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SB 375: Lion or Mouse?

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Introduction

The rules governing regional planning changed dramatically when Governor Schwarzenegger signed Senate Bill 375 (SB 375) into law on September 30, 2008. See Stats 2008, ch 728. The amount of actual substantive change likely to result from SB 375 is difficult to quantify, given the aspirational language, vague standards, and conflicting requirements in the bill. Only time will tell how effective SB 375 will be in its effort to integrate land use with reductions in greenhouse gas (GhG) emissions, housing allocation requirements, regional transportation issues, and potential streamlining for certain project approvals under the California Environmental Quality Act (CEQA) (Pub Res C §§21000–21177).

SB 375 appears to be a best attempt to reach compromise among the diverse interests of the California Building Industry Association (CBIA), the League of California Cities, and the affordable housing and environmental lobbies that were active in developing and negotiating its provisions. The bill has a little something for everyone, while leaving several issues open to interpretation and the will of the concerned parties. At a minimum, SB 375 creates a complex set of laws that take the first step toward creating an overarching strategy for the pursuit of regional transportation-oriented development and the goals for GhG emissions enumerated in the Global Warming Solutions Act of 2006 (Health & S C §§38500–38598). Alternatively, SB 375 could simply create yet another level of regional planning considerations that costs everyone a great deal of money but delivers little substantive change. As advocates on all sides point out, the goals and policies SB 375 sets for the future are just as important as the tangible changes it seeks to accomplish.

Whatever the ultimate outcome, interested parties throughout California—from regional transportation agencies to local governmental agencies to land developers—will need to work in this dramatically new world and make the best of it together. To that end, this article highlights some of the key elements of SB 375 and discusses potential issues that will need to be addressed going forward. Additionally, the article discusses the various opportunities presented to interested parties and stakeholders to get involved in the process to protect their interests at an early stage.

SB 375: The De Facto Implementation of AB 32 for Land Use

To fully understand SB 375, it must first be put into context with another groundbreaking piece of environmental legislation, the Global Warming Solutions Act of 2006 (Health & S C §§38500–38598) (AB 32). (See Warnke and Ridgway, AB 32 Deconstructed: The Global Warming Solutions Act of 2006—Part 1, 31 CEB RPLR 70 (May 2008).) Enacted in 2006, AB 32 requires the State of California to reduce its GhG emissions to 1990 levels no later than 2020. See Stats 2006, ch 488. During and after the passage of AB 32, there has been tremendous concern about the land-use sector's contribution to global climate change—with some environmental advocates calling for substantial increase of the percentage of GhG reductions to be

achieved by the land-use sector. In adopting SB 375, the legislature found that the transportation sector is the single largest contributor of GhGs of any sector, contributing over 40 percent of the GhG emissions in California, with automobiles and light trucks alone contributing almost 30 percent. Stats 2008, ch 728, §1(a).

SB 375 appears to have taken the lead role as the implementation component for AB 32 for land use. On December 11, 2008, the California Air Resources Board (CARB) adopted a final Scoping Plan outlining how California will achieve the GhG emissions reduction goals set by AB 32. The inclusion of a significant land-use component in the AB 32 Scoping Plan, and the land-use policies enumerated in SB 375, underscore that without rethinking how our cities are developed, any GhG reductions achieved through gas emissions standards, energy efficiency, renewable energy, low carbon fuel standards, and industrial emissions reductions would be negated by the ever-increasing driving population in California. Thus, SB 375 was born from the realization that "[w]ithout improved land use and transportation policy, California will not be able to achieve the goals of AB 32." Stats 2008, ch 728, §1(c).

Consequently, SB 375 seeks to reduce GhG emissions by promoting growth patterns in high-density, mixed-use developments located around mass transit hubs, and thereby indirectly encourage people to drive less. The bill shifts the development emphasis from sprawl-inducing suburban development and planning to urban and metropolitan development and planning. The message that SB 375 clearly sends to public agencies, developers, and other stakeholders is that dense, transit-oriented, and mixed-use development is a critical goal for GhG emissions reduction and the collective good.

What Does SB 375 Change?

SB 375 requires that all Metropolitan Planning Organizations (MPOs) in California update their Regional Transportation Plans (RTPs) so that resulting development patterns and supporting transportation networks can reduce GhG emissions by the amounts to be set by CARB. In total, California has 18 MPOs, all of which receive state and federal funding to accomplish regional transportation planning. (As shown on the map below, these MPOs vary greatly in size and population—most cover only a single county, while those in the Bay Area and Los Angeles regions include a regional transportation network covering multiple counties.)

Under the current state and federal framework, the 18 MPOs in California prepare Regional Transportation Plans (RTPs) for their respective regions. The RTP sets forth the long-range (20-year) transportation plan for the region and is based on a set of land-use assumptions about future development patterns. The RTP also attempts to identify the existing and future transportation needs in the region and includes rough cost estimates. Existing federal law requires that an RTP must be updated every four or five years, depending on whether the region meets federal air quality attainment standards. 23 USC §134(i). For example, the Bay Area's most recent RTP update is scheduled for approval in spring 2009 and will be updated again in 2013. Likewise, the Southern California Association of Governments approved its latest RTP in 2008 and will update it again in 2012.

To encourage regional sustainable land-use development, as further described below, SB 375 requires all MPOs to update their RTPs so that resulting development patterns and supporting transportation networks can reduce GhG emissions in accordance with regional thresholds to be set by CARB in accordance with AB 32. However, even with these mandates, each MPO may not be implementing the same measures to fight GhG emissions. In fact, each of the MPOs in California will likely have very different strategies and policies for their respective RTPs, depending on their regional transportation and housing needs. Thus, interested parties would be wise to closely monitor the upcoming RTPs for the MPO regions in which their projects will be located, to ensure that their projects are consistent with the varying regional planning strategies, procedures, and standards that will inevitably result.

With the above modifications to the current land-use framework, the language of SB 375 attempts to change the landscape of regional planning through a multi-pronged approach, as described below.

CARB to Set Regional GhG Targets

As required by SB 375, CARB has created a Regional Targets Advisory Committee (RTAC) to recommend factors to consider and methodologies to use for setting the regional GhG targets. On January 23, 2009, CARB appointed 21 members to the RTAC, including representatives of the MPOs, affected air districts, the League of California Cities, the California State Association of Counties, local transportation agencies, and members of the public. A list of the appointed members can be found at http://www.arb.ca.gov/cc/sb375/rtac/memberlistfinal.pdf. The RTAC must submit its report with its recommendation to CARB by September 30, 2009. Govt C §65080(b)(2)(A)(i).

In recommending factors and methodologies for CARB to use in setting the regional targets, the RTAC may consider any relevant issues, including data needs, modeling techniques, growth forecasts, the impacts of regional jobs/housing balance on interregional travel and GhG emissions, economic and demographic trends, the magnitude of GhG reduction benefits from a variety of land-use and transportation strategies, and appropriate methods to describe regional targets and to monitor performance in attaining those targets. Govt C §65080(b)(2)(A)(i). Once the MPOs receive their respective reports from the RTAC, they must hold at least one public workshop within the region. Govt C §65080(b)(2)(A)(ii).

In turn, after reviewing the RTAC report, CARB must provide targets for each region by June 30, 2010. However, before setting the targets for a region, CARB must exchange technical information with the MPO and the affected air district, which may include a recommendation for a GhG target for the region. Govt C §65080(b)(2)(A)(ii).

MPOs to Develop Sustainable Community Strategy as Part of Regional Transportation Plan

As noted above, each MPO is required to prepare an RTP. 23 USC §134. Under SB 375, the RTP must be "internally consistent" and include the following four elements:

- A policy element that describes the transportation issues in the region, identifies and quantifies regional needs, and describes the desired short-range and long-range transportation goals and pragmatic objective and policy statements;

- A Sustainable Communities Strategy;

- An action element that describes the programs and actions necessary to implement the plan and assigns implementation responsibilities; and

- A financial element that summarizes the cost of plan implementation constrained by a realistic projection of available revenues, which must also include recommendations for allocation of the funds.

Govt C §65080(b)(1)–(4). The most groundbreaking of the RTP elements of the, however, will be the Sustainable Communities Strategy.

The Sustainable Communities Strategy

The linchpin of an RTP is the Sustainable Communities Strategy (SCS), which is designed to achieve certain goals for the reduction of GhG emissions in each MPO region from California's largest category of GhG contributors: automobiles and light trucks. The SCS will essentially be a blueprint-like set of planning assumptions with a regional overlay map intended to shape the land-use component of the RTP and promote residential development near urban cores and transit corridors.

To accomplish this goal, an SCS must, among other things:

- Identify the general location of uses, residential densities, and building intensities within the region (i.e., regional overlay map);

- Identify a transportation network to serve the transportation needs of the region;

- Identify areas within the region sufficient to house all residents of the region over the life of the RTP;

- Include a discussion of how the development pattern and transportation network can work together to reduce GhG emissions; and

- Set forth a forecasted development pattern for the region that, when integrated with the transportation network and other transportation measures and policies, will reduce the GhG emissions from automobiles and light trucks to achieve, if there is a feasible way to do so, the reduction targets set by CARB.

Govt C §65080(b)(2)(B).

For purposes of developing an SCS, it appears that SB 375 adopts the broad and flexible definition of feasible found in CEQA, i.e., "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." Govt C §65080.01(c). See also Pub Res C §21061.1. As in CEQA, determining what is "feasible" for accomplishing the goals outlined in SB 375 for reduction of GhG emissions will likely be much debated (and potentially litigated). Before adopting an SCS, the MPO must quantify the reduction in GhG emissions projected to be achieved by the SCS and lay out the differences, if any, between the amount of that reduction and the target for the region established by CARB. Govt C §65080.01(b)(2)(G). For an adopted SCS to be enforceable, CARB must certify that the final SCS submitted by an MPO meets the regional GhG emissions targets set by CARB. Govt C §65080.01(b)(2)(I)(i). If CARB finds the final SCS is unable to reduce GhG emissions to achieve the targets established by CARB, the MPO may revise and resubmit it. Govt C §65080.01(b)(2)(I)(ii).

However, this process is not uniform for each jurisdiction. For example, SB 375 explicitly sets out different procedures for the development of an SCS within the six-county region represented by the Southern California Association of Governments as well as for the eight San Joaquin Valley MPOs. Govt C §65080.01(b)(2)(C), (M). Moreover, different MPOs will likely take greatly varying approaches in the development of an SCS, depending on the level of regional camaraderie, regional resources, and housing and transportation needs.

The Alternative Planning Strategy

If it becomes clear after the SCS process that "federal planning requirements" preclude meeting the GhG

emissions targets, or if the public will not accept the proposed framework of the SCS, or if SCS does not achieve the GhG reduction targets, the MPO must prepare an Alternative Planning Strategy (APS). Govt C §65080(b)(2)(H). The APS would be prepared as a separate document from the RTP and would theoretically show how the regional GhG emissions targets set by CARB could be achieved through alternative development patterns or additional transportation measures. However, unlike the SCS, the APS would not be deemed part of the RTP and would not be considered an "applicable land use plan" under CEQA. Thus, SB 375 notes that "an [APS] shall not constitute a land use plan, policy, or regulation, and the inconsistency of a project with an APS shall not be a consideration in determining whether a project may have an environmental effect." Govt C §65080(b)(2)(H)(v). Consequently, it is unclear how an APS would be used. It may well be that an APS will have little practical application to regional stakeholders.

Opportunity for Public Input

Before the adoption of an SCS, each MPO must conduct at least two informational meetings in each county within the region. The general purpose of these informational meetings is to present a draft of the SCS to the members of the board of supervisors and the city council members in that county, to solicit their input and recommendations. Govt C §65080(b)(2)(D). Additionally, each MPO must also adopt a Public Participation Plan for the development of the SCS to encourage the active participation of a broad range of stakeholder groups and the general public as a whole. Govt C §65080(b)(2)(E). Finally, because the RTP (including the adopted SCS or APS) would be considered a "project" for CEQA purposes, an EIR would be required to assess the environmental effects of the plan. Thus, interested parties would have the opportunity to further comment during the environmental review process.

Given the vast opportunity for public involvement in the development of each MPO's SCS, it is vital that stakeholders and their advocates get involved early in the SCS process. As outlined above, the SCS will identify the general location of land uses and policies for reducing GhGs on a regional scale. This means that landowners and other stakeholders could be either positively or negatively affected by the SCS and its designation of land uses. Consequently, any project proponents (or opponents) would be ill-advised to adopt a "wait and see" approach to the SCS process.

Creates Synergy Between Regional Housing and Transportation Planning

SB 375 requires that planning for transportation and housing occur together. To accomplish that goal, the bill extends the general plan housing element update period from five to eight years, thereby synchronizing those efforts with the eight-year Regional Housing Needs Allocation (RHNA) periods. See Govt C §65588. Additionally, the housing allocation plan must allocate housing units within the region consistent with the development pattern included in the SCS. To that end, any resolution approving a final housing need allocation plan must demonstrate that the plan is consistent with the SCS in the RTP.

Once the housing element has been submitted to the Department of Housing and Community Development, local governments have three years to rezone parcels within the housing element boundaries to demonstrate consistency with the SCS. Govt C §65583(c)(1)(A). However, if a local government fails to complete the required rezoning in the three-year period (unless extended one year), SB 375 provides two anti-NIMBY ("not in my back yard") remedies:

- The local government may not disapprove a housing development project, or impose other discretionary measures to make the project infeasible, if the housing development project complies with the housing element and has at least 49 percent affordable units. The local government may, however, disapprove the project if it makes written findings based on substantial evidence that the project would adversely impact public health and safety and if there is no feasible method to adequately mitigate or avoid the adverse impact on public health and safety. Govt C §65583(g)(1)–(2).

- If a local government attempts to deny a consistent project after failing to rezone parcels to be consistent with the SCS, a project applicant or any other interested party may bring an action under CCP §1085 (writ of mandate) to force the local government agency to overturn the denial of the project. In any such action, the city or county (or both) must bear the burden of establishing that the project will have an adverse impact on public health and safety. Govt C §65583(g)(3).

These provisions may give project proponents additional leverage to obtain local approval of infill or high-density projects that are consistent with the SCS.

Focuses Transportation Funding

SB 375 focuses public transportation funds on infrastructure improvements that are consistent with or facilitate the SCS. Thus, projects that are not consistent with an adopted SCS could have state transportation funding withheld altogether, and projects that are consistent with the SCS will likely be financed with regional improvement funds. Govt C §65080(b)(4)(A)–(B). This may result in an increased need for privately financed transportation infrastructure, such as toll roads, to serve those developments that are found not to be consistent with the SCS, which may have serious cost implications for many suburban projects.

Allows for CEQA Streamlining

For residential and residential mixed-use projects located in a region in which an SCS has been adopted and approved by CARB, certain CEQA streamlining benefits may accrue to those projects meeting specified requirements. However, these residential or mixed-use residential projects must be consistent with the use designation, density, building intensity, and applicable policies specified for the project area in the adopted SCS. Pub Res C §§21155,–21159.28.

What Does "Consistent" Mean?

As a threshold matter, perhaps the biggest battleground for interested stakeholders will be the determination of whether a proposed project is consistent for purposes of SB 375. This is because, to be eligible for any of the benefits under SB 375, a project must be consistent with an adopted SCS. In all likelihood, each regional MPO will have its own standards for determining a project's consistency with its adopted SCS. For project proponents, the "consistent" designation is the initial hurdle that must be met for the project to have access to transportation funding, CEQA streamlining and exemption, and the other benefits enumerated in SB 375. Because there does not appear to be a uniform standard or threshold to guide the consistency determination, this will likely be a highly litigated area for project proponents and opponents alike. Either way, unless a statewide standard or threshold for project consistency is developed, project proponents will likely face different consistency standards in each jurisdiction in which projects are developed.

CEQA Streamlining for Residential or Mixed-Use Residential Projects

For all residential or mixed-use residential projects that are found to be consistent with an approved and CARB-certified SCS or APS, any findings or other determinations for any CEQA documents prepared or adopted for the project are not required to discuss:

- Growth inducing impacts; or

- Any project specific or cumulative impacts on global warming or the regional transportation network from cars and light-duty truck trips generated by the project.

Pub Res C §21159.28(a).

Additionally, any EIR prepared for a "consistent" residential or mixed-use residential project is not required to discuss a reduced-density alternative to address the effects of car and light-duty truck trips generated by the project. Pub Res C §21159.28(b). However, project applicants should note that the definition of "regional transportation network" included in SB 375 excludes local streets and roads. Pub Res C §21159.28(c). Thus, residential and mixed-use

residential project applicants will still be required to address impacts from cars and light-duty truck trips on local streets and roads in any environmental documents prepared for the project. Moreover, residential and mixed-use residential project proponents will still be required to comply with any conditions, exactions, or fees for the mitigation of the project's impacts on the structure, safety, or operations of the regional transportation network or local streets and roads. Pub Res C §21159.28(c).

CEQA Streamlining for "Transit Priority" Projects

SB 375 also gives preferential treatment to "transit priority projects" that are consistent with general use designation, density, building intensity, and applicable policies specified in either the adopted SCS or APS, by allowing review via a "sustainable communities environmental assessment" (SCEA). See Pub Res C §§21155(b) (defining "transit priority projects"), 21155.2(b) (defining "sustainable communities environmental assessment"). However, a number of conditions must be met before a project can be considered a "transit priority project" warranting CEQA streamlining, including minimum densities, size and usage requirements, location near a "major transit stop" or "high-quality transit corridor" (as defined in the bill), and many others. Pub Res C §§21155–21155.3.

Projects deemed "transit priority projects" qualify for review through an SCEA. Under this new streamlined approach, an initial study must first be prepared to identify all significant or potentially significant impacts of the transit priority project, excluding growth-inducing impacts and project-specific or cumulative impacts on global warming or the regional transportation network from cars and light-duty truck trips generated by the project. The initial study must identify any cumulative effects that have been adequately addressed and mitigated under the requirements of CEQA in any prior certified environmental impact reports for the project. When the lead agency for the project has determined that a particular cumulative effect of the project has been adequately mitigated, that cumulative effect will not be treated as cumulatively considerable for the purposes of the SCEA. Pub Res C §21155.2(b)(1). Additionally, the SCEA must contain measures that either avoid or mitigate to a level of insignificance all significant or potentially significant effects of the projects required to be identified in the initial study. Pub Res C §21155.2(b)(2).

As an alternative to the SCEA, a transit priority project may be reviewed via an EIR. Pub Res C §§21155(c). First, an initial study must be prepared to identify all significant or potentially significant impacts of the transit priority project, excluding growth-inducing impacts and project-specific or cumulative impacts on global warming or the regional transportation network from cars and light-duty truck trips generated by the project. As with the SCEA, the initial study must identify any cumulative effects that have been adequately addressed and mitigated under CEQA requirements in any prior certified environmental impact reports for the project. If the lead agency determines that a cumulative effect has been adequately addressed and mitigated, that cumulative effect will not be treated as cumulatively considerable. Pub Res C §21155.2(c)(1).

Complete CEQA Exemption for Sustainable Communities Projects

In addition to CEQA streamlining, some "transit priority projects" meeting more rigorous requirements may be declared to be "sustainable communities projects" and thus completely exempt from CEQA mandates. Specifically, for a "transit priority project" to be considered a "sustainable communities project," the legislative body of the lead agency, after conducting a public hearing, must find that 12 environmental criteria, seven land-use criteria, and one of three affordable housing criteria have all been met. Pub Res C §21155.1(a)–(c). However, given the extent of these requirements, it is unlikely that many projects will be deemed "sustainable communities projects" and qualify for a full CEQA exemption.

Timeline for AB 32 and SB 375 Implementation

AB 32 requires CARB to set reduction targets for the state for various sectors of the economy. CARB adopted its final Scoping Plan on December 11, 2008.

The Scoping Plan includes reduction targets for the state and a detailed plan indicating how these emission reductions will be achieved from significant sources of GhG via regulations, market mechanisms, and other actions. SB 375 then requires CARB to divvy the state GhG emissions targets and assign each region a target for the automobile and light truck sectors for 2020 and 2035. The SCS or APS for each region must strive to meet this target. Consequently, the expected timeline for the implementation of the AB 32 and SB 375 mandates is as follows:

January 31, 2009: CARB must create an RTAC to recommend facts to consider and methodologies to use for setting the regional GhG targets. The committee must include representatives of the MPOs, affected air districts, the League of California Cities, the California State Association of Counties, local transportation agencies, and members of the public. Govt C §65080(b)(2)(A)(i).

During 2009: CARB staff will draft rules to implement its plan and hold a series of public workshops on each measure (including market mechanisms). Any interested stakeholder should carefully monitor and participate in this process to ensure that CARB sets reasonable targets for each region in a reasonable manner.

September 30, 2009: The RTAC must submit its report to CARB with its recommendations. Govt C §65080(b)(2)(A)(i).

By January 1, 2010: Many early action measures put into place by CARB will take effect. See http://www.calepa.ca.gov/legislation/2006/FactSheetAB32.pdf.

During 2010: CARB will likely conduct a series of rulemakings, after workshops and public hearings, to adopt GhG regulations and rules governing the cap-and-trade program.

June 30, 2010: CARB must have reviewed report from RTAC and must provide draft GhG targets for each region. Govt C §65080(b)(2)(A)(ii).

September 30, 2010: CARB must provide each affected region with GhG emission reduction targets for the automobile and light truck sector for 2010 and 2035. Govt C §65080(b)(2)(A). Once these GhG targets are adopted, each of California's 18 MPOs must prepare an SCS (and possibly an APS) as part of its next regularly scheduled RTP update. Again, any interested stakeholders should actively participate in the SCS/APS process to ensure that their interests are adequately represented. Any projects deemed inconsistent with the SCS will likely face an uphill battle gaining acceptance and approval.

By January 1, 2011: CARB will likely have completed its major rulemakings for reducing GhG emissions, including the rules governing the cap-and-trade program. However, CARB will probably continue to revise and supplement its rules well after January 1, 2011, to ensure the GhG reduction goals are accomplished by the 2020 deadline. See Health & S C §38562(a).

By January 1, 2012: GhG rules and market mechanisms adopted by CARB take effect and are legally enforceable. Health & S C §38562(a).

December 31, 2020: Deadline for achieving 2020 GhG emissions cap. GhG emissions must be reduced to 1990 levels or below. Health & S C §38562(c).

Given the length of time it will take to implement SB 375, many stakeholders wonder what will happen with regional planning in the interim. For example, will projects be made indirectly subject to the various draft plans that are developed, even though CEQA generally does not require compliance with draft plans? How will the different jurisdictions handle or apply these plans—e.g., in determining significance of GhG emissions from vehicle miles traveled (VMT)? With these uncertainties, it is assured that without stakeholder participation and input at every step of the way, the implementation of SB 375 is likely to be fraught with pitfalls for developers and other affected parties.

Does SB 375 Have Teeth?

Notwithstanding the expectations of far-reaching and dramatic change with which it has been greeted, SB 375 does not mandate that many of its established targets actually be achieved and, thus, is perceived by some as being "toothless." Rather than enumerating strict mandates, SB 375 creates incentives to achieve its targets. As detailed above, these incentives include:

- Transportation funding for infrastructure improvements that are consistent with or facilitate the SCS;
- Streamlined CEQA review for qualifying projects; and
- Extra time—eight years instead of five—for cities and public agencies to update housing plans required by the state.

Thus, any "teeth" associated with SB 375 are indirect; the intention of the bill (in light of the compromises made by the various interest groups) is to influence and guide local land-use decisions, rather than mandate their outcomes.

The Six Nothings

For example, at the behest of the various interest groups involved in the sculpting of SB 375, specific disclaimer language was inserted into the bill expressly stating that "nothing" in the bill shall (the six "nothings" in Govt C §65080(b)(2)(J)):

- Be interpreted to supersede the prerogatives of local agencies over land-use planning;
- Be interpreted to limit CARB's authority under any law;
- Be interpreted to authorize the abrogation of vested rights;
- Require a local agency's land-use policies and regulations to be consistent with the regional plans that are created;
- Require a metropolitan planning organization to approve a strategy inconsistent with federal law; or
- Relieve a public or private entity or any person from compliance from any other law.

The bill further states that neither the SCS nor the APS regulates the use of land and, except as provided in Govt C §65080(b)(2)(I), they are not subject to state approval. Govt C §65080(b)(2)(J).

These "disclaimer" provisions may lead to arguments in the future over their interpretation, as some of them arguably conflict with other provisions of SB 375. Thus, despite the disclaimers contained in SB 375, there will likely be some pressure put on local agencies to endeavor to be consistent with the SCS for the region. Notably, the California Attorney General appears to be urging local agencies to comply with SB 375. In a January 13, 2009, letter to the City of Pleasanton, the Attorney General's office argued that the city's draft CEQA review of a proposed General Plan update failed to adequately address GhG emissions from transportation and also argued that the city's General Plan failed to provide for enough housing. The January 13 letter may be viewed at http://ag.ca.gov/globalwarming/pdf/comments_Pleasanton_GP.pdf.

Moreover, although the plans developed under SB 375 may not regulate the use of land directly, they certainly could have a strong indirect effect on the planning process that controls local land use, and may in some cases act to supersede the prerogatives of local agencies over land-use planning. See Govt C §65080(b)(2)(J). Such issues could very well be the subject of litigation in future years because, with regional planning, there will be winners and there certainly will be losers. This is especially true in those areas where inter-governmental relationships are not always benevolent.

Consistency: In the Eye of the Beholder

As noted, another potential hotbed of litigation may materialize concerning whether projects are "consistent" with the SCS. SB 375 defines "consistent"

as having the same meaning as that term is used in 23 USC §134. However, even with this guidance, it remains to be seen how different MPOs and jurisdictions judge the consistency of a proposed project with an adopted SCS. Inconsistent approaches among jurisdictions might lead to further confusion regarding the implementation of SB 375. Eventually, these differing standards throughout California may lead to further litigation as stakeholders seek to clarify their obligations under the legislation.

With these issues on the horizon, one way that project proponents and their counsel can be proactive in this area is by participating in the SCS process to ensure that the plans contain very clear standards for judging consistency from one jurisdiction to the next. Because it will likely be impossible for a project to be consistent with the SCS in every minute detail, it will be crucial for project proponents and other interested parties to work together to develop reasonable and obtainable standards for consistency. Whatever ends up being the standard for consistency, it is likely that project EIRs will need to use that standard in considering whether the project is consistent with the SCS.

CEQA Significance

Whether or not SB 375 has any legal teeth, the GhG emissions targets and SCS will undoubtedly be used by some MPOs, cities, counties, and other agencies as the basis for developing standards of significance (and possibly mitigation measures) under CEQA. This could have both positive and negative implications. On one hand, a project proponent may be faced with the argument that its project causes significant effects if it does not comply with the strategies laid out in the SCS. Thus, projects that are not consistent with an adopted SCS will likely have to perform additional mitigation and/or be deemed to have more severe VMT-related effects. However, as explicitly stated in SB 375, no such argument can exist if a project is only inconsistent with an adopted APS. See Govt C §65080(b)(2)(J). In contrast, when projects are generally consistent with the SCS, even if they do not qualify for the CEQA streamlining measures or exemption, project proponents will likely be able to argue that their GhG effects from VMT are less because of such consistency (or, alternatively, that any GhG effects are mitigated by such consistency).

Either way, this is a key area for project proponents to seek counsel and to evaluate the extent to which their projects are consistent with the SCS, particularly while the SCS for the region is still being developed. Individualized analysis of the expected effects of SB 375 on a landowner's properties (and their development potential) in light of existing plans is critical to determining which properties are vulnerable to the imposition of future restrictions, and which are "advantaged" by likely SCS consistency. This will help landowners determine what sort of advocacy may be needed with the local MPO and cities, as well as before CARB. Additionally, the assistance of counsel and individual analysis of the expected effects will further protect project applicants from the likely argument that projects should strive to be consistent with the plans and policies outlined in an SCS even while it is being developed, as the City of Pleasanton is currently facing. Eventually, when the SCSs have been developed, the consistency determination will be more straightforward and may likely be completed by planning firms.

Getting Involved

Ultimately, no one can know exactly what SB 375 will do, other than create a series of planning milestones that must be met between now and 2010 and then into the future. These milestones may be what is needed to begin to pull the diverse landscape of regional planning together into a coherent policy for meeting California's housing and transportation needs in the future. Agencies and property owners should evaluate the legislation to determine how it affects them and how to address its provisions. They should also stay in close contact with the planning processes being conducted by CARB and by the local MPO that will affect specific properties located within their jurisdictions and/or under their ownership. Proactive participation will be vital, and all stakeholders should consider taking the following actions:

- Closely monitor the regional GhG targets being developed by the RTAC and CARB to ensure that CARB sets reasonable GhG emissions targets for each region.

- Stay involved in the development of the SCS in their region to ensure that their projects are consistent with the SCS and comply with CEQA.
- Get involved in the Program EIR process for the regional RTP to ensure that each of their concerns is adequately addressed and commented on.
- Work with counsel to ensure that their projects adequately address each issue created by the new regional planning framework established by SB 375.

Conclusion

Whatever the ultimate outcome, interested parties throughout California—from regional transportation agencies to local governmental agencies to land developers and industries—will need to navigate the new legal landscape created by SB 375, AB 32, and related bills. SB 375 cannot and should not be viewed in isolation. It is essential for interested parties to become involved early in its implementation, carefully consider how its provisions will affect them going forward, and take swift and affirmative actions to influence the various policies, procedures, and plans as they are developed.

About the Authors

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