

---

Volume 10

Issue 3

*Taking It Upstream: Collaboration, Consensus  
Building & Sustainable Development- A Green  
Leadership (Un)Conference*

Article 3

---

4-1-2010

## Getting the Green Light for Senate Bill 375: Public Engagement for Climate-Friendly Land Use in California

Greg Greenway

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Dispute Resolution and Arbitration Commons](#), [Environmental Law Commons](#), [Land Use Law Commons](#), and the [Natural Resources Law Commons](#)

---

### Recommended Citation

Greg Greenway, *Getting the Green Light for Senate Bill 375: Public Engagement for Climate-Friendly Land Use in California*, 10 Pepp. Disp. Resol. L.J. Iss. 3 (2010)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol10/iss3/3>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# Getting the Green Light for Senate Bill 375: Public Engagement for Climate-Friendly Land Use in California

Greg Greenway\*

## I. INTRODUCTION

Signed into law in September 2008, California's Senate Bill 375 (SB 375) is the first statewide legislation in the nation to link transportation and land use planning to climate change.<sup>1</sup> The law is lengthy and complex, but the central concept is simple: locate homes closer to jobs, services, and transit so that Californians drive less frequently, travel shorter distances, and reduce their greenhouse gas (GHG) emissions.<sup>2</sup> This article examines the approach to public participation outlined in SB 375, and argues that a critical success factor is the design and execution of strategies by local governments to engage citizens in the implementation of the legislation.<sup>3</sup> Because the law does not change local authority over land use decisions or mandate that any jurisdiction promote the regional agenda, public involvement at the local level will ultimately determine whether SB 375 changes prevailing land use patterns to address global warming, or simply turns up the heat on local communities and exacerbates conflicts over land use. The article concludes

---

\* The author is Executive Director of Threshold 2010, a non-profit organization located in San Mateo County, California that specializes in public engagement on housing and land use issues.

1. S.B. 375, 2007 Leg., Reg. Sess. (Cal. 2008), available at [http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb\\_0351-0400/sb\\_375\\_bill\\_20080930\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_bill_20080930_chaptered.pdf) [hereinafter S.B. 375].

2. *See id.*

3. Throughout this article "citizen" is used in the broadest sense, to refer to members of a community who have democratic rights and obligations "to engage in civic discussion, to work in concert with others toward public goals, to contribute toward the welfare of the commons, and to employ their voice and vote to guide the actions of elected officials." *See generally* Common Sense California, <http://www.common senseca.org> (last visited Mar. 27, 2010).

with an examination of a recent initiative in San Mateo County that offers a promising approach to engaging the public in land use decisions.

## II. A VISION OF SUSTAINABLE DEVELOPMENT

The Sustainable Communities and Climate Protection Act (SB 375) is landmark legislation in several respects. First, it calls for a historic change in California's growth pattern, one that definitively rejects suburban sprawl.<sup>4</sup> SB 375 promotes a future in which metropolitan regions accommodate all of their growth within areas that are already developed.<sup>5</sup> It targets automobile dependence and envisions higher-density infill housing in pedestrian-friendly city centers served by quality transit.<sup>6</sup> It integrates regional plans for housing and transportation infrastructure.<sup>7</sup> It calls for nothing less than a paradigm shift in the way that most local governments and communities in California approach development.<sup>8</sup>

Second, it puts California in a national leadership position by creating a policy framework to advance "smart growth" principles at the regional level.<sup>9</sup> From a planning perspective, SB 375 has the ambitious goal of integrating the currently disparate regional processes governing transportation funding, land use planning, housing development, and greenhouse gas reductions.<sup>10</sup> From an institutional standpoint, the law requires extensive coordination among regulatory agencies to align existing programs that address regional growth patterns (principally the Regional Transportation Plan (RTP), the Regional Housing Needs Allocation

---

4. See Sustainable Communities and Climate Protection Act, ch. 728, 2008 Cal. Stat. 85 (codified as amended in scattered sections of CAL GOV'T CODE and CAL. PUB. RES. CODE).

5. Sustainable Communities and Climate Protection Act, ch. 728, sec. 2, § 14522.1, 2008 Cal. Stat. 85 (codified as amended in scattered sections of CAL GOV'T CODE).

6. Sustainable Communities and Climate Protection Act, ch. 728, sec. 4, § 65080, 2008 Cal. Stat. 85 (codified as amended in scattered sections of CAL GOV'T CODE).

7. Sustainable communities and Climate Protection Act, ch. 728, sec. 2(e), 2008 Cal. Stat. 85 (codified as amended in scattered sections of CAL GOV'T CODE).

8. In signing the law, Governor Schwarzenegger stated that Senate Bill 375 (SB 375) "constitutes the most sweeping revision of land use policies since Governor Ronald Reagan signed the California Environmental Quality Act (CEQA) four decades ago . . ." OFFICE OF THE GOVERNOR, SB 375 STEINBERG SIGNING MESSAGE (2008), available at [http://gov.ca.gov/pdf/press/SB375\\_Steinberg\\_Signing\\_Message.pdf](http://gov.ca.gov/pdf/press/SB375_Steinberg_Signing_Message.pdf).

9. Central to the concept of "smart growth" is the location of housing, jobs, retail, services, recreation and transit within proximity of one another to promote compact, walkable communities that use resources and infrastructure efficiently. Suburban sprawl, and particularly the encroachment of development on open space and farmland, typically represents the antithesis of smart growth principles. See generally Smart Growth America, <http://www.smartgrowthamerica.org> (last visited Mar. 27, 2010), for further discussion and resources.

10. S.B. 375, *supra* note 1.

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

(RHNA), and the California Environmental Quality Act (CEQA)).<sup>11</sup> From a political point of view, SB 375 requires regional agencies to strike a balance between a “top-down” and “bottom-up” approach toward implementation, one that effectively involves local decision makers without undermining regional imperatives.

Third, SB 375 is a cornerstone of the state’s broader strategy to address climate change. California’s Global Warming Solutions Act of 2006 (Assembly Bill 32) establishes goals for statewide greenhouse gas reductions, and gives the California Air Resources Board (CARB) authority over sources of emissions.<sup>12</sup> SB 375 is, in effect, the implementing legislation to achieve the AB 32 GHG reduction targets for the transportation sector, the largest source of global warming pollution in the state.<sup>13</sup>

---

11. In this respect, SB 375 does not create an entirely new regional planning framework, but rather builds upon and modifies the existing approach anchored in the regional transportation plan. As noted in the law, some regions already use a “blueprint” process to prepare the land use allocation baseline for their regional transportation plans. It also intends to bring together current climate change initiatives within a coordinated regional framework. A staff report to the Bay Area’s SB 375 Joint Policy Committee cites more than twenty agency initiatives related to climate change, and at least as many non-governmental efforts. BRUCE RIORDAN & TED DROETTBOOM, CLIMATE PROGRESS REPORT AND 2010 STRATEGY DISCUSSION (STAFF REPORT TO JOINT POLICY COMMITTEE) 2-3, 6-9 (2010), available at <http://www.abag.ca.gov/jointpolicy/Climate%20Progress%20Report%20%20and%202010%20Strategy.pdf>.

12. Assem. B. 32, 2006 Leg., Reg. Sess. (Cal. 2006), available at [http://www.climatechange.ca.gov/publications/legislation/ab\\_32\\_bill\\_20060927\\_chaptered.pdf](http://www.climatechange.ca.gov/publications/legislation/ab_32_bill_20060927_chaptered.pdf). In the estimation of the California State Association of Counties (CSAC), SB 375 “is a monumental step forward in the State’s efforts to achieve the global warming goals consistent with AB 32.” CSAC, SB 375 (STEINBERG): ADDRESSING GREENHOUSE GAS EMISSIONS FROM THE TRANSPORTATION SECTOR VIA REGIONAL TRANSPORTATION PLANS, CSAC ANALYSIS 1 (2008), available at <http://www.csac.counties.org/images/users/1/SB%20375%20CSAC%20Fact%20Sheet%20-%20Oct21,08.pdf>.

13. As noted in the text of SB 375, the transportation sector accounts for over forty percent of state GHG emissions, with cars and light trucks contributing nearly thirty percent. The law declares that, “Without improved land use and transportation policy, California will not be able to achieve the goals of AB 32.” S.B. 375, *supra* note 1, at 4. Transportation GHG emissions are the product of vehicle fuel efficiency, the carbon content of fuel itself, and the number of vehicle miles traveled (VMT). SB 375 applies only to reductions in VMT from cars and light trucks that result from changes in statewide growth patterns (while taking into account projected gains in fuel efficiency and changes in fuel content).

### III. THE CENTRALITY OF HOUSING

SB 375 empowers CARB to set regional GHG reduction targets from the transportation sector for each of the eighteen Metropolitan Planning Organizations (MPOs) in California.<sup>14</sup> In turn, each MPO is charged with preparing a regional land use plan, called a Sustainable Communities Strategy (SCS), to achieve the targets.<sup>15</sup> The SCS is included in the MPO's Regional Transportation Plan, expressing its underlying land use assumptions and becoming a blueprint for how the region will meet its GHG targets if it is feasible to do so.<sup>16</sup> In addition to linking land use and transportation planning through the SCS, SB 375 makes two other basic changes in existing law. It synchronizes the planning horizon of the RTP and the RHNA process to ensure that the land use projections of the SCS are consistent with the level of housing development anticipated by city and county general plans.<sup>17</sup> It also creates new mechanisms within CEQA to encourage local land use decisions that support the implementation of the SCS.

For a law that governs emissions reductions from the transportation sector, SB 375 is remarkably housing-centric. It intends that land use policy contribute to the statewide climate change strategy by changing the way

---

14. See CSAC, MAKE IT WORK: IMPLEMENTING SENATE BILL 375 (2009), available at <http://sustainablecalifornia.berkeley.edu/pubs/SB375-POLICYBRIEF.pdf>.

15. S.B. 375, *supra* note 1.

16. *Id.* The determination of feasibility affects the planning process. If the MPO finds that the SCS cannot feasibly achieve the target, it must submit an Alternative Planning Strategy (APS) to show how it could reach it. Once the MPO submits the SCS or APS, CARB may approve or reject it. Unlike an SCS, an APS does not become part of the RTP. Either approach, however, enables local jurisdictions to take advantage of SB 375's CEQA incentives discussed below. Further references in this article to SB 375's requirements and incentives with respect to the SCS generally apply equally to the APS process, but for purposes of simplicity and acronym reduction, the article will refer only to SCS going forward.

17. *Id.* The law extends the timeframe for the RHNA from five years to eight years, making it consistent with the RTP update process every four years. As a practical matter, this allows cities and counties to adopt general plan housing elements on the same cycle as the regional plans for transportation infrastructure to support new development. Beyond this rationale, the need for consistency of the RTP and RHNA processes is grounded in federal law. 23 C.F.R. § 450.322. Because the RTP must pass a "realism test" regarding its assumptions about growth, there must be a reasonable expectation that current and future local land use plans will collectively produce the regional development pattern embodied in the SCS. If the federal government deems the growth projections to be unrealistic, it has the power to withhold federal transportation funding for the RTP. Existing land use plans are not the only factor that determines whether an RTP is realistic. Federal regulations require that they be considered along with other factors, and it is also realistic to assume that local plans will change over the course of the minimum twenty year timeframe of the RTP. TOM ADAMS, AMANDA EAKEN & ANN NOTTHOFF, COMMUNITIES TACKLE GLOBAL WARMING: A GUIDE TO CALIFORNIA'S SB 375, at 16-17 (2009). The authors' respective organizations were co-sponsors of SB 375.

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Californians build and live. Compact, transit-oriented residential and mixed-use development makes it easier for people to live their lives without depending on the automobile. When homes are located near essential services, residents can more easily walk or bike to school, child care, and the market. When regional housing and jobs are in balance, trips to and from work are shorter. When development is concentrated near transit stations, commuters are more likely to travel by rail or bus. Hence, the location and intensity of housing development is the key to reducing vehicle miles traveled under the SCS.<sup>18</sup>

The Sustainable Communities Strategy establishes one requirement related to housing that, if implemented, would represent a major departure from California's growth pattern of the last half century. In making its growth projections, the SCS must "identify areas within the region sufficient to house all the population of the region, including all economic segments of the population, over the course of the planning period of the regional transportation plan taking into account net migration into the region, population growth, household formation and employment growth."<sup>19</sup> According to federal law, the planning horizon of the RTP is at least twenty years.<sup>20</sup> Even in the shorter term, the integration of the RTP and the RHNA process means that SCS must also identify areas within the region sufficient to house an eight-year projection of the regional housing need.<sup>21</sup> The SCS must "identify the general location of uses, residential densities, and building intensities within the region,"<sup>22</sup> but it is the requirement to accommodate *all* growth from the region within the region that is extraordinarily significant.<sup>23</sup> The SCS abides no sprawl.

---

18. The Urban Land Institute reviewed dozens of studies to analyze the impact of compact development in walkable neighborhoods on vehicle miles traveled. See REID EWING ET AL., *GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE* (2008).

19. CAL. GOV'T CODE § 65080(b)(2)(B)(ii). While current methods of calculating the regional housing need include assumptions about employment growth, SB 375 can be expected to increase RHNA numbers by focusing on the jobs/housing balance. SB 375 requires that, "The region's existing and projected housing need shall reflect the achievement of a feasible balance between jobs and housing within the region using the regional employment projections in the applicable regional transportation plan." CAL. GOV'T CODE § 65584.01(d).

20. 23 C.F.R. § 450.322(a).

21. CAL. GOV'T CODE § 65080(b)(2)(B)(iii).

22. CAL. GOV'T CODE § 65080(b)(2)(B)(i).

23. It is made all the more so by the fact that the SCS is likely to project a greater housing need than the current RHNA process because it is required to take greater account of growth from employment.

Notwithstanding the case and sentiment against it, suburban sprawl has been common in California over the last fifty years, in tandem with the expansion of the interstate highway system. Those who attempt to measure sprawl may come to different conclusions about its definition and extent.<sup>24</sup> Nevertheless, two observations are clear enough. First, cities typically grow in a way that makes it necessary to drive from one destination to another.<sup>25</sup> Second, communities in the most urbanized metropolitan regions have rarely built enough housing to accommodate all of their own population growth.<sup>26</sup> The result is that these regions, despite increasing their density, continue to export growth to adjacent, less densely urbanized areas, sometimes at the expense of farmland and open space.<sup>27</sup>

---

24. Some calculations of historical land utilization (growth in land development divided by growth in population) demonstrate that California as a whole has become slightly more efficient in the use of land over time, and that other states have a higher "sprawl index." For example, John Landis, of U.C. Berkeley's Department of City and Regional Planning, has found that, despite population growth, "each person has been using slightly less land than the previous generation." Landis attributes the slight increase in density to the trend toward national developers building larger homes on smaller lots in expansive projects. Dan Bryant, *Farms, Urban Sprawl: Which Is Ahead?*, WESTERN FARMS PRESS, June 16, 2001, available at [http://westernfarmpress.com/mag/farming\\_farms\\_urban\\_sprawl](http://westernfarmpress.com/mag/farming_farms_urban_sprawl).

25. See REID EWING ET AL., MEASURING SPRAWL AND ITS IMPACT: THE CHARACTER AND CONSEQUENCES OF METROPOLITAN EXPANSION (2002), available at <http://smartgrowthamerica.org/sprawlindex/MeasuringSprawlTechnical.pdf>. Smart Growth America characterizes sprawl not just by its low density of development, but also by the dispersion of homes, jobs, and services; the poor accessibility of the street network; and the lack of thriving activity centers or downtowns.

26. For example, during the last RHNA cycle from 1999-2006, not a single county in the metropolitan Bay Area saw the jurisdictions within it collectively approve enough permits for new homes to address all of the identified housing need (which would be even greater using the methodology proposed by SB 375). ASSOCIATION OF BAY AREA GOVERNMENTS (ABAG), A PLACE TO CALL HOME: HOUSING IN THE SAN FRANCISCO BAY AREA 9 (2002), available at [http://www.abag.ca.gov/planning/housingneeds/pdf/respirces/ABAG\\_housing\\_report\\_2006\\_FINAL\\_1.pdf](http://www.abag.ca.gov/planning/housingneeds/pdf/respirces/ABAG_housing_report_2006_FINAL_1.pdf).

The fact that most of these counties score relatively low on a statewide sprawl index (with San Francisco being by far the least sprawling county in the state) only emphasizes what a challenge it is to meet the entire housing needs allocation within the region. BARBARA A. MCCANN & REID EWING, MEASURING THE HEALTH EFFECTS OF SPRAWL: A NATIONAL ANALYSIS OF PHYSICAL ACTIVITY, OBESITY AND CHRONIC DISEASE 36-37 (2003), available at <http://www.smartgrowthamerica.org/report/HealthSprawl8.03.pdf>.

27. As the ABAG report notes:

Many communities in the Bay Area consider themselves to be 'built out,' with no room for growth. In addition, there is the perception that planning for housing promotes growth and that, if communities simply do not plan for it, it will not happen. What goes unacknowledged is that this growth does occur, and local land use policy choices put significant pressure on neighboring regions, including the Central Valley, to absorb spillover growth.

ABAG, *supra* note 26, at 9-10.

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

#### IV. CARROTS WITHOUT A STICK

If infill development has not been the norm in California, then the task of containing growth within metropolitan regions would appear daunting on its face. Not only does SB 375 call for a qualitative shift in the kind of development that defines the state, but it also demands a scale and pace of housing growth that in some metropolitan regions is heretofore unknown. As if this were not enough, SB 375 seeks to achieve its ambitious goals through minimal mandates and regulations. Rather than compelling local jurisdictions to do much of anything differently, the law relies on incentives, market forces, political leadership, and public education to be the driving forces for change.

This approach is understandable, if not particularly propitious, from the standpoint of those in the smart growth trenches. On the one hand, it is easy to argue that a heavy-handed approach by the State would be doomed from the outset. City and county officials already resent the countless unfunded mandates imposed from above, and control of land use is arguably the most fundamental and closely guarded power of local government. On the other hand, political realities meant that the final form of the legislation was the product of carefully negotiated compromise among an “impossible coalition” of stakeholders.<sup>28</sup> In any case, the result is a comprehensive and welcome framework for encouraging, but not compelling, local governments to comply voluntarily with the terms and requirements of a regional growth blueprint.

---

28. The law’s co-sponsors defend this outcome as advantageous in the long run: “By focusing SB 375 on an open process and incentives rather than complex mandates, all the interests were able to realize gains . . . . SB 375 enjoyed a process of principled compromise that can produce more widespread success in the legislative arena. Reaching agreement on complex, large-scale, and controversial issues is the strongest path for durable achievements.” ADAMS ET AL., *supra* note 17, at 11. Whether for reasons of enlightened policymaking or political expedience, the adopted legislation replaced earlier versions of the bill that reportedly took a more top-down approach and emphasized mandates over incentives. AMERICAN PLANNING ASSOCIATION (APA), APA CALIFORNIA SUPPORTS SB 375 – LANDMARK REGIONAL TRANSPORTATION PLANNING, HOUSING, CEQA AND GLOBAL WARMING EMISSION REDUCTION MEASURE 2 (2008), *available at* <http://www.calapa.org/attachments/wysiwyg/5360/SB375ApaSupports.doc>. Higgins suggests that diverse stakeholders reached agreement because “SB 375 provides *more certainty* for local governments and developers by framing how AB 32’s reduction goal from transportation planning for cars and light trucks will be established.” BILL HIGGINS, TECHNICAL OVERVIEW OF SB 375 (V 1.3) (MEMO TO CALIFORNIA LEAGUE OF CITIES) 2 (2009), *available at* [http://www.cacities.org/resource\\_files/27666.SB%20375%20Implementation%20Final%2001-09%20\(2.0\).doc](http://www.cacities.org/resource_files/27666.SB%20375%20Implementation%20Final%2001-09%20(2.0).doc).



Given its shortage of mandates, SB 375 sets forth a number of incentives designed to nudge local governments to implement the regional plan. Among the more significant are the following:

CEQA Relief. A residential and mixed-use project that is consistent with the designation, density, and intensity in the SCS does not have to analyze: (a) its impacts on GHG emissions from cars and light trucks, (b) its growth inducing or cumulative impacts from cars and light trucks, or (c) reduced density as an alternative to address the effects of cars and light trucks generated by the project.<sup>29</sup>

Transit Priority Projects. Certain kinds of projects qualify for special forms of CEQA relief. Transit Priority Projects are defined as projects that: (a) are consistent with the SCS, (b) are at least fifty percent residential, (c) have a density of at least twenty units per acre, and (d) are within half a mile of a transit corridor that has a minimum fifteen minute service at peak times. Under a strict set of circumstances (size, environmental thresholds, affordability level, open space set-asides), such projects are eligible for CEQA exemption. Qualified Transit Priority Projects that do not meet the strict criteria may still be eligible for a streamlined CEQA process.<sup>30</sup>

RHNA Teeth. Other than the change of the planning period to eight years, the process of allocating the regional housing need and certifying general plan housing elements remains largely unchanged. SB 375 affects zoning deadlines and penalties for noncompliance. Local governments must complete and submit their housing elements to the State one year after they receive their housing allocation. Jurisdictions that fail to submit a timely housing element must move to a four-year cycle. All zoning consistent with the approved housing element must be complete within three years, and must include minimum density and development standards.<sup>31</sup> If the jurisdiction does not complete the zoning within this timeframe, any interested person may file suit in court. The court is required to issue an order or judgment and may impose sanctions if the jurisdiction does not comply. By potentially penalizing cities and counties that do not zone enough land to meet their RHNA targets, SB 375 at least puts baby teeth into the law by making housing elements more enforceable, encouraging each

---

29. This relief is meaningful. Developers commonly point to a CEQA paradox: compact, infill projects reduce regional congestion by placing people closer to jobs and transit, but such projects seem like net traffic generators during environmental review because the law only requires quantification of the project's local traffic impacts.

30. CAL. PUB. RES. CODE § 21155 (West 2009).

31. S.B. 375, *supra* note 1. The 3-year period begins ninety days after the local jurisdiction receives final comments from the State, and the law allows for a 1-year extension. *Id.*

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

local jurisdiction to do all it can to contribute its share of the regional housing supply.<sup>32</sup>

Anti-NIMBY Provision.<sup>33</sup> SB 375 extends protection for projects in which at least forty-nine percent of the units are affordable to lower-income households (which in most cases means a project that is 100% affordable).<sup>34</sup> If the approved housing element indicates a site is suitable for residential development but the jurisdiction has not completed the corresponding zoning, then authorities can deny an affordable project that meets the applicable standards only for health and safety reasons.

Despite its implications for housing and mixed-use development, SB 375 uses the regional transportation planning process as its platform to address climate change. The law does not require, however, that local jurisdictions comply with the Sustainable Communities Strategy in order to receive transportation funding. It only makes explicit the existing authority of MPOs to adopt any number of policies and conditions for transportation funding.<sup>35</sup> What it does require is that the funding decisions for the regional transportation network be consistent with the SCS, presumably directing more resources toward transit oriented development.<sup>36</sup> It has been noted that MPO regional policymakers are also local elected officials, meaning that “[they] are not likely to support measures that limit the discretion of cities and counties, particularly in those MPOs where every city and county in the region has a seat on the MPO board.”<sup>37</sup> Rather than forcing cities and counties to approve housing along transit corridors, the link between transportation funding and the SCS serves as an incentive for local jurisdictions to share the regional vision.

## V. THE CHALLENGE OF PUBLIC ACCEPTANCE

For SB 375 to achieve its potential, hundreds of communities throughout California must embrace the regional blueprint as their own. The problem is that most communities have not welcomed the kind of development that SB 375 implies, and those urban areas that are expected to

---

32. As noted above, SB 375 will probably increase the size of most jurisdictions’ housing allocations because of the way the law factors employment growth into RHNA calculations. *Id.*

33. NIMBY stands for Not In My Backyard.

34. HIGGINS, *supra* note 28, at 16.

35. *Id.* at 9. The law does not change the role of the RTP in relation to local governments.

36. *Id.*

37. *Id.*

increase their density have not been accustomed to the scale of development that the law anticipates.<sup>38</sup> One of the main reasons that higher density, infill development has not taken hold throughout the state, despite strong support among professional planners, is that residents frequently organize to oppose such development. Despite polls that indicate broad support for smart growth principles, community acceptance of smart growth projects is sporadic. The lack of public support may find expression as vocal opposition at public hearings, but it can also be encoded in land use plans that discourage higher density development.

Land use decisions inflame passions because they implicate property rights, home values, social equity, environmental protection, and community identity. Those who already live in a particular city or town, and especially those who own homes, often moved or stayed there because they like things how they are, or were. Higher densities and building intensities, even on underutilized infill sites, can challenge local conceptions of how the community should look and feel.<sup>39</sup> It is easy to dismiss this response as classic NIMBY behavior, but that takes the focus off the dynamics of the public process that exaggerate community opposition.

There are understandable reasons why more people typically speak out at public hearings against new housing proposals than in favor, and that voters often punish elected officials for approving higher density development. Generally this has to do with the perceived distribution of costs and benefits. New housing will be located in a particular place, meaning that those who already live in proximity to that site will be acutely affected by any negative impacts of the project (e.g., local traffic congestion from new residents, diminished sightlines from taller buildings, or changes to the look and feel of the neighborhood). On the other hand, those who might benefit from new housing, including affordable housing, are more dispersed (young people who will start their own households in the future, people who work in the community but commute in because of a lack of local housing choices, or service sector employees who struggle privately to make ends meet). As a result, it is easier to mobilize constituencies against housing because concerned neighbors live close to one another, can identify the source of potential impacts, and are likely to experience those impacts directly. It is more difficult to organize an effective constituency in favor of

---

38. THRESHOLD 2008, FINAL REPORT 4 (2009), *available at* [http://threshold2008.org/cmsAdmin/uploads/Threshold\\_2008\\_Final\\_Report\\_March\\_09.pdf](http://threshold2008.org/cmsAdmin/uploads/Threshold_2008_Final_Report_March_09.pdf) (explaining that San Mateo County “can accommodate only about a third of its growth over the next generation”).

39. Some of the more contentious struggles over affordable housing even raise the question of who “belongs” in the community.

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

housing because the likely beneficiaries are not concentrated geographically, the benefits are more diffuse (a single project addresses only a fraction of the regional need), and non-voters, residents under eighteen, and local employees who reside elsewhere but would like to live closer to work, do not command the same attention from elected officials.

The nature of the public process itself is a constraint on housing approvals. Every proposed development and significant policy decision requires formal hearings before appointed and elected officials. Public hearings tend to favor those who say no rather than yes, for at least two reasons.

First, as noted above, citizens who are most vocal at public meetings are not necessarily representative of the entire community. Indeed, those who would benefit the most from new housing are usually not in the room at all. Notifications of public meetings are generally targeted toward those households within a certain distance of the proposed project, so those who do not live in the neighborhood may never be aware of the process. Young people who cannot yet vote but who will need housing in the future are not likely to show up to a public meeting on a school night. Likewise, local employees who live in another community are unlikely to stay after work so they can speak to the planning commission or city council. The result is a consistent selection bias in the public voice that informs housing decisions.

Second, public hearings are frequently divisive. At the point of decision-making, citizens seek to win votes from public officials, not to explore the full range of community interests or to find common ground. The format of the public hearing rewards effective advocacy, which requires that arguments be prepared and evidence marshaled prior to listening to what other community members have to say. The meeting is structured in such a way that citizens appeal directly to public officials, providing “input” in a format that is essentially competitive with opposing constituents. There is no dialogue, no mediation, and no search for common ground—only a few minutes to make one’s case and sit down. It is not surprising that on high stakes issues the debate is often contentious and bitter, pitting neighbor against neighbor (or neighbor against professional advocate) and setting a tone which discourages broader public dialogue.

Elected officials are charged with creating solutions and perhaps pursuing the common good, but on housing decisions, they usually deliberate without the benefit of hearing from all stakeholders or necessarily knowing what the larger community would support if given a chance to consider the issues carefully. To the extent that policymakers want citizens to be informed about important community issues and want to receive a

broad representation of those citizens' informed views, they are in a difficult position at the public meeting. It is hard to know what their constituents would have them do when they hear from only a few, and it takes an act of political courage to vote one way when those in the room are urging another.

Ultimately, the motivated public will have its say. Even when elected officials summon and sustain the political will to approve housing that their constituents have decried as too dense or too tall, the referendum process allows citizens to appeal those decisions by putting them to a public vote. Given that most citizens are generally not informed about particular projects or the regional housing need and that the environmental review process highlights and quantifies a proposed project's negative impacts, the deck is stacked against housing if motivated constituencies choose to oppose it. If the ballot box becomes the final stop for land-use planning, then SB 375 faces a major challenge in asking communities to make dramatic changes to the path that most have been following for decades. The kinds of local land-use decisions required for SB 375 to be successful are precisely the ones for which it has been most difficult to build public support.

## VI. PUBLIC PARTICIPATION UNDER SB 375

SB 375 is not silent on the need to involve the public.<sup>40</sup> As each region develops its SCS, it is required to create a "public participation plan."<sup>41</sup> Those charged with implementing the legislation acknowledge that an effort of this scale, particularly one that relies on leadership and incentives over mandates and regulations, must work successfully with a wide range of stakeholders.<sup>42</sup> Most of the focus within the legislation, and in the discussion around it, is on how to involve elected officials and stakeholders in the development of regional GHG targets and more importantly for the purposes of this article, the creation of each region's SCS.<sup>43</sup> There has been much less attention to how the regional blueprint will be accepted and implemented at the local level and to the skills and resources that local governments will need to engage their communities effectively.

Before outlining the legislation's requirements for public participation, it is important to note that an incentives-based approach raises the stakes for

---

40. See generally S.B. 375, *supra* note 1.

41. *Id.* at 6.

42. See, e.g., JOINT POLICY COMMITTEE, POLICIES FOR THE BAY AREA'S IMPLEMENTATION OF SENATE BILL 375, at 4, 9, 13 (2009), <http://www.abag.ca.gov/jointpolicy/Policies%20for%20SB%20375%20September%202009.pdf> (outlining implementation policies adopted by a regional planning consortium in the San Francisco Bay Area).

43. 2008 CAL. LEGIS. SERV. 728 § 1(e) (West).

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

citizen engagement. In order for SB 375 to be successful, local leaders must become ambassadors for the regional blueprint, and local communities must embrace it as their own. Cities and counties must be willing and able to take advantage of the incentives that the law provides. This is not a criticism of the way SB 375 is designed to work. The evolution of the legislation away from mandates and regulations gives it a chance to succeed by making it more adoptable and by avoiding early conflict over local control. Moreover, even a more mandate-oriented approach would not automatically solve the problem of public acceptance without fundamentally altering local land-use authority.<sup>44</sup> With its changes to CEQA and RHNA, SB 375 confronts real constraints in the planning process for new housing.<sup>45</sup> At the same time, the public still holds a trump card.

SB 375 includes specific requirements for participation by local government, stakeholders, and the public.<sup>46</sup> The first phase of outreach pertains to the determination of GHG reduction targets.<sup>47</sup> SB 375 calls for an “iterative process” between CARB and MPOs to establish regional emission targets for cars and light trucks for 2020 and 2035.<sup>48</sup> As prescribed by the law, CARB has already appointed a Regional Targets Advisory Committee (RTAC) to recommend factors and methodologies for setting the targets.<sup>49</sup> Each MPO receives the advisory committee’s report and must hold at least one public workshop before recommending a target for the region to CARB.<sup>50</sup>

---

44. That is to say, all the incentives or sanctions imaginable would not necessarily prevent citizens from pressuring elected officials or overturning their decisions at the ballot box, unless perhaps those sanctions were to affect those individual citizens directly and significantly. For their part, local officials have demonstrated a selective willingness to comply with existing mandates insofar as many cities consistently fail to make land use or zoning changes consistent with housing element law (largely because the law has few enforcement mechanisms).

45. 2008 CAL. LEGIS. SERV. 728 (West).

46. *Id.*

47. *Id.*

48. *Id.* at § 1(e). The MPO submits a proposed technical methodology for estimating GHG emissions from its SCS, CARB replies, and the two then work together to reach an agreement. Once the MPO adopts and submits an SCS, CARB may only accept or reject it, at which point the MPO may either revise and resubmit the SCS or adopt an Alternative Planning Strategy.

49. CAL. GOV’T CODE § 65080(b)(2)(A)(i) (West 2010). The 21-member RTAC released a report with its recommendations in September 2009. REGIONAL TARGETS ADVISORY COMMITTEE, RECOMMENDATIONS OF THE REGIONAL TARGETS ADVISORY COMMITTEE (RTAC) PURSUANT TO SENATE BILL 375: A REPORT TO THE CALIFORNIA AIR RESOURCES BOARD 1 (2009), available at <http://www.arb.ca.gov/cc/sb375/rtac/report/092909/finalreport.pdf>.

50. CAL. GOV’T CODE § 65080(b)(2)(A)(ii) (West 2010).

Prior to the adoption of the Sustainable Communities Strategy, SB 375 requires each MPO to involve local officials and the public in development of the plan.<sup>51</sup> For the benefit of policymakers, MPOs must hold at least one or two meetings in each of their counties for members of the board of supervisors and city councils.<sup>52</sup> The purpose is to allow elected officials to review a draft of the SCS and to solicit and consider their input and recommendations. These are the minimal requirements of the law, so individual MPOs are free to exceed these standards for involving local officials.<sup>53</sup>

Each MPO must also develop a “public participation plan” that includes.<sup>54</sup>

- Outreach to a broad range of stakeholder groups to encourage active participation during the planning process;<sup>55</sup>
- Consultation with transportation agencies and commissions;
- At least one public informational workshop in each county;<sup>56</sup>
- A fifty-five-day circulation period for the draft SCS;
- At least two or three public hearings on the draft SCS;<sup>57</sup>
- A one-step process to receive notices; information and updates.

---

51. *Id.* All participation requirements for the SCS described in this section apply equally to the APS, if any. CAL. GOV'T CODE § 65080(b)(2)(F) (West 2010).

52. CAL. GOV'T CODE § 65080(b)(2)(E) (West 2010). “The metropolitan planning organization may conduct only one informational meeting if it is attended by representatives of the county board of supervisors and city council members representing a majority of the cities representing a majority of the population in the incorporated areas of that county.” *Id.*

53. Staff reports and comments from regional agency representatives in the Bay Area indicate the intention to involve not just local elected officials, but also local appointed officials and government planning staff. There is a clear recognition among those charged with implementing the legislation that local support is critical, undoubtedly in part because representatives to the four regional boards that comprise the SB 375 Joint Policy Committee are themselves local elected officials. See JOINT POLICY COMMITTEE, MINUTES OF THE MEETING OF NOVEMBER 6, 2009, at 2, available at <http://www.abag.ca.gov/jointpolicy/JPC%20Minutes%2011-06-09.pdf>.

54. CAL. GOV'T CODE § 65080(b)(2)(D), (F) (West 2010).

55. The efforts must be consistent with the agency's adopted Federal Public Participation Plan, and must include outreach to “affordable housing advocates, transportation advocates, neighborhood and community groups, environmental advocates, home builder representatives, broad-based business organizations, landowners, commercial property interests, and homeowner associations.” CAL. GOV'T CODE § 65080(b)(2)(F)(i) (West 2010).

56. *Id.* The law requires one workshop in most counties, but at least three workshops in counties with a population over 500,000 (sixteen of California's fifty-eight counties according to 2008 data). See also California State Association of Counties, CA County Population, <http://www.counties.org/default.asp?id=399> (last visited Mar. 27, 2010).

57. CAL. GOV'T CODE § 65080(b)(2)(F)(v) (West 2010). The law requires at least two hearings in single county MPOs (fourteen in the state) and three hearings in multiple county MPOs (four in the state).

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

SB 375 does not prescribe the content of each region's SCS. By design, the public participation plan creates an opportunity for "upstream" citizen involvement in the policymaking process, early enough to influence the regional growth blueprints.

## VII. THE MISSING PIECE: LOCAL COMMUNITY ENGAGEMENT

It is important to note what SB 375 does not say about public participation. It does not make provisions for how the public is engaged in the implementation of the SCS after its adoption. It does not provide new powers, guidance, tools, or resources to cities and counties to help them engage their citizens. The focus of the outreach and participation component of SB 375 is the development, acceptance, and approval of the SCS itself.<sup>58</sup> Moreover, the mandatory components of the public participation plan are oriented toward elected officials and "stakeholder groups," with minimal requirements for including the general public.

Successful citizen engagement is critical to SB 375 because the law does nothing to diminish local control over land use. The Sustainable Communities Strategy is certainly a plan of sorts, but it is a plan without authority. The law is clear that, "Neither a sustainable communities strategy nor an alternative planning strategy regulates the use of land . . . . Nothing in a sustainable communities strategy shall be interpreted as superseding the exercise of the land use authority of cities and counties within the region."<sup>59</sup> At the final point of implementation for the regional vision, only local governments have the power to approve development permits. At the same time, SB 375 does not compel local general plans to be consistent with the SCS, does not compel local elected officials to approve projects, and does not compel local communities to advance the regional agenda.<sup>60</sup>

From a public engagement standpoint, this means that the participation program needs to operate effectively not only at the regional level, but also within individual jurisdictions. MPOs need to do the heavy lifting to involve and recruit local officials. If SB 375 is to effect real change, local

---

58. This is not to say that regional policymakers are ignoring the issue of local community engagement, only that the law itself does not make explicit provisions regarding public participation during implementation phase of the SCS.

59. CAL GOV'T CODE § 65080(b)(2)(K) (West 2010).

60. The law states that nothing about the SCS "shall require a city's or county's land use policies and regulations, including its general plan, to be consistent with the regional transportation plan or an alternative planning strategy." *Id.*



policymakers not only need to believe in the benefits of the regional blueprint process, but they also need information and support to communicate effectively with their constituents. It is not just a matter of explaining why it is important to address climate change and how SB 375 will help in that effort. Local officials will have to do that and more. Cities and counties need resources and effective methods of including their citizens if there is any chance of the hundreds of communities throughout California embracing a new development paradigm as their own.

There are at least three challenges to winning public support at the community level. First, in broad outline, the adopted SCS predetermines the preferred policy outcomes. To this extent, MPOs will be most interested in presenting the public with choices about how to implement the law but not whether to do so, while local citizens may feel that the deck was stacked before they sat down at the table. Second, the benefits of implementation in terms of climate change are regional (or global) and long term, while the perceived costs of new development are local and immediate. Third, as noted above, California communities have not overwhelmingly jumped onboard with smart growth practice, especially with respect to higher density and affordable housing, despite advocacy campaigns and overwhelming support among professional planners.

An adverse local reaction to the regional blueprint could easily confound the mechanisms working for SB 375. The law banks heavily on incentives, market forces, and political leadership.<sup>61</sup> Each of these approaches runs through or up against the public in some way.

SB 375 certainly creates an array of potentially valuable incentives that make it possible for qualified projects to move more easily through the planning process.<sup>62</sup> Its CEQA relief is meaningful if extremely hard to attain, especially for Transit Priority Projects.<sup>63</sup> Yet, the lowering of hurdles in the housing approval process begs the question of whether communities support new housing at all. In many cases, the CEQA incentives may be equivalent to telling a community that it will not be able to take advantage of a streamlined process to approve development that it does not want in the first place.<sup>64</sup> SB 375 does appear to make local housing elements more enforceable,<sup>65</sup> but it remains to be seen how sanctions will be applied and

---

61. See ADAMS ET AL., *supra* note 17, at 6.

62. *Id.*

63. HIGGINS, *supra* note 28, at 13, 21.

64. *Id.* at 2. "Those cities and counties that find the CEQA streamlining provisions attractive have the opportunity (but not the obligation) to align their planning decisions with the decisions of the region."

65. See ADAMS ET AL., *supra* note 17, at 11.

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

what effect they will have. If the past is any guide, the consequences of failing to approve enough zoning for homes to meet RHNA targets are not particularly severe. The incentives help willing communities, but they do not necessarily help communities become more willing.

Analysts and advocates have pointed out that demographic trends favor a growing market for compact housing and mixed-use development.<sup>66</sup> An aging population and shrinking average household size means that more people are looking for smaller homes within walking distance of the places they need to go.<sup>67</sup> As a result, nearly half the homes developed in California in 2008 were attached units, more than a ten percent increase over the period from 1998 through 2004.<sup>68</sup>

Yet market forces alone, without changes in both public and political will, may take a long time to exert their influence on the housing approval process. Market signals tell developers what kind of products consumers will buy or rent, which explains why they are eager to propose higher density, mixed use projects, but it does not explain the enormous challenge they face in receiving entitlements to build those projects. The market drives demand, but the public process determines approvals. As discussed earlier, the level of community acceptance heavily influences the outcome of that process. If local elected officials want to be responsive to their constituents, they pay attention to the voters who already live in their communities more than they do to prospective new residents who might welcome a more compact style of development. In the end, the market works far from perfectly when it encounters the public process.<sup>69</sup>

To leverage its incentives and the market, SB 375 depends upon political leadership. The MPOs must demonstrate leadership by working transparently and collaboratively, involving cities and counties at every

---

66. See ADAMS ET AL., *supra* note 17, at 8; ARTHUR NELSON, PREPARING FOR THE NEXT BOOM (PowerPoint Presentation) (2007) (on file with author).

67. See *id.* Today, only thirty-three percent of U.S. households consist of couples with at least one child, compared with forty-eight percent in the 1960s. *Id.* It has been projected that only twenty-three percent of the nation's households will have children in 2030. *Id.*

68. ADAMS ET AL., *supra* note 17, at 8, citing EWING & NELSON, CO<sub>2</sub> REDUCTIONS ATTRIBUTABLE TO SMART GROWTH IN CALIFORNIA (2008).

69. This is not to deny that the market influences the kind of housing that local governments approve. The data indicate that compact development is gaining market share. At the same time, the total amount of infill housing approved in most urban areas has not been sufficient even in recent years to meet the identified need or, most likely, to satisfy the potential market demand.

stage of the new approach to regional transportation and land use planning.<sup>70</sup> This is far from business as usual for the MPOs if the goal is “a genuine regional/local partnership.”<sup>71</sup> Local officials, in turn, must exercise leadership by pulling the levers of change and bringing their communities along. Again, public acceptance of the development paradigm is key. First, many elected officials understandably share the views of the constituents who voted them into office. It is not clear how many of them are prepared to embrace SB 375 and take advantage of the opportunities it presents, but past practice indicates that many will not be inclined toward providing leadership in that direction. Second, even the most willing elected officials are in a difficult position if their constituents continue to oppose compact development, and if the regional process offers few resources for planning and related infrastructure.<sup>72</sup> Third, as previously noted, voters have proven willing to overturn the decisions of leaders who challenge the community’s views on development.

This suggests that SB 375 requires leadership by local officials toward their own constituents, as they help to promote a level of community

70. As noted by the Regional Planning Program Director for SB 375 the Bay Area, “[T]he regional agencies, individually and collectively, have very little authority over land use. That authority rests almost exclusively with local governments. A realistic transportation *and land-use* strategy can, therefore, only be prepared with local governments participating as partners and co-leaders.” TED DROETTBOOM, LOCAL GOVERNMENT ENGAGEMENT IN THE SUSTAINABLE COMMUNITIES STRATEGY 1 (2009) (staff memo to Joint Policy Committee meeting of November 6, 2009) (emphasis in original), available at <http://www.abag.ca.gov/jointpolicy/jpc%20375%20lg%20engagement.pdf>.

71. See *id.* at 5. A staff report on the Bay Area’s strategy for local government engagement describes and evaluates a work plan that “employs relatively traditional ‘outreach’ strategies.” The report further states:

We do not believe these are sufficient to generate the level of inclusion and engagement which a genuine partnership requires. Yet, we are uncertain as to what will truly involve key local decision makers and their staff advisors as active participants in SCS development – particularly in the current environment of resource scarcity.

*Id.*

72. SB 375 does not provide any funding for planning, although other legislation makes grant funding available to local agencies for planning related to sustainable development (Steinberg, Senate Bill 732, Statutes of 2008 is implementing legislation for use of Proposition 84 funds). The RTAC observed that the funds available through SB 732 are not nearly enough to support local government planning efforts envisioned by SB 375, noting that “planning staffs are struggling to keep pace with current planning demands, leaving little capacity for comprehensive, sustainable long range planning.” REGIONAL TARGETS ADVISORY COMMITTEE, *supra* note 49, at 34. The Committee concludes that, “Planning resources for RTPs and compatible local general plans will be critical to the success of SB 375.” *Id.* at 30. Regional agencies sponsored Senate Bill 406, which would have enabled a small vehicle license surcharge to provide planning funds for regional and local governments. The governor vetoed the bill, but the agencies continue to seek planning support. JOINT POLICY COMMITTEE, *supra* note 42, at 8. Apart from the matter of planning resources, SB 375 does not provide any investment for infrastructure to support infill development.

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

acceptance of new forms of development that gives the regional blueprint a chance at implementation from below. In its report to CARB, the Regional Targets Advisory Committee report acknowledges the pivotal (and precarious) role of local leadership:

As the branches of government closest to the people, it will often be up to city and county officials to act on and explain the reasons for carbon saving strategies. These officials will need support in developing reports and information and packaging it in a way that the broader public can easily understand. If the public is confused or cannot draw a connection between the action taken and the benefits to the community, they are likely to object and register their dissatisfaction next time they vote.<sup>73</sup>

The report from the RTAC clearly recognizes the importance of “a robust public outreach and education effort.”<sup>74</sup> The Committee outlines possible elements of a program to communicate with a variety of audiences. It recommends that the goals of the effort should be to: (a) create a “positive image of integrated planning for land use, transportation, and housing,” (b) “increase awareness of ‘climate change’ legislation,” (c) elicit input on each proposed SCS, and (d) promote the “co-benefits” of climate change strategies.<sup>75</sup>

There are reasons to be optimistic that a comprehensive education effort could achieve gains in public support for sustainable development strategies. Generational shifts and the changing demographics of household formation are creating an emerging market for smaller homes and walkable communities. Rising fuel prices make long commutes prohibitively expensive. Worsening highway congestion restricts access to geographically dispersed jobs, services, and recreation. Limited water supply and shrinking government revenues put a premium on efficient use of natural resources and existing infrastructure. All of these factors point in the direction of a growing and increasingly receptive audience for sustainable development messages. There is even evidence to suggest that such messages already resonate with many Californians. The co-sponsors of SB 375 point out that several counties have recently approved tax increases to fund transit, and they cite a poll by the National Association of Realtors that found public

---

73. REGIONAL TARGETS ADVISORY COMMITTEE, *supra* note 49, at 31.

74. *Id.* at 38.

75. *Id.*

support for mixed-use development concentrated in urban areas “where people can walk places and use their cars less.”<sup>76</sup>

“Substantive change starts with education,” according to the RTAC report.<sup>77</sup> Yet, it does not end there. It is important to recognize the limits of “public education” if by that we mean the transmission of persuasive information to voters. Such an approach is not likely to prevent conflicts over land use at the local level when development proposals come forward.

Even with sharply crafted messages, an exclusive focus on the benefits of compact development runs the risk of understating real and perceived tradeoffs for individual communities. A greater intensity of development might in fact slow local traffic, particularly as planners redesign cities to serve people over automobiles. Taller buildings might diminish certain lines of sight. Higher density housing could indeed alter the look, feel, and character of the built environment. Larger RHNA numbers imply visibly larger populations in already developed areas. Tradeoffs such as these come to the fore in land use decisions and disputes, and they manifest most acutely at the local level. As a result, an individual’s expression of support for smart growth principles in general does not necessarily translate into support for specific projects in one’s own city or town, let alone in one’s own neighborhood.<sup>78</sup> To be relevant, an education campaign must realistically address the local costs and tradeoffs of a new regional development pattern, giving people a useful framework for weighing benefits against impacts that are apparent and tangible to them.

---

76. ADAMS ET AL., *supra* note 17, at 13 (citing NATIONAL ASSOCIATION OF REALTORS, THE KEY FINDINGS FROM A NATIONAL SURVEY OF 1,000 ADULTS CONDUCTED OCTOBER 5, 7, 9-10, 2007 (PowerPoint presentation) (2007), available at [http://www.realtor.org/smart\\_growth.nsf/docfiles/transportationSurveyFall2007.pdf/\\$FILE/transportationSurveyFall2007.pdf](http://www.realtor.org/smart_growth.nsf/docfiles/transportationSurveyFall2007.pdf/$FILE/transportationSurveyFall2007.pdf)).

77. ADAMS ET AL., *supra* note 17, at 13.

78. Caution is also advisable when interpreting opinion poll results themselves. It is not surprising, for example, that a majority of those surveyed by the Association of Realtors prefers the option of less auto dependent growth when the question itself asserts the benefits of that growth. Questions of this form elicit more information about the relative persuasiveness of different arguments in favor of development than they do about the respondent’s opinions for or against development. What do we learn, for example, from the fact that 57% of respondents agree (31% strongly) that “[b]usiness and homes should be built closer together, so that stores and shops are within walking distance and don’t require the use of an automobile,” while only 55% agree (27% strongly) that business and homes should be built closer together, often in the same community, to shorten commutes and limit traffic congestion? NATIONAL ASSOCIATION OF REALTORS, *supra* note 76, at slide 9. Presumably, we learn that people are perhaps slightly more interested in living close to stores and shops than living close to work. We might learn something else entirely if the question did not explicitly state benefits of development, but instead asked whether people agree that “[b]usinesses and homes should be built closer together, even if that means raising the height limit for buildings in your city or town?”

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Along the same lines, a credible education and outreach campaign should openly entertain the risk that communities might reject the regional vision. For citizens to make the SCS blueprint their own, they must feel that they have a choice, that the important decisions have not already been made before they come to the table. To the extent that there are local conversations about SB 375, the starting point for most is likely to be whether to support the SCS, not how to do so.<sup>79</sup> Within those conversations, there will undoubtedly be abundant voices (and silent preferences) for “no growth” (that is, limiting growth in one’s own community and externalizing the consequences). To maximize its relevance at the local level, a comprehensive public education strategy would not only employ an information campaign to promote the benefits of conformity with the SCS, but would also create a framework for considering other alternatives, including rejection of the SCS or a path of “no growth.”<sup>80</sup> An education campaign that skips this step may find itself successful in “moving the needle” of public opinion on the question of how to grow while neglecting the more fundamental question of whether we need to plan for growth at all. It is perfectly consistent for someone, when asked, to express a strong preference for infill housing rather than encroachment on open space, and simultaneously to believe that neither form of development is necessary in the first place.<sup>81</sup>

Finally, there is the matter of who participates at the point of decision-making.<sup>82</sup> Efforts to raise public awareness do not address the dynamics of an approval process that enables relatively small groups of motivated citizens to exercise disproportionate influence over decisions.<sup>83</sup> Demonstrable changes in constituent views may embolden leaders to evaluate testimony at public hearings in a different light, but what happens during those hearings will always be important. An education effort

---

79. DROETTBOOM, *supra* note 70, at 5.

80. *Id.* at 3.

81. As discussed in the case study below, Threshold 2008, in a random sample survey of approximately 1,800 residents of San Mateo County, found comparable preferences to those reported in the Association of Realtor’s national survey of 1,000 Americans. When asked to compare their views on different kinds of development, the Threshold respondents overwhelmingly preferred that any new homes built be concentrated in already developed areas, and especially near transit. However, when asked about the need for new development in the first place, only thirty-eight percent of the Threshold sample believed the county needed to create any new housing at all. See THRESHOLD 2008, *supra* note 38.

82. THRESHOLD 2008, *supra* note 38, at 20.

83. *Id.*

designed to create a “positive image” of SB 375 and the regional blueprint will not determine who participates in the decision-making process.<sup>84</sup>

Despite these considerations, an informational approach can complement and contribute to a more ambitious public education strategy.<sup>85</sup> Arguments and data in favor of integrated regional planning can help to frame the tradeoffs that leaders ask citizens to consider. The RTAC’s emphasis on the “co-benefits” of climate change strategies is relevant here.<sup>86</sup> If the power to implement (or not to implement) the SCS is under local control, then it makes sense to frame the choices and tradeoffs that communities face in terms of local quality of life.<sup>87</sup> Asking a city to assess the costs and benefits of compact growth for its own residents is more likely to result in support for the regional vision than explaining to that city why it needs to sacrifice in order to save the planet.<sup>88</sup> Beyond identifying some of these co-benefits, the RTAC report goes further to suggest possible incentives for cities to implement the SCS that would amplify local community benefits.<sup>89</sup>

The more thoroughly local governments engage their communities, the more effective public education will be. With so much at stake and such a new approach to complex policy issues, meaningful civic engagement is not a luxury. In the context of SB 375, it means giving people real choices, providing them with the information and time they need to assess the tradeoffs of those choices, facilitating community dialogue about the local/regional connection, and sustaining participation by informed citizens throughout individual project reviews.

At a minimum, SB 375 needs local governments to make a commitment to civic engagement because otherwise the likelihood is that most communities will stay on whatever path they are already following without much regard to the new legislation.<sup>90</sup> Local leaders have a chance to win public acceptance of the new approach, or at least to counterbalance opposition. Less cynically perhaps, community engagement at the local level may uncover creative and unanticipated solutions to real problems. As the RTAC report suggests, “local governments themselves are perhaps in the

---

84. REGIONAL TARGETS ADVISORY COMMITTEE, *supra* note 49, at 38. One way to affect participation in the public process is to connect an education campaign to community organizing. There are certainly those who advocate and pursue this strategy as a way to counter predictable opposition to infill development. *Id.* at 38-40.

85. REGIONAL TARGETS ADVISORY COMMITTEE, *supra* note 49.

86. *Id.* at 32.

87. *Id.* at 32, 42-44.

88. *Id.* at 32-33.

89. *Id.*

90. DROETTBOOM, *supra* note 70.

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

best position with public input to identify the list of ideas that can facilitate forward thinking local action.”<sup>91</sup>

Without mandatory changes in the planning process, this sort of comprehensive civic engagement represents a monumental challenge to local governments. They need at least two things to be successful: financial resources to support a robust and participatory planning process, and the tools and expertise to design novel ways of including the public in that process. Local governments must be willing to go beyond what is legally required to start a broader conversation about growth. They must bring new voices into that conversation and create new forums for identifying common ground.<sup>92</sup>

If leaders want to use a strategy of civic engagement to build public support for SB 375, they necessarily take a leap of faith. An open public dialogue about growth management raises the question of whether to embrace the regional plan, not just how to adapt to it locally. Leaders who are committed to community dialogue as a pathway to durable solutions are risking the possibility that the people will reject the solutions proposed by policymakers. On the other hand, if the current growth pattern truly is unsustainable and the benefits of compact development are compelling, then it seems reasonable to assume that many citizens, when informed and engaged, would come to the same conclusions as professional planners and smart growth advocates.<sup>93</sup>

The following section describes a civic engagement initiative in San Mateo County, California that offers a basis for this assumption. It demonstrates one promising model for involving citizens in land use planning, and for identifying and expanding common ground among the informed public.<sup>94</sup> It provides evidence that a carefully designed deliberative process featuring facilitated small group dialogue can substantially increase public support for the kind of development associated with SB 375.<sup>95</sup> It also offers reassurance that informed and engaged citizens are eager to tackle complex policy issues and are fully capable of intelligently assessing the tradeoffs of California’s alternative futures.<sup>96</sup>

---

91. REGIONAL TARGETS ADVISORY COMMITTEE, *supra* note 49, at 32-33.

92. THRESHOLD 2008, *supra* note 38, at 11.

93. *Id.* at 3.

94. *Id.*

95. *Id.* at 3, 11.

96. *Id.* at 3.



### VIII. A CASE FOR CIVIC ENGAGEMENT: THRESHOLD 2008

San Mateo County's housing shortage is urgent and growing.<sup>97</sup> For most of the last decade, housing production in the county has fallen short of the identified need by about 1,000 homes each year.<sup>98</sup> Based on projected population and job growth, the county will face a gap of nearly 50,000 homes by 2025.<sup>99</sup> At the current rate of housing development, this sub-region of the Bay Area will accommodate only about one-third of its forecasted growth during this period. Assuming that the regional blueprint calls for the county to create sufficient housing over the next twenty-five years to meet 100 percent of the need it generates, then the SCS is essentially asking the twenty-one jurisdictions within San Mateo County to triple their housing production going forward.

The impacts of the housing shortage are apparent; fewer people who work or grow up in San Mateo County have a chance to live there.<sup>100</sup> Traffic congestion chokes the regional arterials as many who work in the county commute from outlying suburban communities.<sup>101</sup> Employers face challenges in attracting and retaining employees, threatening the region's economic vitality. Critical service workers and emergency responders often live far from the communities they serve.<sup>102</sup>

Threshold 2008 was a community driven effort to bring the voice of the informed public into housing policy decisions in San Mateo County.<sup>103</sup> The goal was to test a particular approach toward civic engagement to determine whether it could build support for housing solutions, and to discover the specific kinds of housing policies and development the informed public would prefer.<sup>104</sup> The project proposed community dialogue as a strategy to overcome some of the limitations of the formal approval process.<sup>105</sup> From the perspective of dispute resolution, this type of civic engagement seeks to expand the mutually acknowledged common ground among parties with

---

97. *Id.* at 4-5.

98. *Id.* at 4 (based on RHNA targets compared with actual housing production countywide for the period 1999-2006).

99. ECONOMIC & PLANNING SYSTEMS, SAN MATEO COUNTY HOUSING NEEDS STUDY (2007), available at <http://www.co.sanmateo.ca.us/housingdepartment/PDFS/Housing%20Needs%20Study.pdf>.

100. THRESHOLD 2008, *supra* note 38, at 5.

101. *Id.*

102. *Id.*

103. For more about Threshold 2008 and its subsequent activities, see <http://www.threshold2008.org>. For a more detailed report on the project and its results, see THRESHOLD 2008, *supra* note 38.

104. THRESHOLD 2008, *supra* note 38, at 3.

105. *Id.*

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

diverse social characteristics, values, and opinions. As a tool for local agencies, it holds the possibility of preventing conflicts over land use before they reach the public hearing. On a spectrum of civic engagement, Threshold's approach represents a case of "deliberative democracy," and its methods depend upon many of the same facilitation skills shared by mediators.

During 2008, Threshold engaged more than 1,000 citizens in meaningful dialogue about urgent housing problems and possible solutions. The project consisted of four phases: a baseline survey, a countywide assembly, an online dialogue, and multiple community conversations.

Baseline Survey. Prior to convening any public dialogues, Threshold conducted a random sample phone survey of San Mateo County residents. It covered a range of values and opinions related to housing and land use, and provided a snapshot of the broader public's current views. A total of 1,822 residents completed the phone survey, which consisted of twenty-six questions.<sup>106</sup>

Countywide Assembly. Threshold invited each person who completed the baseline survey to participate in a face-to-face, two-day dialogue.<sup>107</sup> Of those who took the phone survey, 238 participated in the weekend event.<sup>108</sup> The opinions and demographic characteristics of these participants were generally representative of the larger sample. Called the "Countywide Assembly on Housing Choices," the event was a "deliberative poll" designed in partnership with of Stanford University to measure changes of opinion under good conditions for deliberation.<sup>109</sup> The purpose was to identify the kinds of housing solutions that the public would prefer if they had access to relevant information, time to consider their options, and an opportunity to discuss the issues with other citizens. Threshold divided the 238 participants into twenty-six small groups. On each day, there were two facilitated small group dialogues and two plenary sessions where a representative from each small group directed a question to a panel of

106. Threshold worked with Stanford University's Center for Deliberative Democracy to develop the baseline survey as part of the "deliberative poll" described below.

107. THRESHOLD 2008, *supra* note 38, at 8.

108. *Id.*

109. "Deliberative polling" is a method of public consultation created by Professor James Fishkin to get informed opinions from scientific random samples. For more on deliberative polling and deliberative democracy generally, see generally JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2009). The Countywide Assembly took place in March 2008 at Cañada College in Redwood City.

experts, whose answers informed the next round of small group dialogue.<sup>110</sup> At the end of the weekend, Threshold asked the Countywide Assembly participants the same questions they answered by phone a month earlier, as well as some additional questions.<sup>111</sup> Any changes in their knowledge or opinions can be attributed to their participation in the event.<sup>112</sup>

Online Dialogue. In May 2008, 552 people who live or work in San Mateo County registered to participate in “Public Voices for Housing Choices,” a web-based, two-week dialogue on the same issues discussed at the Countywide Assembly.<sup>113</sup> Threshold posted information and policy documents to support the dialogue, and on most days, one or more experts were available online to answer questions on the topic of the day. The Online Dialogue complemented the Countywide Assembly by capturing the nuances of different perspectives—including how people connect their values and opinions, how they reconcile their own views with those of others, and why they adopt certain positions.<sup>114</sup>

Community Conversations. Condensing the dialogue format to two-and-a-half hours, the Community Conversations reached a diverse audience in a variety of settings.<sup>115</sup> Threshold trained forty facilitators, and more than 200 people who live or work in San Mateo County participated in eighteen local dialogues. “As a complement to the random selection of the Countywide Assembly and the self-selection of the Online Dialogue, the Community Conversations allowed targeted outreach to specific groups of citizens, . . . including those who are typically underrepresented in the public process . . . .”<sup>116</sup>

“Throughout all phases of the project, participants considered similar policy options, questions, and supplemental information.”<sup>117</sup> The problem was framed in the broadest terms possible: San Mateo County has a housing supply problem that has become a housing affordability problem for many

---

110. The Countywide Assembly agenda, expert panelist biographies, list of small group facilitators, and participant briefing materials are available at <http://www.threshold2008.org>.

111. THRESHOLD 2008, *supra* note 38, at 8.

112. *Id.*

113. Threshold worked with Viewpoint Learning Inc. on the design and execution of the Online Dialogue.

114. THRESHOLD 2008, *supra* note 38, at 9.

115. Threshold worked with Viewpoint Learning on the design of the Community Conversations and the facilitator trainings. A number of documents related to the Community Conversations are available at the Threshold 2008 website, <http://www.threshold2008.org>, including participant materials, facilitator materials, host resources, and promotional materials.

116. THRESHOLD 2008, *supra* note 38, at 9.

117. *Id.* at 10.

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

people who grow up or work there.<sup>118</sup> Threshold asked citizens four questions regardless of the forum for the dialogue:

- How should we grow? (How much housing do we want and where should we put it?)
- Who should decide? (What are the proper roles for local, regional, and state authorities?)
- Which policy tools should we use to encourage solutions?
- How should we pay for preferred solutions?

Regarding the first and most fundamental question, Threshold presented four alternatives:<sup>119</sup>

- Continue on the current path with limited housing growth;
- Limit housing growth but invest in improving commutes;
- Rezone some open space for new housing development;
- Build more higher density housing in already developed areas[.]

There are two essential features of the issue framing and content of the participant materials. First, information must be balanced, accurate and sufficient to permit reflection and dialogue on the issues.<sup>120</sup> Second, the materials are designed to emphasize the tradeoffs of alternative policy options.<sup>121</sup> Participants consider a range of clear choices and the best available arguments about the consequences of those alternatives. If someone takes a position with a realistic understanding of the tradeoffs, then that constitutes an informed choice.<sup>122</sup>

Project Results. Participants in the project represented a broad cross section of the public, including many who had limited or no experience with the formal planning process.<sup>123</sup> Four findings stand out.

---

118. *Id.*

119. *Id.* The participant materials and dialogue facilitators presented the choices as a starting point for discussion, and they invited participants to propose other alternatives or to combine options.

120. Threshold sought to ensure this balance through rigorous stakeholder review. *Id.* Months before the first public event, the project convened a committee of forty stakeholders to review the participant briefing materials. Committee members included elected officials, government staff, technical experts, housing and environmental advocates, and business and labor representatives.

121. *Id.*

122. It is not just the briefing materials, of course, that determine the effectiveness of the deliberative process. The design of the meetings, the interaction of small and large groups, and the use of skilled facilitators are all essential to the quality of the dialogues.

123. *Id.* at 12. Fifty-six percent of participants had never participated in a local planning process in the last five years; twenty-one percent had “a few times.”

First, the Countywide Assembly dramatically increased participant support for creating new housing in the county.<sup>124</sup> In the baseline phone survey, only 38% of residents believed that the county needs more housing.<sup>125</sup> After spending a weekend considering competing policy options, deliberating in small groups and consulting experts, support for creation of new homes rose to 68%.<sup>126</sup> Participants also gave substantially different answers to many of the other questions they had answered a month earlier. They were more concerned about the impacts of the housing shortage, and they became measurably more knowledgeable about the issues.<sup>127</sup>

Second, the project revealed a clear preference among informed citizens for the kind of development envisioned by SB 375. Despite differences in recruitment and demographics in each phase, the common ground identified by the dialogues was remarkably consistent across all three methods.<sup>128</sup> When asked to choose, most people strongly preferred higher density infill development to development of lower density homes on currently undeveloped land.<sup>129</sup> In the scientific sample, more than 90% supported mixed-used development and housing near transit, and nearly half said that they were likely to live in a transit oriented development themselves. Only 26% believed that higher density housing harms the character of local communities, and 82% said that it can help revitalize downtown areas.<sup>130</sup>

Third, dialogue participants are prepared to reconcile local land use control and integrated regional planning. A majority of people who participated in the dialogues believe that local government should have the most say over housing decisions, but they also believe that cities should be held accountable for delivering on their housing commitments and that they should collaborate on countywide solutions.<sup>131</sup> After deliberation, citizens became more supportive of *both* local control and increased regional authority.<sup>132</sup> A sizeable majority (73%) supported enforcement of state laws that require cities to plan for housing development, and more than half (53%) supported creation of a countywide body to hear appeals when cities

---

124. *Id.*

125. *Id.* at 17.

126. *Id.*

127. *See id.*

128. *Id.* at 12.

129. *Id.*

130. *Id.* at 19.

131. *Id.* at 12.

132. *Id.* at 20.

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

do not approve developments that appear to abide by locally adopted guidelines.<sup>133</sup>

Fourth, participants expressed overwhelming support for more constructive ways to engage the public in housing and land use decisions.<sup>134</sup> Two-thirds believed that that increased public participation in the planning process is “extremely important.”<sup>135</sup> Participants in both the Online Dialogue and the Community Conversations identified neighborhood opposition as a significant roadblock to new housing development, advocating broader public engagement to help people see the value of housing to the entire community.<sup>136</sup> The clear message in all phases of the project was that engaged citizens want more and better public involvement on land use issues.

The Threshold project yielded a wealth of information beyond these central findings. It highlighted questions that remain open and difficult for people even after deliberation. It demonstrated that people do not change their core values, but they will change their opinions about how to achieve those values. It pointed to the kinds of policy tools that are most likely to enjoy community support, and it indicated how the informed public would be willing to spend public funds. It showed convincingly that well-designed, dialogue-based civic engagement can significantly increase the public’s understanding of land use issues. It also justified faith in the ability of ordinary citizens to tackle complicated policy questions when given favorable conditions to do so. Threshold participants listened to one another and tried to reconcile their self-interest with the common good. They were willing to reconsider their own views about how to achieve their values. The dialogues also inspired many of them to become more engaged in public life.<sup>137</sup>

For policymakers who routinely face public opposition to new housing, the project offers some suggestions about how facilitated dialogue can help to address community concerns. To the degree that neighbors within a planning area or adjacent to a proposed development are inclined to oppose plans for new housing, a carefully designed process that brings balanced information to the table, presents a range of choices, and uses facilitated

---

133. *Id.*

134. *Id.* at 12.

135. *Id.* at 20.

136. *Id.* at 24.

137. More than ninety percent of Countywide Assembly participants asked Threshold to contact them about other ways to participate and stay informed.

dialogue may have the best chance of expanding common ground prior to divisive public hearings. Given real interests that often cause neighbors to oppose new housing, a consistent effort to engage the broader public in dialogue about regional and local housing needs is also likely to present policymakers with a more representative range of voices upon which to base decisions about specific sites. The fact that people appear most motivated to oppose new housing when there is an actual project involved suggests that early and ongoing engagement around land use planning (starting, for example, with a regional growth blueprint) might be most effective in revealing the cumulative, long-term tradeoffs involved in decisions about particular sites.

## IX. CONCLUSION

The promise and the challenge of SB 375 are equally great. Depending on how local communities receive it, the law might intensify familiar conflicts over land use, or instead create an opportunity for Californians to design their communities for the next generation. Lacking the authority to implement SB 375, regional agencies depend on the voluntary and collective commitment by local governments to take climate change seriously. This article argues that even the most enthusiastic leaders need to bring their constituents along for the journey, and that struggles over implementation of the SCS will undoubtedly overshadow the challenges of getting it adopted.

It is not reasonable to expect that any single piece of State legislation can override decades of local land use practice. The analysis offered here might be nothing more than an assertion of what the law's sponsors have known all along—that it is not politically possible to go further at this time. This does not mean, however, that SB 375 is doomed to irrelevance. At a minimum, it is a step in the right direction. It makes the regional planning process more robust, it creates a framework for willing leaders and stakeholders to coordinate their efforts, and it advances an alternative vision of California's future. It also addresses real constraints along a new path, beginning with coordination and consistency among regional agencies themselves (aligning their priorities, improving their communication, harmonizing their organizational cultures).

Local officials who support the regional vision need support, in turn, to engage their constituents. Regional planners and civic engagement practitioners have much to offer local authorities as they enact their own participation strategies. Projects like Threshold 2008 demonstrate that there are tools available to engage the public in different ways, with potentially different outcomes than California has come to expect. In the context of SB 375, MPOs are in a position to sponsor creative forms of deliberation within

[Vol. 10: 3, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

each sub-region during development of the SCS, and to provide local governments with resources and expertise to apply similar practices to their own circumstances and projects. To bring its landmark climate change strategy to life, SB 375 needs an implementation plan. Thinking beyond adoption of the SCS, a complete participation plan would include guidance, resources and tools that local governments can use to engage their citizens every time they make significant land use decisions. In the current economic environment, such an investment in public engagement might appear prohibitively expensive. But for historic legislation with the ambitions of SB 375, the cost of not involving citizens in this effort will be even higher for California in the long run.



