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Sprawl Bill May Have Widespread Effects

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A couple of groundbreaking state laws may signal the start of a busy era for California climate change lawyers.

Following AB 32, a 2006 law setting greenhouse gas reduction targets, the state Legislature passed SB 375, a law that turns land use planning on its head, and that climate change lawyers say is being closely watched by other states.

Gov. Arnold Schwarzenegger signed the bill into law in September, making it the nation's first attempt to tackle global warming by limiting urban sprawl. SB 375 gives local governments and developers incentives to build high-density projects near public transportation. The overall goal is to create well-designed, walkable communities that result in fewer car trips. In California, 38 percent of greenhouse gases come from cars.

'Smart growth' not a new idea

But where SB 375 breaks new ground is its approach. It encourages local governments to integrate their transportation and land use planning, offering some big carrots along the way: Projects that reduce car trips are put at the front of the line for state and federal transportation dollars. Those built within half a mile of public transit lines, among other criteria, are exempt from California's burdensome environmental review process.

"It is the first attempt in the country to subject our transportation and land use planning to fixed performance standards," said Robert Wyman Jr., co-chairman of the 220-lawyer climate change practice at Latham & Watkins.

"This is the first time those efforts will actually be subject to a tonnage (of carbon dioxide) number. It will be either a tonnage cap or a per capita number per region. That's never been done before. It's making regions accountable for the land use and transportation planning in a concrete way," said Wyman, who is based in Los Angeles.

The law tosses out a decades-long focus on traffic studies to guide growth. The idea is that when you plan a community based on how busy its intersections will become if you add a development — as many communities do — that encourages broad, sprawling growth. Instead, plan communities where people can actually give up several car trips.

In fact, traffic volume — measured by "intersection level of service" — is on the chopping block in the latest draft of guidelines for the California Environmental

Quality Act. Barbara Schussman, a partner in Bingham McCutchen's Walnut Creek office who specializes in land use litigation, says it shows that policy makers are looking closely to see how SB 375's transportation model works out.

"SB 375 technically doesn't mandate a whole lot, but it creates some incentives," said Schussman, whose firm's climate change group has about 45 attorneys. "The hope was that if there ever was a time for people to embrace regional planning, this would be it. People do see climate change is real, and they see this as a way to tackle it. It's very difficult to get people to come to a consensus, and this might be the right time politically to do that."

These changes are adding a new level of complexity to project development, and clients are already asking how it will affect their proposed developments, said David Gold, a Walnut Creek partner specializing in land use at Morrison & Foerster.

"It's going to mean an increased sophistication in the way land use attorneys function in California," Gold said. "For those land use attorneys that have primarily worked at the local level, and know their planning commissions and city council, this is going to be a whole new ballgame. This is going to involve the Air Resources Board. This is going to be understanding how the state is approving transportation dollars and understanding how state housing laws work."

And the law opens up questions of potential litigation. Local governments may fight over housing allocation changes. Regions may think they've been given unfair emissions targets. Or citizens could try to sue over a development's ability to meet targets.

"The statute is not too clear as to what the consequences of failure are," Wyman said. "It creates a process and a performance expectation, but it does not create an enforcement regime."

He doubts a private citizen would have a cause of action to oppose a project or a regional plan, but litigation could be tied to other statutes that do create enforcement regimes, such as the Clean Air Act.

While AB 32, the Global Warming Solutions Act of 2006, attacks the supply side by placing limits on emissions from cars, power plants and industrial operations, Wyman notes that SB 375 is the first jab at tackling the demand side.

While lawyers in tax, finance, regulatory and other practices expect a lot of climate change work under the Obama administration, state governments are not waiting for federal legislation, instead mulling over their own options for tackling the problem. Connecticut, Florida, New Jersey, California and Minnesota have all passed similar bills (to AB 32) to address the issue of global climate change. A local government in Massachusetts recently invited Wyman to come give a talk on SB 375.

"There's a lot of interest. It's viewed as an experiment. People will be watching," Wyman said. "Places all over the country are looking at AB 32 and SB 375 as potential models."