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## Examining California's SB 375's High Density "Sustainable Communities Strategy" and What it Means for Cities with their Own Low Density Strategies to Curb the Excesses of Growth: Separate Paths to a Better World?

Byron K. Toma

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# Examining California's SB 375's High Density "Sustainable Communities Strategy" and What it Means for Cities with their Own Low Density Strategies to Curb the Excesses of Growth: Separate Paths to a Better World?

Byron K. Toma\*

## *Abstract*

*In 2006, the State of California adopted a pioneering effort by a mere state to address global warming. The law was known in California as Assembly Bill 32. It sought to mandate that local governments in California reduce Greenhouse Gas Emissions to 1990 levels by 2020. Beyond 2020, the law required greater further reductions at specified milestones. The methods adopted to achieve these reductions were set forth in California Senate Bill 375 which, among other strategies, required regional governments in California to herd local governments into adopting an anti-sprawl approach to growth. That strategy is called the "Sustainable Communities Strategy." It provides a series of incentives for compact, high density development. Many California local governments have adopted anti-growth measures over the years, but some seem completely incompatible with high density developments. This paper examines these differing urban planning strategies to visualize how these laws will interact and co-exist with each other in the near future. It does so by focusing upon one unique Northern California city, the City of Alameda, with grass-roots laws seeking to keep it in the past and forward looking regional planning efforts [crafted by the Bay Area's Metropolitan Planning Agencies, i.e. the Association of Bay Area Governments (ABAG) and the Metropolitan Planning Commission (MTC)] seeking to thrust it into the future.*

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### I. Introduction

In the movie adaptation of the Broadway musical "Brigadoon,"<sup>1</sup> two American hunters stumble upon a quaint, old-fashioned village nestled in the fog of the Scottish highlands.<sup>2</sup> They sense that things are a little different in the town.<sup>3</sup> However, the two travelers are soon charmed by the sweetness of the simple people and their beguiling little community.<sup>4</sup> They promptly learn that the villagers dearly love their little town as well.<sup>5</sup> They also learn that one of them, the village pastor, made the ultimate sacrifice to preserve that special way of life.<sup>6</sup> The pastor, seeing the threat of the outside world, asked God to spare his 18<sup>th</sup> century town's innocence and beauty.<sup>7</sup> If God granted his wish, the pastor promised to leave that cherished way of life in Brigadoon behind.<sup>8</sup> As the story opens, the tourists encounter villagers who are still marveling at the wonderful miracle that had, in the villagers' perception, taken place just two days past.<sup>9</sup> As the tourists eventually learn, Brigadoon emerged from the Scottish mist only one day every century so that the outside world would never affect the quality of their lives.<sup>10</sup>

In Northern California, less than a half mile off the busy piers of the Oakland<sup>11</sup> waterfront, lies the island<sup>12</sup> City of Alameda.<sup>13</sup> Alameda is, in

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1. BRIGADOON (MGM/UA 1954) (based on the screenplay, book and lyrics written by Alan Jay Lerner referring to a Scottish village). The play first ran on Broadway in 1948. The movie was released in 1954. The video was released by MGM/UA in 1993. See generally *Brigadoon*, IMDB.COM, <http://www.imdb.com/title/tt0046807/> (providing details about the film version including a plot synopsis, images, cast members, etc.) (last visited March 30, 2011) (on file with Journal of Energy, Climate, and the Environment).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. See Alameda-Oakland Estuary Crossing Feasibility Study, ALAMEDA COUNTY TRANSP. IMPROVEMENT AUTHORITY 1, available at [http://www.actia2022.com/files/managed/Document/282/A070006\\_N\\_Alameda-Oakland\\_Estuary\\_100709.pdf](http://www.actia2022.com/files/managed/Document/282/A070006_N_Alameda-Oakland_Estuary_100709.pdf) (studying the feasibility of a new Alameda-Oakland estuary crossing). At its most suitable site for a bike crossing, the distance between the two cities is a mere one thousand feet. *Id.*

12. See GRETA DUTCHER AND STEPHEN ROWLAND, IMAGES OF AMERICA—ALAMEDA 7 (2009) (indicating Alameda was originally a peninsula connected to what is now Oakland and only became an actual island in the San Francisco Bay in 1902); see also IMELDA MERLIN, ALAMEDA—A GEOGRAPHICAL HISTORY 1 (6th ed. 1977) (describing geographical features of the Island of Alameda). The year 1902 marked the completion of a federal harbor improvement project started in 1874 called the Tidal Canal. *Id.* Today access to

many ways, a real life counterpart to the fictional village of Brigadoon.<sup>14</sup> Years ago, the citizens adopted a local ballot measure called "Measure A."<sup>15</sup> Like the parish pastor's pact with God, Measure A was intended to protect and preserve all that was good in the city against the unsavory elements of the outside world.<sup>16</sup> In a nutshell, it generally prevented new residential developments from exceeding the density of a duplex residential unit.<sup>17</sup> There could not be more than one residence for each 2000 square feet of land.<sup>18</sup> There were notable exceptions made for low-cost and senior citizen housing,<sup>19</sup> but the ban on high-density housing developments was generally unequivocal.<sup>20</sup> The citizens of the city wanted to preserve the quaint

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Oakland is provided by two underwater tunnels and three bridges. *Id.*

13. See *City of Alameda Demographics*, CITY OF ALAMEDA <http://www.cityofalamedaca.gov/About-Alameda/Demographics> (last visited Jan. 15, 2011) (listing City of Alameda demographic information—Alameda is a Charter City located across the Oakland/Alameda estuary with a population of approximately 75,409) (on file with Journal of Energy, Climate, and the Environment).

14. See MERLIN, *supra* note 12, at 1–2 (describing geographical features of the Island of Alameda). Geographically, Alameda enjoys (and perhaps suffers from) a degree of isolation unique among East Bay cities. *Id.* The Oakland Alameda estuary virtually cuts off Alameda from contact with its more metropolitan neighbor to the east. *Id.*

15. See Measure A Trifold, <http://www.actionalameda.org/Media/measure%20a%20trifold.pdf> (urging citizens to vote in support of Measure A and touting its benefits to the community). Measure A was initially adopted in 1973. *Id.* In its original form, it prohibited all multiple dwelling units in the City of Alameda. *Id.*

16. See ALAMEDA MUN. CODE, ch. 7, § 30(a) ("The proliferation throughout the City of residential dwellings in attached groups of more than two (2) units has created and if continued will, further create land use densities and other undesirable effects to a degree which affects adversely the environment and the quality of living conditions necessary to and desirable by the people.").

17. See Measure A Trifold, *supra* note 15 (describing the purpose of Measure A).

18. See ALAMEDA CITY CHARTER, Article XXVI Sec. 26-3, *available at* <http://www.cityofalamedaca.gov/getdoc.cfm?id=99> (last visited March 30, 2011) ("The maximum density for any residential development within the City of Alameda shall be one housing unit per 2,000 square feet of land.") (on file with Journal of Energy, Climate, and the Environment).

19. See *2006–14 Regional Housing Needs Allocation*, ASS'N OF BAY AREA GOV'TS, <http://www.abag.ca.gov/planning/housingneeds/rhnd2.html> (last visited Jan. 15, 2011) ("The state periodically assigns a Regional Housing Needs Allocation (RHNA) to each region in California. Working with regional and local government, the regional housing needs is allocated to individual jurisdictions. The Bay Area is currently performing the 4th revision of its RHNA for the period 2006–14.") (on file with Journal of Energy, Climate, and the Environment). These exceptions were necessary to address what would otherwise be the high cost of meeting the city's obligation to provide such housing opportunities under the Regional Housing Needs Allocation which makes projections about housing needs in the region and makes every city provide a fair share of different economic categories of housing.

20. See Article XXVI, *supra* note 18 ("The maximum density for any residential development within the City of Alameda shall be one housing unit per 2,000 square feet of land.").

Victorian and Queen Anne houses that constituted much of the island's original housing stock.<sup>21</sup> Over the years, many of these gorgeous old homes were razed and replaced with three story apartment complexes.<sup>22</sup> The citizens of the city understood the disadvantages of Measure A,<sup>23</sup> but like the villagers of Brigadoon, they regarded the law as a true blessing.<sup>24</sup>

Then, like in the story of Brigadoon, the townspeople of Alameda were confronted by outsiders. SunCal California<sup>25</sup> secured the exclusive negotiating agreement (ENA)<sup>26</sup> to redevelop the Alameda Naval Air Station<sup>27</sup> on the far Northwestern end of the island. The strangers, seemingly unaware that their actions threatened to change the way of life on

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21. See *Measure A*, ACTION ALAMEDA, <http://www.actionalameda.org/measure-a/measure-a.php> (last visited August 29, 2010) ("Measure A in Alameda was enacted in 1973 in response to a development trend that destroyed . . . beautiful Victorian homes and historic buildings") (on file with Journal of Energy, Climate, and the Environment).

22. See MERLIN, *supra* note 12, at 96 (describing population growth and the resulting dilemmas in Alameda).

23. See Josh Harkinson, *Memo to Alameda's NIMBYs*, MOTHER JONES BLUE MARBLE BLOG (June 1, 2010, 9:00 AM), <http://motherjones.com/blue-marble/2010/04/memo-alamedas-nimbys> (last visited March 30, 2011) (discussing the Alameda Point controversy and advocating "pro-environment, pro-growth community activis[m]") (on file with Journal of Energy, Climate, and the Environment). Limitations upon development deprived the city of possible solutions to urban blight and the acquisition of new parks, public areas, and services. *Id.*

24. See Guy Span, *City of Alameda's Measure B Goes Down in Flames*, EXAMINER.COM (Feb. 3, 2010, 11:33 AM), <http://www.examiner.com/public-transportation-in-san-francisco/city-of-alameda-s-measure-b-goes-down-flames> (last visited March 30, 2011) (reporting the defeat of Measure B at the polls with 85% voting against it) (on file with Journal of Energy, Climate, and the Environment). The Measure A growth limitation would have been limited by what was termed "Measure B," which would have provided for greater development of Alameda Point than is currently allowed under Measure A. *Id.*

25. See *SunCal Companies*, SUNCAL COMPANIES, <http://www.suncal.com/> (last visited March 30, 2011) ("SunCal Companies [are] the largest privately owned developer of masterplanned and mixed-use communities in the West") (on file with Journal of Energy, Climate, and the Environment).

26. See *City of Alameda—Community Profile*, EAST BAY ECON. DEV. ALLIANCE, <http://www.edab.org/City/alameda.htm> (last visited March 30, 2011) (listing demographic, geographic, and economic statistics concerning the city of Alameda) (on file with Journal of Energy, Climate, and the Environment). The ENA was executed on July 18, 2007 between SunCal and the Alameda Reuse and Redevelopment Authority (ARRA). The ARRA is a governmental entity charged with facilitating the transition of the Alameda Naval Air Station to civilian use and is responsible for development and implementing reuse plans.

27. See MERLIN, *supra* note 12, at 92 (relaying the history of the Naval Air Station on Alameda). In 1936 the residents of Alameda voted to give the western portion of their island to the federal government for use as a Navy Air Base. *Id.* The Navy occupied some 2,671 acres as an active Naval Air Station. *Id.* See M.L. Shettle, Jr., *Historic California Posts: Naval Air Station, Alameda (Benton Field)*, <http://www.militarymuseum.org/NASAlameda.html> (last visited August 28, 2010) (summarizing the history of Benton Field) (on file with Journal of Energy, Climate, and the Environment). The base was finally decommissioned in April 25, 1997. *Id.*

the island, sought to secure a dispensation from the limitations of Measure A through the adoption of Measure B.<sup>28</sup> Measure B would have allowed much higher development densities at Alameda Point.<sup>29</sup> The people of Alameda rejected Measure B and "ran out of town" those who had threatened the integrity of Measure A and their "small town" way of life.<sup>30</sup>

The City formally ended its ENA with SunCal California on July 20, 2010.<sup>31</sup> How the rest of this story will ultimately unfold is still unknown. The City of Alameda today is facing the climax of its decade-long struggle to redevelop the Naval Air Station.<sup>32</sup> In the movie climax of *Brigadoon*, the village people prevent a disgruntled villager from leaving the town.<sup>33</sup> If anyone left *Brigadoon*, the special magic that spared *Brigadoon* from the outside world would be lost.<sup>34</sup> In the movie, the lifeless corpse of the wayward villager is carried off screen.<sup>35</sup> In the case of Alameda, their disgruntled former developer has more fight left and has filed a lawsuit<sup>36</sup> in

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28. See *Measure B*,

[http://www.alamedapointcommunity.com/pdfs/alameda\\_point\\_initiative.pdf](http://www.alamedapointcommunity.com/pdfs/alameda_point_initiative.pdf) (last visited Sept. 3, 2010) (detailing the Alameda Point Realization Initiative, including higher density limits).

29. *Id.*

30. See *Glossary*, ALAMEDAPOINTINFO.COM,

<http://alamedapointinfo.com/glossary/2/letterm> (last visited March 30, 2011) ("Measure B: SunCal's ballot measure to redevelop Alameda Point. It was defeated by a vote of 85 to 15 percent on February 2, 2010.") (on file with *Journal of Energy, Climate, and Environment*). SunCal had supported this ballot measure to permit broad development of the Alameda Naval Air Station beyond the limits that would have been imposed under current land use restrictions (i.e. Measure A). *Id.*

31. See LexisNexis Litig. Resource Community Staff,

*Alameda Point Developer Sues City Of Alameda, Alleging Breach Of Contract*, LEXISNEXIS LITIG. RESOURCE COMMUNITY (Aug. 26, 2010, 6:18 PM) <http://www.lexisnexis.com/Community/LitigationResourceCenter/blogs/newlawsuitfilings/archive/2010/08/26/alameda-point-developer-sues-city-of-alameda-alleging-breach-of-contract.aspx> (reporting on the breach of contract suit filed against the city of Alameda by SCC Alameda) (on file with *Journal of Energy, Climate, and the Environment*). The exact manner in which this outcome came to pass is mired in allegations of ethical violations by Council members, Brown Act violations, an Interim City Manager's Machiavellian behavior and more. *Id.*

32. See Alameda Point [ex Naval Air Station Alameda], GLOBAL SECURITY, <http://www.globalsecurity.org/military/facility/alameda.htm> (last visited Feb. 17th, 2011) (stating that the Navy promptly began efforts to turn over the Alameda Naval Air Station to civilian control after the base closure on April 25, 1997) (on file with *Journal of Energy, Climate, and Environment*).

33. BRIGADOON, *supra* note 1.

34. *Id.*

35. *Id.*

36. See Brief for Plaintiff, SCC Alameda Point, LLC v. City of Alameda (C.D. Cal. 2010) (No. SACV10-01171 CJC), *available at* <http://www.scribd.com/doc/37584465/SunCal-Alameda-Complaint> (alleging a breach of contract by the City of Alameda).

Federal Court to require the City to resume talks upon the Exclusive Negotiating Agreement.<sup>37</sup> Alameda is merely one of a growing number of California cities and towns seeking legal strategies to control urban growth and to curb what they view as threats to their quality of life.<sup>38</sup>

This article will examine SB 375,<sup>39</sup> essentially California's pact with the environment, which hopes to sustain our modern quality of life against the threat of global climate change by reducing Greenhouse Gase (GHG)<sup>40</sup> emissions to 1990 levels by 2020. In particular, it will examine the "Sustainable Communities Strategy"<sup>41</sup> that must be crafted by Metropolitan Planning Organizations (MPOs)<sup>42</sup> (the Association of Bay Area Governments<sup>43</sup> and the Metropolitan Transportation Commission<sup>44</sup> jointly

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37. See *id.* (stating that in SunCal's view, city officials have "corrupted the entitlement process and prevented its completion").

38. See generally Jeffrey A. Dubin, D. Roderick Kiewiet, & Charles N. Noussair, *Voting on Growth Control Measures: Preferences and Strategies* (Cal. Inst. Tech., Social Science Working Paper 777, 1991), available at <http://www.hss.caltech.edu/SSPapers/sswp777.pdf> ("investigat[ing] the behavior of voters when they confront competing propositions concerning the same issue on the same ballot, and find[ing] strong evidence of strategic voting").

39. See S. CAL. ASS'N OF GOV'TS, SENATE BILL 375 FACT SHEET, available at [http://www.scag.ca.gov/factsheets/pdf/2009/SCAG\\_SB375\\_Factsheet.pdf](http://www.scag.ca.gov/factsheets/pdf/2009/SCAG_SB375_Factsheet.pdf) (last visited September 3, 2010) (summarizing the nature and effects of SB 375). While the law is very lengthy, it boils down to being an effort to curb GHG emissions by curbing urban sprawl. *Id.*

40. See CAL. ADMIN. CODE tit. 14, § 15364.5 (2009) (defining "greenhouse gases" as carbon dioxide, methane, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride).

41. See Bill Fulton, *SB 375 Is Now Law—But What Will It Do?*, CAL. PLAN. AND DEV. REP., BILL FULTON'S BLOG (Oct. 1, 2008, 8:32 AM), <http://www.cp-dr.com/node/2140> (last visited March 30, 2011) (describing five important aspects of SB 375) (on file with Journal of Energy, Climate, and the Environment). Under SB 375, the Sustainable Communities Strategy will lay out how Metropolitan Planning Organizations (i.e. like ABAG and the MTC in the San Francisco Bay Area) will meet the necessary GHG emissions reductions established by the California Air Resources Board (CARB). *Id.* The CARB targets were announced in the summer of 2010. *Id.*

42. See JEREMY G. MARCH, CALIFORNIA TRANSPORTATION LAW 71–73 (2000) (discussing Federal MPO requirements). MPOs were created by federal law to participate in the metropolitan planning process described in Titles 23 and 49 of the United States Code. *Id.* These came about due to the adoption of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and the Transportation Equity Act for the 21st century (TEA-21). *Id.* MPOs must be designated for each urbanized area with a population in excess of 50,000 either by agreement between the Governor and units of general purpose local governments that together represent at least 75 percent of the affected population, 23 U.S.C. § 134(b)(1)(A); 49 U.S.C. § 5303(c)(1)(A), or pursuant to procedures established by applicable state or local law. 23 U.S.C. § 134(b)(1)(B); 49 U.S.C. § 5303(c)(1)(B).

43. See *Overview*, ASS'N OF BAY AREA GOV'T, <http://www.abag.ca.gov/overview/overview.pdf> (last visited September 5, 2010) ("The Association of Bay Area Governments (ABAG) is the regional planning agency for the nine counties and 101 cities and towns of the San Francisco Bay region").

44. See *About MTC*, METROPOLITAN TRANSP. COMMISSION,

serve in this capacity in the San Francisco Bay Area) to comply with SB 375<sup>45</sup> and the apparent tension between it and local anti-density measures such as the City of Alameda's Measure A, dedicated to preserving the best of the past.

In many ways, this is a tale about two conflicting efforts aimed at the same goal, each with its own narrow vision of preserving the world. Can there be harmony between these two seemingly conflicting efforts toward preserving the world as we know it? What will happen to cities such as Alameda under SB 375? What consequences lie ahead for an MPO<sup>46</sup> that must deal with low/no growth cities such as Alameda and its counterparts who have adopted similar growth management strategies?<sup>47</sup> These are some of the questions this paper will attempt to examine.

## II. Traditional Urban Planning in California

Like one contemplating the idyllic storybook village of Brigadoon, one might look back fondly upon the simplicity of traditional urban planning in California. Even in decades past, however, land use law was complicated and urban planning was a daunting process.<sup>48</sup> The traditional elements of

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[http://www.mtc.ca.gov/about\\_mtc/about.htm](http://www.mtc.ca.gov/about_mtc/about.htm) (last visited September 5, 2010) ("[T]he Metropolitan Transportation Commission (MTC) is the transportation planning, coordinating and financing agency for the nine-county San Francisco Bay Area.") (on file with Journal of Energy, Climate, and Environment).

45. See Fulton, *supra* note 41 (describing these requirements of SB 375 in detail).

46. See MARCH, *supra* note 42, at 75 (discussing Metropolitan Planning Area boundaries). The term "Metropolitan Planning Area" refers to the area under the administration of the MPO for purposes of 23 U.S.C. § 134, and to carry out 49 U.S.C. § 5303. *Id.* Such metropolitan planning areas must encompass at least the existing urbanized area and include contiguous area expected to become urbanized within a 20 year forecast period. *Id.*

47. See *Urban Habitat Program v. City of Pleasanton*, 164 Cal. App. 4th 1561 (2008) (affirming the dismissal of a claim against the city of Pleasanton for failing to comply with California's Housing Element Law and violating California's Least Cost Zoning Law and reversing with regard to the other causes of action in the complaint). In the case of another city, Rio Vista, its citizens have been "urged" to re-examine their housing element by the state HCD—they appear willing to do so. See CITY OF RIO VISTA PLANNING COMMISSION, STAFF REPORT (Aug. 11, 2010), <http://www.riovistacity.com/files/Agenda%20Item%204%20SR-Draft%20GPA-2010%20HE%20update%20and%20ND.pdf> ("review[ing] and consider[ing] . . . recommendation of approval for a General Plan Amendment (GP 10-001) for update to the Housing Element and of a Negative Declaration for environmental impacts associated with the proposed land use regulatory document update").

48. See *Our Services*, URBAN PLAN. PARTNERS, INC., [http://www.up-partners.com/downloads/UPP\\_Tearsheet.pdf](http://www.up-partners.com/downloads/UPP_Tearsheet.pdf) (last visited March 30, 2011) ("developers and public agencies sometimes feel that the planning process is arduous and overly complicated . . . Master Plans, Specific Plans and other policy documents and development regulations . . . help[] communities resolve complex issues").

local urban planning in California are briefly summarized below to provide the reader with a background regarding the context into which the new legal obligations of SB 375 arise.

### A. *The General Plan*

As in most states, cities and counties in California are required to prepare master planning documents called "general plans."<sup>49</sup> These general plans serve as essentially the blueprints for all future developments within that jurisdiction. Other planning documents must be consistent with the general plan,<sup>50</sup> and in that sense they are akin to planning constitutions, prepared with the intention of being comprehensive and long-term.<sup>51</sup> General plans are required to contain at least seven elements: land use, circulation, housing, conservation, open space, noise, and safety.<sup>52</sup> What we will focus upon in this paper are the housing and circulation elements.

#### 1. *The Housing Element (Part of the General Plan)*

The Department of Housing and Community Development (HCD) requires all general purpose local governments to prepare housing elements consistent with the State Housing Element guidelines.<sup>53</sup> Under California law, HCD is tasked with determining the regional housing needs for all income groups, and councils of governments (COGs)<sup>54</sup> are tasked with the adoption of a regional housing need plan that distributes a "fair share" of the regional housing need to each city and county within that jurisdiction.<sup>55</sup> Each city or county must submit both draft housing elements and proposed amendments of their housing elements to the HCD for review and comment, and final versions must also be supplied to HCD.<sup>56</sup> Updates are

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49. See GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, GENERAL PLAN GUIDELINES 8 (2003) available at [http://www.opr.ca.gov/planning/publications/General\\_Plan\\_Guidelines\\_2003.pdf](http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf) (explaining that every city and county in California is required to have a long-term general plan).

50. CAL. CODE REGS. tit. 7, § 65860 (2009).

51. See Albert I. Herson and Gary A. Lucks, *California Environmental Law and Policy, a Practical Guide* 52 (2008) (discussing general plans, specific plans, and redevelopment plans).

52. CAL. CODE REGS. tit. 7, § 65302 (2009).

53. CAL. CODE REGS. tit. 7, § 65585(a) (2009).

54. See ASS'N OF BAY AREA GOV'T, <http://www.abag.ca.gov/> (last visited Feb. 17, 2011) (describing that in the San Francisco Bay Area, this role is played by ABAG).

55. CAL. CODE REGS. tit. 7, § 65584.06 (2009).

56. See generally *Overview of Housing Element Law*, CAL. DEP'T OF HOUSING AND COMMUNITY DEV., [http://www.hcd.ca.gov/hpd/housing\\_element2/GS\\_beforeYouBegin.php](http://www.hcd.ca.gov/hpd/housing_element2/GS_beforeYouBegin.php) (last visited March 15, 2011) (describing the process) (on file with Journal of Energy, Climate, and the Environment).

expected every five years and an annual report must be supplied to the Office of Planning and Research (OPR) and the HCD on housing element implementation.<sup>57</sup>

The purpose of the housing element law is egalitarian and high-minded. As the California Legislature has declared, "the early attainment of decent housing and a suitable living environment for every Californian, including farmworkers, is a priority of the highest order."<sup>58</sup> Its accomplishment is entrusted to a system of housing needs assessment and allocation presided over by MPOs who analyze housing needs and assignment of housing allocations to local governments within their region.<sup>59</sup>

## 2. *The Circulation Element (Part of the General Plan)*

A significant element of any general plan is the circulation element of the general plan, which is a reference to the circulation of people and resources within and around the local government establishing the general plan.<sup>60</sup> In essence, it is the portion of the general plan that considers transportation resources. Such circulation elements include an assessment of transportation routes, transportation terminals, utilities and easements, rail systems, airports, and any land use involving a consideration of transportation resources.<sup>61</sup>

### *B. The Specific Plan*

Specific plans implement general plans within a smaller geographic area. Specific plans create a framework within which land use controls, such as zoning, ordinances, and subdivision regulations, must conform, as is the case for public works projects and development agreements.<sup>62</sup>

A specific plan is required by state law to include text and a diagram that addresses all of the following in detail:

- 1) The distribution, location, and extent of the uses of land, including open space within the area covered by the plan;

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57. CAL. CODE REGS. tit. 7, §§ 65588(b), 65400(b) (2009).

58. CAL. CODE REGS. tit. 7, § 65580(a) (2009).

59. *See generally* ASSOCIATION OF METROPOLITAN PLANNING ORGANIZATIONS, <http://www.ampo.org/> (providing information on the AMPO) (last visited March 14, 2011).

60. *See generally* CITY OF HIGHLAND, City of Highland General Plan 3-1 (2006), available at [http://www.ci.highland.ca.us/GeneralPlan/PDFs/03-Circulation\\_Element.pdf](http://www.ci.highland.ca.us/GeneralPlan/PDFs/03-Circulation_Element.pdf). (describing the circulation element).

61. *See* HERSON & LUCKS *supra* note 51, at 52–53 (summarizing general plan issues and elements).

62. CAL. CODE REGS. tit. 7, §§ 65450–65457 (2009).

- 2) The proposed distribution, location, extent and intensity of major components of public and private transportation, sewage, water, drainage, solid waste disposal, energy, and other essential facilities proposed to be located within the area covered by the plan and needed to support the land uses described in the plan;
- 3) The standards and criteria by which development will proceed and, where applicable, standards for conservation, development, and utilization of natural resources; and
- 4) A program of implementation measures including regulations, programs, public works projects, and financing measures necessary to carry out the matters listed above.<sup>63</sup>

### C. Zoning

If a General Plan is a long-range policy defining a local government's aspirations regarding the future of a community's land use goals, zoning laws reflect the current, present-day allowable uses to which properties within a local governmental jurisdiction may be used.<sup>64</sup> Every city in California has an existing zoning ordinance.<sup>65</sup> Zoning ordinances must be reasonably related to the public welfare.<sup>66</sup> Indeed, the Courts have recognized that zoning ordinances must be reasonably related to the public welfare of the affected region as well as the citizens of the city.<sup>67</sup> In *Livermore*, the California Supreme Court devised a three-step analysis for determining whether a land use regulation bore a reasonable relationship to the regional welfare.<sup>68</sup> The *Livermore* test for land use regulations looks at three items of analysis.<sup>69</sup> The first is the probable effect and duration of the land use restriction.<sup>70</sup> The second is the competing interests affected by the restriction.<sup>71</sup> The third is whether the regulation represents a reasonable accommodation of the competing interests in light of the probable effects.<sup>72</sup>

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63. CAL. CODE REGS. tit. 7, § 65451(a) (2009).

64. See HERSON & LUCKS, *supra* note 51, at 58 (discussing zoning and subdivisions).

65. Daniel J. Curtin and Cecily T. Talbert, Curtin's California Land Use Planning Law 45 (26th ed. 2006).

66. See *Arnel Dev. Co. v. City of Costa Mesa*, 126 Cal. App. 3d 330, 336 (1981) (holding that an ordinance completely precluding the development of multiple family residences in the area was invalid).

67. See *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 610–11 (1976) (remanding to determine whether measure prohibiting issuance of additional residential building permits until local educational, sewage, and water facilities met certain standards, was reasonably related to the welfare of the region).

68. *Id.* at 608–09. (explaining the test).

69. *Id.* (dividing the test into three items).

70. *Id.* at 608.

71. *Id.*

72. *Id.* at 609.

#### *D. Subdivision Regulation*

The final element of California's traditional means of addressing housing issues is the Subdivision Map Act.<sup>73</sup> The Subdivision Map Act requires cities and counties to regulate and control the design and improvement of subdivisions within their boundaries.<sup>74</sup> The Map Act has defined goals which include:

- 1) the encouragement of orderly community development by providing for the regulation and control of the design and improvement of the subdivision, with a proper consideration of its relation to adjoining areas;
- 2) the assurance that areas within the subdivision that are dedicated for public purposes will be properly improved by the subdivider so that they will not become an undue burden upon the community; and
- 3) the protection of the public and individual transferees from fraud and exploitation.<sup>75</sup>

In decades past, the above four tools of local land use planning were basically sufficient to deal with urban planning issues at a local level.<sup>76</sup> They seemed to be adequate tools to control the forces of growth.<sup>77</sup> Then came the period after World War II and the "Baby Boom."<sup>78</sup> Single family homes in the San Francisco Bay Area were in great demand.<sup>79</sup> Soon communities sprouted farther and farther from the urban core.<sup>80</sup> Soon there was a recognition that planning efforts at a more regional level were necessary.<sup>81</sup> In 1961, the Association of Bay Area Governments (ABAG)

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73. See generally CAL. CODE REGS. tit. 7, §§ 66410–66413.5 (2009).

74. *Id.* § 66411.

75. 61 Ops. Cal. Atty. Gen. 299, 301 (1978); see also 77 Ops. Cal. Atty. Gen 185 (1994) (summarizing the main purposes of the Act as promoting orderly community development and protecting the public from fraud and exploitation).

76. See ELISA BARBOUR, PUB. POLICY INST. OF CAL., METROPOLITAN GROWTH PLANNING IN CALIFORNIA, 1900–2000, 14 (2002) (calling the local planning techniques in California prior to WWII "comprehensive" and "well coordinated").

77. *Id.* (approving the techniques).

78. See *Baby Boom*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/47555/baby-boom> (last visited Jan. 16, 2010) (defining the term "baby boom" as the demographic spike in birthrates in the United States in the period immediately following the end of the Second World War, circa 1945 to roughly 1955) (on file with Journal of Energy, Climate, and the Environment).

79. See Howard F. Gregor, *Urban Pressures on California Land*, 33 LAND ECON. 311, 316 (1957) (discussing growth of single family dwellings in the San Francisco Bay Area after World War II).

80. See Steven H. Goldfarb, *Parochialism on the Bay: An Analysis of Land Use Planning in the San Francisco Bay Area*, 55 CAL. L. REV. 836, 837 (1967) (describing population growth in Bay Area suburbs from 1950–1960).

81. See *id.* at 838 (arguing that the demographic changes necessitated a shift in focus

was created, and regional planning in the San Francisco Bay Area had a forum for expression.<sup>82</sup> Today, the ABAG works chiefly with regional housing needs and the Metropolitan Transportation Commission (MTC) with regional transportation planning and funding.<sup>83</sup> Their products, the Regional Housing Needs Assessment/Allocation (for the ABAG) and the Regional Transportation Plan (for the MTC) will be examined below.

### III. Traditional Regional Planning in California

In addition to the summary of local planning laws outlined above, certain regional planning tools were developed to address planning beyond traditional county lines.<sup>84</sup> Any discussion of regional planning efforts requires some attention to the Regional Housing Needs Assessment/Allocation (RHNA) and the Regional Transportation Plan (RTP).<sup>85</sup>

#### A. The Regional Housing Need Assessment/Allocation

California law has implemented a means of determining the existing and projected housing needs during a planning period, and that process has been termed the RHNA process.<sup>86</sup> It aims at evaluating the housing and growth issues with a regional approach within a COG representing regional interests and goals.<sup>87</sup> As of 2004, the Legislature mandated that the allocation plan be consistent with certain objectives, including:

- 1) increasing the housing supply and the mix of housing types, tenure, and affordability in the region in an equitable manner which must result in each jurisdiction receiving an allocation for low and very low income units;

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from local to regional planning).

82. See Geoffrey Pay, *California's Civil War: Regional Management in the Bay Area*, 18 ENVIRONS: ENVTL. L. & POL'Y J. 72, 76 (1995) (describing ABAG's founding and initial goals).

83. See *id.* at 77 (discussing ABAG's relationship with MTA).

84. See *Regional Housing Needs Assessment*, S. CAL. ASS'N OF GOV'TS, <http://www.scag.ca.gov/Housing/rhna/index.htm> (last visited Jan. 16, 2011) (explaining RHNA's use in local housing planning) (on file with Journal of Energy, Climate, and the Environment); see also *Regional Transportation Plan*, S. CAL. ASS'N OF GOV'TS, <http://www.scag.ca.gov/rtp2008/index.htm> (last visited Jan. 16, 2011) (describing RTP's purpose as assisting with regional transportation planning) (on file with Journal of Energy, Climate, and the Environment).

85. *Id.* (same).

86. Cal. Gov't Code § 65584.

87. See CURTIN & TALBERT, *supra* note 65, at 521 (explaining how the RHNA process was established "to evaluate housing and growth issues in a regional context").

- 2) promoting infill development and socioeconomic equity, the protection of environmental and agricultural resources, and the encouragement of efficient development patterns;
- 3) promoting an improved intraregional relationship between jobs and housing; and
- 4) allocating a lower proportion of housing needs to an income category when a jurisdiction already has a disproportionately high share of households in that category.<sup>88</sup>

The Regional Housing Need Assessment "represents the minimum need for additional housing during the periodic planning period and does not represent a cap."<sup>89</sup> While the California HCD develops a forecast for statewide housing needs, it then, after consultation with the region, makes a determination regarding a COG region's share of the statewide burden to address the housing need.<sup>90</sup> At a local level, each jurisdiction (city or county) is allocated the number of housing units it is expected to build for very low, low, moderate, and above moderate income households within the jurisdiction.<sup>91</sup> The RHNA is generally seen as a good faith target, not an absolute requirement.<sup>92</sup> The jurisdiction that fails to meet its obligation must, however, provide some showing of good cause for its failure.<sup>93</sup>

### *B. The Regional Transportation Plan*

While regional housing planning has been driven by a need to address the shortage of affordable housing at a state level,<sup>94</sup> transportation planning at a regional level has been largely spurred by both state and federal law.<sup>95</sup> Federal law, in the form of ISTEA,<sup>96</sup> TEA-21,<sup>97</sup> the Federal Transit Act,<sup>98</sup>

88. CAL. GOV'T CODE § 65584(d)(1)-(4).

89. Letter from Cathy E. Creswell, Deputy Director of HCD, to Mark Pisano, Executive Director of SCAG (July 6, 2005) [http://www.hcd.ca.gov/hpd/hrc/plan/he/scag\\_update\\_schedule.pdf](http://www.hcd.ca.gov/hpd/hrc/plan/he/scag_update_schedule.pdf) (last visited Jan. 16, 2011).

90. CAL. GOV'T CODE § 65584.01; *see also* CURTIN & TALBERT, *supra* note 65, at 469 (describing the regional housing needs allocation process).

91. CAL. GOV'T CODE § 65584(d)-(e).

92. *Four Concepts: Smart Growth, Housing Elements, Regional Fair Share and Regional Housing Needs Determination*, TAM ALMONTE, <http://www.tamalmonte.org/issues/tamalmonte.org-PertinentConcepts.pdf> (last visited Jan. 18, 2011) (on file with Journal of Energy, Climate, and the Environment).

93. *Id.* ("It seems that the RHND Allocation number is a goal rather than an absolute requirement.").

94. *See* CAL. GOV'T CODE § 65580(a) (declaring that addressing California's housing needs "is a priority of the highest order").

95. *See* MARCH, *supra* note 42, at 71 (stating that both federal and state regulations "require detailed and comprehensive transportation planning at the regional level").

96. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1, et seq., 105 Stat. 1914 (codified as amended at 23 U.S.C. § 101 (2003), amended by

regulations accompanying ISTEA,<sup>99</sup> and state statutes and regulations require comprehensive transportation planning at the regional level. Each Transportation Planning Agency (TPA)<sup>100</sup> must every four years adopt and submit an updated RTP<sup>101</sup> to the California Transportation Commission and to Caltrans.<sup>102</sup> The regional transportation planning process in the Metropolitan Planning Area (MPA),<sup>103</sup> governed by the MTC,<sup>104</sup> is somewhat more complex. A unique set of additional state laws apply to the MTC region and mandate more than the typical types of information to appear in the plan.<sup>105</sup> The MTC's RTP must also include the following: the national system of interstate and defense highways, the California Freeway and Expressway System, and other highways within the state highway system; transbay bridges; and mass transit systems.<sup>106</sup>

The typical elements of an RTP include the following: a policy element; an action element; a financial element; and a reference to environmental and air quality documentation.<sup>107</sup> In addition, the California Transportation Commission's Regional Transportation Plan Guidelines recommend, but do not require, that the RTP include an executive summary and a needs assessment.<sup>108</sup>

Regional planning organizations like ABAG and the MTC have long been forward-thinking with regard to addressing regional needs.<sup>109</sup> In an

Transportation Equity Act for the Twenty-First Century, Pub. L. No. 105-178, §§ 1112(c), (d), 1114(b)(2), (3), 1207(b), 1211(a), (i), (n), 1212(c), 1216(a), 3030(e)(2), (3), (g), 5213, 112 Stat. 107, 151, 185, 189, 192, 194, 379-381, 463 (1998) [hereinafter TEA-21].

97. TEA-21 §§ 1203-1204, 112 Stat. at 170-184.

98. 49 U.S.C. § 5301 (1998).

99. 23 C.F.R. § 450.200 (2010).

100. See CAL. GOV'T CODE § 65080.1 (setting forth the process of designating a new transportation planning agency in a geographic area). The term "Transportation Planning Agency" does not appear to be defined. It appears to describe a function of an agency designated with specific planning chores.

101. See CAL. GOV'T CODE §§ 65080.5-65081 (setting forth the process of adopting and contents of an RTP).

102. CAL. GOV'T CODE § 65080(d); see also CAL. DEP'T OF TRANSP., <http://www.dot.ca.gov/> (last visited Feb. 1, 2011) (using "Caltrans" as an abbreviation for the California Department of Transportation) (on file with Journal of Energy, Climate, and the Environment).

103. In effect, the area under the jurisdiction of a Transportation Planning Agency.

104. See MARCH, *supra* note 42, at 142 (stating that the MTC region encompasses the City and County of San Francisco, Alameda County, Contra Costa County, Marin County, Napa County, San Mateo County, Santa Clara County, Solano County and Sonoma County).

105. *Id.* at 143.

106. CAL. GOV'T CODE § 66510(a)-(c).

107. CAL. GOV'T CODE § 66510(b)(1)-(4).

108. MARCH, *supra* note 42, at 120.

109. While ABAG predates the Federal Clean Air Act of 1963, Pub. L. No. 88-206, 79 Stat. 392 (1963), [hereinafter CAA] by two years, the mandate of the CAA that the states shall submit a State Implementation Plan (SIP) specifying the manner in which national

area such as the San Francisco Bay Area, where one city abuts the next, regional planning is the only meaningful way to address many urban problems. Bay Area cities do not behave as independent units, but operate instead as a part of an interwoven system of economic and social networks.<sup>110</sup> ABAG adopted the notion of "Smart Growth" in the early part of this decade.<sup>111</sup> ABAG was a leader in developing what it termed "the Smart Growth Strategy/Regional Livability Footprint Project."<sup>112</sup> That project utilized local workshops (i.e. citizen groups) to assist professional planners to make projections for future population growth in the area.<sup>113</sup> This project, in turn, was used by the MTC and the Bay Area Air Quality Management District (BAAQMD) in developing a regional transportation plan and a regional air quality plan.<sup>114</sup> With concerns mounting regarding

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primary and secondary ambient air quality standards will be achieved and maintained no doubt gave both ABAG and the MTC a meaningful purpose for existence. As amended in 1990, the Clean Air Act provides as follows:

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

42 U.S.C. § 7407(a). For nonattainment areas (such as the San Francisco Bay Area), the CAA contains special rules requiring the State containing such areas and the elected officials of such affected areas to submit jointly reviewed and updated planning procedures adopted pursuant to Section 7504. *Id.* § 7504. Section 7504(a) provides, in part, as follows:

In preparing such procedures the State and local elected officials shall determine which elements of a revised implementation plan will be developed, adopted, and implemented (through means including enforcement) by the State and which by local governments or regional agencies, or any combination of local governments, regional agencies, or the State.

*Id.* Clearly much of the framework of subsequent air quality planning law (including the SCS) is borrowed from this statutory scheme. Perhaps EPA practices with regard to unsatisfactory SIPS may provide a model for CARB dealing with the unsatisfactory SCS of MPOs.

110. *See* Cecily Talbert Barclay, Curtin's California Land use and Planning Law 2010, 459 (describing the Bay Area city network structure).

111. *See id.* at 456–457 (providing an introduction to the Smart Growth movement).

112. *See id.* at 460 ("In an attempt to foster discussion about regional planning as it relates to the Bay Area's potential Smart Growth objectives, ABAG initiated the 'Smart Growth Strategy/Regional Livability Footprint Project.'").

113. *See id.* ("Using input from the workshops and a meeting of more than 100 planning directors, ABAG developed three alternatives for future development in the Bay Area.").

114. *See id.* ("Every two years ABAG makes projections for future population and household change and employment growth throughout the region. These projections are used . . . to develop a regional transportation plan . . . [and] in developing a regional air

the effects of climate change on California, the nation, and the world, the State of California took a leadership role in adopting new laws to reduce GHG emissions.<sup>115</sup> With this new focus upon the broad goal of reducing GHG emissions, new requirements and strategies have appeared upon the legal landscape.<sup>116</sup>

#### IV. Urban Planning after AB 32 and SB 375

Just as in the story line of Brigadoon,<sup>117</sup> the major forces of the outside world (*i.e.*, climate change and global warming) have threatened to undermine a simpler way of life. This is particularly the case for urban and regional planners in California. While the basic elements of regional planning outlined above continue to be important, they must now work in concert with new tools intended to accomplish GHG emission reductions.<sup>118</sup> The new tools are as follows: 1) the Sustainable Communities Strategy and 2) the Alternative Planning Strategy.<sup>119</sup>

##### A. The "Sustainable Communities Strategy" and "Alternative Planning Strategy"

In the San Francisco Bay Area, the "Sustainable Communities Strategy" has been the result of collaborations between the ABAG and the MTC.<sup>120</sup>

##### 1. The Sustainable Communities Strategy

The Sustainable Communities Strategy (SCS) is essentially a regional GHG emissions reduction plan that utilizes concepts of compact development and smart growth to contain suburban sprawl in the manner contemplated by SB 375.<sup>121</sup> Commentators have referred to SB 375 as

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quality plan.").

115. *See id.* at 621 (providing a list of regulatory measures that California has adopted with regard to combating GHG emissions).

116. *See infra* notes 117–173 (providing analyses of the Sustainable Communities Strategy and Alternative Planning Strategy).

117. *See* BRIGADOON, *supra* note 1 (summarizing the story line of BRIGADOON).

118. *See* BARCLAY, *supra* note 110, at 624–25 (outlining the community planning requirements and target emissions standards set forth in SB 375).

119. *See infra* notes 117–156, and accompanying text (discussing the nature and merits of the Sustainable Communities Strategy and Alternative Planning Strategy).

120. *See generally* Kimsey Memorandum, *infra* note 132 (providing correspondence between MTC and ABAG as to parameters and implementation of the Sustainable Communities Strategy).

121. *See* BARCLAY, *supra* n. 110, at 625 (outlining the "sustainable communities strategy" as an element of SB 375).

"anti-sprawl" legislation,<sup>122</sup> and they note that the text of SB 375 takes special note of the fact that emissions from cars and light trucks are responsible for fifty percent of the air pollution in California.<sup>123</sup> Sprawling suburban development patterns in California have left it a state almost entirely dependent upon its system of roads and highways.<sup>124</sup> This has resulted in the automobile-centered lifestyle that California has become known for throughout the world.<sup>125</sup>

How does the SCS implement its anti-sprawl vision? It does so at a regional level by requiring consistency between SCS GHG emission reduction goals and the RHNA.<sup>126</sup> It also requires consistency between SCS GHG emission reduction goals and the RTP.<sup>127</sup> What this means in practice is that cities and counties that do not follow compact development or smart growth will not receive the same favored levels of housing allocations and transportation funding as those that do.<sup>128</sup> As to transportation funding, funds for transit planning and funding will not be as forthcoming to cities and counties that ignore transit-oriented development or principles of compact development.<sup>129</sup> It should be noted that since the SCS, RHNA, and RTP are all planning measures at a regional level, no

122. *See id.* at 624 ("In passing SB 375, known colloquially as 'anti-sprawl' legislation, the Legislature sought to encourage the development of housing near urban areas and job centers and thus reduce GHG emissions generated by commuters.").

123. *See* S.B. 375, 2007–2008 Sess. § 1(d) (Cal. 2008), Stats. 2008, ch. 728, § 1 ("[A]utomobiles and light trucks account for 50 percent of air pollution in California and 70 percent of its consumption of petroleum.").

124. *See* Daniel Lerch, *A Less Car-Dependent California*, POST CARBON CITIES (Sept. 22, 2008), <http://postcarboncities.net/node/3512> (last visited March 30, 2011) (opining that California needs a less car dependent culture) (on file with Journal of Energy, Climate, and the Environment).

125. *See* Robert Cruickshank, *Redefining the California Dream for the 21st Century*, CALITICS (Aug. 7, 2007, 11:24 AM), <http://www.calitics.com/showDiary.do?diaryId=3438> (last visited March 30, 2011) (discussing the car-based California lifestyle and need for change) (on file with Journal of Energy, Climate, and the Environment).

126. *See* Joseph Carreras, *The Linkage Between the Sustainable Community Strategy and the Regional Housing Needs Assessment (RHNA)*, HOUSING/REGIONAL HOUSING NEEDS ASSESSMENT 1 (2009), <http://www.scag.ca.gov/housing/pdfs/rhna/SCSrelatedRHNApolicyissues.pdf> [hereinafter CARRERAS, HOUSING] (discussing the interplay between sustainable community strategy and goals set by the Regional Housing Needs Assessment).

127. *Id.*

128. *Id.*

129. *See generally* Press Release, Metropolitan Transportation Commission, MTC Responds to Governor's 90-Day Plan (Mar. 21, 2000), [http://www.mtc.ca.gov/news/press\\_releases/archive/rel093.htm](http://www.mtc.ca.gov/news/press_releases/archive/rel093.htm) (explaining the RTP as a transit funding agenda) (on file with Journal of Energy, Climate, and the Environment). It should be noted that the MTC's RTP is essentially a twenty-year budget (periodically updated) designed to finance transportation plans and programs. Since the RTP, SCS/APS and RHNA must be consistent, clearly those out of step with the SCS/APS regional agenda cannot expect a full share of the funds available for transit planning and funding.

particular city or county is commanded to do a set amount toward the goal.<sup>130</sup> Collectively, the MPO must achieve the goals, but the MPO cannot compel the governments in its region to all do an equal share toward accomplishing the regional objectives.<sup>131</sup> Regional governments do not have the regulatory powers to do more than provide incentives such as density bonuses or perhaps some transit planning funds.<sup>132</sup> Every entity can choose its own course.<sup>133</sup> Hence, some SCS proposals that are submitted to CARB may fail. This is particularly the case in the San Francisco Bay Area where the BAAQMD and the MTC have adopted rigorous GHG emission reduction goals.<sup>134</sup>

## 2. *The Alternative Planning Strategy (APS)*

If a region's MPO fails to prepare an SCS that meets the goals of GHG emissions reductions sought by CARB, the MPO must prepare an Alternative Planning Strategy (APS).<sup>135</sup> The Alternative Planning Strategy should not be thought of as going back to scratch and submitting a new plan for GHG emissions reductions.<sup>136</sup> What it will likely be, instead, is the

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130. See CAL. GOV'T CODE § 65584 (West 2010) (effective Apr. 10, 2007) (addressing the city or county share of regional housing needs, determination and distribution). MPOs, as regional entities, attempt to crystallize a consensus but do not generally have the authority to compel or supersede the authority of local governments except to the extent that they are authorized or enlisted to perform specific roles under state law, such as the preparation of the allocation of housing under the state statutory scheme.

131. See Tom Adams, Amanda Eaken & Ann Notthoff, Nat. Resources Def. Council, *Communities Tackle Global Warming—Guide to California's SB 375*, 12 (2009), available at <http://www.nrdc.org/globalWarming/sb375/files/sb375.pdf> (discussing the implementation of S.B. 375 in California communities); see also Bill Fulton, *The Disconnect Between S.B. 375 and Local Planning*, Cal. Plan. & Dev. Rep., Bill Fulton's Blog (Sept. 23, 2008, 11:46 AM), <http://www.cp-dr.com/node/2134> (assessing whether California communities can effectively implement S.B. 375) (on file with Journal of Energy, Climate, and the Environment). Metropolitan Planning Organizations do not have land use authority. Implementation of S.B. 375 must depend upon the land use approvals of local governments.

132. See Memorandum from Doug Kimsey, Metro. Transp. Comm'n, to the Bay Area P'ship 7 n.13 (Dec. 1, 2009), available at [http://apps.mtc.ca.gov/meeting\\_packet\\_documents/agenda\\_1396/07\\_SB375.pdf](http://apps.mtc.ca.gov/meeting_packet_documents/agenda_1396/07_SB375.pdf) [hereinafter Kimsey Memorandum] ("SB 375 explicitly provides that neither the SCS nor the APS will regulate the use of land or supersede the exercise of the land-use authority of cities and counties . . . . [And] there is no requirement that a city or county's land-use policies and regulations, including its general plan, be consistent with [either]."). The Memorandum further explains that "alignment of local land use policy with the SCS will have to be voluntary." *Id.*

133. *Id.*

134. *Id.* at 1–2.

135. See generally Fulton, *supra* note 41 (providing a description of the process regarding the role of the APS at the California Planning and Development Report website).

136. *Id.* This is admittedly supposition since there is, as of this writing, no APS to examine from a California MPO.

equivalent of an extra credit project in high school.<sup>137</sup> It will likely be an opportunity to do, with additional work, what perhaps should have been achieved without the extra project.<sup>138</sup> Here, the preparation of an SCS taken in concert with the additional efforts outlined in an APS will hopefully meet the goals of the local air district and CARB. Although the relationship between the SCS and APS is not clear in the statutory scheme, it is unlikely that an SCS that fails to secure approval will be completely abandoned.<sup>139</sup> Instead, an APS will likely outline the additional measures that, in concert with the original SCS, will produce the necessary GHG emission reductions sought by CARB.<sup>140</sup>

Of course, this is merely a guess. Planners and the general public will not know what CARB has in mind for a submitted APS until one (most likely from the Southern California Association of Governments) is submitted, and a formal government response from CARB is due. Reference to practices of the Environmental Protection Agency under the Clean Air Act to unsatisfactory implementation practices under a State's Implementation Plan (SIP) may prove instructive. Perhaps CARB will be willing to provide MPOs additional time extensions to create interim steps within a SCS that may eventually secure conditional approval of the SCS provided adequate progress is made toward realizing GHG reduction goals.

### 3. *Consequences of Utilizing the Alternative Planning Strategy*

If a region must prepare an APS, some argue that it has essentially lost its opportunity to utilize CEQA Streamlining provided in SB 375.<sup>141</sup> It may also suffer funding consequences under the Regional Transportation Plan.<sup>142</sup> There is much debate whether utilizing an APS will deny a region

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137. *Id.* It is essentially a second chance.

138. *Id.* How it will be different from an amended SCS is not entirely clear.

139. *Id.* The SCS will probably start with existing documentation such as the existing RTP. An insufficient SCS can probably still make use of the efforts described in the RTP for facilitating GHG reductions.

140. *Id.* It is difficult to imagine that the efforts undertaken to produce a SCS would be wholly abandoned in the effort to secure greater GHG emission reductions. It is far more plausible that the original effort (SCS) would be amended to include additional measures that may satisfy CARB.

141. Timothy Cremin, Principal, Meyers Nave, Speech given at the Bay Area City Attorney's Luncheon in Pacifica on "BAAQMD CEQA Guidelines" (Aug. 27, 2010) (adopting the position that a literal reading of the law supports this view).

142. *See id.* (explaining that a literal reading of the law supports this view); *see also* L.A. County Energy & Environmental Efforts: Climate Change Legislation—Assembly Bill 32: California Global Warming Solutions Act of 2006, available at [http://green.lacounty.gov/legislative\\_monitoring.asp](http://green.lacounty.gov/legislative_monitoring.asp) (last visited Oct. 9, 2010) (responding to the passage of legislation requiring further emissions reduction in California). The denial of transportation funding may rest upon the view that the APS is essentially independent from the RTP. As a document outside the RTP, analysts reason that it cannot affect funding

access to CEQA Streamlining.<sup>143</sup> According to some practitioners, the likely result of an SCS that does not secure the approval of CARB is that the MPO will be required to "patch it" with an APS that, together with the SCS, will meet the GHG emissions targets set for accomplishment by CARB.<sup>144</sup> If the APS satisfies CARB, there is no reason why streamlining of CEQA requirements should not be available. A public policy argument can be made that those areas with more difficulty achieving a GHG emissions reduction need all the tools available to bring compact in-fill communities on-line. An APS with higher density targets should not be difficult to plan. Whether the APS can be accomplished is a different matter without city support. And, as noted earlier, regional governments have no way to make small cities accept a fair share of the GHG emissions reduction burden.<sup>145</sup> Small cities may balk at the idea of higher densities. This will require larger cities to take up more responsibility, and probably greater obligations toward low-cost housing.<sup>146</sup> In the San Francisco Bay Area, this means that cities such as San Jose, San Francisco, and Oakland may be required to pay the piper for Alameda's tune.<sup>147</sup>

Of course if neither a legally adequate SCS nor APS can be crafted to satisfy CARB, then there is clearly no place for the streamlining of CEQA.<sup>148</sup> The CEQA streamlining proposed in SB 375 clearly contemplates that such measures would only be acceptable within the context of an SCS or APS consistent with CARB GHG emissions targets.<sup>149</sup>

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commitments within the RTP.

143. Ken Moy, General Counsel, Ass'n of Bay Area Gov'ts, Remarks at the Meeting of Ass'n Bay Area Governments (Sept. 7, 2010) (noting that there is still a great deal of uncertainty and debate regarding what the requirements of SB 375 really mean).

144. *Id.*

145. *See supra* Part II.A.1. (discussing regional fair share housing needs assessments).

146. *Id.* Larger cities are often more capable of dealing with "NIMBY" influences that often drive small city politics. Consequently, they can often address issues on a wider, less local, and more regional basis. This would arguably include addressing very low, and low-income housing. These levels of housing are often not welcomed by smaller suburban communities.

147. *Id.* These cities are the three largest cities in the San Francisco Bay Area.

148. *See* CAL. PUB. RES. CODE § 21155 (West 2010) (effective Jan. 1, 2009) (considering CEQA streamlining within the context of an SCS or APS). A CARB approved SCS or APS presumably meets GHG reduction goals. If those goals cannot be adequately addressed by the area served by an MPO, then logically every project should be required to establish what its GHG impacts will be through a full EIR as a means of focusing efforts toward meeting those goals.

149. *See id.* ("[Chapter 4.2: Implementation of the Sustainable Communities Strategy] applies only to a transit priority project that is consistent with the general use designation, density, building intensity, and applicable policies specified for the project area in either a sustainable communities strategy or an alternative planning strategy."). These strategies require State Air Resources Board approval "pursuant to subparagraph (H) of paragraph (2) of subdivision (b) of Section 65080 of the Government Code, [to accept] a metropolitan planning organization's determination that the sustainable communities strategy or the

#### 4. Sustainable Communities Strategy/Alternative Planning Strategy Timetables for Policy Alignments

In the San Francisco Bay Area, ABAG and the MTC have adopted a timetable for the accomplishment of the milestones for SCS/APS preparation.<sup>150</sup> According to the published ABAG/MTC SCS Work Plan, GHG and housing targets would be established in September/October of 2010.<sup>151</sup> Throughout the balance of 2010 until the final draft SCS is adopted in January/February of 2012, regional governments and local governments would construct and test alternative scenarios.<sup>152</sup> They would engage the public and eventually choose a strategy.<sup>153</sup> Between the adoption of the final draft SCS in early 2012 to the adoption of the final SCS, RTP, and RHNA, the regional and local governments would refine the SCS and concurrently build a consistent RTP and RHNA.<sup>154</sup> The alignment of regional policies is at the heart of the SCS.<sup>155</sup> In addition to the policy alignment between ABAG and MTC, the Bay Area Air Quality Management District and the Bay Conservation and Development Commission will also be aligning policies and regulations that will influence the region's distribution of land uses and the public infrastructure.<sup>156</sup>

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alternative planning strategy would, if implemented, achieve the greenhouse gas emission reduction targets." *Id.*

150. *See generally* Kimsey Memorandum, *supra* note 132 (describing the SCS Work Plan Schematic).

151. *See id.*, at 2 ("*Foundation* phase (through September 2010), during which the targets are developed, we collect the information we will need for the SCS, build and refine our forecasting models, and, most importantly, engage our local-government partners in the enterprise.") (emphasis in original).

152. *See id.* ("*Construction* phase (October 2010 through January 2012), during which we develop and evaluate alternative scenarios (or packages) of land-use patterns and of transportation networks, measures and polices, engage stakeholders and the general public . . . and choose a preferred final draft SCS.") (emphasis in original).

153. *See id.* (describing the construction phase).

154. *See id.* ("*Integration* phase (February 2012 through March 2013), during which we refine the Sustainable Communities Strategy, use the SCS to build a detailed transportation investment plan and a consistent regional housing needs allocation, and associated environmental review and other related documents.") (emphasis in original).

155. *See id.* at 13 (discussing regional policy alignment).

156. *See id.* ("While ABAG and MTC develop the region's first SCS, the Air District and BCDC will also be putting together policies and regulations that will affect the region's distribution of land uses and the placement of public infrastructure.").

*B. CEQA Streamlining Incentives*

If an MPO can meet the GHG emission targets set forth in the SCS or APS, it is likely to be entitled to CEQA streamlining.<sup>157</sup> What this means is that many projects may be spared the expense and delays caused by GHG emissions reduction analysis in their project EIRs.<sup>158</sup> Instead, program EIRs with GHG analysis may be used in tiered EIRs.<sup>159</sup> This may mean that more projects will be completed and that the vision of the community can be more quickly accomplished. For new types of favored developments such as Transit Priority Projects, the speed and ease with which such developments are able to complete the CEQA process may have real changes upon the landscape.<sup>160</sup> While "bad" GHG-producing projects may still secure approval with a Statement of Overriding Considerations (SOC) despite a failure to adopt adequate mitigations called for by the community, the political will may not exist to adopt an SOC.<sup>161</sup>

It is likely that cities and counties that contribute the most to the MPO being in compliance with an SCS or APS will be rewarded for their efforts.<sup>162</sup> The reward an MPO may give a city taking on greater housing

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157. See CARRERAS, HOUSING, *supra* note 126, at 3 ("The sustainable communities' strategy is a growth strategy for the region which, in combination with transportation policies and programs, strives to reduce greenhouse gas emissions and, if it is feasible, help meet ARB's targets for the region."). Carreras goes on to explain that "[i]f the sustainable communities' strategy (SCS) will not achieve the region's greenhouse gas reduction target, the region must also prepare a separate document called the 'alternative planning strategy (APS).'" *Id.* CEQUA incentives are also available for projects consistent with this strategy. *Id.*

158. See CAL. ENVTL. QUALITY ACT GUIDELINES § 15183.5(c) (2010), available at <http://www.califaep.org/resources/Documents/FINAL%20CEQA%20Handbook%20HighQuality.pdf> (providing guidelines regarding community planning or zoning projects). Project EIRs that must take into account GHG emissions reductions are likely to be considerably more expensive and time-consuming than those EIRs that can make use of existing programmatic EIRs that have addressed GHG emission reductions. *Id.*

159. *Id.*

160. See CAL. ENVTL. QUALITY ACT GUIDELINES § 15093 (2010), available at <http://www.califaep.org/resources/Documents/FINAL%20CEQA%20Handbook%20HighQuality.pdf> (noting the decision-making agency's balancing authority). To the extent that separate individual studies of GHG emissions need not be undertaken, such projects will likely clear CEQA much more expeditiously than non-priority projects.

161. *Id.* An SOC permits a legislative body to supersede what would otherwise be required under an EIR in the interests of advancing what they regard as overriding considerations.

162. See generally CARRERAS, HOUSING, *supra* note 126 (discussing the interplay between sustainable community strategy and goals set by the Regional Housing Needs Assessment). Incentives for working toward the objectives of the MPO are additional transit planning funding and favorable allocations of housing.

obligations, which must address very low and low cost housing, may be additional funding for transit planning under the RTP.<sup>163</sup>

*V. Why Some Cities Need "Density" and "Compact Development" to Reduce GHG Emissions More Than Others*

In the boom days of the Silicon Valley,<sup>164</sup> many South and East Bay cities became saturated with new high-technology workers and their families.<sup>165</sup> There was soon a press to make more family housing available.<sup>166</sup> While the cities of the South Bay soon priced themselves beyond the reach of many moderate income families,<sup>167</sup> more remote towns soon stepped in to seek to fill the housing void.<sup>168</sup> Cities such as Morgan Hill, Manteca, and San Ramon quickly became bedroom communities for the Silicon Valley. As more families moved into these communities, ever more remote cities such as the City of Lathrop and the City of Hollister grew to fill the housing gap.<sup>169</sup> Commute congestion from these fringe

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163. *Id.* The consistency requirement between the SCS/APS and the RTP and RHNA strongly suggests that the regional transportation plan will favor those areas undertaking more housing responsibilities, particularly those that assume these obligations with higher density housing near transit hubs.

164. See PUB. POL'Y INST. OF CAL., RESEARCH BRIEF NO. 75, THE DYNAMICS OF SILICON VALLEY 1–2 (Jul. 2003), [http://www.ppic.org/content/pubs/rb/RB\\_703JZRB.pdf](http://www.ppic.org/content/pubs/rb/RB_703JZRB.pdf) (referring to the "Silicon Valley" as the Santa Clara Valley (at the southern end of the San Francisco Bay Area) where the production of silicon microprocessing chips triggered a major industrial boom in the 1980s and 1990s).

165. See *id.* (noting that from 1990 to 2001, jobs in the software industry alone in the Silicon Valley rose from 48,500 to 114,600).

166. See RANDAL O'TOOLE, CATO INSTITUTE, POLICY ANALYSIS NO. 646, HOW URBAN PLANNERS CAUSED THE HOUSING BUBBLE 13 (Oct. 1, 2009) [hereinafter O'TOOLE HOUSING BUBBLE] (noting that urban growth boundaries authorized under a 1963 law permitting growth management planning resulted in the extraordinary rise in housing prices in the Bay Area in the period thereafter).

167. See generally Erin Adrian, Santa Clara Univ. Civil Society Institute, Occasional Paper No. 1, Why is Housing so Expensive in the Silicon Valley? (Sept. 2001), <http://www.scu.edu/civilsocietyinstitute/events/upload/SVHousing.pdf> (last visited March 30, 2011) (asserting that space has not been the limiting factor in terms of South Bay housing scarcity, but rather it has been more a factor of regulation such as urban growth boundaries, zoning, and other land use regulations).

168. See *In Many U.S. Cities, the "Outskirts" Are Now "In," According to RTKL, Assoc.*, BUS. WIRE, Apr. 19, 2005, [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2005\\_April\\_19/ai\\_n13631913/?tag=content;coll](http://findarticles.com/p/articles/mi_m0EIN/is_2005_April_19/ai_n13631913/?tag=content;coll) (last visited March 30, 2011) (warning that while the flight to the fringe cities is commonplace, the pace of expansion may be detrimental to such cities) (on file with Journal of Energy, Climate, and the Environment).

169. See O'TOOLE HOUSING BUBBLE, *supra* note 166, at 13 (arguing that Central valley counties (like San Joaquin and San Benito) were much less prone to adopting strict growth management plans).

communities is intense<sup>170</sup> and calls for mass transit solutions.<sup>171</sup> As a part of the solution, BART is headed east in both Alameda and Contra Costa counties,<sup>172</sup> and VTA is extending BART services toward Santa Clara County's urban fringe.<sup>173</sup> Many of these new growing communities at the edge of the urban core have built single family homes that lower income people can buy at prices much lower than homes closer to the urban core.<sup>174</sup> Whether to encourage such fringe cities to grow in undeveloped areas is one of the major issues in urban planning.

#### A. *The Case in Favor of Compact Development (Smart Growth)*

The wisdom of compact development appears unassailable. With a focus toward in-fill development and transit oriented development, this development strategy appears to offer major advantages over suburban sprawl so common in California.<sup>175</sup> SB 375 expressly sought to address

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170. See Proshant Gopal, *The Unraveling of the Suburban Fringe*, BUSINESSWEEK, July 12, 2008, available at [http://www.businessweek.com/lifestyle/content/jul2008/bw20080711\\_257959.htm](http://www.businessweek.com/lifestyle/content/jul2008/bw20080711_257959.htm) (discussing commuter traffic in high-density locales).

171. See Thales: Transforming Cities, [http://www.thalesgroup.com/News\\_and\\_events/Transforming\\_cities/](http://www.thalesgroup.com/News_and_events/Transforming_cities/) (last visited October 1, 2010) (calling for mass transit solutions in urban areas worldwide) (on file with Journal of Energy, Climate, and the Environment).

172. See Santa Clara Valley Transp. Authority, *BART to Silicon Valley*, BART.GOV, <http://www.vta.org/bart/index.html> (last visited January 18, 2011) (providing information about the BART rail system and expansion projects) (on file with Journal of Energy, Climate, and the Environment). The projects are known as eBART for the Contra Costa eastern extension and BART to Livermore for the Alameda County extension. See Santa Clara Valley Transp. Authority, *East Contra Costa BART Extension (eBART)*, BART.GOV, <http://www.bart.gov/about/projects/ecc/> (last visited March 30, 2011) (describing the eBART route) (on file with Journal of Energy, Climate, and the Environment); see also Santa Clara Valley Transp. Authority, *BART—Alameda County*, BART.GOV, <http://www.bart.gov/about/planning/alameda.aspx> (last visited March 31, 2011) (same) (follow link to "Bart to Livermore") (on file with Journal of Energy, Climate, and the Environment). There is, of course, the Warm Springs Extension that will bring BART to the Alameda/Santa Clara County line. See Santa Clara Valley Transp. Authority, *Warm Springs Extension Project Overview*, BART.GOV, <http://www.bart.gov/about/projects/wsx/> (last visited March 30, 2011) (describing the future Warm Springs project) (on file with Journal of Energy, Climate, and the Environment).

173. See Santa Clara Valley Transp. Authority, *Downtown East Valley Project*, VTA.ORG, <http://www.vta.org/projects/dtev/> (last visited September 29, 2010) (discussing that VTA plans to extend one of its lines south of Alum Rock Park toward Eastridge).

174. See Francesca Levy, *Cities Where Homes Have Lost the Most Value*, FORBES (Jan. 4, 2010, 11:54 AM), available at [http://www.msnbc.msn.com/id/34644840/ns/business-real\\_estate/](http://www.msnbc.msn.com/id/34644840/ns/business-real_estate/) (stating that "[i]n Merced, [California] . . . median homes lost 62 percent of their value," illustrating that many of these cities are in dire straights due to the high rates of foreclosure that resulted from the subprime loans issued to the less qualified borrowers).

175. See TRANSP. RESEARCH BD., SPECIAL REPORT 298, DRIVING AND THE BUILT ENVIRONMENT: THE EFFECTS OF COMPACT DEVELOPMENT ON MOTORIZED TRAVEL ENERGY

leapfrog development patterns by linking transportation planning to land use planning.<sup>176</sup> The encouragement of development close to transit (i.e. transit-oriented development) and the emphasis upon giving preferences to in-fill development would, as proponents argue, relieve dependence upon the private automobile.<sup>177</sup> As the text of SB 375 notes, cars and "light trucks account for fifty percent of air pollution in California."<sup>178</sup> In the opinion of its advocates, housing density would certainly reduce the necessity for automobile trips and reduce GHG emissions.<sup>179</sup> A report from the Transportation Research Board, *Driving and the Built Environment*, concluded that doubling the density of most new development and making other land-use changes such as concentrating jobs, mixed use developments, and making transit system improvements,<sup>180</sup> could reduce carbon dioxide emissions by up to 11 percent.<sup>181</sup>

In addition to controlling sprawl, advocates of compact development believe that other advantages of Smart Growth are walkable cities, maintenance of farm lands, open space, and lower infrastructure costs from not having to maintain roads and utilities in increasingly outlying areas.<sup>182</sup>

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USE, AND CO<sub>2</sub> EMISSIONS 3–10 (2009), available at [http://www.nap.edu/catalog.php?record\\_id=12747](http://www.nap.edu/catalog.php?record_id=12747) (outlining major benefits associated with compact development).

176. See S.B. 375, § 1(e), 2008 REG. SESS. (Cal. 2008) ("The Legislature intends . . . to build upon that . . . process by requiring metropolitan planning organizations to develop and incorporate a sustainable communities strategy which will be the land use allocation in the regional transportation plan.").

177. See Robert Cervero, *Office Development, Rail Transit, and Commuting Choices*, 9 J. OF PUBLIC TRANSP. 41 (Nov. 5, 2006) (discussing the value of transit proximity to work); see also G. B. ARRINGTON & ROBERT CERVERO, TRANSIT COOPERATIVE RESEARCH PROGRAM, REPORT 128: EFFECTS OF TOD ON HOUSING, PARKING, AND TRAVEL 16 (2008), available at <http://www.nctr.usf.edu/jpt/pdf/JPT%209-5%20Cervero.pdf> ("Employment densities at destinations are more important than population densities at trip origins. Having an office or workplace near a transit stop is a strong motivator for many Americans to reside near transit and motivates people to buy into high transit-accessible neighborhoods. The end result is that having both ends of the trip within a convenient walk to and from a transit stop is key to high ridership levels.").

178. S.B. 375, § 1(d), 2008 Reg. Sess. (Cal. 2008).

179. See TRANSP. RESEARCH BD., *supra* note 175, at 11 (recommending policies that support more compact development).

180. See ARRINGTON & CERVERO, *supra* note 177, at 19 (noting that the three top factors that most influence transit ridership are station proximity, transit quality, and parking policies).

181. TRANSP. RESEARCH BD., *supra* note 175, at 168.

182. See *id.* at 94–96; see also *FOCUS Program Goals*, SAN FRANCISCO BAY AREA VISION, <http://www.bayareavision.org/initiatives/programgoals.html> (last visited March 14, 2011) (describing the goals and benefits of the program) (on file with Journal of Energy, Climate, and the Environment).

*B. The Case Against Compact Development*

Despite the popularity of so-called Smart Growth among planners, there are vocal opponents to this development strategy.<sup>183</sup> Critics of Smart Growth such as Randal O'Toole of the Thoreau Institute, argue that Smart Growth requires planned gridlock to induce the use of transit, which causes increased traffic congestion, pollution, and a distortion of the housing market.<sup>184</sup> O'Toole points to the failure of mixed-use developments in Portland and the shortage of single-family housing that the press for compact, high-density housing caused in that community.<sup>185</sup> He also points out that the cost of new infrastructure in the suburbs is often cheaper than augmenting existing infrastructure in cities, and he notes that jobs often follow workers into the suburb maintaining travel times at a static level.<sup>186</sup> Critics of compact growth point to bankrupt developments, higher taxes, and the high costs of compact developments on housing as key reasons to oppose Smart Growth.<sup>187</sup>

One of O'Toole's chief criticisms of Smart Growth is that there are other means of accomplishing GHG reductions other than through heavy-handed regulations that stunt the opportunity of Americans to enjoy personal mobility.<sup>188</sup> Mobility is choice, and that right, in the view of Smart Growth opponents, must be protected—so he argues. O'Toole even argues that car ownership advances economic mobility among low-income individuals.<sup>189</sup> The argument that GHG emissions are not reduced by compact development essentially rests upon the view that people will not

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183. See Randal O'Toole, *The Folly of Smart Growth*, 24 REG. 20 (Fall 2001) [hereinafter O'Toole Folly], available at <http://www.cato.org/pubs/regulation/regv24n3/otoole.pdf> (stating his opinion on why smart growth may produce an even worse quality of life for residents).

184. See *id.* at 22–24 (stating that Portland's "land-use policies have distorted the region's housing market greatly" and "have also placed a stranglehold on the Portland-area road system").

185. See *id.* at 23 (describing how urban-growth boundary and restrictions on new single-family housing has created a shortage of single-family housing).

186. See *id.* at 20–23 (advocating low density development).

187. See *id.* at 22 (providing a summary of the negative effects of Smart Growth); see also Randal O'Toole, Cato Institute, Policy Analysis no. 653, *The Myth of the Compact City: Why Compact Development is Not the Way to Reduce Carbon Dioxide Emissions*, 15–18 (Nov. 18, 2009) [hereinafter O'Toole Compact City], available at <http://www.cato.org/pubs/pas/pa653.pdf> (discussing the costs associated with compact development).

188. See O'Toole Folly, *supra* note 183, at 25 (discussing alternative methods of reducing GHG such as higher toll fees during rush hour and incentives to drive cleaner cars).

189. See O'TOOLE COMPACT CITY, *supra* note 187, at 18 ("Several studies have found that auto ownership is a key factor to helping low-income families move into the middle class.").

leave their cars despite the difficulty of managing congested highways.<sup>190</sup> Hence, people will generate more GHG emissions due to being on highways longer, consuming more fuel and creating more emissions.<sup>191</sup>

The real opposition to Smart Growth and compact development may simply be the age old fear of losing those things that we have traditionally cherished—small town life, personal safety, and space between ourselves and our neighbors. Consequently, many cities have adopted laws that they hope will preserve their unique character and the features that set them apart from other communities.<sup>192</sup>

#### VI. *The City of Alameda's Measure A and other Growth Management Measures*

The City of Alameda's Measure A is only one of numerous legal efforts mounted by California cities in the hope of addressing the pressures of rapid growth.<sup>193</sup> The problem is real. It has been reported that between 2010 and 2050, the population of California will grow by approximately twenty million.<sup>194</sup> To place that in perspective, California's current population is thirty-seven million.<sup>195</sup> California's need to find places to

190. *See id.* at 17 (discussing the effects of compact development on traffic congestion).

191. *See id.* (explaining the environmental effects of longer commutes).

192. While the focus of this paper is upon growth management measures adopted by cities, cities have actually adopted a vast array of different ordinances to preserve their unique qualities beyond growth management laws. In some communities, they have adopted anti-"big box" ordinances to prevent the arrival of a Walmart that was perceived as a threat to their "All-American" downtowns. *See* Brannon P. Denning and Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907, 953–54 (2005) (describing various cities' "big box" ordinances). In other cases, they have adopted historic preservation laws to preserve old neighborhoods. The laws are often as varied and unique as the objects of the preservation efforts themselves. *See* David F. Tipson, *Putting the History Back in Historic Preservation*, 36 URB. LAW. 289, 290–91 (2004) (describing the evolution of the historic preservation ordinance).

193. *See* Robert H. Freilich & Neil M. Popowitz, *The Umbrella of Sustainability: Smart Growth, New Urbanism, Renewable and Green Development in the 21st Century*, 42 URB. LAW. 1, 2–3 (2010) ("United States population growth is increasing demand for housing and commercial space. By 2025 the United States population will reach 350 million, adding 67 million people since 2000. The nation will need 35 million new housing units . . . bring[ing] the total number of units constructed to about 52 million.").

194. *See* Press Release, Dep't of Fin., *New State Projections Show 20 Million More Californians by 2050; Hispanics to be State's Majority Ethnic Group by 2040* (May 2004), *available at*

[http://www.dof.ca.gov/HTML/DEMOGRAP/ReportsPapers/Projections/P1/documents/P1\\_Press\\_Release\\_5-04.pdf](http://www.dof.ca.gov/HTML/DEMOGRAP/ReportsPapers/Projections/P1/documents/P1_Press_Release_5-04.pdf) (announcing that the population of California will reach nearly 55 million in 2050).

195. *See* Press Release, League of Cal. Cities, *California's Growth Issues Compound Challenges of Sustainability* (Apr. 23, 2008), *available at* [http://www.cacities.org/resource\\_files/26732.How%20Should%20CA%20Grow.pdf](http://www.cacities.org/resource_files/26732.How%20Should%20CA%20Grow.pdf) (discussing the challenges of growth on California).

house and employ these new residents will change the landscape of the state.

#### A. *The History of Growth Management Measures*

The need for a legal constraint upon growth was evident even in the early 1970s when the first test case for management growth regulations, *Golden v. Planning Board of Ramapo*,<sup>196</sup> was upheld by the high court of New York.<sup>197</sup> Since then, a long string of cases has frequently sustained such growth management laws in many other states based upon the police power and the importance of maintaining public health, safety, and welfare.<sup>198</sup>

California courts were soon to follow the lead of their New York counterparts. In *Construction Industry. Ass'n v. City of Petaluma*,<sup>199</sup> the Ninth Circuit upheld the City of Petaluma's growth management plan which fixed the housing development rate at 500 dwelling units per year for a period of five years.<sup>200</sup> It also dictated that building permits be evenly divided between single-family and multiple-family residential units.<sup>201</sup> Essentially invoking the broad police power<sup>202</sup> of local governments, the Ninth Circuit held that the concept of public welfare under the police power was sufficiently expansive to embrace the City of Petaluma's municipal aspiration to preserve its small town character, open space, and low population density.<sup>203</sup> The Court also noted that the plan was rationally

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196. See *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291, 305 (N.Y. 1972) (holding that the ordinance did not reach "confiscation" under the constitution, and was therefore valid).

197. See *id.* at 296 (describing what commentators have identified as the initial test regarding the legality of growth management plans is the legal challenge of the so-called "Ramapo Plan," which was the growth management plan adopted by the Town of Ramapo in New York State).

198. See generally John R. Nolon, *Local Land Use Controls That Achieve Smart Growth*, 31 ENVTL. L. REP. 11025 (2001) (commenting on multiple cases which deal with Smart Growth).

199. See *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 909 (9th Cir. 1975) (concluding that the concept of public welfare was broad enough for the court to uphold Petaluma's ordinance limiting growth for the purpose of preserving its small town character and other related desires).

200. See *id.* at 900 (reversing the district court's decision that certain aspects of the city of Petaluma's plan were unconstitutional).

201. See *id.* at 901 ("The Plan further directs that allocations of building permits are to be divided as evenly as feasible between the west and east sections of the City and between single-family dwellings and multiple residential units . . .").

202. See CAL. CONST. art. XI, § 7 (using "police power" as a reference to the authority of government to enact laws to protect the public's health, safety, and welfare).

203. See *Constr. Indus. Ass'n*, at 908-09 ("[T]he concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace.").

related to the environmental welfare of the city and did not discriminate against interstate commerce.<sup>204</sup>

In *Associated Home Builders, Inc. v. City of Livermore*,<sup>205</sup> the California Supreme Court articulated how it would evaluate whether a growth management measure, adopted through a voter initiative, bears a substantial and reasonable relationship to the public welfare.<sup>206</sup> It would seek the necessary rational relationship to the public welfare by asking three fundamental questions:

- 1) What is the probable effect and duration of the municipal ordinance?
- 2) What are the competing interests affected by the municipal ordinance?
- 3) In light of the probable impacts, does the municipal ordinance represent a reasonable accommodation of the competing interests?<sup>207</sup>

It is interesting to note that even though this case was heard in 1976, the Court was aware of the need to consider regional impacts.<sup>208</sup> The Court recognized that the scope of the inquiry must extend to the welfare of those significantly affected by the measure and not merely those within the political boundaries of the city.<sup>209</sup> Applying the test outlined above, the Court held that the City's growth management ordinance was lawful,

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204. *See id.* at 909 ("[T]he local regulation here is rationally regulated to the social and environmental welfare of the community and does not discriminate against interstate commerce . . .").

205. *See* *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596 (1976) (holding that the notice and hearing provisions of the zoning law at issue did not apply to zoning ordinances enacted by initiative).

206. *See id.* at 588 (discussing the issue of whether the city can enforce an ordinance prohibiting issuance of building permits until local educational, sewage disposal and water supply facility standards are met).

207. *See id.* at 608–09 (explaining the "process by which a trial court may determine whether a challenged restriction reasonably relates to the regional welfare").

208. *See id.* at 588 (expressing concern for the "growing conflict between the efforts of suburban communities to check disorderly development, with its concomitant problems of air and water pollution and inadequate public facilities, and the increasing public need for adequate housing opportunities").

209. *See* *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n*, 160 P. 3d 116, 260 (Cal. 2007) (finding that an Airport Land Use Compatibility Plan was deemed a "non-project" by the County under CEQA largely because it did not authorize development there). The decision shows that while local governments frequently focus upon what concerns their jurisdiction, the Courts have consistently looked at the consequences of local actions beyond the direct impacts upon the government entity). *Id.* *See also* *Muzzy Ranch Co. v. Solano Cnty. Airport Land use Comm'n*, 23 Cal. Rptr. 3d 60, 72–73 (2005) (holding that the plan was a project under CEQA due to the potential that the project held to result in physical change to the environment by displacing housing development from the Travis vicinity to elsewhere in the region); *see id.* (showing to the planners that they must think out of the traditional "jurisdictional box" and consider the consequences upon the region).

finding that the opponents of the ordinance had failed to meet their burden of proving that it lacked a reasonable relationship to the regional welfare.<sup>210</sup>

Subsequent to *Livermore*, in *Long Beach Equities, Inc. v. County of Ventura*,<sup>211</sup> the California Court of Appeal upheld growth regulations against a facial takings claim, which alleged that the regulations did not promote the public welfare.<sup>212</sup> The Court, however, ruled in favor of the county, holding that the growth control legislation satisfied the test of promoting the broad public welfare without constituting a regulatory taking.<sup>213</sup>

Not all growth control initiative measures have been successful.<sup>214</sup> The California Court of Appeal struck down an initiative-based growth control ordinance in *Building Industry Ass'n v. City of Oceanside*.<sup>215</sup> The Court found that the ordinance in question was inconsistent with the city's general plan housing element.<sup>216</sup> Similarly, in 2010, the City of Pleasanton's initiative-based absolute housing cap was found to be in violation of the RHNA requirement to provide what ABAG has determined to be the city's fair share of housing to very low, low, and moderate income households.<sup>217</sup> Again, the broad regional housing needs of the area were deemed by the court to be superior to the draconian methods adopted by the

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210. See *Associated Home Builders*, at 609–10 ("The burden rests with the party challenging the constitutionality of an ordinance . . . . Plaintiff in the present case has not yet attempted to shoulder the burden.").

211. See *Long Beach Equities, Inc. v. County of Ventura*, 231 Cal.App.3d 1016, 1030–31 (1991) (holding the suit was not ripe for adjudication, since the developer had failed to show that it had pursued all available remedies and had received a final rejection or that all of the property's beneficial uses were presently destroyed).

212. See *id.* at 1016 (refusing to interfere with the Guidelines and the Growth Management Ordinance because it "provide[s], legitimate bases for the protection of the public welfare regarding such development").

213. See *id.* (noting that "[l]ocal government legislation is constitutional on its face if it bears 'a substantial relationship to the public welfare' . . . and inflicts no irreparable injury on the landowner"). The court went on to say that "[t]his is true even where a substantial diminution in value of the property is alleged . . ." and commented that "courts have long recognized the legitimacy of such ordinances because such laws are designed to protect the public weal." *Id.* See also *Long Beach Equities, Inc.*, 231 Cal. App. 3d at 1030 (holding that LBE did not have a cause of action against the county because of the expenditures and delays associated with the county's development plans).

214. See *Bldg. Indus. Ass'n v. City of Oceanside*, 33 Cal. Rptr. 2d 137, 137 (1994) (reversing the judgment of the trial court and finding that the city's growth control initiative "conflicted with the city's general plan and with the state planning and zoning law").

215. See *id.* at 137 ("Prop. A impermissibly conflicts with the City's general plan . . .").

216. *Id.*

217. See Paul Shigley, *Regional Planning Scores Victory over Local Control in Pleasanton*, CAL. PLAN. & DEV. REP. (Mar. 26, 2010, 9:14 AM) <http://www.cp-dr.com/node/2641> (last visited March 30, 2011) (summarizing the superior court case) (on file with Journal of Energy, Climate, and the Environment).

initiative to close the community from the rest of the world.<sup>218</sup> In 1998, the city's voters approved Measure GG, which strengthened an earlier growth control measure by capping new housing in the city to 750 units per year and establishing an absolute cap of 29,000 units for the city for eternity.<sup>219</sup> The San Francisco-based public interest organization, Urban Habitat, sued to enforce the State Housing Element Law in 2006.<sup>220</sup> In his ruling, Judge Frank Roesch held:

It is self-evident that the city cannot comply with the state statute requiring the city to accommodate its RHNA when the city is not permitted by its local law, Measure GG, to allow the number of housing units to be built that would satisfy the RHNA.<sup>221</sup>

Judge Roesch went on to note that "[t]he question of which law prevails is elementary. State law preempts whenever local laws contradict state law."<sup>222</sup> The primacy of State planning laws is becoming clear. While the SCS and APS as regional "strategies" are essentially flexible, the obligations of cities and counties to comply with the express mandates under the RHNA are superior to local ordinances. The regional planning mandates, as creatures of State law, will always prevail.

#### *B. Local Growth Management Ordinances and the SB 375 Anti-Sprawl Agenda*

The original motivation for cities to manage their growth is far more basic than the current interest in Smart Growth to curb greenhouse gases.<sup>223</sup> It was simply an effort by cities to preserve what they had always enjoyed. California communities, in adopting slow-growth measures, were simply reacting to the unwanted effects of sudden growth, which included traffic congestion, rising costs of housing, increased taxes to pay for new infrastructure, burdens upon the existing infrastructure, environmental degradation, and a loss of a sense of place.<sup>224</sup> It was a conservative rather

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218. *See id.* ("In approving SB 375, the Legislature made regional planning an even greater priority than it has been under the housing element law.")

219. *See id.* ("In 1998, they modified the earlier restrictions by approving Measure GG, which limited annual housing permits to 750 units per year and . . . established 29,000 units as the maximum number of units in town.")

220. *See id.* ("The San Francisco-based group Urban Habitat Program sued to enforce the housing element law in 2006.")

221. *Id.*

222. *Id.*

223. *See* Juliet F. Gainsborough, *Slow Growth and Urban Sprawl, Support for a New Regional Agenda*, 37 URB. AFFAIRS REV. 728, 740 (2002) (editorializing on the basic reasons for slow growth measure adoption).

224. *See id.* (listing the unwanted occurrences predicating slow growth measures).

than a progressive agenda.<sup>225</sup> Indeed, the late California Supreme Court Associate Justice Stanley Mosk, a leading progressive on the bench, expressed strong concerns that such measures were wrong-headed:

I must repeat the misgivings I retain about the constitutional validity of no-growth or limited-growth ordinances. An impermissible elitist concept is invoked when a community constructs a legal moat around its perimeter to exclude all or most outsiders. The growing tendency of some communities to arbitrarily restrict housing to present residents appears at odds with Supreme Court pronouncements from *Shelley v. Kraemer*, to the words of Justice Douglas in *Reitman v. Mulkey*: "[H]ousing is clearly marked with the public interest."<sup>226</sup>

Justice Mosk touches upon what was clearly in the backs of most people's minds when they thought of wealthy communities adopting growth control measures. It was a rather transparent effort to close the town to the poor, minorities, and the troubles associated with the urban core. Growth control appeared wicked and selfish. Today, in contrast, with clear obligations upon cities to provide for very low and low income households, the motives for such growth control measures appear to be more legitimate.<sup>227</sup> All communities may have a legitimate reason to slow the hard press toward mindless development without a full consideration of the community and environmental consequences.<sup>228</sup> Nevertheless, the tension between the "haves" and the "have-nots" is very much at the core of transit policy today.<sup>229</sup>

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225. See *id.* (describing the agenda as conservative).

226. Bldg. Indus. Ass'n of S. Cal. v. City of Camarillo, 41 Cal. 3d 810, 825 (1986) (Mosk, J., concurring).

227. See Gainsborough, *supra* note 223, at 729 (finding the new push to slow growth measures more legitimate).

228. See *id.* (explaining the trend toward slow growth measure adoption).

229. See Mark Garret & Brian Taylor, Reconsidering Social Equity in Mass Transit, 13 BERKELEY PLAN. J. 6, 7 (1999), available at <http://www.uctc.net/papers/701.pdf> (noting that in most communities, the vast majority of mass transit riders are generally poor and minorities (with the exception of cities such as New York and San Francisco)). It is interesting that a sharp distinction is growing between mass transit service to the well-off and those to the inner city. *Id.* at 7–8. As some commentators have noted regarding this tension in who is served by mass transit:

Equity Planners have also worked to improve public transit service for those that depend on it for access to jobs, shopping, school, and other services. In some cases, they have opposed expensive rail transit projects serving wealthier, suburban commuters at the expense of inter-city bus riders. For example, during the 1970s, city planners in Cleveland fought against costly city proposals to extend commuter rail lines and to construct a downtown people-mover system to serve the business community.

*VII. Why the Post-SB 375 World Must Allow a Diverse Response from Cities*

City governments are increasingly interested in competing for the same industries, companies, and well-heeled inhabitants.<sup>230</sup> What is good for one city's downtown may not be good for another city's downtown.<sup>231</sup>

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*Id.* at 8. It is not a surprise that the same drama between the "have" and the "have-not" transit users is playing out in the San Francisco Bay Area. The MTC has long rewarded BART with generous funding grants as the backbone of the Bay Area system of mass transit. *See Transit Breakthrough in Restoring Civil Rights: Title VI Complaint by San Francisco Bay Area Coalition Has National Implications*, OAKLAND LOCAL (Feb. 23, 2010), available at <http://oaklandlocal.com/article/transit-breakthrough-restoring-civil-rights-title-vi-complaint-san-francisco-bay-area-coalit> (suggesting that the Metropolitan Transportation Commission, or MTC, had long funded the Bay Area Rapid Transit, or BART, agency). This has generated a perception that the MTC has favored the politically influential over the politically marginal. *See id.* ("BART has historically ignored the transit needs of thousands of low-income Black, Latino, Asian and white residents of the Bay Area and the federal government has given them a free pass."). Groups such as Urban Habitat have consciously sought to undermine and defeat federal funding for projects such as the Oakland Airport Connector project. *See id.* ("The complaint, filed by the nonprofit law firm Public Advocates on behalf of Urban Habitat, TransForm and Genesis, charged [BART] with failing to take the needs of communities of color and low-income communities into account when planning the OAC project."). That people mover system has been viewed as catering to the privileged, just as transit to the suburbs by train is also viewed as a "have" transit program. *See id.* ("Urban Habitat helped organize a coalition that filed a civil rights complaint to stop \$70 million in stimulus funds from being allocated to a \$500-billion boondoggle elevated 'people-mover' known as the [OAC].").

What groups like Transform fail to recognize is that the will for any funding of mass transit is limited. Middle class voters are unlikely to support mass transit funding for systems they either choose not to or are afraid to use. In addition, advocates of a reallocation of transit funds often fail to recognize that the availability of mass transit is, even for trips to the airport and the suburbs, more likely to be essential to the working poor. Query how will the working poor without cars travel to their jobs in the suburbs? Many find employment opportunities not otherwise available in the inner city as nannies, domestic servants, in-home support workers, and other service jobs. Likewise, many of the working poor could still benefit from the employment opportunities that exist at the Oakland Airport even if the general clientele is higher income.

230. *See Slicker Cities: The Real Contest is Among Communities, Not Nations*, BLOOMBERG BUSINESSWEEK (Aug. 21, 2006), available at [http://www.businessweek.com/magazine/content/06\\_34/b3998442.htm?chan=top+news\\_top+news](http://www.businessweek.com/magazine/content/06_34/b3998442.htm?chan=top+news_top+news) ("The real contest isn't between nations. It's between communities, whether they be neighborhoods, cities, or tight-knit regions.").

231. *See generally Meeting Summary*, COMMUNITY DIALOGUES—BART TO LIVERMORE (Jan. 21, 2010) available at <http://www.cityoflivermore.net/civica/filebank/blobload.asp?BlobID=3194> (last visited March 31, 2011) (summarizing a town meeting regarding a BART extension to Livermore) (on file with Journal of Energy, Climate, and the Environment). The author is aware of the objection of a city served by BART (Pleasanton) to a BART extension into the downtown of an adjacent city (Livermore). *Id.* The city already served by BART had placed its station in

Indeed, the rise of one city has often led to the demise of another.<sup>232</sup> Shoppers generally express little loyalty for the city in which they live<sup>233</sup> and will go to the newest mall or trendiest shopping district and forsake that which is old or a bit less convenient with regard to parking, unique shops, or other desirable amenities.<sup>234</sup> Cities should be concerned about the collective rush toward the "sameness" of cookie-cutter Transit Priority Projects and Transit Villages.<sup>235</sup> Too much of the same thing may be a bad thing.<sup>236</sup> Transit Priority Projects may in fact be easier to get off the ground (under SB 375 CEQA streamlining provisions) than developments requiring full CEQA review, but are they really desirable?<sup>237</sup> Will the public adopt them?<sup>238</sup> Will they sell?<sup>239</sup>

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the highway median. *Id.* The adjacent city, to promote transit-oriented development, sought the rail alignment to be placed into its downtown. *Id.* The city already served by BART felt this would take shoppers away from its shopping areas, although the claimed reason for objection was that it would take the rail alignment through a chain of lakes area. *Id.* The chain of lakes, far from being environmentally sensitive, were old abandoned quarries left over from mining activity. *Id.* The city served by BART urged placement of its neighbor's station in the highway median as well. *Id.* Environmental concern is often genuine, but it may also be a means of veiling less virtuous objectives that thwart better environmental options. *Id.*

232. The City of Pittsburg was severely impacted economically by the development of large up-scale shopping malls in Walnut Creek. Interview with Michael Wood, former City Attorney of the City of Pittsburg, California (Sept. 2010) (regarding inter-city competition).

233. It is notable that, in a recent Wharton Business School study called "Shopping 2009: Mitigating the Mall Malaise," the average number of miles traveled to arrive at a favorite mall was twenty-five miles. See Stephen Hoch et al., *Shopping 2009: Mitigating the Mall Malaise*, Presentation Before the NRF 98th Annual Convention & Expo (Jan. 11–14, 2009), available at [www.nrf.com/Attachments.asp?id=23601](http://www.nrf.com/Attachments.asp?id=23601) ("The average mall shopper drives 25 miles to their mall of choice, and will visit 5 stores while there.").

234. See *id.* ("Range and uniqueness of stores and restaurants, as well as attractiveness of mall represent more than 50% of what drives shopper loyalty.").

235. See generally Urban Land Inst. San Francisco, Bay Area 2009 MarketPlace: Bringing Cities and Developers Together Around Transit-Oriented Development, <http://www.todmarketplace.org/2009TODMarketPlaceRpt.pdf> (recounting that in the Bay Area, there have been meetings between private development interests and local governments). TODs in some areas will clearly have a much greater opportunity for success than others. *Id.*

236. Arrington and Cervero note:

TOD plans should carefully consider the volumes that retail developers require, as the rules specifying the distance that customers will travel to any particular store are inflexible. High density offices and residences can be good sources of transit riders, but they do not always ensure retail demand, particularly if local retail demand already is being met.

ARRINGTON & CERVERO, *supra* note 177, at 27.

237. Increasingly, evidence shows that in many high technology communities, such living arrangements are desirable:

SB 375 forces regional governments to consider ways of reducing GHG emissions.<sup>240</sup> It does not dictate a particular pathway.<sup>241</sup> Each

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According to CTOD, which tracks national demand for TOD, firms and workers are increasingly exhibiting a preference for 24-hour neighborhoods. In the past companies preferred suburban campus environments near freeways, and regions lured employers without regard to bigger picture development goals. Now other issues are coming into play, including the rise of the creative class and the increasing importance of technology and talent in a region's economic development strategy. Because firms are chasing talent, which is choosing to locate in diverse, lively urban regions, firms now prefer these locations. According to a recent Jones Lange LaSalle survey (CTOD, 2005), access to transit is very important to 70% of new economy companies.

*Id.*

238. See Joseph M. Rabiansky et al., *Mixed-Use Development and Financial Feasibility: Part II—Physical, Phasing, Design and Public Policy Factors*, 34 REAL EST. ISSUES, no. 2, at 1 (Jul. 1, 2009) (noting that "place-making" is a sensitive matter of correct timing and placement); see also *Id.* at 2 ("[Place-making] requires a development in which all the buildings do not look the same, rather they are complementary. The master plan ensures the buildings are integrated with each other and the planned public spaces."). As they note in their conclusion:

With the growing interest in mixed-use development, careful thought must be given to how to analyze financial feasibility and the strengths and weaknesses of these projects relative to traditional single-use development. The potential exists for mixed-use to create additional value and outperform single-use real estate developments through the synergy and appeal of a compact neighborhood that serves the residents' and tenants' needs while providing an attractive destination for community residents and visitors. However, developers and operators must consider the substantial obstacles that must be overcome through design, financing and operation to create a harmonious, integrated whole that achieves the investors' and community's objectives rather than a group of disparate, conflicting uses.

*Id.* at 5.

239. See Peter Slatin, *Mixing it Up*, RETAIL TRAFFIC (July 1, 2003, 12:00 PM), [http://retailtrafficmag.com/development/construction/retail\\_mixing](http://retailtrafficmag.com/development/construction/retail_mixing) ("Overall development costs for such New Urbanist projects and other mixed-use designs are often higher than for single-purpose products.").

240. See TIMOTHY CREMIN, LEAGUE OF CAL. CITIES, SUMMARY OF DEAL POINTS OF SB 375, 1 (2010), available at [http://www.cacities.org/resource\\_files/27104.375DealSummary.pdf](http://www.cacities.org/resource_files/27104.375DealSummary.pdf) ("The League, CSAC and 'planning organizations' are included in the committee's membership."). A Regional Targets Advisory Committee will recommend protocols for setting GHG reduction targets for the regions. *Id.* The League of California Cities, the California State Association of Counties, and "planning organizations" are included in the committee's membership. *Id.*

241. See *id.* (stating that at the present time, the Regional Targets Advisory Committee to CARB is only establishing broad planning for GHG reductions). The GHG reductions will occur in one of two ways depending upon whether the land use baseline used for the RTP (which will largely be adopted as the SCS) will achieve the required target. See *id.* ("Planning for GHG reductions occurs in one of two ways depending on whether the land

community is still essentially in charge of its destiny.<sup>242</sup> While the focus upon density and compactness in the Sustainable Communities Strategy is one means of hopefully reducing GHG emissions, it is clearly not the only way.<sup>243</sup>

### VIII. *Why the City of Alameda's Housing Response Can be Different*

What sets Alameda apart from many other cities in the Bay Area is its proximity to two of the three major urban areas in Northern California. Its boundaries literally abut those of Oakland and San Francisco.<sup>244</sup> It is not a city from which a long commute to work centers is necessary. San Francisco lies some seven miles to the west and Oakland less than a mile to the east. A large residential community located at Alameda Point would afford residents a housing option that may not otherwise be available except in more remote areas such as Suisun City,<sup>245</sup> City of Lathrop,<sup>246</sup> or the City of Oakley.<sup>247</sup> Each of those communities offers people willing to move there the option of traditional single family housing in affordable working class communities.<sup>248</sup> There is no reason to believe that such housing will not continue to be the favored type of housing for families with children.<sup>249</sup>

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use baseline used in the regional transportation plan . . . will achieve the target."). If yes, the League does not believe that further planning is necessary. *See id.* ("If yes, then no further planning is necessary."). If not, the League believes that the region must submit a separate APS that shows how the target could be achieved. *See id.* ("If no, the region submits a separate 'Alternative Planning Strategy' (APS) that shows how the target could be achieved.").

242. *See id.* (noting that while minimum housing allocations must be met under the RHNA, cities are not required to adopt a "compact development agenda" if they choose not to do so).

243. *See id.* (proposing that an APS may be the process whereby alternative means of reducing GHG emission reduction strategies may be considered by CARB).

244. *See* MERLIN, *supra* note 12, at 1 ("Alameda Island lies on the east side of San Francisco Bay, roughly parallel to Oakland."). These abutting boundaries are under water. *See id.* ("Before 1902 [Alameda] was a peninsula, connected to the mainland by a mile-wide neck of marshy ground . . . [T]he completion of the Tidal Canal . . . severed Alameda from the east shore of San Francisco Bay. Today three bridges and two tubes furnish access routes between Oakland and Alameda."). San Francisco lies about seven miles distant across the Bay. *See id.* ("[Alameda] lies opposite to the city of San Francisco, about seven miles distant across the bay.").

245. *See* SUISIN CITY, <http://www.suisun.com/> (last visited March 30, 2011) (describing the remote San Francisco suburb located in central Solano County).

246. *See* CITY OF LATHROP, <http://www.ci.lathrop.ca.us/> (last visited March 30, 2011) (describing the remote San Francisco suburb located in San Joaquin County).

247. *See* CITY OF OAKLEY, <http://www.ci.oakley.ca.us/> (last visited March 30, 2011) (describing the remote San Francisco suburb located in eastern Contra Costa County).

248. These communities all boast relatively new subdivisions supplying workers to the pricey Bay Area after an hour or more of commuting each morning.

249. This is not necessarily a natural choice, but is at least what has become a popular American preference due in large part to transportation policies that have favored the

While more remote cities with access to mass transit may have their best option of satisfying SB 375 requirements through Transit Oriented Developments (TODs), it is not clear that high density TODs would assist a city such as Alameda to meet SCS GHG emission reduction goals or that such developments would be a good idea. It is not within the regular path of convenient and widely-used mass transit.<sup>250</sup> The mass transit available on the island (an AC Transit Bus Line and two Ferry Lines to San Francisco) is slow, requires mode splits,<sup>251</sup> and is unlikely to meet the needs of most commuters. Higher density housing would be better served by communities with more direct access to circulation elements that could deal with higher numbers of travelers.

What a city like Alameda can offer in the effort to reduce GHG emissions is proximity to the Oakland Downtown and a living environment that most people would otherwise need to travel fifty miles to enjoy.<sup>252</sup> A safe, new residential development of single family homes with good public schools a few miles from Oakland and San Francisco could reduce the commuting time of thousands of morning travelers who would otherwise travel long distances for this type of housing option.<sup>253</sup> It may do a great

development of vacant land at the edges of the urban core. See John McCrory, *The Edge City Fallacy: New Urban Form or Same Old Megalopolis?*, <http://johnmccrory.com/selected-writings/the-edge-city-fallacy/> (last visited Aug. 29, 2010) ("Transportation policies since the Federal Highway Act of 1916 have favored increasingly sprawled suburbs over more compact central cities in a number of ways.").

250. Alameda is not serviced by BART or Amtrak. The nearest BART station is at Fruitvale station in Oakland, and the nearest Amtrak station is across the water at Jack London Square.

251. A "mode split" refers to a change in the mode of travel such as from a car to a train or from a train to a bus. See SAN FRANCISCO TRANSIT EFFECTIVENESS PROJECT, APPENDIX B: GLOSSARY B-3 (2006) ("[Mode split refers to] [t]he proportion of all trips that are made on the various modes of transportation, whether walking, biking, public transit, car, and so on."). The more mode splits arise during a trip, the less likely it is that mass transit will be used by travelers.

252. A so-called "close-in" suburb with good schools, safety, and proximity to jobs and urban amenities would certainly appeal to most fringe suburb commuters.

253. See Dowell Myers & Elizabeth Gearin, *Current Preferences and Future Demand for Denser Residential Environments*, 12 HOUSING POL'Y DEBATE 633, 635-36 (2001) available at [http://cascadeagenda.com/files/ca-cities/current\\_prefs\\_for\\_density.pdf](http://cascadeagenda.com/files/ca-cities/current_prefs_for_density.pdf) ("The sense is that consumers favor a housing product that satisfies five major criteria: suburban location and design; single-family detached unit style; location within a low-density neighborhood; ease of automobile use, including driving and parking; and lowest cost given these criteria."). Some argue that the preference for suburban housing has less to do with consumer preferences than public policies that perceive it to be the public's preference. See generally McCrory, *supra* note 229 ("[R]egardless of the actual extent of Americans' preferences for low-density living and high mobility, government policies . . . have been the decisive factor in allowing these attitudes to be translated into real patterns of settlement with the force of all-encompassing ideologies."). See also O'TOOLE HOUSING BUBBLE, *supra* note 166 (defending the view that Americans prefer single family homes).

deal more than merely moving passengers from remote areas by mass transit into the urban core.

Several other areas such as Treasure Island (in the middle of the San Francisco Bay)<sup>254</sup> and Hunters Point<sup>255</sup> offer similar opportunities to have desirable low density housing very close to the urban centers of the Bay Area. Low density housing close to downtowns is very desirable to a segment of the population, namely young couples seeking to start families.<sup>256</sup> Such housing should not be discouraged merely because it does not fall within the box of conventional smart growth thinking. In the opinion of the author, "Smart Growth" will work only to the extent that it addresses the aspirations of the people. In a democracy, the will of the people should be paramount even if scholars and planners have different notions of what would be best for society. To its credit, the SCS does not seek to overturn the goals and aspirations of cities. A community's general plan remains unchanged by SCS unless the community wishes to make a change. While a region may be responsible for making changes to meet SCS goals, a small city like Alameda is not expected to make radical changes in its priorities. It may remain the "city of homes."<sup>257</sup> However, other communities within the region may receive incentives for contributing to the solution sought by SCS. The large cities may accept greater density and move their skyline upward. In exchange, they will receive at least more planning funding for their transportation projects and a favorable housing allocation. In this respect, an MPO region is a bit like a large family entering a restaurant. Each member of the family gets a menu and is allowed to choose what fits his or her mood. At the end of the meal, because of past practice and custom, everyone looks to Dad to pay the bill. It is likely to be much the same with accomplishing the goals of the MPO.

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254. See *Naval Air Station, Treasure Island*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/facility/treasure-island.htm> (last visited Feb. 2, 2011) (describing Treasure Island as a man-made, rectangular island adjacent to Yerba Buena Island, on which there was formerly a naval base that was decommissioned at around the same time as the Alameda Naval Air Station).

255. See *Hunters Point Naval Shipyard, San Francisco Naval Shipyard*, GLOBAL SECURITY, [http://www.globalsecurity.org/military/facility/hunters\\_point.htm](http://www.globalsecurity.org/military/facility/hunters_point.htm) (last visited Feb. 2, 2011) (describing Hunters Point as the site of a decommissioned naval shipyard, approximately seven miles south of the Financial District of San Francisco, which is undergoing redevelopment).

256. See, e.g., Michael Scott, *Can the Suburban Fringe be Downtown Adjacent?*, NEW GEOGRAPHY (Aug. 4, 2010), <http://www.newgeography.com/content/001702-can-the-suburban-fringe-be-downtown-adjacent> ("It has become abundantly clear from the brisk interest of potential buyers of our current Folsom, California residence, that living in a suburban locale still holds a special appeal.").

257. Judith Lynch, *Celebrating Domestic History*, ALAMEDA SUN (Sept. 8, 2006), available at [http://www.alamedasun.com/index.php?option=com\\_content&task=view&id=348&Itemid=25](http://www.alamedasun.com/index.php?option=com_content&task=view&id=348&Itemid=25).

The large cities are likely to accept the most density in housing, including the burdens of low income housing, to benefit both themselves as well as their small city neighbors. As long as the bill is covered, no one at the table worries. This is largely the likely scenario in meeting the SCS. Is the inability of the process to induce cities to adopt greater compactness and higher density a problem? In the case of cities such as Alameda, it really is not. It is not a fringe city causing sprawl. More housing, even at a lower density than ideal in the central urbanized zone, will reduce GHG emissions to the extent that it prevents homeowners from drifting to fringe cities.

What planners should do is encourage more housing opportunities for young workers in centrally located communities like Alameda. Alameda may be at the forefront of what planners are recognizing to be a desirable type of new housing, namely, suburban communities near the downtown with close access to what makes urban living desirable.<sup>258</sup> If moving new low density suburbs close to the urban core is impossible, then perhaps cities could consider the radical move of moving their inhabitants. Alameda has many retired people who may no longer need to commute to the same extent as those with jobs.<sup>259</sup> Many retired persons live on lower household budgets than when they were employed.<sup>260</sup> For many retired persons, the cost of homeownership can become increasingly burdensome.<sup>261</sup> The legislature should consider incentives<sup>262</sup> to encourage

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258. The vast majority of population growth in the U.S. urban regions will not be occurring in the urban core of metropolitan areas, but in the suburbs, and very notably in geographically close-in suburbs that succeed in exuding an urban aura. See Scott, *supra* note 256 ("[T]he vast majority of population growth in U.S. urban regions will occur not in downtown cores, but in suburbs, and of those, most notably the close-in suburbs exuding an urban feel."). The author makes an interesting point that central cities are better suited to serving as civic and cultural centers than places suited for family life. See *id.* ("While urban housing has captured the imagination of many Americans, downtowns may be best suited for the role of civic and cultural centers—places that people come to visit, rather than where they reside."). While there are definitely more people who are single in this time of economic recession, they are likely to have deferred, rather than to have abandoned, notions of seeking a family life. See *id.* ("Demographic trends also show a steady rise in the number of adults without children, who are presumably less likely to purchase a big house."). In the opinion of the author, overbuilding the urban mixed use infrastructure could pose problems in the future.

259. See CITY OF ALAMEDA, DRAFT HOUSING ELEMENT 2001–2006, pt. C–1, available at [http://www.alamedahousing.com/element\\_4.html](http://www.alamedahousing.com/element_4.html) (last visited Sept. 26, 2010) ("In 2000, approximately 22 percent . . . of Alameda's population was over 55 years of age . . .").

260. See *id.* at tbl.IV–2 (reporting that the estimated monthly household income for a retired couple in 2001 was \$1,692 dollars).

261. See *id.* at pt. E–1 ("Housing costs since 1990, particularly since 1998, have escalated rapidly.").

262. These incentives could include an earlier age at which retirees could transfer their Proposition 13 tax base provided that the move could be shown to effect a GHG emissions reduction. Whether this would be done by way of documenting equity exchanges or the commuting time reductions of proposed buyers of homes near the urban core, a number of

retirees from their single family homes near the inner urban core to outlying R-1 and transit oriented developments.<sup>263</sup> This would provide housing opportunities that could meaningfully shorten commutes for young workers who must commute daily<sup>264</sup> and help accomplish GHG reductions. In addition, financial and tax incentives could assist the elderly to escape high crime urban areas for the more tranquil suburbs.<sup>265</sup>

One legislative change to bring about change may be lower voter approval thresholds for school bond measures in areas within twenty-five miles of an urban core. Improved schools in the urban core may encourage families to move toward urban schools.<sup>266</sup> It may also encourage retired persons to move to areas where school bonds pass less easily and make homes closer to the urban core available to working families. Elimination of barriers to the movement of the non-working elderly from housing closer and more convenient to work should be considered.<sup>267</sup> Whether it is through an earlier one-time transfer of the Proposition 13 tax base,<sup>268</sup> or

approaches could prove viable.

263. Cf. Öhman & Lindgren *infra* note 264. While young families often focus upon schools and playgrounds, retired people have different primary concerns. Access to medical facilities and services by public transit are often what motivate the elderly to leave their R-1 homes. *Id.*

264. See Marianne Öhman & Urban Lindgren, *Who is the Long-Distance Commuter? Patterns and Driving Forces in Sweden*, CYBERGEO: EUR. J. GEOGRAPHY, tbl.1 (Apr. 27, 2007), available at <http://cybergeog.revues.org/index4118.html> (suggesting that, with time, the elderly become increasingly less interested in moving from their long-term homes, but are at the same time more fatigued by the act of engaging in long-distance commuting). Hence, the peak time to move working people closer to their workplaces is between the ages of 20 and 30 when they are predisposed to being highly mobile. See *id.* at para. 41 ("Individuals generally have their peak of migration between the age of 20 and 30.")

265. See Richard Morin & Paul Taylor, *Suburbs Not Most Popular, but Suburbanites Most Content*, PEW RESEARCH CENTER (Feb. 26, 2009), available at <http://pewresearch.org/pubs/1134/content-in-american-suburbs> (suggesting that, statistically, the place of highest resident contentment in the United States is in the suburbs). Morin and Taylor noted that, according to "a Pew Research Center Social & Demographic Trends survey that explore[d] what Americans like . . . about the places where they live," "[s]uburbanites [we]re significantly more satisfied with their communities than are residents of cities, small towns or rural areas." *Id.*

266. See Russell Scott Smith, *Affluent Parents Return to Inner-City Schools for Educational Opportunities*, EDUTOPIA.ORG, <http://www.edutopia.org/parents-activism-urban-public-schools> (last visited Oct. 4, 2010) (reporting that affluent parents are returning to some innovative inner city schools due to the economic recession).

267. See Fernando Ferreira, *You Can Take it With You: Proposition 13 Tax Benefits, Residential Mobility, and Willingness to Pay for Housing Amenities*, 94 J. PUB. ECON. 661, 662 (2010), available at [http://real.wharton.upenn.edu/~fferreir/documents/ferreira\\_prop13.pdf](http://real.wharton.upenn.edu/~fferreir/documents/ferreira_prop13.pdf) (discussing the mobility rates of those over 55 years of age in California after the passage of Proposition 13).

268. Currently, a one-time tax base transfer is allowed to those aged 55 or older (or severely disabled persons of any age). See CAL. REV. & TAX CODE § 69.5(a)(1) ("Notwithstanding any other provision of law . . . any person over the age of 55 years . . .

through incentives that would enhance housing trade between specific homeowners in remote and closer-to-work communities,<sup>269</sup> the options should be investigated.

While compactness and urban infill projects may appear to be important goals to planners, they are almost meaningless concepts to those who look for places to live. While the Sustainable Communities Strategy assumes that compactness and mixed use will ensure a community's long-term survival, it is safety,<sup>270</sup> access to goods and services, and quality public schools<sup>271</sup> that motivates most families to invest in a community. There may be a serious disconnect between what Planners view to be vital (to meet planning goals) and what consumers really want (which is at the core of a sustainable city). The success of SCS planning may depend upon whether they have really considered what people, rather than planners, think are important. Having the "social engineering" laws to get there is equally important.

In the opinion of the author, the City of Alameda has every reason to maintain its current low density focus under Measure A, and advocates of sustainability would be well advised to assist, rather than to attempt to thwart, such low density housing options near the urban core.<sup>272</sup> Low density single family homes near Oakland's downtown should be applauded and encouraged. Alameda is the type of vibrant, walkable/cyclable community that planners hope to foster with mixed-use developments but seldom achieve. Most importantly, it is what the people who live there want. To the extent that Measure A complies with the other obligations imposed upon the City of Alameda under law, there is no reason

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may transfer . . . the base year of that property to any replacement dwelling of equal or lesser value . . .").

269. Equity exchanges between those living in the urban fringe and those living within the urban core could facilitate GHG emissions reductions.

270. See Julie Berry Cullen & Steven D. Levitt, *Crime, Urban Flight, and the Consequences for Cities*, 81 REV. ECON. & STAT. 159, 160 (1999) (suggesting that it is crime, more than any other factor, that appears to spur the flight of highly educated households with children out from the urban core to outlying suburban communities). Cullen and Levitt determined that "[h]ighly educated households and households with children are most responsive to crime." *Id.*

271. See ARRINGTON & CERVERO, *supra* note 177, at 27 ("Because most TOD residents have no children, quality of schools was not a major factor in moving into TOD neighborhoods: fewer than one of 20 surveyed respondents identified this as a top three factor in influencing their residential location choice.").

272. See Marlon G. Boarnet, Ralph B. McLaughlin & John I. Carruthers, U.S. Dep't. of Hous. & Urban Dev., Working Paper No. REP 07-02, *Does State Growth Management Change the Pattern of Urban Growth? Evidence from Florida 22* (2009), available at [http://www.huduser.org/publications/pdf/mgb\\_jic\\_rbm\\_rep\\_0702.pdf](http://www.huduser.org/publications/pdf/mgb_jic_rbm_rep_0702.pdf) (presenting evidence that Florida's goal of imposing high density development with the Growth Management Act may have encouraged suburban sprawl rather than reduced it).

why the community cannot choose to accommodate its housing obligations at a low density level.<sup>273</sup>

#### *IX. Considering Why Cities Must be Voluntary Participants in SCS/APS*

In the opinion of the author, one of the virtues of the Sustainable Communities Strategy is its focus on empowering communities at a local/city level.<sup>274</sup> Although it purports to be regional, it is essentially locally/city based.<sup>275</sup> Cities get to plan their own communities utilizing established methodologies, and this is largely a good thing.<sup>276</sup> It is only in the regional aggregate that the GHG emissions targets must be met.<sup>277</sup> Among the State's 18 MPOs, only SCAG appears to be out of compliance with the established GHG emissions reduction goals.<sup>278</sup> Although some

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273. As noted earlier, the City of Pleasanton recently received a rude wake-up call from the Court on its Measure GG, a housing cap that prohibited the Pleasanton City Council and City Government from permitting the construction of more than 29,000 housing units from 1996 until the end of time. The measure was struck down by a writ of mandate filed by Urban Habitat and Sandra de Gregorio as a violation of the Housing Element Law set forth in Sections 65580–65589.8 of the California Government Code. Order Granting Petition for Writ of Mandate, *Urban Habitat Program v. City of Pleasanton*, No. RG06-293831 (Cal. Super. Ct. Mar. 12, 2010). The court stated that under the Housing Element Law, a city was required to "implement programs to zone or rezone [and] to establish adequate sites to accommodate its Regional Housing Needs Allocation (RHNA) and must timely adopt a housing element with an inventory of sites which can accommodate a city's share of the regional housing need." *Id.* (citing CAL. GOV'T CODE §§ 65583, 65584.09, 65588).

274. With the regional process of developing an SCS, "the MPO must hold at least two workshops for local officials, or just one workshop if attended by a majority of agencies representing a majority of the population of the region. These workshops are specifically for the local[ly] elected officials to comment" upon the regional targets and share concerns. CREMIN, SUMMARY OF DEAL POINTS OF SB 375, *supra* note 141. Thereafter, there are 3 key opportunities for local input. *Id.* The first is the process for setting a specific regional target, which includes a workshop within the region and an extended period of information exchange between the CARB and the region. *Id.* The second are the three workshops within each county that the MPO must hold before the development of a draft SCS/APS. *Id.* The third are the three public hearings in different parts of each region that must be held once the draft SCS/APS are completed and circulated for at least 90 days. *Id.* The region then submits the SCS or APS to CARRB for certification. *Id.* at 2. If rejected, CARB must provide its reasoning. *Id.*

275. The SCS/APS must not only account for the growth patterns in cities for the next 20 years, it must also account for the RHNA allocation, and it must consider all current general plans. *Id.*

276. See CARRERAS, HOUSING *supra* note 126, at 2 (noting that there is no requirement for general plans to be consistent with the SCS or APS). Of course, if the RHNA is adjusted due to the SCS, it may require a city amend its general plan to make adjustments for the added housing in the general plan housing element. *Id.*

277. *Id.* at 1.

278. See Damien Newton, *SCAG Takes a Pass on History, Moves Forward with Lower GHG Reductions*, LA STREETS BLOG (Sept. 3, 2010), <http://la.streetsblog.org/2010/09/03/scag-takes-a-pass-on-history-moves-forward-with->

may feel that this inherent flexibility in the SCS is at the expense of what may be important on a region-wide basis, governments must advance the aspirations of their communities if they are to have legitimacy.<sup>279</sup> Some may argue that more control must be taken by regional governments at an earlier time in the entitlement process so that these governments can address the bigger environmental picture.<sup>280</sup> They would argue that at this time of environmental crisis, we need people to step back and take a look at coordinating remedies and correcting mistakes that we have taken for granted and learned to live with. All of this makes sense, but it fails to recognize first, the special role of local governments in our democracy and second, that funding mechanisms made by MPOs will provide broad encouragement to making higher density housing available where it will make a difference. Local government decision-making must be respected. It represents the public will at a "grass roots" level. The scheme of regional governments are not intended to supplant legitimate local governments, but to provide incentives, financial and otherwise, to cities and counties to voluntarily meet the regional goals that have been set by the policymakers of the MPO (who are generally elected officials of local governments themselves).<sup>281</sup>

Cities are essentially discrete political entities with their own special set of aspirations. In principle, their points of view must be respected and taken into account just as those of individuals within any civic community. People may want to live in smaller cities, and may not want others to disturb their settled expectations of living in a small town.<sup>282</sup>

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lower-ghg-reductions/ (reporting that SCAG initially offered an 8% reduction by 2035); see also Damien Newton, *CARB Adopts Aggressive Targets to Meet State Greenhouse Gas Laws*, LA STREETS BLOG (Sept. 27, 2010), <http://la.streetsblog.org/2010/09/27/carb-adopts-aggressive-targets-to-meet-state-greenhouse-gas-laws/> (reporting that CARB deemed SCAG's initial goal inadequate and overturned it by requiring an 8% reduction by 2020 and a 13% reduction by 2035).

279. A regional plan should reflect the varied goals and objectives of the region. The only legitimacy regional governments enjoy is when they tap the insights and aspirations of those popularly elected by the people to represent and express their local interests and hopes.

280. See Iffat Qamar, *Sustainable Development Through Integration of Planning and Environmental Assessment: International Practice and Lessons for California*, 1 FOCUS: J. CITY & REGIONAL PLAN. DEP'T 17, 17 (2004), available at <http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1010&context=focus> (examining international environmental planning practices to devise a path for California to integrate environmental assessment at the planning stage).

281. See Nat'l Ass'n of Regional Councils, *What is a Regional Council?* NARC, <http://narc.org/regional-councils-mpos/what-is-a-regional-council.html> (last visited March 31, 2011) (describing the purpose of regional councils) (on file with Journal of Energy, Climate, and the Environment).

282. See Zachary Neal, *Cities: Size Does Not Matter Much Anymore*, NEW GEOGRAPHY (Sept. 8, 2010), available at <http://www.newgeography.com/content/001759-cities-size-does-not-matter-much-anymore> (discussing the role of technological advances in helping to connect cities and make their size irrelevant). These commentators note that in

In the opinion of the author, one of the principal failings of SB 375's Transit Oriented Development streamlining is the focus on merely getting urban in-fill in place and not upon the basic reasons people want to live in dwellings. People do not gravitate to mere square footage. They need a "functional" living space. In other words, they need a place that provides a sense of safety and opportunities for growth, emotionally, educationally, and culturally. Many TODs do not provide such amenities for family life (*i.e.*, for children) except in their marketing materials. Most people who marry and have families want happy surroundings, quality schools for their children, and a nurturing community within which to pursue life's other goals.<sup>283</sup> Most transit villages and TODs don't reach this benchmark.<sup>284</sup> They are merely dwellings for sale by developers. If TODs are to succeed, they must be built with a focus on what drives people to select homes.<sup>285</sup> They must be safe.<sup>286</sup> They must be attractive or at least clean and maintained.<sup>287</sup> They must offer decent shopping, services, and schools.<sup>288</sup> How can this be accomplished?

TODs could be the site of police substations or at least patrolled by police presence. They could also be the hubs of magnet schools that justify surrendering distant suburban homes for those in the urban core. Common areas in the TODs must be well-maintained, well-lit, and quickly cleaned when the commons require attention. Proximity to shops and services is already recognized by planners. The other criteria are less frequently the focus of attention. In this economically depressed time, how can these types of investments be paid for? It should be regarded as an integral part of the price of urban development. If the developer cannot pay for the

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the information age, it is not a matter of placing work in the core cities and "growing" cities (or rebuilding them), but a matter of connecting and creating interdependence among the cities, large and small, whether core or edge cities. *Id.*

283. See Hank Dittmar, Foreword to DENA BELZER & GERALD AUTLER, THE BROOKINGS INSTITUTION CENTER ON URBAN & METROPOLITAN POL'Y, DISCUSSION PAPER, TRANSIT ORIENTED DEVELOPMENT: MOVING FROM RHETORIC TO REALITY (2002) available at <http://www.brookings.edu/es/urban/publications/belzertod.pdf> (last visited March 31, 2011) ("In our view, transit-oriented development must be mixed-use, walkable, location-efficient development that balances the need for sufficient density to support convenient transit service with the scale of the adjacent community.").

284. See Scott, *supra* note 256 (discussing a preference over the downtown core for suburban neighborhoods on the fringe of downtown instead).

285. See DANIEL G. CHATMAN, TRANSIT-ORIENTED DEVELOPMENT AND HOUSEHOLD TRAVEL: A STUDY OF CALIFORNIA CITIES 98 (2006), [http://policy.rutgers.edu/faculty/chatman/documents/TODs\\_and\\_travel\\_in\\_CA.pdf](http://policy.rutgers.edu/faculty/chatman/documents/TODs_and_travel_in_CA.pdf) (reporting findings of what respondents look for when choosing a new neighborhood with the three most common being low crime, access to shops and services, and visual characteristics of the neighborhood).

286. *Id.*

287. *Id.*

288. *Id.*

infrastructure and on-going costs, Mello-Roos<sup>289</sup> type of financing of such services could be considered. People do not leave the urban core simply to move toward the suburbs. They leave the urban core because the urban core fails to provide clean, safe communities with access to shopping, services, and good schools.<sup>290</sup>

### X. Conclusions

Near the end of the movie *Brigadoon*, the protagonist (played by Gene Kelly) leaves the beautiful young village woman (played by Cyd Charisse) to return to his own time and place in 1950s New York.<sup>291</sup> He soon realizes that he has made a terrible mistake and returns to the misty hills where *Brigadoon* once lay.<sup>292</sup> Sadly, it was gone.<sup>293</sup>

Many opportunities only come once. Hence, in the case of regional planning efforts for the former Alameda Naval Air Station, the opportunity to do what is right for the Bay Area cannot be squandered. Likewise, the amazing opportunity for the State of California to restructure itself due to the ambitious targets of SB 375 should not be underestimated or misunderstood. Seldom are opportunities and incentives to change like those presented by SB 375 available to justify fundamental societal reorganization. We face an amazing array of new options if we allow ourselves to consider them.

At the end of the movie *Brigadoon*, villagers emerge from the Scottish mist to lead the protagonist back into the bosom of the community that time had forgotten.<sup>294</sup> It was a miracle that the movie easily explained as the result of love. Clearly, many love the community of Alameda, and many have high hopes for the development of the former Naval Air Station at Alameda.<sup>295</sup> Whether love alone may harmonize the disparate political forces supporting the Sustainable Communities Strategy (Smart Growth) and Alameda's Measure A (the past is worth preserving) is an open

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289. Mello-Roos financing is a reference to community funding of infrastructure improvements under the Mello-Roos Community Facilities District Act that was enacted by the State of California in 1982. CAL. GOV'T CODE §§ 53311–68 (West, Westlaw through 2010 Reg. Sess.). It was a strategy of shifting the costs of infrastructure improvements necessary for new developments upon the purchasers of new homes within such community facilities districts. The strategy was necessary at least in part due to the constraint placed upon local government taxes and public expenditures by Proposition 13.

290. See CHATMAN, *supra* note 285.

291. BRIGADOON, *supra* note 1.

292. *Id.*

293. *Id.*

294. *Id.*

295. See ALAMEDA POINT VISION, <http://www.alamedapointvision.org/home2> (last visited Feb. 7, 2011) (exemplifying one such group).

question. Fear and distrust often color the world of politics.<sup>296</sup> Only understanding and a willingness to accept new ways of thought and action truly prepare us to meet the future.<sup>297</sup> A full realignment and rethinking of local government planning priorities must be embraced if California is to reach its GHG emission reductions by 2020. For lovers of small town life, acknowledging the need to be a part of the greater world may not be easy, but as Mr. Lundie observed in a wistful moment in *Brigadoon*: "It's the hardest thing in the world to give up everything. Though it's usually the only way to get everything."<sup>298</sup> Simply put, we may need to give up everything we know to get everything we want. At the same time, urban planners should recognize the deficiencies of their own Smart Growth models. Many dense housing facilities close to TODs fail to have decent public schools or streets that are as clean and safe as their suburban alternatives. Planners don't appear to always work these important aspirations for good schools,<sup>299</sup> access to goods and services, and safe

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296. See California Proposition 23 (2010), BALLOTPEDIA (Jan. 21, 2011, 6:14 PM), [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_23\\_\(2010\)](http://ballotpedia.org/wiki/index.php/California_Proposition_23_(2010)) (reviewing Proposition 23 and listing groups and arguments made for and against suspending GHG emission reductions of AB 32 until the economy reaches very low levels of unemployment). The levels are so low, many regard the passage of the initiative as a termination of GHG emission reductions rather than a mere suspension. *Id.* Proposition 23 was defeated on the November 2, 2010 ballot. *Id.* What it does reflect, however, is a distrust by conservative groups, such as the Jarvis Gann Taxpayers' Association, of things unknown. See *id.* To the extent that there is still substantial debate on the full scope of the impacts from AB 32 and SB 375, see generally *id.* (outlining academic studies on the impact of AB 32 on jobs), many have concluded that sweeping environmental laws, rather than GHG emissions, are what should be regarded as a threat to our way of life. See generally SUSPEND AB 32!, <http://suspendab32.org/> (last visited Jan. 17, 2011) (advocating the suspension of AB32 and criticizing the actions of CARB).

297. Part of the necessary process of embracing change is to understand the costs and the benefits of adaptation to change. Those who oppose and deny the existence of climate change are often those who are not convinced that they will profit from the costs of the changes required. Efforts should be mounted to convince property owners that they have potentially much more to lose than anyone else. This is particularly the case with property owners in communities such as the City of Alameda that rises, on average, only several feet above the mean high tide line. See generally WILLIAM E. EASTERLING, BRIAN H. HURD & JOEL B. SMITH, *COPING WITH GLOBAL CLIMATE CHANGE: THE ROLE OF ADAPTATION IN THE UNITED STATES* (2004), available at <http://www.pewclimate.org/docUploads/Adaptation.pdf> (discussing how the United States might cope with the impacts of climate change and the extent to which adaptation can reduce consequences to the economy and natural resources).

298. BRIGADOON, *supra* note 1 available at [http://www.great-quotes.com/cgi-bin/viewquotes.cgi?action=search&orderby=&Movie=Brigadoon+\(TV\)&startlist=15](http://www.great-quotes.com/cgi-bin/viewquotes.cgi?action=search&orderby=&Movie=Brigadoon+(TV)&startlist=15) (last visited Jan. 17, 2010).

299. See Interview with Jeff Speck, founder, Speck & Assocs., <http://www.asla.org/ContentDetail.aspx?id=26394> (last visited Jan. 18, 2011) (discussing demographic shifts as an indicator of smart growth expansion). Speck argues that a reason why the inner cities are now primarily populated by fewer and fewer parents with children, and more and more by childless millennials, Gen X'ers and Gen Y'ers, but pre-family households or empty nesters. The simple reason is the cities universally have inferior school

communities<sup>300</sup> into their TOD plans. Planners need to take stock of what realtors have long known—you have to give the public what they want.<sup>301</sup> There is definitely a strong need for communities such as Alameda. TODs do not generally address the needs of the majority of families with children.<sup>302</sup> Suburbs like Alameda, close to urban downtown areas, may be the "next best thing" to TODs in addressing GHG emissions. It is imperative that community leaders and planners think outside of their limited agendas (traditional or smart growth/progressive) and see a common vision of a better future. The opportunity for reinvention that SB 375 provides is much too great to waste and must be used wisely.

I was recently asked what I thought should be done with Alameda Point. I wrestled with the question for a few hours. The former Naval Air Station has a gorgeous vista toward the Golden Gate. At dusk the silhouette of the City of San Francisco looks like a vision from a pop-up book against a background of fiery orange and red. Yet there is one major problem to any development at Alameda Point today—timing.

California is mired in a recession. At the time of this writing the unemployment rate in California hovers at around 12%.<sup>303</sup> The State of California has few funds for the type of capital construction projects that the island requires, new bridges and/or tunnels under the estuary, to make development of the northern end of the island viable. The people of the island understand this. The politicians of the island, ever ready to promote development to garner more taxes and political goodwill, often fail to understand the facts or choose to ignore the truth. In the absence of bridges and tunnels or mass transit to accommodate transportation needs, only a few likely uses for Alameda Point appear feasible today.

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systems.

300. See CHATMAN, *supra* note 285 (finding that what most respondents to a survey reported is that they wanted to live in communities that were safe, close to shops and services, and attractive).

301. And, returning to the movie-based inspiration for this paper, when movie mogul Louis B. Mayer passed away in 1957, his funeral was attended by a huge crowd. Comedian Red Skelton apparently quipped: "Give the people what they want, and they'll come out for it." See SNOPEs (Aug. 20, 2006, 4:50 AM), [http://msgboard.snopes.com/cgi-bin/ultimatebb.cgi?ubb=get\\_topic;f=32;t=000457;p=0](http://msgboard.snopes.com/cgi-bin/ultimatebb.cgi?ubb=get_topic;f=32;t=000457;p=0) (discussing the origins of the quote).

302. TODs normally are not family-oriented. According to Arrington and Cervero, "[s]urvey data and anecdotal case-study data offer strong insights into the demographic make-up of TOD residents. TODs often have large shares of childless couples, empty-nesters, Generation X'ers, and foreign immigrants (some of whom come from places with a heritage of transit-oriented living)." ARRINGTON & CERVERO, *supra* note 177, at 22.

303. Press Release, Cal. Emp't Dev. Dep't, California's Unemployment Rate Unchanged at 12.4 Percent (Oct. 22, 2010), *available at* [http://www.edd.ca.gov/about\\_edd/pdf/urate201010.pdf](http://www.edd.ca.gov/about_edd/pdf/urate201010.pdf) (reporting that the California seasonally-adjusted unemployment rate was 12.4% in September of 2010).

A residential university campus may not generate the same degree of traffic congestion as other uses of the property.<sup>304</sup> Most students would likely stay largely on campus during the work week. Jobs could potentially be brought to the island and presumably prevent the need for locals to leave the island for employment. While the art deco buildings on the Naval Air Station would serve well as the foundation for a new UC or CSU campus, the State can hardly afford to maintain the universities it currently operates.<sup>305</sup> It is unlikely that the dream of a new public university campus at Alameda Point will receive the necessary financial support to make it a reality.

Then there are state prisons to consider.<sup>306</sup> California appears to have an unending ability to fund new prison facilities.<sup>307</sup> Surrounded on three sides by water, Alameda Point might be perfect for the mission of detaining the state's miscreants. Even the toxic marsh crust<sup>308</sup> that lies a few feet under the surface of Alameda Point turns into an advantage for a prison. There won't be any tunneling under the State Prison in Alameda—or there will be a lot of sick inmates with bad rashes in the infirmary to give the plot away.

All jesting aside, there is only one viable development plan for Alameda Point today. It is simply to wait for the right time for development. In the movie *Brigadoon*, Cyd Charisse bids good bye to Gene Kelly at the stone bridge.<sup>309</sup> In her eyes you can see the pain and heartbreak of losing the man she loves, and as a moviegoer your heart aches for her. Yet she maintains her dignity and poise—and it makes her all the more alluring and unforgettable. She could, no doubt, have done many "undignified things" to keep her man around, but *Brigadoon* is a 1950s

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304. To the extent that students at a residential college largely commute to classrooms, this is typically handled well by walking or biking to classes.

305. See Larry Gordon & Carla Rivera, *Plan Adds Funds for UC, CSU*, L.A. TIMES, Oct. 7, 2010, at AA1 (reporting that despite the fact that the UC and CSU systems did not fare as badly as they feared under the 2010 state budget, both systems received less funding than they had three years ago).

306. Like university students, prisoners are unlikely to have long commutes. Their transportation needs will likely be met by walking.

307. See *Bill to Propel \$12 Billion Prison Construction Project Sent to Governor with Budget Package*, S.F. BAY VIEW, Jan. 9, 2009, <http://sfbayview.com/2009/bill-to-propel-12-billion-prison-construction-project-sent-to-governor-with-budget-package/> (noting that as late as 2009, the State of California proposed twelve billion dollars toward the construction of new prisons in the State).

308. See Cal. Dep't Of Toxic Substances Control, *Class-3 Permit Modification to the Hazardous Waste Facility Permit Fact Sheet* (2003), available at [http://www.dtsc.ca.gov/OMF/Projects/upload/AlamedaPoint\\_FS\\_PermitMod\\_0703.pdf](http://www.dtsc.ca.gov/OMF/Projects/upload/AlamedaPoint_FS_PermitMod_0703.pdf) (describing in detail the marsh crust in Alameda at the Naval Air Station and Fleet Industrial Services Center sites). In short, you would be well advised to wear a moon suit before you touch that stuff.

309. BRIGADOON, *supra* note 1.

movie. (They didn't do things that way back then—well, not in the movies!) No, she was willing to walk away, to slip back into a century of solitary sleep with her dignity and integrity intact. Alameda might take a cue from the movies of the 1950s. Alameda Point is beautiful and will likely never be forgotten by developers. It will someday meet its destiny—if not in the past century or this one—then maybe in the next. As all movie lovers know, a perfect ending is worth waiting for.