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# SB 375: Promise, Compromise and the New Urban Landscape

*John Darakjian\**

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## I.

### INTRODUCTION

On September 27, 2006, California Governor Arnold Schwarzenegger signed into law AB 32,<sup>1</sup> the Global Warming Solutions Act, widely considered the most comprehensive and progressive piece of legislation ever drafted to address the causes of anthropogenic climate change. The statute gives the California Air Resources Board (CARB) broad authority to regulate any source of greenhouse gas emissions (GHGs), including those from the transportation and land use sectors.<sup>2</sup> The eleventh-hour enactment of SB 375 in September, 2008 represents the first legislative step towards aligning the state's future land development with AB 32's emissions reduction goals.<sup>3</sup> Vaunted as a "trifecta of the impossible" by one of the statute's contributory drafters,<sup>4</sup> SB 375 seeks to harmonize three distinct areas—regional housing need, transportation infrastructure development and statewide air quality goals—in one comprehensive program. The law builds upon existing regulatory structures and seeks to incentivise compact development through a mix of project funding and process streamlining all targeted toward one end: reducing vehicle miles traveled (VMT) among California's 23 million licensed drivers.<sup>5</sup> Whether SB 375 will herald a new era of smart growth

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1. See CAL. HEALTH & SAFETY CODE § 38500 *et seq.*

2. See CAL. HEALTH & SAFETY CODE § 38560; *see also* CAL. AIR RESOURCES BOARD, CLIMATE CHANGE DRAFT SCOPING PLAN 9 (June 2008 Discussion Draft) [hereinafter DRAFT SCOPING PLAN, June 2008] ("Improvements in land use and the way we grow and build our communities will further reduce emissions from the transportation sector.").

3. CAL. GOV'T CODE § 65080 *et seq.*; [http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_375&sess=CUR&house=B&author=steinberg](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_375&sess=CUR&house=B&author=steinberg).

4. Tom Adams, Chairman, CLCV Board, Comments at SB 375 Press Conference (Aug. 8, 2008), available at <http://www.ecovote.org/podcast/sb375-press-conf.m4v>.

5. See California DMV Vehicle Registration Data, [http://www.dmv.ca.gov/about/profile/what\\_dmv\\_does.html](http://www.dmv.ca.gov/about/profile/what_dmv_does.html).

or simply add additional strata to an already complex planning process remains to be seen.

This Comment will look to past failures and present successes to determine what potential obstacles may arise in implementing the nascent law. Additionally, the Comment provides recommendations, both legislative and administrative, intended to bridge the gap between the untested language of the statute and practical achievement of its goals.

Understanding both the promise and potential pitfalls of SB 375 requires analyzing the law's overall structure to find the balance between what its language mandates and what the statute hopes to achieve through incentive—determining what must be done and what is still left to the caprice of local and regional governments. Beginning with Part II, this Comment will explore the environmental crisis and regulatory context under which the statute was conceived and ultimately enacted. The global and regional effects of climate change will also briefly be discussed. Part III will look to California's historical attempts to legislate smart growth, evaluating both the efficacy and structure of previous programs. These early state efforts to constrain suburban sprawl are presented as the evolutionary predecessors to SB 375, informing our understanding of this newest legislative species and providing an historical base from which to evaluate its potential for success or failure.

Part IV provides an overview of the statute's basic functional structure. The bill is not a stand-alone law but instead amends current regional transportation and environmental statutes. SB 375 inserts additional documentation into the regional transportation plan (RTP) already required under state and federal law<sup>6</sup> and adopts new regulatory procedures under the California Environmental Quality Act<sup>7</sup> (CEQA) for those projects meeting specified criteria. The section will also discuss how and by what time frame emissions-reduction targets will be assigned by CARB to each of the state's seventeen metropolitan planning organizations (MPOs) as well as the relative authority and obligations assigned to each of these various agencies. Additionally,

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6. See CAL. GOV'T CODE § 65080(a) ("Each transportation planning agency designated under Section 29532 or 29532.1 shall prepare and adopt a regional transportation plan."); see also 49 U.S.C. § 5303(i)(1) ("Each metropolitan planning organization shall prepare a transportation plan for its metropolitan planning area.").

7. CAL. PUB. RES. CODE § 21000 *et seq.*

the means by which the statute seeks to align the previously discrete housing-need allocation and transportation planning processes will be explored. Consideration of the workings of SB 375 illustrates the extent to which the new statute transforms the landscape of land use regulation in California and the degree to which previous structuring remains unchanged. The consequences of these issues will be discussed in detail in the subsequent sections.

Viewed from any perspective, SB 375 is legislation born of compromise. The statute endured fourteen amendments between its introduction and eventual adoption as its author attempted to appease the many stakeholders—builders, environmentalists, local and regional governments—whose concerns and concessions are now embodied in the law's text. As a result, the law is far less robust than it might otherwise have been, sacrificing strict mandate for incentive and suggestion in a bid for adoption. Part V will explore the effects of this compromise on regulatory consistency under SB 375 and the end run around compliance provided via the statute's alternative measures. This section also explores issues of funding, administrative complexity and litigative challenge likely to affect implementation.

Finally, Part VI presents recommendations and possible solutions to those issues considered in the previous sections. Suggestions range from the provision of guidelines for agency and judicial administration to the establishment of clearer, less equivocal policy under both SB 375 and AB 32. Each is directed at preserving the unlikely coalition of policy makers and stakeholders who made the law possible and ensuring the statute's goals are not swallowed by exceptions.

## II.

### TRANSPORTATION, LAND USE AND GLOBAL WARMING

The issue of worldwide climate change is somewhat unique as it involves localized actions with global repercussions. While theories describing the basic potential for human activity to affect the atmosphere date back to the latter half of the nineteenth century, the bulk of scientific research in this area did not begin to

amass until the late 1970s.<sup>8</sup> Over the following twenty years, a growing consensus developed among climate scientists as to the “greenhouse effect” created by fossil fuel consumption and the resulting emission of carbon dioxide into the atmosphere.<sup>9</sup> As the research progressed, it became clear that CO<sub>2</sub> was only the most abundant among a list of GHGs, each the product of human activity and each capable of trapping heat and increasing ambient temperature.<sup>10</sup> As a result, scientists began to predict the earth’s climate would steadily warm in concert with the planet’s growing population.

Whatever uncertainty may have persisted as to the reality of anthropogenic global warming or its effects on the planet was laid to rest with the 2007 Intergovernmental Panel on Climate Change report. The Panel, established by the United Nations and consisting of over 2500 expert scientific reviewers,<sup>11</sup> stated in unequivocal language their “very high confidence that the global average net effect of human activities since 1750 has been one of warming.”<sup>12</sup> As climate change transitioned from debatable theory to verifiable fact, the world was left to contemplate the results of unabated GHG emissions and the consequences of an economy addicted to fossil fuels. The basic facts are clear: the effects of persistent or increasing GHG levels on the global environment may vary from region to region, but, in the aggregate,

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8. See Spencer Weart., *The Modern Temperature Trend, The Discovery of Global Warming* (2007), available at <http://www.aip.org/history/climate/summary.htm>.

9. See James E. Hansen et al., *Climate Impact of Increasing Atmospheric Carbon Dioxide*, 213 *SCIENCE* 957, 964 (1981); see generally Stephen H. Schneider, *The Greenhouse Effect: Science and Policy*, 243 *SCIENCE* 771 (1989); Russell D. Thompson, *The Impact of Atmospheric Aerosols on Global Climate Change: A Review*, 19 *PROGRESS IN PHYSICAL GEOGRAPHY* 336-50 (1995).

10. See CAL. CLIMATE CHANGE CTR., *MANAGING GREENHOUSE GAS EMISSIONS IN CALIFORNIA I-6* (2006)

(Anthropogenic activities generating four different gases – carbon dioxide (CO<sub>2</sub>) from fossil fuel combustion, nitrous oxide (N<sub>2</sub>O) primarily from agriculture and transportation, methane (CH<sub>4</sub>) primarily from agriculture and landfills, and “high global warming potential” gases used in industry – account for almost all GHG emissions in the State. Of these, CO<sub>2</sub> is the most important. Emissions of CO<sub>2</sub> are mainly associated with carbon-bearing fossil fuel combustion, with a portion of these emissions attributed to out-of-state fossil fuel used to generate electricity for consumption within California. Excluding imported electricity, 83% of California’s GHG emissions are carbon dioxide (CO<sub>2</sub>) emissions from fossil fuel combustion, a percentage that has held quite steady between 1990 and 2002.).

11. Press Flyer, IPCC, *Announcing the 2007 4th Assessment Report*, available at <http://www.ipcc.ch/pdf/press-ar4/ipcc-flyer-low.pdf>.

12. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS SUMMARY FOR POLICYMAKERS 3* (2007).

these effects are overwhelmingly negative.<sup>13</sup> They include flooding and hurricanes of increasing frequency and severity, rising ocean levels, decreased availability of fresh water, reduced agricultural production and the increased incidence of malaria and diarrhoeal diseases.<sup>14</sup>

At the same time as the international scientific community established the present danger represented by climate change, the United States Supreme Court weighed in with equal clarity on the matter. In March of 2007, the Supreme Court decided *Massachusetts v. EPA*.<sup>15</sup> In its majority opinion, the court declared that the "harms associated with climate change are serious and well-recognized."<sup>16</sup> In addition to establishing the general danger represented by climate change, the case is significant for two principal holdings: First, the court declared CO<sub>2</sub> a pollutant properly regulated by the Environmental Protection Agency under the Clean Air Act;<sup>17</sup> and second, the court recognized standing by an individual state premised on concrete harms resulting from climate change.<sup>18</sup> The *Massachusetts* ruling clearly established states as potential victims of climate change, giving their attempts to regulate against further harm new validity and urgency. But with carbon emissions in some states rivaling those of major industrialized countries, states could act as significant drivers of climate change as well.

As stated above, because GHGs are long-lived and readily capable of dispersing throughout the earth's atmosphere, climate change is a problem of local actions and global consequences.<sup>19</sup> With a population of 35 million residents (expected to grow to 55 million by 2050), California is one of the world's most prolific emitters of CO<sub>2</sub>.<sup>20</sup> If the state were a nation, its yearly GHG

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13. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 11-12 (2007).

14. *Id.*

15. *Massachusetts v. EPA*, 127 U.S. 1438, 1455 (2007).

16. *Id.*

17. *Id.* at 1462.

18. *Id.* at 1455.

19. See NAT'L ACAD. OF SCI., CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS (2001), available at <http://books.nap.edu/html/climatechange/3.html> ("If the average survival time for a gas in the atmosphere is a year or longer, then the winds have time to spread it throughout the lower atmosphere, and its absorption of terrestrial infrared radiation occurs at all latitudes and longitudes.").

20. CAL. CLIMATE CHANGE CTR., OUR CHANGING CLIMATE: ASSESSING THE RISKS TO CALIFORNIA 1 (2006), available at [http://meteora.ucsd.edu/cap/pdffiles/CA\\_climate\\_Scenarios.pdf](http://meteora.ucsd.edu/cap/pdffiles/CA_climate_Scenarios.pdf).

emissions would place it somewhere between the tenth- and sixteenth-highest contributors globally.<sup>21</sup> California will likely face significant harms from climate change in the coming years. Although the potential to be injured by climate change is in no way unique to California—it was one of 12 state petitioners in *Massachusetts*—several factors make the region particularly vulnerable. In a 2006 report, the California Climate Change Center found “the state’s vital resources and natural landscapes are already under stress due to California’s rapidly growing population.”<sup>22</sup> The vast majority of residents currently live in regions that fall significantly short of federal and state air quality standards. And the state as a whole suffers from some of the nation’s worst air quality.<sup>23</sup> Rising temperatures will place pressure on California’s already strained water supply, particularly in the hotter, drier southern regions of the state, reducing snowpack in the Sierras and increasing flooding in the plains.<sup>24</sup> In addition to threatening the potable water supply, a projected decrease of 30 percent in spring stream flow could wreak havoc with the state’s agriculture economy.<sup>25</sup> Current estimates predict California farmers could lose as much as 25 percent of their needed water supply.<sup>26</sup>

It was under the threat of such dire consequences that the state enacted AB 32. The law establishes a 1990 baseline emissions inventory defining the target greenhouse gas emissions level to be reached by 2020.<sup>27</sup> As activities within the state were evaluated for their contribution to emissions, the movement of goods and people throughout the state emerged as a significant culprit.

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21. See CAL. ENERGY COMM’N, INVENTORY OF CALIFORNIA GREENHOUSE GAS EMISSIONS AND SINKS I 20 (2006), available at <http://www.energy.ca.gov/2005publications/CEC-600-2005-025/index.html> (placing California as sixteenth if compared among world nations), but see *supra* note 10 at I-6 (stating that only nine of the world’s nations have greater emissions than California).

22. NAT’L ACAD. OF SCI., *supra* note 19, at 2.

23. See *id.* at 5 (“Californians currently experience the worst air quality in the nation, with more than 90 percent of the population living in areas that violate the state’s air quality standard for either ground-level ozone or airborne particulate matter.”).

24. See *id.* at 6-7 (“Continued global warming will increase pressure on California’s water resources, which are already over-stretched by the demands of a growing economy and population. Decreasing snow-melt and spring stream flows coupled with increasing demand for water resulting from both a growing population and hotter climate could lead to increased water shortages.”).

25. See *id.* at 7.

26. *Id.*

27. CAL. AIR RESOURCES BOARD, SUMMARY OF BOARD MEETING DEC. 6 & 7, 2007, at 5-7 (2007) [hereinafter ARB DEC. 6 & 7], available at <http://www.arb.ca.gov/board/ms/2007/ms120607.pdf>.



California's transportation sector, currently responsible for 38 percent of overall emissions, represents the state's single largest producer of GHGs.<sup>28</sup> If no action is taken, emissions from the sector are projected to increase by approximately 25 percent by 2020, an increase of 46 million metric tons of CO<sub>2</sub> per year.<sup>29</sup> Among the transportation sector, passenger vehicles are responsible for close to 30 percent of California's GHG emissions.<sup>30</sup> Considering the numbers, it is not surprising that the state would seek all possible means to reduce emissions from this sector.

In its June 2008 scoping plan, CARB addressed the nexus between VMT emissions and the state's land use policies. CARB suggested several means by which carbon emissions from cars and light trucks might be reduced, but ultimately determined that these measures alone might not be enough:

While improved vehicle technology and lower carbon fuels provide most of the transportation reductions in 2020, additional reductions can be achieved by making the connection between transportation and land use. This scenario reflects an increased emphasis on urban infill development: more mixed use communities, improved mobility options, and better designed suburban environments.<sup>31</sup>

The legislative findings section of SB 375 even more aggressively states the necessity for reduced VMT, claiming "[w]ithout improved land use and transportation policy, California will not be able to achieve the goals of AB 32."<sup>32</sup> While this assertion is debatable, the potential benefits from compact, less sprawling development are becoming increasingly well established.<sup>33</sup> A recent U.C. Berkeley study evaluating regional California blueprint models combining land use and enhanced transit poli-

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28. See DRAFT SCOPING PLAN, June 2008, *supra* note 2, at 7 (The transportation sector easily outpaces the second ranked sector, electricity production, by a 15 percent lead in GHG emissions.).

29. *Id.*

30. See CAL. AIR RESOURCES BOARD, CLIMATE CHANGE DRAFT SCOPING PLAN 38 (October 2008 Discussion Draft) [hereinafter DRAFT SCOPING PLAN, October 2008], available at <http://www.arb.ca.gov/cc/scopingplan/document/draftscopingplan.htm>.

31. ARB DEC. 6 & 7, *supra* note 27, at 33.

32. See SB 375 § 1(c).

33. It is not entirely clear that future advances in clean passenger vehicle propulsion technology would not minimize – or even remove entirely – VMT from any state-wide, transportation-induced emissions consideration. However, under currently available technology or even the fuel-efficiency improvements we are likely to see in the near future, statements asserting the necessity of VMT reductions are more supportable.

cies determined an average value of four percent per capita VMT reduction as compared to business-as-usual planning.<sup>34</sup> In any event, California's regional and local governments, the traditional holders of land use authority, have now been conscripted into the fight against GHG reduction.<sup>35</sup>

The push to increasingly wield land use as a weapon against growing carbon emissions has been felt beyond the state's legislative and policy arenas. Beginning in 2006, the California attorney general commenced aggressively litigating against counties failing to account for GHG emissions in their general plans and various approved projects.<sup>36</sup> This was a provocative move considering local governments have been fiercely protective of the exclusive land use authority traditionally granted them by the state.<sup>37</sup> Negotiations resulted in settlement in most of the suits, but the state had conveyed a clear message: the once unassailable realm of local planning would now be shaped and limited by the statewide goals of AB 32. SB 375 is a direct result of this new policy but it remains to be seen whether the statute's flexible, incentive-based approach will be sufficient to alter the land-use status quo. SB 375 is certainly the most substantial and sweeping

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34. CAROLINE RODIER, A REVIEW OF THE INTERNATIONAL MODELING LITERATURE: TRANSIT, LAND USE AND AUTO PRICING STRATEGIES TO REDUCE VEHICLE MILES TRAVELED AND GREENHOUSE GAS EMISSIONS (2008), available at [http://www.arb.ca.gov/planning/tsaq/docs/rodier\\_8-1-08\\_trb\\_paper.pdf](http://www.arb.ca.gov/planning/tsaq/docs/rodier_8-1-08_trb_paper.pdf).

35. ARB DEC. 6 & 7, *supra* note 27, at 31. The Board describes regional and local governments as "essential partners" in achieving GHG reduction goals under AB 32. Anticipating the incentive-based structure of SB 375, the Board "encourages local governments to incorporate greenhouse gas reduction measures and regional blueprint plans into their general plans." *Id.*

36. Attorney General Jerry Brown relied primarily on CEQA provisions in bringing suit against Contra Costa County's Conoco-Phillips Rodeo Refinery Expansion Project (2006), San Jose's Coyote Valley Specific Plan (2007) and, perhaps most notably, San Bernardino County's update to its General Plan (2007). Each of the comments or complaints alleges the various Planning Committees' failure to "properly evaluate and mitigate global warming impacts" and claims, because the projects would produce a "large, quantifiable increase in greenhouse gas", each would "make it more difficult for the state to achieve the GHG reductions required by Assembly Bill 32." See *State v. County of San Bernardino*, No. CIVSS-0700329, at 2-3 (Cal. Super. Ct. Aug. 28, 2007) (order regarding settlement), available at [http://ag.ca.gov/cms\\_pdfs/press/2007-08-21\\_San\\_Bernardino\\_settlement\\_agreement.pdf](http://ag.ca.gov/cms_pdfs/press/2007-08-21_San_Bernardino_settlement_agreement.pdf); see also Letter from Edmund G. Brown, Jr., Cal. Att'y Gen., to Maureen Parkes, Contra Costa County Board of Supervisors, (May 18, 2007), available at <http://www.pcl.org/projects/2008symposium/proceedings/Coatsworth4.pdf>.

37. See William C. Baer, *California's Fair-Share Housing*, 7 J. PLANNING HISTORY 48, 52 (2008) [hereinafter *Fair-Share*] ("First, local governments are the last in line in being granted political power. The federal and state governments, being prior and superior in power, limit local government power in many ways. Land use is the major exception.").

law of its kind, but it is not the first attempt within the state to curb sprawl and encourage compact development.

### III.

#### THE SMART GROWTH PEDIGREE: THE SLOW GROWTH MOVEMENT, AB 857 AND THE SACOG BLUEPRINT

##### A. *The Slow Growth Movement*

Twenty years ago, Los Angeles took the first tentative steps toward structured development land use reform with the passage of Proposition U. Motivated by growing sentiment among county homeowners that unchecked real estate development was at odds with their desired quality of life, proponents of the proposition presented the law as a remedy for the congestion plaguing the city's notoriously gridlocked byways.<sup>38</sup> The proposition sought primarily to limit further high-rise construction throughout Los Angeles, only allowing continued development in specified urban areas like downtown and Century City and reducing by half the height of new buildings on the majority of the city's commercially zoned property.<sup>39</sup> But the movement towards slow growth was not limited to Los Angeles, nor was it limited to commercial or urban projects; during the same election year a spate of slow-growth propositions appeared on ballots throughout the state. San Francisco residents placed an initiative on the ballot to limit downtown office development. Simi Valley and Moorpark voters came out to restrict residential growth. And in San Diego housing development was limited to 8,000 new units per year.<sup>40</sup> All told, the 1986 California ballots contained forty-five slow-growth initiatives, compared to just ten statewide in the previous year.<sup>41</sup> In each case, voters welcomed the grassroots initiatives, passing them by large margins.<sup>42</sup> Additionally, the slow-growth movement seemed to find support not just among wealthy suburbanites but, perhaps somewhat unexpectedly, among inner-city communities as well.<sup>43</sup> It appeared concern over the effects of

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38. See ROBERT GOTTLIEB ET AL., *THE NEXT LOS ANGELES* 152 (2006).

39. *Id.*

40. See WILLIAM B. FULTON, *THE RELUCTANT METROPOLIS* 54 (2001); see also Jon D. Hull, *Not in My Neighborhood*, *TIME*, Jan. 25, 1988, at 27.

41. *Id.*

42. *Id.*

43. Hull, *supra* note 40, at 28 (writing on the topic of wide support for the late-1980s slow growth movement, the author discusses the reasons for inner-city endorsement: "Developers have never been eager to build in poorer areas, and many

unchecked development crossed both economic and geographic lines.

But slow growth provided an incomplete solution for the state's ever-expanding population. The movement's land-use policy seemed to be one in which development—particularly sprawl—was accepted as inevitable, but where voters hoped to defer it for as long as possible. Limits on commercial building height or number of housing units per year suggest what voters don't want in the short term but fail to offer a viable alternative for future growth.<sup>44</sup> It is this aspect that most distinguishes the "slow growth" of Proposition U and its ilk from the "smart growth" represented by SB 375. If properly implemented, the Sustainable Communities Strategies (SCS, discussed in detail below) provide a growth blueprint, not simply to restrict development but also to redirect it. Where slow growth only tied the hands of developers and local governments, smart growth promises to give them new tools.

#### B. AB 857

As it became clear that slow growth would not provide the needed panacea for California's housing ills, a more comprehensive, top-down solution was sought with the passage of new legislation. In 2002, the state enacted AB 857 in an attempt to encourage greater consistency between capital spending and infrastructure planning. A list of the bill's intended goals read as virtually identical to those of SB 375: focus development in existing communities and encourage efficient growth on the edges; provide greater clarity for developers and local government throughout the planning process; address concerns of air pollution, water pollution, sprawl, and traffic congestion; and address

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of those neighborhoods are equally concerned about congestion. In Los Angeles, Proposition U passed by large margins in all 15 council districts, including Watts and other low-income communities.”).

44. The vast majority of slow growth laws remain in place and active, but some cities have responded to their rigidity by altering them or significantly limiting their scope. In 2002, in a move both emblematic of slow-growth's failure to provide alternatives and anticipatory of SB 375 and smart growth, then-mayor James Hahn and the Los Angeles City council “watered down” Prop. U, creating land zones where projects could be doubled in size where the development mixed business with residential use and where developments implementing affordable housing could be one-third larger than permitted when located within 1,500 feet of a bus stop. Steven Leigh Morris, *City Hall's "Density Hawks" are Changing L.A.'s DNA; Bitter Homes & Gardens?*, L.A. WEEKLY, Feb. 28, 2008, at 36.

inequities among communities.<sup>45</sup> AB 857 sought to inform local and regional smart growth by requiring a new inclusion to an already required state-level document. Current law mandated that the governor prepare a “comprehensive State Environmental Goals and Policy Report” every five years, now AB 857 required any subsequent revision of the report be “consistent with state planning priorities” and further defined such priorities as those which “relate to infrastructure that supports infill development and redevelopment, cultural and historic resources, environmental and agricultural resources, and efficient development patterns.”<sup>46</sup> With the bill, the state made clear its intentions for future development but left wholly unaddressed the local and regional governments in whose hands ultimate land use authority lay. Unlike SB 375, AB 857 offered no incentives to builders, nor did it attempt to mandate change in the housing or transportation arenas. In the carrot-and-stick world of land use regulation, the new law appeared to offer neither, and for six years the statute remained in place but was generally ignored.<sup>47</sup>

The six years of inactivity following AB 857’s enactment created a regulatory vacuum for SB 375 to fill. In June 2008, CARB held a symposium featuring recommendations for smart-growth-based land use legislation.<sup>48</sup> The reports were intended to inform the board’s forthcoming AB 32 scoping plan. Both recommendations anticipated legislation with the same regulatory goals as AB 857 but hoped for something with more teeth, calling for regional and local governments to work together in the reduction of greenhouse gas emissions through coordinated transportation

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45. CALIFORNIA FUTURES NETWORK, BILL TO “GET STATE’S PLANNING ACT TOGETHER” SENT TO GOVERNOR (Draft Press Release, Aug. 2002).

46. SB 375, Legislative Counsel’s Digest 2; *see also* CAL. GOV’T CODE §§ 65041.1(a), 65041.1(b) and 65041.1(c).

47. An April 2004 editorial in the Los Angeles Times echoes the sentiments of so many of AB 857’s critics, describing the “once ambitious” bill as adding “some shape and guidance” to the present – and, according to the article, “ignored” – state planning law passed under former Governor Reagan in 1978 (which previously had no coherent investment priorities), lauding the new law for establishing priorities that support infill development but lamenting that the law “has not been fully implemented.” *A Balm for Growing Pains*, L.A. TIMES, Apr. 10, 2004, at B22. The editorial goes on to warn continued lack of support for the bill by current Governor Schwarzenegger could lead the bill to the same impotent fate as the law it sought to bolster. Considering the law attempted to supply additional direction to a document “ignored” for the previous twenty-four years, perhaps it is not surprising that AB 857 failed to alter California’s planning landscape. *Id.*

48. CAL. PLANNING AND DEV. REP., Vol. 23, Issue 6 (2008).

and land use planning.<sup>49</sup> With SB 375 still winding its way through the state assembly and its fate uncertain, the board recommended resuscitating the “long-ignored” AB 857 as a first step towards state-directed smart growth reform.<sup>50</sup> The board’s Seascape Action Plan went even further, calling for legislation mandating local general plan compliance with regional emissions reduction scenarios.<sup>51</sup> This level of compliance was far beyond that required by the unused and relatively anemic AB 857, but echoed language marking the first draft of SB 375.<sup>52</sup> Although the “will adopt” mandate of the action plan would eventually evolve under county-driven political pressure to the current “may adopt” language of SB 375, the new law still manages to demand more from the land use process than AB 857 while at the same time remaining true to its predecessor’s vision of compact development for the state. AB 857 has arguably been replaced by the more comprehensive, more robust SB 375, but the latter law might not exist if not for the former.

### C. *The SACOG Blueprint*

Perhaps no single element has been more influential in the drafting of SB 375 than the Sacramento Area Council of Governments (SACOG) Blueprint project. Introduced in 2004 and conceived by resident activists and community leaders, the Blueprint provided a compact, transit-oriented model as an alternative to sprawl in California’s capital.<sup>53</sup> Based on successful smart-growth programs in cities like Portland, Salt Lake and Denver, the SACOG Blueprint offered county residents the opportunity to vote on one of many “preferred growth alternatives.”<sup>54</sup> This transparency and public involvement allowed citizens to understand the process and its goals and subsequently boosted the

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49. *Id.*

50. *Id.*

51. See RECOMMENDATIONS FOR THE 2008 HAAGEN SMITT CONFERENCE FOR CONSIDERATION BY THE AIR RESOURCES BOARD AS THEY DEVELOP THE STATE SCOPING PLAN, SEASCAPE ACTION PLAN (2008) (“Local governments *will* adopt either a climate action plan or similar policies in their general plans that are consistent with the regional blueprint.”) (emphasis added).

52. The original draft of SB 375 stated, “The bill would impose a state-mandated local program.” (Feb. 21, 2007).

53. Rick Cole, *Restoring Luster to the Golden State*, SAN GABRIEL VALLEY TRIBUNE, Oct. 13, 2008, at B2.

54. See SACRAMENTO REGION BLUEPRINT TRANSPORTATION/LAND USE STUDY, SPECIAL REPORT 12 (2007).

plan's popularity among regional and local leaders.<sup>55</sup> While Sacramento won't see ground broken on the first Blueprint-directed projects until early 2009, a shift in the region's land use and transportation policies is already evident on the ground.<sup>56</sup> SB 375's author, Senator Darrell Steinberg, cites the SACOG blueprint as the inspiration for the new law and its state/regional/local cooperative structure.<sup>57</sup>

Taking its cue from the SACOG Blueprint, SB 375 gets right what so many previous anti-sprawl approaches got wrong. The bill's smart-growth backbone offers alternatives to business-as-usual development where slow growth offered only limitations, and it effectively engages local governments and citizens in the process, something AB 857 failed to do. Even so, questions remain as to whether the rest of the state is ready for this region-centric approach. Rick Cole, city manager for Ventura County and frequent commentator on local government land use issues, claims that—outside of Sacramento—California may simply be “not yet up to the task” of directing smart growth. Cole describes the majority of the state's regional bodies as “faceless bureaucracies that lack the leadership to engage the public and implement SB 375's ambitious new mandates.”<sup>58</sup> The nascent law, “heavy on incentives and light on penalties,” does very little to break the close ties, both political and economic, that bind the “faceless” regional agencies and local governments.<sup>59</sup> This alone may pose the greatest threat to effective implementation. Part IV will consider the structure of the new law, assessing what SB 375 requires from each level of government, and how it attempts to achieve its goals.

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55. *Id.*

56. SACOG's October/November 2008 Regional Report discusses the compact nature of projected development in the area's primarily agricultural Yolo County. Under the Blueprint plan, the county will achieve the diversified economic development needed in the area converting only 1/2 of one percent of rural land, providing “grocery stores, doctor's offices, schools and parks” but leaving 97% of the unincorporated area in farming and open space. Additionally, based on SACOG's Blueprint Preferred Growth Scenario, the Sacramento Regional Transit District will for the first time develop its Transit Master Plan to incorporate growth projections and land use models. See SACRAMENTO AREA COUNCIL OF GOVERNMENTS, REGIONAL REPORT: REGIONAL TRANSIT UPDATES TRANSIT MASTER PLAN 1 (Aug./Sept. 2008).

57. Darrell Steinberg, Cal. State Sen., Comments at SB 375 Press Conference (Aug. 8, 2008), available at <http://www.ecovote.org/podcast/sb375-press-conf.m4v>.

58. CAL. PLANNING AND DEV. REP., *supra* note 48.

59. *Id.*

## IV.

SB 375: STRUCTURE, IMPLEMENTATION  
AND THE ROLE OF CARB

Before I describe the ways in which SB 375 seeks to alter the existing structure of land use and urban planning in California, a brief description of the regulatory hierarchy as it existed prior to the law is in order. Simply put, major infrastructure investment and environmental regulation has been the traditional purview of the state with local governments controlling land use. In between these two extremes exist the multicity and regional agencies. Regional planning organizations were developed in response to federal mandates in the 1960s and 1970s for urban areas with populations exceeding 50,000 residents. The agencies were needed to provide input on regional transportation investment plans. Over the same period, councils of government sprang into being under the same mandates to offer input for various urban renewal and investment programs. As a result of their similar functions and common heritage, councils and planning organizations often coincide functionally and, together, represent the middle strata between state and local government. Two roles have come to dominate their work: first, the creation and regular updating of long-term transportation plans; and, second, assisting the state in implementing housing need allocation at the local level. As such, councils and planning organizations have acted as an interface between state and local governments and it is toward this middle stratum that SB 375 directs the majority of its mandates. With boards usually populated by locally elected officials, these intermediary agencies have often produced plans "more likely to resemble an aggregation of desired projects of local governments."<sup>60</sup> SB 375 looks to change this, not by shifting authority within the existing structure nor changing established roles, but by providing comprehensive and consistent statewide priorities toward compact development, all while retaining some flexibility of application for the state's diverse regions.

Broadly, SB 375's incentive-based structure seeks to accomplish three related ends: utilizing the regional transportation planning process to help California meet its GHG emission reduction targets under AB 32, reforming CEQA to encourage

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60. ELISA BARBOUR & MICHAEL TEITZ, *BLUEPRINT PLANNING IN CALIFORNIA: FORGING CONSENSUS ON METROPOLITAN GROWTH AND DEVELOPMENT* 8 (2006).



mixed use and mass-transit adjacent development, and coordinating the regional housing needs allocation process with the regional transportation planning process. It is worth reiterating that for all SB 375's ambition, two significant features of the state's regulatory landscape are left untouched. First, the bill unequivocally provides that "the adopted strategies do not regulate the use of land" and that cities retain all their exclusive land use authority (a surprising caveat from the law widely touted as one of the most significant land use statutes in decades). Second, state and federal funding are never made expressly contingent upon compliance.<sup>61</sup> Instead, the Bill assembles a regulatory patchwork of incentives and administrative coordination capable of covering the state when whole, but subject to unraveling with any missing piece. As a result, this first-in-the-nation attempt to link land use and GHG comes at the price of significant statutory complexity. The basic process is described below.

#### A. *The Role of CARB*

Two primary responsibilities are given to the state Air Resources Board under SB 375: the establishment of emissions targets and approval of regional SCSs. In achieving the first, CARB is required by the statute to assemble a regional targets advisory committee that attempts to involve all stakeholders and government officials in the target-setting process.<sup>62</sup> The targets

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61. SB 375, LEGISLATIVE COUNSEL'S DIGEST (1); *see also* CAL. GOV'T CODE § 65080(b)(2)(J)

(Neither a sustainable communities strategy nor an alternative planning strategy regulates the use of land, nor, except as provided by subparagraph (I), shall either one be subject to any state approval. Nothing in a sustainable communities strategy shall be interpreted as superseding the exercise of the land use authority of cities and counties within the region. Nothing in this section shall be interpreted to limit the state board's authority under any other provision of law. Nothing in this section shall be interpreted to authorize the abrogation of any vested right whether created by statute or by common law. Nothing in this section shall require a city's or county's land use policies and regulations, including its general plan, to be consistent with the regional transportation plan or an alternative planning strategy.)

62. *See* CAL. GOV'T CODE § 65080(b)(2)(A)(i)

(No later than January 31, 2009, the state board shall appoint a Regional Targets Advisory Committee to recommend factors to be considered and methodologies to be used for setting greenhouse gas emission reduction targets for the affected regions. The committee shall be composed of representatives of the metropolitan planning organizations, affected air districts, the League of California Cities, the California State Association of Counties, local transportation agencies, and members of the public, including homebuilders, environmental organizations, planning organizations, environmental justice organizations, affordable housing organizations, and others.)

will be set regionally and not locally, a possible result of multiple suggestions favoring agency-by-agency regulation and target adoption received by CARB during the comment portion of its scoping plan.<sup>63</sup> The agency will then be required to update these targets every eight years in conformity with the new planning schedule that seeks to unify housing and transportation needs.<sup>64</sup> In addition to allowing adjustment of regional targets with increases—or decreases, although current growth predictions make this option much less likely—in population, this element of flexibility will also allow for targets to reflect changes in fuel carbon reduction and fuel efficiency standards. If CARB feels such advances must be addressed sooner than the eight-year reevaluation period would allow, the statute provides for a four-year assessment to be made.<sup>65</sup>

The amount of reduction in emissions from cars and light trucks that will be required from transportation planning is still not set, but initial values suggest where the first statutory targets will likely fall. In its June 2008 scoping plan, CARB called for a 2-million-metric-ton reduction of GHG levels from this sector statewide, amounting to roughly 1.2 percent of total reductions.<sup>66</sup> This number jumped to 5 million metric tons in the most recent scoping plan released just five months later.<sup>67</sup> The potential exists for the number to rise again, as CARB has until January 1, 2009 to adopt a final plan. With ever more ambitious emissions reductions required from the personal transportation sector, unless the very near future brings significant reductions in the carbon content of automotive fuels or drastic improvements in efficiency standards, reducing VMT through infill and mixed-use development may be the most ready path to meeting the state's goals.

Beyond target setting, CARB is entrusted with final review of any SCS or APS adopted by a regional planning agency.<sup>68</sup> But this review is “limited to acceptance or rejection” of two basic aspects of the submitted plan: the quantification of GHG emissions reductions the strategy would achieve and the methodology

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63. See LEAGUE OF CALIFORNIA CITIES, TECHNICAL OVERVIEW OF SB 375 (v1.1), at 9 (Sept. 2008) [hereinafter LEAGUE].

64. See CAL. GOV'T CODE § 65080(b)(2)(A)(iv).

65. *Id.*

66. See DRAFT SCOPING PLAN, June 2008, *supra* note 2, at 11, 33.

67. See DRAFT SCOPING PLAN, October 2008, *supra* note 30, at 51.

68. See CAL. GOV'T CODE § 65080(b)(2)(J).

used to arrive at that determination.<sup>69</sup> If CARB were to find the plan deficient in some way, the MPO may revise or simply adopt an APS. The language of the statute is careful to note that, beyond this limited review, neither an SCS nor an APS is “subject to state approval.”<sup>70</sup>

The degree to which CARB could or should regulate land use decisions—traditionally the exclusive domain of city government—was left largely unresolved by AB 32.<sup>71</sup> SB 375 does little to provide any definitive answer to this question, but it does begin to carve out state-level land use direction, if not actual authority. Because the bill continues to place all the planning decisions in the laps of cities without mandating compliance, the incentive-based design of the program allows significant CARB input while still side-stepping the question of just how far CARB’s authority to dictate land use might extend. This suggest-but-don’t-tell approach probably represents CARB’s current practical limits. Any attempt to statutorily secure greater control for state or regional players might well be legally defensible, but it would likely prove politically and logistically unworkable. Local governments are fiercely protective of their exclusive control in this arena and arguments could be made that local decisions are still best left to local agencies.

### B. *The RTP and SCS*

At the heart of SB 375 is the Sustainable Communities Strategy. The SCS is essentially a “blueprint” for regional transportation infrastructure and development, intended to reduce VMT and, as a result, work to achieve emissions reductions under AB 32. Under the statute, each of the state’s seventeen metropolitan planning organizations (MPOs)—representing the regional strata of the SB 375 structure—is required to prepare a new version of the document every eight years.<sup>72</sup> As will be described in more detail below, the sustainable strategy is to be included in the state and federally mandated regional transportation plan (RTP).<sup>73</sup> As a planning organization drafts its SCS, it “shall”:

- (i) identify the general location of uses, residential densities, and building intensities within the region; (ii) identify areas within the

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69. *Id.*

70. CAL. GOV’T CODE § 65080(b)(2)(1)(ii).

71. Tom Adams, *supra* note 4.

72. See CAL. GOV’T CODE § 65080(b)(2)(B).

73. See CAL. GOV’T CODE § 65080(b)(2).

region sufficient to house all the population of the region, including all economic segments of the population, over the course of the planning period of the regional transportation plan taking into account net migration into the region, population growth, household formation and employment growth; (iii) identify areas within the region sufficient to house an eight-year projection of the regional housing need for the region pursuant to Section 65584; (iv) identify a transportation network to service the transportation needs of the region; (v) gather and consider the best practically available scientific information regarding resource areas and farmland in the region as defined in subdivisions (a) and (b) of Section 65080.01; (vi) consider the state housing goals specified in Sections 65580 and 65581; (vii) set forth a forecasted development pattern for the region, which, when integrated with the transportation network, and other transportation measures and policies, will reduce the greenhouse gas emissions from automobiles and light trucks to achieve, if there is a feasible way to do so, the greenhouse gas emission reduction targets approved by the state board.<sup>74</sup>

These elements require regional agencies, some for the first time, to integrate planning for both transportation and housing towards the goal of GHG emissions reduction. To further align what were previously disparate processes, the statute mandates a level of internal consistency among the various documents and the agencies that prepare them.

As required by both state and federal law, each planning organization has always included both a “policy element” and a “financial element” in their RTPs.<sup>75</sup> Current law further requires that the “objective[s] and policy statements” under each element be consistent with one another.<sup>76</sup> As the sustainability strategy is now a required addition to the region’s transportation plan, all future plans drafted under SB 375 must reflect funding choices consistent with the law’s GHG emissions reduction goals: less suburban development distant from retail and employment centers, increased use of urban infill, projects mixing residential and commercial development and the location of new residential development near public transportation. Federal law additionally

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74. CAL. GOV’T CODE §§ 65080(b)(2)(B)(i)-(vii).

75. See CAL. GOV’T CODE § 65080(b)(1) (“A policy element that describes the transportation issues in the region, identifies and quantifies regional needs, and describes the desired short-range and long-range transportation goals, and pragmatic objective and policy statements. The objective and policy statements shall be consistent with the funding estimates and financial element.”).

76. *Id.*

mandates that the assumptions underlying such choices be consistent with the intentions of local planning agencies.<sup>77</sup>

The combined effect of the above is to harmonize once-independent regulatory processes towards the common goal of compact development for the state. But the mandates of SB 375 are not rigid, and alternatives exist for those regions unable to achieve compliance via the SCS, as will be seen below.

### C. *The APS*

Planning organizations that cannot meet their regional emissions targets under an SCS through “feasible” means shall prepare an alternative document called, appropriately, the Alternative Planning Strategy (APS).<sup>78</sup> This alternative strategy must “identify the principal impediments”<sup>79</sup> to achieving regional targets and demonstrate how GHG emissions could be achieved through “alternative development patterns, infrastructure, or additional transportation measures or policies.”<sup>80</sup> The alternative strategy is similar to the sustainable strategy in that neither directly affects nor supersedes local land use decisions and in neither case must local general plans, local specific plans, or local zoning be consistent with the documents.<sup>81</sup> Unlike the SCS, this alternative strategy is not included in the transportation plan but is instead a separate document.<sup>82</sup> This differs markedly from early drafts of the statute. Originally, the bill offered regional agencies planning flexibility in the form of alternatives to the SCS but maintained the requirement that such documents be included in the transportation plan.<sup>83</sup> The ultimate exclusion of the alternative strategy from the transportation plan, the result of intense local government lobbying, allows for regional compliance under the law while leaving policy and funding choices unaffected.<sup>84</sup> This erodes the SCS/RTP association so central to VMT reduction under SB 375 and has repercussions—discussed

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77. 42 U.S.C. § 7506(c)(1).

78. See CAL. GOV'T CODE § 65080(b)(2)(B)(vii); see also § 65080(b)(2)(H).

79. CAL. GOV'T CODE § 65080(b)(2)(H)(i).

80. *Id.* at (b)(2)(H).

81. See CAL. GOV'T CODE § 65080(b)(2)(J).

82. CAL. GOV'T CODE § 65080(b)(2)(H).

83. SB 375, July 17 amendment, section intended to amend CAL. GOV'T CODE § 65080(b)(2)(D).

84. The “policy element” and “action element” of the RTP are only required to be internally consistent. With the APS a “separate” document, the RTP need no longer reflect its compact development goals.

in detail below—for virtually all levels of interadministrative harmonization required under the bill.

But the APS may nevertheless serve emissions reduction goals in some regions. Like the sustainable strategy, the alternative strategy must still receive CARB approval before adoption.<sup>85</sup> As consistency with a board-approved plan garners CEQA streamlining for qualified projects, local governments and builders may just as readily use an alternative planning strategy to access these benefits.<sup>86</sup>

#### D. *CEQA Exemptions and Streamlining*

The incentive “carrot” dangled by the new law before both private and public developers is lessened administrative burdens under the California Environmental Quality Act. CEQA potentially applies to any proposal for physical development in California, requiring state and local agencies to identify the significant environmental impacts of their actions and, where feasible, to mitigate those impacts. Any such project requiring approval from a government agency will be subject, at the very least, to some minimal review regarding the nature of the proposal and its potential effects on the environment. For many projects more extensive review may be required, necessitating drafting a full environmental impact report. As with any process that involves man hours, expert input and potential delay, compliance with CEQA can represent significant expense for developers. The new law offers potential relief from some of the Act’s associated costs through administrative streamlining for certain projects.

SB 375 offers developers CEQA streamlining for two basic forms of compact transit-based projects: residential and mixed-use residential projects consistent with a CARB-approved plan, and Transit Priority Projects (TPPs). Consistency with either development allows for various degrees of regulatory streamlining, ranging from less onerous administrative burdens under CEQA to full exemption.

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85. See CAL. GOV'T CODE § 65080(b)(2)(H)(ii).

86. See CAL. PUB. RES. CODE § 2155(a); see also CAL. PUB. RES. CODE § 21159.28(a).

i. Residential or Mixed-Use Projects Consistent With SCS/APS

SB 375 defines a residential or mixed-use residential<sup>87</sup> project as one where at least 75 percent of the total building footage of the project is designated for residential use.<sup>88</sup> The required minimum drops to 50 percent for infill development (those sites located in primarily urban-zoned areas).<sup>89</sup> Residential projects will receive a number of CEQA exemptions if the projects both incorporate feasible mitigation measures set forth in a prior applicable EIR and are consistent with the use designation, density, building intensity and applicable policies contained in either an SCS or APS.<sup>90</sup> Such projects shall not be required to “reference, describe or discuss” (1) growth-inducing impacts or (2) any project-specific or cumulative impacts from cars or light-duty truck trips generated by the project on global warming or the regional transportation network, nor are they required to consider residential density alternatives.<sup>91</sup>

ii. Transit Priority Projects

In addition to approved residential developments, SB 375 creates a new type of project in the TPP. A priority project is one that (1) contains at least 50 percent residential use, (2) has a minimum net density of twenty units per acre, (3) has a floor area ratio of not less than 0.75 for nonresidential use, and (3) is located within one half-mile of a “major transit stop” or “high-quality transit corridor”<sup>92</sup> included in an RTP.<sup>93</sup> Projects meeting the above criteria can qualify for two possible levels of

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87. In the interest of economy, “residential” and “mixed-use residential” projects will be referred to collectively as “residential” projects throughout the remainder of the paper as SB 375 applies identical treatment to both classes of project.

88. CAL. PUB. RES. CODE § 21159.28(d).

89. See CAL. PUB. RES. CODE § 21061.3 (defining “infill” for purposes of the statute); see also CAL. PUB. RES. CODE § 21155(b).

90. CAL. PUB. RES. CODE § 21159.28(a).

91. *Id.*

92. For the purposes of a TTP, a “major transit stop” is defined as “a site containing an existing rail transit station, a ferry terminal served by either a bus or rail transit service, or the intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods.” CAL. PUB. RES. CODE § 21064.3. A “high-quality transit corridor” is defined as “a corridor with fixed route bus service with service intervals no longer than 15 minutes during peak commute hours.” CAL. PUB. RES. CODE § 21155(b).

93. CAL. PUB. RES. CODE § 21155(a).

streamlining: full CEQA exemption or a Sustainable Communities Environmental Assessment (SCEA), a short-form EIR.

To receive complete exemption from CEQA, a TPP must meet a substantial list of requirements. Such projects, deemed Sustainable Communities Projects (SCPs), must be no bigger than eight acres or 200 units, be capable of service from existing utilities, have no significant effect on historic resources, have buildings 15 percent more energy efficient than required under current law with landscaping designed to achieve 25 percent less water usage than the average household in the region, and provide any of the following: five acres of open space, 20 percent moderate income housing, 10 percent low-income housing, or 5 percent very-low-income housing.<sup>94</sup> This extensive list of requirements has led some observers to deem this the “narrow exemption” and others have expressed doubt as to whether any builder will achieve the SCP.<sup>95</sup> Because qualifying for the full exemption is so difficult, the SCEA is likely to emerge as the Bill’s most-sought incentive.

For those TPPs that cannot meet the above requirements, a truncated EIR is still available in the form of a SCEA.<sup>96</sup> The streamlined review granted to such projects is virtually identical to the residential project review described above. Such non-exempt TPPs qualify for initial study project specific analysis, shorter comment period, and exemption from cumulative or growth-inducing analysis consistent with the SCS/APS. In an attempt to insulate this limited EIR from the legal challenges typical to partial CEQA exemptions of this type, the statute expressly states SCEAs shall be reviewed under the deferential “substantial evidence” standard.<sup>97</sup>

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94. CAL. PUB. RES. CODE §§ 21155.1(b), (c).

95. See DAVID A. GOLD, ET AL., SB 375 BECOMES LAW, PUSHING GREENHOUSE GAS REDUCTION TO THE FOREFRONT OF CALIFORNIA TRANSPORTATION, ECONOMIC AND LAND USE PLANNING, MORRISON & FOERSTER: LEGAL UPDATES AND NEWS (Oct. 2008); Telephone interview with Ethan Elkind, Environmental Law Fellow, UCLA School of Law, in Los Angeles, CA (Oct. 30, 2008). Due to the burdensome requirements of the SCP, builders may shy away from these mixed-housing developments despite the attraction offered by full environmental review exemption. Telephone interview with Ron Mazzioti, Ventura County Developer, in Ventura, CA (Oct. 1, 2008) [hereinafter Mazzioti] (“The low-income requirement is a real deterrent to builders, because you’re giving those units away . . . it’s a killer to all developers.”).

96. CAL. PUB. RES. CODE § 21155.2(b).

97. See CAL. PUB. RES. CODE § 21155.2(b)(7); see also LEAGUE, *supra* note 63, at 9 (“A SCEA is reviewed under the ‘substantial evidence’ standard. The intent of



As described above, even in those cases where infeasibility claims erode the administrative alignment aspects of SB 375, the incentives to develop compact projects consistent with the statute's goals remain. The California building industry has lobbied for environmental streamlining for years, and pushed hard for the inclusion of CEQA reforms into the bill.<sup>98</sup> Preserving the availability of these benefits, and the promise of reduced costs and greater regulatory certainty they provide, is vital to implementation. Parts V and VI will discuss potential threats to streamlining under the law and offer recommendations towards maintaining their viability and value.

### E. *Housing Element Reform*

Under SB 375, California's housing allocation process will be aligned with the regional transportation planning, creating a new joint structure unique to the state. Housing to meet the state's needs had previously been allocated by MPOs pursuant to the so-called "fair share" standard, a top-down process where federally generated population predictions are filtered through state, regional and local agencies.<sup>99</sup> Parcels of unused land are then rezoned—frequently agricultural acreage on the periphery of the grid, distant from urban city-centers—to accommodate the area's presumed housing needs (known as the Regional Housing Needs Allocation or RHNA). Guided by the somewhat amorphous "fair share" allocation standard, the process frequently results in undesirable consequences. Potentially lucrative single-family developments are regularly built just outside of existing bedroom communities, further exacerbating the growth of sprawl. Conversely, although codification of the standard was meant to direct

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the author was to eliminate the 'fair argument' test as the standard of review for a sustainable communities environmental assessment.").

98. See CALIFORNIA BUILDING INDUSTRY ASSOCIATION, MEMORANDUM ON SB 375 (Aug. 7, 2008). The memorandum lists the absence of CEQA reform from early versions of the bill as among the "objectionable provisions" the Association successfully struck from the statute in its spring 2008 negotiations with Senator Steinberg. Prior to this date, the Association had formed a coalition along with, among others, the League of California Cities in opposing the bill.

99. See Baer, *Fair-Share*, *supra* note 37, at 49

(Simply put, the state forecasts its growth for a five-year period by four income classes and then distributes shares of that growth to each region, which in turn sub-allocates appropriate shares to each locality. A slight bit of adjustment is allowed from the bottom-up by localities, but for all intents and purposes, it is a top-down process, slightly mediated by the COGs. The state then reviews the local plan for compliance.).

local land use decisions toward greater social equity,<sup>100</sup> many communities have chosen to “zone out” apartments and multi-family high-density housing, effectively excluding such development from areas with the best jobs, schools and transportation options.<sup>101</sup>

SB 375 seeks to fundamentally alter this process and its outcomes. Previously, local governments generated a general plan accommodating their RHNA number every five years and an RTP every four years. Jurisdictions must now adopt both their RTP/SCS and allocation plans on the same schedule, every eight years.<sup>102</sup> The statute links the processes internally as well, mandating the SCS accommodate the region’s RHNA-predicted housing need and requiring the allocation plan zone new housing “consistent with the development pattern” of the SCS.<sup>103</sup> The effects of this alignment could be significant. As transportation planning will now, ostensibly, reflect the VMT reduction goals of the SCS, local governments throughout the state should find themselves allocating more housing (i.e., a greater portion of their RHNA numbers) to infill and around transportation corridors and less to the periphery of its jurisdiction.

SB 375 requires that zoning pursuant to RHNA allocation occur within three years of adopting the housing element.<sup>104</sup> Failure to comply carries certain penalties and restrictions. For those jurisdictions that fail to meet zoning deadlines, the law mandates that they return to a four-year planning cycle. Regions that continue to miss deadlines will fall under court order to do so and will remain under such jurisdiction until they comply. Additionally, those agencies that fail to provide zoning for low- and very-low-income households will be precluded from disapproving any

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100. See CAL. GOV’T CODE §§ 65750 *et seq.* & § 65584.09.

101. Testimony of Michael Rawson, National Committee on Fair Housing and Equal Opportunity, Sept. 9, 2008, Los Angeles, CA, available at [http://www.prrac.org/projects/fair\\_housing\\_commission/los\\_angeles/rawson.pdf](http://www.prrac.org/projects/fair_housing_commission/los_angeles/rawson.pdf) (“This ‘exclusionary zoning,’ as it came to be called, is in some ways more insidious than base discrimination by sellers and landlords, for it creates citadel communities surrounded by moats of restrictive zoning that insulate the inhabitants from integration, deprive the excluded of opportunity and entrench patterns of segregation.”).

102. See CAL. GOV’T CODE § 65588(b) (“The housing element shall be revised as appropriate but not less than every eight years.”); see also § 65588(e)(7)(C) (“Local governments within the regional jurisdiction of a metropolitan planning organization or a regional planning transportation agency. . . shall be subject to the eight year planning period.”).

103. See CAL. GOV’T CODE §§ 65584.04(i)(1), (3).

104. See CAL. GOV’T CODE § 65583(c)(1)(A).

general plan-compliant affordable housing project.<sup>105</sup> The alignment of housing allocation and transportation planning under the statute as well as the degree to which it compels local governments to accommodate affordable housing is truly unique to SB 375 and is considered by many observers to be the most remarkable aspect of the bill.

But all of these achievements are premised on the existence of an SCS. The new law's many mandates for internal consistency among existing transportation and land use documents will only serve to drive compact growth if such priorities are clearly stated within these documents. With the allowance of alternative plans that remain wholly separate from a region's transportation plan, that clear language is now lost and, with it, the smart growth priority set it represents. Again, without this document, any harmonization required between the RHNA allocation and the compact development patterns disappear.

## V.

### OBSTACLES TO IMPLEMENTATION

#### A. *Transportation Infrastructure: Smart Growth's Missing Link*

Concern among some pundits that SB 375 will result in large profits for developers without a concurrent improvement in VMT reduction (the bill's ultimate and intended goal) may not be totally unfounded. Increased density represents an important half of the VMT reduction equation but, without the availability of clean, reliable and affordable mass transit, the benefits of high-density living could be significantly reduced or lost entirely.<sup>106</sup> The majority of California's major city-centers are woefully short on public transit, and the state has historically placed funding for such projects low on its list of budgetary priorities.<sup>107</sup> But proximity to those same underfunded and not-yet-established mass transit lines garners SCS-compliant developments much-sought-after CEQA streamlining as well as the potential

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105. See CAL. GOV'T CODE § 65583(g)(1).

106. See Casey Mills, *Without Transit Funding, State's Smart Growth Efforts Not Enough*, BEYOND CHRON, Sept. 4, 2008, <http://www.beyondchron.org/news/index.php?itemid=6052> ("Smart growth does not operate on dense development alone. Be it for work, fun, or doctor's appointments, people must leave their neighborhood sometimes. Without transit that gets people to and from their jobs quickly, provides the ability to go out at night once and a while, and remains affordable, one of smart growth's main benefits – reducing the miles Californians drive – will be seriously compromised.").

107. *Id.*

for significant funding.<sup>108</sup> Local governments are also likely to wield their still-exclusive zoning authority to “upzone” areas previously restricted to only commercial or industrial use—areas desirable for their proximity to centers of commerce.<sup>109</sup> The combined effect will be to markedly strip the regulatory red tape from some very large, potentially lucrative mixed-use developments in areas now available for the first time. And all of it will be premised on the availability of mass transit.

While SB 375 requires the state’s transit planners to consider where their respective regions’ residents will be living and working as new transportation plans are designed, the bill contains no specific mandates directing transportation funds towards additional public transit—and, therefore, away from roads and highways. Nor does it specifically provide for the continued maintenance of current systems. It follows that the “planning assumptions” discussed above will necessarily draw more funds to mass transit projects as planning organizations seek to reflect sustainable strategies (which ostensibly place more residential and mixed-use development along transit corridors) in their policy elements. But with these agencies dependent on continued local support and with no mandate for directed public transit spending, it is far from certain that funds will find their way to more rail and bus lines.<sup>110</sup>

For regions like the San Francisco Bay Area that boast clean, widely used rail transit systems, the above concerns are all but absent. But however, for Los Angeles, the most populous city in California, inadequate public transportation may pose a threat to real-world VMT reductions. In spite of the slowly growing popularity of the nineteen-year-old Metro rail system, Los Angeles is still a city dominated by the bus, with forty miles of route to

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108. See Samantha Young, *Ca. Land Use Dispute Complicates Budget*, FORBES, July 26, 2007, available at <http://www.forbes.com/feeds/ap/2007/07/26/ap3956150.html>.

109. *Id.*

110. See BARBOUR & TEITZ, *supra* note 60, at iv

(COG/MPOs have been the institutional nexus for blueprints because they bring together regional systems-level planning functions (for transportation and air quality, in response to state and federal mandates) and the community-level land use authority of local governments (cities and counties). But COG/MPOs have no actual land use authority; they can only influence local policy through identifying funding incentives from their own resources, or through peer pressure, advice, or technical assistance. This lack of direct authority presents a difficult challenge for implementing blueprint land use objectives – that is, for translating the merely advisory “preferred scenarios” into reality on the ground.).

every mile of MTA rail.<sup>111</sup> The city also has the distinction of maintaining the nation's most overcrowded buses.<sup>112</sup> With L.A.'s most-ridden bus line moving commuters at a sluggish average of 11.7 miles per hour in 2007 and propelled by the same high-carbon-emitting engines as its passenger-vehicle counterparts, it's clear that the city—and others like it—requires a significant expansion of its mass transit infrastructure.<sup>113</sup> Unfortunately, California's current budgetary woes make this unlikely. The most recent proposal by the Governor's office advocates cutting \$250 million in gas tax revenue previously earmarked for transit and the elimination of an additional \$317 million only recently allocated to transit by the Budget Conference Committee.<sup>114</sup> The specter of massive underfunding has already begun to affect decisions at the local level. In August 2008, Sacramento Regional Transit announced it would be cutting its "already skeletal" bus services and increasing fares for both buses and trains.<sup>115</sup> Without a priority shift in California's capital, the state's transit infrastructure—its "backbone of smart growth"—may not be able to support SB 375's ambitious VMT reduction goals.<sup>116</sup>

Beyond public transportation concerns and the necessity for infrastructural support, the implementation of SB 375 may be hindered by weaknesses and ambiguities within the statute itself.

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111. David Zahniser, *What's Smart About Smart Growth?*, L.A. WEEKLY, May 31, 2007, at 24.

112. See Thomas A. Rubin, *Learning from Los Angeles: Rail and Transport Equity*, TECH TRANSFER NEWSLETTER, Spring 2000, available at <http://www.techtransfer.berkeley.edu/newsletter/00-2/LosAngeles.php>.

113. *Id.*; see also Los Angeles County Metropolitan Transit Authority: Ridership Statistics, available at [http://www.metro.net/news\\_info/ridership\\_avg.htm](http://www.metro.net/news_info/ridership_avg.htm) (The system also appears to be decreasing in popularity: based on total monthly boardings over three consecutive Februaries, MTA reports system wide usage has decreased by 2.9 million boardings between 2007 and 2009.); see also Rubin, *supra* note 112

(Contrary to conventional wisdom, Los Angeles County is not an area of spread-out, low-density land use and population well served by endless roads and freeways. In fact, the greater Los Angeles Urbanized Area (UZA) is spread out, but it is also the most densely populated UZA in the country. It has one-third more residents per square mile than greater New York City. Also, it has the second lowest number of roadway miles per capita of the nation's 64 largest UZAs. Little wonder that greater LA leads the nation in freeway congestion. Some sort of transit should be successful in Los Angeles.)

114. CALIFORNIA BUILDING INDUSTRY ASSOCIATION, *supra* note 98; see also GOVERNOR'S BUDGET SUMMARY 2008-09 98 (2008), available at <http://www.ebudget.ca.gov/pdf/BudgetSummary/FullBudgetSummary.pdf>.

115. See *Sacramento Regional Transit Board Backs Fair Hikes*, SACRAMENTO BEE, Aug. 26, 2008, at 4B.

116. Testimony of Michael Rawson, *supra* note 101.

### B. *APS, Feasibility and the Breakdown of Internal Consistency*

As discussed in Part IV, the presence of an approved, adopted SCS is central to the procedural harmonization goals of SB 375. This blueprint scenario is the linchpin to the law's administrative restructuring and, when pulled, things quickly begin to fall apart. While it's true that local governments are under no statutory mandate to adopt a planning organization's sustainable strategy as part of their own General Plan, the regional agency is required to include the strategy as a necessary part of its transportation plan. But as is often the case in environmental legislation,<sup>117</sup> the statute requires only "feasible" measures be included in the regional SCS.<sup>118</sup> If the on-the-ground realities of a particular region make development of an SCS impossible under the feasibility rubric, then an APS will be required; this now effectively removes any additional documentation required by SB 375 from the region's RTP and, as local governments have the same freedom to ignore the APS as they do the SCS, the new legislation will have virtually no practical effect in such areas. In the end, a claim of infeasibility by any of California's seventeen MPOs will effectively place that region outside the reach of significant portions of the statute.

Another casualty under this scenario is the RTP/RHNA alignment. The harmonization of housing allocation and transportation infrastructure is one of the most significant and ambitious goals of SB 375 and arguably will do more to reduce VMT than any other aspect of the statute. As is mentioned throughout this Comment—and throughout the statute itself—SB 375 mandates no land use policy, nor does it require compliance of any kind on the part of local government.<sup>119</sup> But SB 375's treatment of housing and the restructuring it attempts to achieve in this arena is supported by clear mandates and equally clear language. Under the new law, the region's existing and projected housing need "shall" reflect the "balance between jobs and housing within the region" based upon employment projections in the applicable

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117. Both the Clean Water Act and the Clean Air Act apply the feasibility standard to limit and define administration of reduction measures under the laws. See 33 U.S.C. § 1254(q)(1) ("where collection of sewage in conventional, community-wide sewage collection systems is impractical, uneconomical, or otherwise infeasible"); 42 U.S.C. § 7502(a)(1)(A) ("The Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures.").

118. CAL. GOV'T CODE § 65080(b)(2)(B)(vii).

119. SACRAMENTO AREA COUNCIL OF GOVERNMENTS, *supra* note 56.

RTP.<sup>120</sup> But again, without the inclusion of an approved SCS in the RTP, the legislative coordination of people, transportation and jobs promised by the statute is lost. The mandatory adoption of the APS, the scenario's required alternative, then becomes no more than an exercise in smart growth drafting, allowing for compliance with the letter of the law and little else.<sup>121</sup> The Bill's legislative history gives some insight into the origins of this back-door to the law.

Some level of compliance flexibility existed in even the earliest drafts of SB 375, but in such a way as to leave the statute's mandates intact. Original versions of the bill addressed those regions unable to prepare an SCS (referred to in previous iterations of the bill as a Preferred Growth Scenario or PGS) capable of reducing GHG emissions to target levels by allowing for the preparation of a "supplement" to the failed blueprint.<sup>122</sup> These PGS supplements would have allowed the planning agency to demonstrate how targets could be achieved "through additional transportation investments, land use incentives, or other programs and incentives."<sup>123</sup> But, as a supplement to the PGS, a document—like the later SCS—required by the bill to be included in the RTP, this alternative list of compliance strategies would still have been included in the federally mandated transportation plan and, accordingly, would have allowed for regional administrative flexibility while leaving all internal harmonization mandates intact. This remained the case for the first six drafts of the Bill, with no mention of a second, separate tier of compliance. The APS in its current form did not appear until the September 12, 2007 amendment, seven months after the bill was first introduced. With this first reference to the alternative blueprint came the caveat that the document, unlike the SCS, not be included in the regional transportation plan.

The characterization of the APS as a "separate" document—and the end run to compliance it provides—was considered a ma-

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120. CAL. GOV'T CODE § 65584.01(d)(1).

121. There may be some value in the consideration of alternatives even absent any mandate to implement them, but this begins to look a great deal like AB 857 and its requirement that agencies wielding no current land use authority consider smart growth alternatives, hoping local agencies might adopt similar priorities by virtue of proximity. As discussed above, this approach led to little, if any, actual change in land use practice throughout the state.

122. SB 375, July 17 amendment, section intended to amend CAL. GOV'T CODE § 65080(b)(2)(D).

123. *Id.*

lor lobbying victory by city and county governments. In its overview of SB 375, the League of California Cities refers to the “unclear” relationship that existed between the supplement and the RTP in previous versions of the Bill.<sup>124</sup> The document then lists among the League’s “Key Amendments” the statutory separation of the APS, stating the “land use pattern in the Alternative Planning Strategy will *not* affect or be part of the RTP or its funding.”<sup>125</sup> This concession fundamentally weakened the law but was likely necessary if the Bill was ever to see adoption.<sup>126</sup> However it may threaten the smart growth goals of SB 375, the APS is nevertheless a part of the statute and remains available to those regions with a supportable feasibility claim.

The Bill defines “feasible” broadly, taking into account not only “economic, environmental, legal, social, and technical factors” that may pose obstacles to emissions reductions but also considering whether such reduction might be accomplished “within a reasonable period of time.”<sup>127</sup> With such a flexible definition, threats to feasibility may come in a variety of forms including insufficient transportation infrastructure, local government budgetary issues and even resistance to project development among area residents. Among these significant potential obstacles lies one element that, if the proper guidance and support are provided for regional governments, could be effectively mitigated. Before a given region may adopt an SCS, it must fully quantify the GHG emissions reductions likely to result from the strategy.<sup>128</sup> Such analysis can be challenging for even relatively small developments but will be particularly so for regionwide assessments involving potentially hundreds or thousands of variables. Although acceptance of the SCS is pre-

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124. LEAGUE, *supra* note 63, at 20.

125. *Id.* (emphasis in original).

126. The League overview lists the separation of the APS and several other issues as “required in order for the board to consider supporting” the Bill. *Id.* With 400 city officials sitting on the League’s various policy committees, the endorsement of this politically powerful coalition was vital to the Bill’s success. Without it, SB 375 may have remained permanently stalled. See League of California Cities: Policy Committees, [http://www.cacities.org/index.jsp?displaytype=&section=about&zone=loc&sub\\_sec=about\\_policy](http://www.cacities.org/index.jsp?displaytype=&section=about&zone=loc&sub_sec=about_policy).

127. CAL. GOV’T CODE § 65080.01(c) (2008).

128. CAL. GOV’T CODE § 65080(b)(2)(G) (“Prior to adopting a sustainable communities strategy, the metropolitan planning organization shall quantify the reduction in greenhouse gas emissions projected to be achieved by the sustainable communities strategy and set forth the difference, if any, between the amount of that reduction and the target for the region established by the state board.”).



mised on such quantification, no widely accepted methodology is currently available.

Two general overviews of emissions analysis have been released in the past two years, one drafted by the California Air Pollution Control Officers Association (CAPCOA) and the other by the Association of Environmental Professionals (AEP), but neither may provide the tools regional governments need as they work to comply with SB 375. The CAPCOA white paper attempts some guidance by providing “a common platform of information and tools to support local governments,” but the Association is careful to include a “disclaimer” stating the work “is intended as a resource, not a guidance document” and “is not intended, and should not be interpreted, to dictate the manner in which an air district or lead agency chooses to address greenhouse gas emissions.”<sup>129</sup> Similarly, the AEP claims only to provide “interim information” about the many valid approaches to GHG quantification without recommending any single methodology.<sup>130</sup> CARB, apparently aware of the lack of guidance in this area, stated in its June 2008 scoping plan that “technical tools will need to be refined to ensure sound quantification techniques are available” for assessing regional target compliance.<sup>131</sup> It is unclear whether the board itself intends to produce something akin to a definitive guideline or if it is content to wait for some future consensus to arise in the scientific community. But until such assistance is available, SCS adoption may be delayed indefinitely as ill-equipped regional agencies struggle with the complexities of carbon emissions accounting.

### C. *California's Land Use Status Quo: Loose Ends, Local Ties*

Even among those regions that successfully negotiate the various economic and logistic impediments to SB 375 compliance, questions remain as to the extent the new law will actually affect planning at the local level.

As stated above, MPOs wield no land use authority and, by express language throughout the statute, are granted no additional authority under SB 375. However, these regional agencies

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129. CAPCOA, CEQA & CLIMATE CHANGE: EVALUATING AND ADDRESSING GREENHOUSE GAS EMISSIONS FROM PROJECTS SUBJECT TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT DISCLAIMER (Jan. 2008).

130. ASS'N OF ENVTL. PROF'LS, ALTERNATIVE APPROACHES TO EVALUATING GREENHOUSE GAS EMISSIONS 1 (2007).

131. DRAFT SCOPING PLAN, June 2008, *supra* note 2, at 50.

can and do place conditions on the allocation of transportation funds. SB 375 requires the “action element” (that portion of the RTP that “describes the programs and actions necessary to implement the plan”)<sup>132</sup> and the “financial element” (that portion that “summarizes the cost of plan implementation”)<sup>133</sup> of the region’s transportation plan to be consistent with that of the sustainable strategy. Ostensibly, the SCS portion of the transportation plan is an accurate representation of the region’s land use intentions. This means the planning assumptions contained within the RTP, and the allocation of federal transportation funds they direct, must now reflect the compact-growth blueprint. This is significant if the funds controlled by such agencies are to find their way to more and better clean-powered public transportation and away from the state’s ever-expanding highway system. This is the outer reach of the internal consistency mandated by SB 375.

Local planning agencies are welcome to harmonize their general plans in conformity with the SCS (or APS) but, again, are under no affirmative obligation to do so.<sup>134</sup> This ultimate municipal discretion to employ or reject the strategies proposed by the regional agencies was recognized by the California State Senate when it considered the bill. With no illusions regarding the state’s reticence to usurp local land use authority, and the extent to which that reticence is reflected in SB 375, the senate bill analysis describes the statute as “built on faith that cities and counties will voluntarily implement the SCS or at least respond to regional political pressure to do so.”<sup>135</sup> This funding structure places MPOs in a position to strongly encourage smart growth and discourage those cities choosing to buck the development plans as envisioned in the SCS by providing funding to the for-

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132. CAL. GOV’T CODE § 65080(b)(3) (2008).

133. CAL. GOV’T CODE § 65080(b)(4)(A) (2008).

134. In response to pressure from city and county governments, many of whom drafted “Oppose Unless Amended” memoranda directed at early versions of the bill, Sen. Steinberg ensured maintenance of California’s current land use status quo by inserting explicit guarantees of local government autonomy into the law: “Nothing in this section shall require a city’s or county’s land use policies and regulations, including its general plan, to be consistent with the regional transportation plan or an alternative planning strategy.” CAL. GOV’T CODE § 65080(b)(2)(J). Nowhere in the statute is the receipt of transportation funding made contingent on local compliance with or adoption of the compact scenarios of an SCS or APS.

135. MARK STIVERS, BILL ANALYSIS 13 (Aug. 2008), available at [http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb\\_0351-0400/sb\\_375\\_cfa\\_20080903\\_100317\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_cfa_20080903_100317_sen_comm.html).

mer and denying it to the latter. But some observers question the political will of regional agencies to make such decisions.<sup>136</sup> As locally elected officials, MPO board members will be understandably reluctant to advocate funding choices that may be politically or socially unpopular among their constituents.<sup>137</sup> As such, SB 375 does little to change the transportation funding structure as it existed prior to the new law. The statute unquestionably injects a new consideration of compact growth and awareness of alternatives to business-as-usual development into the statewide planning process, and this alone arguably represents a substantial achievement. But with the decision to comply at the local level driven not by mandate but by incentive, whether the law's effects are sweeping or barely noticeable will depend on how aggressively these agencies choose to comply with their regional SCS/APS. Fortunately, realization of SB 375's smart-growth goals may be driven by more than just "faith" and regional pressure. Beyond the administrative incentives described above, both social and market forces could act to promote compact development under the new law.

#### D. California's Changing Landscape

Even in the absence of statutory mandates, Californians may be ready for a move in a new direction. The state once defined by the geometric order of suburban developments and the primacy of sprawl over urban living has seen resident preferences shift in recent years. Consumer demand for smaller, communal living space is on the rise and a growing number of homebuyers now claim to want compact, walkable communities as opposed to the single-family home on the large private lot.<sup>138</sup> Ventura

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136. See LEAGUE, *supra* note 63, at 9 ("It is worth noting that the decision-makers on the regional MPOs are made up wholly of local elected officials. Accordingly, MPOs are not likely to support measures that limit the discretion of cities and counties, particularly in those MPOs where every city and county in the region has a seat on the MPO board."); see also Bill Fulton, *SB 357 Is Now Law — But What Will it Do?*, CALIFORNIA PLANNING & DEVELOPMENT REPORT, Oct. 1, 2008, available at <http://www.cp-dr.com/node/2140> (describing the situation under SB 375 as having "the same major structural issues as the RTP itself" and "unlikely that elected officials sitting as regional planning board members will pull the trigger on each other").

137. See *id.*

138. See REID EWING & ARTHUR C. NELSON, *CO<sub>2</sub> REDUCTIONS ATTRIBUTABLE TO SMART GROWTH IN CALIFORNIA* (2008), [http://climateplanca.org/ewing\\_analysis.pdf](http://climateplanca.org/ewing_analysis.pdf); see also S. Handy et al., *Is Support for Traditionally Designed Communities Growing? Evidence from Two National Surveys*, 74 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 209-221 (no. 3, 2008).

County builder Ron Mazzioti describes the current landscape as one in which “the single-family home is becoming less and less common.”<sup>139</sup> Speaking of his fellow developers—and the depressed housing market in which they currently fight to survive—Mazzioti claims “the ones that are lasting are the ones that are doing condos, apartments and mixed use.”<sup>140</sup> Mazzioti, who has been building large-scale single- and multi-family developments in Southern California for twenty years, attributes some of the change to rising gas prices and increasingly scarce funding for first-time home buyers, but thinks the shift has more to do with quality of life:

People don't want to live thirty minutes from their job and twenty minutes from shopping anymore. That's why we're seeing more commercial development below residences. Buyers seem to be moving away from the separation of the suburbs—they want the San Francisco-style experience.<sup>141</sup>

The move toward compact, walkable communities observed by builders like Mazzioti may be indicative of changing consumer preferences on a national level. 2003 witnessed per-square-foot prices for attached housing exceed those for detached dwellings, a historic first for the American home market.<sup>142</sup> Additionally, real estate industry studies report that approximately one-third of individuals surveyed expressed a preference for “smart growth housing products and communities.”<sup>143</sup> The attractiveness of such developments only increases when accompanied by reductions in VMT.<sup>144</sup> Shifts in national demographics are also likely to continue the push towards compact growth. As the number of childless and single-person households grow to represent the lion's share of new housing need, it is projected that demand for attached and small-lot housing will exceed that currently available by 71 percent.<sup>145</sup>

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139. See Mazzioti, *supra* note 95.

140. *Id.*

141. *Id.*

142. EWING ET AL., GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE 20 (2007).

143. *Id.*

144. *Id.* (“When smart growth also offers shorter commutes, it appeals to another one-quarter of the market, because many people are willing to trade lot or house size for shorter commutes.”).

145. Arthur C. Nelson, *Leadership in a New Era*, 72 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 393 (no. 4, 2006). Nelson claims childless households will approach 90 percent of the market and single-person households will make up one-third of that number.

In the end, California's economy may emerge the real winner from the smart-growth movement. A recent report issued by Berkeley's California Climate Change Center suggests pursuing emissions reduction initiatives may yield significant economic rewards for the state.<sup>146</sup> The report predicts California's annual gross state product could increase by \$60-74 billion and result in the creation of anywhere between 17,000 and 89,000 new jobs.<sup>147</sup> Compact development regulation is certainly only one piece of this puzzle, but with smart-growth reforms targeted at the state's largest-emitting sector, any advantage gained in this arena will be significant. Even local-level officials have begun to appreciate the potential to save the state's economy while helping to save the planet. Advocating the need for cities to craft "sustainability plans" and to be "held accountable for their share" of emissions under AB 32, Rick Cole challenged California's cities and counties to take action: "[B]y encouraging innovative approaches to meeting the 2020 targets, we can promote California as a world leader in green industry and green building."<sup>148</sup>

With so much to potentially gain, both environmentally and economically, it is imperative the state's first ambitious experiment in smart growth be a successful one. The following section will detail a series of recommendations toward that end.

## VI.

### RECOMMENDATIONS

#### A. *Infrastructure*

The viability of SB 375 depends on a robust public transportation infrastructure and the continued funding necessary to develop and maintain it. Surprisingly, this element has not been fully addressed in the smart growth dialogue. The current budgetary crisis has threatened services at every level of government, and transportation has been no exception. However, if the state hopes to see genuine GHG reduction under the plan, the expansion of public transportation must become a priority and not an afterthought. Proposition 42 was to provide a reliable revenue stream to feed the state's transportation needs but, so far, has

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146. DAVID ROLAND-HOLST, ECONOMIC GROWTH AND GREENHOUSE GAS MITIGATION IN CALIFORNIA 3 (2006), available at <http://calclimate.berkeley.edu/GrowthStrategiesFullReport.pdf>.

147. *Id.*

148. Rick Cole, *Thinking Global, Acting Municipal*, L.A. TIMES, Aug. 31, 2007, at A5.

failed. The 2002 law, which constitutionally dedicates the state's share of gasoline sales tax to transportation programs, initially increased transportation funding by \$1 billion, only to see the majority of those dollars diverted to the general fund.<sup>149</sup> There needs to be a rededication to transportation funding at the state level, and city and county governments may have to find new sources of revenue to fund local transit services.

One such option could be the adoption of peak-hour toll charges along California's most congested traffic arteries. This could both reduce emissions by disincentivizing driving and provide a potentially significant mass transit funding source. Such automatic electronic tolling, generally referred to as congestion pricing, has been effectively implemented in two California counties. Since 1998, San Diego's I-15 has maintained two high-occupancy toll (HOT) lanes in which low-occupancy vehicles are charged a variable toll (where fees may be increased or decreased by twenty-five-cent increments to regulate traffic flow) while high-occupancy vehicles, public transit buses and emergency vehicles are exempt.<sup>150</sup> These lanes generate \$2 million annually in toll revenues, with close to one-half of those funds supporting transit service along the I-15 corridor.<sup>151</sup> Similar variably-priced lanes have been in operation along Orange County's SR 91 since 1995 with the region experiencing comparable revenue gains and reduced congestion to those reported by San Diego.<sup>152</sup>

In addition to targeting vehicles currently on the road, VMT reduction measures should also focus on those cars still occupying the showroom floor. Imposing a feebate system targeting the purchase of new vehicles falling below some fuel economy benchmark and dedicating some or all of the resulting revenue to transit projects would both reduce the number of inefficient cars on the state's streets and highways and provide expanded and improved public transportation options.<sup>153</sup> But questions remain

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149. Proposition 42 contains an emergency crisis suspension provision and this has been used virtually every year since the law's enactment to divert funds out of the Public Transportation Account and into the General Fund.

150. U.S. Dept. of Transportation, Federal Highway Administration, *Congestion Pricing: A Primer*, (Dec. 2006), available at <http://ops.fhwa.dot.gov/publications/congestionpricing/index.htm>.

151. *Id.*

152. *Id.*

153. Feebate policy has generally been presented as penalizing inefficient vehicle purchases so that a one-time rebate could be offered on high-efficiency vehicles. I believe such funds would be better directed toward the state's struggling transporta-

as to whether these regulatory options or others like them are available to regional governments, questions that may not be answered until the first such project is challenged.<sup>154</sup>

## B. *Actions by CARB*

### i. Compliance Clarity

CARB must assure local governments that general plan compliance with SB 375 will be deemed to satisfy emissions reductions for transportation within the land use sector under AB 32. Before the bill's adoption, some local groups and builders were skeptical as to CARB's authority to direct land use within the state.<sup>155</sup> If the board were to levy further requirements against these entities, it could invite legal challenge and threaten the atmosphere of cooperation that has followed in the new law's wake. Clearly establishing that additional mandates will not be forthcoming should help to further strengthen the tenuous truce between SB 375's various stakeholders. If CARB is to set emissions standards for local governments, assurance that such standards will be met via SB 375 compliance will likely go a long way towards incentivizing cities and counties to voluntarily adopt development patterns contained in the SCS.

Additionally, CARB should maintain the current amount of GHG reduction sought from the land use sector and resist the call of some environmental groups to double the most recent number.<sup>156</sup> The final draft scoping plan already achieves substantial GHG reductions from passenger vehicles, using light-duty vehicle standards and low-carbon fuel standards. Increasing

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tion services rather than at an alternative vehicle market in which consumer demand has traditionally been high and, accordingly, where additional cash incentive seems unnecessary.

154. *New GHG Land-Use Panel Faces Controversial Modeling Issues*, CEQA, INSIDE CAL/EPA, vol. 20, no. 4, Jan. 30, 2009 ("Regional policies, such as congestion pricing or an indirect source rule for GHGs, may require approval by the state legislature. 'Without these tools, it may be difficult' to reach the GHG targets, [one] source argues.").

155. *Groups Plan Final Push for Changes to AB 32 Climate*, INSIDE CAL/EPA, vol. 19, no. 42, Oct. 17, 2008 ("The issue of how to address GHG emissions from land use has been arguably the most controversial in ARB's development of the scoping plan. Local governments and builders have been skeptical of ARB's authority to dictate how locals can develop land, housing blueprints, and other planning.").

156. *Cities Urge CARB to Resist Calls for More Land Use GHG Reductions*, INSIDE CAL/EPA, vol. 19, no. 47, Nov. 21, 2008. Environmental groups have argued that the October Scoping Plan's call for a 5 million ton reduction in GHG emissions from the land use sector does not go far enough and instead have called for that number to double to 10 million tons.

the reductions required for land use will only apply additional pressure to what is likely to be a lengthy and potentially contentious target-setting process. This may have the effect of leading to one of two equally undesirable results: stakeholders will come to an impasse, leaving the statute stalled before it had a chance to start; or regional governments will sign off on targets they cannot by any “feasible” means meet (and through the APS option, will never have to). Either option could spell failure for the whole program, or at the very least establish an ongoing and public battle between CARB and local governments.

By the same token, developers and local governments should refrain from lobbying for further CEQA exemptions under the statute. AB 782, introduced February 26, 2009 and currently awaiting referral to an Assembly policy committee, seeks to extend SB 375’s current exemptions to “any development project, including, but not limited to, a residential or mixed-use residential project, health facility, educational facility, retail facility, commercial job center, or transportation project.”<sup>157</sup> This is a mistake. The inclusion of CEQA streamlining in the original bill, perhaps the statute’s most divisive compromise, led a number of environmental groups to either entirely withdraw their support or assume a neutral position.<sup>158</sup> Pushing for greater exemptions may only serve to alienate those environmental stakeholders still championing the statute and its aims.

Again, cities and counties should receive assurance that compliance with SB 375 represents compliance with AB 32. And land use targets and environmental review exemptions should be maintained at their current levels. As the first law of its kind—and as a regulatory structure California hopes to export to other states—it is better that SB 375 represent a modest success than an impressive failure.

## ii. Provision of GHG Emission Evaluation Guidelines

Perhaps the most significant action CARB can take in securing the continued viability of SB 375 is the provision of clear and workable guidelines for regional and local governments to assist in quantification of project emissions reductions. As described above, a Sustainable Communities Strategy cannot be adopted until it is established that achievement of the regional target can

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157. Proposed amendment to CAL. PUB. RES. CODE § 21159.28(c).

158. *Industry Eyes Bills to Ease GHG Policies Tied to Land-Use, CEQA*, INSIDE CAL/EPA, vol. 20, no. 4, Jan. 30, 2009.



be accomplished under the plan. A practical methodology by which MPOs could assess the reduction in GHG emissions likely to be achieved under a given SCS may be the single most effective weapon against an infeasibility finding. Without such a tool, regions throughout the state could rely too readily on the statute's "capable of being accomplished . . . in a reasonable period of time" language, opening the door to APS adoption and the end run to compliance that it provides.<sup>159</sup> Here again, the force of political pressure among the state's various planning organizations cannot be discounted; the effective implementation of generally accepted quantification methodologies by just one or two of California's MPOs (and subsequent acceptance by the state board) may erode the will of other planning organizations to claim those same methods as infeasible in their regions. Accordingly, such guidelines should be made available to regional and local agencies as soon as is possible, particularly before these entities begin wrestling with the complexities of emissions quantification.

### C. *Consider Amendment*

Courts and stakeholders should remain cognizant of the potential difficulty inherent in designing the appropriate mitigation standards for a given project and locality, allowing for creativity in the selection and development of regional mitigation techniques. At the same time, the permissive feasibility standard should not compromise realization of the statute's goals. CARB and state policymakers must closely watch the progress of SB 375; if the post-statutory landscape is widely populated with APS submissions, it may justify future amendment to require the document as an official part of the RTP. This may be necessary if the law is ever hoped to achieve its legislative purpose.

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159. It should be noted that under SB 375, regional entities have great discretion in determining infeasibility and that, once made, CARB cannot reject such a claim. As such, even the existence of flexible and widely accepted quantification methodologies are no absolute guarantee against a regional infeasibility finding.

VII.  
CONCLUSION

“A small step can be an important step if it is the step that turns a corner.”<sup>160</sup> This is an apt description of what the new law is and what it promises to be. As detailed above, SB 375 is not without its frailties and the statute’s success is contingent upon support, both political and economic, from all levels of government. But there is no question that the law represents an achievement of progressive environmental legislation and its very existence is a triumph of cooperative effort. Once California committed to the ambitious path laid out by AB 32, all that remained was to take the first steps. The state has begun its journey with SB 375, and only the coming years will tell where it will take us.

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160. These were the words with which UCLA Environmental Law Fellow Ethan Elkind chose to open his SB 375 workshop during the October 2008 Environmental Conference in Yosemite.

