SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

THE PORT SUSTAINABILITY INSTITUTE, et al, Petitioners, vs. ASSOCIATION OF BAY AREA GOVERNMENTS, et al, Respondents.	RG13-699215 [TENTATIVE] ORDER DENYING PETITION FOR WRIT OF MANDATE AND PROPOSED STATEMENT OF DECISION Date: November 10, 2014 Time: 1:30 pm Dept.: 14

The Petition of The Port Sustainability Institute, et al ("Petitioners") for a writ of mandate came on regularly for hearing on November 10, 2014, in Department 14 of this Court, Judge Evelio Grillo presiding. The Court having considered the pleadings, the evidence, and the arguments submitted in support of and in opposition to the petition, it is hereby ORDERED: The Petition of Petitioners for a writ of mandate is DENIED.

PROPOSED STATEMENT OF DECISION

This is the court's proposed statement of decision. CRC 3.1590(f). In accordance with CRC 3.1590(g) the parties have fifteen (15) days from the date of service of this

order within which to file any comments or objections. If comments or objections are filed, the Court will determine whether, and if so when, a hearing will be scheduled on the comments or objections.

LEGAL AND FACTUAL BACKGROUND

In 1997, the Legislature passed legislation that required regional transportation planning agencies to prepare and adopt regional transportation plans. (Gov. Code § 65080.) Section 65080 stated, and still states:

> Each transportation planning agency designated under Section 29532 or 29532.1 shall prepare and adopt a regional transportation plan directed at achieving a coordinated and balanced regional transportation system, including, but not limited to, mass transportation, highway, railroad, maritime, bicycle, pedestrian, goods movement, and aviation facilities and services. The plan shall be action-oriented and pragmatic, considering both the short-term and long-term future, and shall present clear, concise policy guidance to local and state officials.

Federal law imposes similar requirements. (23 USC 134(c); 49 USC 5303(c) and (i).)

The Metropolitan Transportation Commission ("MTC") is such a transportation planning agency, and it is responsible for providing comprehensive regional transportation planning for the region comprised of the City and County of San Francisco and the Counties of Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano, and Sonoma. (Gov. Code § 29532.1(a), 66500, 66502.)[1]

In 2006, the Legislature enacted AB 32, the Global Warming Solutions Act, which made law the goal of reducing overall greenhouse gas emissions to 1990 levels by 2020, directed a statewide cap on emissions. (H&S 38560, 38561.) AB 32 directed the

[1] The court will refer to all respondents collectively as "MTC."

California Air Resources Board ("CARB") to develop regulations to reduce greenhouse gas emissions from stationary sources and from vehicles.

In 2007, the Legislature enacted SB 375, which required the MTC to adopt a sustainable communities strategy. (Gov. Code 65080(b)(2).) The sustainable communities strategy was to be designed to meet both specific greenhouse gas reduction targets and to consider the land use and transportation needs of metropolitan areas. (Gov. Code 65080(b)(2)(B).) Regarding legislative intent, SB 375 states at section 1:

> The Legislature finds and declares all of the following:
>
> (b) In 2006, the Legislature passed and the Governor signed Assembly Bill 32 (Chapter 488 of the Statutes of 2006; hereafter AB 32), which requires the State of California to reduce its greenhouse gas emissions to 1990 levels no later than 2020.
>
> (c) Greenhouse gas emissions from automobiles and light trucks can be substantially reduced by new vehicle technology and by the increased use of low carbon fuel. However, even taking these measures into account, it will be necessary to achieve significant additional greenhouse gas reductions from changed land use patterns and improved transportation. Without improved land use and transportation policy, California will not be able to achieve the goals of AB 32.
>
> (d) In addition, automobiles and light trucks account for 50 percent of air pollution in California and 70 percent of its consumption of petroleum. Changes in land use and transportation policy, based upon established modeling methodology, will provide significant assistance to California's goals to implement the federal and state Clean Air Acts and to reduce its dependence on petroleum.
>
> (e) Current federal law requires regional transportation planning agencies to include a land use allocation in the regional transportation plan. Some regions have engaged in a regional "blueprint" process to prepare the land use allocation. This process has been open and transparent. The Legislature intends, by this act, to build upon that successful process by requiring metropolitan planning organizations to develop and incorporate a sustainable communities strategy which will be the land use allocation in the regional transportation plan.

> (f) The California Environmental Quality Act (CEQA) is California's premier environmental statute. New provisions of CEQA should be enacted so that the statute encourages developers to submit applications and local governments to make land use decisions that will help the state achieve its climate goals under AB 32, assist in the achievement of state and federal air quality standards, and increase petroleum conservation.
>
> (g) Current planning models and analytical techniques used for making transportation infrastructure decisions and for air quality planning should be able to assess the effects of policy choices, such as residential development patterns, expanded transit service and accessibility, the walkability of communities, and the use of economic incentives and disincentives.
>
> (i) California local governments need a sustainable source of funding to be able to accommodate patterns of growth consistent with the state's climate, air quality, and energy conservation goals.

SB 375 directed CARB to set regional greenhouse gas reduction targets for each regional planning area in California. (Gov. Code 65080(b)(2)(A).) SB 375 directed metropolitan planning organizations to develop sustainable communities strategies to meet the CARB targets. (Gov. Code 65080(b)(2).) Regarding the obligation of metropolitan planning organizations, to develop sustainable communities strategies, Gov. Code 65080(b)(2)(B) stated:

> The sustainable communities strategy shall (i) identify the general location of uses, residential densities, and building intensities within the region; (ii) identify areas within the region sufficient to house all the population of the region, including all economic segments of the population, over the course of the planning period of the regional transportation plan taking into account net migration into the region, population growth, household formation and employment growth; (iii) identify areas within the region sufficient to house an eight-year projection of the regional housing need for the region pursuant to Section 65584; (iv) identify a transportation network to service the transportation needs of the region; (v) gather and consider the best practically available scientific information regarding resource areas and farmland in the region as defined in subdivisions (a) and (b) of Section 65080.01; (vi) consider the state housing goals specified in Sections 65580 and 65581; (vii) set forth a forecasted development pattern for the region, which, when integrated with the transportation network, and other transportation measures and policies, will reduce the

> greenhouse gas emissions from automobiles and light trucks to achieve, if there is a feasible way to do so, the greenhouse gas emission reduction targets approved by the state board; and (viii) allow the regional transportation plan to comply with Section 176 of the federal Clean Air Act (42 U.S.C. Sec. 7506).

On September 20, 2010, the CARB Board approved Resolution 10-31, which set greenhouse gas emission reduction targets for the metropolitan planning organizations. For the Bay Area, CARB Resolution 10-31 approved the targets proposed in the staff report, which used a baseline of 2005 and were 7% for 2020 and 15% for 2035. (AR 1689, 11625-26, 43509-10.)

In April 2013, the MTC circulated a draft EIR for a proposed Bay Area Plan. (AR 321-1642.) The draft EIR defined the scope of the project and states, "An RTP is a long-range plan that identifies the strategies and investments to maintain manage and improve the region's ground transportation network." (AR 340.) The draft EIR identified the goals of the proposed Bay Area Plan, stating:

> The Plan aims to achieve focused growth by building off of locally-identified Priority Development Areas and by emphasizing strategic investments in the region's transportation network including strong emphasis on operating and maintaining the existing system. The Plan's goals helped guide development of the alternatives and preparation of findings and overriding considerations.
>
> The seven goals of Plan Bay Area are: (1) Climate Protection (2) Adequate Housing (3) Healthy and Safe Communities (4) Open Space and Agricultural Preservation (5) Equitable Access (6) Economic Vitality (7) Transportation System Effectiveness.

(AR453-454.)

On 7/18/13, the MTC adopted Resolution 4111, which in turn adopted the Bay Area Plan. (AR257-305.)

The Bay Area Plan encourages development of housing in "Priority Development Areas" that are located near public transit and that permit people to live, work, and meet their day-to-day needs in a pedestrian friendly environment. (AR 55658.) Local entities can nominate areas as PDAs, and the ABAG makes the determination whether an area qualifies. If an area is a PDA, then it is eligible for CEQA streamlining provisions (AR 55668), increased transportation funding (AR 55679-80), and other benefits.

The Bay Area Plan states that there will be $292 billion in various investments over a 27 year period. One element of that is the One Bay Area Grant Program ("OBAG"), which permits ABAG to distribute $14.6 billion in funds to counties that focus housing growth in the PDAs. (AR 55679)

FIRST CAUSE OF ACTION - PETITION FOR WRIT OF MANDATE.

Standard of Review. Petitioners seek a writ directing the MTC to set aside the Bay Area Plan. The adoption of the Bay Area Plan is a quasi-legislative act subject to review under CCP 1085 and not a quasi-judicial act subject to review under CCP 1094.5. (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1482-1484.) The standard of review is stated in *Association of Irritated Residents v. California Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1494, as follows:

> "[S]tatutory provisions directing [an agency] to develop and prepare a ... plan and progress report are within the category of quasi-legislative acts." ... The limited scope of review of such action is set out in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 78 Cal.Rptr.2d 1, 960 P.2d 1031. "Because agencies granted such substantial rulemaking power are truly 'making law,' their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the

> lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end." ... Thus, the court must first determine whether the administrative action is " 'within the bounds of the statutory mandate' " ...—that is, whether the scoping plan adopted by the Board is within the authorization conferred by the Act. In answering this question, the court exercises its independent judgment. ... If answered in the affirmative, the second question is whether the plan " ' "is reasonably necessary to effectuate the purpose of the statute," ' " which requires the court to determine only whether the Board exercised its discretion arbitrarily and capriciously, without substantial evidentiary support.

Some of Petitioners' claims are for equal protection under the law. The standard of review for equal protection claims is stated in *Court House Plaza Co. v. City of Palo Alto* (1981) 117 Cal.App.3d 871, 881-882, as follows:

> Actions taken by respondent in its legislative capacity are reviewable under Code of Civil Procedure section 1085, the traditional writ of mandate. ....
>
> The denial of the one-year extension will be upheld if there is any reasonable basis in fact to support the legislative determination of the city council. ... "Every intendment is in favor of the validity of the exercise of the police power." ...
>
> It is true that persons or entities similarly situated may not be unjustly discriminated against by the government. (Cal.Const., art. I, s 7; ...) ... However, a classification will not be deemed unreasonable and discriminatory "if it is based upon some difference, or distinction, having a substantial relation to a legitimate public purpose. ... The classification will not be set aside if any state of facts may reasonably be conceived to justify it. ... And the decision of a legislative body, as to what is a sufficient distinction to warrant the classification, will not be overthrown by the courts unless it is palpably arbitrary." ...

(See also *City and County of San Francisco v. Pace* (1976) 60 Cal.App.3d 906, 910-911.) Petitioners have not identified any law suggesting that taxpayers and landowners are a protected category of persons or that the court should apply any heightened level of judicial scrutiny to its consideration of the equal protection claims.

Some of Petitioner's claims are that the Bay Area Plan does not comply with the law. The court reviews these claims using its independent judgment.

The Bay Area Plan complies with the Legislative direction to develop a "feasible" plan. Gov. Code 65080(b)(2)(B) requires the MTC to develop a "feasible" Regional Transportation Plan. Section 65080(b)(2)(B) states:

> The sustainable communities strategy shall ... (vii) set forth a forecasted development pattern for the region, which, when integrated with the transportation network, and other transportation measures and policies, will reduce the greenhouse gas emissions from automobiles and light trucks to achieve, if there is a feasible way to do so, the greenhouse gas emission reduction targets approved by the state board; ... .

The Bay Area Plan is "within the bounds of the statutory mandate." The Plan is on its face designed to meet the requirements of a Regional Transportation Plan generally and goals of a sustainable communities strategy specifically. (Gov. Code 65080(b)(2)(B).) Petitioners do not argue that the Bay Area Plan is outside the bounds of the statutory mandate.

The Bay Area Plan also sets out a feasible plan to meet the legislative goals. The purpose of AB 32 and SB 375 is to reduce greenhouse gas emissions. Petitioners argue that the Bay Area Plan is not feasible and that therefore the MTC exercised its discretion arbitrarily and capriciously, and without substantial evidentiary support. Specifically, Petitioners argue that the Plan unrealistically assumes (1) support of PDA development with locally controlled funding, (2) the "defiscalization" of land use decision making (changing Proposition 13), (3) stabilization of federal funding levels, and (4) modernization of CEQA. (Ptnr Opening at 7:4-10; AR 55711-72.)

Petitioners implicitly assert that the legislature directed MTC to develop a plan that was certain to achieve the greenhouse gas emission reduction targets approved by

CARB, and on that basis assert that the Plan fails to meet the legislative direction. Petitioners misread the definition of "feasible" and the legislative direction to the MTC.

The court's analysis starts with the word "feasible." Gov. Code 65080.01(c) defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors. "Capable of" is generally defined as "having the ability or capacity for." (Dictionary.reference.com.) In the context of Penal Code 244.5, the Court of Appeal stated, "The statute defines a "stun gun" as being "capable of temporarily immobilizing a person by the infliction of an electrical charge." ... There is no requirement that a victim actually be immobilized." (*In re Branden O.* (2009) 174 Cal.App.4th 637, 642.) (See also Welf. & Inst.Code § 11325.5 [whether a person is "capable of employment"].)

The court will give effect to the word "capable" in the definition of feasible and not require that a "feasible" plan be certain to succeed. Stated otherwise, the court will not read the phrase "capable of being accomplished in a successful manner" as meaning "certain to be accomplished in a successful manner." The statutory language is clear, so the court does not need to consider the statute's purpose, legislative history, and public policy, or reason, practicality, and common sense. (*Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 582-583.)

The court does, however, note that the definition of "feasible" in Gov. Code 65080.01(c) is identical to the definition of "feasible" in CEQA, Pub. Res. Code 21061.1. Where the legislature uses the same definition in two places, the court infers that the legislature meant the same thing. This is particularly true where the statutes concern

similar matters, as AB 32, SB 375, and CEQA all concern effective planning to protect the environment. In the context of CEQA, the "feasible" "embraces the concept of reasonableness," and therefore presumably does not require absolute certainty. (*SPRAWLDEF v. San Francisco Bay Conservation and Development Commission* (2014) 226 Cal.App.4th 905, 917-918.) (See also *California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 981, 999-1003 [discussing feasibility in CEQA context].) This supports the court's reading of the statute.

It was not arbitrary and capricious for the MTC to assume that in the future there would be (1) support of PDA development with locally controlled funding, (2) the "defiscalization" of land use decision making (changing Proposition 13), (3) stabilization of federal funding levels, and (4) modernization of CEQA. As a matter of law, it is not per se arbitrary and capricious to make assumptions about future events. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com'n* (2008) 164 Cal.App.4th 1, 16 [land use plan assumed "future operations at double the current level"].) On the fact of the case, it was not arbitrary and capricious for the MTC to make assumptions about future legislative actions. SB 375's statement of legislative findings notes that "Without improved land use and transportation policy, California will not be able to achieve the goals of AB 32" and "Changes in land use and transportation policy ... will provide significant assistance to California's goals to implement the federal and state Clean Air Acts and to reduce its dependence on petroleum." (SB 373, section 1.) Thus, the legislature itself anticipated future changes.

The Bay Area Plan sets out a plan for seeking the financial tools to implement the Plan. (AR 55711-55713.) It is not arbitrary and capricious for the MTC to assume that it

will achieve most or all of its legislative goals. For example, the Governor recently signed into law SB 628, which permits the creation of Enhanced Infrastructure Financing Districts that can fund infrastructure projects for transportation priority projects and to implement a sustainable communities strategy.

It was not arbitrary and capricious for the MTC to assume that PDAs can accommodate a significant percentage of the projected housing needs of the Bay Area. As noted above, the Bay Area Plan must be feasible, but is not required to be certain to succeed. The housing plan is feasible under that definition of feasible.

In addition, there is substantial evidence to support the MTC's implied factual finding that PDAs can accommodate a significant percentage of the projected housing needs of the Bay Area. The MTC commissioned a feasibility report that examined a sample of 20 representative potential PDAs. The feasibility report concluded that the 20 projected PDAs could accommodate 92% of the housing units allocated to them with only minor adjustments to zoning. (AR 48330.) The MTC could reasonably extrapolate from this sample to conclude that currently proposed and yet to be identified PDAs can accommodate a significant percentage of the projected housing needs of the Bay Area.[2]

The Bay Area Plan does not violate equal protection by exempting certain development from CEQA. SB 375 includes provisions stating that if projects are consistent with a sustainable communities strategy then they are eligible for CEQA streamlining. (Pub. Res. Code 21155 et seq. and 21159.28.) CEQA streamlining is in

[2] The MTC was making quasi-legislative decisions. The MTC did not need to meet the standards articulated in *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, regarding the the admission of sampling information and the weight to be given to such evidence in litigation before a finder of fact can reasonably extrapolate from the sample.

the nature of a CEQA exemption. *Sunset Sky Ranch Pilots Ass'n v. County of Sacramento* (2008) 47 Cal.4th 902, 907, discusses CEQA exemptions as follows:

> [T]he Legislature specifically exempted certain activities from environmental review. ... These exemptions reflect legislative policy decisions. Although we construe CEQA broadly " 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language,' " we do not balance the policies served by the statutory exemptions against the goal of environmental protection. ... Indeed, the purposes of the various exemptions are not necessarily consistent with CEQA's general purposes.

The Bay Area Plan is consistent with Pub. Res. Code 21155 et seq. and permits CEQA streamlining for projects that are consistent with a sustainable communities strategy. Petitioners' argument that the CEQA streamlining violates equal protection is therefore an argument regarding the statute and not the MTC's adoption of the Bay Area Plan. The CEQA streamlining bears "a substantial relation to a legitimate public purpose." The legitimate public purpose is limiting greenhouse gas emissions. The CEQA streamlining bears a substantial relation to the public purpose because it encourages development in areas that are located close to public transit and that are designed to permit people to live, work, and meet their day-to-day needs in a pedestrian friendly environment. The statute and the Bay Area Plan do not violate equal protection.

The Bay Area Plan does not violate equal protection by promoting affordable housing. SB 375 includes provisions stating that if projects provide affordable housing then they are eligible for CEQA streamlining. Gov. Code 65080(b)(2)(B)(iii) and (vi) state:

> (B) Each metropolitan planning organization shall prepare a sustainable communities strategy, ... The sustainable communities strategy shall ... (iii) identify areas within the region sufficient to house an eight-year projection of the regional housing need for the region ... (vi) consider the state housing goals ...

Pub. Res. Code 21155.1(c)(1) states that a transit priority project is exempt from CEQA if it meets certain requirements including providing housing to families of moderate, low, and very income, with commitments that "to ensure the continued availability and use of the housing units for very low, low-, and moderate-income households at monthly housing costs with an affordable housing cost or affordable rent."

As discussed above, CEQA streamlining is in the nature of a CEQA exemption. The legislature decided to permit CEQA streamlining to support moterate to very low income housing and the Bay Area Plan is consistent with the relevant statutes. As above, Petitioners' argument that the CEQA streamlining violates equal protection is therefore an argument regarding the statute. The statute and the Bay Area Plan do not violate equal protection.

The Bay Area Plan does not unlawfully usurp local land use autonomy. The relevant statute prohibits the Bay Area Plan from usurping local land use autonomy Gov. Code 65080(b)(2)(K) states:

> (b) The regional transportation plan shall be an internally consistent document and shall include all of the following: ...
>
> (2) A sustainable communities strategy prepared by each metropolitan planning organization as follows: ...
>
> (K) ... Nothing in a sustainable communities strategy shall be interpreted as superseding the exercise of the land use authority of cities and counties within the region. ... Nothing in this section shall require a city's or county's land use policies and regulations, including its general plan, to be consistent with the regional transportation plan or an alternative planning strategy. ... .

Consistent with the law, the Bay Area Plan states:

> Preserving Local Land Use Control

> Adoption of Plan Bay Area does not mandate any changes to local zoning, general plans or project review. The region's cities, towns and counties maintain control of all decisions to adopt plans and permit or deny development projects. Similarly, Plan Bay Area's forecasted job and housing numbers do not act as a direct or indirect cap on development locations in the region. The forecasts are required by SB 375 and reflect the intent of regional and local collaboration that is the foundation of Plan Bay Area.
>
> The plan assists jurisdictions seeking to implement the plan at the local level by providing funding for PDA planning and transportation projects. Plan Bay Area also provides jurisdictions with the option of increasing the efficiency of the development process for projects consistent with the plan and other criteria included in SB 375.

(AR 55630.)

The Bay Area Plan does not unlawfully coerce local authorities. The Bay Area Plan provides incentives for local authorities to approve development consistent with the Bay Area Plan. There is a point where "the financial inducement offered by [a government entity] might be so coercive as to pass the point at which "pressure turns into compulsion." (*South Dakota v. Dole* (1987) 483 U.S. 203, 211.) (See also *National Federation of Independent Business v. Sebelius* (2012) 132 S.Ct. 2566, 2604, 2601-2607.) Case law suggests that the point of compulsion depends on (1) whether the government inducements to participate in a new program are new inducements or are the maintenance of existing benefits (*Sebelius*, 132 S.Ct. at 2607) and (2) whether the government inducements to participate in a new program are substantially out of proportion to the benefits of the new program (*South Dakota v. Dole* (1987) 483 U.S. 203, 211). The court has found no case law, but this appears to be an issue where the court exercises its independent judgment.

The Bay Area Plan includes inducements to local governments to make legislative changes consistent with the Plan, but it does not withdraw or any existing benefits or

impose any new requirements if a local government fails to make legislative changes consistent with the Plan. The OBAG funding is new funding to implement the Plan. Petitioners have not identified any existing funding that local governments will lose if they decide to not make legislative changes consistent with the Plan. This is not like *Sebelius*, where the federal government passed legislation that stated that if a state decided to not comply with the Patient Protection and Affordable Care Act's new coverage requirements for Medicaid, it would lose not only the federal funding for those requirements, but all of its federal Medicaid funds. The Court found that legislation unlawfully coercive.

The Bay Area Plan's inducements to make legislative changes consistent with the Plan are not substantially out of proportion to the benefits of the Plan. The OBAG funding might be significant, but it is not an offer that local governments cannot afford to refuse. The Plan allocates $292 billion in total, and the OBAG funding is $14.6 billion, or about 5% of the total funding. (AR 48367, 55679.) The inducements are similar to this at issue in *Dole*, where the federal government passed legislation that stated that the Secretary of the Treasury was to withhold 5% of federal highway funds from South Dakota if it permitted "the purchase or public possession ... of any alcoholic beverage by a person who is less than twenty-one years of age." The Court found that legislation lawful.

<u>The Bay Area Plan is consistent with federal requirements for Regional Transportation Planning.</u> Petitioner argue that the Bay Area Plan is unlawful because it encourages development in PDAs and not in all urbanized areas in the Bay Area. Gov. Code 65080(a) requires the MTC to consider the factors in 23 USC 134. 23 USC

134(a)(1) in turn states that it is federal policy to "foster economic growth and development within and between States and urbanized areas, while minimizing transportation-related fuel consumption and air pollution." 23 USC 134(b)(7) then states "The term "urbanized area" means a geographic area with a population of 50,000 or more, as determined by the Bureau of the Census."

The court exercises its independent judgment because this concerns whether the Plan complies with a statute. In doing so, however, the court considers that the legislature directed the MTC to implement the legislation and that the MTC has familiarity with satellite legal and regulatory issues and therefore the court gives some deference to the MTC's interpretation of the legislation. (*Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 494.)

Starting with the statute, the plain language of the statute states that the MTC must balance many competing factors (23 USC 134(h)(1)(A) through (H)), strongly suggesting that the MTC has substantial discretion. Most directly, 23 USC 134(a)(1) directs the MTC to "foster economic growth and development ..., while minimizing transportation-related fuel consumption and air pollution." There is no requirement that the MTC foster economic growth equally across all an urbanized area. To the contrary, the direction that the MTC minimize "transportation-related fuel consumption and air pollution" suggests that the MTC should at least consider concentrating development in specific areas to minimize the need for transportation within and between geographic areas.

Applying the statute to the Plan, the Bay Area Plan is consistent with the statute. The MTC had the discretion to develop a plan that treated different portions of the

urbanized area differently. In addition, the Plan includes investments in the Bay Area's transportation network, which will benefit urbanized areas that are not PDAs.

The Bay Area Plan is not based on racial classification. Racial classifications are subject to strict scrutiny. (*Coral Const., Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 337; *In re Morales* (2013) 212 Cal.App.4th 1410, 1424.) The court exercises its independent judgment in determining whether the Plan is based on racial classification.

The draft Bay Area Plan included the observation that the Bay Area is likely to have an increase in Asian and Hispanic ethnicities, and then stated:

> Both population groups have demonstrated an historic preference for multifamily housing and they form multigenerational households at higher rate than the general population. This is expected to drive higher demand for multifamily housing in contrast to the historic development pattern of building primarily single-family homes. Likewise many Latinos and Asians rely more on public transit than non-Hispanic whites. This too is expected to increase demand for robust transit system that makes it easier for people who don't own cars to commute shop and access essential services.

(AR 34742.) These statements were made in the context of establishing assumptions for future housing needs. There were comments that these statements reflected stereotypes and were based on income levels rather than actual preferences. (AR 39463-65.) The statements were deleted from the Bay Area Plan.

Petitioners argue that although the references to racial housing preference was deleted that the underlying assumptions about housing needs remain in the Bay Area Plan and therefore render the Plan's projections of housing needs suspect. The court concurs that the deleted references to racial housing preference remain relevant if the analysis

remained the same and it appears that the new reasoning is a pretext for reliance on presumed racial housing preferences.

The Bay Area Plan's projection of the Bay Area population in 2040 anticipates and ageing baby boomer population, an increase in racial and ethnic diversity, increased employment, and a relative increase in low income households. (AR 55650-55653.) The projected demand for housing is based on expected household income and demand, past housing production trends, and local plans. (AR55654.) The analysis of projected demand for multi-unit housing focused on the ageing baby boomer population, employment forecasts, and projected demand near transit (AR 55654.) Petitioners have not identified any evidence in the record suggesting that the analysis of housing preferences is a pretext for presumed housing preferences based on race.

The Bay Area Plan does include data on projected increases in the population and in doing so it breaks the data down by age. (AR 55650-51.) The data used in the Plan came in part from the United States Census Bureau and the California Department of Finance, both of which provided data broken down by "age, gender, and race/ethnicity." (AR 48711-73.) The Bay Area Plan included this data in providing information about expected changes in the Bay Area population from 2010 to 2040. (AR 48777-79.) There is no indication that the Plan used the data on population trends by race/ethnicity to forecast housing needs or that the Plan encourages or compels persons of any race or ethnicity to reside in any geographic area or type of housing.

OTHER CLAIMS

This order concerns only the petition for a writ of mandate and does not address directly the merits of the second cause of action for declaratory relief, the third cause of action for Taxpayer Injunctive Relief, or the fourth cause of action for violation of the equal protection clause. That said, the resolution of the petition for a writ might affect the continued viability of the other claims.

FURTHER PROCEEDINGS.

Following preparation of a Final Statement of Decision, the court will direct Respondents to prepare and submit a proposed judgment after review by Petitioners under C.R.C. 3.1312. The court notes, by way of dicta, that it is unclear whether the court may enter judgment on the petition for a writ while the other claims are still unresolved.

DATED: _____ _____

Evelio Grillo
Judge of the Superior Court