



CONTRA COSTA TRANSPORTATION AUTHORITY

November 27, 2007

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Hon. Darrell Steinberg, District 6
California Senate
Room 4035
State Capitol
Sacramento, CA 95814

RE: SB 375:
Position: Oppose Unless Amended

Dear Senator Steinberg:

This letter conveys the Authority's opposition to SB 375 unless it is dramatically amended.

This bill purports to reduce greenhouse gas emissions by better linking land use and transportation planning. However, based as it is on the assumption that a "top-down" regional transportation plan (RTP) can fundamentally change the land use decisions of local governments and the individual choices of consumers, we believe the bill is unlikely to accomplish this objective. Rather, the past thirty years of experience with the Clean Air Act suggests the most likely result will be increased litigation against capacity-enhancing transportation projects and a corresponding significant loss of mobility for Californians.

With regard to reducing greenhouse gas emissions, a simple sensitivity analysis indicates that the single most beneficial step would be to significantly increase the average miles per gallon of the vehicle fleet. Beyond that, while politically difficult to implement, an increase in the pricing of auto travel is the most direct and effective step, particularly in the near term. While land use changes can, over the long term, potentially play a significant role in limiting the number of vehicle miles traveled, the urban form evolves relatively slowly, and there are many obstacles to the types of growth patterns the bill appears intended to encourage. Moreover, land use changes are far more likely to occur through a collaborative process involving the local jurisdictions with land use authority rather than through the "top-down," indirect approach envisioned in SB 375.

Our understanding of the Sacramento regional experience, which has been touted as the model for the bill, is that the entire process was collaborative—the result of community-based planning, rather than directives from the regional agency.

Hon. Darrell Steinberg

November 27, 2007

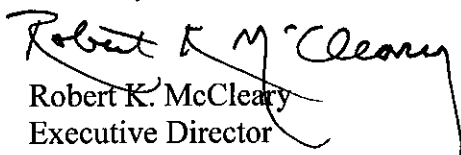
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We are convinced that the objectives of SB 375, i.e., the integration of land use and transportation, the reduction of greenhouse gas emissions, and improved mobility, would be more readily achieved if the bill were amended to:

- (1) Remove the risks of potential litigation against transportation projects and the RTP from the legislation (please see the attached letter from our legal counsel, Nossaman, Guthner, Knox and Elliott, outlining the numerous points of exposure created by the legislation);
- (2) Specify that any "target" for greenhouse gas emissions reductions given to a region are advisory only, and not subject to legal challenge; i.e., not showing they can be achieved in an RTP would not provide a "cause of action" against the RTP under CEQA in any way;
- (3) Make it easier to build housing and mixed-use projects satisfying specific criteria likely to be effective in reducing VMT/capita compared to current trends, exempting them fully from CEQA or providing, as a minimum, that traffic congestion and traffic impacts could not be a cause of action under CEQA against projects meeting the criteria; and
- (4) Specify that any land use planning done under the legislation shall be focused at the county level, include 20 year housing goals, and done on a fully collaborative basis with local support for both the land use scenarios evaluated in the RTP process, and for the land use pattern ultimately accepted as the basis for the final RTP.

We appreciate your consideration of our concerns, suggestions, and initial analysis of potential litigation issues prepared by our legal counsel. and would be pleased to discuss them further with you. We have contacted your office on behalf of our agency and several other Self-Help County executives to ask if you would be interested in meeting with us. In any case, feel free to contact me if you have any questions.

Sincerely,


Robert K. McCleary
Executive Director

c.c. Authority Members
Hon. Don Perata
Hon. Tom Torlakson
Hon. Mark DeSaulnier
Hon. Guy Houston
Bay Area CMA Directors; Steve Heminger, MTC; Rebecca Long, MTC
Attachment

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REFER TO FILE #
030510 - 0120

November 14, 2007

Robert K. McCleary
Executive Director
Contra Costa Transportation Authority
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Dear Mr. McCleary:

EXECUTIVE SUMMARY AND CONCLUSIONS

You have asked us to comment on SB 375 and the potential impact it might have on local agencies—specifically the type of litigation that might occur if it passes and is implemented.

There are several areas in which the bill would likely spur extensive litigation in our view. Initially we must focus on the difference between some of the disclaimer language in SB 375 and what would be its actual effect. The bill purports not to displace cities and counties as the entities that traditionally have been responsible for land use planning. However, as a practical matter, it would appear that the effect of the bill as implemented would be just that—to a major degree replace cities and counties with certain transportation planning agencies as to a great many land use planning decisions. This alone will be a source of litigation. The effect will be varied in different parts of the state, as the regional transportation planning in the San Francisco Bay region is different from that in other areas of the state. Further, although the bill disclaims conflict with federal law, it appears there will be such conflicts, and how to balance them could be a source of litigation.

There are also many specific areas of the bill that would give rise to litigation. SB 375 would give rise to differences among government agencies as to the proper allocations in such plans. Both developers, from the one side, and organized environmental groups, from the other, would most likely challenge both the process and the results. There are a number of highly subjective requirements of the bill—the balancing of priorities, modeling, concepts such as “substantially consistent,” and words such as “feasible,” “significant” and “reasonable”—all of

which could lead to litigation over their meaning in specific contexts. Even after planning occurs, if targets are not met then agencies could be sued. Finally, other areas of litigation would be the interface with other statutes and planning activities, the relative rights of different government jurisdictions to make decisions, and the possibility of paying damages in inverse condemnation.

After summarizing some pertinent portions of the bill in the next section, this letter then focuses in more detail on some 18 areas in which we feel SB 375 might give rise to litigation.

SB 375

The bill is still in the drafting stage and language could change. The purpose of this letter is to comment on the existing draft and identify what might lead to litigation, but it is not meant to identify what the proper interpretation of each section should be. That would have to be left to a full analysis once the final bill and context are in existence. Consequently, nothing we say should be taken as an opinion of what something means—only as an identification of what the issues will be.

The bill can be characterized as having both land use planning and environmental aspects, among others. In analyzing the bill for purposes of this letter, the distinction did not appear to be meaningful, as the issues were often interconnected. One of the stated purposes of the bill is to link land use patterns and transportation to reduce greenhouse gas emissions, so the bill purposely interconnects several issues. Consequently, we simply identify individual issues that might lead to litigation, regardless of their generic category.

SB 375 states in its preamble that “without significant changes in land use and transportation policy, California will not be able to achieve” significant greenhouse gas reductions (§ 1(c)). The bill then proposes that these significant changes be accomplished by having the specified transportation planning agencies prepare “a sustainable communities strategy” (SCS) (§ 5(b)(2)(B)). The SCS shall among other things “set[] forth a development pattern for the region” (*Id.*)

A transportation agency is then directed to structure its forecast development pattern for purposes of the RTP by identifying “areas within the region sufficient to house all the population of the region ... over the course of the planning period and by identifying “significant resource areas and significant farmland” which will be off limits for development. Incidental thereto, the agency shall also “identify a transportation network to service the transportation needs of the area” (*Id.*). Elsewhere a transportation agency is also directed to “identify the lands for growth in housing and employment in the sustainable communities strategy” according to a list of priorities. In addition, the agency is to describe “feasible measures to mitigate the impact of projected development” on the lands identified as available for growth (§ 5(b)(2)(F)(vi).)

In adopting its SCS (its forecast development pattern), the agency must find that “zoning has been enacted within the region for a five year supply of housing need ...or state with specificity why the development pattern set forth in the sustainable communities strategy is the development pattern that is most likely to occur” (§ 5(b)(2)(G)). Finally, if the SCS cannot achieve the greenhouse gas emission targets, then the agency shall prepare a supplemental SCS establishing “alternate development patterns or additional transportation measures.”

A difficult portion of the bill to understand and analyze is that which states it does not require cities and counties to make specific land use decisions or rigidly follow decisions made by the transportation agencies. SB 375 states that an SCS “does not regulate the use of land” and nothing in an SCS “shall be interpreted as superseding or interfering with the exercise of land use authority of cities and counties within the region” (§ 5(b)(2)(I)). The bill addresses that issue further, however, in the implementation section, which purports to create a streamlined environmental impact review process for local jurisdictions that have adopted general plans that are “substantially consistent” with the SCS of the regional transportation agency (§ 10(a)). Further, the environmental analysis of a residential, commercial or retail project may “tier” the analysis of the climate impacts of greenhouse gas emission only if the project is “consistent with a sustainable communities strategy” (§ 9(f).) The approval of capital transportation projects is also linked to consistency with the SCS.

It appears to us that these implementation provisions and others will pressure local jurisdictions to develop general plans that are substantially similar to an SCS in order to have any realistic development within their jurisdictions. Even though cities and counties may not necessarily be required to do certain things by the text, as a practical matter they may be forced to. Further, entities that control funds may choose to grant or deny them based upon how they feel counties and cities are complying. Therefore, even though on its face the bill leaves open the possibility that cities and counties will act independently on land use issues, that will not likely be the practical effect. We are therefore making this analysis based upon the realistic effect of the bill, not just what appears on its face.

This issue is complicated by the differential effect it will have on regions of the state. Because of the greater statutory authority and responsibility that the Metropolitan Transportation Commission (MTC) has in the San Francisco Bay Area, versus that of regional agencies in Southern California and elsewhere, decisions on the SCS would be made on more of a local county level – where representation is broader – in Southern California and elsewhere than in the MTC region.

ANALYSIS

Within this context there are a number of issues that would arise and are therefore areas of possible litigation.

1. First, before dealing with specifics about the proposed statute, is a general observation. A number of issues would arise over the fact that SB 375 would, in its

presumptions about future growth, as a practical matter override the existing city and county land use planning structure and transfer that function in part to regional transportation planning agencies. This creates a host of issues of conflict with other laws and possibly even constitutional provisions, especially where it pertains to charter cities. Perhaps more important is the fact that, whatever the flaws of existing law, cities and counties, and those subject to their land use planning decisions, generally know what the rules are. While not all such law is settled, SB 375 would reopen issues long ago settled. Indeed, although SB 375 purports to leave planning decisions to the entities traditionally handling them, the cities and counties, it would likely require substantial amendments to their existing general plans, amendments that could lead to litigation. Thus aside from the merit or lack of merit of SB 375, it would remake the system, and that alone could give rise to litigation.

2. Given the broad and subjective definitions involved, transportation agencies undoubtedly would be challenged on their decisions to identify lands available for projected housing and job growth and "significant farmlands" not available for such growth. It seems likely that agencies would use definitions from existing State, regional and local agency policy and guidance. Such definitions are typically not developed through a public process, and have not been subject to review or adopted by publicly elected officials. This identification process is fraught with opportunities for dispute, especially if the specified transportation agencies' identifications differ from the planning designations and zoning of local jurisdictions. The litigation could come from other government agencies, developers, and land owners who may argue that their land has become worthless because they happen to own property in an area not favored by the transportation agencies. Litigation may also come from environmental groups claiming that the definitions are not restrictive enough.

3. SB 375 (§ 5) requires identification of lands for growth in housing and employment in the SCS in accordance with certain "priorities." The list of priorities is subjective and its specifications subject to wide interpretation. Such broad, unsettled priorities could lead to litigation over their meaning and application.

4. The proposed statute is unclear with respect to who decides and what the standards are for determining whether a local jurisdiction's general plan is "substantially consistent" with the SCS, and with respect to whether a specific project is "consistent with a sustainable communities strategy." (Note the absence of the modifier "substantially" with respect to specific projects.) Although the term "consistent with" in reference to an SCS is a twice-defined term, (§ 6(c) and § 9(f)), the definition is somewhat circular, and also includes another subjective term: "reasonable service levels." Presently each city and county uses or adopts its own threshold of service levels, and there is a great variety in these between jurisdictions. There does not appear to be any mechanism in SB 375 to provide for who makes the "consistent with" decision, which is a potential litigation risk of some significance.

5. Under SB 375, the California Air Resources Board will assign carbon reduction targets to each region of the state based upon its estimate of emissions from vehicles. The regional transportation planning agency appears to be required to structure its own plans

accordingly, and other local agencies might fall in line behind that. This invites litigation between and among regional transportation planning agencies over the relative allocation of carbon reduction targets to each of them, as each would have different rates of growth, different land use patterns and problems, and different levels of public transportation and vehicle use. Further, it would invite litigation within each individual region. The bill does not clearly spell out all the criteria and guidelines for making those allocations, and therefore invites litigation to resolve those issues.

6. SB 375 requires “modeling” to address specific parameters, including “induced growth.” At the present time modeling is more of an academic concept than a clearly defined legal one. Litigation could occur as a result, whether by challenge to the environmental analysis for the RTP, or the environmental analysis for individual projects on the RTP. There is a high potential for disagreement about modeling consistency with such requirements. There is already pending at least one CEQA suit on a road project that alleges failures in the modeling resulted in underestimation of traffic projections. SB 375 would increase such suits.

7. Despite its intention that the SCS is not intended to conflict with the requirements of federal law, SB 375 creates a conflict relative to growth forecasts. The SCS may not be consistent with current trends, given the specifications of the bill. Or, if the SCS is unable to achieve reduction targets, then a supplement (which is not part of the RTP (§ 65080(b)(2)(H)) will be proposed. That will lead to confusion as to what the adopted forecasts are. This opens an area of litigation.

8. The bill requires the RTP to identify resource lands, including critical habitat and farmland. By such identification, these areas are implicitly protected from development. Despite the bill’s disclaimer not to conflict with federal law, that places SB 375 potentially in conflict with such law relative to critical habitat and species protection, which would allow some development in these areas. This could be a potential source of litigation.

9. Local agencies do not always meet their planning targets, and get sued for failing to do so—even though on their face such targets are goals, not mandates. Recent litigation against the Metropolitan Transportation Commission for failing to reach a targeted increase in transit use for the region is an example. Failure to meet the plans discussed in the prior paragraph thus present further sources of litigation against various agencies.

10. SB 375 directs agencies to make land use planning decisions for the purpose of reducing carbon emissions. This competes with the Regional Housing Need Allocation (RHNA) process, which requires decisions based upon other policies. The conflicting requirements could be a source of litigation.

11. SB 375 could create pressures resulting in litigation among local governments. It gives some *de facto* land use authority to regional agencies, but cities and counties, which have heretofore been the primary drivers of such planning decisions, may have differing views of what is proper planning. This is exacerbated by the lack of provisions for

meaningful input by cities and counties into the preparation and adoption of the SCS. Such a problem could only be cured by adding extensive public review, collaboration with local governments, and an adoption process for the various provisions, such as the adoption of the SCS—but that in turn could lead to litigation over the process.

12. Some of the issues that we might expect to see raised if SB 375 were to become law have been litigated in connection with the formation of regional planning agencies, such as the Coastal Zone Commission, the Tahoe Regional Planning Compact and the San Francisco Bay Conservation and Development Commission. See e.g., *CEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal. App. 3rd 306. Generally, the courts have upheld the creation of regional commissions that have a planning function, although there are differences in SB 375 that might distinguish it from those cases. One distinction is that the earlier cases involved regional planning that transcended any one local jurisdiction. While that is certainly true about greenhouse gases, this bill does not propose to create a super agency that looks at the problem on a statewide basis, but merely shifts the responsibility to a myriad of regional transportation planning agencies. Consequently there may be complaints that this manner of addressing the issue of greenhouse gases will have an impact upon owners and developers in differing ways depending on the plan adopted as part of each RTP in a manner that violates their right to equal protection or due process.

In the cited case it was argued that, in effect, the Commission was zoning land without any due process being afforded to the owners whose land was subject to the commission's plan. The court rejected that contention by saying that the Coastal Initiative "does not zone any property but merely requires the Commission to formulate a coastal plan for submission to the Legislature." (*Id.* at 313.) By contrast, it appears that under SB 375, RTPs could, for example, on paper designate land as not available for development without a meaningful opportunity for input by the affected owners. One supposes that regulations could be adopted to address that issue, but once again they could vary from one agency to another and raise issues of unequal protection under the laws, depending on the location of one's land. There are other distinctions between the types of agencies for which authority has been resolved in the past in litigation and the agencies with these new powers under SB 375—for example, permitting authority—that would have to be ironed out by litigation or further clarifying statutes.

13. The issues raised and the policies and economics at stake are of interest to organized environmental groups in California. A growing practice of those groups is to override local government planning by use of the initiative and referendum power. Thus major litigation could result over what local agencies do in carrying out the bill, and what those groups might do in competition if they do not like the result.

14. The law of inverse condemnation may result in local government being required to pay damages if regulation results in a complete loss of value of property. While the law on the subject is complicated, and not all regulation results in inverse condemnation damages, this bill would expose the agencies carrying out its functions to greater risk—or at least to litigation. Note that a major initiative measure on condemnation, which would have expanded

damages for such decisions, failed at the polls about a year ago. However, we understand several more are in the drafting stages and SB 375 could further complicate that scenario. In the same vein, under cases interpreting the California Constitution in the land use planning context, developers of land may attain certain vested or contractual rights as they proceed. SB 375 purports to exempt certain capital projects by date. However development and land use decisions are not so exempted; they often take so long that developments now in process might run afoul of SB 375.

15. Pursuant to SB 97 (Stats. 2007, Ch. 185), the Governor's Office of Planning & Research and the Resources Agency, are required to adopt CEQA guidelines for the mitigation of greenhouse gas emissions. Because that task has not been completed, there is the possibility of conflict, and therefore litigation, arising out of SB 375 as compared to whatever guidelines are created by the other effort.

16. The California Air Resources Board similarly is pursuing a comprehensive regulatory program to address, greenhouse gas emissions in California. There is possible conflict between what those subject to SB 375 might develop as compared to what the subsequently developed regulations might require.

17. The designation of significant farmland provisions may compete with the Williamson Act and other open space and agricultural preservation laws. For example, a landowner with property in an Agricultural Preserve and subject to a Williamson Act contract can petition for a disestablishment or diminishment of the Agricultural Preserve and can non-renew or petition to cancel the Williamson Act Contract. These procedures may not be consistent with designation of lands for preservation under the provisions of SB 375.

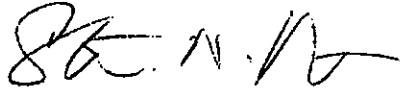
18. The implementation of SB 375 will depend upon the meaning and interpretation by implementing transportation agencies of many terms in the bill – terms which are potentially ambiguous or subjective and flexible as to invite litigation over whether a transportation agency has properly applied them: words such as “significant,” “reasonable” and “feasible.” For example the word “feasible,” has been the subject of repeated litigation over whether an agency is correctly applying the term. *Morris v. Williams* (1967) 67 Cal. 3rd 733, 757 [Health and Welfare Agency to proportionately reduce expenditures “to the extent feasible.”]; *Department of Transportation v. Chavez* (1992) 7 Cal. App. 4th 407, 417 [Whether it was “feasible” for a state agency to contract with the disabled.]; *City of Los Angeles v. U.S. Dept. of Commerce* (9th Cir. 2002) 307 F. 3rd 859 [Whether in conducting census it was “feasible” to use certain methodology.]. The definitions of “feasible,” “significant” and “reasonable” call for judgments when applied to specific circumstances. That opens up a world of argument for proponents and opponents of a particular issue.

November 14, 2007

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The foregoing describes some of the major issues we see that could lead to litigation as a practical result of SB 375, but by no means all of the issue. We look forward to your further questions and discussion.

Sincerely,

A handwritten signature in black ink, appearing to read "S.N. Roberts", written in a cursive style.

Stephen N. Roberts
of NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP

SNR