

Recent Land Use Law Cases
(That Could Change Your World)
2015 Sonoma State University
Planning Commissioners Conference

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CBIA v. City of San Jose

61 Cal.4th 435 (2015)

- In 2010 San Jose becomes one of 170 CA cities with an inclusionary housing requirement
- In other words, a “housing-on-housing” requirement
- How should inclusionary requirements be evaluated, legally?

San Jose ordinance provisions

Requires new developments of 20 or more units to sell at least 15% of the for sale units at a price affordable to low or moderate income households

Or, instead ...

- Construct off-site for sale units
- Pay an in lieu fee based on median sales price of affordable units
- Dedicate land equal in value to in lieu fee
- Acquire and rehab a comparable number of units
- Then, requirement goes up to 20% of units

Ordinance provides these incentives for providing units on site

- Density bonus
- Reduced number of required parking spaces
- Reduced set-back requirements
- Financial subsidies and assistance from City in the sale of the affordable units

Also allows some differences for affordable units

- Must have same quality of exterior design, comparable square footage and bedroom count
- But may be attached or on smaller lots
- And have different, though functionally equivalent, interior finishes, features, and amenities

Ordinance doesn't apply to rental units unless *Palmer* is overturned

- *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009)
- Court found invalid a requirement that new residential development construct rental units at affordable levels, because conflicts with California's Costa-Hawkins Act
- Costa-Hawkins allows landlords to set rents as they see fit when a tenancy begins

In passing ordinance, City's findings:

- Ordinance consistent with City's housing element goals
- Requirements are reasonably related to impacts of projects because:
 - New market rate housing drives up the price of available land, reducing the development opportunities for affordable housing
 - New residents of market rate housing create demands for services, creating a demand for new employees (some of whom won't be able to afford market rate housing)

CBIA brought challenge alleging

- City hadn't provided evidence of a "reasonable relationship" between:
 - Impact: need for additional subsidized housing units caused by development of new residential development projects
 - and
 - Condition: the new affordable housing exactions imposed by the ordinance

CA Supreme Ct found

- The inclusionary housing requirements aren't "exactions"
- Because don't require giving up property (either dedicating land or paying a fee)
- Rather, limit the way the developer may use property

Why does not being an “exaction” matter?

- If an exaction, ordinance is evaluated under the “unconstitutional conditions doctrine” and its special limitations derived from *Nollan* and *Dolan* cases

Nollan v. Calif. Coastal Commission

“Essential Nexus”

- Condition on permit to build house in coastal zone
- Impact of project – blocked view of ocean from inland
- Condition – required access across Nollan property above Mean High Tide line
- U.S. Supreme Court found condition invalid as not being related to project impacts

Dolan v. City of Tigard

“Rough proportionality”

- Conditions on permit to expand store and pave parking lot (creekside property)
- Project impacts: increased traffic and run-off
- Conditions required dedications for bike path and in floodplain
- U.S. Supreme Court found conditions must be “roughly proportional” to project impacts

“Heightened Scrutiny”

- Together, *Nollan* and *Dolan* require essential nexus and rough proportionality
- Some degree of quantification
- Burden of proof on city

If not an exaction

- Evaluate as an “ordinary exercise of police power”

Police power

- Local government authority to regulate private activity to promote the public's health, safety, welfare
- Broad power: use restrictions, development standards, aesthetic controls, price controls (e.g., rent control)

Limits on police power

- Must be reasonably related to public health, safety, welfare
- Local exercise may not conflict with state or federal law

Here,

- Increasing affordable housing and spreading it out are “unquestionably constitutionally permissible purposes”
- And price controls are, generally, constitutionally permissible means to achieve a city’s legitimate public purposes

Limits to imposing price controls under U.S. Constitution

- Due Process clause (14th amendment)
“... nor shall any person be deprived of life, liberty, or property without due process of law”
- Takings clause (5th amendment)
“... nor shall private property be taken for public use without just compensation”

Under due process clause

- The price control can't be "confiscatory"
- I.e., can't deny a property owner a fair and reasonable return on its property
- Here, the ordinance had not yet been applied to any proposed development, and there's no indication that the requirement plus the "incentives" would produce a confiscatory effect
- And CBIA didn't allege a confiscatory effect

Under takings clause

Price controls may be “regulatory takings” under *Penn Central v. New York*, considering:

- the economic impact of the regulation on the claimant
- the extent to which the regulation has interfered with distinct investment-backed expectations
- the character of the governmental action

But CBIA didn't rely on *Penn Central*

San Remo Hotel v. San Francisco (2002)

- Fee imposed under Hotel Conversion Ordinance
- *San Remo* says an impact fee needs to “bear a reasonable relationship ... to the deleterious public impact of the development”
- Court says not applicable here, because San Jose ordinance is about restricting use, not addressing impacts

Ehrlich v. Culver City (1996)

- City imposed conditions on residential project built on former private tennis club
- Public art condition (provide or pay in lieu fee)
- *Ehrlich* court says public art condition isn't an exaction, so evaluated under ordinary police power standard

BIA of Central California v. City of Patterson (2009)

- Inclusionary housing case
- Says: There must be a reasonable relationship between the amount of the fee and “the deleterious public impact of the development”
- CA Supreme Court in *CBIA v. San Jose* says, “For a number of reasons we conclude that the *City of Patterson* decision was incorrect in this respect”

Sterling Park v. Palo Alto (2013)

- California Supreme Court held that Palo Alto's inclusionary housing requirements are covered by CA's Mitigation Fee Act to determine applicable statute of limitations
- But, in *CBIA v. San Jose*, the court said *Sterling Park* is limited to the procedural question of statute of limitations, not the substantive question here (are inclusionary requirements exactions)

Finally, *Koontz v. St. Johns River Water Management District*

- U.S. Supreme Court (2013)
- Florida fee to address wetlands impacts
- Are impact fees subject to “heightened scrutiny?”
- States were split on this question

Ehrlich on impact fees

- City imposed a “recreational mitigation fee” to offset lost tennis courts
- Subject to “heightened scrutiny?”
- *Ehrlich* said only if “ad hoc” (not “legislative”)
- *Koontz* fee was *ad hoc*
- U.S. Supreme Court said heightened scrutiny applies to impact fees, though didn’t make the *ad hoc*/legislative distinction

CA Supreme Court says

- San Jose inclusionary fee is legislative
- *Koontz* didn't purport to address legislative fees, only *ad hoc*
- So, CA Supreme Court seems to stand by its distinction in *Ehrlich*: *ad hoc* fees subject to heightened scrutiny and legislatively enacted fees something less demanding (though not an issue in this case because not an exaction at all)

But, ...

- Petition for review by U.S. Supreme Court filed by Pacific Legal Foundation, September 15, 2015

*California Building Industry
Association v. Bay Area Air Quality
Management District*

Does CEQA require an analysis of how existing environmental conditions will impact future residents or users of a proposed project?

That is ...

- Does CEQA apply only to the effects of the “project” on the environment (e.g., building a freeway)?
- Or does it also apply to the effects of the environment on the project (e.g., building housing near an existing freeway)?

- Oral argument before CA Supreme Court Oct. 7, 2015
- Ruling due any day

BAAQMD adopts “thresholds” for air contaminants

- Including effects of existing air pollution (e.g., freeways and rail lines) on a proposed project’s occupants

Same principle could apply to

- Sea level rise
- Seismic and geological issues
- Noise
- Etc.

BAAQMD argues

- Legislature intended CEQA to protect new users and residents of projects from existing and reasonably foreseeable adverse environmental impacts

Language of CEQA

- “A project will have a significant effect on the environment where it causes “substantial adverse effects on human beings, either directly or indirectly.” Public Resources Code section 21083(b)(3).

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CEQA Guidelines section 15126.2(a)

- “The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected. For example, an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision.”

CBIA argues

- “The purpose of CEQA is to protect the environment, not to protect projects from the environment”

Baird v. Contra Costa County (1994)

- Project: Proposed addiction treatment center near pre-existing sources of contamination
- Court says CEQA doesn't apply to impacts on the proposed facility and its residents

Ballona Wetlands Land Trust v. City of Los Angeles (2011)

- EIR for a mixed-use development
- Court says EIR need not address impacts of sea-level rise on the project.
- Rejects Guidelines section 15126.2(a) as beyond scope of CEQA

BAAQMD argues

- *Baird* and *Ballona* are wrong, and California Supreme Court should overturn

“The Social Determinants of Health for Planners”

- New paper from California Planning Roundtable
- www.cproundtable.org

The Social Determinants of Health for Planners: Live, Work, Play, Learn!

A paper by
California Planning Roundtable

*Healthy Communities Work Group
Social Determinants of Health Subcommittee*

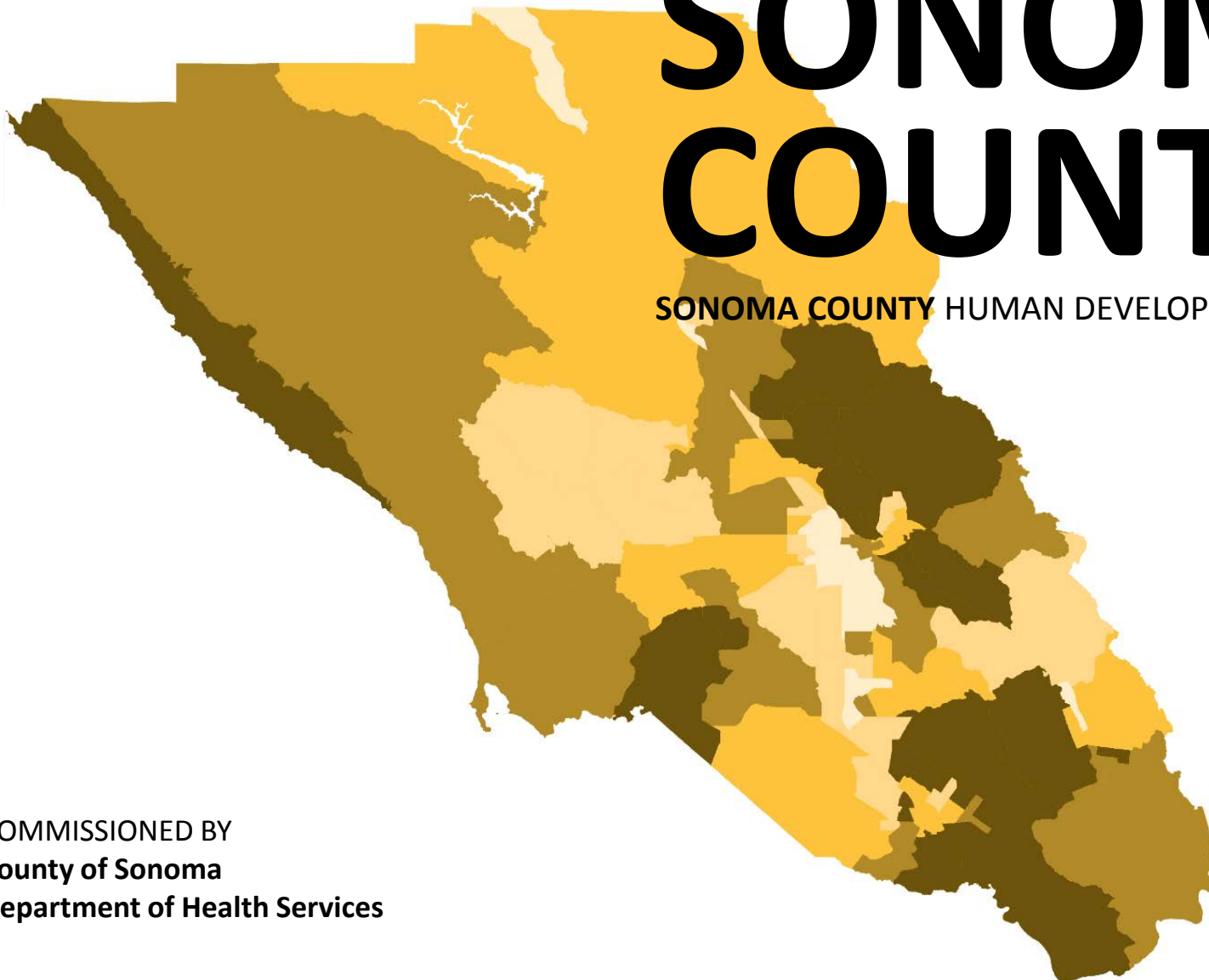


- Communities with access to healthy foods, quality affordable housing, good schools, and safe places to walk, bike, and play are healthier than those that don't
- The intersection of economic, social, and physical factors is known as the Social Determinants of Health

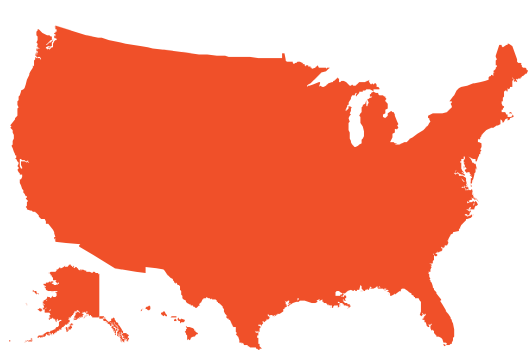
A PORTRAIT OF **SONOMA** **COUNTY**

SONOMA COUNTY HUMAN DEVELOPMENT REPORT 2014

COMMISSIONED BY
County of Sonoma
Department of Health Services



LIFE EXPECTANCY IN YEARS



U.S.

79.0

years



California

81.2

years

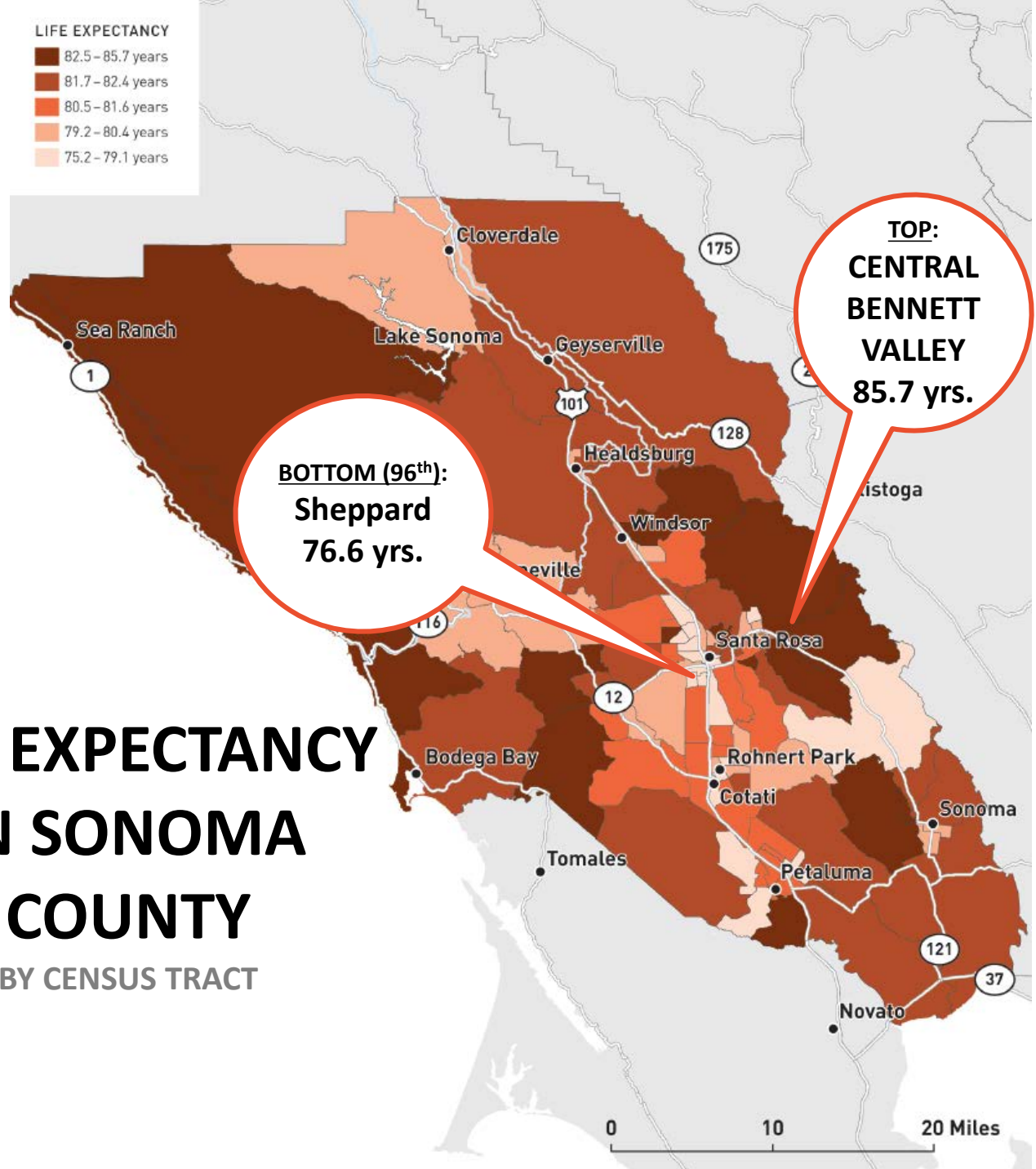


Sonoma

81.0

years

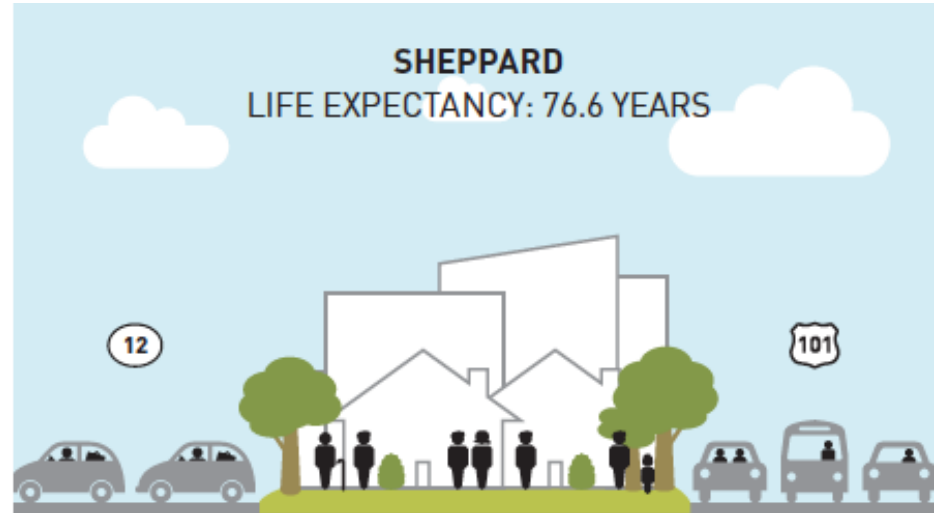
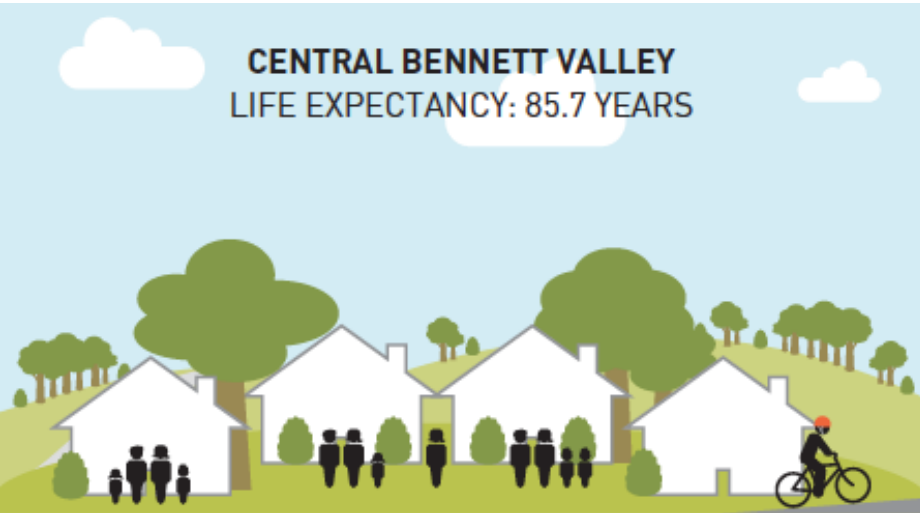
LIFE EXPECTANCY



**LIFE EXPECTANCY
IN SONOMA
COUNTY
BY CENSUS TRACT**

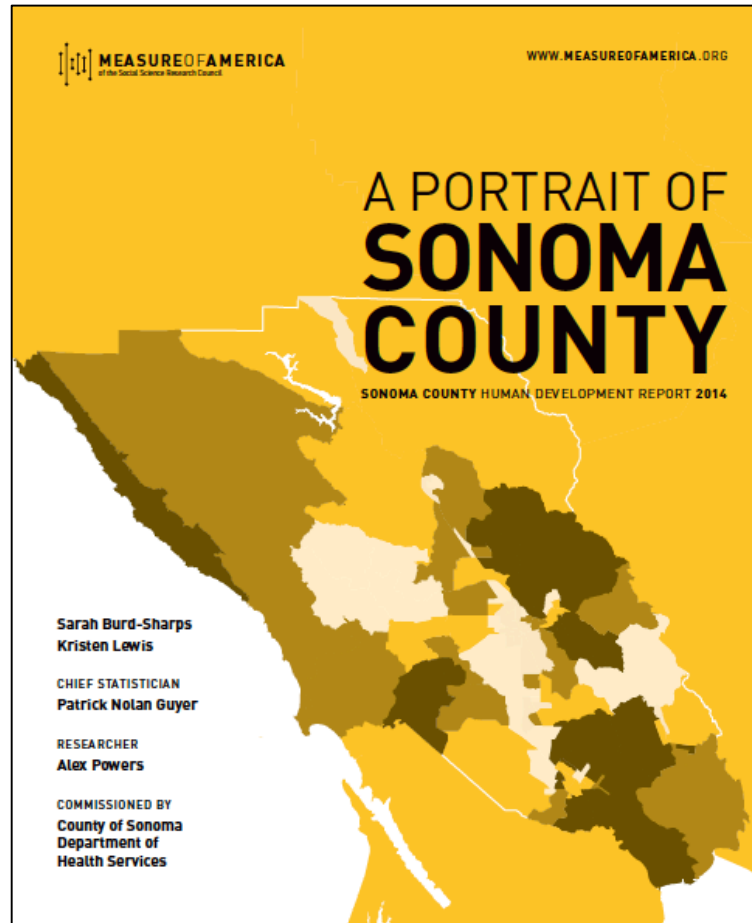


A TALE OF TWO NEIGHBORHOODS



- **6.6%** living in poverty
- **extensive** parks and green space
- **40.8%** at least bachelor's degree
- **\$44,564** median personal earnings

- **18.7%** living in poverty
- **limited** parks and green space
- **8.2%** at least bachelor's degree
- **\$22,068** median personal earnings



To map over 30 Sonoma County indicators by census tract, go to:
www.measureofamerica.org/SONOMA