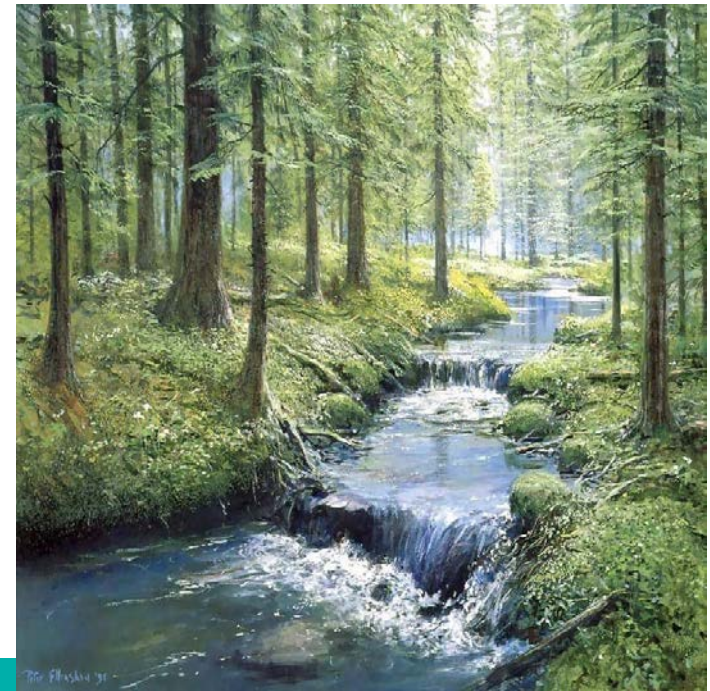
- **Environmental Leadership Development Projects:**
 - Environmentally cool; \$100 million investment in CA
 - Front-loaded administrative record
 - Shortened litigation schedule
- **Special legislation: certain sports projects (e.g., Warriors and Kings arenas):**
 - Front-loaded administrative record
- **Doesn't streamline the CEQA process itself**

Why Can't We Streamline, Without Making it Complicated?

- **Business v. Environmental Lobbies:**
 - Compromise isn't pretty
 - Environmental lobby currently has the upper hand
- **Some of the Key Issues We Fight Over:**
 - Fair argument
 - "Late hits"
 - Litigation: Causes of action and NIMBY challenges
- **Is change in the air?**
 - Broad push this session to improve housing production
 - Of the 100+ housing bills, some suggest streamlined CEQA processes

Recent Streamlining Efforts

Erin Efner & Darin Ranelletti



Overview of Recent CEQA Streamlining

- **The California Legislature has created several new methods of streamlining infill development over the past few years**
- **For Example:**
 - SB 226 streamlining for projects meeting adopted performance standards
 - SB 743 for projects consistent with a specific plan
 - SB 375 for transit priority projects



CEQA Streamlining Comparison

	Program EIRs	Master EIRs	Section 21083.3/Section 15183	Section 21094.5/ Section 15183.3 - SB 226
Time Limit	None	5 Years (“refreshed” with updated information)	None	None
Plan Consistency	Not explicitly required, but “within the scope”?	Silent	Consistency with General Plan and Zoning	Consistency with SCS
Project-Level Detail	Not required, but a PEIR “will be most helpful ... if it deals with the effects of the program as specifically and comprehensively as possible.”	Late projects must have been specifically identified in the Master EIR	Not required	Not required
Document Containing First Tier Analysis	An EIR prepared for a program, plan, policy or ordinance	A Master EIR for specified projects	An EIR for a comprehensive general plan amendment or zoning code	An EIR for a planning level decision, as well as any supplements or addenda thereto
Uniformly Adopted Development Standards	Can be used as thresholds of significance in an analysis, but not conclusively	Can be used as thresholds of significance in an analysis, but not conclusively	Can be used to address peculiar impacts of the project, only if adopted by a city or county with a finding that the standard will substantially mitigate the effects of future projects. Findings can be made at project approval	Can be used to address either new specific impacts or impacts that are more significant than previously analyzed, provided the finding is made at project approval
Limits on Analysis of Later Project	“Substantially more severe” impacts	New or more severe impact	Impacts peculiar to the project or its site	New specific impacts or impacts that are more significant than previously analyzed

CEQA Streamlining Comparison

	Subsequent/Supplement /Addendum (15162-15164)	Specific Plan EIR (Section 15182)	Specific Plan EIR (Section 21155.4) – SB 743	SCEA/SCEIR (Section 21155.2) – SB 375
Time Limit	None	None	None	None
Plan Consistency	Not explicitly required, but project must relate to the original CEQA document's subject	Residential project consistent with specific plan	Residential, employment center, or mixed-use development project consistent with specific plan and SCS, within a transit priority area	Consistency with SCS.
Project-Level Detail	Subsequent analysis focuses on later project	Detail at level of Specific Plan	Detail at level of Specific Plan	No explicit level set for "prior EIRs"
Document Containing First Tier Analysis	An EIR or MND	EIR certified for approved Specific Plan	EIR certified for approved Specific Plan	Prior certified EIRs
Uniformly Adopted Development Standards	Can be used as thresholds of significance in an analysis, but not conclusively	Can be used as thresholds of significance in an analysis, but not conclusively	Can be used as thresholds of significance in an analysis, but not conclusively	Can be used as thresholds of significance in an analysis, but not conclusively
Limits on Analysis of Later Project	New or substantially more severe impacts	New or substantially more severe impacts	New or substantially more severe impacts	For SCEA: no fair argument. For SCEIR on residential or mixed-use project: growth inducing impacts and vehicle GHG emissions

Comparing Use of Streamlining Methods

Streamlining Method	Relative Ease of Use ^a	Breadth of Applicability ^b	Extent of Streamlining ^c	RTP/SCS Consistency Required?
SB 375: Sustainable Community Project Exemption Under SCS	4	5	1	Yes
SB 375: Residential or Mixed-use Projects Consistent with SCS	3	4	4	Yes
SB 375: Transit Priority Project Under SCS – SCEA or SCEIR	3	3	3	Yes
SB 226: Urban Infill	4	3	4	Yes
SB 743: Partial Exemption for Parking/Aesthetics	1	3	5	No
SB 743: Specific Plan Exemption	1	3	1	Yes

Note: SB 375: Sustainable Community Project Exemption received a “4” under Relative Ease of Use because it requires the review of existing environmental conditions, which is not otherwise generally required under CEQA.

^a Scale of 1-5, with 1 being easiest.

^b Scale of 1-5, with 1 indicating the greatest range of applicable projects.


^c Scale of 1-5, with 1 indicating the greatest reduction of standard CEQA processes or least number of qualifying standards.


Role of the Regional Transportation Plan/Sustainable Communities Strategy


- **To be eligible for most streamlining methods, a project must be consistent with the regional Sustainable Communities Strategy**
- **Plan Bay Area:**
 - PBA describes how region can accommodate 820K new households and 1.3 million jobs by 2040
 - Identifies Priority Development Areas (PDAs), calls for housing/jobs around PDAs
 - Transit Priority Areas (TPAs) contain Transit Priority Projects (TPPs)
 - If a TPP, you have cleared first hurdle for streamlining (under SB 375)!




TPP Areas

 Eligible areas for residential or mixed-use CEQA streamlining

 Eligible areas for only residential CEQA streamlining

 Ineligible areas for CEQA streamlining

ROADS AND RAIL LINES

 Rail Line

 Freeway

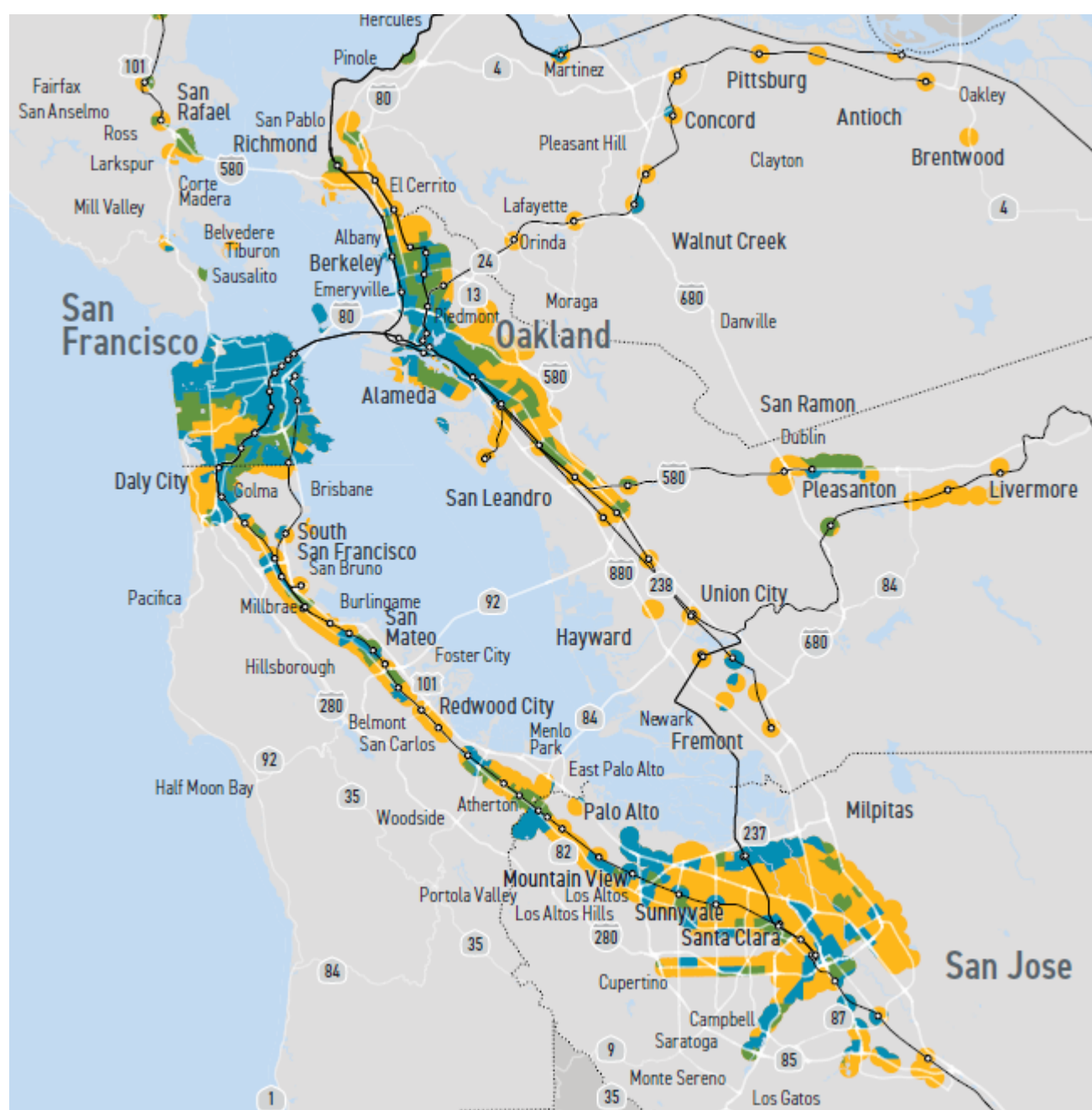
 Major Road

2010 POPULATION

Oakland > 350,000

Novato 50,000–350,000

Pacifica <50,000



Source: Draft Plan Bay Area 2040.



Saving CEQA: The Promise and Peril of Efforts at Reform
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Jurisdictions Using Streamlining

- **City and County of San Francisco:**
 - Community Plan Exemption, CEQA Guidelines Section 15183
 - Infill Exemption, CEQA Guidelines Section 15183.3
- **Menlo Park:**
 - Infill EIR, CEQA Guidelines Section 15183.3
- **City of Los Angeles:**
 - Starting to use SB375
- **Cities of Sacramento and West Sacramento:**
 - SB375

Case Study: City of Oakland

- **City of Oakland:**

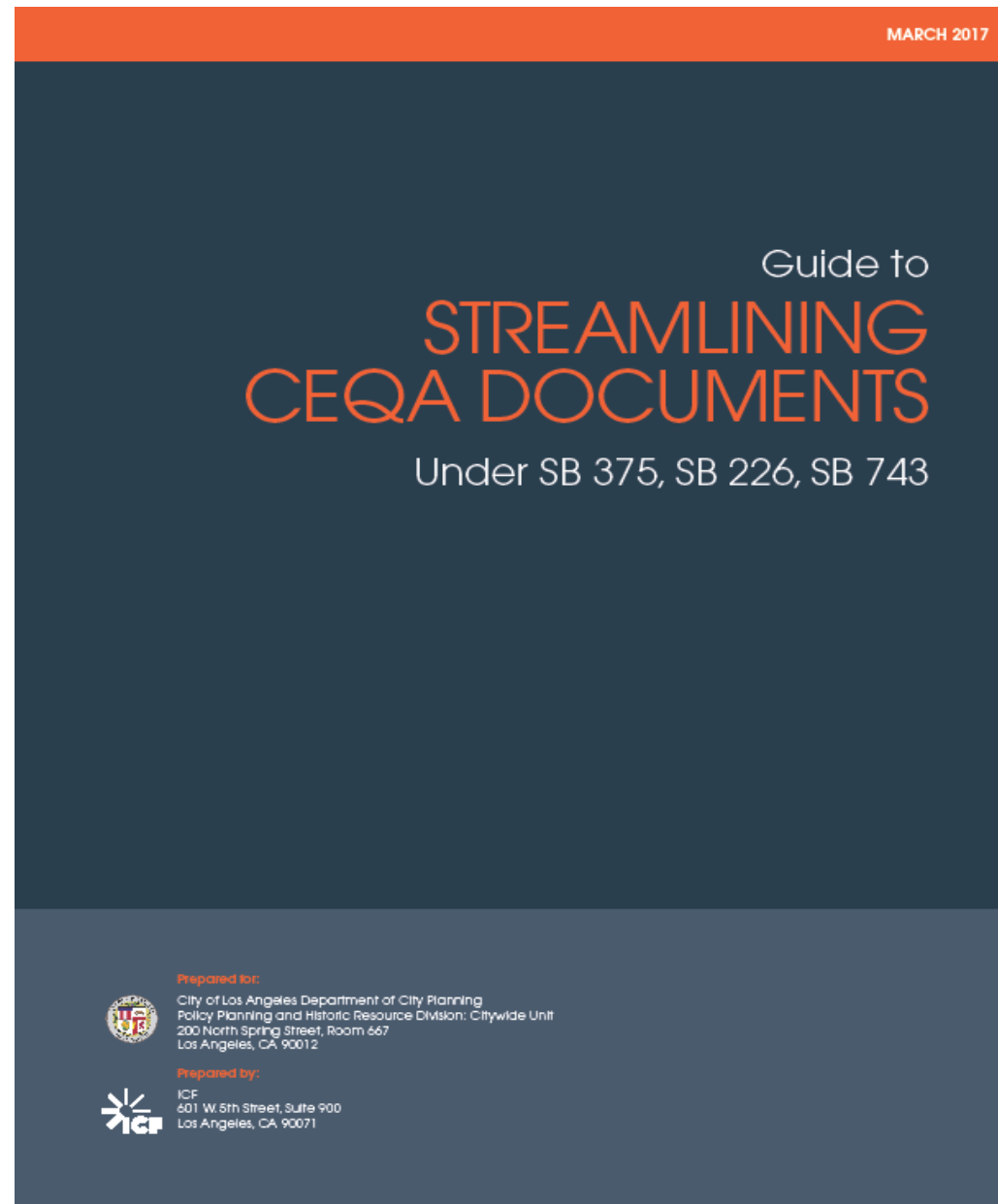
- Policies to update and streamline CEQA process
 - e.g., Housing Element of General Plan; Energy and Climate Action Plan
- Specific Plans:
 - Accompanying EIR used for future streamlining
 - Program-level versus project-level
- Uniformly Applied Development Standards:
 - “Standard Conditions of Approval” adopted by City Council, updated by Planning Director
- CEQA Document: “CEQA Analysis” = customized combination document:
 - Relies on multiple streamlining approaches, e.g., exemptions, tiering, addendum
- Updated Thresholds of Significance:
 - e.g., early implementation of SB743 to replace LOS with VMT in transportation analysis

Takeaways

- **Don't forget about the RTP/SCS if you don't have a first-tier EIR**
- **Establish development and environmental policies; modify CEQA process to support policies**
- **Local agencies have more control of the CEQA process than they may think**
- **Community engagement helps with reform efforts**
- **Ideas for funding the reform work at the local agency:**
 - Technical assistance grants from government agencies
 - Surcharge on permit application fees



Available Summer 2017!



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Questions for Discussion

- **Are streamlining techniques always useful, or do they just make things more complicated in some cases?**
- **When are they best employed?**
- **While employing streamlining techniques on a local level, should we simultaneously be pursuing legislation reform? If so, what should be the focus?**
- **Where are we with the Governor's By Right proposal? Will this return in some iteration?**