

GROWING SMALLER & COOLER WITHOUT EXCLUSION OR DISPLACEMENT

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I. INTRODUCTION

The emerging efforts to reduce greenhouse gas emissions through land use policies requiring more compact development carry with them substantial risks and opportunities for lower-income people and communities of color. At the federal, state, and local levels, governments are developing strategies to alter planning for future land use, centering new growth around mass transit and major transportation corridors. Yet while compact growth near transit and employment can reduce reliance on the automobile, unless transit-centered development includes affordable housing and access to affordable transit, the reduction of developable land area can also lead to increased housing costs and displacement of lower-income and minority households. This inconvenient truth poses critical challenges for land use planning that must be addressed, but it also provides significant opportunities for education and advocacy about segregation and exclusionary zoning.

This article will explore the possible adverse and disproportionate consequences for lower-income communities of these well-meaning land use strategies, as well as the opportunities they offer for gaining support for affordable housing and combating existing patterns of segregation. It will focus on California's recently adopted "Sustainable Communities Strategy" legislation (Senate Bill 375) as an early indicator of the potential pitfalls and opportunities of land use and transportation planning that aims to reduce climate warming. Specifically, the article will examine the unfolding implementation of S.B. 375 in the Sacramento and San Francisco Bay Area regions. Finally, the article will consider legal issues raised by the possible disproportionate impact of these land use planning strategies on groups protected by fair housing and civil rights laws.

The authors conclude that the principles of social equity and the law teach that adverse consequences on lower-income communities must be adequately considered and fully mitigated as society embarks on comprehensive changes in land use and transportation planning to reduce greenhouse gases. Specific suggestions for adequate consideration and mitigation will include a discussion of mandatory affordable housing requirements and the provision of replacement housing and adequate relocation assistance. Transit-oriented development

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without affordable housing could become just another iteration of urban renewal that leaves lower-income communities behind.

II. CLIMATE CHANGE AND CHANGING LAND USE AND TRANSPORTATION POLICY

Transportation and land use planning and policy changes are implicated in the federal,¹ state, and local government efforts to curb greenhouse gas (GHG) emissions. These efforts aim to (1) improve vehicle technology, (2) transition to low carbon fuels, and (3) shrink the development footprint through compact growth centered around mass transit and major transportation corridors—the so-called three-legged stool of GHG reduction for motor vehicles.² However, the third leg—the land use leg—requires recognition that neighborhoods and communities of lower-income peoples can be overlooked or overrun, as is too often the case when societies move quickly with comprehensive transportation and land use reform.

The land use leg assumes that more compact future development will reduce vehicle miles traveled and therefore GHG.³ This makes sense if the *only* criterion is GHG reduction, but reducing developable land area can also lead to increased housing prices, gentrification, and displacement of lower-income and minority households unless specific counter measures are taken.⁴ Moreover, the decrease in transportation costs yielded by compact development often will not offset housing cost increases, especially for those households that already have

1. The federal government is in its second year of the Sustainable Communities Initiative (SCI) pilot program providing grants to facilitate sustainable regional planning. See Docket No. FR-5500-N-01.

2. REID EWING ET AL., GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE 3 (2006) [hereinafter GROWING COOLER]; REGIONAL TARGETS ADVISORY COMMITTEE, CAL. AIR RES. BD., RECOMMENDATIONS OF THE REGIONAL TARGETS ADVISORY COMMITTEE (RTAC) PURSUANT TO SB 375 4 (2009) [hereinafter RTAC RECOMMENDATIONS], <http://www.arb.ca.gov/cc/sb375/rtac/report/092909/finalreport.pdf>.

3. RTAC RECOMMENDATIONS, *supra* note 2.

4. STEPHANIE POLLACK ET AL., DUKAKIS CTR. FOR URBAN & REG'L POLICY, MAINTAINING DIVERSITY IN AMERICA'S TRANSIT-RICH NEIGHBORHOODS 1-4 (2010); GREGORY INGRAM & YU-HUNG HONG, LINCOLN LAND INST. OF LAND POLICY, SMART GROWTH POLICIES: AN EVALUATION OF PROGRAMS AND OUTCOMES 85-86, 142, 149 (2009) (examining four states with comprehensive smart growth policies—Oregon, New Jersey, Florida, and Maryland—and reporting that statewide smart growth programs are likely to contribute to reduced affordability for renters and owners except to the extent affordable housing is required and actually provided); CAROLINE RODIER ET AL., EQUITY ANALYSIS OF LAND USE AND TRANSPORTATION PLANS USING INTEGRATED SPATIAL MODEL 4, (2010) Transportation Research Board Annual Meeting, Paper Submitted, Aug. 1, 2009); Daniel Carlson & Shishir Mathur, *Does Growth Management Aid or Thwart the Provision of Affordable Housing?*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING 20-80 (Anthony Downs ed., 2004) (If growth management is viewed through the lens of housing affordability, one could conclude that growth management thwarts the provision of affordable housing; if affordable housing options were available in a more compact urban form, closer to work and services, or if high-capacity public transportation was available, reduced transportation costs could be expected); Charles Bagli, *They Bet the Rent, and Lost*, N.Y. TIMES, Apr. 29, 2010, at B1, B4 (reporting on the plans of Stellar Management and the Rockpoint Group to demolish 1,538 affordable rental townhouses in San Francisco's Park Merced development and replace them with 7,400 non-rent-controlled apartments as "part of a plan to create a dense, environmentally sustainable community based on public transportation and wind turbines"); see generally, Ngai Pindell, *Planning for Housing Requirements*, in AFFORDABLE HOUSING DEVELOPMENT 5-7, 20-27 (Tim Iglesias & Rochelle E. Lento eds., 2005).

severe housing cost burdens.⁵ And lest we forget, the sweeping changes in land use and transportation patterns ushered in by the development of the interstate highway system in the 1950s both facilitated and exacerbated segregation of minority and lower-income groups.⁶ Interstate highways enabled relocation of workplaces out of cities to emerging suburbs, leaving behind the jobless who were disproportionately persons of color and contributing to a multigenerational racial divide between suburbia and the inner city. Today, most transportation infrastructure runs through low-income and minority communities, placing these communities at the center of the pressure for redevelopment brought by smart growth policies.⁷

The new attention to land use provides an unprecedented opportunity to instill broader awareness of the potential impact of climate action on lower-income communities and to garner support for policies to increase densities necessary to facilitate affordable housing, preserve affordable housing, and combat segregation and exclusionary zoning.⁸ There are a number of possible policy initiatives to address these issues: mandatory inclusion of affordable housing in smart growth development and historically exclusive communities; requiring replacement housing and relocation assistance to mitigate displacement; provision of financing for affordable housing and mass transit; and mandatory analysis of fair housing impacts of land use decisions.

III. CALIFORNIA EMBRACES INFILL DEVELOPMENT – WITH OR WITHOUT AFFORDABLE HOUSING?

California has a longstanding state housing goal of ensuring that its residents have decent, affordable housing.⁹ Over thirty years ago, the California Legislature established this goal when it adopted California's comprehensive Housing Element Law,¹⁰ declaring: "The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian . . . is a priority of the highest order."¹¹

5. BARBARA J. LIPMAN, SOMETHING'S GOTTA GIVE: WORKING FAMILIES AND THE COST OF HOUSING, (New Century Housing, Issue 2, 2005) (working households spend seventy-seven cents on transportation for every dollar for housing).

6. RODIER ET AL., *supra* note 4; *see generally* E. SWIFT, THE BIG ROADS: THE UNTOLD STORY OF THE ENGINEERS, VISIONARIES, AND TRAILBLAZERS WHO CREATED THE AMERICAN SUPERHIGHWAYS (2011).

7. RODIER ET AL., *supra* note 4.

8. *See generally* DAVID RUSK, POVERTY & RACE RES. ACTION COUNCIL, BUILDING SUSTAINABLE, INCLUSIVE COMMUNITIES: HOW AMERICA CAN PURSUE SMART GROWTH AND REUNITE OUR METROPOLITAN COMMUNITIES (2010); Florence Wagman Roisman, *Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMPOSIUM J. 87 (1998); *see* MICHAEL STOLL, BROOKINGS INST., JOB SPRAWL AND THE SPATIAL MISMATCH BETWEEN BLACKS AND JOBS (2005) (African-Americans disproportionately reside in communities with few job opportunities); JUDITH K. HELLERSTEIN ET AL., SPATIAL MISMATCH OR RACIAL MISMATCH? 1-4 (U.S. Census Bureau Ctr. for Econ., Paper No. CEs-WP-07-16, June 2007).

9. CAL. GOV'T CODE § 65580 (2005).

10. GOV'T §§ 65580-65589.8 (mandating that all local governments to adopt a housing element in their general plans "to make adequate provision for the housing needs of all economic segments of the community" and to also zone for the community's allocated share of the regional need for affordable housing).

11. GOV'T § 65580(a); *see also* GOV'T §§ 65589.4(g), 65589(d), 65589.5(g), 65589.7(f).

The goal echoes the national housing goal established thirty years before.¹²

The state has fallen far short of this aspiration and today faces a continuing crisis in housing affordability that affects the social and economic well being of all Californians.¹³ California has now adopted legislation, discussed below, aimed at steering development toward higher density infill.¹⁴ Although promising to curb suburban sprawl and attendant GHG emissions, the law brings potential obstacles to the implementation of the state's affordable housing requirements and the state housing goal. Its "one small size fits all" focus threatens to discourage affordable housing development in suburban communities with significant affordable housing needs and significant local resistance to affordable housing development.

A. Inherent Tension Between Planning for Housing Affordability and Planning to Curb Climate Change

California's Housing Element Law¹⁵ mandated that all local comprehensive general plans include a "housing element" that makes available sufficient land with appropriate densities and infrastructure to accommodate the community's allocated share of the state-determined regional need for housing for all income levels.¹⁶ This "fair share" planning obligation is not unique to California,¹⁷ but the legislative mechanism requiring each jurisdiction to rezone sufficient sites to accommodate a quantitatively prescribed number of affordable units was unprecedented.¹⁸ California's new infill growth management legislation requires the allocation of this fair share to be consistent with the reduced development footprint, but it fails to account for the resources needed to maintain affordability, the existing need for affordable housing outside the new development footprint, and the potential displacement of lower-income

12. The Housing Act of 1949, 42 U.S.C. § 1441 (2011) ("The Congress hereby declares that the general welfare and security of the Nation and health and living standards of its people require . . . the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family . . .").

13. California remains mired in a chronic housing crisis. It ranks in the top four of the least affordable rental markets in America. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA'S RENTAL HOUSING: MEETING CHALLENGES, BUILDING ON OPPORTUNITIES 33 (2011), http://www.jchs.harvard.edu/publications/rental/rh11_americas_rental_housing/AmericasRentalHousing-2011-bw.pdf. Despite the economic downturn, rents continue to rise with five of the ten most expensive rental markets in the nation in California. PUB. POLICY INST. OF CAL., CALIFORNIA HOUSING: PLANNING FOR A BETTER FUTURE 3 (2011), http://www.ppic.org/content/pubs/report/R_611JK2R.pdf.

14. A.B. 32, 2005–2006 Assemb., Reg. Sess. (Cal. 2006), *infra* note 20; S.B. 375, 2007–2008 S., Reg. Sess., *infra* note 21.

15. GOV'T §§ 65580–65589.8.

16. See GOV'T §§ 65583–65588; CAL. AFFORDABLE HOUS. LAW PROJECT, CALIFORNIA HOUSING ELEMENT MANUAL 8–17 (2009), <http://pilpca.org/wp-content/uploads/2011/08/HE-Manual-2009-with-BB-P.pdf>.

17. Pindell, *supra* note 4, at 5–7. For a comprehensive description and analysis of the beginnings of the move toward state mandated comprehensive local planning for affordable housing see generally AMER. BAR ASSOC. ADVISORY COMM. ON HOUS. AND URBAN GROWTH, HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE, AND PLANNING LAW 7–12 (R. Fishman ed., 1978).

18. Pindell, *supra* note 4, at 8–11.

communities by new urban redevelopment.¹⁹

B. A.B. 32 and S.B. 375—New Planning Mandates for Infill Housing

1. California's Sustainable Communities Laws

California has taken what some consider big steps toward GHG reductions in the realm of land use and transportation. The Global Warming Solutions Act of 2006 (A.B. 32)²⁰ set a goal to reduce emissions to 1990 levels by 2020. S.B. 375²¹ followed in 2008, requiring region-wide coordination of land use and transportation planning efforts.²² The linchpin of the land use strategy in these laws is to compress the geographic footprint of future development.

A.B. 32 and S.B. 375 are intended to steer growth to existing urban areas with mass transit and major transportation corridors²³ based on the assumption that more compact future development will reduce vehicle miles traveled and therefore emissions.²⁴ But as discussed above, reducing developable land area can lead to increased housing prices and displacement of lower-income households.²⁵ Also, decreased transportation costs will not offset the increased housing costs for those families.²⁶ To ensure that households of all income levels share in the benefits of this new compact growth, implementation of A.B. 32 and S.B. 375 must be accompanied by new state and local laws and policies that plan for and preserve affordable housing²⁷ and combat segregation and exclusionary zoning.²⁸ The policies must also strive to go beyond achieving the conventional “jobs–housing balance”²⁹ and instead ensure a jobs–housing fit—a match between the number of jobs in the community and housing units affordable to the people who do those jobs.³⁰ The advisory committee assembled to fashion implementation strategies for S.B. 375 recognized that the long used concept of jobs–housing *balance* simply compares the number of jobs to the number of houses.³¹ A “perfect” 1:1 jobs/housing ratio, therefore, could exist in higher-

19. RTAC RECOMMENDATIONS, *supra* note 2, at 4.

20. 2006 CAL. STATS., ch. 488, § 1 (codified as CAL. HEALTH & SAFETY CODE § 38500 *et seq.*).

21. 2008 CAL. STATS., ch. 728, § 4 (codified as CAL. GOV'T CODE §§ 65080, 65400, 65583, 65584.01, 65584.02, 65584.04, 65587, and 65588 and CAL. PUB. RES. CODE §§ 21155 *et seq.*, and § 21159.28; named the “Sustainable Communities and Climate Protection Act” the following year (2009 CAL. STATS., ch. 354, § 1 (SB 575)), but still generally referred to as SB 375). For a comprehensive description of the contents and requirements of S.B. 375, see Joel Ellinwood, *SB 375: California's First Step to Manage Greenhouse Gas Effects of Land Use Development*, 26 CAL. REAL PROP. J. 33 (2008).

22. See CAL. GOV'T CODE § 65080 (2005).

23. RTAC RECOMMENDATIONS, *supra* note 2, at 4.

24. GROWING COOLER, *supra* note 2.

25. POLLACK, *supra* note 4; INGRAM & HONG, *supra* note 4.

26. LIPMAN, *supra* note 5.

27. INGRAM & HONG, *supra* note 4, at 86 (observing that smart growth policies must explicitly require the production of housing for lower and moderate income households).

28. See generally, *supra* note 8.

29. GROWING COOLER, *supra* note 2, at 153; see Robert Cervero & Michael Duncan, *Which Reduces Vehicle Travel More: Jobs–Housing Balance or Retail–Housing Mixing?*, 72 J. AM. PLAN. ASS'N 475, 475–76 (2006); Andrea Sarzynski et al., *Testing the Conventional Wisdom About Land Use and Traffic Congestion: The More We Sprawl, the Less We Move?*, 43 URB. STUD. 601 (2006).

30. See RTAC RECOMMENDATIONS, *supra* note 2, at 28–29; *infra* Part IV.A.

31. *Id.*

income areas where there are relatively few units affordable to the local workforce. “Jobs–housing fit” on the other hand compares the extent to which the affordability of housing matches the wage levels of jobs in an area—a critical factor if increasing housing production near job centers is to actually reduce vehicle miles traveled.³²

Under S.B. 375, California’s eighteen Metropolitan Planning Organizations (MPOs), which encompass most of the state’s population,³³ must develop a Sustainable Communities Strategy (SCS) forecasting a long-range development pattern aimed at achieving emissions targets³⁴ set by the California Air Resources Board.³⁵ The SCS must be adopted as part of the next Federal Regional Transportation Plan.³⁶ The SCS establishes a twenty-year development pattern that is feasible and sufficient to house “all economic segments” of the population of the region expected for that time period.³⁷ If the MPO or the Air Resources Board determines that the SCS cannot reduce emissions to the target levels established by the Board, the MPO must then prepare an Alternative Planning Strategy³⁸ describing impediments to meeting the emissions targets set forth in the SCS and outlining the most practicable means of achieving those targets.³⁹

S.B. 375 prudently requires public participation in preparing the SCS.⁴⁰ The process is ongoing, and as addressed below, public participants now endeavor to craft SCSs with effective but realistic development footprints that include affordable housing and avoid displacement of lower-income neighborhoods.⁴¹ The experience to date is mixed, with initial draft SCS documents lacking analysis of the effect of the proposed development footprint on housing affordability and lower-income communities.⁴² The Sacramento and San Francisco Bay Area regions are examined below as examples. Beyond indicating whether the SCS will likely increase the jobs–housing *balance* or whether housing production will increase around transit centers, affordability and potential displacement are not addressed in the draft plans. The deficiencies indicate that both the law and the analytical tools available to implement the law are severely

32. For example, in 2011 despite the substantial number of homes in San Francisco, when the average earnings in each of the seventy-four most common employment categories is compared to the median home price in the city, *none* of these jobs pay enough for the employee to afford a median-priced home. See Ctr. for Hous. Pol’y, *Paycheck to Paycheck*, NAT’L HOUS. CONF. (Dec. 15, 2011), http://www.nhc.org/chp/p2p_2011_q3/index.php. Similarly, only eight percent of the jobs in San Francisco provide pay sufficient to afford the “fair market rent” for the city as determined by the U.S. Department of Housing and Community Development. *Id.*

33. See *Sustainable Communities*, CAL. AIR RES. BD., <http://www.arb.ca.gov/cc/sb375/sb375.htm> (last visited Jan. 29, 2012).

34. *Id.*; CAL. GOV’T CODE § 65080(b)(2)(B) (2005).

35. *Id.* § 65080(b)(2)(A). CAL. AIR RES. BD., REGIONAL GREENHOUSE GAS EMISSIONS REDUCTION TARGETS PURSUANT TO SB 781, RES. 10–31 (2010), <http://www.arb.ca.gov/cc/sb375/final.resolution.10.31.pdf>.

36. GOV’T §§ 65080(b)(2)(B), (b)(4)(B).

37. *Id.*

38. *Id.* § 65080(b)(2)(J).

39. *Id.* § 65080(b)(2)(I).

40. *Id.* § 65080(b)(2)(E)–(F).

41. See *infra* Part IV.B (discussing public participation in the Sacramento region).

42. See *infra* Part IV.B–C.

lacking.

2. Relationship to Local Land Use and Planning Law – Conflict Looms.

As explained, California’s Housing Element Law⁴³ requires local governments to make adequate provisions to accommodate each community’s share of the regional housing needs in four income levels: very low, low, moderate, and above moderate.⁴⁴ In all but one region, the MPO charged with preparing the SCS is also the entity that must determine each community’s share of the regional housing need.⁴⁵ The numerical allocation of need takes into account both existing and projected lower-income housing needs.⁴⁶ The allocation of need must also account for both socioeconomic equity and environmental concerns,⁴⁷ but the emphasis is to ensure that all communities plan and zone for housing needs of lower-income households even if the community is not proximate to urban centers or mass transit.⁴⁸ Retention of the focus on meeting the lower-income needs wherever they may be is critical to ensure that lower-income families in declining suburbs and rural communities are not left behind as the SCS process guides development away from them.

Although the SCS does not supersede this local land use authority,⁴⁹ S.B. 375 links the development footprint outlined in the SCS with the allocation of the regional housing needs to local governments by requiring the needs allocation to be consistent with the SCS.⁵⁰ It also provides incentives for developers and local governments to site new residential and mixed-use projects on infill sites located within the footprint outlined in the SCS by affording priority for available transportation funds and relaxing environmental review requirements.⁵¹

Consequently, despite the Housing Element Law mandate to allocate housing need based on many varied factors, there is pressure on regions to steer

43. GOV’T §§ 65580–65589.8.

44. *Id.* §§ 65583, 65584.

45. In the San Francisco Bay Area the Metropolitan Transportation Commission is charged with preparing the SCS, while the Association of Bay Area Governments determines the regional housing need allocation for each local jurisdiction. *See id.* §§ 65080(b)(2)(C), 65588(e).

46. *Id.* §§ 65583, 65584(d), 65584.04(d).

47. *Id.* § 65584(d)(2).

48. *Id.* §§ 65583, 65584(d), 65584.04(d). The law lays out the parameters for the methodology to be developed by each region for allocation of the regional housing needs to local jurisdictions. The methodology must be consistent with objectives ensuring equitable distribution of affordable housing, including: increasing housing supply and affordability in all jurisdictions in an “equitable manner,” each community receiving a share of lower-income housing need, promoting infill development and socioeconomic equity, and allocating a lesser portion of housing need in an income category with a disproportionately high share of households in that category. *Id.* § 65584(d). The methodology must also take into account data-based factors including the existing and projected jobs-housing relationship and the high housing cost burdens. *Id.* § 65584.04(d).

49. *Id.* § 65080(b)(2)(K).

50. *Id.* § 65584.04(i).

51. The law ties coveted federal Department of Transportation funding for transportation projects to the SCS, requiring consistency between the SCS and the financial and action elements of the Regional Transportation Plan. *Id.* § 65080(b)(2)(B). Certain infill and “transit priority” developments proposed within and consistent with the SCS footprint receive relaxation of or outright exemption from the California Environmental Protection Act’s (CAL. PUB. RES. CODE § 21000 *et seq.*) environmental review mandates. *Id.* § 21155 *et seq.*, § 21159.28.

the housing need allocation toward transit-rich areas notwithstanding demonstrated need for affordable housing in other areas.⁵² This could have significant fair housing and civil rights implications by (1) hampering affordable housing development in communities with less proximity to transit, and (2) causing displacement of lower-income residents and gentrification of inner city communities that receive the allocation.⁵³ S.B. 375 has installed systemic tension in California land use planning law—one that must be reconciled to adequately harmonize the critical tandem goals of GHG reductions and elimination of housing poverty and segregation.

IV. CALIFORNIA EFFORTS TO HARMONIZE COMPACT GROWTH AND HOUSING AFFORDABILITY

A. The Regional Targets Advisory Committee

S.B. 375 required the Air Resources Board to convene a Regional Targets Advisory Committee (RTAC)⁵⁴ to provide recommendations for GHG reduction target-setting and preparation of the SCS.⁵⁵ The RTAC Recommendations include a chapter on housing and social equity, acknowledging the adverse social consequences of changing land use patterns, such as displacement, gentrification, and increased housing costs.⁵⁶ Among other things, the RTAC recommended that: (1) Housing and transportation affordability and jobs-housing fit be incorporated into the methodology for setting emissions targets because of their emissions-reducing effect; (2) Adverse social consequences should be avoided to the extent possible in the regional SCS; and (3) Future target setting, SCS preparation, and research and model development should fully incorporate social equity factors.⁵⁷

These recommendations brought first light to S.B. 375's potential impacts on housing affordability and displacement.⁵⁸ As preparation of the SCSs proceeds, though, it is becoming clear that more ambitious, concrete goals and requirements will be essential to accommodate compact development and broader social equity concerns. S.B. 375 offers the best opportunities to influence and shape the land use changes contained in the SCS in the regional SCS development process.⁵⁹ The bill mandates each regional metropolitan planning organization to adopt and implement a public participation plan for preparing

52. GOV'T § 65080(b)(2)(B).

53. *See infra* Part V.

54. GOV'T § 65080(b)(2)(A)(i). The statute requires the RTAC to be comprised of representatives of regional transportation and planning agencies, air quality districts, local governments, and members of the public including homebuilders, planning organizations, environmental organizations, environmental justice organizations, and affordable housing organizations. Author Rawson was a member of the RTAC, appointed as an affordable housing representative.

55. *Id.*

56. RTAC RECOMMENDATIONS, *supra* note 2, at 28.

57. *Id.*

58. These impacts had received virtually no attention in the committee reports preceding adoption of the legislation.

59. The process requires substantial public participation. GOV'T § 65080(b)(2)(E)–(F).

the Strategy.⁶⁰ The plan must provide for workshops throughout the region, circulation of the draft Strategy prior to the adoption of the RTP, and at least three public hearings.⁶¹ There is much to learn from the experience in the Sacramento region.

B. Using Coordinated Regional Advocacy to Develop a Sustainable Community Strategy – Sacramento Region

Coordinated, community-driven regional advocacy is critical to ensure that a metropolitan planning organization alleviates public concerns in developing its sustainable communities strategy, particularly with respect to the region’s lower-income households. In the Sacramento region of California, the Coalition on Regional Equity (CORE), a community action collaborative, has emerged as a leader.

The regional planning entity charged with preparing the SCS and allocating the “fair share” housing needs in the Sacramento region is the Sacramento Area Council of Governments (SACOG).⁶² It encompasses six counties—El Dorado, Placer, Sacramento, Sutter, Yolo, and Yuba—and the twenty-two cities of these counties.⁶³ Uniquely, the council area includes the state capital (a city of nearly half a million people), several suburban cities, large agricultural areas, rural municipalities, and significant natural habitats and open space.⁶⁴

In October 2010, SACOG was one of forty-five local or regional governing bodies around the country to receive a grant through the U.S. Department of Housing and Urban Development’s Sustainable Communities Regional Planning Grant Program.⁶⁵ The program is intended to build economic competitiveness by connecting housing with good jobs, quality schools and transportation.⁶⁶ SACOG is using its \$1.5 million grant to develop its SCS and accelerate transit-oriented development.⁶⁷ These and other federal funds SACOG has received come with conditions and obligations that community advocates can use as tools to promote

60. GOV’T § 65080(b)(2).

61. *Id.* (only two public hearings are required if the MPO covers only one county).

62. See GOV’T § 65588(e); *Sacramento Area Council of Governments Fact Sheet*, SACRAMENTO AREA COUNCIL OF GOV’TS, at 1, http://www.sacog.org/about/advocacy/pdf/fact-sheets/FactSheet_SACOG.pdf (last visited Jan. 27, 2012).

63. *Sacramento Area Council of Governments Fact Sheet*, *supra* note 62, at 1.

64. See NAT’L ASS’N OF DEV. ORGS. RESEARCH FOUND., REGIONAL APPROACHES TO SUSTAINABLE DEVELOPMENT: LINKING ECONOMIC, TRANSPORTATION AND ENVIRONMENTAL INFRASTRUCTURE IN RURAL AND SMALL METROPOLITAN AMERICA 9 (2011), <http://www.nado.org/wp-content/uploads/2011/09/NADO-Sustainable-Devt-2011.pdf>; *State & County Quick Facts: Sacramento (city), California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06/0664000.html> (last updated Jan. 17, 2012).

65. Brian Sullivan, *HUD Awards New Grants to Promote Smarter and Sustainable Planning*, Press Release HUD No. 10-233, U.S. DEP’T OF HOUSING & URBAN DEV. (Oct. 14, 2010), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-233.

66. *Id.*

67. See SACRAMENTO AREA COUNCIL OF GOV’TS, DRAFT: METROPOLITAN TRANSPORTATION PLAN/SUSTAINABLE COMMUNITIES STRATEGY FOR 2035 8-5 (2011), <http://www.sacog.org/2035/files/Draft-mtpscs/MTP%20SCS%20COMPLETE%202011-10-11.pdf> [hereinafter DRAFT: MTP/SCS].

equity in regional housing, land use, and transportation planning.⁶⁸ These conditions and obligations are described in detail, *infra* in Section V of this article.

In February 2011, the California Air Resource Board assigned its final regional GHG reduction targets.⁶⁹ For the SACOG region, the assigned targets are a seven percent reduction by 2020 and sixteen percent by 2035.⁷⁰ SACOG is scheduled to adopt its regional transportation plan, including its final SCS, and determine the regional housing needs allocation for all jurisdictions⁷¹ by April 2012.⁷² Each of these must be consistent with the requirements of S.B. 375 and the state mandated GHG reduction targets.⁷³ This complex and multi-layered set of processes poses both risks and opportunities for affected communities.

CORE and founding member Sacramento Housing Alliance are pushing to ensure that SACOG's SCS and related plans will facilitate sufficient affordable housing development by, among other things, advocating for policies such as inclusionary or mixed income zoning requirements, displacement protections, and the creation of jobs-housing fit modeling and standards.⁷⁴ Generally, inclusionary measures require new developments to set aside or dedicate some percentage of land or units for affordable housing.⁷⁵ CORE grew out of the efforts of a coalition of community groups to win an inclusionary policy for Sacramento County.⁷⁶ In 2004, the Alliance launched a successful three-year campaign to enact and preserve Sacramento County's inclusionary housing ordinance.⁷⁷ With the strong support of a very diverse coalition including affordable-housing developers and advocates, environmentalists, transportation advocates, social service providers, organized labor, the faith community, civil rights leaders, and health groups,⁷⁸ the ordinance survived an aggressive legal

68. DRAFT: MTP/SCS, *supra* note 67, at 8-1 to 8-2; Cooperative Agreement Provisions: Terms & Conditions for FY 2010 Notice of Funding Availability from U.S. Dep't of Housing & Urban Dev., Office of Sustainable Hous. & Cmty., 17-18 (2010) (on file with Mona Tawatao).

69. See CAL. AIR RES. BD., EXEC. ORDER NO. G-11-024, RELATING TO ADOPTION OF REGIONAL GREENHOUSE GAS EMISSION REDUCTION TARGETS FOR AUTOMOBILES AND LIGHT TRUCKS PURSUANT TO SENATE BILL 375 (Feb. 15, 2011), http://www.arb.ca.gov/cc/sb375/executive_order_g11024.pdf.

70. See CAL. AIR RES. BD., RESOLUTION 10-31, REGIONAL GREENHOUSE GAS EMISSION REDUCTION TARGETS PURSUANT TO SB 375, attachment 4 (Oct. 23, 2010), http://www.arb.ca.gov/cc/sb375/eo_attachment.pdf.

71. The regional housing needs allocation (RHNA) sets the housing-need numbers for each income category allocated to each jurisdiction.

72. DRAFT: MTP/SCS, *supra* note 67, at 2-3.

73. See CAL. GOV'T CODE § 65584.04 (2005).

74. *Transportation and Land Use Principles*, COAL. ON REG'L EQUITY 4 (Oct. 26, 2010), <http://equitycoalition.org/wp-content/uploads/2011/10/Transportation-and-Land-Use-Planning-Principles.pdf> (providing a full list of CORE's transportation and land use planning principles and proposed action items).

75. NON-PROFIT HOUSING ASS'N OF N. CAL. ET AL., AFFORDABLE BY CHOICE: TRENDS IN CALIFORNIA INCLUSIONARY HOUSING PROGRAMS 5 (2007), <http://calruralhousing.org/drupal/sites/default/files/SampleHReport.pdf>. Nearly one-third (170) of the jurisdictions in California has this type of measure. *Id.*

76. See *About: CORE History*, COAL. ON REG'L EQUITY, <http://equitycoalition.org/about/> (last visited June 7, 2012).

77. See SACRAMENTO COUNTY, CAL., CODE § 22.35.030 (2005). Unlike many other inclusionary ordinances, this ordinance contains deep income targeting, including requirements to provide housing affordable to extremely low-income households. *Id.*; see *About: CORE History*, *supra* note 76.

78. Bldg. Indus. Ass'n of Superior Cal. v. Cnty. of Sacramento, No. 05AS00967 at 3 (Cal. Super.

challenge by market rate housing developers. In 2007, building on this momentum, these groups formed CORE with the mission to advocate regional change that is equitable, that is sustainable, and that promotes public health for lower-income people and communities of color in the greater Sacramento region.⁷⁹ The coalition's advocacy approach is structured such that each organizational member speaks from its unique perspective but pursues a common goal.⁸⁰

CORE and the Alliance have tracked vigilantly and engaged in advocacy around the S.B. 375 and Sustainable Communities Grant developments and implementation. They have focused on the following questions, among others: What impact will S.B. 375's stated mandate to drive denser affordable housing toward the urban core have on regional housing equity requirements?⁸¹ Specifically, what will be the impact on Sacramento County's inclusionary ordinance and others adopted in smaller suburban and semi-rural jurisdictions of the Sacramento Area Council of Governments?⁸² What will SACOG and its member jurisdictions do to ensure that the SCS will actually benefit low-income people and people of color rather than harm them?⁸³

To guide its work and promote a truly equitable SCS, CORE presented to SACOG a set of transportation and land use planning principles, each with a corresponding set of suggested actions.⁸⁴ The goals include balancing housing and employment at all price and income levels; preserving the region's natural assets including farmland, open space, and natural habitats; promoting compact development; expanding families' choice of affordable rental homes in a broad range of communities; and evaluating the impact of the SCS that SACOG adopts on low-income and minority communities.⁸⁵ Notably, one of the proposals calls to expand families' housing choices and promote a variety of types of housing for all income levels. CORE's platform also calls for analyzing each action proposed or undertaken pursuant to the SCS. The analysis includes avoiding or mitigating potential and actual impacts on low-income communities and communities of color. These impacts include displacement, exacerbation of racial

Ct., Mar. 20, 2006). Represented by the authors, the Alliance successfully intervened in the case on behalf of the County as did the California Attorney General—author Tawatao in her capacity as Regional Counsel of Legal Services of Northern California, and author Rawson in his capacity as Director of the California Affordable Housing Law Project of the Public Interest Law Project.

79. See *About: CORE History*, *supra* note 76.

80. For instance, if the coalition's goal is to make blighted areas slated for redevelopment more walkable, a clean-air advocate might emphasize the air pollution reduction benefits resulting from more sidewalk and walkway construction, and the civil rights advocate would underscore inequity and safety issues of a locality failing to provide sidewalks in low-income areas with significant populations of color while providing sidewalks in other areas.

81. This concern is underscored by CORE Transportation and Land Use Principle No. 5, which is "[t]o expand families' choices of affordable rental homes in a broad range of communities." See *Transportation and Land Use Principles*, *supra* note 74, at 2. CORE members have raised this concern in various public meetings convened by SACOG since the spring of 2010. See *About: CORE History*, *supra* note 76.

82. See *About: CORE History*, *supra* note 76.

83. This concern is further underscored by CORE Transportation and Land Use Principles 6 through 8. See *id.* at 2-3.

84. See *id. passim*.

85. *Id.*

and ethnic segregation, isolation and increased transit times and costs, or a combination thereof.⁸⁶

SACOG's Draft Metropolitan Transit Plan/Sustainable Communities Strategy 2035 Update (Draft MTP/SCS), released in November 2011, sets forth steps that SACOG has taken or plans to take that help promote equity.⁸⁷ One of the most significant actions was selecting the Center for Regional Change as one of its sub-recipients on the HUD Sustainable Communities Grant.⁸⁸ The Center is a project of the University of California at Davis that "brings together faculty, students, [and] communities to collaborate on innovative research to create just, sustainable and healthy regional change in California's Central Valley and Sierra Nevada."⁸⁹ The Center's goals include connecting university research with communities, social service providers, environmentalists, and non-profits, among others. The Center also seeks to build unity and create programs to meet unmet community needs.⁹⁰

One of the Center's primary tasks regarding the sustainable communities strategy has been to complete an equity analysis, which SACOG used in selecting the Transit Priority Plan Areas in the SACOG region. Combining its substantial academic and data resources and input from community collaboration, the Center helped SACOG create an equity analysis tool that measures the vulnerability and opportunity of each potential transit priority area. The equity analysis tool uses demographic information, including race, level of education, plus vulnerability and opportunity "indicators."⁹¹ The vulnerability indicators applied include high poverty, unemployment, residential overcrowding, linguistic isolation, housing costs, and small business performance.⁹² Opportunity indicators include significant presence of middle-income households, job richness, and higher levels of carpooling.⁹³

SACOG applied the equity analysis tool to eleven transit priority areas and selected five areas to focus on in the initial phases of implementing the transit plan/sustainable communities strategy.⁹⁴ According to the Center, the selection process was driven by two overarching principles: (1) market viability, and (2) the potential for maximizing learning opportunities for future plan implementation in other areas. SACOG looked at market viability based on the notion that given similar levels of general vulnerability of all areas under consideration, it made the most sense to choose those in which significant investment of public and community resources had the greatest chance of

86. *Id.*

87. See DRAFT: MTP/SCS, *supra* note 67, at 6-1, 6-3 to 6-5, 8-1 to 8-36.

88. *Id.* at 8-5.

89. UC DAVIS CTR. FOR REG'L CHANGE (2008), *available at* <http://regionalchange.ucdavis.edu>.

90. *Id.*

91. See DRAFT: MTP/SCS, *supra* note 67, 8-5 to 8-7.

92. CHRIS BENNER & BEDITA TITHI, UC DAVIS CTR. FOR REG'L CHANGE, SOCIAL EQUITY AND TRANSIT-ORIENTED DEVELOPMENT: SELECTING TRANSIT ORIENTED PRIORITY AREAS IN THE SACRAMENTO SUSTAINABLE COMMUNITIES REGIONAL PLANNING PROCESS 15 tbl.2 (2011), <http://regionalchange.ucdavis.edu/publications/TPA%20Social%20Equity%20Selection%20Report.pdf>.

93. *Id.* at 16 tbl.3.

94. See SACRAMENTO AREA COUNCIL OF GOV'TS, SUSTAINABLE COMMUNITIES PLANNING GRANT TRANSIT PRIORITY AREAS 1 (2011), <http://www.sacog.org/calendar/2011/06/23/Strategic/pdf/2-TPP%20Attach%20A.pdf>.

success.⁹⁵ Community-based advocates and leaders highly knowledgeable of regional land use and planning issues representing a broad range of constituencies were integral to developing the equity indices as well as reviewing the eleven transit priority areas.⁹⁶ The next step in the process is to implement the proposed housing, community development, and transportation investments in the respective transit priority areas. This will begin with the five priority areas SACOG selected.

It will be challenging for community leaders to ensure that equity is a significant driver in these processes because SACOG has little statutory authority over these processes. The outcomes of the processes will be largely dependent upon local authorities and their relationships with project developers and residents in a particular area.⁹⁷ Thus, it will be critical for community advocates and leaders, as well as SACOG, to educate and engage local residents so that they can meaningfully participate in the process. Perhaps leaders and residents can use the opportunity and vulnerability indices (for example, marketability, lack of transit options, et cetera), coupled with civil rights levers detailed below, to ensure local authorities give equity due consideration in their local land use and transportation infrastructure decision.

Notwithstanding SACOG's general institutional support for equity in land use and transportation investments planning and decision-making, as evidenced by its innovative approach and partnership with the Center for Regional Change in the transit priority area process, there is cause for some concern among equity advocates regarding certain aspects of the Draft MTP/SCS. One major concern relates to areas that the Draft MTP/SCS identifies as "environmental justice areas" (areas with large low-income populations or populations of color or both) that have inadequate and insufficient transit service in terms of wait time, connections, system integration, and transportation isolation from the suburbs.⁹⁸ Laudably, SACOG proposes addressing these deficits by, among other means, increasing service hours on buses serving environmental justice areas by eighty-two percent. SACOG also increases access to jobs within thirty minutes of transit travel time in environmental justice areas by forty-eight percent by focusing investment in high-quality transit within a half-mile of transit priority areas located in Placer, Sacramento, and Yolo counties.⁹⁹ However, SACOG's proposed plan regarding transit priority areas—areas within a half-mile of transit routes that will have frequent service by 2035—does not thus far sufficiently address the fact that certain high-opportunity job centers, such as the city of Davis, are isolated transit-wise from nearby lower opportunity cities such as Woodland.¹⁰⁰ Both cities have inclusionary/mixed-income ordinances,¹⁰¹ however, in the

95. BENNER & TITHI, *supra* note 92, at 20–21.

96. *See id.* at 24–25.

97. *See id.* at 26.

98. DRAFT: MTP/SCS, *supra* note 67, at 8-1 to 8-2, 8-20.

99. *Id.* at 8-18, 8-20.

100. The Draft MTP/SCS lists Davis as a transit priority area, but does not contemplate enhanced transportation service to and from Woodland. *See* DRAFT: MTP/SCS, *supra* note 67, at 3-29.

101. *See* WOODLAND MUN. CODE ch. 6A (2012), available at http://www.cityofwoodland.org/municipal_code//_DATA/CHAPTER06A/index.html; *see also* DAVIS MUN. CODE ch. 18, art. 18.05 (2012), available at <http://qcode.us/codes/davis>.

experience of advocates of affordable housing, Davis has capitulated to not-in-my-backyard pressure concerning affordable-housing proposals.¹⁰²

Achieving transit priority area status, moreover, is many years away under SACOG's Draft MTP/SCS for suburban cities¹⁰³ such as Elk Grove. The concern is that S.B. 375's focus on placing new development close to high density transit centers is a disincentive for cities in SACOG's region such as Elk Grove, which is not a transit priority area, to support and facilitate the development of affordable-housing developments.¹⁰⁴ Further, though SACOG has taken a leadership role among other MPOs in improving the "modeling" it uses to predict likely transportation patterns in the future, the limitations of its analysis may not help lower-income people and communities who disproportionately lack sufficient transportation for work and other daily needs. For example, the data underlying the modeling to predict how much SACOG's metropolitan transit plan/sustainable communities strategy will improve access to transportation to job centers for areas with low-transportation opportunity does not presently take type of job into account, including the fact that some number of the potential jobs will have swing shift or night shift hours when current public transportation systems are not running or provide very infrequent service.¹⁰⁵ The last run of the Regional Transit Light Rail Blue Line from Meadowview to downtown Sacramento, for instance, begins at 9:50 p.m.¹⁰⁶ Thus, the modeling being used falls short of incorporating many of the important factors that will determine the actual positive or negative impacts of different proposed transportation plans.¹⁰⁷

A related concern is inadequate consideration of potential displacement. Although SACOG proposes to meet its obligation to analyze the impact of its transportation and sustainable communities plan on poverty overconcentration by ensuring that housing development in transit priority areas is provided for mixed-income levels,¹⁰⁸ thus far SACOG has not offered specifics about

102. In 2008 and 2009, author Mona Tawatao and others represented residents in need of affordable housing who supported the development of the New Harmony Apartments in Davis. Residents of Davis testified against the development based on fears about "overcrowding" of schools and undesirable people moving to the neighborhood. The City initially opposed the development, but following protracted advocacy in subsequent hearings, voted to support the development. See DAVIS CITY COUNCIL, MINUTES OF THE DAVIS CITY COUNCIL: MEETING OF OCTOBER 7, 2008 (Oct. 7, 2008), <http://cityofdavis.org/meetings/council/10-07-08.pdf>; see also DAVIS CITY COUNCIL, MINUTES OF THE DAVIS CITY COUNCIL: MEETING OF NOVEMBER 5, 2008 (Nov. 5, 2008), http://cityofdavis.org/meetings/council/CC_&_RDA_11-05-08_Minutes.pdf; DAVIS CITY COUNCIL, MINUTES OF THE DAVIS CITY COUNCIL: MEETING OF MARCH 3, 2009 (Mar. 3, 2009), http://cityofdavis.org/meetings/council/CC_Minutes_03-03-09.pdf.

103. Elk Grove is not among the transit priority areas listed in SACOG's current Draft MTP/SCS. DRAFT: MTP/SCS, *supra* note 67, at 3-29.

104. MONICA ALTMAIER ET AL., UNIV. OF CAL., BERKLEY, INST. OF URBAN & REG'L DEV., MAKE IT WORK: IMPLEMENTING SENATE BILL 375 40-41 (2009).

105. See DRAFT MTP/SCS, *supra* note 67, at 8-20.

106. See *Light Rail – Blue Line*, SACRAMENTO REGIONAL TRANSIT DISTRICT, <http://www.sacrt.com/schedules/current/routes/R533.htm#pos1> (last visited Feb. 5, 2012).

107. SACOG has been forthcoming regarding the limitations of some of the modeling that it is using to measure potential benefits and impacts of its proposed metropolitan transit plan and of course, there is no model that will predict outcomes with 100% certainty.

108. See SACRAMENTO AREA COUNCIL OF GOV'TS, *supra* note 94, at 1.

protecting lower-income residents likely to be displaced by the gentrification that may ensue due to improved transportation infrastructure.¹⁰⁹ For this reason, in addition to continuing to monitor and address the region-wide equity issues related to the SCS implementation, CORE has decided to focus on two transit priority areas, rated more vulnerable than other areas by the Center for Regional Change's analysis.¹¹⁰ For these areas, CORE plans to do a deeper equity analysis, provide education and technical assistance to community leaders and members and, CORE hopes, work in collaboration with community groups and leaders and SACOG to ensure that the community's vision and needs will be incorporated into the sustainable infrastructure and housing development that takes places in these areas.¹¹¹

In preparing the equity analysis and creating other tools it will use to offer technical assistance to community groups in the two transit priority areas of focus, CORE has looked to a variety of sources. For starters, SACOG's current and proposed metropolitan transportation plan acknowledges that two sides of S.B. 375 implementation need to be balanced, namely: (1) How best to integrate housing and transportation to gain the benefits of more efficient transportation service provision, cleaner air, and lower transportation costs for a significant portion of the population; and (2) How to avoid concentrating lower-income housing opportunities where they already exist.¹¹²

CORE will also rely on statewide policies and laws, such as the RTAC Recommendations¹¹³ on housing and social equity, the Housing Element Law, and the fair housing and other civil rights laws discussed below.

In sum, CORE has a number of equity mandates to rely upon in helping communities and neighborhoods that stand to benefit or lose under SACOG's transportation planning/sustainable communities strategy implementation to advocate for equitable outcomes.¹¹⁴

109. The Draft MTP/SCS contains only a reference to the California Air Resources Board's Regional Targets Advisory Committee's recommendation that gentrification and displacement be addressed in the MTP/SCS and a general statement that SACOG is "committed to deepening its ability" to do so. SACOG has also expressed openness in community stakeholders meetings to analyzing the potential for displacement of residents as part of the Metropolitan Transit Plan/Sustainable Communities Strategy. DRAFT: MTP/SCS, *supra* note 67, at 8-35 to 8-36.

110. These are the City of West Sacramento-Washington Specific Plan Area and City and County of Sacramento-Fruitridge and Stockton area. See BENNER & TITHI, *supra* note 92, at 21-22.

111. This information was obtained on October 26, 2011 by electronic mail correspondence with and a phone interview of Kendra Bridges, Sacramento Housing Alliance (Sacramento) Land Use Policy Director.

112. Memorandum from SACOG Planners' Committee on the Approach to Regional Housing Needs Assessment and Relationship to S.B. 375 and Metropolitan Transit Plan (May 20, 2010) (on file with Mona Tawatao).

113. RTAC RECOMMENDATIONS, *supra* note 2, at 29.

114. Two policy sources that CORE has relied on in creating its equity tools are worth noting. PolicyLink has just published its 2011 guide on Sustainable Communities equity advocacy. KALIMA ROSE ET AL., POLICY LINK, THE 2011 SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT GUIDE (2011), available at <http://www.policylink.org/site/apps/nlnet/content2.aspx?c=IkIXLbMNJrE&b=5136581&ct=10916727>. The guide is geared toward Sustainable Communities HUD grant recipients, but contains helpful information for any group seeking transportation and related housing equity in its community or region. The other source is the Susceptibility to Gentrification Toolkit developed by Karen Chapple of the Center for Community Innovation. KAREN CHAPPLE, UNIV. OF CAL., BERKELEY,

C. The San Francisco Bay Area – Factoring Affordability

The Association of Bay Area Governments' (ABAG) proposed allocation of the area's regional housing needs to transit-oriented development areas offers an unfolding example of the tension between steering growth inward and planning to accommodate existing and projected needs for affordable housing in all communities.¹¹⁵ ABAG proposes that the regional needs be allocated to a Preferred Development Area (PDA) identified in the S.B. 375 sustainable communities strategy based in part on local governments *volunteering* to accept portions of the housing needs share for self-designated transit-oriented areas.¹¹⁶ This is inconsistent with an allocation guided by an objective methodology centered on housing needs in all communities and incorporating a range of quantifiable factors as required by California's Housing Element Law described above.¹¹⁷ Communities that do not volunteer effectively avoid allocation of their full share of the region's affordable housing need. The resulting skewed allocation of housing need also could run afoul of the fair housing and civil rights laws described in the next section of this article by disproportionately affecting lower-income minority households.

Due in large part to comments and analyses of concerned housing and transportation advocates provided to the ABAG OneBayArea SCS Housing Methodology Committee, ABAG has attempted to correct the inherently arbitrary and potentially inequitable nature of the voluntary system by proposing adjustments in the two main components of the regional housing needs methodology. Neither, however, adequately addresses the distorted allocations of the proposed voluntary system.

1. Sustainability Component.

Household Growth in PDAs. The proposed allocation system factors the projected household growth in the volunteered PDAs. Under ABAG's proposed revisions, PDAs could be allocated no more than seventy percent of the forecasted household growth in the PDA (and if projected growth in a PDA exceeds 110% of the jurisdiction's projected growth, the PDA would not be allocated additional growth under the Fair Share Component described below).¹¹⁸ While this adjustment puts a cap on the allocation to volunteered PDAs, it still steers a substantial amount of the housing need allocation based solely on a community agreeing to accept it.

CTR. FOR CMTY. INNOVATION, MAPPING SUSCEPTIBILITY TO GENTRIFICATION: THE EARLY WARNING TOOLKIT (2009), <http://communityinnovation.berkeley.edu/reports/Gentrification-Report.pdf>. Though the Toolkit was applied to communities in the San Francisco Bay Area, CORE adapted it to do its equity assessments of the two transit priority areas it is focusing on.

115. *Sustainable Communities Strategy: Alternative Land Use Scenarios*, ONE BAY AREA (Aug. 30, 2011), http://www.onebayarea.org/pdf/alternative/SCS_Alternative_Scenarios_Aug_2011.pdf.

116. *Id.* at 2-3.

117. See CAL. GOV'T CODE §§ 65583, 65584(d), 65584.04(d) (2005).

118. Memorandum from Ken Kirkey, Planning Dir., Ass'n of Bay Area Gov'ts, to the SCS Housing Methodology Comm.: Recommended Allocation Methodology 3 (June 14, 2011), http://www.onebayarea.org/pdf/HMC_agenda-packet_6-11.pdf.

2. Fair Share Component.

In an attempt to harmonize the goals of maximizing environmental sustainability and ensuring a fair distribution of affordable housing throughout the region, the allocation system includes a “fair share” component. As discussed, prior to S.B. 375 the allocation methodology was based primarily on fair share principles; thus, S.B. 375 altered this system.

Minimum Allocation to Higher Opportunity Communities. “Higher opportunity” communities—communities with a higher proportion of “quality of life factors” (including past affordable housing production and employment and transit opportunities)—must receive at least forty percent of their forecasted household formation growth in all income categories.¹¹⁹ Although the floor ensures some affordable housing will be allocated to higher opportunity communities, PDAs in higher opportunity communities that do not volunteer will not receive a heightened allocation.

Allocation Based on Average Income. Each community would be allocated 175% of the *difference* between its income distribution and the region-wide distribution (that is, communities with higher average incomes would receive a greater percentage of growth share in the lower-income categories.)¹²⁰ The increased weight this factor affords to higher-income areas may help counter the arbitrary nature of the over-weighting for volunteer jurisdictions, but a better counter weight would be one targeted to the higher-income communities that do not volunteer.

These adjustments implicitly recognize that without significant modification, the allocation of regional housing needs based substantially on the voluntary designation of PDAs by local government is contrary to the underlying principle of regional housing need statutes: to ensure that all communities receive an allocation based on the balancing of many socioeconomic and environmental factors.¹²¹ But the adjustments cannot rectify the underlying problem created by ABAG abrogating its charge of objective allocation in favor of allocation founded on random volunteerism. A system that expressly allows high opportunity communities to receive a low-income housing needs allocation of but forty percent of the projected household growth in that income category risks embedding exclusion of lower-income housing from the very areas in which they have long been denied access. The forty percent floor will devolve into the ceiling for communities that have traditionally erected zoning barriers to inclusion of housing affordable to lower-income households within their borders. The proposed adjustments also signal the need for analysis of the potential adverse impact of a volunteer-based distribution of housing needs on households protected by the fair housing laws, the subject to which this article

119. *Id.* at 3–4.

120. *Id.* at 5; *see also* Memorandum from Ken Kirkey, Planning Dir., Ass’n of Bay Area Gov’ts, to the SCS Housing Methodology Comm.: Small Group Discussion on Draft Methodology 1–2 (Sept. 2, 2011), www.onebayarea.org/pdf/HMC_agenda-packet_9-11.pdf; Memorandum from Ken Kirkey, Planning Dir., Ass’n of Bay Area Gov’ts, to the SCS Housing Methodology Comm.: Minimum Housing Floor Analysis, at 1–2 (July 25, 2011), www.onebayarea.org/pdf/HMC_agenda-packet_7-11.pdf.

121. *See* GOV’T §§ 65583, 65584(d), 65584.04(d).

next turns.¹²²

V. FAIR HOUSING AND OTHER CIVIL RIGHTS LAW REQUIREMENTS AND IMPLICATIONS

The pursuit of infill development presents opportunities and potential setbacks in the continuing efforts to eliminate residential segregation and housing discrimination. Inclusion of affordable housing will be central to ensuring that infill development advances the goal of adequate housing for *all*.¹²³ The fair housing laws and other civil rights laws impact infill development in at least two ways:

(1) Requiring local governments and developers to consider and attempt to avoid any potential adverse impact on groups protected by the laws or any increase in segregation resulting from land use and transportation policies and practices or proposed development, including any related displacement; and

(2) Mandating that jurisdictions analyze local impediments to fair housing choices and take affirmative steps to overcome those impediments and thereby “affirmatively further fair housing.”¹²⁴

The U.S. Department of Housing and Urban Development (HUD), accordingly, requires recipients of its Sustainable Communities Regional Planning Grant to complete a fair housing and equity analysis.¹²⁵ The assessment must include analyses of patterns of segregation, or over concentration of poverty in segregated areas and access to areas of high opportunities.¹²⁶ In similar fashion, the U.S. Department of Transportation (DOT) regulations must assess the possible disparate impact of transportation funded plans and projects on racial and ethnic minorities.¹²⁷

A. The Federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968)¹²⁸

The Fair Housing Act (FHA) prohibits government and the private sector from refusing to sell or rent “or otherwise make unavailable or deny, a dwelling

122. Several civil rights organizations, including author Rawson’s California Affordable Housing Law Project, filed a letter with ABAG addressing these fair housing concerns on October 26, 2011. See Letter from Public Advocates Inc. et al. to Ezra Rappoport, Exec. Dir., Ass’n of Bay Area Gov’ts: Analyzing and Addressing RHNA and SCS Fair Housing Concerns (Oct. 26, 2011), http://www.publicadvocates.org/sites/default/files/library/letter_to_e_rappoport_abag_re_fair_housing_issues.pdf.

123. See generally POLLACK, *supra* note 4; INGRAM & HONG, *supra* note 4; Roisman, *supra* note 8; STOLL, *supra* note 8; HELLERSTEIN, *supra* note 8.

124. 42 U.S.C. § 3608 (1988).

125. DEP’T OF HOUS. AND URBAN DEV., FR-5396-N-03, NOTICE OF FUNDING AVAILABILITY (NOFA) FOR HUD’S FISCAL YEAR 2010 SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT PROGRAM 23-24 (2010).

126. *Id.*; see also DEP’T OF HOUS. AND URBAN DEV., FR-5500-N-01, NOTICE OF HUD’S FISCAL YEAR (FY) 2011 NOTICE OF FUNDING AVAILABILITY (NOFA) POLICY REQUIREMENTS AND GENERAL SECTION TO HUD’S FY 2011 NOFAS FOR DISCRETIONARY PROGRAMS 11-13 (2011); DEP’T OF HOUS. AND URBAN DEV., FAIR HOUSING AND EQUITY ASSESSMENT (FHEA) PROGRAM GUIDANCE (2012).

127. U.S. DEP’T. OF TRANSP., Proposed Circular FTA C 4702.1b, TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS, app. A (2011) [hereinafter Proposed Circular]; see 49 CFR § 21.9(b) (2003).

128. 42 U.S.C. § 3601.

to any person because of race, color, religion, sex, familial status, or national origin.”¹²⁹ Its protections apply to public and private land use practices,¹³⁰ and a land use action that limits the availability of affordable housing may make housing otherwise unavailable within the meaning of the FHA.¹³¹ The FHA has been effective in addressing land use discrimination because a violation is established when the *effects* of a facially neutral land use practice fall disproportionately on a protected group and is not supported by an important justification or less discriminatory alternatives are available.¹³² Proof of *intentional* discrimination is not required.¹³³ The FHA, therefore, should play a critical part in planning for sustainable infill development. Many states have fair housing laws that HUD has deemed “substantially equivalent” to the FHA and should, therefore, provide equivalent if not greater protections against well-intentioned planning actions that carry harmful discriminatory effects.¹³⁴

The “discriminatory effect” method of proof provides a potentially powerful tool for contesting exclusionary zoning actions and outright denials of affordable housing developments where there may be no direct evidence of intentional discrimination.¹³⁵ In the context of infill development, it also provides protection to owners and residents of buildings slated for demolition and replacement.¹³⁶ If the proposed project would displace residents comprised disproportionately of members of a protected class or increase segregation in a community, the residents and other affected parties may have a prima facie claim

129. 42 U.S.C. § 3604(a). 42 U.S.C. § 3604(f)(1) contains a similar provision prohibiting discrimination based on handicap.

130. The FHA extends to land use activity through court decisions. See *Keith v. Volpe*, 618 F. Supp. 1132, 1150–51 (C.D. Cal. 1985), *aff’d*, 858 F.2d 467 (9th Cir. 1988); *Metro. Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988), *aff’d*, 488 U.S. 15 (1988).

131. See *Huntington Branch*, 844 F.2d at 928–29; *Smith v. Town of Clarkton*, 682 F.2d 1055, 1059, 1062–64 (4th Cir. 1982).

132. Federal courts have held that a prima facie violation of the FHA occurs when a land use practice or decision results in a discriminatory effect. See *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 2011 U.S. App. LEXIS 18840 at *13–*14 (3d Cir. N.J. Sept. 13, 2011); *Keith*, 618 F. Supp. at 1132; *Metro. Housing Dev. Corp.*, 558 F.2d at 1283; *Huntington Branch*, 844 F.2d at 926; see also *Gallagher v. Magner*, 636 F.3d 380, 381–82 (8th Cir. 2010), *cert. granted* 181 L. Ed. 2d 395 (No. 10-1032, Nov. 7, 2011), *cert. dismissed* 181 L. Ed. 2d 1035 (disparate impact claims are cognizable under the Fair Housing Act when facts demonstrate that municipal code enforcement had disparate impact).

133. *Mt. Holly Gardens*, 2011 U.S. App. LEXIS 18840 at *14–*15; *Keith*, 618 F. Supp. at 1132; *Metro. Housing Dev. Corp.*, 558 F.2d at 1283; *Huntington Branch*, 844 F.2d at 926.

134. See, e.g., California Fair Employment and Housing Act (FEHA), CAL. GOV’T CODE §§ 12900 *et seq.* (1980) (§ 12955 *et seq.* for housing). Section 12955.6 provides that FEHA protections are at least as broad and may afford no fewer rights and remedies as federal FHA. *Konig v. Fair Employment & Housing Comm’n.*, 28 Cal.4th 743, 749 (2002) (affirming that the legislature sought to make the state statute equivalent to the federal FHA). A violation of the FEHA can be established by demonstrating a discriminatory effect on a protected class. GOV’T § 12955.8(b); *Sisemore v. Master Financial, Inc.*, 151 Cal. App. 4th 1386, 1418–20 (Ct. App. 2007) (recognizing that federal case law on disparate impact is applicable to FEHA).

135. See *Inclusive Comm. Project, Inc. v. Texas Dep’t of Hous. & Comm. Dev.*, 749 F. Supp. 2d 486, 500 (N.D. Tex. 2010) (finding a prima facie case established by a showing of disproportionate approval of applications for low-income housing tax credit units in minority neighborhoods thereby exacerbating racial segregation).

136. *Id.*

of discrimination.¹³⁷

If a prima facie claim of discrimination is established with a showing that a land use decision has a disparate impact on a protected group, the burden shifts to the local government to demonstrate that its action has sufficient, non-discriminatory bases and that no feasible alternatives could serve the interest with less discriminatory effect.¹³⁸ Finally, if the defendant makes this showing, the burden shifts back to the challenger to demonstrate that there is a less discriminatory way to advance the governmental interest.¹³⁹

The shift of the burden to the local government to show that its proposed action is legitimate and could not be achieved by alternatives with less discriminatory effects provides a significant legal and educational tool to housing advocates and affordable housing developers as well as neighborhoods threatened with displacement. Once the disparate impact is shown in litigation (or preferably prior to it), the local government or regional planning agency must reassess its plans and possibly change course to a path that will avoid discrimination and advance integration.¹⁴⁰

B. The Duty to “Affirmatively Further” Fair Housing Under the FHA – Compliance a Condition of Receiving Federal Housing Funds.

Beyond the duty of local governments not to discriminate in their land use and zoning decisions, the FHA provides that every entity receiving federal funding for housing or community development has a duty to take affirmative steps to address existing discrimination and further integration.¹⁴¹ The duty to “affirmatively further fair housing” means that the local entity must conduct an analysis of impediments to fair housing choice, take appropriate steps to overcome the effects of the impediments, and maintain records reflecting the analysis and the actions taken.¹⁴² Any jurisdiction receiving housing and community development funds from HUD also must certify that it will “affirmatively further fair housing,”¹⁴³ and it must comply with that

137. *Id.*

138. *Mt. Holly Gardens*, 2011 U.S. App. LEXIS 18840 at *15; *Huntington Branch*, 844 F.2d at 939–41.

139. *Mt. Holly Gardens*, 2011 U.S. App. LEXIS 18840 at *15.

140. *See, e.g., Charleston Hous. Auth. v. U.S. Dep’t. of Agriculture*, 419 F.3d 729, 740–42 (8th Cir. 2005) (holding that the housing authority’s plan to demolish an affordable housing complex had a disparate impact on African-Americans without sufficient justification); *Keith v. Volpe*, 618 F. Supp. 1132, 1160 (C.D. Cal. 1985) (denying proposed affordable housing development to provide replacement housing for tenants displaced by freeway construction had disparate impact on racial minorities).

141. 42 U.S.C. § 3608(e)(5) (1988).

142. *See* 24 C.F.R. §§ 91.225(a), 570.601(a)(2) (2011).

143. 42 U.S.C. § 5304(b)(2) (2004). “Any grant under [the Community Development Block Grant (CDBG) program] shall be made only if the grantee certifies to the satisfaction of the Secretary that . . . the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a *et seq.* (1964)) and the Fair Housing Act, and the grantee will affirmatively further fair housing.” These certifications are made when the jurisdiction *supra* submits its application for federal housing funds in the form of the Consolidated Plan, described *supra* in Part I.D. *See Laurie Lambrix & Louis Prieto, How to Use Fair Housing Laws to Achieve Your Community Development Goals*, 32 CLEARINGHOUSE REV. 208 (1998).

certification.¹⁴⁴

The primary mechanism for a local jurisdiction to promote fair housing is the preparation and implementation of an Analysis of Impediments to Fair Housing Choice (AI).¹⁴⁵ A local government's certification that it will affirmatively further fair housing means that it will prepare an AI, take actions to overcome the identified impediments, and keep records of its efforts.¹⁴⁶ Subject areas addressed by the AI must include local land use laws and policies, decisions to demolish affordable housing and displace lower-income households as a result of redevelopment, and commercialization or gentrification.¹⁴⁷

In the sustainable land use planning context, as explained above, recipients of HUD's Sustainable Communities Program Grant must complete a fair housing and equity analysis as the means of analyzing regional impediments and affirmatively further fair housing.¹⁴⁸ The analyses must contain the following five components both in terms of identification and assessment: segregated areas and those of increasing diversity, racial and ethnic integration, or both; racially or ethnically concentrated areas of poverty; access to existing areas of high opportunity; major public investments; and fair housing issues, services, and activities.¹⁴⁹

Infill- or transit-oriented development plans or proposals that utilize federal funds but fail to include affordable housing infill development or call for demolition of housing in lower-income neighborhoods could run afoul of the duties to analyze and avoid disparate impacts on groups protected by the fair housing laws and to affirmatively further fair housing. And, as Westchester County, New York and Marin County, California have learned, these violations could result in HUD suspending or withdrawing its funding.¹⁵⁰

1. Westchester County, New York Falls Short

Fair housing advocates recently have had success enforcing the duty to promote fair housing and prepare an AI through administrative complaints to HUD and challenges under the False Claims Act.¹⁵¹ In a first-of-its-kind case, a civil rights organization brought a False Claims Act case against Westchester County, New York, alleging that the County had falsely certified that it was affirmatively furthering fair housing.¹⁵² Westchester County had not conducted an independent AI and had failed to analyze race-based impediments to fair

144. See *infra* note 150–51 and accompanying text; see also *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 668 F. Supp. 2d 548, 569 (S.D.N.Y. 2009); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 73, 75 (D. Mass. 2002).

145. 24 C.F.R. §§ 91.225(a), 570.601(a)(2) (2011); see discussion *supra* Part II.D; see generally, *Lambrix & Prieto*, *supra* note 143; see also *infra* notes 150–58 and accompanying text.

146. See *infra* note 159–60 and accompanying text; *Westchester Cnty.*, 668 F. Supp. 2d at 569.

147. U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE 4-4 to 4-6 (1996).

148. See *supra* note 124 and accompanying text.

149. 42 U.S.C. § 3608 (1988).

150. See discussion *infra*.

151. 31 U.S.C. §§ 3729–33 (2009).

152. *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 668 F. Supp. 2d 548, 550 (S.D.N.Y. 2009). This was the first case to challenge the certification of a local government recipient of HUD that the jurisdiction was affirmatively furthering fair housing when in fact it had failed to prepare a legally sufficient AI.

housing choice in the County.¹⁵³ After the court granted summary judgment against the County,¹⁵⁴ the U.S. Department of Justice, having initially declined to intervene, entered the case to assist with settlement, and the parties agreed to a pioneering settlement.¹⁵⁵ The settlement requires the County to spend \$51.6 million to develop 750 affordable housing units over seven years.¹⁵⁶ Six-hundred and sixty of those units must be located in communities with the lowest proportion of African-Americans and Latinos.¹⁵⁷ The County also is required to conduct an analysis of impediments to fair housing choice, an obligation to which it had falsely certified its compliance.¹⁵⁸ Finally, the County agreed to pay a “relator share” of \$7.5 million and \$2.5 million in attorneys’ fees.¹⁵⁹

As implementation of the settlement proceeded, a dispute regarding the requirements of the settlement arose between the County and the United States and was submitted to the designated Monitor of the settlement.¹⁶⁰ Among other things, the monitor determined that the County must: (1) assess the fair housing impacts of local zoning ordinances by February 2012; (2) notify municipalities of their restrictive zoning practices and the consequences of failing to change them; and (3) identify zoning practices that would, if not remedied, result in legal action by the County.¹⁶¹

2. Marin County, California Agrees to Comply After HUD Findings on Noncompliance

On the west coast in 2009, HUD conducted an investigation of the northern San Francisco Bay Area County of Marin and its sub-recipient jurisdictions to determine whether the County is administering its HUD-funded Community Development Block Grant (CDBG) programs and activities free from the effects of discrimination.¹⁶² The County has the *fifth highest* per capita income in the United States at \$91,483.¹⁶³ Possible consequences of noncompliance, as was the case with Westchester County, included repayment of the CDBG funds and loss

153. *Id.* at 562; *see also* United States *ex rel.* Anti-Discrimination Ctr. v. Westchester Cnty., 495 F. Supp. 2d 375, 387–88 (S.D.N.Y. 2007) (denying the County’s Motion to Dismiss).

154. United States *ex rel.* Anti-Discrimination Ctr. v. Westchester Cnty., 668 F. Supp. 2d 548, 559 (S.D.N.Y. 2009).

155. Beyond its terms described here, the settlement is significant because this is the first residential land use case against a local government in which the U.S. Dep’t of Justice (DOJ) has intervened and HUD has brought corollary administrative claims. *See* Stipulation and Order of Settlement and Dismissal, United States *ex rel.* Anti-Discrimination Ctr. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. Aug. 10, 2009) (No. 06 Civ. 2860) <http://www.hud.gov/content/releases/settlement-westchester.pdf>.

156. *Id.* at 4–6.

157. *Id.* at 6–11.

158. *Id.* at 2, 20–21.

159. *Id.* at 5.

160. Monitor’s Report and Recommendation Regarding Dispute Resolution, United States *ex rel.* Anti-Discrimination Ctr. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. Nov. 11, 2011) (No. 06 Civ. 2860).

161. *Id.* at 11–18.

162. *Final Investigative Report Section 109, Title VI And Section 504 Compliance Review County Of Marin, California CDBG Program 5* (Case Nos. 09-09-R003-9 (Section 109), 09-09-R008-6 (Title VI), 09-09-R009-4 (Section 504)) (July 8, 2009).

163. *Id.* at 4.

of funding in the future.¹⁶⁴

Primary issues in the assessment were whether the County and its jurisdictions were in compliance with the obligation to affirmatively further fair housing choice and the County's failure to update its AI since 1994.¹⁶⁵ HUD's conclusions included the finding that:

[T]he county's development of approximately 1,084 units of affordable housing within the 2005–2009 period appears to site the majority of such housing in or immediately adjacent to areas of historic racial or ethnic segregation within the county, thus promoting these patterns of segregation of minorities and having the effect of denying protected classes, especially Blacks and Hispanics, the benefits of integration into the wider community, despite its successive annual certifications to HUD that it has undertaken actions to affirmatively further fair housing choice (24 CFR 1.4, 6.4, 8.4, 91.225, 570.601).¹⁶⁶

HUD also found that the County failed to update its AI despite identification of numerous new impediments.¹⁶⁷

As a result, the County entered into a voluntary compliance agreement that included a requirement that the County prepare a new AI within 150 days.¹⁶⁸ The AI must identify and analyze "the impediments to fair housing within its jurisdiction, including those based on race and ethnicity and municipal resistance to the development of affordable housing."¹⁶⁹ It must also assess "the causes of lower racial and ethnic minority residents in the County relative to adjacent counties."¹⁷⁰ The agreement in addition requires that as a supplement to the AI, the County assess whether a pattern exists in the development of CDBG- and HOME-funded affordable housing that perpetuates segregation.¹⁷¹ If a pattern exists, the County must take necessary actions "to promote, overcome barriers to and cause the development of affordable rental and homeownership housing outside areas of minority concentration."¹⁷²

C. Title VI of the Civil Rights Act of 1964 and the Obligation of Recipients of Federal Transportation Funds Not to Discriminate.

Title VI of the Civil Rights Act of 1964 bans discrimination based on race, color, and national origin by recipients of federal funds.¹⁷³ Like the FHA, facially neutral policies or practices that have a discriminatory effect on the protected groups violate Title VI unless the practices have legitimate justifications and

164. *Id.*; see *infra* note 172.

165. *Id.* at 30, 62.

166. *Id.* at 82.

167. *Id.* at 94.

168. *Agreement for Voluntary Compliance With [citations omitted] Between U.S. Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity and County of Marin* at 6–7 (Nov. 19, 2010), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7736.pdf.

169. *Id.* at 7.

170. *Id.*

171. *Id.*

172. *Id.*

173. 42 U.S.C § 2000d (1964).

there is no less discriminatory alternative.¹⁷⁴ Accordingly, under the DOT Title VI regulations, recipients of federal assistance are prohibited from maintaining facially neutral transportation policies or practices that have a discriminatory effect without legitimate bases and unless there is no less discriminatory alternative.¹⁷⁵ States such as California that incorporate infill development land use polices in the MPO metropolitan transportation plans required for recipients of federal transportation funds¹⁷⁶ risk loss or suspension of transportation monies as well as HUD funds if their land use practices and policies result in discrimination.¹⁷⁷

As with the obligation to conduct an analysis of impediments to fair housing choice under the affirmatively furthering fair housing requirement of the FHA, the MPO must analyze whether its transportation planning or expenditures result in any disparate impacts.¹⁷⁸ A person believing that any specific class of persons has been subjected to discrimination by a recipient of transportation funds may file a complaint with the Federal Transit Administration (FTA).¹⁷⁹ In 2009, riders of San Francisco Bay Area mass transit did just that when the Bay Area Rapid Transit Authority (BART) proposed using DOT funds to extend BART from the nearest BART station to the Oakland International Airport and reduce the local bus service that had previously served as public transportation between BART and the airport.¹⁸⁰ The extension would not offer viable public transit options to the neighborhood's largely lower-income, minority residents because of the proposed \$12 roundtrip fare and absence of stops.¹⁸¹

The administrative complaint resulted in the FTA conducting a civil rights compliance review, and, finding that BART had failed to conduct a required equity analysis, withdrawing \$70 million in American Recovery and Reinvestment Act funds from the project in February of 2010.¹⁸²

VI. SUSTAINABLE COMMUNITIES ARE AFFORDABLE COMMUNITIES—SOME ESSENTIAL ELEMENTS TO ADD TO THE NEW ERA OF PLANNING.

The early lessons from the California experience are that the inclusion of affordable housing and realization of the potential for displacement of lower-income and minority communities were not adequately addressed in S.B. 375. They also have not been adequately incorporated in the beginning stages of the preparation of the first round of SCS. At minimum, land use planning laws and policies aimed at reducing global warming should include:

174. See, e.g., *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1015–16 (E.D. Pa. 1976); *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 820–21 (3d Cir. 1970).

175. 49 CFR § 21 (2003).

176. See *supra* Section III.

177. 49 CFR § 21.13.

178. Proposed Circular, *supra* note 127, at app. A.

179. 49 CFR § 21.11.

180. See *Bart/Oakland Airport Connector*, PUBLIC ADVOCATES, <http://www.publicadvocates.org/bartoakland-airport-connector-oac> (last visited May 29, 2012).

181. *Id.*

182. *Id.*; see Letter from Peter Rosgoff, Fed. Transit Admin., to Cal. Metro. Transp. Comm'n (Feb. 12, 2010), http://www.publicadvocates.org/sites/default/files/library/feb_12_bart_mtc_letter.pdf.

- Reduction of racial and economic residential segregation;¹⁸³
- Mandatory inclusion of affordable housing in transit-oriented or smart growth developments;
- Preservation of existing neighborhoods, displacement prevention and provision of relocation assistance at levels prescribed by the Uniform Relocation Act (URA)¹⁸⁴ and Section 104(d) of the Housing and Community Development Act,¹⁸⁵ including comparable replacement housing and permanent replacement housing; and
- Inclusion of housing affordability and jobs-housing fit in methodologies developed to measure the impact of climate action plans on GHG reduction.¹⁸⁶

The implementation of state climate change legislation such as S.B. 375 is complex, and, as in any new sweeping legislative mandate, the learning curve for everyone involved is steep. However, citizens, groups, and communities must not be daunted by the complexity and uncertainty, especially when there is potential opportunity and risk for the most vulnerable populations and there are many and growing sources to support sustainable communities equity advocacy. Lower-income households need affordable housing more than ever to recover from the economic crisis.

The risks for lower-income communities must be adequately addressed and fully mitigated in any strategy for comprehensive changes in land use and transportation planning to reduce climate warming. Future development surely will exacerbate climate change unless we build more densely and closer to mass transit. But, it must be recognized that in the early stages, advances in vehicle efficiency and low carbon fuel will be the most critical to solving the problem.¹⁸⁷ For this crucial first stage of the campaign to slow GHG emissions, then, we must insist that the important efforts to compact growth not sacrifice lower-income communities and families based on the mistaken belief that the sacrifice is unavoidable as we strive to dodge climate change disaster.

183. RUSK, *supra* note 8, at 3.

184. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 (1970).

185. In addition to the URA, greater protections are provided for displacement caused by the Community Development Block Grant (CDBG) program, Urban Development Action Grants (UDAG), and the HOME Investment Partnerships (HOME) program under section 104(d) of the Housing and Community Development Act of 1974. 42 U.S.C. § 5304(d).

186. *Supra* note 9. In California, advocates, including affordable housing, public interest law and environmental justice organizations, and regional government staff have formed the Jobs-Housing Fit Working Group to define and develop a methodology for measuring the match between job wage levels and housing affordability that can be used in the preparation of SCS. The working group eventually hopes to establish a quantifiable link between jobs-housing fit and reduction of GHG emissions.

187. INGRAM & HONG, *supra* note 4, at 74.