February 7, 2010

SB 375: Smart Growth Savior or Just the Beginning

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Available at: https://works.bepress.com/navjot_athwal/1/
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 that may create a barrier to attaining the reduction goals set forth in the bill. Finally, this Article focuses on the states 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 decades 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.¹ 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.”² 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.³ So the saying goes, “without improved land use, the stool topples.”⁴

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.⁵ 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 itself⁶ and due to a lack of consistent planning regimens across an entire region.⁷ In short, “planning problems, with air pollution and traffic congestion being the classic examples, are regional in nature, but planning solutions are typically tied to the parochial boundaries of local government jurisdictions.”⁸ While some states have found success with regional models, California has been unable to find a

³ Id.
⁴ Id.
⁶ Id.
⁷ WILLIAM FULTON & PAUL SHIGLEY, GUIDE TO CALIFORNIA PLANNING 93 (3d ed. 2005).
⁸ Id.
useful and politically acceptable solution. 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 and local governments have zealously guarded their regulatory power over land use. The state, with a few rare exceptions—including the Coastal 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. 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 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, even if that plan is in conflict with local plans; (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

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9 Id.
11 FULTON, supra note 7, at 93.
12 Abbott & Kindermann, supra note 10.
simultaneously. The first three of the above named aspects 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 than officials with a regional constituency. California has 18 Metropolitan Planning Organizations. A few cover multiple counties, but most of them cover a single county. 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. 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.

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. To develop these targets, the bill requires CARB to create

14 The fourth aspect will be excluded from the present discussion because it does not address urban sprawl.
16 Id.
17 Id.
19 Id.
a Regional Targets Advisory Committee by January 31, 2009. 20 The Regional Targets Advisory Committee, comprised of representatives of the Metropolitan Planning Organizations, the League of California Cities, the California Association of Counties, planning organizations, developers, and other stakeholder groups, will recommend factors and methodologies to be used in the development of the regional GhG reduction targets. 21 Finally, before setting the targets for each region, CARB is required to exchange technical information with the Metropolitan Planning Organization for that region and the Metropolitan Planning Organization may make recommendations regarding the target. 22

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. 23 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.” 24 Although the Sustainable Community Strategy component is the heart of SB 375, it is “not as bulletproof as one may think.” First, because the Sustainable Community Strategy is part of the Regional Transportation Plan, it is subject to certain federal regulations under the Clean Air Act; most notably a provision stating that the Regional Transportation Plan is required to be based on current planning assumptions in the region that take local “general

21 Id.
22 Id.
plans into account.”25 As a result, if a certain type of development pattern is unlikely to emerge from local-decision making, it will be difficult for the Metropolitan Planning Organization to say that it reflects current planning assumptions.26 Second, and more importantly, local government lobbyists succeeded in inserting language within the bill that states SB 375 does not confer land use authority on the Metropolitan Planning Organizations, the Sustainable Community Strategy is not a land use plan, and that the Sustainable Community Strategy cannot in anyway supersede or require consistency for “a local general plan, local specific plan, or local zoning.”27 This important concession means that local governments’ own general plans need not conform to the Sustainable Community Strategy.

If the Sustainable Community Strategy proves infeasible to achieve the GhG reduction target, the Metropolitan Planning Organization must develop an Alternative Planning Strategy.28 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.29 Like the Sustainable Community Strategy, the Alternative Planning Strategy does not constitute a land use plan or regulation and neither directly affects, or supersedes, local land use decisions, nor requires that a local general plan, local specific plan or local zoning be consistent with the Alternative Planning Strategy.

26 Higgins, supra note 20, at 6.
27 Id.
28 Id.
29 Id.
CARB’s role in the approval of a Sustainable Community Strategy or Alternative Planning Strategy is “very limited.”\textsuperscript{30} CARB may merely accept or reject the Metropolitan Planning Organization’s determination that the plan, if implemented, would achieve the regional GhG reduction target established by CARB.\textsuperscript{31} It lacks the authority to interfere in any way with local decision-making.\textsuperscript{32}

C. Incentives

The development pattern in the Regional Transportation Plan is implemented entirely through incentives rather than mandates.\textsuperscript{33} These incentives, addressed immediately below, include granting (1) transportation funding and (2) California Environmental Quality Act (CEQA) relief to projects that conform to the Sustainable Community Strategy/Alternative Planning Strategy.\textsuperscript{34}

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.\textsuperscript{35} 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.”\textsuperscript{36} In other words, the allocation of transportation funds—as dictated by the Metropolitan Planning Organization board,
which consists entirely of locally elected officials—must be consistent with the Sustainable Community Strategy, its land use plan, and its transportation polices. Note, however, that if an Metropolitan Planning Organization adopts an Alternative Planning Strategy rather than 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.  

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. Two types of projects qualify for CEQA breaks under SB 375—residential or mixed-use projects and transit priority projects. 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 impacts nor does it have to cover project specific or cumulative impacts dealing with climate change. 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.

37 Id.
38 Telephone Interview with Tom Adams, President, California League of Conservation Voters, (April 1, 2009).
39 Id.
40 Id.
41 Id.
42 Adams Telephone Interview, supra note 38.
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.” 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.

2. Does not grant land use power to the Metropolitan Planning Organizations or any other regional government 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 plans that are created by the Metropolitan Planning Organizations.

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.

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43 Real Estate and Construction Law Blog, supra note 15.
45 Id.
46 Adams Telephone Interview, supra note 38.
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.\textsuperscript{47}

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.\textsuperscript{48}

7. Provides no penalties for a region’s failure to comply with their Sustainable Community Strategy.\textsuperscript{49}

*** 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.\textsuperscript{50} 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.”\textsuperscript{51} 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 for failing to comply with the Sustainable Community Strategy plans and retains land use authority with the local governments.\textsuperscript{52} Thus, SB 375 is purely incentive based; transportation funding and CEQA relief “is the carrot dangled in front of cities and counties to conform their general plans to the strategy.”\textsuperscript{53}

\textsuperscript{47} Fulton, Planning and Development Report, supra note 13. 
\textsuperscript{48} Higgins, supra note 20, at 7. 
\textsuperscript{50} Fulton, Planning and Development Report, supra note 13. 
\textsuperscript{51} Office of the Governor, supra note at 1. 
\textsuperscript{52} Regional Change, supra note 49. 
\textsuperscript{53} Abott & Kindermann, supra note 10.
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. In the early stages of the bill such a regulatory approach was considered. Under this approach cities had to conform their general plans to the Sustainable Community Strategy and accordingly did

54 FULTON, supra note 7, at 296.

55 Telephone Interview with Bill Craven, Consultant, Senate Natural Resources & Water Committee, (March 24, 2009).
not retain land use authority. However, such a regulatory approach, although initially envisioned as a remote possibility, is a political impossibility in California.\textsuperscript{56} Consequently, the fundamental premise of the bill had to be incentive based.\textsuperscript{57} 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.”\textsuperscript{58} California’s vast size and complexity has made further state control of land use politically unimaginable.\textsuperscript{59} It is therefore apparent that a top down state knows best approach was not possible under SB 375.

Proponents therefore argue that creating mandates rather than incentives would have ensured the bill’s failure. \textbf{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.\textsuperscript{60} The approach taken under the bill serves as a quick, early, and initial attempt to GhG reduction as it forces local officials, for the first time, to focus on the region rather than the parochial boundaries of local government jurisdictions.\textsuperscript{61} One reason SB 375 will have more of an impact than people acknowledge is because it forces regional transportation planners and local land use planners to talk amongst one another for the first time in California’s history.\textsuperscript{62} The transportation planning 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

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} FULTON, supra note 7, at 297.
\textsuperscript{59} Id.
\textsuperscript{60} Craven Telephone Interview, supra note 55.
\textsuperscript{61} Id.
\textsuperscript{62} Telephone Interview with Bill Higgins, Legislative Representative (housing and land use), League of California Cities, (August 14, 2009).
achievement. Additionally, the processes employed under the bill are important because they help strengthen the land use planning process at the regional level. 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 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. In addition, Oregon has passed a bill similar to SB 375 labeled House Bill 2001 and the Waxman legislation has begun pushing similar concepts at the federal level.

In sum, proponents argue that SB 375 is the first bill in the nation to link transportation, land use, climate change, and CEQA in a successful package and will serve as a model for other states, the nation, and the rest of the world. Although it may not be strong enough to achieve all of its purported goals, it provides a quick and early initial response, may serve as a sturdy stepping-stone to stronger laws, and is “politically potent and powerful.”

Environmentalists disagree with the arguments advanced by these proponents and conclude instead that not only does SB 375 achieve nothing, it may in fact weaken preexisting policies to fight climate change. The Planning and Conservation League (PCL), the Sierra Club and the
Center for Biological Diversity (CBD) all raised concerns over the bill.71 The CBD in particular argued that the bill gives away too much in the way of CEQA concessions in exchange for aspirational policies.72 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.”73 Therefore, “existing climate change policies were better off without it;”74 especially in light of the “opportunity cost associated with spending money and time on a very indirect approach.”75

This debate remains 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 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.76 It is therefore vital that local governments retain this much-guarded authority.77 Next, they argue that the incentives under the bill are sufficient to get local governments to comply with the Sustainable Community Strategy

71 Although all have raised concerns to the bill, CBD was the only environmental group to ultimately oppose the bill while the Sierra Club and PCL ultimately endorsed it.
72 Id.
74 Vespa Telephone Interview, supra note 70.
76 Telephone Interview with Richard Lyon, Senior Legislative Advocate, California Building Industry Association, (April 1, 2009).
77 Id.
plans and thus, giving the regional governments land use authority is unnecessary. 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. These proponents concede that the federal and state governments are better equipped to address a global issue such as the concentration of carbon dioxide and other greenhouse gases in the atmosphere, but when such a concern is tied to land use these larger and less democratic governments lack the accountability and expertise necessary to deal with the issue effectively. 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. Instead, it is local governments that possess the tools and experience necessary to succeed in reducing GhG through land use. 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. Additionally, local governments understand their communities’ desires and goals and are able to respond more quickly to the needs of their citizens. Land use entails figuring out where schools and businesses will be located and how neighborhoods will look and feel; issues best addressed within the locality. Finally, local government politicians are more accountable than their state and regional counterparts and the local process provides more

78 Craven Telephone Interview, supra note 55.
79 Craven Telephone Interview, supra note 55.
80 Id.
81 Id.
82 Higgins Telephone Interview, supra note 62.
83 Craven Telephone Interview, supra note 55.
84 Higgins Telephone Interview, supra note 62.
transparency than state and regional governance structures.\textsuperscript{85} Accountability, expertise, transparency and response time are in turn key ingredients to GhG reduction through smart land use planning.\textsuperscript{86}

However, when asked why local governments are best positioned to address land use concerns when tied to a global concern such as GhG reduction, at least some of the reasoning of these proponents seems to be circular and contradictory. It is “because local governments—i.e. cities and counties—have always had the authority to approve development projects and make land use decisions in California and the last thing we want is to upset this fundamental structure.”\textsuperscript{87} This argument, however, seems no different than what has been labeled “business as usual.” The very purpose of the bill was to break this inertia by requiring, not merely allowing, local jurisdictions to consider GhG reduction when implementing land use policy. Otherwise, the bill lacks meaningful purpose and other measures could have been utilized to achieve the reduction goals more effectively.\textsuperscript{88} Additionally, because local government officials sit on the Metropolitan Planning Organization boards, it is difficult to see why regional Metropolitan Planning Organizations lack the same expertise in land use and accountability to local constituents that local governments arguably possess. Proponents argue, however, that even regional Metropolitan Planning Organizations lack the necessary connection to voters for effective land use policy because the local official on the board is serving in a position he/she was not elected for.\textsuperscript{89} Consequently, these Metropolitan Planning Organization board members

\textsuperscript{85} Craven Telephone Interview, \textit{supra} note 55.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} Vespa Telephone Interview, \textit{supra} note 50.
\textsuperscript{89} Higgins Telephone Interview, \textit{supra} note 62.
will be less responsive to local voters and land use authority is therefore best left with local
governments.  

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. 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; the fact that local governments may be best equipped to deal with land use
should thus not be conclusive. Additionally, 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.

“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.” The
challenge, however, has been in keeping localities’ commitment to such programs over time.

Currently, SB 375, pursuant to Federal Regulation 450.316(a)(4), requires a Regional
Transportation Plan to consider the likely effect of transportation policy decisions on land use
and development and requires the consistency of such transportation plans with provisions of
short and long-term land use and development plans. Consequently, the bill fragments power
between local and regional governments with the latter retaining power over transportation
planning and the former over land use policy. This regulation effectively paralyzes the regional

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90 Id.
91 Vespa Telephone Interview, supra note 70.
92 Id.
93 Higgins Telephone Interview, supra note 62.
95 Id.
96 23 CFR 450.316(a)(4).
Metropolitan Planning Organizations. Accordingly, rather than fragmenting power under the bill, it may have been wise to consolidate these powers within the regional Metropolitan Planning Organizations—the body 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 not best able to deal with land use when tied to the global concern of climate change. For example, some locally elected officials have already proceeded to question whether climate change was ever a real problem and whether their actions can have any meaningful impact on climate change. Thus, there is a “certain amount of foot dragging going on with local officials who don’t think it’s a problem or think it’s someone else’s problem.” 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. 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, and CEQA was also emerging as a way to deal with GhG reduction.

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.”

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98 Id.
99 Vespa Telephone Interview, supra note 70.
100 Vespa Telephone Interview, supra note 70.
101 Id.
102 Dunphy, supra note 94 at 32.
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. The incentives under the bill may be sufficiently strong to coerce most local governments to comply with the Sustainable Community Strategy plans even in the absence of a direct mandate to do so. 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 track.” 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.” 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.

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 an Sustainable Community Strategy, then the funding incentive that exists under Sustainable Community Strategy would be lost. Although repercussions for the adoption of an Alternative Planning Strategy rather than an Sustainable Community Strategy have yet to play out, the potential shift to an Alternative Planning Strategy provides no clear and specific detriment to an Metropolitan

103 Morrison Interview, supra note 67; Craven Telephone Interview, supra note 55.
104 Craven Telephone Interview, supra note 58.
105 Id.
106 SB 375 Analysis, Comments Section Paragraph 9(b).
107 Morrison Interview, supra note 67.
108 Adams Telephone Interview, supra note 38.
Planning Organization. In fact, the potential shift by an Metropolitan Planning Organization to an Alternative Planning Strategy may actually be the preferred route for two reasons: (1) the choice between an Sustainable Community Strategy versus an Alternative Planning Strategy is about feasibility; accordingly, Metropolitan Planning Organizations that push too far via the implementation of an Sustainable Community Strategy may find themselves in litigation brought by affected parties; and (2) SB 375 states that inconsistency with an Alternative Planning Strategy is not a significant impact for CEQA purposes.

Proponents argue however, that political pressures will encourage most Metropolitan Planning Organizations to adopt an Sustainable Community Strategy rather than an Alternative Planning Strategy. 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. Thus, according to these proponents, most Metropolitan Planning Organizations will strive to adopt an Sustainable Community Strategy even in light of the lack of 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. This proposal even receives majority support across party

109 Morrison Interview, supra note 67.
110 Id.
111 Higgins Telephone Interview, supra note 62.
112 Id.
113 Id.
114 PPIC Statewide Survey (2009), http://www.ppic.org/content/pubs/survey/S_709MBS.pdf at 15; see attached Exhibit A.
lines “with Democrats (87%) and independents (79%) more likely to favor the idea than Republicans (62%).”

Under the situation where a Metropolitan Planning Organization does indeed adopt an Alternative Planning Strategy rather than a Sustainable Community Strategy, even in light of the purported political pressures against doing so, 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. In fact, representatives from the CBD, a non-profit conservation organization aimed at securing a future for endangered species, argue that the CEQA incentives prove too much. The CBD was the sole environmental group to oppose the bill because “SB 375, in its current form, removes existing and proven environmental protections under . . . [CEQA] in exchange for voluntary measures that are largely duplicative of existing efforts to address green house gas emissions from the transportation sector.” 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.” Additionally, the CBD argues that the incentives are too readily obtained and require projects to meet only minimal criteria. 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 long list of caveats, the eventual impact of the CEQA provisions may not be as significant as some believe. Specifically, Richard Lyon, Senior Legislative Advocate for the California Building Industry Association, projects that the level of

115 Id.
116 Craven Telephone Interview, supra note 55.
117 Letter from Vespa, supra note 73.
118 Id.
119 Id.
120 Fulton, Planning and Development Report, supra note 13.
CEQA relief provided for under the bill will not produce a lot of projects and thus, the CEQA incentives prove too little. In a similar vein, Clark Morrison, Land Use Partner at Cox and Castle, believes that meeting the definition of a Transit Priority Project will be nearly impossible. Therefore, most stakeholders seem to agree that, either because they are too strong or too weak, the CEQA incentives under the bill will have little impact on GhG reduction. Even if a Sustainable Community Strategy is adopted and thus the transportation funding incentive remains viable, putting full faith in this purely incentive based approach may still be unfounded. From some viewpoints, direct mandates may be the only way to prevent local governments from continuing with “business as usual.” Proponents admit that although a purely incentive based approach may not be strong enough to achieve all of the bills stated goals, it is as strong as drafters could make it in the very first go around. Thus, although such an approach may have been immediately necessary to overcome political opposition, it may be insufficient in the long run. Instead, if the goals of SB 375 are to be realized in the future, it is the region that may need to ultimately wield land use authority. Urbanist Architect Peter Calthorpe recognizes that California’s land use history does not support the optimistic view that proponents advance. Regional governments are not effective without direct authority over land use. A regional government can create a plan but unless the city or county has incorporated that plan within its general plan there is no legal basis to enforce those regional plans and consequently, no way to guarantee smart growth. Consequently, while progress is being made with SB 375, “proponents and opponents seem to agree on one point: there is still

121 Morrison Interview, supra note 67.
122 Craven Telephone Interview, supra note 55.
123 Id.
124 Peter Calthorpe, Class Presentation: Smart Growth & Planning for Sustainable Communities. Legal And Business Aspects of Real Estate Development (Feb. 19, 2009).
125 Id.
126 Id.
more to be done.”\textsuperscript{127} SB 375 is a great way to initiate climate change policy, but a greater demand from local governments will be required in the future.\textsuperscript{128} Whether this change comes in the way of regional land use authority is still to be seen.

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.\textsuperscript{129} In 1997, Governor Glendening engineered the passage of a law that sought to manage growth by the way state funds were directed.\textsuperscript{130} The law created “Priority Funding Areas” in existing urban and suburban areas and directed state infrastructure funds to those areas.\textsuperscript{131} As a result, local governments could direct growth wherever they pleased, but they would not get state infrastructure funds outside the Priority Funding Areas.\textsuperscript{132} The state thus decided to use its $15 billion budget as an incentive for smart growth.\textsuperscript{133} 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 programs and ultimately designates the areas.\textsuperscript{134} This smart growth policy has made a significant difference in Maryland.\textsuperscript{135} Will the incentive based approach utilized by

\textsuperscript{127} Regional Change, \textit{supra} note 49.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{FULTON, supra} note 7, at 297.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} Maryland Department of Planning, \textit{Smart Growth Priority Funding Areas Act of 1997}, http://www.mdp.state.md.us/fundingact.htm.
\textsuperscript{135} \textit{FULTON, supra} note 7, at 297.
California under SB 375 attain similar success? In light of the regional governance structure employed by SB 375, such success seems doubtful.¹³⁶

**B. Regional Metropolitan Planning Organization’s**

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.¹³⁷ Under SB 375 it was never contemplated that the state rather than the regional Metropolitan Planning Organization would make these transportation-funding decisions because “that would have been a bill with a five minute shelf life.”¹³⁸ 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.¹³⁹ To shift that authority from the Metropolitan Planning Organizations to state bureaucrats far removed in Sacramento would have been politically impossible.¹⁴⁰ The bill instead purports to employ a more decentralized approach under which “sole” transportation funding authority is delegated to the regional Metropolitan Planning Organizations rather than the state.

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.¹⁴¹ Not only does it fail to change the existing Metropolitan Planning Organization structure under which the regional board

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¹³⁷ Id.
¹³⁸ Craven Telephone Interview, supra note 55.
¹³⁹ Higgins, supra note 20, at 4.
¹⁴⁰ Lyon Telephone Interview, supra note 76.
¹⁴¹ Fulton, California Planning and Development Report, supra note 13.
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 regional Metropolitan Planning Organization structure under which the regional board consists entirely of local government officials.\(^{142}\) It is unlikely that local government officials sitting as regional planning board members will “pull the trigger” on each other.\(^ {143}\) 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.\(^ {144}\) This project attempted to provide a critical link between land use and transportation planning.\(^ {145}\) 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.\(^ {146}\) Thus, the locally elected SCAG board members refused to follow a regional approach and instead proceeded with “business as usual.”\(^ {147}\)

This commitment by Metropolitan Planning Organizations to “business as usual” is also readily apparent from the conduct of individual board members. For example, Hasan Ikharata, the executive director for SCAG, refuses to see the link between sprawl development and greenhouse gas emission: “I don’t think 375 should be thought of as a global warming bill. I

\(^{142}\) Adams Telephone Interview, supra note 38.

\(^{143}\) Fulton, California Planning and Development Report, supra note 13.


\(^{145}\) Id.

\(^{146}\) Adams Telephone Interview, supra note 38.

\(^{147}\) Id.
don’t think it’s the most cost effective way to reduce GhG emissions.”¹⁴⁸ The most public attack, however, came from Ty Schuiling, planning director for San Bernardino Associated Governments (SANBAG).¹⁴⁹ 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.”¹⁵⁰ Consequently, although supporters of SB 375 emphasize that its success will be realized through strong incentives, the bill fails to alter the current regional planning structure under which local officials sitting as Metropolitan Planning Organization board members are delegated decision-making authority.¹⁵¹ As a result, “Metropolitan Planning Organizations are not likely to support measures that limit the discretion of cities and counties”¹⁵² 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 back scratching and horse-trading that it permits; nonetheless they still vehemently defend it.¹⁵³ Their defense is three fold: (1) first, to get this bill across, they had to use an existing structure and a new or revised regional governance structure would have ensured the bill’s defeat;¹⁵⁴ (2) second, CARB’s interjection into the process under SB 375 will limit or eliminate the potential for back scratching;¹⁵⁵ and (3) finally, this structure is not a weakness of the bill but rather one if its strengths as it requires local government officials, for the first time, to

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¹⁴⁹ Id.
¹⁵⁰ Id.
¹⁵¹ Id.
¹⁵² Higgins, supra note 20, at 9.
¹⁵³ Adams Telephone Interview, supra note 38; Craven Telephone Interview, supra note 55.
¹⁵⁴ Craven Telephone Interview, supra note 55.
¹⁵⁵ Adams Telephone Interview, supra note 38.
get in a room together and focus not only on their own boundaries, but also the entire region. Proponents argue that because the Sustainable Community Strategy has to be ultimately approved by CARB and because CARB has sole authority to approve the GhG reduction targets, local governments cannot continue business as usual through mutual back scratching. 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 Sustainable Community Strategy 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.” CARB must also work within strict constraints as it must complete its review of the Sustainable Community Strategy within 60 days and lacks the ability to conditionally approve an Sustainable Community Strategy or “otherwise interfere in any way with local decision making.”

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. She elaborated that CARB has its hands full with AB 32 and accordingly has a limited role under SB 375. This is a fact that proponents can concede to; they acknowledge that the air board lacks staff or background expertise in either

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156 Craven Telephone Interview, supra note 55.
157 Adams Telephone Interview, supra note 38.
158 SB 375 Analysis, supra note 106, at ¶ 18.
159 Higgins, supra note 20, at 7.
160 Interview with Richard Frank, Lecturer in Residence, Berkeley Law, in Berkeley, Cal. (Mar. 18, 2009).
161 Id.
land use or transportation planning.\textsuperscript{162} In light of these counter-arguments—(1) CARB’s review of an Sustainable Community Strategy is expressly limited by the text of the bill and (2) impliedly limited by CARB’s scarce resources and lack of expertise on the land use and transportation front—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 and back scratching seems unfounded.

Proponents’ next argue that CARB’s sole authority in setting GhG reduction targets provides yet another roadblock to the potential back scratching made possible by the regional structure utilized under SB 375. However, it is apparent from the text of the bill that this may not be as strong an impediment as anticipated. First, although CARB sets the GhG reduction targets, it only does so after appointing a Regional Targets Advisory Committee (Regional Targets Advisory Committee) to recommend factors and methodologies to be used in setting these targets.\textsuperscript{163} 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.\textsuperscript{164} 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.”\textsuperscript{165} These representatives may consider “any relevant issues” in recommending the factors and methodologies to be used by CARB.\textsuperscript{166} The various groups compiled under the Regional Targets Advisory Committee to make such recommendations

\begin{thebibliography}
\bibitem{AdamsTelephoneInterview} Adams Telephone Interview, \textit{supra} note 38.\textsuperscript{162}
\bibitem{SB375Analysis} SB 375 Analysis, \textit{supra} note 106, at ¶ 2.\textsuperscript{163}
\bibitem{SB375Analysis2} SB 375 Analysis, \textit{supra} note 106, at ¶ 3.\textsuperscript{164}
\bibitem{Higgins} Higgins, \textit{supra} note 20, at 8.\textsuperscript{165}
\bibitem{SB375Analysis3} SB 375 Analysis, \textit{supra} note 106, at ¶ 4.\textsuperscript{166}
\end{thebibliography}
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 are a topic of this paper. These provisions advance the respective goals of these various stakeholders and in turn weaken the bill itself. 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.

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. 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 recognizing that we do not want to stifle the markets just as they are coming back in 2011 and 2012.” Additionally, even Regional Targets Advisory Committee representatives themselves have 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

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168 Lyon Telephone Interview, supra note 76.
169 Id.
seriously explored to achieve reduction objectives and “we cannot simply rely on regulatory approaches.”

Second, CARB’s sole authority to set the reduction targets is also weakened by two other 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 region.” As a result, CARB’s 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. Accordingly, although proponents’ tout CARB’s interjection into the pre-established regional governance structure as an effective means to overcome the back scratching and self-interest the structure permits, influential stakeholders are likely to diminish CARB’s ultimate role.

2. Lack of Penalties on the Regional Metropolitan Planning Organization

SB 375 also fails to place mandates upon the regional Metropolitan Planning Organization’s 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. Senator Steinberg, the bill’s author, has admitted that the intent of the bill was to encourage regions to consider climate change in their planning and the lack of punishments for a region’s failure to meet the goals set forth in the Sustainable Community Strategy was “intentional.” Drafters and proponents of the bill do not seem phased by the lack of penalties imposed on the region and maintain faith in the ability of local officials sitting as regional board members, to consider

171 Regional Change, supra note 49.
172 Id.
climate change concerns transcending their borders. 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; by placing these local officials in a room together, SB 375 will force them to focus on the entire region rather than on their own local boundaries.”

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. Adams 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 take SB 375 quite seriously and will make an effort to achieve the regional targets within the Sustainable Community Strategy. 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. 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.

Adams optimism is not universally shared. Although the penalty-free regional governance structure has a fair chance at working there are no guarantees it will work and if it does not work,

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173 Craven Telephone Interview, supra note 55.
174 Id.
175 Adams Telephone Interview, supra note 38.
176 Id.
177 Id.
well then “we will come back with a more rigorous and more mandate oriented bill.”

Additionally, 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.” For example, support for AB 32 has declined 7 points from July 2008 (73%) and 12 points from 2007 (78%); the decline being sharpest among Republicans (57% 2008, 43% today).

Additionally, given California’s diverse growth and development contexts, some areas will refuse to comply. “Our cities are the bell shaped curve and we have cities that are in fact implementing smart growth but we also have cities that will continue to build single family subdivisions.” Willingness to comply seems highest in the bay area where transit is rich—“folks in the bay area believe that we should have more aggressive targets on vehicle miles traveled than people in the south believe.” Conversely, in light of the culture and history of the central valley, “it is going to be quite a challenge to make SB 375 work in the central valley regions.” 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 say that the

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178 Craven Telephone Interview, supra note 55.
179 PPIC Statewide Survey, supra note 114 at 5.
180 Id.
181 Higgins Telephone Interview, supra note 62.
182 The Planning Report, supra note 170.
183 Adams Telephone Interview, supra note 38.
federal and state governments are not doing enough to address global warming,\textsuperscript{184} it is the Central Valley, Los Angeles, and Inland Empire residents who are more likely than other regions to say air pollution is a big problem in their regions.\textsuperscript{185} 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.\textsuperscript{186}

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.\textsuperscript{187} Local Governments, especially cities, often strive to serve only their own constituents and borders.\textsuperscript{188} 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.\textsuperscript{189} 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. Further, as if pedigree were not enough, take also the animosity that Kevin Hanley, member of the Auburn City Council and the six-county Sacramento Region Metropolitan Planning Organization—the Sacramento Area Council of Governments (SACOG)—has portrayed for SB 375 itself.\textsuperscript{190} Hanley’s opposition to the bill covers everything from CARB’s role in setting the reduction

\textsuperscript{184}PPIC Statewide Survey, supra note 114 at 23.
\textsuperscript{185}Id.; see attached Exhibit B
\textsuperscript{186}THE CALIFORNIA PLANNERS’ BOOK OF LISTS (2009), http://www.co.kern.ca.us/planning/pdfs/2009_PBOL.pdf at 118.
\textsuperscript{187}Regional Change, supra note 49.
\textsuperscript{188}FULTON, supra note 7, at 69.
\textsuperscript{189}Calthorpe, supra note 124.
\textsuperscript{190}Kevin Hanley, Op-Ed., My View: Steinberg’s SB 375 Isn’t A Smart Growth Strategy, Sac. Bee, Sept. 29, 2008, at 15A.
targets to the “nonsensical” incentives that the bill creates. Accordingly, in light of the recent recession, California’s history, and the future animosity the bill is likely to face, it seems unlikely an approach that fails to place penalties on the regional Metropolitan Planning Organizations will be sufficient to attain the underlying goals of SB 375.

C. External Barriers to Attaining the GhG Reduction Goals

Although the structure of SB 375 itself 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 market and practical constraints and even assuming that the self interested structure of SB 375 provides no barrier, without further action on the part of the state SB 375 will falter.

The final part of this paper will be split up into two sections. The first will identify the relevant market and practical constraints that may prevent the reduction goals of SB 375 from being attained. Once these constraints are identified, they will be analyzed to determine their likely impact, whether they indeed present an insurmountable barrier, and finally, methods to reduce their impact. The second section will discuss requisite action on part of the state to help overcome these constraints and whether state action since the enactment of SB 375 has been consistent with the reduction goals outlined within the bill.

1. Market and Practical Constraints of Infill Development

SB 375 has been deemed the “smart growth bill” 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

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191 Id.
192 Regional Change, supra note 49.
193 Website-- http://www.sacbee.com/arnold/story/1278949.html
whatever they want it to mean.”

To provide clearer guidance on the issue, the Smart Growth of America Coalition recently laid out ten principles of smart growth. Communities throughout California have increasingly utilized these principles as the definition of smart growth. 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. 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 to shifting the development emphasis from sprawl inducing suburban development to more urban and metropolitan development, the bill also strives to encourage development to surround public transit corridors—i.e. bus stops and rail lines.

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 and, possibly too narrow to be marketable and practicable. In light of insurmountable

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194 FULTON, supra note 7, at 295.
195 Id.
196 Id. at 295-96
197 Judy Davidoff, Rafael Muilenburg & Dan Bane, SB 375: Lion or Mouse?, REAL PROP. L. REP. (2009).
199 FULTON, supra note 7, at 9
constraints, alternative approaches—including utilizing greenfields\textsuperscript{200} and suburban revitalization—must be considered as they are critical to accommodating the growth needs of the state.\textsuperscript{201} During negotiations prior to the bill’s enactment, representatives from the California Building Industry Association (“CBIA”) made this concern clear to the legislature and encouraged it to “recognize that growth pressures in California cannot be met by merely collecting people in downtown communities or forcing jobs to locate in these communities.”\textsuperscript{202} Instead 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.\textsuperscript{203}

Environmentalists disagree, however, arguing instead that smart growth and greenfield development cannot coexist and although constraints to infill development do exist, they are not insurmountable.\textsuperscript{204} This debate between the building industry and the environmental community as to whether, from a market and practical standpoint, this narrow definition of smart growth—i.e. transit oriented, infill development—can itself accommodate the need for future housing in California is ongoing. 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.\textsuperscript{205} There is certainly a demographic group and economic factors that are encouraging and allowing more urban infill development, but not all

\textsuperscript{200} A greenfield today is defined as any parcel of land not previously developed, and is characterized by: (1) rural or extremely low-density lands; (2) significant natural, cultural, or agricultural resources; and (3) locations outside recognized urban limits. Jim Heid, Greenfield Development Without Sprawl: The Role of Planned Communities, URBAN LAND, (2004) at 4.

\textsuperscript{201} Lyon Telephone Interview, supra note 76.

\textsuperscript{202} Id.

\textsuperscript{203} Id.

\textsuperscript{204} Vespa Telephone Interview, supra note 70.

\textsuperscript{205} Id.
development will occur by way of infill because the public does not want it so. 206 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.” 207

These above arguments are supported by statistics and reports. In the last fifteen years, the middle class citizens of child bearing age have been consistently moving out of San Francisco to other local jurisdictions throughout the bay area and Sacramento. 208 These relocation decisions are guided by more affordable housing choices and a better environment and school system for their children. 209 Those that support the bill’s adoption of a broader definition of smart growth argue that the bill should accommodate these preferences of the public. It is important to “be clear on what [the legislature] means by “Preferred Growth Scenario. It isn’t about your preferences for your own life. They’re talking about their preferences for your own life. And for your family’s life.” 210 In short, alternatives to urban infill development must be considered under the bill and the various governing bodies under it should strive to incorporate these alternatives within the definition of “smart growth.” 211

However, cities have made a long climb back since the 1970’s and 1980’s. 212 There is “pent-up market demand for the alternative to drivable sub-urbanism that is readily apparent and we in the real estate market [need to] re-tool how we design, plan, regulate and finance to serve these markets.” 213 Most Americans now live in single-family suburban houses that are

206 Morrison Interview, supra note 67.
208 Lyon Telephone Interview, supra note 76.
209 Vespa Telephone Interview, supra note 70.
211 Id.
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. Many consumers have already begun demanding different options to the one-size-fits-all drivable sub-urbanism. 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. In one particular study, Levine and his colleagues asked more than 1,600 mostly suburban residents to hypothetically trade off typical suburban amenities (such as large living spaces) against typical urban ones (such as living within walking distance of retail districts). They found that “about a third of the people surveyed solidly preferred traditional suburban lifestyles, featuring large houses and abundant amounts of driving[,] another third, roughly, had mixed feelings[,] and the final third wanted to live in mixed-use, walkable urban areas—but most had no way to do so at an affordable price.”

Demographic changes in the country may further weaken preferences for car-based suburban living. By 2000, families with children comprised only a third of all households and by 2025 they will be closer to a quarter. The new generation of citizens as compared to the baby boomer generation are starting families later and having fewer children. These changes will likely push against suburban living preferences. In addition, the boomers themselves are

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214 Id.
216 The Next Slum, supra note 212 at 74.
217 Id.
218 Id. at 73.
219 Id.
220 Id.
221 Id.
becoming empty-nesters and many have voiced a preference for urban living. Accordingly, by 2025 the U.S. will contain about as many single person households as families with children which in turn will weaken preferences for suburban as opposed to urban living.

Cost continues to be a problem, however. “Per square foot, urban residential neighborhood space goes for 40 percent to 200 percent more than traditional suburban space.” However, 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. Moreover, extreme traffic congestion that afflicts most of California has altered everyone’s sense of what is acceptable. “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.”

Even more so than market constraints, 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. “[I]nfill can’t happen fast enough or at a large enough scale to make an immediate difference.” Even if all market constraints to infill evaporated—i.e. 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

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222 Id.
223 Id.
224 Id. at 72.
225 Id. at 73.
226 FULTON, supra note 7, at 298
227 Id.
228 Heid, supra note 200 at 1.
229 Id. at 2
before making much of a course correction.”  

For example, Portland, Oregon, a jurisdiction dedicated to “smart growth,” projects in its metropolitan regional plan that 70 percent of near term growth will be on greenfield land versus built up areas.  

Other U.S. jurisdictions predict numbers closer to 90%.  

In sum, the proponents of an expanded definition of “smart” growth conclude that 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, this trend will capture only a relatively small proportion of future development.

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; and (2) land prices in close-in locations often are too high to support affordable market-rate housing.  

In his working paper, *Planned Communities and the Smart Growth Movement*, Don Priest, a land development consultant and former Urban Land Institute (ULI) research director and staff vice president, makes a strong case that in light of these limits, infill will have modest success and limited potential.  

He also argues that infill development in central cities is proceeding too slowly to significantly offset “the need for outlying growth.”  

Statistics cited by Priest make evident that even in metropolitan areas with successful records of infill development, infill as a percentage of total growth remains a minor portion of total growth.
In the Washington D.C. metropolitan area for example, which has conditions very favorable to infill, infill accounts for only 25% of total area growth. Similarly in the Los Angeles region, the central city captures only 12 percent of regional growth. Thus, “[t]he key to understanding the limitations of infill is to recognize that there are many practical obstacles that are very difficult to overcome.” Although none of the above outlined difficulties associated with infill make planning for it any less important to a balanced regional housing strategy, these issues do suggest that even with strong market demand and political will, increasing density in older neighborhoods will be a slow process. Accordingly, SB 375 should look to more than just infill to meet its GhG reduction goals.

A final practical limitation to infill development is financing. Banks are clamping down on their requirements for lending and infill development is especially prone to more stringent lending standards. 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. 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. In the realm of infill development, however, a bank is lending on the entire project and not just on a particular phase. This is because with infill

237 Id.
238 Id.
239 Id.
240 Id.
241 Telephone Interview with Richard Lyon, Senior Legislative Advocate, California Building Industry Association, (August 14, 2009).
242 Id.
243 Lyon Telephone Interview, supra note 241.
244 Classroom Lecture, Bill Falk, Boalt Hall—Feb. 5, 2009.
245 Id.
development a developer cannot sell even a single unit until the entire project is built out.\textsuperscript{246} This structure, in turn, becomes very risky for the bank.\textsuperscript{247} A developer constructing an infill project would consequently have to convince a bank that there is a market out there for the project and there are buyers lined up to purchase the units; a difficult endeavor.\textsuperscript{248} For instance, in order to provide financing for a high-density infill project, Fannie Mae requires proof that the developer has secured buyers for at least 70\% of the units.\textsuperscript{249} The economic downturn has only intensified the hurdles to obtaining financing for future development generally and infill development in particular.\textsuperscript{250} Thus, in the absence of additional action from the State or Federal Government, smart growth as that term is defined within the bill, may not only be impracticable but unattainable.\textsuperscript{251}

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.\textsuperscript{252} 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.\textsuperscript{253} “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.”\textsuperscript{254} Breaking preexisting development patterns is a difficult task but is a necessary one as well.\textsuperscript{255} 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

\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Lyon Telephone Interview, supra note 241.
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} Temple, supra note 2.
\textsuperscript{253} Temple, supra note 2.
\textsuperscript{254} Id.
\textsuperscript{255} Vespa Telephone Interview, supra note 70.
sprawl patterns merely because doing so would be tough as a practical matter; not doing so would be devastating as an environmental matter.\footnote{Id.} Business as usual has not only had negative environmental consequences, but has also resulted in unintended social, economic and health consequences, including economic exposure to increasing oil prices and social segregation.\footnote{Leinberger website http://www.cleinberger.com/AdminHome.asp?ArticleID=208} Accordingly, in light of these drastic consequences of climate change, 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.\footnote{Vespa Telephone Interview, \textit{supra} note 70.}

Additionally, the purpose of the CEQA incentives incorporated within the bill was to alleviate the very concerns about the practicability of infill development.\footnote{Id.} In fact, as mentioned in section \textbf{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.\footnote{Letter from Vespa, \textit{supra} note 73.} Finally, the lack of space argument posited by the building industry and other stakeholders can also be refuted.\footnote{Vespa Telephone Interview, \textit{supra} note 70.} There indeed may be sufficient space within existing cities to accommodate the growing population of California.\footnote{Vespa Telephone Interview, \textit{supra} note 70.} The CBD has viewed and commented on general plans for various preexisting cities and has concluded that these cities have sufficient space to accommodate California’s growing population within a 20 to 30 year horizon.\footnote{Id.} What it comes down to is how each community views its sustainability and consequently how it grows and the practical constraints will be taken on a case-by-case basis. However, such constraints are not so numerous that they
will provide an insurmountable hurdle to infill development.\footnote{Id.} In short, 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, one thing is clear: it is unlikely that all future development can be infill. “In lifestyle terms, infill and smart growth is clearly a strong niche market” but “California will remain an auto-oriented society for many years to come.”\footnote{FULTON, supra note 7, at 305.} Even those that argue infill must be the focal point of development for the future acknowledge the insurmountable hurdles to accommodating all future development within infill locations.

What has occurred in Sacramento provides further support that a bill like SB 375 cannot bring an end to all suburban development. The Sacramento region adopted a Blueprint in December of 2004, which represents “a bold vision for growth in that region and promotes compact, mixed-use development and more transit choices as an alternative to low density development.”\footnote{blueprint website www.sacregionblueprint.org} SB 375 was modeled after the Blueprint and seeks to require all regions in California—not just the SACOG region—to engage in a process similar to that required by the Blueprint.\footnote{blueprint website www.sacregionblueprint.org} Those involved with the Blueprint have deemed it a success but 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.”\footnote{Homefront article—http://www.sacbee.com/736/story/1285305.html} 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. First, given that greenfield development seems to be inevitable, these interest groups should focus their energies not on whether to develop on

\footnote{Id.} \footnote{FULTON, supra note 7, at 305.} \footnote{blueprint website www.sacregionblueprint.org} \footnote{blueprint website www.sacregionblueprint.org} \footnote{Homefront article—http://www.sacbee.com/736/story/1285305.html}
greenfields, but rather how to develop better or “smarter.” Second, they should also look to revitalize established suburban residential areas, which are “viable as locations for a second generation of urban growth.” 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 end greenfield development’s attachment to sprawl.” Greenfield development retains much of the same potential for smart growth as infill development. The three characteristics of Greenfield development--(1) rural or extremely low-density lands; (2) significant natural, cultural, or agricultural resources; and (3) locations outside recognized urban limits--at once make greenfields an incredible asset as well as a liability for accommodating future growth. 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.” It is clear that only by addressing the complex benefits and costs of development at the regional scale can the issues of land use balance, resource conservation, multimodal transportation, employment, diversity, and affordability be resolved. The creation of a larger regional vision results in many of the benefits of urban infill development but at a drastically lower cost and is crucial to break the

269 Heid, supra note 200 at 3.
270 FULTON, supra note 7, at 299.
271 Heid, supra note 200 at 4.
272 Id.
273 Id.
274 Id.
275 Id.
bond between sprawl and greenfield development. Thus, the ultimate goal is to form a “cohesive, regionally cooperative human and natural environment.”

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. Proponents argue that there are three prerequisites to sprawl-free greenfield development. Addressing one or even two of these elements is simply not sufficient and all three need to be incorporated to ensure success.

These three perquisites include: (1) green infrastructure; (2) mobility and access; and (3) livability and lifestyle choices.

Green infrastructure is the process of making intelligent choices about where greenfield development should and should not go. 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.” 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, and future bus and rail connections. Finally, the third and final priority is providing a range of

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276 Id. at 6.
277 Id.
278 Id.
279 Id.
280 Id.
281 Id.
282 Heid, supra note 200 at 6.
283 Id.
life and lifestyle choices. 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.

In addition to “smart” greenfield development, suburban revitalization and redevelopment should also be looked at as a serious alternative to infill development. Infill development is a real opportunity only in select areas of California that are transit-rich enough for one to live without a car. Suburban revitalization and redevelopment can help fill this void as it can help “create more and 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.” Today, older suburbs are increasingly crowded, diverse and jobs-rich. These areas may be out of raw land, but are rich with underutilized parcels—some of them zoned for residential use, but many more of them are commercial parcels, either in old downtowns, declining shopping centers, or commercial strip areas from the 1950s and 1960s. These historic patterns of suburban development in California provide the state with a vast and diverse supply of land that can be recycled for new urban uses.

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

\[\text{Deleted: a}\]
that are already built out;\textsuperscript{291} 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.\textsuperscript{292} 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.”\textsuperscript{293} The downtown revitalization in San Diego offers an extraordinary example of this trend. With the help of redevelopment planning and subsidies of the ‘70s and ‘80s, San Diego has effectively created a “thriving big-city downtown” with increased condominium construction and an urban-style Ralph’s supermarket.\textsuperscript{294} Although San Diego offers a great example of suburban downtown revitalization, the revival of the large-scale downtown is the exception rather than the rule in California.\textsuperscript{295} More common has been the redevelopment of downtowns in smaller cities.\textsuperscript{296} For example, one of the more outstanding transformations has been that of Old Town Pasadena. 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

\begin{notes}
\item[291] Id.
\item[292] Vespa Telephone Interview, supra note 70.
\item[293] FULTON, supra note 7, at 300.
\item[294] Id.
\item[295] FULTON, supra note 7, at 300.
\item[296] Id.
\end{notes}
strategy thereby becoming one of LA’s most successful shopping centers.\textsuperscript{297} 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.\textsuperscript{298} 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.\textsuperscript{299} 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 sites.”\textsuperscript{300} 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.\textsuperscript{301} Conversely, retail properties change more quickly and “[y]esterday’s hot shopping center can easily become today’s vacant property.”\textsuperscript{302} 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.”\textsuperscript{303} A successful example in California is The Crossings in Mountain View—a project designed by New Urbanist Architect Peter Calthorpe.\textsuperscript{304} Under this project, a dead mall was completely razed and replaced with “a fairly high-density housing development that

\textsuperscript{297} Id. 301
\textsuperscript{298} Id.
\textsuperscript{299} FULTON, supra note 7, at 301.
\textsuperscript{300} Id.
\textsuperscript{301} Id. at 302.
\textsuperscript{302} Id.
\textsuperscript{303} FULTON, supra note 7, at 302.
\textsuperscript{304} Id.
included small-lot single-family homes as well as an attractive park.” 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.

In sum, suburban revitalization and smart greenfield development are two very innovative and effective alternatives to urban infill development. These alternatives help create walkable developments that create an urban feel. Thus, they 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; 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 growth under SB 375 to encompass these very viable and wise alternatives to urban infill—as already discussed above; 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

Senator Darrel Steinberg has stated that SB 375 will be used as the national framework for fighting sprawl and transforming California’s growth into smart growth. In addition, Governor Schwarzenegger has stated that SB 375 “constitutes the most sweeping revision of land-use policies since Governor Ronald Reagan signed the California Environmental Quality

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305 Id.
306 Id.
307 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.
Act.309 Although these and other proponents of the bill praise it as the solution to sprawl as it will encourage transit oriented infill development near employment centers, the question still remains, can transit oriented development be a freestanding policy, or does it require other measures in order to be effective? Proponents and opponents alike, agree that encouraging transit-oriented development cannot be a freestanding policy and more, especially in the form of additional public transit funding, will be required.310 Moreover, land use experts argue that the law will not be as sweeping as proponents assume unless the state takes it seriously and backs up the bill with additional financing and incentives.311 In sum, 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.312

The overarching message that SB 375 clearly sends to public agencies, developers and other stakeholders is that dense, transit oriented and mixed use 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 state and without public transit funding from the state, these areas will be unable to comply with the bills goals and mandates.313 Thus, without state funding transit-oriented development and the reduction goals of SB 375 will become nothing but a hoop dream. 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 375 as the key to GhG reduction, it is unfortunate that

309 Id.  
310 Higgins Telephone Interview, supra note 62.  
312 Davidoff, supra note 197.  
313 Higgins Telephone Interview, supra note 62.
when it came to making fiscal and budget decisions the state has slashed funding for public transit and has gutted redevelopment agencies statewide.\textsuperscript{314}

State funding decisions since the passage of the bill are at odds with the environmental goals of the bill. 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.\textsuperscript{315} 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.”\textsuperscript{316} 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.\textsuperscript{317} 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 the redevelopment cuts and 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.\textsuperscript{318} Several environmental groups that ultimately approved the bill, including the Sierra Club and the National Resource Defense Council, are planning to send letters to the administration to protest these measures.\textsuperscript{319}

The state has traversed this contradictory path even in light of strong support among California residents for increased public transit funding. Across all regions, residents believe

\textsuperscript{314} Id.
\textsuperscript{315} Id.
\textsuperscript{316} Malcolm Maclachlan, Governor’s Office Announces Climate Change Summit Lineup, CAPITOL WEEKLY, Nov. 13, 2008. http://www.capitolweekly.net/article.php?_adctlid=vijq2q43wvsl855olxjoyz4q662hkw3&issueId=xj4ev62q1hdw61&xid=xjnf0cyy2jb95ys.
\textsuperscript{317} Id.
\textsuperscript{318} Id.
\textsuperscript{319} Id.
that the state is not doing enough to address global warming and more, especially in the form of increased public transit, should be done.\textsuperscript{320} 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\%).\textsuperscript{321} Conversely, only 18\% of residents say the state should focus on building freeways and highways.\textsuperscript{322} Transit ridership further supports this trend. 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.\textsuperscript{323} “Transit ridership reached 2.8 billion trips in the third quarter, a 6.5\% jump from the same period last year. 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.

One other message SB 375 conveys to local governments, Metropolitan Planning Organizations and other stakeholders is that that housing should be constructed near employment. Again, however, drafters fail to realize that this cannot be a freestanding policy under the bill. The state needs to do more in the way of incentives for employers to locate in areas where employment opportunities are currently lacking. Doing so would also alleviate the current concerns regarding “smart” greenfield development—i.e. such development is far from employment making it necessary to commute. Additionally, with such increased employment

\textsuperscript{320} PPIC Statewide Survey, \emph{supra} note 114 at 23.
\textsuperscript{321} \emph{Id.}; see attached Exhibit C.
\textsuperscript{322} \emph{Id.} see attached Exhibit C.
\textsuperscript{323} Dunphy, \emph{supra} note 94 at 30.
opportunity, transportation infrastructure would also become cheaper.\footnote{324} Studies conducted under SB 375 have concluded that necessary transportation infrastructure is much cheaper if housing is located near employment centers.\footnote{325} Thus, by creating employment opportunities, the state can also make easier its task of providing transit.

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.\footnote{326} Yet the state has failed to take such action thereby increasing the burden on local governments and regional Metropolitan Planning Organization’s to attain the reduction targets while at the same time decreasing its own burden.\footnote{327} 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.\footnote{328} The bay area, however, has the BART system up and running, a relatively small land area, and plenty of employment opportunities as compared to other regions of California.\footnote{329} These circumstances make it optimal for increased TOD and until the state takes further action to provide similar public transit and employment opportunities in other regions of the state, it should not push these other regions to follow the bay area’s lead.\footnote{330}

Art Leahy, Metro CEO and member of the Regional Targets Advisory Committee, has emphasized critical differences between Southern California and Bay area regions. The Southern California region, he argues, encompasses “Riverside, Orange, San

\footnote{324} Adams Telephone Interview, supra note 38.  
\footnote{325} Id.  
\footnote{326} Higgins Telephone Interview, supra note 62.  
\footnote{327} Higgins Telephone Interview, supra note 62.  
\footnote{328} The Planning Report, supra note 170.  
\footnote{329} Id.  
\footnote{330} The Planning Report, supra note 170.
Bernardino, and L.A. Counties which are very, very widely spread out.”331 Additionally, “we are not going to have a BART system all over Southern California by the year 2020 or by the year 2030.”332 Conditions within the bay area—most importantly the availability of public transit within that region—make it very suitable for attaining the goals of SB 375; however, 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.333 Los Angeles is indeed making improvements but Leahy and others are not optimistic 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.334

Regional Targets Advisory Committee itself has also failed to take into consideration the lack of consistency between the State’s environmental policies and funding decisions. Members of the Regional Targets Advisory Committee are aiming to attain unrealistic goals by accepting unrealistic assumptions.335 For example, some members are assuming a full restoration of state funding for transit operations that seems unlikely.336 It is good to have dreams but such dreams do not constitute an action plan that has components, actions, and incentives that will take us where we want to go.337 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;338 otherwise, the bill is destined for failure.

331 Id.
332 Id.
333 Id.
334 Id.
335 Id.
336 Id.
337 The Planning Report, supra note 170.
338 Id.
Additionally, state government should 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. At the local level, Seattle, Charlotte and North Carolina 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. At the national level, the American Recovery and Reinvestment Act of 2009 is pumping billions of dollars into transportation infrastructure nationwide despite the current recession.

The international community is also attempting to embrace rather than reject transit opportunities during this enduring recession. 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. 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.

Finally, even local jurisdictions within the state of California are looking to integrate more public transit within their communities. For example, in Los Angeles, the two largest construction

339 Id.
340 Alexander E. Kalamaros, Transportation Blueprints, URBAN LAND, July 2009 at 42.
341 Id.
342 Id.
343 Id.
344 Id.
345 Id.
projects are both light-rail lines, and passage of Measure R\textsuperscript{346} is expected to jump start a number of TOD opportunities.\textsuperscript{347}

In sum, the recession has failed to intimidate local, national and international jurisdictions away from public transit opportunities and environmentalists and other stakeholders argue that “[w]e don’t have to do away with environmental safeguards to get the economy moving again.”\textsuperscript{348} These stakeholders and jurisdictions understand the importance public transit plays in creating smarter, greener communities and thus refuse to consider the pursuit of such opportunities as dispensable. The state should take its lead from these jurisdictions. Rather than reducing transit funding thereby obliterating infill opportunities in California, it should strive to provide additional funding in order to make the goal of smart growth a reality within the state. 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. \textit{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—}

\textsuperscript{346} Id.; Measure R will provide $40 billion to be spent on congestion relief and transportation investments countywide over the next 30 years.

\textsuperscript{347} Id.

\textsuperscript{348} Malcolm Maclachlan, \textit{Governor’s Office Announces Climate Change Summit Lineup}, CAPITOL WEEKLY, Nov. 13, 2008. http://www.capitolweekly.net/article.php?_adcltid=vijq2q43wsvsl855oljjoyz4q662hkw3&issueId=xj4ev62g1hdw61&xid=xjn0cyy2jb95ys.
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 their proposition. 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

<table>
<thead>
<tr>
<th>“How about...”</th>
<th>All Adults</th>
<th>Party</th>
<th>Likely Voters</th>
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<td></td>
<td></td>
<td>Dem</td>
<td>Rep</td>
</tr>
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<td>...requiring an increase in energy efficiency for residential and commercial buildings and appliances?</td>
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<td>86%</td>
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<td>Oppose</td>
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<td>12</td>
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<td></td>
<td>Don’t know</td>
<td>4</td>
<td>2</td>
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<td>...requiring industrial plants, oil refineries, and commercial facilities to reduce their emissions?</td>
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<td></td>
<td>Oppose</td>
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<td>6</td>
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<tr>
<td></td>
<td>Don’t know</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>...encouraging local governments to change land use and transportation planning so that people could drive less?</td>
<td>Favor</td>
<td>78%</td>
<td>87%</td>
</tr>
<tr>
<td></td>
<td>Oppose</td>
<td>18</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>Don’t know</td>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>
Exhibit B

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

<table>
<thead>
<tr>
<th>Region</th>
<th>All Adults</th>
<th>Central Valley</th>
<th>San Francisco Bay Area</th>
<th>Los Angeles</th>
<th>Orange/San Diego</th>
<th>Inland Empire</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very satisfied</td>
<td>24%</td>
<td>18%</td>
<td>30%</td>
<td>12%</td>
<td>31%</td>
<td>17%</td>
</tr>
<tr>
<td>Somewhat satisfied</td>
<td>44%</td>
<td>38%</td>
<td>44%</td>
<td>46%</td>
<td>50%</td>
<td>43%</td>
</tr>
<tr>
<td>Somewhat dissatisfied</td>
<td>22%</td>
<td>24%</td>
<td>20%</td>
<td>30%</td>
<td>15%</td>
<td>25%</td>
</tr>
<tr>
<td>Very dissatisfied</td>
<td>10%</td>
<td>19%</td>
<td>5%</td>
<td>11%</td>
<td>3%</td>
<td>14%</td>
</tr>
<tr>
<td>Don’t know</td>
<td>--</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
</tr>
</tbody>
</table>
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.”

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