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8 Exempt from Filings Fees
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10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA

13
14 THE POST SUSTAINABILITY INSTITUTE,) Case No. RG13699215
ROSA KOIRE, MICHAEL SHAW,)
15) **RESPONDENTS' OPPOSITION BRIEF**
Plaintiffs and Petitioners,)
16) Department: 31
v.) Judge: Evelio Grillo
17) Hearing Date: October 21, 2014
ASSOCIATION OF BAY AREA) Time: 1:30 p.m.
18 GOVERNMENTS, METROPOLITAN)
TRANSPORTATION COMMISSION, and DOES)
19 1-25,)
20 Defendants and Respondents.)
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I. INTRODUCTION

Plan Bay Area (Plan), adopted on July 18, 2013 by Respondents Metropolitan Transportation Commission (“MTC”) and Association of Bay Area Governments (“ABAG”) (collectively, the “Agencies”), constitutes the Agencies’ plan to reduce the region’s greenhouse gas emissions by 16 percent by 2040 by setting forth a forecasted development pattern for the region, which, when integrated with the transportation network and other transportation measures and policies, will reduce greenhouse gas emissions by reducing vehicle miles travelled. In order to implement this development pattern, local jurisdictions must integrate their land use planning with the Agencies’ Plan to collectively achieve the anticipated greenhouse gas reductions.

Plan Bay Area is not a “grand experiment in social engineering” as alleged by Petitioners The Post Sustainability Institute, Rosa Koire, And Michael Shaw (collectively, “Petitioners”). (Petitioners’ Opening Brief (POB), p. 25.) Nor is Plan Bay Area “a gun to the head.” (POB, p. 21.) And Plan Bay Area does not allow “rule by an unelected, unaccountable agencies [sic].” (POB, p. 25.) Rather, Plan Bay Area does precisely what the applicable statutes demand.

As this Opposition Brief demonstrates, Petitioners’ arguments are often misleading and inaccurate; fail to address all the evidence in the record and instead focus on evidence Petitioners have cherry-picked to support their arguments; ignore substantial evidence supporting the Agencies’ determinations; and misconstrue applicable law. The Petition for Writ of Mandate should be denied.

II. FACTS

A. Legal Framework

The Agencies developed Plan Bay Area pursuant to federal and state laws that require each metropolitan planning organization (MPO) to prepare a combined regional transportation plan (RTP) and sustainable communities strategy (SCS). (23 U.S.C. § 134; Gov. Code, § 65080 et seq.) This integrated, long-range land use and transportation plan is intended to link the location of housing and jobs with transit, thus reducing vehicle miles travelled and greenhouse gas emissions. (23 U.S.C. § 134 (a)(1); Gov. Code, § 65080, subd. (b)(2)(B).

1. Federal regional transportation planning law

Federal law requires MTC to prepare an RTP. (23 U.S.C. § 134(c); 49 U.S.C. § 5303(i).) For

1 over 30 years, the primary purpose of the RTP has been to identify transportation projects, programs,
2 and services to address current conditions, as well as future regional growth, and to specify needed
3 transportation projects given available financial resources. (AR 9826.) The RTP must be developed for
4 a time period of not less than 20 years and must reflect the most recent assumptions for population,
5 travel, land use, congestion, employment, and economic activity. (23 C.F.R. § 450.322(a), (e); AR
6 554.) The RTP also must be developed in coordination with local planning agencies, and must
7 consider planning decisions, such as general plans within each jurisdiction. (23 U.S.C. § 134(g)(3); 23
8 C.F.R. § 450.316(b).) The RTP must be updated every four years. (49 U.S.C. § 5303(i)(1)(B).)

9 **2. State greenhouse gas reduction law**

10 AB 32, the Global Warming Solutions Act (Health & Saf. Code, § 38500 et seq.), establishes
11 the greenhouse gas emissions reduction goal of achieving 1990 levels by the year 2020. AB 32 directs
12 the California Air Resources Board (CARB) to develop and implement regulations to reduce
13 greenhouse gas emissions from stationary sources and address greenhouse gas emissions from
14 vehicles. (Health & Saf. Code, §§ 38560, 38561.)

15 **3. Senate Bill 375 combines federal requirements for transportation planning with
16 state greenhouse gas reduction goals.**

17 SB 375, the Sustainable Communities and Climate Protection Act (Gov. Code, § 65080 et
18 seq.), requires RTPs to include land use and climate change with the goal of reducing greenhouse gas
19 emissions by reducing vehicle miles traveled. SB 375 directs CARB to set regional greenhouse gas
20 reduction targets for each metropolitan planning region in California. (Gov. Code, § 65080, subd.
21 (b)(2)(A); AR 8817.) Regions must integrate a development pattern using an SCS into their regional
22 transportation plan to demonstrate how they can achieve the CARB targets, if there is a feasible way to
23 do so. (Gov. Code, § 65080, subd. (b)(2)(B); AR 765, 55631.)

24 **B. Plan Bay Area**

25 Plan Bay Area is the combined RTP and SCS for the nine-county San Francisco Bay Area. By
26 2040, the nine-county San Francisco Bay Area’s population will grow 30 percent from the 2010 level,
27 resulting in over 2.1 million more residents. Employment will increase by 33 percent, adding over 1.1
28 million additional jobs. To house this population growth, approximately 660,000 new housing units

1 will need to be built in the same timeframe. (AR 438.) This increase in population and employment
2 will affect the region’s complex transportation network. (AR 55650-55655.) The Plan relies on a
3 strategy of focusing growth around the region’s existing and planned public transit system, primarily
4 through the Priority Development Area (PDA) framework, to house the growing population and
5 achieve the targets for reduction of greenhouse gas emissions. (AR 457, 1690.)

6 The Agencies sought input from all local governments in the Bay Area to prepare the Plan.
7 (Gov. Code, § 65080, subd. (b)(2)(E); AR 55630, 55631, 55636, 55641, 55643, 55644, 55658, 55675.)
8 However, the Plan does not “mandate any changes to local zoning, general plans or project review.”
9 (AR 55630.) Local agencies maintain control of all land use decisions within their jurisdiction. (*Id.*)

10 **1. Priority Development Areas**

11 Priority Development Areas are transit-oriented, infill development opportunity areas within
12 existing communities that local agencies expect will accommodate the majority of future development.
13 PDAs are nominated by local jurisdictions on a voluntary basis. Each Bay Area county and more than
14 half of the Bay Area’s cities have at least one PDA. (AR 457, 48337, 55630.) In order to designate a
15 PDA, the local jurisdiction must identify an area where new homes could be located. These
16 neighborhoods must be served by at least one transit stop, be supported by local plans that provide a
17 wide range of housing options, and include amenities to meet the day-to-day needs of residents in a
18 pedestrian-friendly environment. (AR 43022.) If the location meets these criteria, the local agency
19 may nominate the area as a PDA. ABAG reviews the designation and makes a final determination
20 about whether the area qualifies. The PDAs are the core of Plan Bay Area. (AR 1711, 55658-55660.)

21 **2. Achieving the Greenhouse Gas Targets through Land Use Planning**

22 CARB set greenhouse gas reduction targets for the Bay Area to achieve a 7 percent per capita
23 emission reduction from 2005 levels by 2020, and a 15 percent per capita reduction from 2005 levels
24 by 2035. (AR 1689, 11625-11626, 43509-43510.) Changes in passenger travel patterns, resulting from
25 the land use pattern and other transportation and climate program investments under the Plan, are
26 projected to reduce per capita light-duty vehicle greenhouse gas emissions by 16 percent between
27 2005 and 2035, achieving the CARB target. (AR 563, 789, 1690, 55693.)

28 The Plan proposes a transportation and land use pattern for the region that “*if implemented,*

1 [would] achieve the greenhouse gas emission reductions targets.” (Pub. Resources Code, § 21155,
2 subd. (a) (emphasis added).) Local jurisdictions are ultimately responsible for the manner in which
3 their communities develop and retain discretion to carry out or deny projects regardless of consistency
4 with the Plan. (Gov. Code, § 65080, subd. (b)(2)(K); AR 1675.)

5 **C. One Bay Area Grant Program**

6 Plan Bay Area invests \$292 billion from federal, regional, state, and local sources over the
7 Plan’s 27-year period. The One Bay Area Grant (OBAG) Program commits \$14.6 billion of these
8 funds (or approximately 5%) from discretionary funds available under federal surface transportation
9 legislation known as MAP-21 (Moving Ahead for Progress in the 21st Century) to better integrate the
10 region’s federal transportation program with the goals of SB 375.¹ (AR 29292-29329, 42892-42903,
11 55679.) Over the first four years of the Plan, \$320 million in OBAG funds will be distributed to
12 counties based on a formula that emphasizes the counties’ existing populations and also considers past
13 housing production, future housing commitments, and efforts to produce low-income housing. (AR
14 55679 [See Figure 20 which shows specific amounts available to each county].) OBAG funding
15 supports jurisdictions that focus housing growth in PDAs through their planning and zoning policies.

16 OBAG allows communities flexibility to invest in transportation infrastructure that supports
17 infill development by providing funding for bicycle and pedestrian improvements, local street repair,
18 and planning activities, while also providing specific funding opportunities for Safe Routes to Schools
19 projects and Priority Conservation Areas. By promoting transportation investments in PDAs, the
20 OBAG program supports the sustainable communities strategy in Plan Bay Area. (AR 55679.)

21 **III. STANDARD OF REVIEW**

22 The “abuse of discretion” standard governs review of Petitioners’ claims. Code of Civil
23 Procedure section 1094.5, subdivision (b), provides that the court’s inquiry shall extend to the
24 following questions: whether the agency has proceeded without, or in excess of, jurisdiction; whether
25 there was a fair trial; and whether there was any prejudicial abuse of discretion. (*Le Strange v. City of*

26 _____
27 ¹ / These funds are available subject to MAP-21 mandates for Surface Transportation Programs and
28 Congestion Mitigation and Air Quality Improvement funds. (23 U.S.C. §§ 133, 149; AR 42892-
42903.)

1 *Berkeley* (1962) 210 Cal.App.2d 313, 320.) Abuse of discretion is generally established when: “(a) the
2 respondent has not proceeded in the manner required by law, (b) the order or decision is not supported
3 by the findings, or (c) the findings are not supported by the evidence.” (*Ibid.*, citing 2 Cal.Jur.2d § 220,
4 pp. 363, 364; see also Code Civ. Proc., § 1094.5, subd. (b).)

5 **A. The Substantial Evidence Standard of Review Applies to the Agencies’ Findings.**

6 Code of Civil Procedure section 1094.5 requires that agency findings be supported by
7 substantial evidence in light of the whole record. (*Topanga Assn. for a Scenic Community v. County*
8 *of Los Angeles* (1974) 11 Cal.3d 506, 514-518; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143–144.) The
9 trial court must afford a strong presumption of correctness concerning the agency findings. Petitioners
10 bear the burden of convincing the court that the administrative findings are contrary to the weight of
11 the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal. 4th 805, 817; Evid. Code, § 500.)

12 **B. Rational Basis Review Applies to Petitioners’ Equal Protection Claims.**

13 In land use decisions, when a classification is challenged under the equal protection clause, the
14 courts must apply the “rational basis” standard of review. (*Santa Monica Beach v. Superior Court*
15 (1999) 19 Cal.4th 952, 980-981 (*Santa Monica Beach*); see also *Del Monte Dunes at Monterey, Ltd. v.*
16 *City of Monterey* (9th Cir. 1990) 920 F.2d 1496, 1508 [exercise of land use decision “are
17 presumptively constitutional and, therefore, need only be rationally related to a legitimate state
18 interest, unless the distinctive treatment of the party involves either a fundamental right or a suspect
19 classification.”]; *City of New Orleans v. Dukes* (1976) 427 U.S. 297, 303 [“states are accorded wide
20 latitude in the regulation of their local economies under their police powers, and rational distinctions
21 may be made with substantially less than mathematical exactitude.”]; *American Tower Corp. v. City of*
22 *San Diego* (9th Cir., Aug. 14, 2014, No. 11-56766, No. 11-56767, No. 11-56861, No. 11-56862) 2014
23 U.S. App. LEXIS 15641, pp. 55-56.) Petitioners bear the burden of proving that ““no reasonably
24 conceivable set of facts could establish a rational relationship between the regulation and the
25 government’s legitimate ends.”” (*Santa Monica Beach, supra*, 19 Cal.4th at p. 967.)

26 **IV. ARGUMENT**

27 **A. Petitioners Misinterpret the Feasibility Requirements of SB 375.**

28 Pursuant to SB 375, Plan Bay Area must meet eight requirements to show how the region can

1 meet its housing need, including affordable housing; meet the region’s transportation network needs;
2 and reduce emissions from cars and light trucks to achieve the region’s greenhouse gas reduction
3 targets if there is a feasible way to do so. (Gov. Code, § 65080, subd. (b)(2)(B).)² In order to achieve
4 these goals, Plan Bay Area is necessarily an aspirational document. SB 375 acknowledges this, stating
5 in several places that the Agencies must determine whether the Plan, “if implemented,” would achieve
6 the targets. (Gov. Code, § 65080, subd. (b)(2)(I)(ii); Pub. Resources Code, §§ 21155, subd. (a),
7 21159.28, subd. (a).) SB 375 thus acknowledges that, while the Plan is intended meet each of the
8 stated goals, achieving those goals requires cooperation and action from other stakeholders.

9 Further, neither SB 375 nor the Plan direct local jurisdictions to adopt the Plan’s land use
10 pattern. To the contrary, SB 375 expressly prohibits using an RTP/SCS to regulate the use of land or to
11 supersede the exercise of the land use authority of cities and counties within the region. (Gov. Code, §
12 65080, subd. (b)(2)(K).) Under SB 375, the success of an RTP/SCS therefore inherently relies on
13 independent actions by local agencies with land use authority, as well as actions by other stakeholders.
14 (Gov. Code, § 65080, subd. (a) [RTP, including the SCS, must provide “clear, concise policy guidance
15 to local and state officials”].) Petitioners ignore this.

16 Petitioners argue that, because implementation of the Plan requires subsequent action at the
17 federal, state, and local level, the Plan is infeasible. (POB, p. 7.) Petitioners are wrong. The record
18 shows that significant growth allocated under the Plan can be accommodated under current conditions,
19 but that changes in existing policies are necessary to accommodate the balance. As described above,
20 the fact that subsequent action is required is entirely consistent with the requirements of SB 375 and
21 does not render the Plan infeasible. The record further shows that CARB, the agency tasked with

22 _____

23 ^{2/} Government Code section 65080, subdivision (b)(2)(B) requires that an SCS: (i) identify the
24 general location of uses, residential densities, and building intensities within the region; (ii) identify
25 areas sufficient to house all the population in the region, including all economic segments, over the
26 course of the planning period; (iii) identify areas in the region to house an eight-year projection of the
27 regional housing need; (iv) identify a transportation network to service the region’s needs; (v) gather
28 and consider information on farmland and other resource areas in the region; (vi) consider state goals
of providing adequate and affordable housing; (vii) set forth a forecasted development pattern for the
region, which, when integrated with the transportation network, will reduce the greenhouse gas
emissions from automobiles and light trucks to achieve the greenhouse gas emission reduction targets
established for the region if there is a feasible way to do so; and (viii) allow the RTP to comply with
federal Clean Air Act requirements for conformity.

1 accepting or rejecting the Agencies’ determination that the Plan represents a feasible way to achieve
2 the greenhouse gas reduction goals if it were implemented, indicated its initial acceptance. (Gov.
3 Code, § 65080, subd. (b)(2)(J)(ii); see also AR 43033, 43498-43617 [transcript of CARB Board
4 meeting during which staff presented its initial determination to the Board].) Substantial evidence in
5 the record therefore supports the Agencies’ determination that the Plan fully complies with
6 Government Code section 65080, subdivision (b), including the requirement that the Plan set forth a
7 forecasted development pattern that can feasibly achieve the greenhouse gas targets. (AR 264 [MTC
8 Resolution adopting the Plan and finding “that the Plan, including the SCS, meets the requirements of
9 [SB 375] as codified in California Government Code § 65080, subdivision (b)”]; see also AR 1684.)

10 **1. The Feasibility Report concludes the sample PDAs are “ready” to accommodate more
11 than half of the housing allocated to them through 2040 in Plan Bay Area.**

12 As Petitioners note, the Agencies commissioned preparation of an independent assessment of
13 the “readiness and feasibility of PDAs to accommodate the number of housing units envisioned by
14 Plan Bay Area.” (POB, p. 7; AR 48329.) Economic & Planning Systems (EPS) prepared the in-depth
15 Priority Development Area Development Feasibility and Readiness Assessment (“Feasibility Report”)
16 to evaluate the ability of 20 representative PDAs to accommodate new residential development,
17 consistent with housing forecasts in Plan Bay Area. (AR 48325-48377.) EPS considered a variety of
18 factors, including: the current applicable zoning and development regulations, the quality and quantity
19 of developable sites, the political environment, market factors, infrastructure needs, and development
20 financing capacity and opportunities. (AR 38424, 48330.) After evaluating these factors, EPS
21 concluded the growth allocations in the Plan represent an achievable outcome. (AR 38426.)

22 Petitioners wrongly allege the Feasibility Report concluded that the Plan is infeasible. (POB,
23 pp. 6-13.) In fact, the Feasibility Report shows that well over half of the development allocated to
24 them over the 27-year planning horizon of Plan Bay Area is “ready” to be accommodated in the
25 sample PDAs as of today. (AR 48330-48333.) While a cooperative effort by local, regional, and state
26 stakeholders will be required to accommodate the remaining 38 percent, the Plan is “feasible” as
27 defined in Government Code section 65080.01, subdivision (c).

28 Petitioners rely on a statement in the Feasibility Report that, while substantial development

1 capacity exists in the PDAs given current local land use policy, “some upzoning or increase in
2 allowable densities will be required” to meet the Plan’s ultimate growth allocations. (AR 48330.)
3 Petitioners argue that “the reference to required ‘upzoning’ or ‘increase in allowable densities’ renders
4 Plan Bay Area woefully infeasible.” (POB, p. 8.) Petitioners ignore the Feasibility Report’s conclusion
5 that the *current* physical capacity based on zoning and land supply in the sample PDAs would
6 accommodate 92 percent of the housing units allocated to them, meaning that only minor adjustments
7 in allowable densities would be required to accommodate all the growth allocated to the sample PDAs.
8 This is logical given that local jurisdictions recommended PDAs to the Agencies and, in many cases,
9 have already adopted consistent densities into their general plans and zoning codes. (AR 48330,
10 48356.) The Feasibility Report also states that local planning processes and political circumstances do
11 not represent a major constraint on growth. (AR 48356 [noting that elected officials and community
12 stakeholders have been supportive of planning efforts and development project applications consistent
13 with the PDA designations].) Thus, there is no “woeful” inadequacy in the Plan. Instead, its growth
14 allocations are consistent with the scope and purpose of any comprehensive regional plan. (AR
15 38426.) Moreover, the Plan’s assumptions are consistent with applicable law and guidance. (See Sen.
16 Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (c) [changes in land use patterns will be required to
17 achieve the greenhouse gas reduction goals]; AR 9829-9830 [2010 California Transportation
18 Commission RTP Guidelines acknowledging the appropriateness of an SCS including planning
19 assumptions not based on existing local plans].)

20 The Feasibility Report also considered overall “readiness” of the sample PDAs, which reflects
21 the number of housing units that can be expected based on multiple factors, including policy, market,
22 infrastructure, financing, and related constraints. The Feasibility Report concludes that 62 percent of
23 the housing units identified for the PDAs included in the sample are “ready” to be developed under
24 current conditions, considering these constraints.³ Thus, more than half of the growth allocated
25 through the Plan Bay Area horizon of 2040 in the sample PDAs could be developed today considering
26 _____

27 ³ / This is distinct from the estimated 92% of allocated housing units that could be accommodated
28 considering current physical capacity based on zoning and land supply, which does not take into
account the policy, market, infrastructure, financing, and related constraints.

1 policy, market, infrastructure, financing, and related factors. (AR 48332-48333.)⁴ Sixty two percent is
2 not an insignificant number, given that the Plan identifies housing to support the expected population
3 growth of over 2 million more residents with 660,000 new housing units. (AR 48329.) And, of course,
4 all of these units will not be required in the next four years, at which time the Plan must be updated
5 and development patterns modified to reflect evolving policy priorities, changing economic
6 conditions, and lessons learned from the first four years of Plan implementation. (Gov. Code, § 65080,
7 subd. (d); AR 38426, 55705 [“Plan Bay Area is a work in progress that will be updated every four
8 years to reflect new initiatives and policies”].)

9 In sum, the Feasibility Report provides substantial evidence that the Plan’s growth allocations
10 can be feasibly achieved. There is no “elephant in the room” as Petitioners allege. (POB, p. 8.)

11 **2. That changes from existing policies are required to implement the Plan is consistent**
12 **with law and does not render the Plan infeasible.**

13 **a. Implementation of Plan Bay Area is achievable, despite the need for legislative**
14 **change.**

15 Petitioners argue that, because the Plan and the Feasibility Report acknowledges legislative
16 changes will be required to achieve the Plan’s ultimate goals, it must be infeasible. (POB, pp. 7-12.)
17 Petitioners misquote the record, stating that “EPS outlines a number of constraints rendering Plan Bay
18 Area infeasible: policy, market, infrastructure, site location, financing, and financial feasibility
19 constraints.” (POB, p. 8.) EPS did outline challenges to full implementation of the Plan, but did not
20 conclude that these challenges rendered the Plan infeasible. (AR 38425 [letter from EPS stating that
21 comment letters alleging the Feasibility Report concluded the Plan was infeasible “represented an
22 overly pessimistic interpretation of our results”].) Instead, EPS stated its belief that “the growth
23 allocations in Plan Bay Area represent an achievable, if not easy, outcome consistent with the scope
24 and purpose of any comprehensive regional plan.” (AR 38426.)

25 The Feasibility Report also concludes that implementation of “a range of policy actions to be

26 ^{4/} Petitioners cherry-pick evidence in the Feasibility Report showing that some sample PDAs are
27 more “ready” to accommodate new growth than others. (POB, pp. 12-13.) The Feasibility Report
28 acknowledges that the results of its readiness assessment vary widely among the sample PDAs, but
the overall results show that 62 percent of the proposed housing in the PDAs analyzed meet the
readiness criteria described in the Feasibility Report. (AR 48347.)

1 pursued at the local, regional, state, and federal levels” would allow the sample PDAs to accommodate
2 80 percent or more of the housing growth allocated to them by 2040. (AR 48333.) The policy actions
3 include: reinstating some form of redevelopment authority to provide development financing,
4 modernizing CEQA, supporting long-term adjustment of tax rates to balance financial incentives for
5 new development, stabilizing federal funding levels for housing development, supporting
6 transportation funding policies that encourage Plan Bay Area development patterns, and refining local
7 land use policies to improve flexibility, predictability, and efficiency of land use regulations. (AR
8 48333.) These potential policy actions were based on suggestions made by local agency staff and
9 private developers who participated in preparation of the Feasibility Report, EPS’ own experience
10 with planning and implementing urban development, and actions identified in the Plan. (AR 48364.)
11 Notably, even with these policy changes, EPS did not “arrive at or accept the conclusion that housing
12 in the PDAs cannot possibly grow beyond the figures” included in the Feasibility Report. (AR 38425.)

13 That policy changes are required is entirely consistent with SB 375, which acknowledges that
14 achieving a region’s greenhouse gas target will require a departure from the business-as-usual model.
15 (Sen. Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (c) [“it will be necessary to achieve significant
16 additional greenhouse gas reductions from changed land use patterns and improved transportation.
17 Without *improved land use and transportation policy*, California will not be able to achieve the goals
18 of AB 32.”]; see also Sen. Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (d) [noting that “*changes in*
19 *land use and transportation policy*, based upon established modeling methodology, will provide
20 significant assistance to California’s goals to implement the federal and state Clean Air Acts”].) This
21 recognition is further consistent with AB 32 and the Scoping Plan. (AR 8771 [Scoping Plan calls AB
22 32 “groundbreaking legislation” that “makes it clear that a business-as-usual approach toward
23 greenhouse gas emissions is no longer acceptable.”], 8779 [noting that the “foundation of the Scoping
24 Plan’s strategy is a set of measures that will cut greenhouse gas emissions by nearly 30 percent by the
25 year 2020 as compared to business as usual”].)

26 **b. The Plan’s approach to advocate for policy change.**

27 The Plan includes the Agencies’ strategies to address these funding concerns through
28 advocacy, implementation of best practices, public education campaigns, grant programs, and

1 partnerships. (AR 43031, 55711-55713.) Five out of seven advocacy objectives identified in the Plan
2 relate to the financial tools necessary to fund the housing, infrastructure and transportation goals of
3 Plan Bay Area, thus recognizing the necessity of continuing to support legislative changes. SB 375
4 explicitly acknowledges that funding sources for local agencies are not currently available, but are
5 needed to accommodate growth in a way that will achieve the greenhouse gas reduction goals. (Sen.
6 Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (i) [stating that “local governments need a sustainable
7 source of funding to be able to accommodate patterns of growth consistent with the state’s climate, air
8 quality, and energy conservation goals”].) The 2010 RTP Guidelines also recognize that local and state
9 legislation is often required to implement various funding mechanisms and recommends that MPOs
10 research the possibility for new funding legislation. (AR 9838-9839, 9930.)

11 Further, while the Plan includes legislative changes that the Agencies will advocate for at the
12 state and federal level, the Feasibility Report notes that there are a number of ways cities and counties
13 can address the need for funding attributable to changes in redevelopment law.⁵ (AR 48365-48366.)
14 None of these potential mechanisms reflect “wild assumptions” as characterized by Petitioners. (POB,
15 p. 13; AR 38425 [Feasibility Report “does not assume that major new county, regional, state, or
16 federal funding resources would be made available”].) Rather, these mechanisms are reasonable and
17 within the power of local jurisdictions.

18 **c. Policy constraints apply to both PDA and non-PDA development.**

19 Plan Bay Area also acknowledges that single-family homes will continue to be in demand and
20 that residential land will continue to be available in non-PDAs. (AR 48361, 55655.) The Feasibility
21 Report considered whether development in non-PDAs could “more easily or feasibly” be provided
22 given the constraints identified for development in the PDAs. (AR 48358-48362.) The Feasibility
23 Report concluded that capacity constraints, as well as the same policy, market, infrastructure, and
24 financing constraints, would also affect development in non-PDAs. (AR 48358-48361; see also AR
25 38425 [EPS letter stating that “many of the same political, regulatory, market, and infrastructure

26 _____
27 ^{5/} Specifically, the Feasibility Report notes that local agencies can incentivize redevelopment by
28 providing land use planning incentives and bonuses, allowing sale or leasing of public lands for
private uses, and using capital improvement programs or other public revenues to fund or subsidize
infrastructure costs otherwise borne by the private sector. (AR 48365-48366.)

1 challenges [that must be addressed in PDAs] will constrain growth outside the PDAs.”.) For
2 example, EPS notes that non-PDAs typically have less existing infrastructure to accommodate new
3 growth and new suburban subdivisions frequently carry significant costs to install new roadways
4 utility extensions parks schools etc. (AR 48361.) Regulatory, market, and infrastructure planning
5 changes are required to overcome such obstacles. (AR 48361.)

6 **3. The Agencies properly relied on CARB findings as evidence of Plan feasibility.**

7 SB 375 requires that CARB review Plan Bay Area and accept or reject the Agencies’
8 determination that the Plan represents a feasible way to achieve the greenhouse gas emission reduction
9 targets. (Gov. Code, § 65080, subd. (b)(2)(J)(ii).) CARB staff therefore reviewed the Plan and
10 prepared a Draft Technical Evaluation, which made the initial determination that “if implemented,
11 [Plan Bay Area] would achieve the [greenhouse gas] emissions reductions claimed and meet the
12 targets set by [CARB] for 2020 and 2035.” (AR 43033.)⁶ CARB staff further found that the Agencies
13 “used reasonable model inputs and assumptions” in preparing the Plan. Notably, CARB staff had the
14 information in the Feasibility Report when making its determination. (AR 43089.) The Technical
15 Evaluation also found the process used by the Agencies to develop the Plan’s land use scenario
16 consistent with federal air quality regulations requiring that “the assumptions reflect the growth pattern
17 that is most likely to occur, based on the best information available.” (AR 43049 [citing 40 C.F.R.
18 93.122].) The Technical Evaluation further concluded the Agencies’ development of the land use
19 scenario consistent with guidance in the California Transportation Commission’s 2010 RTP

20 _____
21 ^{6/} While the June 2013 Draft Technical Evaluation does not “necessarily reflect the views and policies
22 of the Air Resources Board” (AR 43010), CARB staff’s findings in the Technical Evaluation were
23 presented to the Board, and several Board members also indicated support for the CARB staff report.
24 (AR 43502 [Chairperson Nichols: “this is just another accomplishment in terms of adding
25 transportation to housing, to land use, to the environment, and social equality as part of the overall
26 approach to finding mutual benefits from individual steps that need to be taken to solve individual
27 problems.”]; AR 43553 [Board Member Balmes: “I appreciate all the efforts that [the Agencies]
28 involved in this plan have made. And I really agree with you that the integration of transportation
policy with land-use policy is [an]. . . incredibly important thing.”]; AR 43506 [Board Member Gioia:
“We’re looking forward to the adoption of this plan in July.”]; AR 43566 [Board Member Mitchell: “I
want to commend you on your SCS. I think you’ve done a very fine job. . . I think what we are seeing
now is that this can be done successfully, and it has great promise.”]; AR 43569 [Board Member
Roberts: “[T]he plan looks terrific.”]; AR 43556 [Board Member Sperling: “I want to say this has
been one of the most inspiring set of presentations I’ve heard in a long time. I was – I’m very
impressed.”].)

1 Guidelines.⁷ (AR 43049; see also AR 9828-9830, 9835 [RTP Guidelines setting forth best practices
2 for designing a forecasted development pattern that considers local context].)

3 The Technical Evaluation also notes that the Plan includes strategies to “address challenges in
4 transportation financing, affordable housing, governance, climate adaptation, natural disasters, and
5 economic analysis.” (AR 43031.) The Technical Evaluation further acknowledges that, because of
6 their land use authority, “local governments will also play an essential role in implementing Plan Bay
7 Area.” (AR 43031; see also 43032 [noting that local governments “will be critical to the success of
8 Plan Bay Area at reducing [greenhouse gas] emissions from passenger vehicle demand”].) CARB’s
9 analysis thus provides substantial evidence that the Plan can achieve the greenhouse gas targets if
10 implemented, and the fact that implementation requires cooperation does not render it infeasible.

11 Based on the substantial evidence in the record, including the information prepared by EPS,
12 CARB’s Technical Evaluation and testimony from CARB Board members, the Agencies concluded
13 that the Plan constitutes a feasible land use development pattern that can achieve the SB 375 goals.

14 **B. Plan Bay Area does not Violate Equal Protection Guarantees.**

15 Petitioners next argue that Plan Bay Area “impermissibly exempts favored developers” from
16 the requirements of CEQA, thereby violating the equal protection clauses of the state and federal
17 Constitutions. (POB, pp. 13-17.) SB 375 was passed to achieve a certain goal – reducing greenhouse
18 gas emissions through a reduction in vehicle miles travelled. (Sen. Bill No. 375 (2008-2009 Reg.
19 Sess.) § 1, subs. (a) – (c).) The Plan relies on the CEQA streamlining incentive created by SB 375 to
20 help the Bay Area achieve that goal. Plan Bay Area’s intended application of this incentive is not
21 discriminatory and is rationally related to achieving the goal of SB 375, as well as the environmental
22 protection goals of CEQA. Petitioners have failed to meet their burden.

23 **1. SB 375 authorizes CEQA streamlining benefits for projects consistent with the Plan.**

24 As stated in the Legislative findings, the CEQA streamlining provisions of SB 375 were
25 enacted to “encourage developers to submit applications and local governments to make land use
26 decisions that will help the state achieve its climate goals under AB 32, assist in achievement of state

27
28 ^{7/} SB 375 requires that the RTP Guidelines include guidance for preparation of an SCS. (Gov. Code, § 14552.1.)

1 and federal air quality standards, and increase petroleum conservation.” (Sen. Bill No. 375 (2008-
2 2009 Reg. Sess.) § 1, subd. (f).) SB 375 therefore provides that, after adoption of an SCS, a project
3 that is consistent with the land use designation, density, building intensity, and applicable policies
4 specified for the project area in the SCS is eligible for CEQA streamlining benefits. (Pub. Resources
5 Code, §§ 21155, subd. (a), 21159.28, subd. (a).)

6 Specifically, projects that are consistent with the SCS and meet a detailed list of additional
7 criteria set forth in Public Resources Code section 21155.1 are statutorily exempt from CEQA.
8 Importantly, the criteria are intended to ensure that the individual project will not have additional
9 impacts not considered in the SCS EIR. (Pub. Resources Code, § 21155; AR 428.) A project that
10 does not qualify for the exemption may be eligible to comply with CEQA using a Sustainable
11 Communities Environmental Assessment (“SCEA”). (Pub. Resources Code, § 21155.2.) An SCEA is
12 available for a project that *does not result in any* potentially significant environmental impacts after
13 mitigation and has incorporated all feasible mitigation measures performance standards or criteria set
14 forth in the prior applicable EIRs including the EIR for the Plan. (Pub. Resources Code, § 21155.2
15 subd. (a).) A project that will result in one or more potentially significant impacts after mitigation may
16 be reviewed using a tiered EIR, which is only required to address the significant or potentially
17 significant effects of the project and is not required to include discussion of growth-inducing impacts,
18 any project specific or cumulative impacts from cars and light-duty truck trips on global warming or
19 the regional transportation network, cumulative effects *that have been adequately addressed and*
20 *mitigated* in prior applicable certified EIRs, off-site alternatives, or a reduced density alternative to
21 address effects of car and light truck trips. (Pub. Resources Code, § 21155.2, subd. (c).) In addition,
22 EIRs for qualifying residential or mixed-use residential projects are not required to include discussion
23 of growth inducing impacts, any project specific or cumulative impacts from cars and light-duty truck
24 trips generated by the project on global warming or the regional transportation network, or reduced
25 density alternative to address effects of car and light truck trips generated by the project. (Pub.
26 Resources Code, § 21159.28, subds. (a) – (b).)

27 Petitioners allege that a project eligible for streamlining may “circumvent” environmental
28 review “regardless of the proposed project’s potential environmental impact.” (POB, pp. 16-17.) As

1 is clear from the above, the CEQA streamlining provisions under SB 375 and the Plan do not allow a
2 “work around” for environmental compliance, but simply allow a consistent project to rely on the
3 extensive analysis already done in the SCS EIR. (AR 428-429; see also AR 430-432.) To facilitate
4 reliance on these CEQA streamlining provisions, the Plan Bay Area EIR provides substantial
5 evaluation of cumulative and growth-inducing impacts and climate change impacts related to cars and
6 light duty trucks on a regional level, based on the uses, densities, building intensities and policies
7 included in the Plan. (AR 428; see also AR 565-572, 600-659, 734-739, 844-861, 883-844, 917-934,
8 991-1015, 1031-1049, 1060-1068, 1116-1130, 1158-1173, 1184-1189, 1356-1354 [cumulative
9 discussions], 1342-1357 [growth-inducing], 788-823 [climate change].) These analyses relate to how
10 land use and transportation choices influence individual and household transportation behavior, and
11 the resulting effects on air quality, greenhouse gas emissions, transportation, and noise. To the extent
12 a project is consistent with the uses, densities, intensities, and applicable policies of the SCS, it may
13 rely on the analysis in the Plan Bay Area EIR of climate change, growth-inducing, and cumulative
14 effects in its environmental analysis. (Pub. Resources Code, §§ 21155.2, subd. (b)(1), 21159.28, subd.
15 (a); AR 428.)

16 **2. Plan Bay Area does not impermissibly favor a certain class of development.**

17 Petitioners allege that Plan Bay Area violates Constitutional equal protection guarantees
18 because “development projects aimed at increasing low-income housing are eligible for CEQA
19 streamlining.” (POB, p. 16.) First, the record cite provided by Petitioners does not support this
20 assertion. (AR 55668.) In fact, consistent with SB 375, this page of the record sets forth the criteria for
21 CEQA streamlining described above; a project “may qualify” if it is: “1) consistent with the approved
22 Plan Bay Area [SCS], including all land use designations, building space intensities, and applicable
23 policies; or 2) considered a residential/mixed-use residential project or a transit priority project.” (AR
24 55668; see also Pub. Resources Code, §§ 21155, 21159.28.)

25 Further, the Plan does not favor development based on “whether a building is occupied by low-
26 income families or more affluent individuals” as asserted by Petitioners. (POB, p. 16.) The CEQA
27 streamlining benefits available under the Plan favor projects consistent with the uses, densities,
28 intensities, and applicable policies identified in the Plan regardless of wealth, as provided under SB

1 375. (Pub. Resources Code, §§ 21155, 21159.28; AR 55630, 55631, 55668.) This is consistent with
2 equal protection law, including the case cited by Petitioners, which allows some disparate treatment if
3 rationally related to a legitimate interest of the state; here, reducing greenhouse gas emissions by
4 reducing vehicle miles travelled is a legitimate state interest. (Sen. Bill No. 375 (2008-2009 Reg.
5 Sess.) § 1, subd. (f); see *Cleburne v. Cleburne Living Center, Inc.* (1980) 473 U.S. 432, 447-450
6 [requiring a special permit for a group care facility invalid where requirement not rationally related to
7 a legitimate purpose]; compare *Belle Terre v. Boraas* (1974) 416 U.S. 1, 9-10 [equal protection
8 guarantee not violated where definition of what constitutes “family” under a zoning ordinance
9 rationally related to a permissible state objective of providing “the blessings of quiet seclusion and
10 clean air”]; *County Bd. of Arlington County v. Richards* (1977) 434 U.S. 5 [county zoning ordinance
11 prohibiting parking without a permit rationally related to permissible state objective of reducing traffic
12 in residential neighborhoods]; *Pennell v. San Jose* (1987) 485 U.S. 1 [city’s rent control ordinance,
13 allowing for rent adjustments based on tenant hardship, was a legitimate and rational use of city’s
14 police powers]; *Great American Houseboat Co. v. United States* (9th Cir. 1986) 780 F.2d 741 [denial
15 of boating permit rationally related to a desire to avoid overcrowding and environmental concerns];
16 *American Tower Corp., supra*, 2014 U.S. App. LEXIS 15641 at p. 56-57 [denial of conditional use
17 permit for telecommunication facility rationally related to minimizing aesthetic impact of wireless
18 facilities].)

19 **3. Policies in the Plan related to affordable housing targets are not discriminatory.**

20 Consistent with the goals of SB 375, Plan Bay Area housing distribution is guided by policies
21 that support equitable and sustainable development by “maximizing the regional transit network and
22 reducing [greenhouse gas] emissions by providing convenient access to employment for people of all
23 incomes.” (AR 55664.) Petitioners appear to argue that, because the distribution of growth in the Plan
24 takes into account affordable housing, it favors developers of affordable housing, and such alleged
25 favoritism is not rationally related to the goals of CEQA. (POB, pp. 16-17.)

26 The provisions of CEQA enacted by SB 375 specifically recognize the importance of, and
27 provide incentives for, affordable housing. For example, one of the criteria for determining whether a
28 project qualifies for the CEQA exemption discussed above is whether the project will provide

1 affordable housing. (Pub. Resources Code, § 21155.1, subd. (c).) SB 375 specifically requires that the
2 SCS identify areas sufficient to house State Department of Housing and Community Development’s
3 eight-year projection of the region’s need for housing, which includes housing units for households
4 with very low, lower, moderate, and above-moderate incomes. (Gov. Code, §§ 65080, subd.
5 (b)(2)(B)(iii), 65584, subds. (d) & (e); AR 55667.) In addition, SB 375 requires that the Plan consider
6 State goals for adequate and affordable housing. (Gov. Code, § 65080, subd. (b)(2)(B)(vi) [requiring
7 that the SCS consider the adequate and affordable housing goals set forth in Government Code
8 sections 65580 and 65581].) The facts that the Plan includes consideration of affordability in its
9 distribution of housing, and projects consistent with the Plan are eligible for streamlining benefits is
10 thus entirely consistent with, and rationally related to, the purposes and goals of SB 375 and CEQA.

11 **C. Plan Bay Area does not Usurp Local Land Use Control.**

12 Petitioners next allege that the Plan “unequivocally coerces local governments into adopting
13 land use enactments that are consistent with its goals in order to establish a regionalist government of
14 non-elected agencies.” (POB, p. 19.) Petitioners further allege that the Plan thereby violates the
15 “home rule” guarantee of Article XI, section 5 of the California Constitution, which allows local
16 government entities to “make and enforce all ordinances and regulations in respect to municipal affairs
17” (POB, pp. 17-18.) Citing only their attorney, Petitioners claim that “[t]o make matters worse,”
18 the effect of meeting the greenhouse gas reduction targets “will be virtually nil.” (POB, p. 2.)

19 The Agencies do not dispute that land use regulation is a “municipal affair.”⁸ (POB, p. 18.)
20 Contrary to Petitioners’ alarmist rhetoric, however, the Plan does not “strong arm local governments”
21 into complying with its policies. (POB, p. 21.) Rather, as Petitioners acknowledge: “Nothing in a
22 sustainable communities strategy shall be interpreted as superseding the exercise of the land use
23 authority of cities and counties within the region.” (POB, p. 17, citing Gov. Code, § 65080, subd.
24 (b)(2)(K).) SB 375 contemplates that the Plan must therefore rely on the cooperation of local agencies
25 to approve development consistent with the growth allocations in the Plan. If the Plan is implemented
26

27 ⁸ Where a violation of the “home rule” guarantee is alleged, the court must initially inquire whether
28 the case presents a conflict between state statute and local rule. If it does not, the inquiry need go no
further. (*Johnson v. Bradley* (1992) 4 Cal. 4th 389, 399.)

1 by local agencies, then the greenhouse gas reduction goals of SB 375 can be achieved. CEQA
2 streamlining benefits and OBAG funding for projects that are consistent with the Plan are permissible
3 incentives to achieve the goals of SB 375 and, as shown below, are not coercive.

4 **1. Local agencies retain discretion to make land use decisions under the Plan.**

5 Cities and counties, not MTC or ABAG, are ultimately responsible for the manner in which
6 their local communities are built in the future. Cities and counties are not required to revise their “land
7 use policies and regulations, including [their] general plan, to be consistent with the regional
8 transportation plan or an alternative planning strategy.” (Gov. Code, § 65080, subd. (b)(2)(K).) The
9 land use portion of the Plan will only be implemented insofar as local jurisdictions act upon the Plan’s
10 policies and recommendations. (Pub. Resources Code, §21155, subd. (a) [Plan Bay Area provides a
11 transportation and land use vision that “*if implemented*” would achieve the greenhouse gas reduction
12 targets for the region] [emphasis added].) Under SB 375 and Plan Bay Area, lead agencies for future
13 projects in the Bay Area retain discretion to: (1) carry out or approve projects that are not consistent
14 with the Plan, (2) deny approval of projects even if they are consistent with the Plan, (3) reach
15 environmental conclusions and/or adopt mitigation measures that differ from those identified in the
16 Plan Bay Area EIR. (AR 1675.) In short, the Plan is advisory and not binding on local government.

17 As discussed above, the 169 PDAs included in the Plan are “existing neighborhoods nominated
18 by the local jurisdictions as appropriate places to concentrate future growth that will support the day-
19 to-day needs of residents and workers in a pedestrian-friendly environment served by transit.” (AR
20 55660.) The Feasibility Report concludes that there is physical capacity, based on current zoning and
21 land supply, to accommodate 92 percent of the housing units allocated to the sample PDAs, meaning
22 that these local jurisdictions have already updated their applicable planning regulations to
23 accommodate nearly all the growth allocated to them without any rezoning or change in land use
24 policies. Since the Plan was developed with local input, it does not require any “strong arming” or
25 “guns to the head” to implement, as alleged. (POB, p. 21.) Petitioners’ hyperbolic argument falls flat.

26 **2. The availability of CEQA streamlining benefits and OBAG funding act to incentivize
consistent development, and do not punish inconsistent development.**

27 **a. SB 375 supports the Plan’s approach.**

28 The purpose of SB 375 is, in part, to “*encourage* developers to submit applications and local

1 governments to make land use decisions that will help the state achieve its climate change goals under
2 AB 32, assist in the achievement of state and federal air quality standards, and increase petroleum
3 conservation.” (Sen. Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (f).) The CEQA streamlining
4 benefits and availability of OBAG funding are mechanisms used to *incentivize* development of
5 projects that will help the state achieve the goals set forth in SB 375. These incentives do not in any
6 way limit the existing land use authority of any city or county. (Gov. Code, § 65080, subd. (b)(2)(K).)

7 SB 375 explicitly acknowledges that financial incentives will be necessary to achieve the
8 greenhouse gas reduction goals. (See e.g., Gov. Code, § 65080, subd. (b)(4)(C) [stating that MPOs
9 “shall consider financial incentives” for cities and counties that have resource areas or farmland,” and
10 “shall also consider financial assistance” to counties that “contribute toward the greenhouse gas
11 emission reduction targets by implementing policies for growth to occur within their cities.”]; Sen.
12 Bill. No. 375 (2008-2009 Reg. Sess.) § 1, subd. (g) [noting that the modeling tools used to make
13 transportation infrastructure decisions can also “assess the effects of policy choices, such as residential
14 development patterns . . . and the use of economic incentives and disincentives.”].)⁹ This is also
15 consistent with AB 32, which explicitly directs that CARB’s Scoping Plan “identify and make
16 recommendations on . . . potential monetary and nonmonetary incentives [that are] necessary and
17 desirable to facilitate the achievement of the maximum feasible and cost-effective reductions of
18 greenhouse gas emissions by 2020.” (Health & Saf. Code, § 38561, subd. (b); see also *Assn. of*
19 *Irrigated Residents v. State Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1495.)

20 Consistent with SB 375, the Plan is designed to provide a broad array of incentives and
21 voluntary measures and strategies that can be adapted to local circumstances, rather than compel local
22 agencies and project proponents to pursue projects consistent with the Plan objectives, as alleged by
23 Petitioners. (POB, pp. 19-20.) For example, the transportation projects in the Plan “were selected to
24 complement a certain type of land development (balanced and compact within previously developed
25 _____

26 ^{9/} The Legislature has enacted several statutes that provide incentives for development that meets
27 specified criteria. (See e.g., *Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744,
28 770 [finding the State Density Bonus Law and other Government Code provisions authorizing
incentives for residential development “clearly show an important state policy to promote the
construction of low income housing and to remove impediments to the same.”])

1 areas) and discourage another type of development (imbalanced, sprawling, and on greenfields). (AR
2 1683.) Similarly, the Plan “encourages localities to adopt land use policies and programs that promote
3 focused growth rather than growth beyond targeted areas. These may include urban growth boundaries
4 and reduced parking requirements which already have been embraced by many local governments in
5 some cases with supportive votes of residents at the ballot box.” (AR 1684.)

6 **b. The Plan is not in conflict with federal law.**

7 Petitioners rely on federal case law on the limits of Congressional power under the Spending
8 Clause finding that, in some circumstances, financial inducements offered by Congress might be so
9 coercive as to pass the point at which “pressure turns into compulsion.” In *South Dakota v. Dole*
10 (1987) 483 U.S. 203 (*Dole*), cited by Petitioners, the Court found the “argument as to coercion is
11 shown to be more rhetoric than fact” where the state of South Dakota would lose 5% of the funds
12 otherwise available under specified highway grant programs if it did not change its minimum drinking
13 age. (*Id.* at p. 211.) Likewise, in *Steward Machine Co. v. Davis, Collector of Internal Revenue* (1937)
14 301 U.S. 548, 586 (*Steward Machine*), the Court states there must be a showing that the financial
15 inducements are being used as “weapons of coercion, destroying or impairing the autonomy of states.”
16 No such showing was made in *Steward Machine* where Congress predicated a tax abatement on a
17 State’s adoption of a particular type of unemployment plan. And no such showing can be made here.
18 Just as Congress may attach appropriate conditions to taxing and spending programs to preserve
19 control over use of federal funds, the Agencies may attach conditions to grant of OBAG MAP-21
20 funds to ensure achievement of Plan Bay Area goals.¹⁰

21 Here, like the highway grants at issue under *Dole*, OBAG funding is a small percentage of the
22 overall funding available under Plan Bay Area. (*Dole, supra*, 483 U.S. at p. 211.) Specifically, the
23 Plan allocates \$292 billion over the Plan horizon. OBAG funds over the Plan horizon are expected to
24 be \$14.6 billion, representing roughly 5 percent of the overall dollars available under the Plan. As
25 stated in the Plan, “[t]o encourage more development near high-quality transit and reward jurisdictions

26 _____

27 ^{10/} MAP-21 describes requirements for the Agencies’ distribution of OBAG funds under the Surface
28 Transportation Program and Congestion Mitigation Air Quality Program. Despite this, Petitioners
have named no federal defendants.

1 that produce housing and jobs, Plan Bay Area proposes to” direct 5 percent of the funds available
2 under the Plan to transportation investments in PDAs. (AR 55679; see also AR 48367 [Feasibility
3 Report notes that Plan Bay Area allocates \$340 million to Congestion Management Agencies through
4 OBAG and the “amount of funding allocated by the CMAs from other resources, such as their
5 respective sales tax measure funding or regional traffic impact fees, far exceeds the OBAG grants”].)

6 Moreover, not all OBAG funds are required to be used in PDAs. In fact, the OBAG program
7 requires that Congestion Management Agencies (CMAs) develop a PDA Investment and Growth
8 Strategy for their respective counties to guide future transportation investments. As stated in the Plan,
9 the CMAs in larger counties (Alameda, Contra Costa, San Mateo, San Francisco, and Santa Clara)
10 must direct 70 percent of their OBAG investments to projects in the PDAs. For the North Bay
11 Counties (Marin, Napa, Solano, and Sonoma), the requirement is 50 percent. (AR 55679.) Thus,
12 OBAG funds are available to projects outside of the PDAs – in the larger counties, 30 percent of funds
13 are available, and in the less urban counties, half of the available OBAG funds may be used outside of
14 the PDAs. (AR 55679.) In addition, the Plan allows that a project outside the limits of a PDA may
15 count toward the minimums described above, provided that it directly connects to or provides
16 proximate access to a PDA. (AR 55679.) The Plan thus allows for flexibility in spending and local
17 agencies retain discretion to direct funding to projects outside of the PDAs; local agency autonomy is
18 not destroyed or impaired. (*Steward Machine, supra*, 301 U.S. at p. 586.)

19 The other case cited by Petitioners, *Nat. Federation of Independent Business v. Sebelius* (2012)
20 132 S.Ct. 2566 is equally distinguishable. In that case, the Court concluded that provisions in the
21 Patient Protection and Affordable Health Care Act of 2010 ““crossed the line distinguishing
22 encouragement from coercion”” by threatening to withhold existing funds from States that will not
23 accept conditions required under the Act. (*Id.* at p. 2603.) As is clear from the above, the Agencies
24 have not included any conditions for OBAG funding that would threaten existing funding for any
25 program to which a local agency is otherwise entitled. Petitioners have not met their burden of proof.

26 **D. Plan Bay Area Complies with Federal Requirements for Regional Transportation**
27 **Planning.**

28 Petitioners claim that the Plan “does not even acknowledge let alone address the mandate to

1 foster economic growth in *all* urbanized areas, nor does it reference the factors contained in Section
2 134 of Title 23.” (POB, pp. 23-24 [emphasis included].) Petitioners misunderstand the federal
3 requirements. Nothing in the relevant statutes requires consideration of *all* urbanized areas. Rather,
4 federal law mandates that the RTP process “encourage and promote the safe and efficient
5 management, operation, and development of surface transportation systems that will serve the mobility
6 needs of people and freight and foster economic growth and development within and between states
7 and urbanized areas, while minimizing transportation-related fuel consumption and air pollution. . .”
8 (23 U.S.C. § 134(a)(1).) Federal mandates cited by Petitioners also require that the RTP planning
9 process “support the economic vitality of the metropolitan area.” (23 U.S.C. § 134(h)(1)(A).)
10 Metropolitan areas are not limited strictly to urban areas; they may include non-urban areas that are
11 contiguous to existing urbanized areas which are “expected to become urbanized within a 20-year
12 forecast period for the transportation plan. (23 U.S.C. § 134(e)(2)(A).) While these provisions require
13 that the Plan focus on urban areas and new growth opportunity areas, nothing mandates that a
14 particular amount of funding be directed to each and every urban area in the region. Further, section
15 134 requires that economic growth be balanced with the goal of minimizing fuel consumption and air
16 pollution; a goal that is entirely consistent with Plan Bay Area’s strategy of fostering growth in PDAs
17 to reduce vehicle miles travelled.

18 Consistent with section 134 of Title 23, Plan Bay Area makes investments in the entire
19 region’s transportation network. (AR 55672.) Because the Bay Area is relatively built-out, the
20 transportation system is more fully developed with less need to invest in new highways and transit
21 lines. (AR 55676.) Accordingly, Plan Bay Area employs the “fix it first” strategy used in previous
22 RTPs to ensure the region directs a majority of funding to maintain existing transportation
23 infrastructure, often associated with PDAs, while also supporting focused growth in areas served by
24 the transportation system over the life of the Plan. (AR 55675 [Plan Bay Area dedicates 87 percent of
25 all available funds to keeping the current transportation network in working order].)

26 As demonstrated above, Petitioners’ position cannot be reconciled with the requirements of
27 section 134 of Title 23. Not only does the Plan use strategic investments that support focused growth
28 in PDAs, including major new transit projects, to reduce vehicle miles travelled and corresponding air

1 pollution, but it makes continuing investments in the maintenance of the existing regional transit and
2 road system. (AR 55672; see also *Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482,
3 494 [agency interpretation of a statute entitled to deference, particularly where the statute is within its
4 administrative jurisdiction and agency has “special familiarity with satellite legal and regulatory
5 issues”]; *Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp.* (2013) 221 Cal.App.4th 867,
6 880.) Petitioners’ claim that Plan Bay Area is in violation of federal mandates is meritless.

7 **E. Plan Bay Area Housing Forecasts are Race-Neutral.**

8 Finally, Petitioners falsely allege that a “key factual premise” of the initial draft Plan Bay Area
9 was an “unsupported assumption” that increased racial and ethnic diversity will result in increased
10 demand for multifamily housing. (POB, p. 24.) Petitioners further allege the Plan is “tinged with
11 racism.” (*Ibid.*) Not so. As demonstrated by substantial evidence in the record, Plan Bay Area relies on
12 expected income and demand factors for its assumptions and analysis related to housing production.
13 While population demographics that support the income and demand factors consider race, they do so
14 in a neutral way; all races are treated the same in the forecasting process. Further, the Agencies
15 conducted supplementary analysis to confirm the Plan would not have a disparate effect on minority
16 groups. Petitioners ignore this evidence. (AR 264; see also AR 47941-47952.)

17 **1. Housing forecasts were driven by income and demand factors, not race.**

18 Petitioners point to a statement in the Draft Plan that certain minority groups have
19 “demonstrated an historic preference” for multifamily and multigenerational housing. (POB, p. 24.) In
20 response to public comment, that statement was removed from the Final Plan. (AR 3653; *compare*
21 34742 and 55633.) However, the underlying assumptions for developing the housing demand forecast
22 did not include disparate consideration based on race or ethnicity. Thus, no additional revisions to the
23 housing production forecast were required, as Petitioners allege. (POB, p. 25.)

24 The housing production forecast for the Plan is based on “expected household income and
25 demand, past housing production trends, and local plans (including planned zoning changes). (AR
26 55654.) The demand for multi-unit housing focused on the aging baby boomer population,
27 employment forecasts, and projected demand near transit. (*Ibid.*, see also AR 48783-48785.) The Plan
28 cites to research completed by the Urban Land Institute and the University of Southern California,

1 identifying a shift in demand for multifamily housing within close proximity to transit. (AR 55654.)
2 Accordingly, the Plan recognizes the importance of satisfying this demand by promoting compact
3 development within PDA areas served by transit. (AR 55630, 55660, 55693.) Further, the growth
4 distribution factors that support the land use plan consider a number of housing and employment
5 factors, none of which specify by race or ethnicity.¹¹ (AR 55659-55660.)

6 Three main demographic categories inform the Plan: “employment, population, and housing,”
7 and these demographics necessarily inform the housing forecasts described above. (AR 55649.) While
8 the population demographic forecasts by race, it does so in a neutral way. All race and ethnicity
9 groups represented in the Bay Area are treated equally in the forecast process, and the forecast relies
10 on information provided by the Department of Finance, which uses historical trends of population
11 growth by age and ethnicity. (AR 48771-48773, 48777-48779, 55650-55651.) Petitioners rely on a
12 statement in the final Plan that shifts in housing preference are expected as the population becomes
13 more diverse to support its allegation that the Plan’s assumptions are race-based. (POB, p. 25.) This
14 statement reflects nothing more than the unremarkable assumption that a more diverse population will
15 require a more diverse housing supply.

16 **2. Substantial evidence supports the Agencies’ race-neutral Plan.**

17 Moreover, in response to the U.S. Department of Housing and Urban Development (HUD), the
18 Agencies examined whether the Plan would pose disparate effects on disadvantaged communities.
19 (AR 2315, 6911-6958.) The Agencies determined that “PDAs are found in all types of communities
20 throughout the Bay Area and represent the full spectrum of the region’s diversity.” (AR 6918, 6923)
21 The Agencies further found that PDAs “do not represent racially or ethnically concentrated areas of
22 poverty compared to non-PDA areas.” (*Ibid.*) Accordingly, the Agencies confirmed that the Plan *does*
23 *not discriminate* against specific ethnic or minority groups. (AR 6918, 6923 [“the PDAs will not

24 _____
25 ^{11/} Growth Distribution Factors considered in the land use distribution process included housing and
26 employment factors. Specific housing factors included: transit, vehicle miles traveled, future
27 employment, low income in-commuting, housing value, local planning assumptions, and resource
28 areas and farmland. Employment factors considered included: population-serving jobs ratio,
knowledge-sector jobs index, existing employment share, local planning assumptions, and resource
areas and farmland. (AR 55659.)

1 encourage segregation or perpetuate concentrations of poverty”], 6926.)

2 The Agencies further demonstrated that the Plan is not racially-discriminatory in the Equity
3 Analysis Report, which included federally required non-discrimination, environmental justice, and
4 equity analyses for Plan Bay Area. (AR 47931-48112.) The Equity Analysis demonstrates compliance
5 with federal requirements related to Title VI and environmental justice in the RTP development
6 process, and facilitates an understanding of the equity implications of implementing Plan Bay Area for
7 the region’s disadvantaged communities of concern.¹² (AR 47941; see also AR 3618-3622; Gov.
8 Code, § 65080, subd. (b)(1)(E) [requiring that the RTP have a policy element that includes measures
9 of equity and accessibility, including a breakdown by income bracket of percentage of population and
10 jobs served by transit].) The Equity Analysis revealed that “on a per-capita population basis, minority
11 populations in the region are receiving 120% of the benefit of the [Plan’s] investments on public
12 transportation from Federal and State sources compared to non-minority persons.” (AR 48033.)
13 Additionally, the analysis of environmental justice issues found that mitigation measures and regional
14 policies were into the Plan incorporated to minimize displacement impacts. (AR 48034-48035.) As
15 confirmed by the Equity Report, the Plan is not racially or ethnically discriminatory. Accordingly,
16 Petitioners’ claim that the Plan remains racist is unavailing.

17 **V. CONCLUSION**

18 For all of the foregoing reasons, the Agencies respectfully requests that the Court deny
19 Petitioners’ requested relief.

20 Dated: August 29, 2014

THOMAS LAW GROUP

21
22 By: 

Tina A. Thomas

23 Attorneys for Respondents

24 METROPOLITAN TRANSPORTATION COMMISSION and
ASSOCIATION OF BAY AREA GOVERNMENTS

25
26 ^{12/} “Communities of concern” were identified as “census tracts having either (1) significant
27 concentrations of both low-income and minority residents, or (2) significant concentrations of any
28 four or more of the following”: minority persons, low-income persons below 200% of the federal
poverty level, persons with limited English proficiency, zero-vehicle households, seniors aged 75 and
over, persons with a disability, single-parent families, and housing units occupied by renters paying
more than 50% of household income on rent. (AR 47942.)

3 **PROOF OF SERVICE**

4 I am a resident of the United States, employed in the City and County of Sacramento. My
5 business address is 455 Capitol Mall, Suite 801, Sacramento, California 95814. I am over the age of
6 18 years and not a party to the above-entitled action.

7 I am familiar with Thomas Law Group's practice whereby the mail is sealed, given the
8 appropriate postage and placed in a designated mail collection area. Each day's mail is collected and
9 deposited in a U.S. mailbox after the close of each day's business.

10 On August 29, 2014, I served the following:

11 **RESPONDENTS' OPPOSITION BRIEF**

- 12 On the parties in this action by causing a true copy thereof to be placed in a sealed envelope
13 with postage thereon fully prepaid in the designated area for outgoing mail addressed as
14 follows; or
- 15 On the parties in this action by causing a true copy thereof to be delivered via Federal Express
16 to the following person(s) or their representative at the address(es) listed below; or
- 17 On the parties in this action by causing a true copy thereof to be delivered by facsimile
18 machine number (916) 737-5858 to the following person(s) or their representative at the
19 address(es) and facsimile number(s) listed below; or
- 20 On the parties in this action by causing a true copy thereof to be hand-delivered to the
21 following person(s) or representative at the address(es) listed below; or
- 22 On the parties in this action by causing a true copy thereof to be electronically delivered via the
23 internet to the following person(s) or representative at the address(es) listed below:

24 **SEE ATTACHED SERVICE LIST**

25 I declare under penalty of perjury that the foregoing is true and correct and that this Proof of
26 Service was executed this 29th day of August 2014, at Sacramento, California.

27 
28 _____
Stephanie Richburg

1 *The Post Sustainability Institute v. ABAG*
2 Alameda County Superior Court, Case No. RG13699215

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