

## SB 375: Smart Growth Savior or Just The Beginning

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### **Abstract**

*This Article analyzes and dissects what has been commonly referred to as California's Climate Change Smart Growth Bill: SB 375. This bill, which was the result of a unique compromise between environmentalists, local governments and the building industry, seeks to reduce greenhouse gas emissions by creating incentives and in some cases implicit mandates for smarter land use and development choices by local governments and developers thereby seeking to reduce vehicle miles traveled. Thus, in sum the bill strives to help Californians spend less time in their cars. SB 375 was signed into law in 2008, shortly after AB 32 passed into law in 2006.*

*AB 32, the Global Warming Solutions Act, made California the first state in the nation to commit to achieving the Kyoto Protocol. Under AB 32, California will reduce its greenhouse gas emissions to 1990 levels by 2020 and to 80% below 1990 levels by 2050. SB 375 has been deemed by some as an arm of AB 32 and as necessary to attaining the goals set forth in AB 32. It requires the California Air Resources Board to develop regional greenhouse gas reduction targets for automobiles and light trucks. The methodologies that will be used to set the regional targets are currently under development by the Regional Targets Advisory Committee—a committee of stakeholders created under the bill itself. The regions will then develop transportation and land use plans designed to achieve the emissions reduction targets and at stake will be state transportation funding and California Environmental Quality Act streamlining and benefits.*

*Although proponents and drafters have deemed SB 375 as a sweeping revision of land use policy and as a bill that will be responsible for reshaping the face of California's communities into more sustainable walkable communities, this Article places doubt on these optimistic predictions. The arguments within this Article are important for several reasons. First, the Article analyzes the incentives created under the bill to determine whether incentives alone can lead to the optimistic reduction goals set forth in the bill. Second, the Article analyzes the governance structure created under the bill under which local government officials sitting as regional board members are allocated decision making authority and the potential for horse trading that this self interested structure permits. Third, this Article analyzes the considerable market and practical constraints to infill development that may create a barrier to attaining the reduction goals set forth in the bill. Finally, this Article focuses on the state's role in overcoming these internal and external constraints and how the conduct on part of the state since the passage of SB 375 has contradicted its commitment to green house gas reduction as indicated by the passage of both AB 32 and SB 375.*

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### **I. Introduction**

The number of miles driven in California has increased at a rate 50% faster than the rate of population growth for the past two decade and passenger vehicles, which produce about 30% of the state’s heat trapping gases, are the single greatest source of such emissions. In order to reduce these emissions, a reduction in Californians’ vehicle-miles traveled (VMTs) is a

necessity.<sup>1</sup> This translates into “smarter” land use policies that help Californians spend less time in their cars to get to work and to the grocery store. In the global warming context, “land use is thought of as one leg of the three-legged transportation stool, along with vehicle fuel economy and low-carbon fuels like biodiesel.”<sup>2</sup> Studies have concluded that based on today’s sprawling development patterns, projected increases in driving would overwhelm any emission reductions achieved through increased gas mileage and cleaner fuels in the next few decades.<sup>3</sup> So the saying goes, “without improved land use, the stool topples.”<sup>4</sup>

For decades, “sprawl has been the name of the game” for California’s growth patterns, causing home dwellers to commute longer distances to work and adding to air pollution and congestion.<sup>5</sup> This has been the case largely because builders have found it easier and cheaper to build on the periphery of cities rather than within the central city itself<sup>6</sup> and because although “planning problems, with air pollution and traffic congestion being the classic examples, are regional in nature, . . . planning solutions are typically tied to the parochial boundaries of local government jurisdictions.”<sup>7</sup> While some states have found success with regional models, California has been unable to find a useful and politically acceptable solution.<sup>8</sup> This failure is attributable to the fact that in California the land use planning structure has long been governed by a philosophy of local autonomy<sup>9</sup> and local governments have zealously guarded their regulatory power over land use. The state, with a few rare exceptions—including the Coastal

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<sup>1</sup> *Senate Bill 375: Redesigning Communities to Reduce Greenhouse Gases*, Office of the Governor (Oct. 1, 2008), <http://gov.ca.gov/fact-sheet/10707/>.

<sup>2</sup> James Temple, *New Land-Use Law’s Message: Build Near Transit*, S.F. CHRON., Nov. 28, 2008, at A1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Op-Ed., *Steinberg Crafts A Bill Enviro and Developers Can Both Support*, Sac. Bee, Aug. 7, 2008, at 20A.

<sup>6</sup> *Id.*

<sup>7</sup> WILLIAM FULTON & PAUL SHIGLEY, *GUIDE TO CALIFORNIA PLANNING* 93 (3d ed. 2005).

<sup>8</sup> *Id.*

<sup>9</sup> Abbott & Kindermann Land Use Law Blog, <http://blog.aklandlaw.com/2008/11/articles/climate-change/sb-375-a-subtle-shift-in-the-statelocal-long-range-planning-paradigm/> (Nov. 3, 2008).

Commission, Tahoe Regional Planning Agency and the SF Bay Conservation and Development Commission—has proven unwilling to create regional land use regulatory agencies, viewing such an attempt as a political impossibility.<sup>10</sup> However, proponents of SB 375, the “Anti-Sprawl” Bill, view this bill as a reflection of a new area of state intervention, brought on by the rising concern over global warming<sup>11</sup> and a solution to California’s long inability to find a regional solution to fight sprawl and air pollution and to build smart mixed use communities. The question still remains, is SB 375 enough?

## **II. Background--How SB 375 Works**

SB 375 was the result of agreement between a unique coalition of environmentalists, builders and local governments. The deal (brokered by Senator Darrell Steinberg) uses incentives and “requirements” to encourage local governments and builders to concentrate growth in urban areas or close to public transit in an effort to reduce Californians’ use of cars and thereby lower greenhouse gas (GhG) emissions. The bill includes four important aspects: (1) the creation of regional targets for GhG emissions tied to land use; (2) a requirement that regional planning agencies create a plan to meet those targets; (3) the use of “incentives” by these regional planning agencies to achieve the reduction targets; and (4) a requirement that planning for transportation and housing occur simultaneously.<sup>12</sup> The first three of the above named aspects<sup>13</sup> will be discussed in more detail below.

The bill applies to every region in the state that contains a Metropolitan Planning Organization, which is a regional organization usually run by a group of local officials rather

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<sup>10</sup> FULTON, *supra* note 7, at 93.

<sup>11</sup> Abbott & Kindermann, *supra* note 9.

<sup>12</sup> William Fulton, California Planning & Development Report, <http://www.cp-dr.com/node/2140> (Oct. 1, 2008, 08:32 PST).

<sup>13</sup> The fourth aspect will be excluded from the present discussion because it does not address urban sprawl.

than officials with a regional constituency.<sup>14</sup> California has 18 Metropolitan Planning Organizations. A few cover multiple counties, but most of them cover a single county.<sup>15</sup> Under existing law, Metropolitan Planning Organizations are delegated the duty to prepare a Regional Transportation Plan for the region. The Regional Transportation Plan must include both a development pattern for the region and a 20-year transportation plan based on that development pattern.<sup>16</sup> SB 375 provides that the development pattern within the Regional Transportation Plan should be designed to achieve regional GhG reduction targets set by the California Air Resources Board (CARB), thereby impacting transportation planning.<sup>17</sup>

#### **A. Regional Targets Under SB 375**

Under SB 375, CARB has until September 30, 2010 to give each Metropolitan Planning Organization a GhG reduction target for cars and light trucks to be achieved only through changes in the development pattern.<sup>18</sup> To develop these targets, the bill requires CARB to create a Regional Targets Advisory Committee by January 31, 2009.<sup>19</sup> The Regional Targets Advisory Committee will recommend factors and methodologies to be used in the development of the regional GhG reduction targets.<sup>20</sup> Finally, before setting the targets for each region, CARB is required to exchange technical information with the Metropolitan Planning Organization for that

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<sup>14</sup> Real Estate and Construction Law Blog, <http://www.realestateandconstructionlawblog.com/land-use-and-entitlements-sb-375-california-adopts-new-law-geared-to-reduce-greenhouse-gas-emissions-by-integrating-regional-transportation-and-land-use-planning.html> (Oct. 24, 2008).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Fulton, California Planning & Development Report, *supra* note 12.

<sup>18</sup> *Id.*

<sup>19</sup> Bill Higgins, Legislative Representative and Sr. Staff Attorney, California League of Cities, An Open Letter to California City Officials (Jan. 23, 2009), <http://www.calredevelop.org/AM/Template.cfm?Section=Home&CONTENTID=5004&TEMPLATE=/CM/ContentDisplay.cfm>

<sup>20</sup> *Id.*

region and the Metropolitan Planning Organization may make recommendations regarding the target.<sup>21</sup>

## **B. Sustainable Community Strategy**

Once the Metropolitan Planning Organizations have received their regional targets from CARB, they will be required to create a Sustainable Community Strategy, which becomes a part of the Regional Transportation Plan.<sup>22</sup> The Sustainable Community Strategy will effectively be a “set of planning assumptions that shape the land use component of the Regional Transportation Plan and the goal of the Sustainable Community Strategy is to promote development that will reduce GhG emissions.”<sup>23</sup> If the Sustainable Community Strategy proves infeasible to achieve the GhG reduction target, the Metropolitan Planning Organization must develop an Alternative Planning Strategy.<sup>24</sup> Unlike the Sustainable Community Strategy, the Alternative Planning Strategy does not become part of the Regional Transportation Plan. The Alternative Planning Strategy must describe how GhG emission reduction targets would be achieved and why the development pattern and policies within the Alternative Planning Strategy are the most practicable choices for achieving those targets.<sup>25</sup>

## **C. Incentives**

The development pattern in the Regional Transportation Plan is implemented entirely through incentives rather than mandates.<sup>26</sup> These incentives, addressed immediately below, include granting (1) transportation funding and (2) California Environmental Quality Act

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<sup>21</sup> *Id.*

<sup>22</sup> Fulton, California Planning & Development Report, *supra* note 12.

<sup>23</sup> Real Estate and Construction Law Blog, *supra* note 14.

<sup>24</sup> Higgins, *supra* note 19, at 6.

<sup>25</sup> *Id.*

<sup>26</sup> NRDC, *SB 375 Simplified*, available at <http://www.e2.org/ext/doc/SB%20375-Presentation.pdf;jsessionid=B430BCBDA0CD65613103364D84C19763>.

(CEQA) relief to projects that conform to the Sustainable Community Strategy/Alternative Planning Strategy.<sup>27</sup>

### **1. Transportation Funding**

SB 375 requires the Regional Transportation Plan to be internally consistent, analogous to the internal consistency requirement of a city or county's general plan.<sup>28</sup> This means that the "action element" and the "financial element" of the Regional Transportation Plan must be consistent with the Sustainable Community Strategy since, as discussed earlier, "the Sustainable Community Strategy is part of the Regional Transportation Plan."<sup>29</sup> Note, however, that if a Metropolitan Planning Organization adopts an Alternative Planning Strategy rather than a Sustainable Community Strategy, transportation funding decisions need not be consistent with the Alternative Planning Strategy, because as stated earlier the Alternative Planning Strategy does not become a part of the Regional Transportation Plan.<sup>30</sup>

### **2. CEQA Breaks, Exemptions and Streamlining**

Finally, under SB 375 certain development projects that conform to the Sustainable Community Strategy or Alternative Planning Strategy are either exempt from CEQA or qualify for streamlined review.<sup>31</sup> Two types of projects qualify for CEQA breaks under SB 375—residential or mixed-use projects and transit priority projects.<sup>32</sup> A residential or mixed-use project that conforms to the Sustainable Community Strategy qualifies for CEQA streamlining: the Environmental Impact Report (EIR) for the project does not have to cover growth-inducing

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<sup>27</sup> *Id.*

<sup>28</sup> Higgins, *supra* note 19, at 9. Note however, that the action and financial element of the Regional Transportation Plan do not have to be consistent with the Alternative Planning Strategy, since the Alternative Planning Strategy is not part of the Regional Transportation Plan.

<sup>29</sup> Higgins, *supra* note 19, at 9.

<sup>30</sup> Telephone Interview with Tom Adams, President, California League of Conservation Voters, (April 1, 2009).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

impacts nor does it have to cover project specific or cumulative impacts dealing with climate change.<sup>33</sup> Conversely, a Transit Priority Project may qualify for either a “full CEQA exemption” or a streamlining if it meets certain criteria: (1) contains at least 50% residential use; (2) has minimum density of 20 units per acre; (3) the commercial portion of the project has a floor-area ratio of 0.75; and (4) is located within one-half mile of either a rail stop, a ferry terminal, or a bus line.<sup>34</sup>

#### **D. What SB 375 Fails To Do**

That’s what SB 375 purports to do. What does it fail to do? Since SB 375 was the result of an unusual compromise that brought together a variety of diverse interests, most of the mandatory requirements or “teeth” contained in earlier versions of the bill were stripped out. Instead, the final bill represents “a hodgepodge of different provisions that advance the respective goals of the various constituent groups.”<sup>35</sup> The specific disclaimer language that was inserted into the bill at the behest of these groups includes that SB 375—

1. Is purely incentive based and does not depend on any regulatory action for ultimate success.<sup>36</sup>
2. Does not grant land use power to the Metropolitan Planning Organizations to implement the development pattern within the Sustainable Community Strategy and thus explicitly retains land use authority with the cities and counties.
3. Does not require a local government’s land use policies and regulations to be consistent with the regional Sustainable Community Strategy/Alternative Planning Strategy.<sup>37</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> Adams Telephone Interview, *supra* note 30.

<sup>35</sup> Real Estate and Construction Law Blog, *supra* note 14.

<sup>36</sup> Fulton, California Planning & Development Report, *supra* note 12.

<sup>37</sup> *Id.*

4. Does not require transportation-funding decisions to be consistent with the Alternative Planning Strategy because the Alternative Planning Strategy does not become a part of the Regional Transportation Plan.<sup>38</sup>
5. Does not alter the current regional planning structure, and thus it is not the state but local officials sitting as Metropolitan Planning Organization board members that make the transportation funding decisions.<sup>39</sup>
6. Limits CARB's role in the approval of the Sustainable Community Strategy or Alternative Planning Strategy to merely accepting or rejecting the Metropolitan Planning Organizations determination that the plan is sufficient to meet the reduction targets and gives CARB no authority to interfere with local decision making.<sup>40</sup>
7. Provides no penalties for a region's failure to comply with its Sustainable Community Strategy.<sup>41</sup>

\*\*\* Despite its express limitations, SB 375 has been labeled by Governor Schwarzenegger, as the most sweeping revision of land use policies since 1970's CEQA.<sup>42</sup> Proponents state: "SB 375 will be responsible for reshaping the face of California's communities into more sustainable, walkable communities, with alternative transportation options and increased quality of life."<sup>43</sup> It is appropriate, however, to question whether in light of the above listed concessions and compromises, the bill is as strong as it is advertised to be. SB 375 does not impose penalties on local or regional governments and thus is purely incentive based with transportation funding and

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<sup>38</sup> Adams Telephone Interview, *supra* note 30.

<sup>39</sup> Fulton, Planning and Development Report, *supra* note 12.

<sup>40</sup> Higgins, *supra* note 19, at 7.

<sup>41</sup> Regional Change, <http://regionalchange.wordpress.com/2009/02/17/sb-375-the-solution-for-regional-planning/> (Feb. 17, 2009).

<sup>42</sup> Fulton, Planning and Development Report, *supra* note 12.

<sup>43</sup> Office of the Governor, *supra* note 1.

CEQA relief constituting “the carrot dangled in front of cities and counties to conform their general plans to the strategy.”<sup>44</sup>

### **III. Discussion**

The first part of this paper will discuss whether this carrot is sufficient to achieve the purported goals of SB 375, or whether without more, failure to attain GhG reduction is inevitable. The second part of this paper will focus on the governance structure utilized under the bill and whether the potential for horse-trading that it permits will create an insurmountable hurdle to attaining reduction goals. Accordingly, the first two parts of this paper will focus on the internal constraints of the bill and the consequences of such constraints to the ultimate goal of GhG reduction. The third part of this paper will focus on the external constraints to attaining the reduction goals advanced within the bill including practical and market constraints. Once these constraints are identified, they will be analyzed to determine their likely impact, whether they indeed present an insurmountable barrier, and methods to reduce their impact. Finally, the fourth part of this paper will discuss requisite action by the state to overcome these constraints and whether the state has pursued such action since the enactment of SB 375.

#### **A. Incentive Based Approach**

In enacting SB 375 to promote smart growth principles, California took an incentive based approach rather than a statewide approach of regulatory reforms such as that which had been successfully implemented in Oregon and Florida. In Oregon, metropolitan regions were required to create urban growth boundaries under state law; in Florida, local governments in each county are required to submit their comprehensive plans to the state for review and approval.<sup>45</sup> In the

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<sup>44</sup> Abott & Kindermann, *supra* note 9.

<sup>54</sup> FULTON, *supra* note 7, at 296.

early stages of the bill such a regulatory approach was considered.<sup>46</sup> Under this approach cities had to conform their general plans to the Sustainable Community Strategy and accordingly did not retain land use authority. However, such a regulatory approach, although initially envisioned as a remote possibility, is a political impossibility in California.<sup>47</sup> California is not Oregon or even Florida; it is the largest state in the nation where a uniform set of state laws must apply in vastly diverse growth and development contexts “from urban Los Angeles to rural Susanville.”<sup>48</sup> California’s vast size and complexity has made further state control of land use politically unimaginable.<sup>49</sup> It is therefore apparent that a top down state knows best approach was not possible under SB 375.

But this argument is not convincing in and of itself unless the bill creates other benefits since if it achieves nothing, its death is of no consequence. Proponents argue that the bill indeed has many benefits even in the absence of mandates.<sup>50</sup> The transportation and land use planning arenas have been functioning independently from one another for a long period of time and SB 375 requires them to finally interact and coexist; this is a great achievement.<sup>51</sup> Additionally, the processes employed under the bill are important because they help strengthen the land use planning process at the regional level.<sup>52</sup> Finally, the bill also serves as an attempt at a new and innovative legislative model; a model which other states and even the federal government are now seriously considering. For example, at the Florida Climate Conference Summit, the now deceased Nick Bollman, a prominent leader of regionalism, claimed that Florida could not

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<sup>46</sup> Telephone Interview with Bill Craven, Consultant, Senate Natural Resources & Water Committee, (March 24, 2009).

<sup>47</sup> *Id.*

<sup>48</sup> FULTON, *supra* note 7, at 297.

<sup>49</sup> *Id.*

<sup>50</sup> Craven Telephone Interview, *supra* note 46.

<sup>51</sup> *Id.*

<sup>52</sup> Adams Telephone Interview, *supra* note 30.

reduce its overall emissions by implementing clean car regulations without also becoming more efficient with land use and transportation, and he cited SB 375 to make his argument.<sup>53</sup> In addition, Oregon has passed a bill similar to SB 375 labeled House Bill 2001<sup>54</sup> and the Waxman legislation has begun pushing similar concepts at the federal level.<sup>55</sup>

Environmentalists disagree and conclude that not only does SB 375 achieve nothing, it may in fact weaken preexisting policies to fight climate change.<sup>56</sup> The Center for Biological Diversity (CBD) in particular has concluded that the bill gives away too much in the way of CEQA concessions in exchange for aspirational policies.<sup>57</sup> The perspective of the CBD and other environmentalists is discussed in more detail under **Part A(2)** of this discussion, but in brief, they maintain that “SB 375 offers new and substantial exemptions from CEQA analysis of development projects . . . while asking in return only for participation in a voluntary planning process that offers no guarantees of reducing . . . [GhG] emissions from individual projects, municipalities, or the transportation sector.”<sup>58</sup> Therefore, “existing climate change policies were better off without it,”<sup>59</sup> especially in light of the “opportunity cost associated with spending money and time on a very indirect approach.”<sup>60</sup>

This debate is yet unresolved and the question thus remains, is the current incentive based approach sufficient? Or does the future success of SB 375 depend on the utilization of a limited top down approach where the regional Metropolitan Planning Organizations, rather than the

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<sup>53</sup> The Planning Report, *SB 375 Connects Land Use and AB 32 Implementation*, [http://www.planningreport.com/tpr/?module=displaystory&story\\_id=1257&format=html](http://www.planningreport.com/tpr/?module=displaystory&story_id=1257&format=html) (July 2007).

<sup>54</sup> Adams Telephone Interview, *supra* note 30.

<sup>55</sup> Interview with Clark Morrison, Partner, Clark Castle & Nicholson, in S.F., Cal. (April 3, 2009).

<sup>56</sup> Telephone Interview with Matthew Vespa, Senior Attorney, Center for Biological Diversity, (August 17, 2009).

<sup>57</sup> *Id.*

<sup>58</sup> Letter from Matthew Vespa to Speaker of the California State Assembly Karen Bass Re: SB 375 (Aug. 20, 2008).

<sup>59</sup> Vespa Telephone Interview, *supra* note 56.

<sup>60</sup> SB 375 Analysis, Comment 3, [http://info.sen.ca.gov/pub/07-08/bill/sen/sb\\_0351-0400/sb\\_375\\_cfa\\_20070420\\_163218\\_sen\\_comm.html](http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_cfa_20070420_163218_sen_comm.html).

state, retain land use authority? The opinions are mixed. Drafters make two arguments in favor of the incentive based approach taken by the bill. They first argue that land use issues are best addressed at the local rather than the state or regional levels.<sup>61</sup> It is therefore vital that local governments retain this much-guarded authority.<sup>62</sup> Next, they argue that the incentives under the bill are sufficient to get local governments to comply with the Sustainable Community Strategy plans and thus, giving the regional governments land use authority is unnecessary.<sup>63</sup> These arguments are addressed in turn.

### **1. Local Governments Best Equipped to Deal With Land Use Policy**

Proponents of the bill argue that aside from being a political impossibility, taking land use authority away from local governments would have been unwise since local governments are best equipped to deal with land use even when it is tied to a global concern such as climate change.<sup>64</sup> The state, CARB, and even regional Metropolitan Planning Organizations lack the requisite experience in land use and housing fundamentals to make coherent policy decisions in this complex field.<sup>65</sup> Land use is target and infrastructure specific and many local jurisdictions have issues with infrastructure that do not lend themselves to state or national regulation.<sup>66</sup> Additionally, local governments understand their communities' desires and goals and are able to respond more quickly to the needs of their citizens.<sup>67</sup> Land use entails figuring out where schools and businesses will be located and how neighborhoods will look and feel; issues best

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<sup>61</sup> Telephone Interview with Richard Lyon, Senior Legislative Advocate, California Building Industry Association, (April 1, 2009).

<sup>62</sup> *Id.*

<sup>63</sup> Craven Telephone Interview, *supra* note 46.

<sup>64</sup> Craven Telephone Interview, *supra* note 46.

<sup>65</sup> *Id.*

<sup>66</sup> Telephone Interview with Bill Higgins, Legislative Representative (housing and land use), League of California Cities, (August 14, 2009).

<sup>67</sup> Craven Telephone Interview, *supra* note 46.

addressed within the locality.<sup>68</sup> Finally, local government politicians are more accountable than their state and regional counterparts and the local process provides more transparency than state and regional governance structures.<sup>69</sup> Accountability, expertise, transparency and response time are in turn key ingredients to GhG reduction through smart land use planning.<sup>70</sup>

Even assuming local governments are best positioned to deal with land use policy and housing concerns, they may lack the expertise and incentive to effectively deal with GhG reduction.<sup>71</sup> It may be true that CARB, the state, and even regional Metropolitan Planning Organizations are not best equipped to deal with land use, but they are better equipped to deal with climate change and transportation issues. Arguably, it is dealing with these issues that is the crux of the bill.<sup>72</sup> For example, although many stakeholders seem to be focusing on land use as the way to reduce GhG emissions through SB 375, particularly early on, more reduction will be achieved through transportation demand measures than land use policy.<sup>73</sup> “There is a long history [in California] of transportation plans developed at the regional level, often with ambitious projections of infill, compact, and transit-oriented growth.”<sup>74</sup> The challenge, however, has been in keeping localities’ commitment to such programs over time.<sup>75</sup> Currently, SB 375, pursuant to Federal Regulation 450.316(a)(4), fragments power between local and regional governments with the latter retaining power over transportation planning and the former over land use policy.<sup>76</sup> Rather than fragmenting power under the bill, it may have been wise to consolidate these powers within the regional Metropolitan Planning Organizations—the body

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<sup>68</sup> Higgins Telephone Interview, *supra* note 66.

<sup>69</sup> Craven Telephone Interview, *supra* note 46.

<sup>70</sup> *Id.*

<sup>71</sup> Vespa Telephone Interview, *supra* note 56.

<sup>72</sup> *Id.*

<sup>73</sup> Higgins Telephone Interview, *supra* note 66.

<sup>74</sup> Robert T. Dunphy, *U.S. Transit Trends: Time for a Different Outlook?*, URBAN LAND, July 2009 at 32.

<sup>75</sup> *Id.*

<sup>76</sup> 23 CFR 450.316(a)(4).

that is arguably not only best suited to deal with the demands of GhG reduction under the bill, but also more willing to do so than its local counterpart.

Lack of faith in local jurisdictions provides yet another reason that local government is unfit to deal with land use when tied to the global concern of climate change. Indeed, there has already been a “certain amount of foot dragging going on with local officials who don’t think [climate change] is a problem or think it’s someone else’s problem.”<sup>77</sup> Conversely, the state has been more than willing to take requisite action to fight climate change. In fact, action at the state level to reduce GhG was underway even prior to the SB 375’s enactment and thus the argument that the state cannot effectively deal with this issue is without merit.<sup>78</sup> For example, calling for the targets to be met in a voluntary manner was something that CARB was already positioned to do pursuant to AB 32,<sup>79</sup> and CEQA was also emerging as a way to deal with GhG reduction.<sup>80</sup> In sum, it is important “to correct the notion that planning and development are local issues, recognize the national dimensions of local choices, and craft a policy that will reward good choices—and perhaps penalize bad ones.”<sup>81</sup>

## **2. Incentives Under Bill—Sufficient To Cause Change?**

Next, proponents argue that although the bill is “incentive based” in theory, in reality it has coercive elements.<sup>82</sup> There will inevitably be some local governments that refuse to initially follow SB 375 but “slowly transportation dollars will go elsewhere, developers will go elsewhere, housing projects will go elsewhere and these local governments will ultimately need to make changes to comply with the Sustainable Community Strategy in order to get back on

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<sup>77</sup> L.A. Streets Blog, <http://la.streetsblog.org/2009/05/28/locals-continue-attack-on-sb-375-sprawl-bill/> (May 28, 2009).

<sup>78</sup> Vespa Telephone Interview, *supra* note 56.

<sup>79</sup> Vespa Telephone Interview, *supra* note 56.

<sup>80</sup> *Id.*

<sup>81</sup> Dunphy, *supra* note 74 at 32.

<sup>82</sup> Morrison Interview, *supra* note 55; Craven Telephone Interview, *supra* note 46.

track.”<sup>83</sup> The analysis of the bill supports the proposition that it may in fact create mandates: “[w]hile fulfilling the provisions of SB 375 is technically voluntary in many cases, it appears that the prospect of the loss of funds for locally significant transportation projects may create a de facto coercive pressure on local governments.”<sup>84</sup> Thus, although local governments claim to have grasped a great victory in retaining their land use authority, they may have walked out of the negotiation room subject to a new coercive land use regime.<sup>85</sup>

However, these stakeholders may be overly confident in the bill’s purely incentive based approach. First, if a region adopts an Alternative Planning Strategy, rather than a Sustainable Community Strategy, then the funding incentive would be lost.<sup>86</sup> Although repercussions for the adoption of an Alternative Planning Strategy have yet to play out, the potential shift to an Alternative Planning Strategy provides no clear and specific detriment to a Metropolitan Planning Organization.<sup>87</sup> In fact, the potential shift by a Metropolitan Planning Organization to an Alternative Planning Strategy may actually be the preferred route for two reasons: (1) the choice between these regional planning documents is about feasibility; accordingly, Metropolitan Planning Organizations that push too far via the implementation of a Sustainable Community Strategy may find themselves in litigation brought by affected parties;<sup>88</sup> and (2) SB 375 states that inconsistency with an Alternative Planning Strategy is not a significant impact for CEQA purposes.<sup>89</sup>

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<sup>83</sup> Craven Telephone Interview, *supra* note 46.

<sup>84</sup> SB 375 Analysis, Comments Section Paragraph 9(b).

<sup>85</sup> Morrison Interview, *supra* note 55.

<sup>86</sup> Adams Telephone Interview, *supra* note 30.

<sup>87</sup> Morrison Interview, *supra* note 55.

<sup>88</sup> *Id.*

<sup>89</sup> Higgins Telephone Interview, *supra* note 66.

Political pressures, however, may encourage most Metropolitan Planning Organizations to adopt a Sustainable Community Strategy rather than an Alternative Planning Strategy.<sup>90</sup> The Metropolitan Planning Organization board consists of locally elected officials and when more than 50% of your constituents, even in fairly conservative areas, believe more should be done to improve climate change you are not going to turn a blind eye to that.<sup>91</sup> Thus, according to proponents, most Metropolitan Planning Organizations will strive to adopt a Sustainable Community Strategy even in light of the explicit disincentives of doing so. But does the voting public in fact favor action against climate change? A recent PPIC Poll seems to suggest so: 78 percent of Californians and 75 percent of likely voters favor encouraging local governments to change land use and transportation planning so that people would not have to drive as much.<sup>92</sup>

Under the situation where a Metropolitan Planning Organization does indeed adopt an Alternative Planning Strategy thereby rendering the transportation funding incentive void, CEQA relief would need to prove sufficient to fill the gap and motivate local governments to comply with the Alternative Planning Strategy. Proponents believe the CEQA incentives will indeed fill the gap.<sup>93</sup> In fact, representatives from the CBD argue that the CEQA incentives prove too much.<sup>94</sup> The CBD was the sole environmental group to oppose the bill arguing that in light of the current efforts and mechanisms to address the issue of climate change, “the elimination of mandatory existing protections under CEQA is unwarranted and counterproductive.” Representatives from the building industry and land use attorneys disagree with the CBD’s position. These stakeholders argue that because of their limited scope and the

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> PPIC Statewide Survey (2009), [http://www.ppic.org/content/pubs/survey/S\\_709MBS.pdf](http://www.ppic.org/content/pubs/survey/S_709MBS.pdf) at 15; see attached Exhibit A.

<sup>93</sup> Craven Telephone Interview, *supra* note 46.

<sup>94</sup> Letter from Vespa, *supra* note 58.

long list of caveats, the eventual impact of the CEQA provisions may not be as significant as some believe.<sup>95</sup> The CEQA incentives are not likely to produce a lot of projects and meeting the definition of a Transit Priority Project will be nearly impossible.<sup>96</sup> In sum, either because they are too strong or too weak, the CEQA incentives under the bill may have little impact on GhG reduction.

Consequently, while progress is being made with SB 375, “proponents and opponents seem to agree on one point: there is still more to be done.”<sup>97</sup> SB 375 is a great way to initiate climate change policy, but a greater demand from local governments will be required in the future<sup>98</sup> and a purely incentive based approach will not be sufficient. That is not to say that an incentive based approach can never be sufficient as both a first and last resort. The use of government investment money to promote smart growth began in Maryland. Seeking an alternative to the traditional regulatory approach used in Oregon and Florida, Governor Paris Glendening turned to financial incentives rather than regulatory reform as a way to promote smart growth in Maryland.<sup>99</sup> In 1997, Governor Glendening engineered the passage of a law that created “Priority Funding Areas” in existing urban and suburban areas and directed state infrastructure funds to those areas.<sup>100</sup> As a result, local governments could direct growth wherever they pleased, but they would not get state infrastructure funds outside the Priority Funding Areas.<sup>101</sup> Under the Maryland law, although local governments may recommend priority-funding areas, it is the Maryland Office of Planning, a state-planning department, which administers these

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<sup>95</sup> Fulton, Planning and Development Report, *supra* note 12.

<sup>96</sup> Morrison Interview, *supra* note 55.

<sup>97</sup> Regional Change, *supra* note 41.

<sup>98</sup> *Id.*

<sup>99</sup> FULTON, *supra* note 7, at 297.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

programs and ultimately designates the areas.<sup>102</sup> This smart growth policy has made a significant difference in Maryland.<sup>103</sup> Will the incentive based approach utilized by California under SB 375 attain similar success? In light of the regional governance structure employed by SB 375, such success seems doubtful.<sup>104</sup>

## **B. Regional Metropolitan Planning Organizations**

Unlike the structure employed in Maryland, under SB 375 it is the regional Metropolitan Planning Organization, and not the state, that makes transportation funding decisions based on whether the local governments anti sprawl efforts are sufficient.”<sup>105</sup> Under SB 375 it was never contemplated that the state would make these transportation-funding decisions.<sup>106</sup> Regional Transportation Plans have long been a part of the transportation-planning horizon in California and under pre-375 law Metropolitan Planning Organizations have the authority to both create these plans and ensure compliance with them.<sup>107</sup> To shift that authority from the Metropolitan Planning Organizations to state bureaucrats far removed in Sacramento would have been politically impossible.<sup>108</sup>

Although the strict regional approach purportedly adopted under SB 375 may indeed prove meaningful in achieving the GhG reduction goals of SB 375, it is apparent under the plain language of the bill that SB 375 fails to take this purported route.<sup>109</sup> Not only does it fail to change the existing Metropolitan Planning Organization structure under which the regional board

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<sup>102</sup> Maryland Department of Planning, *Smart Growth Priority Funding Areas Act of 1997*, <http://www.mdp.state.md.us/fundingact.htm>.

<sup>103</sup> FULTON, *supra* note 7, at 297.

<sup>104</sup> Fulton, California Planning & Development Report, *supra* note 12.

<sup>105</sup> *Id.*

<sup>106</sup> Craven Telephone Interview, *supra* note 46.

<sup>107</sup> Higgins, *supra* note 19, at 4.

<sup>108</sup> Lyon Telephone Interview, *supra* note 61.

<sup>109</sup> Fulton, California Planning and Development Report, *supra* note 12.

consists entirely of local government officials, but it also fails to penalize these regional Metropolitan Planning Organizations for failing to meet the reduction goals.

### **1. Existing Regional Governance Structure**

SB 375 employs the existing Metropolitan Planning Organization structure under which the regional board consists entirely of local government officials.<sup>110</sup> It is unlikely that local government officials sitting as regional planning board members will “pull the trigger” on each other.<sup>111</sup> Take the Southern California region for example. In 2004, in an effort to meet the region’s many challenges associated with growth, the Metropolitan Planning Organization for the Los Angeles region—Southern California Association of Governments (SCAG)—undertook an approach similar to SB 375 titled the Compass Growth Vision Project.<sup>112</sup> This project attempted to provide a critical link between land use and transportation planning.<sup>113</sup> However, in 2008, when SCAG approved its Regional Transportation Plan, it completely ignored the Vision Project and instead approved all projects consistent with the local government general plans.<sup>114</sup> Thus, the locally elected SCAG board members refused to follow a regional approach and instead proceeded with “business as usual.”<sup>115</sup>

This commitment by Metropolitan Planning Organizations to “business as usual” is also readily apparent from the conduct of individual board members. The most public attack of SB 375 has come from Ty Schuiling, planning director for San Bernardino Associated Governments

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<sup>110</sup> Adams Telephone Interview, *supra* note 30.

<sup>111</sup> Fulton, California Planning and Development Report, *supra* note 12.

<sup>112</sup> Lynn Harris, *Creating New Partnerships: Southern California Implements the Compass Growth Vision*, Western City, Dec. 2009, available at <http://www.cacities.org/index.jsp?zone=wcm&previewStory=24350>.

<sup>113</sup> *Id.*

<sup>114</sup> Adams Telephone Interview, *supra* note 30.

<sup>115</sup> *Id.*

(SANBAG).<sup>116</sup> Schuiling challenged the idea that “land use changes are required to meet the state’s GhG reduction goals because the goal cannot be met by making cleaner vehicles as CARB has suggested.”<sup>117</sup> This example seems to support the notion that “Metropolitan Planning Organizations are not likely to support measures that limit the discretion of cities and counties”<sup>118</sup> regardless of whether those measures would be optimal in achieving the goals of SB 375. Drafters of the bill acknowledge the existence of this self-interested structure and the potential for horse-trading that it permits; nonetheless they still vehemently defend it.<sup>119</sup> Their defense is two fold: (1) first, CARB’s interjection into the process under SB 375 will limit or eliminate the potential for back scratching;<sup>120</sup> and (2) second, this structure is not a weakness of the bill but rather one of its strengths as it requires local government officials, for the first time, to get in a room together and focus not only on their own boundaries, but also the entire region.<sup>121</sup> These arguments will be respectively addressed below.

Proponents argue that because the Sustainable Community Strategy has to be ultimately approved by CARB, local governments cannot continue business as usual through mutual back scratching.<sup>122</sup> Two counter-arguments can be raised to this proposition however. First, although CARB does indeed have authority to approve the Sustainable Community Strategy, its role in reviewing the plan is expressly limited; it may only “accept or reject the Metropolitan Planning Organization’s determination that the plan would, if implemented, achieve the regional GhG emission reduction target established by CARB.”<sup>123</sup> CARB must also work within strict

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<sup>116</sup> William Fulton, California Planning & Development Report, <http://www.cp-dr.com/node/2329> (May 27, 2000, 08:35 PST).

<sup>117</sup> *Id.*

<sup>118</sup> Higgins, *supra* note 19, at 9.

<sup>119</sup> Adams Telephone Interview, *supra* note 30; Craven Telephone Interview, *supra* note 46.

<sup>120</sup> Adams Telephone Interview, *supra* note 30.

<sup>121</sup> Craven Telephone Interview, *supra* note 46.

<sup>122</sup> Adams Telephone Interview, *supra* note 30.

<sup>123</sup> SB 375 Analysis, *supra* note 84, at ¶ 18.

constraints as it must complete its review of the Sustainable Community Strategy within 60 days and lacks the ability to conditionally approve a Sustainable Community Strategy or “otherwise interfere in any way with local decision making.”<sup>124</sup>

Second, CARB’s review of a Sustainable Community Strategy is also implicitly limited because a Sustainable Community Strategy is ultimately a land use plan, an area that CARB knows little about. At an October 2008 conference, CARB Chair Mary Nichols indicated that her board lacks substantial expertise in land use issues, and should not be viewed as the State of California’s policy leader in that subject area.<sup>125</sup> She elaborated that CARB has its hands full with AB 32 and accordingly has a limited role under SB 375.<sup>126</sup> This is a fact that proponents can concede to; they acknowledge that the air board lacks staff or background expertise in either land use or transportation planning.<sup>127</sup> In light of these counter-arguments it seems likely that CARB may defer to the decisions and conclusions of the regional Metropolitan Planning Organizations. If this hypothesis proves accurate, then proponents’ dependence on CARB’s role as a means to block self-interest seems unfounded.

Proponents’ next argue that CARB’s sole authority in setting GhG reduction targets provides yet another roadblock to potential back scratching. However, it is apparent from the text of the bill that this may not be as strong an impediment as anticipated. First, such authority is expressly weakened by two provisions of the bill: (1) CARB must exchange technical information with the Metropolitan Planning Organization prior to setting the regional target; and (2) each Metropolitan Planning Organization may “recommend [its own] target for the

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<sup>124</sup> Higgins, *supra* note 19, at 7.

<sup>125</sup> Interview with Richard Frank, Lecturer in Residence, Berkeley Law, in Berkeley, Cal. (Mar. 18, 2009).

<sup>126</sup> *Id.*

<sup>127</sup> Adams Telephone Interview, *supra* note 30.

region.”<sup>128</sup> Second, although CARB sets the GhG reduction targets, it only does so after appointing a Regional Targets Advisory Committee to recommend factors and methodologies to be used in setting these targets.<sup>129</sup> The Regional Targets Advisory Committee is made up of representatives from “the League of California Cities, California Association of Counties, Metropolitan Planning Organizations, affected air districts, planners, homebuilders, affordable housing organizations, environmental justice organizations and others.”<sup>130</sup> These various groups represent the same stakeholders that were brought together under the bill itself. The unique compromise struck between these groups during the drafting phase of the bill resulted in the adoption of the very provisions and concessions that stripped the teeth of the bill. Because these diverse interests must again strike a compromise when recommending reduction targets, it seems likely that these recommendations will again advance the respective goals of these stakeholders and in turn hinder the goals of SB 375. The bill mandates CARB to take these potentially tainted recommendations into consideration prior to setting the regional targets and CARB may not simply ignore them.<sup>131</sup>

In fact, this hypothesis has already begun to prove true. The building industry and local governments have been encouraging CARB to take a go slow approach and not expect too much from land use, housing, and transportation between now and 2020; rather CARB should realistically expect GhG reduction benefits from land use and transportation around 2035.<sup>132</sup> The recent recession has only added further fuel to the fire by providing these stakeholders with yet another excuse as to why CARB should set lower than expected reduction targets: “there needs to be a balance between trying to attain a measure of GhG reduction through land use but also

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<sup>128</sup> Higgins, *supra* note 19, at 3.

<sup>129</sup> SB 375 Analysis, *supra* note 84, at ¶ 2.

<sup>130</sup> Higgins, *supra* note 19, at 8.

<sup>131</sup> SB 375 Analysis, *supra* note 84, at ¶ 3.

<sup>132</sup> Lyon Telephone Interview, *supra* note 61.

recognizing that we do not want to stifle the markets just as they are coming back in 2011 and 2012.”<sup>133</sup> Additionally, Regional Targets Advisory Committee representatives have also begun to allow concerns other than the environment taint their recommendations. For example, two Southern California appointees to the Regional Targets Advisory Committee, Richard Katz and Art Leahy, have made it clear that market forces and economics should be seriously explored to achieve reduction objectives and “we cannot simply rely on regulatory approaches.”<sup>134</sup> As a result, CARB’s “sole” authority to set the reduction targets should not be interpreted literally and the final targets will be influenced by interests that are in fact much broader.

## **2. Lack of Penalties on the Regional Metropolitan Planning Organization**

SB 375 also fails to place mandates upon the regional Metropolitan Planning Organizations and nowhere in the legislation’s text is there any note of penalties for a region’s failure to comply with their Sustainable Community Strategy. Without such penalties, it is questionable whether SB 375 is a sufficient effort to attack climate change.<sup>135</sup> Senator Steinberg, the bill’s author, has admitted that the lack of punishments for a region’s failure to meet the goals set forth in the Sustainable Community Strategy was “intentional.”<sup>136</sup> Steinberg and other proponents maintain faith in the ability of local officials sitting as regional board members to consider climate change concerns transcending their borders;<sup>137</sup> this optimism is premised on the belief that there are “multiple dimensions to how local government officials act and vote when they are put into a room with a much larger focus than their own city boundaries.”<sup>138</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> The Planning Report, [http://www.planningreport.com/tpr/?story\\_id=1424&format=html&module=displaystory](http://www.planningreport.com/tpr/?story_id=1424&format=html&module=displaystory) (May 2009).

<sup>135</sup> Regional Change, *supra* note 41.

<sup>136</sup> *Id.*

<sup>137</sup> Craven Telephone Interview, *supra* note 46.

<sup>138</sup> *Id.*

Tom Adams, President of the California League of Conservation Voters and one of the key advocates and drafters of the legislation, aligns himself with these optimists and believes that of the four most populated regions (San Diego, Southern California, Sacramento and the Bay Area) it is very likely that three of the regions (excluding Southern CA) will make an effort to achieve the regional targets within the Sustainable Community Strategy.<sup>139</sup> Adams extends his optimism to the various California cities as well. He points to statistics on the governor's office of planning and research website providing that prior to the enactment of SB 375, 157 of the 536 general purpose local governments in California had taken steps to conform their general plan to the Regional Transportation Plan. Adams believes that SB 375 will accelerate this momentum considerably.<sup>140</sup> Statistics from the recent PPIC poll mentioned above and attached as Exhibit A, indicating that voters may be pushing their local governments to change land use and transportation planning, seem to further support Adams' predictions. However, the trend of compliance cited by Adams may not continue much longer given the recent recession; two reasons lead to this conclusion: (1) the budget cuts on the state level have rendered local governments unable to continue compliance efforts—more on this in the fourth and final part of this paper; and (2) residents' support for urgent action on climate change has slipped and a partisan divide on the issue has widened “in a year that has seen both a worsening recession and state budget crisis.”<sup>141</sup>

Additionally, given California's diverse growth and development contexts, it is inevitable that some areas will refuse to comply. Making the matter worse is the fact that those regions least able or willing to comply are the ones that need reforms the most. For example, according to the PPIC Poll, although residents in the San Francisco Bay Area are more likely than others to

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<sup>139</sup> Adams Telephone Interview, *supra* note 30.

<sup>140</sup> *Id.*

<sup>141</sup> PPIC Statewide Survey, *supra* note 92 at 5.

say that the federal and state governments are not doing enough to address global warming,<sup>142</sup> it is the Central Valley, Los Angeles, and Inland Empire residents who are more likely to say air pollution is a big problem in their regions.<sup>143</sup> The statistics cited by Adams, however, seem to refute the proposition that areas like the Central Valley and LA will unlikely comply. Although a majority of the 157 cities that have already taken steps to align their general plans with the preferred land use and transportation scenario set out in the region's blueprint are bay area cities, they also include cities as diverse as Elk Grove, Fairfield, Bakersfield, Chowchilla and Patterson.<sup>144</sup>

Finally, if California's history is the standard by which the likely conduct of regional and local governments under SB 375 is to be measured, then such an optimistic view has little basis.<sup>145</sup> Local Governments, especially cities, often strive to serve only their own constituents and borders.<sup>146</sup> Consequently, lack of regional coordination has been a common theme of planning throughout California, which has led to fragmented localities and the need for SB 375 in the first place.<sup>147</sup> Regional governments have shown similar resistance to smart growth in the past. Take SCAG's resistance to the Compass Growth Vision Project described above as an example. Accordingly, in light of the recent recession, California's history, and the future animosity the bill is likely to face, it seems unlikely that an approach that fails to place penalties on the regional Metropolitan Planning Organizations will be sufficient to attain the underlying goals of SB 375.<sup>148</sup>

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<sup>142</sup> PPIC Statewide Survey, *supra* note 92 at 23.

<sup>143</sup> *Id.*; see attached Exhibit B

<sup>144</sup> THE CALIFORNIA PLANNERS' BOOK OF LISTS (2009), [http://www.co.kern.ca.us/planning/pdfs/2009\\_PBOL.pdf](http://www.co.kern.ca.us/planning/pdfs/2009_PBOL.pdf) at 118.

<sup>145</sup> Regional Change, *supra* note 41.

<sup>146</sup> FULTON, *supra* note 7, at 69.

<sup>147</sup> Peter Calthorpe, Class Presentation: *Smart Growth & Planning for Sustainable Communities*. Legal And Business Aspects of Real Estate Development (Feb. 19, 2009).

<sup>148</sup> Regional Change, *supra* note 41.

### C. External Barriers to Attaining the GhG Reduction Goals

Although the structure of SB 375 presents plenty of hurdles to attaining its GhG reduction goals, the hurdles do not end there. In addition to the bill's internal constraints, external market and practical constraints will make attaining these aspirational GhG reduction goals quite a task. In light of these constraints, without further action on the part of the state SB 375 will falter.

#### 1. Market and Practical Constraints to Infill Development

SB 375 has been deemed the “smart growth bill”<sup>149</sup> but that begs the question: What is smart growth? “Since the term smart growth came into common usage in the 1990’s, it has been appropriated by practically everybody in the planning and development business to mean whatever they want it to mean.”<sup>150</sup> To provide clearer guidance on the issue, the Smart Growth of America Coalition recently laid out ten principles of smart growth.<sup>151</sup> Communities throughout California have increasingly utilized these principles as the definition of smart growth.<sup>152</sup> Of these ten principles, SB 375 seems to focus exclusively on the last two--i.e. infill development that will require new construction to be erected in existing communities and with more compact building design. In addition, the bill also strives to encourage development to surround public transit corridors—i.e. bus stops and rail lines.<sup>153</sup>

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<sup>149</sup> Kevin Yamamura, *Governor Signs Anti-Sprawl Bill*, Sac. Bee, Oct. 1, 2008, <http://www.sacbee.com/arnold/story/1278949.html>.

<sup>150</sup> FULTON, *supra* note 7, at 295.

<sup>151</sup> *Id.* These ten principles include: (1) creating a range of housing opportunities and choices; (2) creating walkable neighborhoods; (3) encouraging community and stakeholder collaboration; (4) fostering distinctive, attractive communities with a strong sense of place; (5) making development decisions predictable, fair, and cost effective; (6) mixing land uses; (7) preserving open space, farmland, natural beauty and critical environmental areas; (8) providing a variety of transportation choices; (9) strengthening and directing development toward existing communities; and finally, (10) taking advantage of compact building design. *Id.* at 295-96.

<sup>152</sup> *Id.*

<sup>153</sup> Felicity Barringer, *California Moves on Bill to Curb Sprawl and Emissions*, N.Y. TIMES, Aug. 29, 2008, at A12.

Accordingly, SB 375 purports to define smart growth as dense, transit-oriented development—a definition that is much more narrow than that adopted in other parts of the country<sup>154</sup> and, as the building industry argues, too narrow to be marketable and practicable. Because the economics of the market and consumer preferences must be considered in any state growth strategy that attempts to meet the states GhG reduction goals,<sup>155</sup> alternative approaches should be considered as they are critical to accommodating the growth needs of the state.<sup>156</sup> Environmentalists disagree, however, arguing that although constraints to infill development do exist, they are not insurmountable.<sup>157</sup> This debate between the building industry and the environmental community is ongoing and the primary arguments advanced by each side of this debate will be addressed below.

From a market standpoint not everyone wants to reside in urban infill development and the bill needs to recognize the realities of what goes on in the market place in terms of location decisions made by individuals and families.<sup>158</sup> There is certainly a demographic group and economic factors that are encouraging and allowing more urban infill development, but not all development will occur by way of infill because the public does not want it so.<sup>159</sup> Some people may want to live in a condo by the train tracks but most people, particularly those with families, “want a yard for their kids to play in; they want a lawn and a garden, they want a little distance between themselves and their neighbor.”<sup>160</sup> In fact, according to statistics in the last fifteen years, the middle class citizens of child bearing age have been consistently moving out of San

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<sup>154</sup> FULTON, *supra* note 7, at 9

<sup>155</sup> Lyon Telephone Interview, *supra* note 61.

<sup>156</sup> *Id.*

<sup>157</sup> Vespa Telephone Interview, *supra* note 56.

<sup>158</sup> Lyon Telephone Interview, *supra* note 61.

<sup>159</sup> Morrison Interview, *supra* note 55.

<sup>160</sup> Sergeant York, *SB 375 – Central Planning Trashed by McClintock*, Red County, (2008), <http://www.redcounty.com/placercountyca/2008/09/sb-375-central-planning-a-bill/>

Francisco to other local jurisdictions throughout the bay area and Sacramento.<sup>161</sup> These relocation decisions are guided by more affordable housing choices and a better environment and school system for their children.<sup>162</sup> Thus, the bill should accommodate these preferences of the public.

However, cities have made a long climb back since the 1970's and 1980's.<sup>163</sup> Most Americans now live in single-family suburban houses that are segregated from work, shopping and entertainment; but it is urban life, almost exclusively, that is culturally associated with excitement, freedom, and diverse daily life and the real-estate market has begun to react.<sup>164</sup> Many consumers have already begun demanding different options to the one-size-fits-all drivable sub-urbanism.<sup>165</sup> According to recent consumer research by Jonathan Levine of the University of Michigan and Lawrence Frank of the University of British Columbia, roughly one in three homeowners would prefer to live in urban infill areas.<sup>166</sup> Demographic changes in the country may further weaken preferences for car-based suburban living.<sup>167</sup> By 2000, families with children comprised only a third of all households and by 2025 they will be closer to a quarter.<sup>168</sup> The new generation of citizens as compared to the baby boomer generation are starting families later and having fewer children.<sup>169</sup> These changes will likely push against suburban living preferences.<sup>170</sup> In addition, the boomers themselves are becoming empty-nesters

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<sup>161</sup> Lyon Telephone Interview, *supra* note 61.

<sup>162</sup> *Id.*

<sup>163</sup> Christopher B. Leinberger, *The Next Slum?*, THE ATLANTIC, March 2008, at 72.

<sup>164</sup> *Id.*

<sup>165</sup> Christopher B. Leinberger, Metropolitan Land Strategist & Developer, <http://www.cleinberger.com/AdminHome.asp?ArticleID=208> (last visited Feb. 17, 2010).

<sup>166</sup> *The Next Slum*, *supra* note 163 at 74.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

and many have voiced a preference for urban living.<sup>171</sup> Accordingly, by 2025 the U.S. will contain about as many single person households as families with children<sup>172</sup> which in turn will weaken preferences for suburban as opposed to urban living. Additionally, although urban living today carries an enormous price premium, as gasoline and heating costs continue to rise conventional suburban living may not be much of a bargain in the future.<sup>173</sup> Moreover, extreme traffic congestion that afflicts most of California has altered everyone's sense of what is acceptable.<sup>174</sup> "The drive required to reach a new single-family subdivision is so long that many residents—affluent and middle class—are willing to live in smaller housing units or different types of neighborhoods if they can avoid commuting."<sup>175</sup>

Even more so than market constraints, however, practical constraints may make the goal of accommodating all future growth in infill an utter impossibility. From a practical standpoint there is insufficient infill space in California to accommodate the demand for new housing that will be instigated by future population growth.<sup>176</sup> "[I]nfill can't happen fast enough or at a large enough scale to make an immediate difference."<sup>177</sup> Even if every prospective homebuyer and renter in America decided tomorrow to return to the city, "the supertanker of population and suburban development would steam on for years before making much of a course correction."<sup>178</sup> Even in metropolitan areas with successful records of infill development, infill as a percentage of total growth remains low.<sup>179</sup> Portland, Oregon for example, a jurisdiction dedicated to "smart growth," projects in its metropolitan regional plan that 70 percent of near term growth will be on

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> FULTON, *supra* note 7, at 298

<sup>175</sup> *Id.*

<sup>176</sup> Jim Heid, *Greenfield Development Without Sprawl: The Role of Planned Communities*, URBAN LAND, (2004) at 1.

<sup>177</sup> *Id.* at 2

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

greenfield land versus built up areas.<sup>180</sup> Other U.S. jurisdictions predict numbers closer to 90%.<sup>181</sup> In sum, although there is statistical evidence of a “return to the cities” movement among retirees, empty nesters, and young professionals, which is transforming older neighborhoods and business centers in many cities,<sup>182</sup> this trend will capture only a relatively small proportion of future development.<sup>183</sup>

While the largest practical constraint is simply a lack of infill sites to house the projected populations, there are also other more intrinsic limits to infill: (1) especially in inner-ring suburbs, land assembly may involve hundreds of small landowners and entitlement may take many more years; (2) land prices in close-in locations often are too high to support affordable market-rate housing;<sup>184</sup> and (3) financing for infill is often more difficult to obtain.<sup>185</sup> From the perspective of a bank, infill development has always been seen as a riskier type of development because of the structure of the loan payback schedule.<sup>186</sup> For example, when developing in a suburban area, the developer will pay down the bank loan as units are sold—i.e. get financing for the first phase and as phase one units are constructed and sold off the developer can pay down the initial loan and get additional financing for phase two construction and so on.<sup>187</sup> In the realm of infill development, however, a bank is lending on the entire project and not just on a particular phase.<sup>188</sup> This structure, in turn, becomes very risky for the bank.<sup>189</sup> The economic downturn has only intensified the hurdles to obtaining financing for future development generally and infill

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Telephone Interview with Richard Lyon, Senior Legislative Advocate, California Building Industry Association, (August 14, 2009).

<sup>186</sup> Lyon Telephone Interview, *supra* note 185.

<sup>187</sup> William Falik, Legal and Business Aspects of Real Estate Development, Classroom Lecture at UC Berkeley School of Law (Boalt Hall), (Feb. 19, 2009).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

development in particular.<sup>190</sup> In light of these practical constraints, SB 375 should look to more than just infill to meet its GhG reduction goals.

However, the whole purpose of SB 375 was to break preexisting development patterns in California and thus it is expected that practical constraints will exist.<sup>191</sup> For decades growth in Northern California has failed to follow the smart growth/infill model, with most building occurring outside the nine-county bay area region.<sup>192</sup> “Those who want to own a home look farther and farther out, a pattern that necessitates ever longer drives to work, and car trips for most shopping and entertainment outing.”<sup>193</sup> The climate crisis is so severe that California, or the rest of the world for that matter, cannot continue with “business as usual” and avoid breaking sprawl patterns merely because doing so would be tough as a practical matter; not doing so would be devastating as an environmental matter.<sup>194</sup> Accordingly, California should strive to take advantage of every available opportunity to reduce emissions without allowing the inevitable difficulties that will be encountered impede such progress.<sup>195</sup>

Further, the purpose of the CEQA incentives incorporated within the bill was to alleviate the very concerns about the practicability of infill development.<sup>196</sup> In fact, as mentioned in section **III(A)(2)** of this paper, the CBD ultimately opposed the bill because the strength of the CEQA concessions outweighed the mandates of the bill.<sup>197</sup> Finally, the lack of space argument posited by the building industry and other stakeholders seems to lack merit.<sup>198</sup> The CBD has viewed and commented on general plans for various preexisting cities and has concluded that

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<sup>190</sup> *Id.*

<sup>191</sup> Temple, *supra* note 2.

<sup>192</sup> Temple, *supra* note 2.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Vespa Telephone Interview, *supra* note 56.

<sup>196</sup> *Id.*

<sup>197</sup> Letter from Vespa, *supra* note 58.

<sup>198</sup> Vespa Telephone Interview, *supra* note 56.

these cities have sufficient space to accommodate California’s growing population within a 20 to 30 year horizon.<sup>199</sup> Accordingly, what it comes down to is how each community views its sustainability<sup>200</sup> and although meeting the reduction targets means making hard choices, these choices may be necessary for the future of this planet.

## 2. Alternatives To Infill

Although there is no clear victor in this debate of whether smart growth under SB 375 should be limited to infill development one thing is clear: it is unlikely that all future development can be infill. “In lifestyle terms, infill . . . is clearly a strong niche market” but “California will remain an auto-oriented society for many years to come.”<sup>201</sup> What has occurred in Sacramento provides further support that a bill like SB 375 cannot bring an end to all suburban development. SB 375 was modeled after the Blueprint: a plan adopted by the Sacramento region that promotes compact, mixed-use development and more transit choices as an alternative to low density development.<sup>202</sup> Although those involved with the Blueprint have deemed it a success they concede that even in Sacramento “[d]on’t look for an end to suburbs and single-family homes in popular school districts [because] you can’t do it on infill alone.”<sup>203</sup> Accordingly, although the thrust of SB 375 is toward infill, given this reality it is prudent that proponents of SB 375 and other stakeholders look seriously at two promising alternatives to infill development: (1) smart greenfield development; and (2) suburban revitalization. Both of these alternatives are analyzed below.

Proponents of smart greenfield development concede that there will be challenges to this type of development but point to abundant evidence “that public will and private self interest can

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> FULTON, *supra* note 7, at 305.

<sup>202</sup> Sacramento Region Blue Print, [www.sacregionblueprint.org](http://www.sacregionblueprint.org) (last visited Feb 22, 2010).

<sup>203</sup> Sac. Bee, <http://www.sacbee.com/736/story/1285305.html>.

end greenfield development's attachment to sprawl."<sup>204</sup> Greenfield development retains much of the same potential for smart growth as infill development.<sup>205</sup> However, getting to smart greenfield development is no easy task and the key ingredient is the success with which each development connects with the others, and "the symbiotic role each plays in making the region greater than the sum of its parts."<sup>206</sup> But how is that to be done? Creating a vibrant regional form is one thing, but to actually realize that goal "when the realities of landownership, [land use control], sensitive resources, or a reluctant populace come to bear" is quite another.<sup>207</sup>

Proponents argue that there are three prerequisites to sprawl-free greenfield development and addressing one or even two of these elements is simply not sufficient and all three need to be incorporated to ensure success.<sup>208</sup> These three prerequisites include: (1) green infrastructure; (2) mobility and access; and (3) livability and lifestyle choices.<sup>209</sup>

Green infrastructure is the process of making intelligent choices about where greenfield development should and should not go.<sup>210</sup> Approached from a regional perspective, proponents argue the land itself gives answers on where to build and where not to build. "[G]reen infrastructure, such as preserved watersheds and other natural and cultural resources . . . can also make "hard" infrastructure such as rights-of-way utilities more land-friendly and cost-effective."<sup>211</sup> Mobility and access is crucial because traffic is the worst thing about sprawl.

Local and regional greenfield planning can enable smarter use of car trips and create alternative modes of transportation including pedestrian accessible shopping, bikeways, carpools, vanpools,

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<sup>204</sup> Heid, *supra* note 176 at 4.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Heid, *supra* note 176 at 6.

and future bus and rail connections.<sup>212</sup> Finally, the third and final priority is providing a range of life and lifestyle choices.<sup>213</sup> Critical to this priority is local or regional access to employment; a point that both the building industry and environmentalists can agree on. A central reason why environmentalists seem to label the concept of smart greenfield development an oxymoron and fundamentally unsustainable is because such development is in remote locations “far from jobs” making it necessary for residents to drive long distances to get to work.<sup>214</sup>

In addition to “smart” greenfield development, suburban revitalization and redevelopment should also be looked at as a serious alternative to infill development. Suburban Revitalization offers a kind of middle ground between infill and smart greenfield development. It differs from smart greenfield development in that it focuses on areas that are already built out;<sup>215</sup> but unlike infill, it is not restricted only to dense, transit-oriented, urban development. Additionally, although environmentalists seem to shun the idea of “smart” greenfield development, even they agree that suburban revitalization can be a very viable alternative to the urban infill development called for under SB 375.<sup>216</sup> Suburban revitalization can help “create . . . more mixed use centers where people can live, work, and shop in a pleasant pedestrian environment—but most of these centers will continue to be connected by cars.”<sup>217</sup> Today, older suburbs are increasingly crowded, diverse and jobs-rich.<sup>218</sup> These areas may be out of raw land, but are rich with underutilized parcels either in old downtowns, declining shopping centers, or commercial strip areas from the 1950s and 1960s.<sup>219</sup> These historic patterns of suburban

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Vespa Telephone Interview, *supra* note 56.

<sup>215</sup> FULTON, *supra* note 7, at 299.

<sup>216</sup> Vespa Telephone Interview, *supra* note 56.

<sup>217</sup> FULTON, *supra* note 7, at 305.

<sup>218</sup> *Id.* at 299.

<sup>219</sup> FULTON, *supra* note 7, at 299.

development in California provide the state with a vast and diverse supply of land that can be recycled for new urban uses.<sup>220</sup> To take advantage of smart development in these older suburbs, local governments should focus on two areas: old downtowns and old malls. Each of these potential areas for suburban revitalization are analyzed below.

Throughout California, old downtowns are attracting attention from planners, developers and investors. These stakeholders see the potential profit from a “large niche market of people who prefer to live and work in compact, mixed-use neighborhoods.”<sup>221</sup> The downtown revitalization in Old Town Pasadena offers an example of an outstanding transformation. Although Pasadena began reviving its downtown in the 1970s with a conventional suburban-style shopping center, by the mid-1980s, however, it undertook a new, more non-traditional strategy thereby becoming one of LA’s most successful shopping centers.<sup>222</sup> By the 1990s, a second and even more remarkable transformation of Old Town began with the implementation of a light-rail system connecting Pasadena to Downtown LA.<sup>223</sup> This in turn instigated a renewed interest among housing developers and lead to the construction of two innovative housing projects over the actual rail line tracks.<sup>224</sup> This case study of Pasadena offers great insight into the potentials of old downtown suburban revitalization: not only does it offer a great opportunity for smart growth in those areas unable to support transit, but if successful, it may in fact attract transit thus allowing for the very transit oriented development SB 375 calls for.

Although California’s old downtowns are prime locations for smart growth policies and projects, planners and developers are also looking at old malls and shopping centers as “smart

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<sup>220</sup> *Id.*

<sup>221</sup> FULTON, *supra* note 7, at 300.

<sup>222</sup> *Id.* at 301.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 301.

sites.”<sup>225</sup> Even though residential areas within existing suburbs could theoretically accept more residential growth, practically this option does not look too promising because current residents are resistant to more density.<sup>226</sup> Conversely, retail properties change more quickly and “[y]esterday’s hot shopping center can easily become today’s vacant property.”<sup>227</sup> In addition, because shopping center properties are usually shaped in a rectangle and range anywhere from 10 to 100 acres, they offer great potential for a “pedestrian-oriented district similar to a downtown.”<sup>228</sup> A successful example in California is The Crossings in Mountain View.<sup>229</sup> Under this project a dead mall was completely razed and replaced with “a fairly high-density housing development that included small-lot single-family homes as well as an attractive park.”<sup>230</sup> Moreover, because the property was located adjacent to Caltrain, a new Caltrain stop was built near the property thereby turning a vacant mall into an innovative smart growth project.<sup>231</sup>

In sum, suburban revitalization and smart greenfield development provide an alternative to conventional car based suburban life within the suburbs themselves. However, the fact still remains that these promising alternatives require abundant funding and until/unless public transit and/or employment centers are extended to geographical areas envisioned for these alternatives to infill, such development would still fail to be “smart” under SB 375. This conclusion necessitates one of two solutions: the state should either (1) expand the definition of smart

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 302.

<sup>227</sup> *Id.*

<sup>228</sup> FULTON, *supra* note 7, at 302.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

growth under SB 375 to encompass these alternatives to urban infill;<sup>232</sup> and/or (2) extend public transit and/or employment to these areas thus allowing them to implement the policies SB 375 mandates. Because the first of these two solutions was addressed above, I focus only on the second here.

#### **D. The State's Role in Overcoming External Constraints**

Although proponents of SB 375 praise it as the solution to sprawl as it will encourage transit oriented infill development near employment centers, it is universally agreed that encouraging transit-oriented development cannot be a freestanding policy; in order to prevent the bill's demise, the state must take it seriously and back up the bill with additional financing and incentives.<sup>233</sup> Accordingly, although the success of SB 375 will depend largely on how hard the regional Metropolitan Planning Organization's and local governments work to implement its policies and attain its goals, it is the state that holds the key to its success.<sup>234</sup>

The overarching message that SB 375 clearly sends to public agencies, developers and other stakeholders is that dense, transit oriented development is critical to the collective good. However, bus, light rail, and other public transit choices are not yet an option in most areas of the state and without public transit funding from the state, these areas will be unable to comply with the bills goals and mandates.<sup>235</sup> The important inquiry then is whether the state has followed through with its GhG reduction policies by setting aside additional funding for public transit in those areas where it is currently lacking. The answer to this inquiry is clearly in the negative. Although the governor and members of the state legislature were quick to praise SB

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<sup>232</sup> This would require that SB 375 allow for planning at the regional scale—which is currently not permitted under the bill due to the concession that local governments retain their land use authority--and the state provide funding for redevelopment.

<sup>233</sup> Higgins Telephone Interview, *supra* note 66.

<sup>234</sup> Judy Davidoff, Rafael Muilenburg & Dan Bane, *SB 375: Lion or Mouse?*, REAL PROP. L. REP. (2009).

<sup>235</sup> Higgins Telephone Interview, *supra* note 66.

375 as the key to GhG reduction, it is unfortunate that when it came to making fiscal and budget decisions the state has, among other things, slashed funding for public transit.<sup>236</sup> For example, in the Southern California region alone, Orange County is going to cut 20% of its public transit service in the next year and Riverside and San Diego are also cutting.<sup>237</sup> Additionally, at the same time the Schwarzenegger administration called its Governor's Global Summit—a high-profile climate conference labeled by the administration as part of the lead-up to the post-Kyoto climate agreement—it also suggested changes that “could hurt efforts to address climate change at home.”<sup>238</sup> With the state facing a \$28 billion budget deficit, the governor has suggested suspending the CEQA environmental review process for many transportation projects as well as scaling back transit projects.<sup>239</sup> These actions could not be more at odds with the policies set forth in SB 375. Most surprising, however, is the fact that Senator Steinberg, the acclaimed author of the bill, voted for a five billion dollar funding cut to local governments that will make it nearly impossible for these jurisdictions to attain the goals of the bill.<sup>240</sup>

The state has traversed this contradictory path even in light of strong support among California residents for increased public transit funding. According to the recent PPIC poll, three in four residents (77%) say the state should focus transportation-planning dollars on expanding public transit and using existing networks more efficiently, up ten points since August 2004 (67%).<sup>241</sup> Conversely, only 18% of residents say the state should focus on building freeways and

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Malcolm Maclachlan, *Governor's Office Announces Climate Change Summit Lineup*, CAPITOL WEEKLY, Nov. 13, 2008.

[http://www.capitolweekly.net/article.php?\\_adctlid=vjq2q43wvsl855o|xjoyz4q662hkw3&issueId=xj4ev62g1hdw61&xid=xjn0cyy2jb95ys](http://www.capitolweekly.net/article.php?_adctlid=vjq2q43wvsl855o|xjoyz4q662hkw3&issueId=xj4ev62g1hdw61&xid=xjn0cyy2jb95ys).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> PPIC Statewide Survey, *supra* note 92 at 23.

highways.<sup>242</sup> In addition, the latest national travel data shows that transit ridership—which earlier last year spiked in part due to the run-up in gas prices—continued to grow despite the collapse of prices at the pump and reached 2.8 billion trips in the third quarter, a 6.5% jump from the same period last year.<sup>243</sup> Accordingly if the state builds it “they”, i.e. the residents, will come. Yet the state has failed to follow through with its policies and has decreased transit funding making the goals of the bill more difficult to attain. By doing so, state actors have not only failed to follow through with the very policies of SB 375, but have also contravened the wishes of their constituents.

It is true that the bill was passed at a time when the nation was going through a horrible recession, making it difficult for the state to provide adequate funding, but at the very least the state should acknowledge the recession by making changes to the bill—including adjusting deadlines within it.<sup>244</sup> Yet the state has failed to take such action thereby increasing the burden on local governments and regional Metropolitan Planning Organizations while at the same time decreasing its own burden.<sup>245</sup> For example, even in light of the recession and the recent cuts to public transit and redevelopment, the state and folks in the bay area are still pushing for more aggressive targets on reducing VMT.<sup>246</sup> However, there are critical differences between the Bay area and California’s other regions. For example, the Southern California region encompasses “Riverside, Orange, San Bernardino, and L.A. Counties which are very, very widely spread out.”<sup>247</sup> Additionally, there is not going to be a BART system all over Southern California by

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<sup>242</sup> *Id.* See attached Exhibit C.

<sup>243</sup> Dunphy, *supra* note 74 at 30.

<sup>244</sup> Higgins Telephone Interview, *supra* note 66.

<sup>245</sup> Higgins Telephone Interview, *supra* note 66.

<sup>246</sup> The Planning Report, *supra* note 134.

<sup>247</sup> *Id.*

the year 2020 or by the year 2030.”<sup>248</sup> Thus, it is very difficult to imagine where Southern California and other regions in California would get the money to plan, much less reconstruct, those regions on the bay area model.<sup>249</sup> Los Angeles is indeed making improvements but it is unlikely that it can change in a way that the state is mandating by 2020 or 2030; at least not without additional finding from the state.<sup>250</sup> The bottom line is the state needs to figure out how to bring both its resources and actions into alignment with its reduction goals and policies,<sup>251</sup> otherwise, the bill is destined for failure.

In the alternative, the State government could follow the lead of other government jurisdictions and refuse to cut back funding for transit and scale back other reduction efforts merely because the recession makes requisite action more difficult. For example, despite the economic downturn, local, national and even global momentum is building for greater focus on more resources to be put into transit-oriented planning and design.”<sup>252</sup> At the local level, Seattle and Charlotte have approved funding for--and in some cases are already developing--light-rail systems with the intent of developing more livable, affordable, walkable, and sustainable communities around transit stations.<sup>253</sup> Additionally, in Los Angeles, the two largest construction projects are both light-rail lines, and the passage of Measure R<sup>254</sup> is expected to jump-start a number of TOD opportunities.<sup>255</sup> At the national level, the American Recovery and Reinvestment Act of 2009 is pumping billions of dollars into transportation infrastructure

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Alexander E. Kalamaros, *Transportation Blueprints*, URBAN LAND, July 2009 at 42.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*; Measure R will provide \$40 billion to be spent on congestion relief and transportation investments countywide over the next 30 years.

<sup>255</sup> *Id.*

nationwide despite the current recession.<sup>256</sup> Finally, the international community is also attempting to embrace rather than reject transit opportunities during this enduring recession.<sup>257</sup> For example, a recent European Investment Bank forum in Barcelona brought together delegates from 35 countries to discuss the opportunity the economic crisis affords Europe to reestablish transportation as a policy priority in improving connections among metropolitan areas to complement sustainability and job generation.<sup>258</sup> Additionally, in order to accommodate an expected population increase of more than three million by 2030 in the United Arab Emirates, Abu Dhabi is looking to create a multibillion-dollar, integrated transportation system in order to guide the city's future development.<sup>259</sup>

In sum, the state does not “have to do away with environmental safeguards to get the economy moving again”;<sup>260</sup> instead the state should take its lead from these other jurisdictions and incorporate such safeguards as part of a recovery plan. The environment is non negotiable and the state should recognize this very critical fact.

#### **IV. Conclusion**

Although proponents and opponents disagree on the optimal approach for growth management in California, one thing is certain: Growth is inevitable, and thus something has to happen before climate change overwhelms us. Whether SB 375 is the solution, however, is still uncertain. The bill is both more and less powerful than it is advertised to be. The bill is more powerful because it contains potentially revolutionary changes to California's arcane processes of regional planning and transportation, as it mandates each region to create a regional land use planning document. However, the bill is less powerful than advertised on the land use front—

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<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> Maclachlan, *supra* note 238.

largely because it is incentive based and fails to alter the pre-SB 375 regional governance structure in which local government officials, sitting as Metropolitan Planning Organization board members, make all of the transportation decisions.

Although there is no consensus on the bill's ultimate success, opponents and proponents do seem to agree on one point: there is still more to be done. SB 375 may represent California's first step towards achieving climate change goals but it is not likely its last; it will take additional state wide, regional and local support to bring about ultimate success. At the state level, funding decisions by state bureaucrats need to align themselves with the climate change policies advocated by the state. Additionally, these bureaucrats should recognize the constraints to infill development and thus strive to adopt a less narrow definition of "smart" growth under the bill. At the regional and local levels, concessions and compromise must come from industry, local governments and Metropolitan Planning Organizations. Whether the support at the regional and local levels can be attained, as proponents suggest, through incentives alone, seems doubtful in light of California's long history of selfish land use and transportation policies. Will the needed change therefore come in the way of a revised regional governance structure and/or regional land use authority? Drafters of the bill think not. They are convinced that such an approach would be a very difficult political attempt in California and substantial evidence supports this conclusion. However, although such an approach would be a very difficult political attempt, in light of California's history, it may be a necessary environmental innovation.

## Exhibit A

### “How about...”

		All Adults	Party			Likely Voters
			Dem	Rep	Ind	
<i>...requiring an increase in energy efficiency for residential and commercial buildings and appliances?</i>	<b>Favor</b>	76%	86%	63%	77%	74%
	<b>Oppose</b>	20	12	34	22	23
	<b>Don't know</b>	4	2	3	1	3
<i>...requiring industrial plants, oil refineries, and commercial facilities to reduce their emissions?</i>	<b>Favor</b>	80	91	63	81	78
	<b>Oppose</b>	16	6	34	18	19
	<b>Don't know</b>	4	3	3	1	3
<i>...encouraging local governments to change land use and transportation planning so that people could drive less?</i>	<b>Favor</b>	78	87	62	79	75
	<b>Oppose</b>	18	10	34	18	22
	<b>Don't know</b>	4	3	4	3	3

## **Exhibit B**

**“How satisfied are you with the air quality in your region today?”**

	All Adults	Region				
		Central Valley	San Francisco Bay Area	Los Angeles	Orange/San Diego	Inland Empire
Very satisfied	24%	18%	30%	12%	31%	17%
Somewhat satisfied	44	38	44	46	50	43
Somewhat dissatisfied	22	24	20	30	15	25
Very dissatisfied	10	19	5	11	3	14
Don't know	-	1	1	1	1	1

## Exhibit C

**“For each of the following pairs of statements, which one is closest to your views about planning for 2025 in your part of California? ...We should focus on building more freeways and highways; or we should focus on expanding mass transit and using carpool lanes, pricing, and other strategies to more efficiently use the existing freeways and highways.”**

	All Adults	Region				
		Central Valley	San Francisco Bay Area	Los Angeles	Orange/San Diego	Inland Empire
Focus on building more freeways, highways	18%	21%	15%	18%	22%	17%
Focus on expanding transit, more efficient use	77	74	82	78	75	71
Don't know	5	5	3	4	3	12