A Necessary Collision: Climate Change, Land Use, and the Limits of A.B. 32

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The California Global Warming Solutions Act of 20061 (Assembly Bill 32, or A.B. 32) represents the nation's first sweeping effort to regulate greenhouse gas emissions. The law sets an aggressive goal for reducing emissions, but leaves open the question of how to reach that goal. Therefore, A.B. 32 will only be a transformative piece of climate change legislation if it results in regulations as sweeping as the law itself. Since a regulatory regime of this scope will encompass the broadest possible spectrum of activities that generate emissions, A.B. 32's implementation will inevitably collide with prior policymaking paradigms that fail to consider climate. One of the most difficult challenges will be the reduction of greenhouse gas emissions from the transportation sector.

Powering more efficient cars with lower carbon fuel stocks will not necessarily be enough to meet A.B. 32's goals of reducing greenhouse gases to 1990 levels by 20202—Californians must drive less. Managing the demand-side of transportation—typically measured in vehicle miles traveled (VMT)—implicates land use as a major indirect source of greenhouse gas emissions. While a general plan or a zoning ordinance is not commonly considered equivalent to a smokestack or a tailpipe, development patterns wield tremendous influence over the transportation choices people make, the vehicle miles they travel, and therefore, the emission of greenhouse gases.

The transportation-land use connection suggests that the California State Air Resources Board (CARB or "the state board"), the primary state regulator of greenhouse gas emissions, must confront the infirmities in local land use decision-making to curb the rising rates of VMT per capita.

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2. Id. § 38550.
The necessary collision between state environmental goals and local land use authority will test the legal limits of A.B. 32 and CARB's administrative authority, as well as the political capacity of a growing coalition of climate action advocates to break a decades-old stalemate between developers and state and local governments. The near exclusive authority of cities and counties over general planning and zoning combined with their inability (or unwillingness) to internalize the costs of broad environmental externalities associated with auto-centric development patterns are undermining the state's efforts to reduce greenhouse gas emissions.

Political and economic factors, manifested through state and local laws and regulations, have left California with a system that deters density and promotes sprawl. The logic of land use has historically been dictated by self-interest; individual cities and counties make decisions based on insular, local demands, which may or may not align with broader state goals. But because A.B. 32 does not explicitly equip CARB with preemptive authority to regulate local land use, it is unlikely that this landmark law will alone be capable of aligning land use decision-making with California's push to mitigate the impacts of the climate crisis.

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INTRODUCTION

Significantly reducing greenhouse gas emissions in California will require more than technological innovation. California’s geographic settlement patterns must also change. Though fuel and cars may become less carbon-intensive, if Californians do not drive less, population growth and sprawl will jointly undermine advancements in low carbon fuels and automotive efficiency. The average Californian should be given the choice between a three-hour commute via plug-in hybrid electric vehicle and a walk to the subway. Needless to say, the market does not offer such opportunities at present.

As of 2004, transportation accounted for 38% of statewide greenhouse gas (GHG) emissions—slightly less than electricity generation (25%) and industrial facilities (20%) combined. Non-commercial automobile usage—measured by vehicle miles traveled (VMT)—is responsible for 27% of California’s greenhouse emissions.

While advancements in automobile efficiency and low carbon fuel technology will dampen the growth rates of VMT per capita, population booms in “bedroom communities,” where VMT growth rates are highest, will substantially undermine such gains in efficiency. Over the next thirty years,


6. 2007 IEPR, supra note 4, at 261.

7. The California Energy Commission predicts that “[m]eeting Executive Order S-3-05’s long-term goal, which requires a reduction by 2050 to 80 percent below 1990 emissions levels, would certainly require nearly carbon-free transportation and strong actions to reduce VMT.” Id. at 262 (emphasis added). Even if both A.B. 1493 and the Low Carbon Fuel Standard are fully implemented, the Energy Commission predicts that “significant further efforts” would be needed to meet A.B. 32 goals on time. Id at 264.
VMT growth rates are projected to outpace population growth. Barring the rapid emergence of carbon-neutral, low-cost automobiles, local decision-making must account for global warming.

A variety of regulatory mechanisms exist that can help reduce greenhouse gas emissions associated with auto-centric local land use planning. However, no state policy lever targets climate change as comprehensively and directly as A.B. 32.

After examining the historical origins of California’s land use problem, this Comment will examine A.B. 32 and alternative policy levers to determine whether the state possesses the sufficient authority to meaningfully regulate greenhouse gas emissions at the local level.

While A.B. 32 does not impose any explicit limitation on the state board’s administrative discretion over which entities or sectors are subject to regulation, other internal and external factors bound CARB’s ability to directly regulate greenhouse gases associated with local land use planning and zoning. Well-developed principles of constitutional law and statutory interpretation establish a presumption against reading A.B. 32 to imply preemptive state authority over local land use, so CARB will likely tread lightly in promulgating emissions reductions measures that directly address land use.

The political forces favoring local control over land use may also deter state intervention at the local level. After exploring A.B. 32’s legal limits, Part I will investigate the political challenges and opportunities likely to emerge in the coming clash between local land use control and California’s climate change goals. The success or failure of A.B. 32 in the land use context will largely depend on a basic question of political will: do enough voters desire a new American dream, where a car and a house with a lawn are replaced with a bicycle, a condo and environmental peace of mind? Two variables thus emerge which this Comment will explore in turn: whether A.B. 32 preempts local land use authority, and whether the political desire for government-led climate change action will trump the historically insulated, fiscally entrenched local land use power.

I. THE ENVIRONMENTAL MYOPIA OF LOCALISM

[O]ur laws cannot defy the laws of nature. Or, more to the point, the laws of humankind cannot define the laws of nature away the same way that a law can define and redefine what constitutes a “corporation,” “contract,” or “burglary.” The latter are all inventions of the law itself and, therefore, entirely susceptible to modification by legal amendment at any time. But

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9. See infra Part III.A.
10. See Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 827 (Cal. 2006); see infra Part II.A.
our laws cannot modify gravitational or electromagnetic forces, the speed
of light or sound, or the laws of thermodynamics.\footnote{11}

The roots of VMT growth in California are buried deep in traditional land
use practices that pervade local government decision-making processes
statewide. The coupling of self-interest and perverse fiscal incentives has left
many California cities and counties unable or unwilling to correct the problem.
California Planning and Zoning Law\footnote{12} requires local agencies to only conform
to broader state environmental goals in a few places. Instead, local
governments operate under a regime of self-imposed environmental law and
state imperatives are injected indirectly through the primary tools of air quality
regulation,\footnote{13} transportation funding, and the California Environmental Quality
Act.\footnote{14} Greenhouse gas regulation under A.B. 32, however, has the potential to
be the best tool yet to integrate broad state environmental objectives into local
decisions.

\section{The Origins of Localism and the Culture of Sprawl}

Most Americans walked to work prior to 1880.\footnote{15} But, with the advent of
new transportation technologies, new patterns of development became possible.
The emergence of electric streetcars allowed urban workers to live further from
their work in residential suburban communities.\footnote{16} In the decades the early
years of the 20$^{th}$ century, the proliferation of trucks and buses brought "value-
reducing" development to these neighborhoods previously insulated from
industrial and urban development.\footnote{17} Single-family homeowners, faced with the
prospect of a factory going up next door, and the accompanying risk of a drop
in the market value of their homes, began the push for adoption of citywide
zoning laws.\footnote{18}

Local governments responded to industrial encroachment on single-family
residential life by restricting land use to various "zones," typically for the
purpose of segregating industrial facilities from residential neighborhoods. In
\textit{Village of Euclid v. Ambler Realty Co.}, the United States Supreme Court
upheld the constitutionality of zoning as a legitimate exercise of local police
power.\footnote{19} In the decade following \textit{Euclid}, the number of municipalities that

\begin{thebibliography}{99}
\bibitem{11} Richard J. Lazarus, \textit{Environmental Law After Katrina: Reforming Environmental Law by
\bibitem{12} \textsc{Cal. Gov't Code} §§ 65000-66499.58 (West 2008). \textit{See infra Part I.B.1.}
\bibitem{13} \textit{See infra} Part I.B.4.
\bibitem{15} William A. Fischel, \textit{An Economic History of Zoning and a Cure for its Exclusionary Effects},
\bibitem{16} \textit{Id.}
\bibitem{17} \textit{Id.}
\bibitem{18} \textit{Id.} at 320–23.
\bibitem{19} \textit{Vill. of Euclid v. Ambler Realty Co.}, 272 U.S. 365, 397 (1926).
\end{thebibliography}
started governing land use through comprehensive zoning exploded from 76 cities in 1926 to 1,246 in 1936.\textsuperscript{20}

After World War II, suburbia was born. Though car prices began decreasing well before the late 1940s, it was not until the national economy emerged from a depression and a war that all levels of government began devoting sufficient resources to develop the roadways and inter-city highways that would make individualized transportation and the daily commute practicable.\textsuperscript{21}

Small towns, previously insulated from growth and isolated from job centers, suddenly became prime targets for developers seeking to accommodate demand from a growing demographic of potential homeowners. Hungry for tax revenue and armed with few policy tools but the zoning principles of \textit{Euclid}, the localities that absorbed this growth were often ill-equipped to manage many of the challenges that accompanied rapid increases in population and land development. The provision of basic community services, such as roads, sewers, parks and schools, proved difficult enough. The environment was far from a top priority.

\section*{B. Policy Drivers of Sprawl}

\subsection*{1. Weak State Oversight of Planning and Zoning}

The direct regulation of land use in California remains firmly within the grasp of cities and counties. In its current form, California Planning and Zoning Law,\textsuperscript{22} the source of state authority over local land use regulation, is an inadequate tool to mandate broad statewide environmental goals such as greenhouse gas reduction into local land use policy.

The core requirements imposed by California Planning and Zoning Law are procedural and informational. For example, all cities and counties are required to develop a general plan,\textsuperscript{23} which acts as the "'constitution for future development' located at the top of 'the hierarchy of local government law regulating land use.'"\textsuperscript{24} All local zoning ordinances and project proposals must be "consistent" with the general plan.\textsuperscript{25} While the general plan must address

\begin{thebibliography}{99}
\footnotesize
\item 20. Fischel, \textit{ supra} note 15, at 319.
\item 22. \textbf{CAL. GOV'T CODE} §§ 65000-66499.58 (West 2008).
\item 23. \textit{Id.} § 65300.
\item 24. DeVita v. County of Napa, 889 P.2d 1019, 1024 (Cal. 1995) (internal quotation marks omitted).
\item 25. \textbf{CAL. GOV'T CODE} § 65359. While "consistency" is undefined by statute, it is commonly accepted that "an action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." Corona-Norco Unified School Dist. v. City of Corona, 21 Cal. Rptr. 2d 803 (Cal. Ct. App. 1993). \textit{See also} 58 Op. Cal. Att'y Gen. 21 (1975), 1975 Cal. AG LEXIS 3; Citizens of Goleta Valley v. Bd. of Supervisors, 801 P.2d 1161, 1171 (Cal. 1990) (noting that "the propriety of virtually any local decision
various substantive elements, the policy decisions that drive these considerations are left to the discretion of municipal and county government. As one California court put it,

"[t]he thrust of the statutory scheme embodied in the state planning and zoning law is to insure that decisions made by local governmental entities, which affect future growth of their communities, will be the result of considered judgment in which due consideration is given to the various interrelated elements of community life. The statutes make clear, however, that local control is at the heart of the process."

Local governments may choose to adopt land use policies that cohere with state environmental goals, but the general planning requirement is merely intended to provide "an opportunity for each city and county to coordinate" with state and federal programs. Furthermore, the Office of Planning and Research, the state executive agency tasked with overseeing statewide land use planning, does not have "any direct operating or regulatory powers over land use, public works, or other state, regional, or local projects or programs." 

2. Failed Efforts to Reform State Planning and Zoning Law

The most direct means to align local land use decision-making with greenhouse gas emissions reduction goals would be to amend California Planning and Zoning Law. But reform efforts to require greater local adherence to state environmental priorities have historically been stymied by political alliances seeking to preserve localism or promote development.

One such example is Senate Bill 44, a 2005 attempt to require local governments to include "air quality guidelines" in general plans. Local government groups such as the League of California Cities and the California State Association of Counties were initially opposed to S.B. 44, until it was significantly modified. Amendments to S.B. 44 mollified local government opposition by recognizing the "competing demands" local governments face "in making local planning and land use decisions" to "balance air quality with other state and local policies and priorities, such as promoting housing development, the protection and conservation of farmland, natural resources, affecting land use and development depends upon consistency with the applicable general plan and its elements.")

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26. Seven elements must be addressed: land use, circulation, housing, conservation, open space, noise, and safety. CAL. GOV'T CODE § 65302.
29. Id. § 65035.
30. S.B. 44, 2005–06 Reg. Sess. (Cal. 2005). The bill, as it was introduced January 4, 2005 died on the assembly floor. It was later amended in its entirety on August 24, 2006 to address changes to the Vehicle Code, passing the Assembly on August 30, 2006 and the Senate August 31, 2006.
and open space, the avoidance of natural hazards, the promotion of job growth and economic development, and other issues of local, regional, and statewide importance.\(^{32}\)

Despite avoiding outright local government opposition, this significant attempt to reform Planning and Zoning Law failed to overcome a second, perhaps more powerful, political lobby—the development industry. The bill became a primary focus of the California Building Industry Association’s 2005 “Dream Killers” campaign\(^{33}\) and was dubbed by the California Chamber of Commerce a “Job Killer” bill.\(^{34}\) Not surprisingly, S.B. 44 died in the Assembly.\(^{35}\)

Though climate-conscious planning has caught on in certain pockets of California, state efforts to mandate smart growth policy at the local level have been consistently defanged. California’s planning and zoning law amounts to little more than a gentle nudge.

3. **The Distorted Incentives of Fiscalized Land Use Decision-making**

VMT growth and local land use decision-making are linked most fundamentally by a fiscal scheme that forces local governments to seek revenue from sales taxes and development fees to provide basic community services. The passage of Proposition 13 in 1978 and Senate Bill 8 in 1979 made it exceptionally difficult for California’s cities and counties to fund basic services for their citizenry, as their primary source of revenue—local property taxes—was capped and delocalized.\(^ {36}\) Now many local governments, aiming to replace lost property tax revenue through sales taxes, structure their general plans and zoning ordinances to encourage commercial development,\(^ {37}\) which increases driving demand, and in turn, greenhouse gas emissions. Needless to say, the local benefits of these revenue streams do not factor in the externalized cost of global warming pollution.

Many cities and counties have turned to auto-centric projects—like “big-box” retail, shopping malls and car dealerships—as a means of generating sales

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\(^{32}\) Id.


\(^{37}\) Id. at 12.
tax revenue in relatively small areas. As the California Energy Commission explains in its bi-annual energy policy report to the Governor,

local competition for retail and auto malls rarely balances community housing needs with the benefits of non-retail business and industry and may exacerbate transportation and associated environmental problems.

State action to remove the cap on property taxes faces steep, if not insurmountable, political hurdles. Thus, the alignment of fiscal incentives that drive local land use decision-making with statewide climate change goals will likely require an end-around—the climatic externalities of sprawl must be internalized somewhere.

4. The Segregated State of Air Pollution and Land Use Regulation

The federal Clean Air Act of 1970 prompted a short-lived period in which the federal Environmental Protection Agency (EPA) retained authority to regulate indirect sources of air pollution and state implementation plans were required to contain an indirect source review program. Unlike smoke stacks, tailpipes, and other traditional point sources that physically emit air pollutants themselves, an indirect source is defined under federal law as "a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution." In 1973, the EPA promulgated a series of indirect source regulations that would have required large regional shopping centers, major parking facilities, major municipal sports complexes or stadiums, major highways and airports, and large amusement and recreational facilities to obtain federally-controlled permits before construction or significant modification. That same year, EPA required California to include in its implementation plan a series of indirect source controls, which included parking bans, and mandatory bus and carpool lanes.

Local political opposition and a meager allocation of federal resources to help CARB implement the regulations forced EPA to abandon the proposed

38. Id.
39. 2007 IEPR, supra note 4, at 211.
42. California ex rel. Air Resources Bd. v. EPA, 774 F.2d 1437, 1439 (9th Cir. 1985).
regulations in the final version of the revised state implementation plan.\textsuperscript{46} By EPA's own assessment, the plan was a failure.\textsuperscript{47}

In general, the federal system "drew heavy criticism because [indirect source reviews] represented a significant federal intrusion into the traditionally local domain of land use control."\textsuperscript{48} As a result of the unpopularity of federal land use controls, Congress prohibited EPA's indirect source review authority in 1977 and the term "land use" was removed from the Clean Air Act entirely.\textsuperscript{49}

While California may still design, implement and enforce indirect source review programs under the federal Clean Air Act,\textsuperscript{50} legal, political and fiscal limitations similarly hinder the State of California's ability to control land use through air quality regulation. Air Quality Management Districts\textsuperscript{51} may adopt and implement regulations that either "[r]educe or mitigate emissions from indirect and areawide sources of air pollution" or "[e]ncourage or require the use of measures which reduce the number or length of vehicle trips."\textsuperscript{52} However, regulatory authority over indirect sources must not infringe on the "existing authority of counties and cities to plan or control land use."\textsuperscript{53} Thus, state-sanctioned air quality officers' authority over land use decision-making remains a delicate legal and political issue. According to a 1993 opinion of the California State Attorney General, Air Quality Management Districts may not regulate indirect sources to the extent that such regulation preempts municipalities' authority to approve or disapprove the use of land by a facility constituting an indirect source of air pollution.\textsuperscript{54}

For example, if a developer were to propose a new Walmart many miles from the nearest population center, the city or county with jurisdiction would have sole authority to permit the project. Such a sprawl-inducing development would of course have to be consistent with that jurisdiction's general plan,\textsuperscript{55} and could only be approved after review pursuant to the California Environmental Quality Act.\textsuperscript{56} But ultimately, the power to issue the construction permit would be vested in the lead local agency, leaving CARB and the regional air quality authorities little say in the decision.

\textsuperscript{46} Id. at 1285.
\textsuperscript{47} Id.
\textsuperscript{48} Manchester Envtl. Coal. v. EPA, 612 F.2d 56, 58 (2d Cir. 1979).
\textsuperscript{49} Woods, supra note 45, at 1285.
\textsuperscript{51} Air Quality Management Districts are the agencies chiefly responsible for developing and implementing the California state implementation plan. While the state implementation plan must ultimately be approved by California Air Resources Board (CARB), the Air Quality Management Districts tend to play an instrumental role in its construction. See id.
\textsuperscript{52} CAL. HEALTH & SAFETY CODE § 40716(a) (West 2006).
\textsuperscript{53} Id. § 40716(b).
\textsuperscript{55} Many general plans now are being amended to include a climate change element; see infra Part III.A.
\textsuperscript{56} See CAL. PUB. RES. CODE, § 21000 (West 2008).
Lacking preemptive authority over local land use decision-making, CARB and the air districts must rely on local governments' political inclinations to voluntarily adopt statewide air quality priorities. Indirect source controls in California’s past state implementation plans have typically been structured as contingent, non-binding proposals for local government adoption and implementation.\textsuperscript{57} In the period between the state implementation plan’s proposal and adoption, local governments may adopt comparable indirect source regulations through local ordinances to qualify for state certification to implement that component of the state plan.\textsuperscript{58}

The certification process is based entirely on voluntary contractual arrangements facilitated through councils of local government and in certain instances, state air quality and local land use priorities have aligned.\textsuperscript{59} But for those revenue-starved localities lacking a robust tax base from existing developments, land use decision-makers can hardly be blamed for failing to reject the near-term fiscal benefits of sprawl.

II. REGULATING LAND USE UNDER A.B. 32

A. CARB’s Broad but Bounded Authority under A.B. 32

A.B. 32 is one of the most ambitious state environmental laws ever enacted. To mitigate the “serious threat” global warming poses on the “economic well-being, public health, natural resources, and the environment of California,”\textsuperscript{60} A.B. 32 assigns the California State Air Resources Board the role of “monitoring and regulating sources of emissions of greenhouse gases that cause global warming in order to reduce emissions of greenhouse gases.”\textsuperscript{61}

Rather than prescribe specific emissions reduction measures that must be taken, the legislature took a hands-off approach, setting out a rigorous timeline and three primary administrative duties to guide CARB’s implementation of the law: (1) establish a mandatory reporting and verification system for statewide GHG emissions;\textsuperscript{62} (2) determine GHG emissions levels in 1990, in order to set

\textsuperscript{57} See Woods, supra note 45, at 1291. Examples of indirect source controls proposed include an “Environmental Review Program” under which the air district would set minimum standards to be used in assessing a proposed project’s air quality impacts, “Trip Reduction for Schools” to increase average vehicle ridership to 1.5 persons per vehicle, and “Special Activities Centers” such as special event centers, airports, and regional shopping centers whose parking arrangements could be altered to favor shuttles or preferential parking for high occupancy vehicles. Id. at 1290–91.

\textsuperscript{58} Id. at 1292–93.


\textsuperscript{60} CAL. HEALTH & SAFETY CODE § 38501(a) (West 2008).

\textsuperscript{61} Id. § 38510.

\textsuperscript{62} Id. § 38530.
a 2020 baseline emissions reduction target, and (3) prepare, approve and implement a “scoping plan . . . for achieving the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions from sources or categories of sources of greenhouse gases by 2020.”

The complex and ongoing Scoping Plan proceedings have witnessed myriad suggested actions by an ever-growing amalgamation of stakeholders and experts. Actions proposed by stakeholders in the land use and local government sector range from entirely voluntary technical assistance measures to preemptive state regulations of general planning activities. CARB initially refused to even consider actions that would require preemption of local governments’ land use authority because, in their view, the authority to regulate land use “fall[s] under the jurisdiction of other state and local agencies.”

CARB’s draft Scoping Plan, released in June 2008, “encourage[s] local governments to set quantifiable emission reduction targets for their jurisdictions” and proposes “recommend[ed] regional greenhouse gas emission reduction targets,” but gives no indication of any intention to mandate these measures. CARB optimistically observes that “actions taken by local governments are expected to provide significant greenhouse gas reductions,” while acknowledging their limited capacity to effect such “actions”—CARB projects less than two percent of total emissions reductions will come from its A.B. 32 regulations in the “Land Use and Local Government” Sector.

B. A.B. 32 Preemption of Local Land Use Regulations Unlikely

CARB’s efforts to reduce greenhouse gas emissions from vehicle miles traveled associated with local land use planning and zoning would certainly be simpler if the statute had expressly preempted local government. In this hypothetical scenario, with regulations adopted pursuant to A.B. 32 that capped vehicle miles traveled per capita or set greenhouse gas emissions limits on the local level, CARB could conceivably deny building permits and even have zoning ordinances or general plans overturned by courts.

However, A.B. 32 left a job that is anything but simple for CARB. The statute’s silence on preemption in the land use context, puts aggressive regulatory actions on much shakier legal footing. CARB is a creature of statute

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63. Id. § 38550.
64. Id. § 38561.
65. A comprehensive list of proposed strategies can be found at http://www.arb.ca.gov/cc/scopingplan/luscat/documents/draft_stakeholder_strategies.pdf (last visited Sept. 27, 2008).
68. Id at 11.
and must act within the limits of its enabling statute as well as those statutes that expand its administrative powers. Because A.B. 32 does not delegate preemptive authority expressly, and likely does not imply such power either, CARB’s efforts to regulate emissions through land use and local government actions will likely take the form of suggestions, not mandates.

The California Constitution confers upon counties and city the power to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Local land use ordinances and regulations fall under this “field of constitutionally protected rights,” and consequently, A.B. 32 will be construed narrowly in the context of land use.

In determining whether A.B. 32 confers preemptive authority to CARB, a court would evaluate whether a particular ordinance or exercise of local land use authority conflicts with A.B. 32. Conflict exists when the ordinance in question “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.” Preemption by state law may either be express or implied. In light of general presumption against preemption in the land use context, the route towards either reading is narrow.

The statute clearly does not expressly preempt local law or land use authority. The text of A.B. 32 reveals no explicit state mandate to preempt local land use authority, to adopt any binding regulations on cities and counties. The term, “land use,” like “transportation,” and a host of other major greenhouse gas emissions sources are not mentioned in the text of the statute.

Thus, implied preemption remains the only avenue for CARB to preempt local regulations in the field of land use. Courts will examine three issues in determining whether A.B. 32 preempts a local land use regulation by implication: (1) whether the subject matter (in this case, the mitigation of global warming through the reduction of greenhouse gas emissions) has been so fully and completely covered by general law as to clearly indicate that it is exclusively a matter of state concern, also known as implied field preemption; (2) whether the subject matter partially addressed by general law clearly indicates that further or additional local action would violate a central state concern; or (3) whether the potential local benefits of an ordinance is outweighed by its adverse effect on the subject matter partially addressed by

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69. 1-10 MATTHEW BENDER, CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE § 10.03 (2008).
70. CAL. CONST. art. XI, § 7.
71. 2 CAL. JUR. 3D Administrative Law § 186 (2007) (citing In re Porterfield, 168 P.2d 706 (Cal. 1946)).
73. Morehart v. County of Santa Barbara, 872 P.2d 143, 156 (Cal. 1994) (citations omitted in original).
74. See Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 827 (Cal. 2006).
the general law. The two latter categories can be understood under the general principle of implied conflict preemption.

1. **A.B. 32 Does Not Fully Occupy the Field of Greenhouse Gas Regulation**

   A.B. 32 maintains, "[n]othing in this division shall relieve any person, entity, or public agency of compliance with other applicable . . . local laws or regulations . . . and other requirements for protecting public health or the environment." Furthermore, A.B. 32 withholding authority from CARB "to alter any programs administered by other state agencies for the reduction of greenhouse gas emissions." Because A.B. 32 did not assign the state board exclusive authority to reduce greenhouse gases, there is no argument for field preemption here.

2. **Preemption of Local Land Use Authority by Implication Unlikely**

   An emissions reduction measure approved in the Scoping Plan and enforced by the state board in a way that intruded on discretionary local land use decisions would also be unlikely to survive legal challenge. The instances in which state preemption of local land use authority have been upheld on implied grounds have involved conflicts between local ordinances and statutes, not administrative regulations.

   In determining whether local regulation impliedly conflicts with A.B. 32, a court would look to the whole purpose and scope of the state legislative scheme. An attempt by CARB to enforce a regulation through implied powers of preemption would only survive judicial scrutiny if the continued application of the city or county’s laws in question were found to be a continuous impairment of A.B. 32's explicit statutory objectives.

   Given the “serious threat” global warming poses “to the economic well-being, public health, natural resources, and the environment of California,” the statute’s objectives could be construed to require state regulation of land use in order to reduce greenhouse gas emissions from vehicle miles traveled “by necessary implication.”

   As CARB itself stated, “[l]ocal governments have the power to affect the main sources of pollution directly linked to climate change through

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75. Sherwin-Williams, 4 Cal. 4th at 897-898.
76. [CAL. HEALTH & SAFETY CODE § 38592(b) (West 2008).]
77. Id. § 38574.
78. See e.g., Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 827 (Cal. 2006); Am. Fin. Servs. Ass’n v. City of Oakland, 104 P.3d 813 (Cal. 2005).
81. [CAL. HEALTH & SAFETY CODE § 38501(a) (West 2008).]
82. Big Creek Lumber Co., 136 P.3d at 827.
infrastructure investments, land use decisions, building codes, and municipal service management.\textsuperscript{83} Unless local governments begin aligning land use decisions with the statewide mandate to reduce greenhouse gas emissions, the purpose of A.B. 32 could be continuously frustrated.

The Attorney General's observations regarding the effects of San Bernardino's general plan outlines the impact that inland growth will have on VMT greenhouse gas emissions without land use reform:

The increases in driving, and in use of energy produced by combustion of fossil fuels in the planned commercial, industrial, and residential development that will occur as a result of adoption of the General Plan update will also increase emissions of greenhouse gases such as carbon dioxide.\textsuperscript{84}

Even for smaller cities and counties, where the effects of local land use decisions may appear insignificant in isolation, the accumulation of these incremental decisions will have a considerable impact on the statewide greenhouse gas emissions.\textsuperscript{85}

Despite the undeniable impact of local land use decision-making on greenhouse gas emissions, the structure of the Health and Safety Code indicates a lack of legislative intent for A.B. 32 to confer authority to regulate land use to CARB. While greenhouse gas regulation could have been integrated into CARB's existing authority over other air pollutants, A.B. 32 creates a separate, independent section of the Health and Safety Code governing this particular type of air pollutant. A.B. 32 provides that, "\textquote{\textquote{n}othing in this division shall limit or expand the existing authority of any district, as defined in Section 39025.}" Thus, any authority held by the Air Quality Management Districts under the California Clean Air Act to regulate indirect sources is not transferable to A.B. 32. The near impossibility for CARB to administer an indirect source regulation at the local level without the aid of these local implementation agencies indicates A.B. 32 does not impliedly preempt local land use regulations.

The "coordination" provisions of A.B. 32 also suggest a narrow reading of the text against implied conflict preemption. The statute explicitly requires CARB to coordinate and consult with state agencies,\textsuperscript{86} other states, the federal government, other nations,\textsuperscript{87} as well as "the environmental justice community, industry sectors, business groups, academic institutions, environmental

\textsuperscript{83} CARB, \textit{supra} note 66, at C-8.
\textsuperscript{86} \textit{CAL. HEALTH & SAFETY CODE §§ 38501(f), 38561(a)} (West 2008).
\textsuperscript{87} \textit{Id.} § 38564.
organizations, and other stakeholders in implementing this division.”

Cities, counties, and local agencies are notably absent from this list.

While local governments might reasonably be considered “other stakeholders,” the legislative history of A.B. 32 indicates the decision to omit local governments from the list of stakeholders was a conscious one. A prior version of A.B. 32 required CARB to “consult with the districts in the development of measures for the reduction of emissions of greenhouse gases that will affect emissions of criteria air pollutants from stationary sources.” That language was eliminated before A.B. 32 was passed.

The limits on A.B. 32 are built into the design of the statute. The legislature had the ability to include a provision authorizing the preemption of local authority, but for whatever reason, political or otherwise, it did not. CARB will either have to find creative, non-preemptive approaches to influencing local land use decision-making, or lobby for additional legislative authority directly regulate in this sector.

C. Achieving A.B. 32’s Goals without Preemption

Without a more explicit directive from the state legislature, the state board would likely fail to assert preemptive authority to reduce indirect sources of greenhouse gas emissions through the regulation of land use. However, alternate modes of regulation exist that could realign development trends to reduce sprawl, vehicles miles traveled, and ultimately, greenhouse gas emissions.

1. “Real” Reductions and the Power of Monitoring

Under A.B. 32, CARB is required to ensure “greenhouse gas emission reductions achieved are real, permanent, quantifiable, verifiable, and enforceable.” To meet this standard, A.B. 32 orders CARB to adopt regulations that require “the reporting and verification of statewide greenhouse gas emissions and to monitor and enforce compliance with this program . . . beginning with the sources or categories of sources that contribute the most to statewide emissions.”

While the statute does not directly address whether the reporting and verification clause applies to local governments, CARB appears to consider

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88. Id. § 38501(f).
89. Were A.B. 32 found to be “susceptible to more than one reasonable interpretation,” courts would likely refer to “extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.” Hoechst Celanese Corp. v. Franchise Tax Bd., 22 P.3d 324, 332 (Cal. 2001) (citing People v. Woodhead, 741 P.2d 154, 156 (Cal. 1987)).
91. CAL. HEALTH & SAFETY CODE § 38562(d)(1).
92. Id. § 38530.
their jurisdiction in this area valid. In June 2007, the state board approved “Guidance and Protocols for Local Governments to Facilitate GHG Emission Reductions” as an early action measure to be prepared for the Scoping Plan due on January 1, 2009 and implemented on January 1, 2010.\(^\text{93}\) This guidance document identifies voluntary measures for local governments to adopt, including: (1) best practices for local governments to reduce GHG emissions; (2) categorization and prioritization of strategies by applicability to community types (i.e., urban, suburban, rural), cost-effectiveness, time needed to achieve reductions, etc.; (3) local government protocols for emission reduction accounting; and (4) appropriate modeling tools to support emission quantification at the local level.\(^\text{94}\)

These voluntary measures do not require CARB to preempt local law. An earlier version of A.B. 32 explicitly authorized CARB to “provide information and assistance to cities, counties, and local agencies to help reduce greenhouse gas emissions in their jurisdictions.”\(^\text{95}\) Though this language was deleted in a subsequent revision, it would appear contrary to the purpose of A.B. 32’s robust monitoring requirements to interpret this revision as an indication of limits on reporting requirements for local governments.

Beyond the issue of preemption, these regulations pointed at local governments, and the indirect sources they control through discretionary land use regulation, appear to fall under the statute’s definition of a “greenhouse gas emission source,” which is defined as:

\[
\text{[A]ny source, or category of sources, of greenhouse gas emissions whose emissions are at a level of significance, as determined by the state board, that its participation in the program established under this division will enable the state board to effectively reduce greenhouse gas emissions and monitor compliance with the statewide greenhouse gas emissions limit.}\]

The text does not distinguish between types of sources, opting for the broadest possible term, “any,” to describe the emission sources subject to greenhouse gas regulation. Unlike this broad definition, other state air pollution laws distinguish between various types of sources including “indirect and areawide sources.”\(^\text{97}\) So long as indirect sources can be considered a “source, or category of sources,” the remainder of the definition could reasonably be interpreted to apply to local land use decisions, such as the inclusion of a climate change element in a local government’s general plan.

The term “indirect source” has been narrowly interpreted by the California Attorney General as excluded from air districts’ permitting authority,\(^\text{98}\) but such authority flows from statutory language that is considerably more explicit.
than the aforementioned section in A.B. 32. Air districts may require a permit "before any person builds, erects, alters, replaces, operates, or uses any article, machine, equipment, or other contrivance which may cause the issuance of air contaminants . . . ."99 While an indirect source could conceivably be viewed as the "cause" of air contamination, roads or buildings cannot be construed as "any article, machine, equipment, or other contrivance."100 But A.B. 32's definition of "greenhouse gas emission source" does not express such limitations on CARB's discretion to monitor and account for the emissions of indirect sources such as roads or buildings attributable to local government action.

The aforementioned list of local government monitoring and verifications measures must also meet A.B. 32's dual requirements of maximizing cost-effectiveness and technological feasibility.101 Measuring and monitoring emissions at the local level is technologically feasible. CARB is already able to quantify the carbon dioxide-equivalent emissions from individual projects.102 Cities and counties already measure the vehicles miles traveled associated with various land use decisions. In fact, several California cities and counties are already voluntarily compiling greenhouse gas inventories in accordance with the California Climate Action Registry's voluntary protocols, while many local planning agencies are amending their locality's general plan to include a climate change element.103 With this triumvirate of practical experience, data, and technology, a statewide inventory of city or county-based greenhouse gas emissions appears technically feasible.

The cost-effectiveness requirement of A.B. 32 is a greater hurdle to measuring and verification measures at the level of local government. Whether local governments would be responsible for financing the monitoring of emissions reduction is unclear. This cost-bearing question was present before A.B. 32's passage—a Senate Appropriations Committee Report indicates this concern:

Staff note that it is not clear who must do the monitoring (Will private entities be responsible for reporting to the board? Will local governments? Will the board?). If the board will do the measuring, it will require additional staff and measurement equipment, at a cost of potentially millions of dollars in 2006–07 and 2007–08. In subsequent years, the board

99. CAL. HEALTH & SAFETY CODE § 42300(a).
100. Id.
101. Id. § 38560.
would need staff to conduct the monitoring, at an annual cost of hundreds of thousands of dollars.\textsuperscript{104}

If the state board outsourced these costs to local governments, financing the monitoring could be problematic. This is an issue CARB will have to resolve going forward, as the budgetary impact of protocol compliance on local governments is not addressed in the early action plan.\textsuperscript{105}

While local governments may not have to mitigate greenhouse gas emissions under A.B. 32, they will likely have to adhere to standards set by CARB if they want those mitigation efforts to count at the state level. To focus solely on reduction without implementing strict monitoring and verifications systems, would be like embarking on an aggressive weight-loss program without a scale or any information about the caloric content of different foods. But even without a scale or food labels, a dieter can at least look in the mirror to get a rough sense of progress. There is no equivalent in the complex field of atmospheric science. The mitigation of climate change through greenhouse gas reductions will require monitoring of a scale and precision unparalleled in the history of environmental regulation.

2. \textit{Regulating Land Use in Concurrence with Local Government}

While CARB will likely avoid any preemption conflicts with local government, it may seek to regulate indirect sources of greenhouse gas emissions alongside local land use authorities under a concurrent jurisdiction approach. Such an approach was upheld in \textit{Orange County Air Pollution Control District v. Public Utilities Commission}, where the California Supreme Court found that neither the California Public Utilities Commission nor the County Air Pollution Control District had “exclusive or paramount authority” to grant a permit to construct a local electric generation facility.\textsuperscript{106} Instead, the Public Utilities Commission, which granted the construction permit, and the air pollution control district, which denied the permit based on emissions regulations, were held to have equally enforceable rules and regulations of concurrent jurisdiction—utilities would have to comply with both.\textsuperscript{107} In this instance, the Public Utilities Commission attempt to unilaterally approve a construction permit was annulled.\textsuperscript{108}

In the A.B. 32 context, such a case could arise if a local government asserted preemptive authority over CARB’s exercise of discretionary regulatory power over the construction of various buildings, parking lots, or other indirect

\textsuperscript{104} Senate Appropriations Committee, Fiscal Summary, A.B. 32, 2005-06 Leg., at 2 (Cal. 2006).

\textsuperscript{105} The early action plan lists “discrete early action greenhouse gas emission reduction measures” that can be implemented before the major reductions that will implemented pursuant to the Scoping Plan. \textit{CAL. HEALTH \\

\& SAFETY CODE } § 38560.5(a) (Deering 2008).

\textsuperscript{106} \textit{Orange County Air Pollution Control Dist. v. Public Utils. Comm’n}, 4 Cal. 3d 945, 947 (1971).

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.} at 54.
emissions sources. A court would be required to examine whether cities' and counties' local land use authority preempts CARB regulations adopted pursuant to A.B. 32. This is the opposite dynamic of the preemption example outlined above, where the state was forced to challenge a city or county. A concurrent jurisdiction outcome could result in a cooperative scheme whereby local governments and CARB would both essentially possess veto power over the construction of indirect sources of emissions.

3. Local Carbon Budgets

If CARB decides not to promulgate preemptive regulations and opts solely to adopt emissions reduction accounting protocols, it is critical that local actions be counted towards 2020 goals as "real" emissions reductions under A.B. 32. Even "voluntary actions" to reduce emissions by early-movers must be monitored and are entitled to credit for such actions.

CARB could establish voluntary local or regional emissions reduction targets as suggested by the draft Scoping Plan, or put differently, cities and counties would be given a "carbon budget." If a local government elected to be regulated under a carbon budget or opted into local or regional emissions targets, it would likely be subject to state enforcement, as local actions "authorized by the state board for use to comply with greenhouse gas emission limits" are enforceable under A.B. 32.

Capped entities (including cities, counties or councils of local government) could choose from a CARB-administered menu of mitigation actions to meet their tailored targets. Each regulated entity would be allocated emissions allowances consistent with its carbon budget, and could potentially trade such allowances with other regions in order to meet its targets. This trading scheme would ensure compliance with section 38562, which requires CARB to:

109. S.B. 97 expressly requires the Office of Planning and Research and the Resources Agency to "incorporate new information or criteria established by the State Air Resources Board," which would logically entail CARB's considered local government greenhouse gas emission reduction accounting protocols. CAL. PUB. RES. CODE § 21083.05(c) (Deering 2008). Thus, coordinating these parallel administrative actions portends little legal conflict.

110. CAL. HEALTH & SAFETY CODE § 38580(a) (Deering 2008).

111. The "carbon budget" concept has been advocated for by at least one member of the state board, Dr. Dan Sperling. For more information, see DEBORAH SALON, DANIEL SPERLING, ALAN MEIER, SINNOTT MURPHY, ROGER GORHAM & JAMES BARRETT, INST. OF TRANSP. STUDIES, UNIV. OF CALIFORNIA, DAVIS, CITY CARBON BUDGETS: ALIGNING INCENTIVES FOR CLIMATE-FRIENDLY COMMUNITIES (2008), http://pubs.its.ucdavis.edu/download_pdf.php?id=1178 (last visited Sept. 9, 2008).

112. CAL. HEALTH & SAFETY CODE § 38571.

113. This list could borrow from, or incorporate the new CEQA guidelines as well. SB 97 expressly requires the Office of Planning and Research and the Resources Agency to "incorporate new information or criteria established by the State Air Resources Board." CAL. PUB. RES. CODE § 21083.05(c) (Deering 2008). Integrating parallel administrative action portends little legal conflict in this context.
(1) Design the regulations, including the distribution of emissions allowances where appropriate, in a manner that is equitable, seeks to minimize costs and maximize the total benefits to California . . . (2) Ensure that activities undertaken to comply with the regulations do not disproportionately impact low-income communities. (3) Ensure that entities that have voluntarily reduced their greenhouse gas emissions prior to the implementation of this section receive appropriate credit for early voluntary reductions . . . 7) Minimize the administrative burden of implementing and complying with these regulations.¹¹⁴

The flexibility of a regional cap-and-trade system would balance the needs for early-movers to receive credit for their voluntary actions prior to A.B. 32, with the economic and fiscal impediments that may have precluded other cities and counties from taking action prior to A.B. 32.¹¹⁵

Assuming a non-preemptive design were possible, local or regional carbon budgets could still be challenged as inconsistent with the text and purpose of A.B. 32. But operating free of the presumption against preemption, this state regulation would likely withstand judicial review. While a regulation establishing local carbon budgets would not likely qualify as a direct emissions reduction measure¹¹⁶ or an alternative compliance mechanism,¹¹⁷ such a regulation meets the definition of a “market-based compliance [mechanism]”¹¹⁸ or a “monetary and nonmonetary incentives” program.¹¹⁹

Voluntary carbon budgets would need to be found “necessary . . . to facilitate the achievement of the maximum feasible and cost-effective reductions of greenhouse gas emissions by 2020.”¹²⁰ Numerous studies already indicate the necessity of aligning local land use decision-making with A.B. 32’s goals, in light of development patterns’ institutionalization of VMT-GHG growth.¹²¹

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¹¹⁴. CAL. HEALTH & SAFETY CODE § 38562(b).
¹¹⁵. Many early-movers enjoy fiscal independence from exaction fees and sales tax revenues (due in part to higher property values) than the local governments that have yet to embrace more climate-conscious land use policies.
¹¹⁶. “Direct emission reduction’ means a greenhouse gas emission reduction action made by a greenhouse gas emission source at that source.” CAL. HEALTH & SAFETY CODE § 38505(e).
¹¹⁷. Both tools are likely intended to regulate stationary emission sources, such as power plants. “Alternative compliance mechanism’ means an action undertaken by a greenhouse gas emission source that achieves the equivalent reduction of greenhouse gas emissions over the same time period as a direct emission reduction, and that is approved by the state board.” Id. § 38505(b).
¹¹⁸. “Market-based compliance mechanism’ means either of the following: (1) A system of market-based declining annual aggregate emissions limitations for sources or categories of sources that emit greenhouse gases. (2) Greenhouse gas emissions exchanges, banking, credits, and other transactions, governed by rules and protocols established by the state board, that result in the same greenhouse gas emission reduction, over the same time period, as direct compliance with a greenhouse gas emission limit or emission reduction measure adopted by the state board pursuant to this division.” Id. § 38505(k).
¹¹⁹. See id. § 38561(b).
¹²⁰. See id.
¹²¹. See, e.g., REID EWING, ROLF PENDALL & DON CHEN, MEASURING SPRAWL AND ITS IMPACT (2002).
One practical issue facing a market-based system of local carbon budgets is how participating entities could use their carbon credits. In theory, a ton of carbon reduced in conjunction with a general plan's climate change element could be equated to a ton of carbon reduced from an electric utility's procurement of a new wind farm. But in practice, such a system could run the risk of double counting reductions for sectors that overlap with land use planning and zoning.

Like all market-based emissions trading systems, the integrity of this regulatory regime would depend on reliable and enforceable monitoring protocols. In order for a factory, an automobile company, or a city to obtain credit for greenhouse gas emissions reductions, these entities must know what their baseline levels of emissions were. If monitoring is inaccurate or lax, the trading regime could be flooded with allowances, causing the cost of compliance to fall, and with it, the incentive to reduce emissions.

Despite the variables and uncertainties, a statewide portfolio of carbon budgets would have a chance at competing with the warped fiscal incentives that currently compel cities and counties with meager resources and limited political will towards sprawl and VMT-intensive growth.

III. BEYOND A.B. 32

A.B. 32 is California's first big step towards climate change mitigation, but it is just that, a first step. For a problem as deeply entrenched as VMT growth, strong environmental review, interagency coordination, and a more explicit directive from the legislature is necessary. Nevertheless, the State of California possesses other tools to address VMT growth and the insular nature of local land use decision-making—including litigation under the California Environmental Quality Act, fiscal incentives through regional transportation planning, and the Climate Action Team process.

A. Environmental Review

Even if CARB adopted only the local government emission reduction accounting protocol, A.B. 32's 2020 targets could be met by local action catalyzed by State ex rel. Brown v. County of San Bernardino and other ongoing suits under the California Environmental Quality Act. In 2007, CEQA litigation sounded a warning signal to local agencies that the failure to consider

122. Order Regarding Settlement, State ex rel. Brown v. County of San Bernardino, No. CIVSS 0700329 (Cal. Super. Ct. Aug. 28, 2007), available at http://ag.ca.gov/cms_pdf/press/2007-08-21_San_Bernardino_settlement_agreement.pdf. The Attorney General claimed the California Environmental Quality Act requires a consideration of the effects of the update on greenhouse gas emissions and potentially adopt feasible mitigation measures for such effects. San Bernardino's failure to address climate change in its general plan update made for a strong CEQA challenge. The county has the "largest land area of any county in the contiguous United States," VMT rates that exceed approximately 28 million miles per day, and an average of 10.35 trips per day per household, with over 84% of these trips taken by car. Pet. for Writ of Mandate ¶ 17.
climate change impacts when making discretionary land use decisions was illegal regardless of A.B. 32. The San Bernardino settlement stipulated that San Bernardino would augment its general plan with a climate change element that would, inter alia, inventory all greenhouse gases “reasonably attributable to [San Bernardino’s] discretionary land use decisions” and internal operations.

In the wake of San Bernardino and numerous warning letters from the Attorney General to other cities and counties considering similar general plan updates, the legislature responded with Senate Bill 97, which requires the Office of Planning and Research to develop guidelines “for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions ....” These emissions mitigation guidelines, due in 2010, will assist local agencies by providing policy tools to make climate-consciousness land use decisions, and according to the Governor, will also provide “predictability to California public agencies and businesses.”

While CEQA may have already done the hard work of mandating land use-inclusive local greenhouse gas inventories, and S.B. 97 will hopefully equip local governments with technical guidance on meeting the new gloss on CEQA, mitigation measures under S.B. 97 should be harmonized with CARB’s Scoping Plan. Otherwise, local action will lack a consistent metric for progress.

Neither the San Bernardino settlement nor S.B. 97 integrated local climate action into the broader A.B. 32 framework. If mitigation efforts at the local level are not monitored and regulated under CARB’s Scoping Plan, the gap will only widen between piecemeal, voluntary, self-enforced action and “real, permanent, quantifiable, verifiable, and enforceable” reductions. A rigorous emissions accounting protocol would make local action meaningful in the context of A.B. 32. If properly designed and implemented, this framework could create substantial monetary and non-monetary incentives for cities and counties to mitigate greenhouse gases in land use decision-making. Even for voluntary local mitigation efforts, if those localities that reduced emissions

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125. CAL. PUB. RES. CODE §§ 21083.05(a) (Deering 2008). S.B. 97 is codified at CAL. PUB. RES. CODE §§ 21083.05, 21097.

126. In light of the deferential judicial treatment CEQA guidelines have historically received, they are likely to be respected by local agencies and courts as having the force of law. See, e.g., City of Santa Ana v. City of Garden Grove, 160 Cal. Rptr. 907 (Cal. Ct. App. 1979) (deferring to CEQA guidelines, which stated that a general plan amendment did constitute a project).

worked with CARB to ensure these reductions were real, permanent, quantifiable, verifiable, enforceable, and most importantly, additional to any reductions receiving credit under the auspices of some other sector (e.g. transportation or electricity), local governments could potentially monetize these efforts through the voluntary carbon market.  

B. Providing Incentives for Localities through Transportation Financing

Senate Pro Tempore Darrel Steinberg introduced Senate Bill 375 to “help implement AB 32 by amending programs that are beyond [CARB’s] current authority.” The bill was signed into law by Governor Schwarzenegger on September 30, 2008. Through incentives such as transportation financing and eased CEQA requirements for development that encourages urban density, S.B. 375 would encourage, but not require, localities to adopt “sustainable communities strategies” to integrate land use decision-making with broader statewide emissions reductions goals under A.B. 32. To fill in any alleged gaps in CARB’s greenhouse gas regulation authority, the bill requires CARB to provide regional greenhouse gas emission reduction targets for the automobile and light truck sector by September 30, 2010.

Much like the “Local Carbon Budgets” proposal above, there remains the open question of how reductions achieved to meet these regional “targets” would count towards statewide emissions “limits” under A.B. 32. From a quantitative standpoint, emissions reductions from land use still would remain complex. From a fiscal perspective, S.B. 375 would establish real financial incentives to gird CARB’s draft Scoping Plan, which “[encouraged] local governments to set quantifiable emission reduction targets for their jurisdictions” and “[recommended] regional greenhouse gas emission reduction targets.” However, this bill runs the risk that CARB would set regional targets insufficiently aggressive, thereby unlocking valuable transportation financing dollars for localities that did little to advance statewide goals under

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128. Additionality is the lynchpin of any voluntary carbon offset project. While various offset providers and exchanges have different criteria for defining additionality, central to all is the requirement that the emissions reduced by the carbon offset project were “additional” business as usual. Put differently, the question is “whether the added revenue or other resources gained from selling GHG offset credits somehow enables a project's implementation, or if the extra revenue simply lines the pockets of those who would have implemented the project anyway?” Michael Gillenwater, *Policing the Voluntary Carbon Market*, Nature Reports Climate Change, 85-87 (November 2007).


131. Id. § 60(b)(2)(A).

132. See infra Part II.C.2.

A.B. 32. The cross-sectoral integrity of this policy framework (i.e. a ton of carbon reduced from an amended general plan is equal to a ton of carbon reduced from a power plant) is crucial, and would be well served by more rigorous and accurate local emissions accounting methodologies.

C. Soft But Substantial Power Vested in the Climate Action Team

The agency ultimately accountable for developing and enforcing the early action measures and the Scoping Plan is the California State Air Resources Board. However, other actors may also play an important role in reducing greenhouse gases generated from VMT. A.B. 32 solidified the Climate Action Team's role as coordinator of "overall climate policy." The Climate Action Team assembled the Land Use Subgroup to identify existing state programs and develop new "cross-cutting" land use strategies that can be employed by state agencies to reduce greenhouse gas emissions. Thus far, the Land Use Subgroup has not recommended legislative or regulatory reforms that would preempt local planning authority. Like CARB, other state agencies are unlikely to attempt to directly preempt local laws and regulations in the land use sector. Several proposals being considered explore indirect means by which state agencies could align local land use planning with emissions reduction goals, as seen in Table 1.

The proposals being considered are compelling. But the Land Use Subgroup has no administrative authority of its own; ultimately the effectuation of land use reform must come from legislative or executive mandates. Without a clear message from Sacramento to the contrary, state agencies are likely to tread lightly, given the reigning jurisprudential presumption that land use regulation is the domain of local government.
Table 1

<table>
<thead>
<tr>
<th>Agency</th>
<th>Strategy</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caltrans</td>
<td>Infill Development</td>
<td>Strengthen infill development near transit stations/stops and employment centers in the regional and local land use planning.</td>
</tr>
<tr>
<td>Caltrans</td>
<td>Regional Blueprint Planning</td>
<td>Support adoption of Blueprint plans at local and regional agencies.</td>
</tr>
<tr>
<td>Housing and Community Development</td>
<td>Housing Element</td>
<td>Update Housing Element guidance and outreach efforts to include climate change considerations</td>
</tr>
<tr>
<td>Housing and Community Development</td>
<td>Parking Maximums</td>
<td>Subject developers seeking State-administered funding to maximum rather than minimum off-street parking standards and bear maintenance costs</td>
</tr>
<tr>
<td>Office of Planning and Research</td>
<td>Vehicle miles traveled inclusion in Environmental Impact Reports</td>
<td>Require VMT to be addressed in EIRs of new development projects over a specified size, with targets determined by state or regional entities.</td>
</tr>
<tr>
<td>Transportation Commission</td>
<td>Regional Transportation Plan Guideline Update</td>
<td>Develop a plan for incorporating strategies to reduce mobile source greenhouse gas (GHG) emissions in the Regional Transportation Plan (RTP) Guidelines</td>
</tr>
<tr>
<td>State Water Resources Control</td>
<td>GHG criteria for Grant Programs</td>
<td>New grant programs under Proposition 84 will include criteria for how well a proposal incorporates climate strategies</td>
</tr>
</tbody>
</table>

137. The strategies outlined in this table were collected from the proposals of various stakeholders in LUSCAT, DRAFT STRATEGIES SUBMITTED TO LUSCAT AND ARB BY STAKEHOLDERS (2008), available at www.climatechange.ca.gov/luscat/documents/2008-03-17-20-21_meeting/draft_stakeholder_strategies.pdf.

138. To support Regional Blueprint Planning, Caltrans currently “provide[s] grants to Metropolitan Planning Organizations to engage in integrated planning that will lead to an on-going framework for collaboration among regional agencies, local governments and State agencies to promote mobility, more housing and transportation choices, access to jobs, healthy communities, and a thriving economy.” DRAFT LUSCAT SUBMISSION TO CARB SCOPING PLAN ON LOCAL GOVERNMENT, LAND USE, AND TRANSPORTATION 59 (2008), available at http://www.climatechange.ca.gov/luscat/documents/2008-05-14_meeting/DRAFT_LUSCAT_Submission_to_CARB.pdf.
D. Can Climate Change Break the Land Use Reform Stalemate?

The many failed attempts to reform Planning and Zoning Law have one thing in common: they all occurred before California’s climate consensus. The new political will—embodied in A.B. 32—to mitigate climate change, could break the cycle, and reverse many years of local deference to auto-centricity and VMT-intensive patterns of development and settlement. The issue of global warming is not so much a thumb on the political scale as it is a steel-toed boot.

It will be a challenge to overcome voters’ well-demonstrated “lack of interest in significant short-term economic sacrifice for the benefit of other persons (and environmental interests) in distant places and times.”139 Local land use reform must be in local government’s self interest if it is going to work. Cities and counties have adequate political and constitutional firepower to block just about any land use reform effort their constituents or their budgets will not tolerate.

If administrative or legislative action does not rearrange the fiscal reality of land use planning, reform efforts will fail. If the myopia of local land use planning is not confronted, California’s historic effort to mitigate climate change will fail too. Global warming represents California’s best chance to strike a balance between self-interest and long-term environmental sustainability. It is time for private interest to align or give way to the greater good.

139. Lazarus, supra note 11, at 1043.

We welcome responses to this Comment. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.