

HOUSING! HOUSING!! HOUSING!!!

City Attorneys Ass'n of Los Angeles County

October 28, 2021

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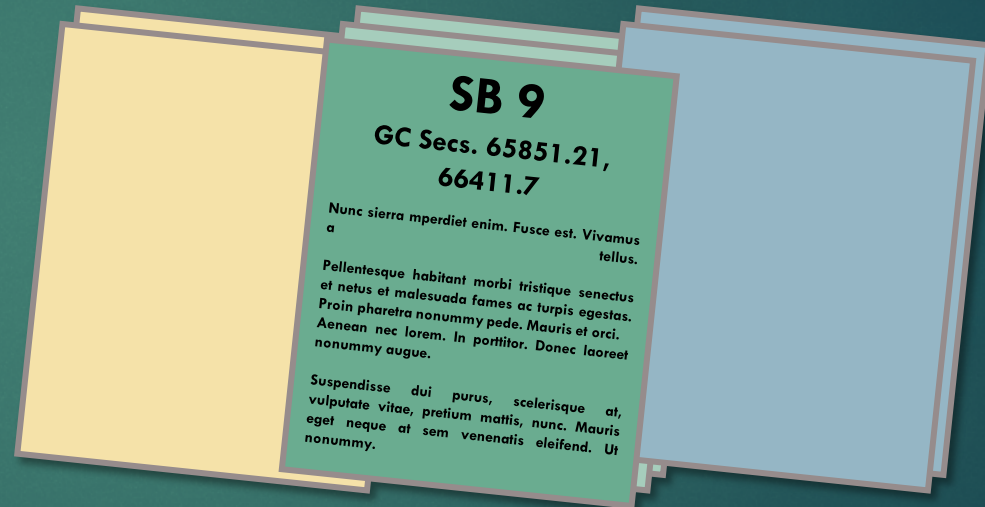
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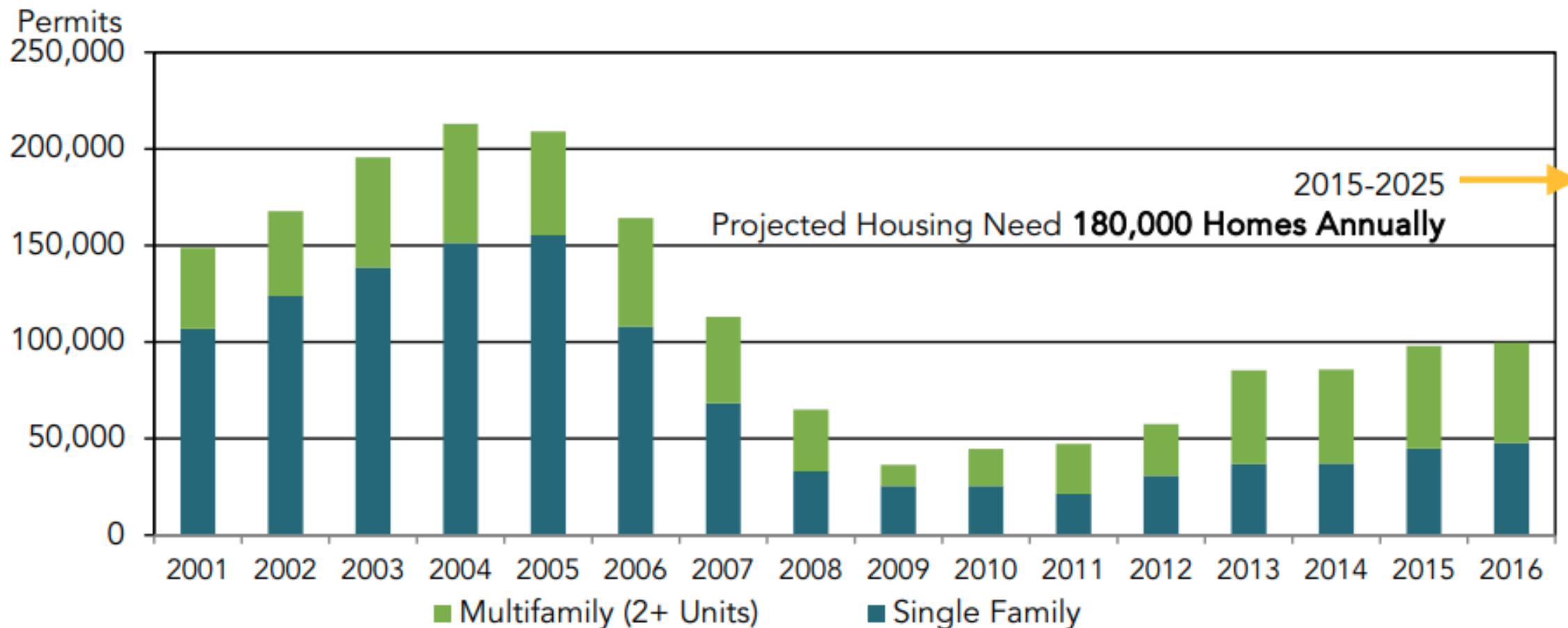
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Annual Permitting of Housing Units 2001-2016

Compared to Projected Statewide Need for Additional Homes



Sources: 2001-2016 New construction housing permit data from Construction Industry Research Board. 2015-2025 Projected Annual Need from HCD Analysis of State of California, Department of Finance P-4: State and County Projected Households, Household Population, Group Quarters, and Persons per Household 2010-2030— Based on Baseline 2013 Population Projection Series. Graphic by HCD. Note: "Raising the Roof" (1997-2020), projected California needed to add an average of 220,000 new homes per year to keep up with projected population increases; updated projected need is less due to lower population increase projections and higher household formation rates.

Annual Residential Construction Starts in California

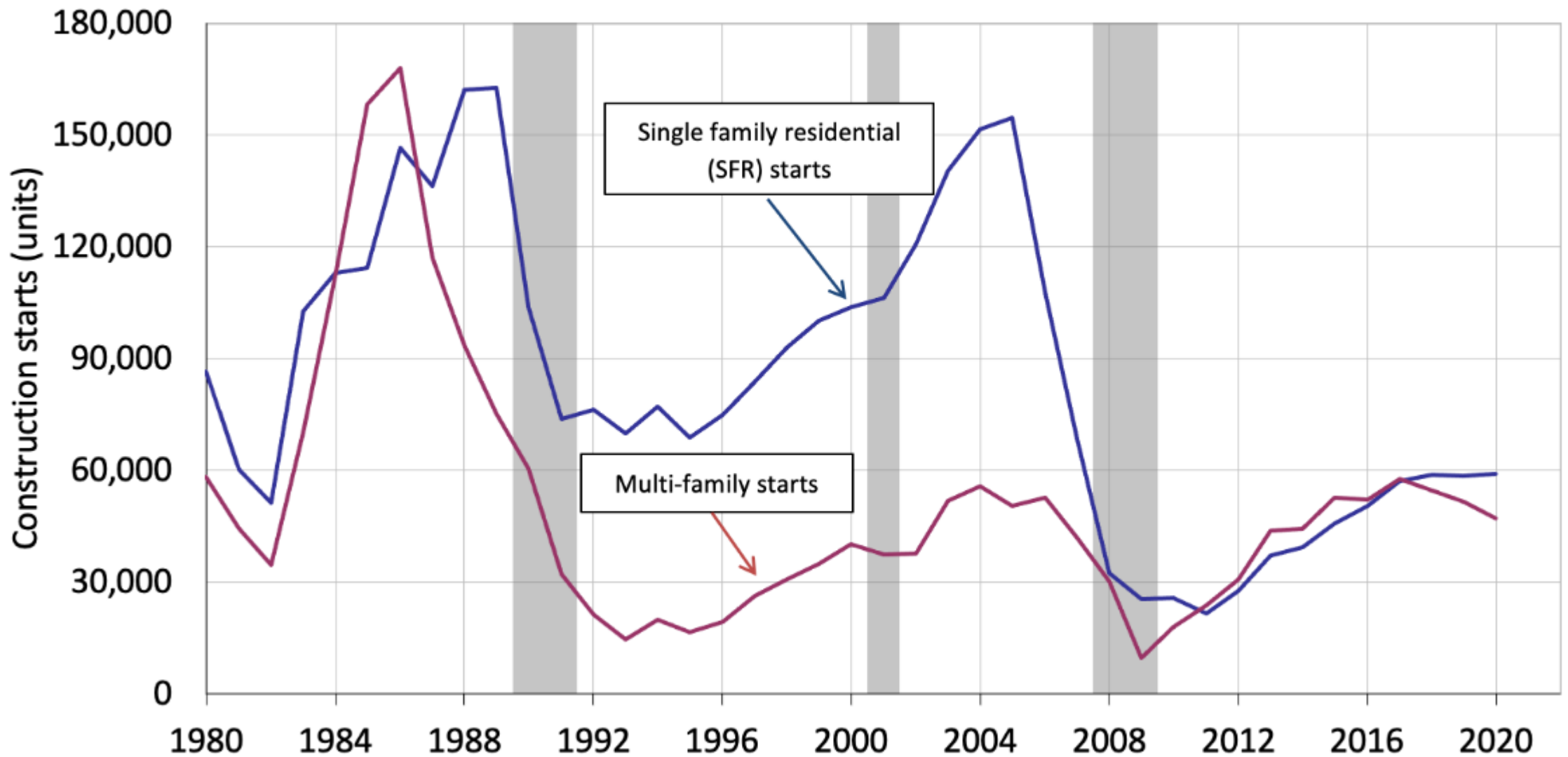


Chart by **first tuesday**

Data courtesy of the U.S. Census

Percentage of California's Renter Households Experiencing Rent Burden by Income

| Income | Total Renter Households (million) | % Rent Burdened | % Severely Rent Burdened |
|--|-----------------------------------|-----------------|--------------------------|
| Extremely Low-Income or Below Poverty Line | 1.41 | 90.2% | 76.9% |
| Very Low-Income | .82 | 85.4% | 47.4% |
| Low-Income | 1.13 | 64.6% | 16.9% |
| All Lower-Income Renter Households (80% AMI and below) Subtotal of above | 3.36 | 80.4% | 49.5% |
| Moderate-Income | .59 | 41.5% | 5.3% |
| Above Moderate-Income | 2.03 | 12% | 0.9% |
| All Renter Households Total | 5.97 | 53.4% | 28.7% |

Source: 2017 National Low-Income Housing Coalition tabulations of 2015 American Community Survey Public Use Microdata Sample (PUMS) housing file.

MANY CAUSES

- ▶ Labor shortages
- ▶ Construction costs
- ▶ Material shortages
- ▶ Obsolete technology
- ▶ Large investors
- ▶ Rising inequality
- ▶ Airbnb and second homes
- ▶ **Zoning and planning approvals**



Legislature's response

- ▶ “The Legislature’s intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval & construction of new housing for all economic segments of California’s communities by meaningfully and effectively **curbing the capability of local governments to deny, reduce the density of, or render infeasible housing development projects**. This intent has not been fulfilled.”

How is this being accomplished?

- ▶ **Require many more sites to be planned for higher density housing** (RHNA and 'no net loss')
 - ▶ Do not allow density reductions
- ▶ **Once sites are planned for housing, make it very difficult to deny housing**
 - ▶ 'Objective standards'
 - ▶ Health & safety finding

How is this being accomplished?

- ▶ **Require even inconsistent projects to be approved**
 - ▶ Density bonus law (65915)
- ▶ **Ministerial and 'by right' review to avoid CEQA**
(SB 35; 65583.2(h) and (i); 65650)
- ▶ **Vest projects before an application is made**
(preliminary applications; 65941.1; 65589.5(o))
- ▶ **HCD as enforcement agency**

Step 1: Require More Sites Planned for Higher Density Housing

- ▶ Greatly increased RHNA
- ▶ **'No Net Loss'**
- ▶ Do not allow density reductions

SCAG RHNA

- ▶ 2013 -2021:
- ▶ **412,137 UNITS**

- ▶ 2021-2028:
- ▶ **1,341,827 UNITS**
 - ▶ 168,000/year



A PERFECT STORM

- ▶ **Harder To Identify Acceptable Sites**
- ▶ “Affirmatively Furthering Fair Housing”
- ▶ Emboldened HCD



RESULT

- ▶ **NOT ONE SCAG City shown to be in compliance**
- ▶ San Diego County:
 - ▶ 5/19 in compliance
 - ▶ 4/19 adopted OUT
 - ▶ 7/19 being reviewed
 - ▶ 3/19 not yet adopted



NO NET LOSS Provisions (Section 65863)

- ▶ Applies when:
 - ▶ Any site in inventory either **downzoned** to reduce density below housing element density; or approved at **lower density** than shown; OR
 - ▶ Site approved with fewer units at the **income level** shown in the inventory.

NO NET LOSS Example

| APN | Zone | DU/A | Acres | Units | Use | Income Category |
|--------------|------|----------------|-------|-------|--------|-----------------|
| 041-0042-002 | R-3 | 20-30 du/ac | 2.0 | 40 | Vacant | Lower |
| 037-0400-027 | R-4 | 30-50 du/ac | 0.5 | 20 | Duplex | Lower |
| 038-0100-040 | R-3 | 20-30 du/ac | 4.5 | 125 | Vacant | Lower |
| TOTAL | | | | 185 | | |


REQUIRED FINDINGS

15

- ▶ Enough adequate sites to meet RHNA;
OR
- ▶ Upzone another site within 180 days.
- ▶ ***Surplus of properly zoned sites needed***

HOUSING CRISIS ACT

16

- ▶ **Cannot reduce density** below that existing on January 1, 2018
 - ▶ Unless “concurrent” density increases
 - ▶ Includes reductions in height, FAR
- ▶ No moratorium without HCD consent
- ▶ Can't enforce growth control limits 

Step 2: Make It Very Difficult to Deny Housing Projects

- ▶ Housing Accountability Act (65589.5)
 - ▶ ‘Objective Standards’ or Health & Safety Finding
 - ▶ Deference to any evidence of consistency
 - ▶ May be “deemed consistent” even if not
 - ▶ General plan controls, not zoning

IF Housing Development Project Complies with Objective Standards

- ▶ If housing development project complies with “**objective**” general plan, zoning, & subdivision standards, a city can only **reduce density** or **deny** if it finds:
 - ▶ A specific adverse impact to public health & safety; AND
 - ▶ The impact can't be mitigated in any other way.

What is an objective standard?

- ▶ “Standards that involve **no personal or subjective judgment** by a public official and **are uniformly verifiable** by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official [before submittal].”
- ▶ Examples: Height, setbacks, lot coverage, % open space, density, FAR, etc.

What is an objective standard?

- ▶ Project is “deemed consistent” with local standards if there is substantial evidence that would allow a reasonable person to conclude consistent. (f)(4)
- ▶ Project is “deemed consistent” if city does not inform developer of inconsistency within 30-60 days of completeness. (j)(2)

What is an objective standard?

- ▶ No rezoning needed if project consistent with general plan but inconsistent with zoning. (j)(4)
 - ▶ GP allows 20-40 units per acre; zoning allows 25 units/acre' is that inconsistent?

CaRLA v. City of San Mateo

- 10-unit market rate apartment denied
- ▶ “If height varies by more than one story between buildings, a transition or step in height is necessary.”



CARLA v. City of San Mateo

- ▶ Trial Court found that the standard was objective and upheld denial of the project on that ground
- ▶ Court of Appeal reversed, finding it was NOT an objective standard.
- ▶ The guideline allows for “transitions” that are other than a step in height; step in height not well defined
- ▶ “Ambiguities in the Guidelines’ height standard are pervasive and not amendable to objective resolution”

CARLA v. City of San Mateo

- ▶ Facts unhelpful to the City include:
 - ▶ Staff and consultant concluded that the project conformed to the standard, whereas Planning Commission and City Council found it did not.
 - ▶ Both interpretations “reasonable“ which court construed as proof positive that it is not objective
 - ▶ Under “reasonable person standard” either interpretation works, so it must be approved.

CARLA v. City of San Mateo

- ▶ Court also determined that HAA and application is constitutional
- ▶ Does not impermissibly encroach on municipal affairs of charter cities
- ▶ Is not an impermissible delegation
- ▶ Does not create due process issue for interested neighbors.

Lessons Learned:

- ▶ Strict standard for “objective”
 - ▶ Cities developing prescriptive standards now
- ▶ A few bones for cities:
 - ▶ Design guidelines and other standards do not need to be part of ZO or GP so long as referenced there
 - ▶ Cities may use subjective standards to apply conditions: city could have required setback

Lessons Learned:

- ▶ Once staff recommends approval and finds consistency, cannot be overcome unless CC finds that interpretation “unreasonable”
 - ▶ But “deemed consistent” provision may override even unreasonable interpretation
- ▶ Developer can still present own view; need strong record
- ▶ Attorneys’ fees if you lose

Lessons Learned:

- ▶ CEQA and Coastal Act as the last line of defense
 - ▶ *Schellinger Bros. v. City of Sebastopol*: must complete CEQA before invoking HAA
 - ▶ Can probably still apply subjective Coastal Act standards
 - ▶ *Kalnel Gardens LLC v. City of Los Angeles* ☀

Step 3: Allow Major Deviations from Adopted Standards

- ▶ Density bonus law (65915)
 - ▶ **Density bonus**
 - ▶ 1 – 4 “**incentives / concessions**”
 - ▶ **Unlimited Waivers** of development standards; and
 - ▶ Reductions in **parking** requirements

DENSITY BONUS Qualifying Projects

- ▶ 10 percent Lower Income (LI) Households
- ▶ 5 percent Very Low Income (VLI) HHs
- ▶ Senior Citizen Housing Development
- ▶ 10 percent Moderate Income for-sale
- ▶ 100 Percent Affordable Projects (80 LI/20 MI)

BENEFIT 1: DENSITY BONUS

- ▶ Minimum 20 percent bonus
- ▶ 50 percent bonus for only 15 percent VLI
- ▶ 80 percent bonus for 100 percent affordable
 - ▶ Unlimited density if within ½ mile of major transit stop

BENEFIT 1: DENSITY BONUS

- ▶ Affordable percent applies only to base density
- ▶ Example:
 - ▶ 100 units base density, 15 VLI units
 - ▶ 50 percent bonus = 150 units
 - ▶ Overall affordability = 10 percent

BENEFIT 1: DENSITY BONUS

- ▶ Inclusionary units can qualify project for density bonus (*Latino Unidos v. County of Napa*)
- ▶ Example:
 - ▶ City requires 10 percent LI
 - ▶ Project qualifies for 20 percent bonus (plus parking reductions, one concession, unlimited waivers)

BENEFIT 2: INCENTIVES & CONCESSIONS

- ▶ 1-4 Modifications of development standards that result in: (1) “identifiable, and actual cost reductions” (2) “to provide for affordable housing.”
- ▶ City may obtain “reasonable documentation” to demonstrate that the incentive meets the definition

BENEFIT 2: INCENTIVES & CONCESSIONS

- ▶ Can only be denied if:
 - ▶ Specific health or safety impact that can't be mitigated;
 - ▶ Violation of state or federal law, or
 - ▶ Does not result in cost reductions to provide for affordable housing.
- ▶ Burden of proof is on City if denies.

BENEFIT 2: INCENTIVES & CONCESSIONS

- ▶ *Schreiber v. City of LA*
 - ▶ Presumption concession will reduce costs;
 - ▶ No need for city to make findings to approve;
 - ▶ Can require 'reasonable documentation' that meets definition;
 - ▶ Economic feasibility doesn't need to be shown;
 - ▶ Must develop own information to deny.

BENEFIT 3: WAIVERS

- ▶ City cannot apply development standards that “physically preclude” the construction of the project with the density bonus or incentive(s) the project is entitled to
- ▶ Developer may request unlimited waivers
- ▶ No economic justification required

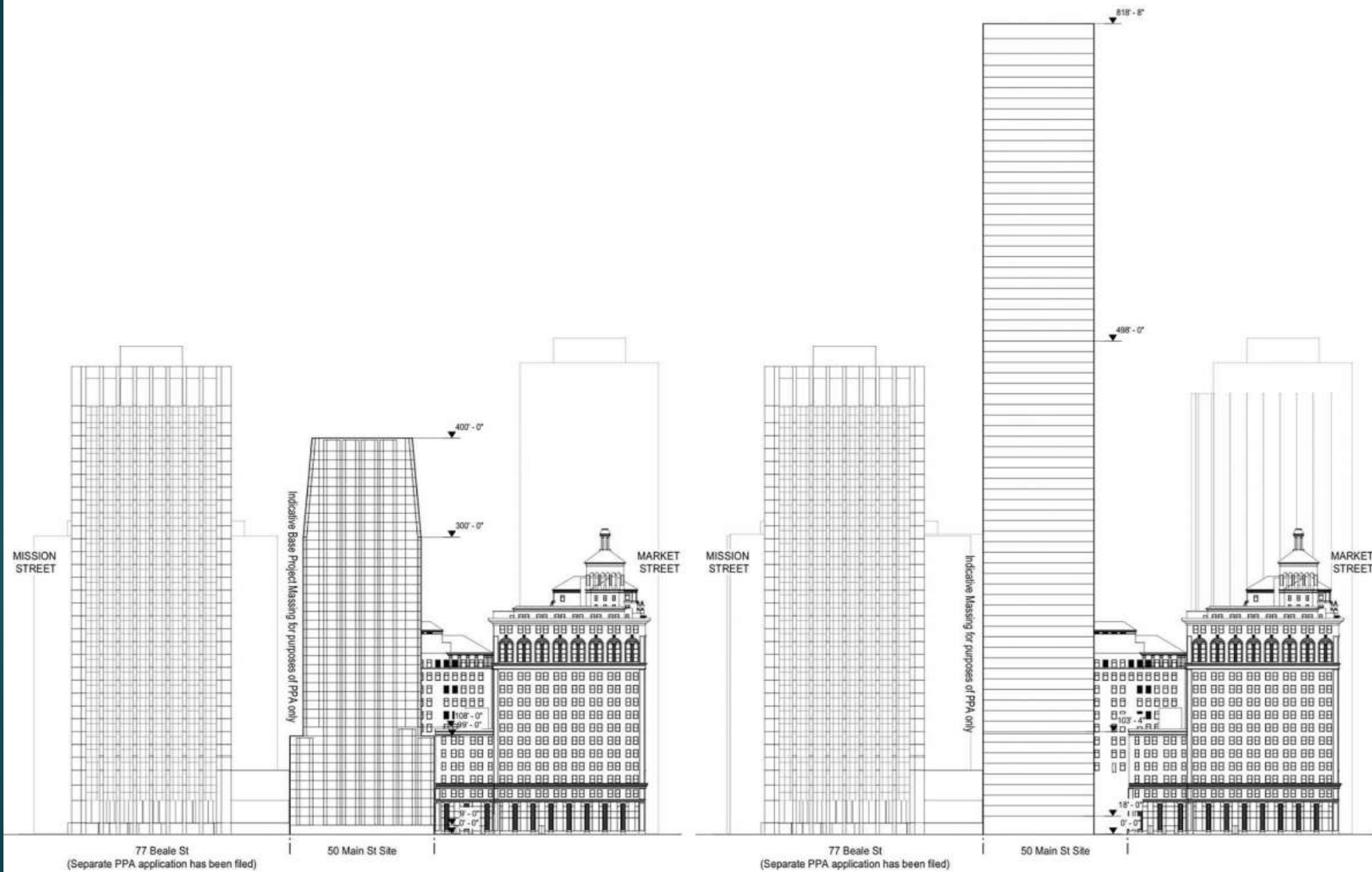
BENEFIT 3: WAIVERS

- ▶ *Wollmer II v. City of Berkeley*
 - ▶ Modest waivers (one story, some setbacks)
 - ▶ Argued that waivers could not be given for project amenities (courtyard & high ceilings)
 - ▶ Court held that waivers could be provided and in dicta stated the waivers *must* be granted

BENEFIT 3: WAIVERS

What does “physically preclude” mean?

- ▶ Developers and HCD: Means the proposed project doesn't conform to city standards.
- ▶ What evidence would justify a denial?
Alternative plan? Do ALL amenities need to be in alternative plan?



DENSITY BONUS & THE HAA

- ▶ Project is consistent with objective standards including all density bonus benefits 

Step 4: Expand Ministerial and 'By Right' Approvals to Avoid CEQA

- ▶ SB 35: Ministerial (65913.4)
- ▶ 'By right':
 - ▶ Housing elements (65583.2(h) and (i))
 - ▶ Supportive housing (65650 et seq.)
 - ▶ Low barrier navigation centers (65660 et seq.)

MINISTERIAL V. 'BY RIGHT'

- ▶ *'BY RIGHT' APPROVAL*: Exempt from CEQA if 20 percent affordable unless subdivision is needed
 - ▶ Only design review allowed
- ▶ *MINISTERIAL REVIEW*: Eliminate discretionary review.

SB 35

- ▶ Key advantages to the applicant:
 - ▶ No CEQA review
 - ▶ Ministerial review ONLY based on objective standards (like building permits)
 - ▶ Strict timelines
 - ▶ Often exempt from all parking requirements

SB 35: Qualifying Projects

- ▶ Site must not have contained housing occupied by tenants within last 10 years
- ▶ Not in the coastal zone, agricultural land, wetlands, habitat, mobilehome park
- ▶ 10 percent or 50 percent of base density affordable to low-income households
- ▶ Must pay prevailing wages if more than 10 units

SB 35: Qualifying Projects

- ▶ Consistent with “objective” zoning, subdivision, and design review standards;
 - ▶ Consistent with zoning if consistent with maximum density in general plan;
 - ▶ Density bonuses are consistent;
 - ▶ General plan standards trump inconsistent zoning, specific plan, and other standards.

Ruegg & Ellsworth v. City of Berkeley


- ▶ **No deference** to local government factual determinations
- ▶ Definition of “historic structure”
- ▶ Applies to charter cities and counties
- ▶ Mixed-use developments qualify

SB35 AND DENSITY BONUS CASES

- ▶ SB 35 shall be “interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply” (§ 65913.4(n))
- ▶ Density bonus “shall be interpreted liberally in favor of producing the maximum number of total housing units” (§ 65915(r))

HOUSING CASES IN GENERAL

49

- ▶ Pressure on courts to favor housing
 - ▶ In most recent cases involving the new statutes, courts have upheld housing approvals and overturned denials
- ▶ Significant attorneys fees exposure; high defense costs even if successful 

Step 5: Allow Vesting before Applying for Development

- ▶ **The Preliminary Application**
 - ▶ Applicant may choose to submit a limited list of information
 - ▶ Can only ask for information specified in statute (65941.1)
 - ▶ City standards “frozen” as of submittal

The Preliminary Application

- ▶ Exceptions include:
 - ▶ Fee increases based on CPI or construction cost index
 - ▶ Needed to mitigate a significant impact
 - ▶ No construction started within 2.5 years of “final approval”
 - ▶ Changed number of units or sf by 20 percent or more

Expiration of the Preliminary Application

- ▶ Must submit 'regular' application within 180 days
- ▶ If incomplete, 90 days to complete the application or application expires (65941.1)



Step 6: Empower HCD

- ▶ 'Housing Accountability Unit' with 25 staff
- ▶ Broader and broader authority
- ▶ Letters of Technical Advice and Notices of Violation
- ▶ Primarily influenced by market-rate developers

What Can Cities Do?

▶ In the Legislature

- ▶ Legislation written by market-rate developers
- ▶ Cities appear to have extremely limited input
- ▶ Affordable housing advocates less influential than market-rate developers

What Can Cities Do?

▶ In the press

- ▶ Each of these measures is applauded in the press
- ▶ Counter arguments viewed as 'NIMBYism'
- ▶ No acknowledgement that RHNA *cannot* be met

Conclusion

If developers have the option of evading local planning & zoning, will that solve the 'housing crisis'? 🌞

- ▶ **Adds Gov. Code § 65852.21 (PIng Law):**
ministerial approval of qualifying “duplex” units within single-family residential zones
- ▶ **Adds Gov. Code § 66411.7 (Map Act):**
ministerial approval of qualifying “urban lot splits” within single-family residential zones



MINISTERIAL TWO- UNIT DEVELOPMENTS

GOLDFARB LIPMAN ATTORNEYS

goldfarb lipman attorneys

Ministerial Duplex Development

- ▶ Ministerial approval of “proposed housing development containing no more than two residential units”.
- ▶ “A housing development contains 2 residential units if the **development** proposes no more than **2 new units** or if it proposes to add one new unit to one existing unit.”
 - ▶ If a lot already has a single-family home and an ADU, does this allow two additional (non-ADU) units?

What projects qualify?

- ▶ Site is in a single-family residential zone;
- ▶ Not a historic site or district;
- ▶ Parcel meets requirements of § 65913.4(a)(6)(B)-(K) (may be in coastal zone);
- ▶ Project would not alter or demolish rent-controlled housing, housing that was Ellis'd in last 15 years, or housing occupied by a tenant in the last 3 years;
- ▶ Project would not demolish more than 25 percent of the existing exterior walls, unless either (a) the local agency allows; or (b) the site has not been occupied by a tenant in the last three years.

What criteria may be applied?

ONLY **objective** zoning standards, subdivision standards, and design standards apply. May adopt local ordinance.

- ▶ Standards cannot preclude two units of 800 sf.
- ▶ Can require 4' rear and side setbacks or none if existing structure or rebuilt in same location.
- ▶ No more than one parking space/unit.

May deny if **building official** makes written finding, based on preponderance of the evidence, that project would have specific, adverse impact on public health and safety or physical environment that cannot be mitigated.

What criteria must be applied?

What cannot be applied?

62

- ▶ Cannot be used for short-term rentals.
- ▶ Cannot reject **solely** because adjacent or connected structures if they comply with building codes and **are** “sufficient to allow separate conveyance.”
 - ▶ Apparently units must be designed to allow condo or separate sale if desired.
- ▶ No bar on owner-occupancy requirements in this section.
- ▶ Apparently ADUs/JADUs must be allowed if no lot split.



MINISTERIAL URBAN LOT SPLITS

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Ministerial Urban Lot Splits

- ▶ Provides for ministerial approval of subdivision of one lot into two lots that meets certain requirements.
- ▶ No discretionary review or hearings permitted.

What projects qualify?

- ▶ Split results in two approx. equal-sized lots (60-40 split);
- ▶ Each new lot is at least 1,200 square feet (lower minimum may be set by ordinance);
- ▶ Lot is zoned single-family residential;
- ▶ Lot split was not established through a prior SB 9 lot split;
- ▶ Neither the owner nor “**any person acting in concert with the owner**” has previously subdivided an **adjacent** parcel through an SB 9 lot split;

65

What criteria must be applied?

- ▶ Applicant signs affidavit stating that **applicant** “**intends to occupy**” one of the units as principal residence for at least 3 years from **date of approval** of the lot split, unless land trust or qualified non-profit;
- ▶ **No other owner occupancy requirements**
- ▶ Units NOT used for short-term rentals;
- ▶ Conforms to all applicable **objective** Map Act requirements;

66

What criteria may be applied?

67

- ▶ **Agency may require easements needed for public services and facilities;**
- ▶ **Parcels may be required to have access to, provide access to, or adjoin the public right-of-way.**
- ▶ Same objective standards provisions
- ▶ Same building official finding possible to deny
- ▶ Same parking provisions

What criteria may be applied?

- ▶ **Agency not required to allow more than two units on any parcel created through an urban lot split**
 - ▶ Includes ADUs, JADUs, density bonus units, and units created by duplex developments
- ▶ **Not required to permit ADUs or JADUs on parcels that use *both* duplex provision and urban lot split provision**

What cannot be applied?

- ▶ Require right-of-way dedications or off-site improvements;
- ▶ **Impose any other owner occupancy standards;**
- ▶ Require the correction of nonconforming zoning conditions;
- ▶ Deny application **solely** because it proposes adjacent or connected structures.

Typical 40' wide, 100' deep,
4,000 square foot Bay Area lot

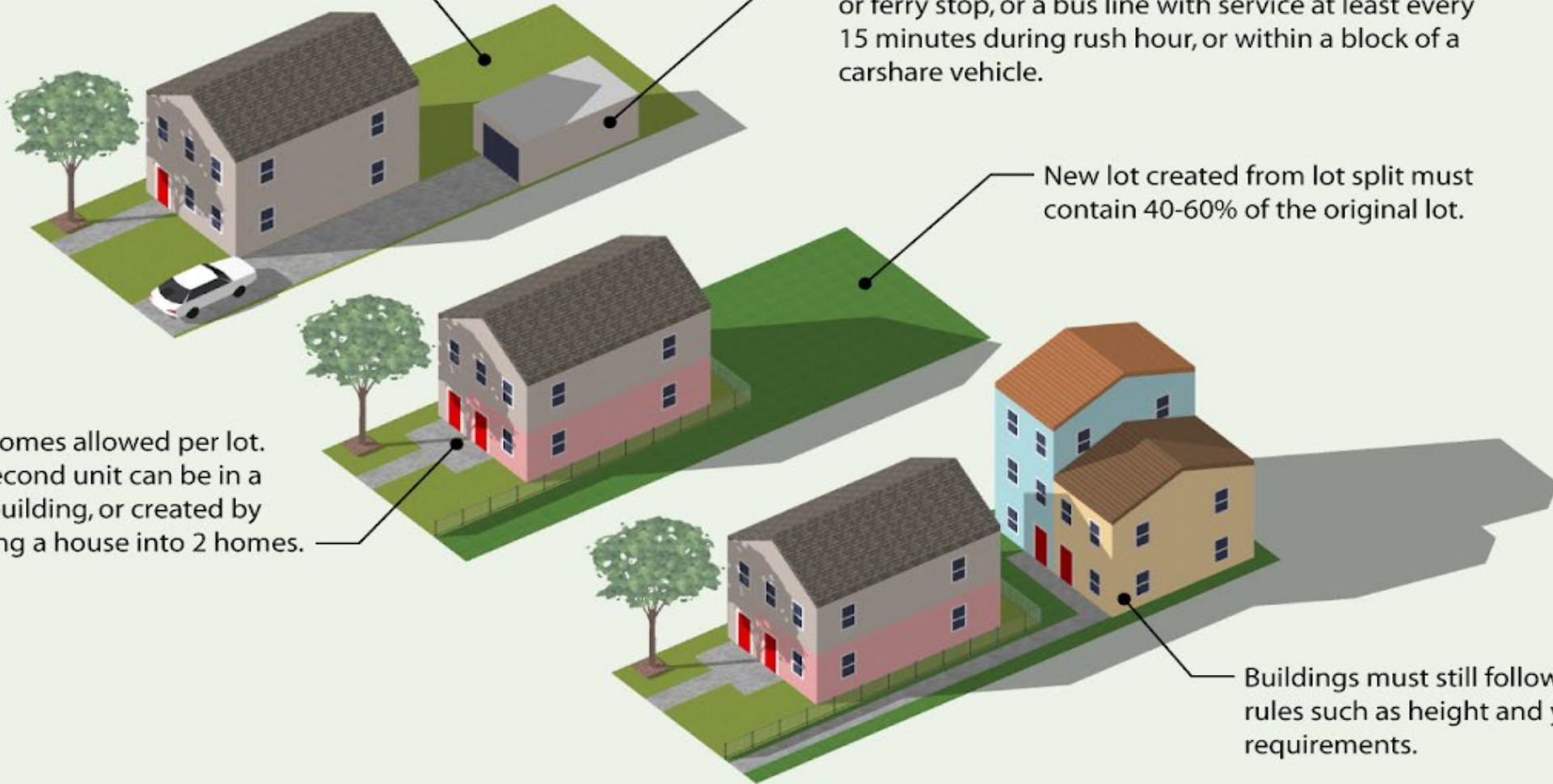
No parking required if lot is within a 1/2 mile of a rail
or ferry stop, or a bus line with service at least every
15 minutes during rush hour, or within a block of a
carshare vehicle.

New lot created from lot split must
contain 40-60% of the original lot.

Two homes allowed per lot.
The second unit can be in a
new building, or created by
dividing a house into 2 homes.

Buildings must still follow local zoning
rules such as height and yard
requirements.

However, you can get exceptions if
there is no other way to build 2 homes
of up to 800 square feet each (enough
space for a 2-bedroom house).



Responding to SB 9

71

- ▶ Local implementing ordinances exempt from CEQA
- ▶ Typical provisions: objective standards; owner occupancy for duplexes without lot split; define ambiguous terms (“acting in concert”)
- ▶ Review historic districts

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