

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BEFORE THE HONORABLE EVELIO GRILLO, JUDGE

DEPARTMENT NO. 14

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THE POST SUSTAINABILITY  
INSTITUTE; ROSA KOIRE;  
MICHAEL SHAW,

Plaintiffs,

vs.

No. RG13699215

ASSOCIATION OF BAY AREA  
GOVERNMENTS; METROPOLITAN  
TRANSPORTATION COMMISSION;  
and DOES 1 to 25,

Defendants.

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ADMINISTRATION BUILDING

OAKLAND, ALAMEDA COUNTY, CALIFORNIA

REPORTER'S TRANSCRIPT OF PROCEEDINGS

November 10, 2014

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COPY

APPEARANCES:

For the Plaintiffs:

TIMOTHY V. KASSOUNI  
Attorney at Law

For the Defendants:

TINA THOMAS  
Attorney at Law

NOVEMBER 10, 2014

P R O C E E D I N G S

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THE COURT: On the Post Sustainability Institute vs. ABAG, your appearances, please.

MR. KASSOUNI: For petitioners, Timothy Kassouni with Kassouni Law.

MS. THOMAS: And for the respondent, the Association of Bay Area Governments and the Metropolitan Transportation Commission, Tina Thomas.

THE COURT: Oh, boy. You know, I have a -- I had a tentative that I meant to get out, and it was actually to deny the petition, and I don't know why it didn't go out.

MR. KASSOUNI: I think we've seen it, Your Honor.

THE COURT: You've seen it.

MS. THOMAS: We got it.

THE COURT: Okay. All right. It's on my electronic register here. It's still saying it wasn't available, but you did see it?

MR. KASSOUNI: Your clerk emailed us on Friday.

THE COURT: All right. The computer hasn't caught up with the reality.

MS. THOMAS: All right.

THE COURT: All right. It's Kassouni?

MR. KASSOUNI: Yes.

THE COURT: I'm assuming you want to argue.

MR. KASSOUNI: Yeah. I have a few, a few points, Your Honor. I don't intend to go over every single issue raised, but a few salient points.

I wanted to begin with the feasibility, which was the initial argument we made. And I think there is early on in the Court's tentative a statement that we were impliedly arguing that SB375 mandates certainty, and I don't know that that's necessarily true. What I can say is that SB375, certainly it doesn't say only "possibly can be achieved" or "might be achieved," and that all that is needed is some sort of good faith shot at the greenhouse target reductions.

In particular, I would cite SB375, which states that the respondents shall -- not "could" -- set forth a plan that will -- again, not "could" -- reduce emissions to achieve, if feasible, target reductions. So I think that that legislative language is far more than to simply say to respondents, look, all you need to do is come up with something that can or could or might be achievable. I think it's a little stronger than that.

In addition, Your Honor, when you get into the definition of "feasibility," which the Court did in its tentative, there are really two components here. And one of -- one component is "capable of being achieved," which the Court cited. But the second component is "within a reasonable period of time."

Now, there's a standard rule of law that statutes are not to be read to render certain language and

terms surplusage. And respectfully, Your Honor, I think the Court's tentative does just that.

THE COURT: Tell me where.

MR. KASSOUNI: Well, there is no reference to the term "reasonable period of time" in the Court's tentative ruling. There's no reference at all to an analysis of the reasonable period of time in respondent's brief.

THE COURT: Hold on for a minute.

MR. KASSOUNI: I'm sorry.

THE COURT: (Making notes.)

So you're saying, by not discussing "within a reasonable period of time," and by not discussing what else?

MR. KASSOUNI: Well, in the Court's tentative, there is certainly a discussion of the term "capability." But that doesn't end these. The statutory language goes on to say, "within a reasonable period of time."

And I want to further point out that I don't see anything in respondent's brief where they even address the timely component, nor does Plan Bay Area address the timely component. So I think we address that, that language in our briefs, that there is a timely component.

I suppose an analogy would be, is it capable that if I buy a lottery ticket, is it conceivable or capable or possible that I will win the lottery? It certainly is. Now, if I had a second qualifier and requirement that I do so within a reasonable period of

time, well, that changes things. And I don't think anybody could say that they are -- if they buy a lottery ticket, they're capable of winning the lottery within a reasonable period of time, no matter how many tickets and how many years they do it. So that's point number one.

MS. THOMAS: Would you like -- I'm sorry. Would you like me to address them point by point?

THE COURT: Just let him get his points out first.

MS. THOMAS: Okay.

THE COURT: All right.

MR. KASSOUNI: There's also -- there is also sort of a shifting argument by respondents. Sometimes they'll say that the greenhouse gas reduction targets have been met. Plan Bay Area says it does. If you look, they have actually a little dart board with the arrow, and the arrow hit it right dead center. And more importantly, the resolution that adopted Plan Bay Area did not say it might be achievable assuming certain variables are met. It says that it will be achieved. I'll point -- refer the Court to -- it's in our reply brief on pages 1 and 2.

Administrative Record 261. I'm quoting from the resolution.

THE COURT: Hold on. Hold on a second.

MR. KASSOUNI: Sure.

THE COURT: (Examining document.) Okay. So where in the reply brief --

MR. KASSOUNI: Well, if you go -- it's page 1, lines 25 to -7 through page 2, lines 1 to 2. And -- and what I refer to there in that, in the reply brief, is -- is I state that the MTC resolution wherein it was declared that Plan Bay Area, quote, will reduce the greenhouse gas emissions from automobiles and light trucks to achieve greenhouse gas emission reduction targets adopted by CARB for the San Francisco Bay Area. And what I was pointing out in my reply brief, that does not mean it might or it can or it's achievable or it's capable.

So the question then is, what is the substantial evidentiary support in Plan Bay Area and in the Administrative Record to support their conclusion that it will be met as drafted? Now, when I'm talking about a little bit of shifting sands with respect to respondent's argument, you've got the MTC resolution. Certain portions of their, of the respondent's opposition brief say that they will be met. Elsewhere, it says it's simply an achievable -- it's -- it's an achievable objective, that it's sort of a work in progress, that they update it every few years.

So the reality is, frankly, I don't really know what their position is. All I can really go on is the MTC resolution, because that, I think, is the -- in terms of the priority, the hierarchy of the process here, that's at or near the top.

I would actually posit the question -- and it's up to the Court if it wants to ask counsel this -- is, are

they going to state on the record today which one it is? Is it that MTC resolution that it will be achieved under current conditions, or is there -- is it their position that it -- variables have to be met for it to be achieved? Because if it is a "will be achieved," I think there's serious problems with the independent EPS report that said, current conditions, it is not going to happen. There are legislative changes. There are state Constitutional amendments that have to be done.

I did see see a letter that was forwarded to you from counsel for respondents, and I'm prepared to address that SB628, but queery, why that letter was even sent?

THE COURT: I haven't seen it.

MR. KASSOUNI: Okay. Well, it's referenced in the tentative, Your Honor.

THE COURT: Well, I haven't seen it.

MR. KASSOUNI: Page 11. And that is actually something that I don't want to go -- it's a long document. It's a long Senate Bill. I'm prepared to address that in my written comments with respect to the tentative.

THE COURT: Okay.

MR. KASSOUNI: But I guess the point being, why is that -- why is that being sent, if MTC has already concluded that under current conditions, the target will be met? To me, it's a concession by respondents that, hey, we've got a lot of legislation we've got to enact for us to hit these targets; here, Your Honor, here's one that Jerry Brown just signed. That's how I view it.

Additional points, Your Honor. There's a reference in the tentative to -- and this is on page 11. There's a reference to the statistic, and the Court states, the feasibility report -- and this is the independent EPS report -- the feasibility report -- the feasibility report concluded that the 20 projected PDAs could accommodate 92 percent of the housing units --

THE COURT: Let me follow you here.

MR. KASSOUNI: I'm sorry. Middle of page 11.

THE COURT: Okay. I got it.

MR. KASSOUNI: Anyway, there's a reference to feasibility report concluded that 20 projected PDAs could accommodate 92 percent of the housing unit allocated to him, and there's a citation to AR48330.

THE COURT: I see that.

MR. KASSOUNI: If you're so inclined, Your Honor, I address that, albeit in a footnote, in the reply brief, how that is a highly skewed and misleading statistic. You'll see where I address that.

THE COURT: Which footnote are you referring to?

MR. KASSOUNI: Yeah. It's -- it's footnote 8 on page 6.

THE COURT: I'm looking at it.

MR. KASSOUNI: Yeah. The point being, that 92 percent figure, what EPS did is it said, okay, here's the 20 sample PDAs. A few of those have way -- have far more capacity than they would need to take on their housing allotments. Now, the analogy would be, if you got 20 PDAs



and 19 of them only have 50 percent capacity, but the 20th has, you know, 500 percent capacity, and on average, maybe it's 92. That's what this is doing.

If you look at that document -- and I would -- in the Administrative Record -- this is probably not in front of you, Your Honor, but I would really encourage the Court to review 35796.

THE COURT: AR?

MR. KASSOUNI: Yeah. The AR. And that is an extremely important chart, for many reasons. You'll see where this 92 percent figure comes in. But you'll see that only four of the 20 PDAs can meet the allotments in Plan Bay Area, four out of 20. That's only 15 percent.

Then what happens is, EPS says, okay, let's assume all of these legislative changes can be met. Then where are we? Well, on that same page, you'll see again that only four out of 20 would be capable of hitting their allotments, even if these variables are satisfied.

So I don't want to lose sight of the big picture, Your Honor, which is this. If MTC is saying it will be met, there's no substantial evidence for it without EPS's own figures and statistics. So to the extent the Court was looking into this 92 percent figure, I'll urge the Court to review this Administrative Record excerpt.

THE COURT: Your argument is basically that the 92 percent figure does not reflect the reality of the actual capacity of the PDAs.

MR. KASSOUNI: That's correct.

THE COURT: Okay.

MR. KASSOUNI: It did an average as opposed to each PDA and what their specific allotment is, and only four out of 20 can get it.

THE COURT: I get that. So it's -- it's like income averaging a company, where you have the five, six people in the company who are making tons of money, and then -- so the average income looks great, but it's really --

MR. KASSOUNI: That's exactly right. You could have nine people making minimum wage and the tenth person making a million a year. You can say, oh, this community has an average income of 300,000.

THE COURT: Okay. I get that.

MR. KASSOUNI: Okay. Now, the other point I want to make, Your Honor -- and this is shifting gears to the equal protection issue. The equal protection argument specifically -- and I want to focus on the low income housing equal protection argument. There is a -- Plan Bay Area is implementing a statutory streamlining, CEQA streamlining law, which it says -- there's -- there's several different streamlining aspects, but one in particular, I think, really cannot be defended on equal protection grounds, even under the loosest standard of review of rational basis. Even if we were to accept the Court's standard of review, I don't see how it can even satisfy that test.

And if the Cleburne characterization, the U.S. Supreme Court case, is one we discussed at length in our reply brief. But the point really is this. The Plan Bay Area basically says, look, to a city or a county, you, you build low income housing -- and I have nothing wrong with -- this is not an issue with low income housing at all. But Plan Bay Area says, you build some low income housing, we're going to grease the skids for you on CEQA, all right? And -- the question then is, how does that disparate treatment of low income housing and, say, housing that is not low income, how --

THE COURT: What?

MR. KASSOUNI: How does the disparate treatment between low housing construction and non low housing (sic) construction, how is that distinction rationally related to the reduction of greenhouse gases? I have -- I didn't see any connection in respondent's brief. I think their argument simply is that, look, the Legislature, you know, wants to reduce greenhouse gas emissions. It's a legitimate public purpose, and therefore, we win.

But that's -- there's more teeth to the inquiry even on a rational basis review. There must be a rational relationship or fair, substantial relation to the purpose of the legislation. That is to say, how does a low income structure relate to the reduction of greenhouse gases versus is a non low income structure? You can have the exact same building. One gets preferential treatment over the other. And again, the Cleburne case, I think, is

instructive in that regard.

I've said a lot, Your Honor. I know counsel for respondents is probably ready to address some of these points. But those were the essential issues. There may be a few others that I allude the Court to in my written opposition to the tentative, but those are the key ones for today.

MS. THOMAS: Thank you, Your Honor. We do concur with the Court's tentative. The Court used the language that it's capable of implementation. This is parallel to --

THE COURT: Slow down just a little bit.

MS. THOMAS: Sure. It's parallel to other language in SB375 that says "if implemented." And the reason why is, I think twofold. First, this is a Regional Plan. It's created by regional government. But it's clear, it's clear, even in the petitioner's briefs, that it must be implemented locally. They have a municipal powers. They have home rule. They have the ability to adopt General Plans and zoning. They are the entities that must implement the Regional Plan. We can't forget who's on that regional body. It's representatives of the nine counties and 101 cities. So they create the plan, but the plan has to be implemented locally.

The other reason that it's clear that it's something that has to be capable of implementation, or if implemented, is because these are long-term plans. It says in SB375 that they can be 20 years or longer. This

is a 27-year plan that's updated every four years, and every time we update those plans, every time MTC and ABAG decide to update that plan, they're obligated to look at the forecast for population, the forecast for housing, the forecast for employment. They'll look at what's been going on in Sacramento in terms of policy change and funding changes. They'll be obligated to look at what's going on locally in terms of changes in General Plans. Referendums and initiatives and all of that is changed every four years as they're moving towards implementation of the plan.

And then, in terms of the actual feasibility study itself, the first number that was looked at was this 92 percent number in terms of zoning capability, and they concluded that 92 percent was -- could be accommodated. And that was done by experts. And that is supported by substantial evidence in the record.

But more, I think that there was a lot of transparency in the feasibility study, because they also looked at a 62 percent number, which was -- it could be, 62 percent of the housing could be accommodated if you took into consideration some of these other policy constraints. And that was like a hard look at it. The more moderate was an 80 percent. So if you look even at the 62 percent number or the 80 percent number, those are about 20 or 23 to 24 years worth of housing.

And again, these are updated every four years, so they're clearly going to have a plan that is capable of

being implemented, and if implemented, will achieve the greenhouse gas targets. Again, it's a constantly shifting landscape at the Legislature, which is why we provided the Court with the recently adopted bill that allows infrastructure financing facilities, because these are changes that the Legislature is grappling with on an annual basis, of ways to make changes in the greenhouse gas rules in California to achieve certain standards that they've established for 2020 and 2050. So it's a constantly changing world out there, and we'll update it ever four years in accordance with SB375 that mandates that we look at certain things.

THE COURT: Okay. Last word, Mr. Kassouni.

MR. KASSOUNI: Yeah. A couple points. Your Honor, yes, we live in a constantly changing world, but the reality is that a lot of people are immediately affected by these. This is a grandiose shift, economically, politically and socially. This is a seismic shift in the Bay Area. And our position is, the Legislature has put a time -- a reasonable time frame constraint on the respondents. If it can't be -- if it's 23, 30, 40 years, constantly changing, then go back to the Legislature and say, you know what, you guys, Legislature, you've got to make changes for us for this to be feasible, because right, now we can't hit the target.

That would be the intellectually honest thing to do. It's not to force the issue, have a predetermined conclusion, and ignore the EPS report. Plan Bay Area did

not even reference an EPS report. They ignored the feasibility components of this whole thing. Hasn't come up until this lawsuit.

Last point I'd want to make, Your Honor, is with respect to this legislation, it's a 30-page act, and I don't -- you know, I do intend on pointing it out to the Court, only because it was referenced in the tentative, but they're already -- if -- if respondents are claiming that this is sort of a substitute for redevelopment agencies which were abolished a few years ago, it's not. These infrastructure agencies already exist. If you look at this Senate Bill closely, what it does is it says, okay, local cities and counties, you can agree to these new infrastructure districts, but A, each city and county has to adopt it with their City Council or Board of Supervisors; B, they also have to vote to approve the issuance of bonds, and third, a -- and perhaps more importantly, that has to be -- the bonds themselves, in order to be issued, have to be approved by 55 percent of the electorate in each city and county. Again, is this going to happen in a reasonable time? Is it going to happen at all? These are speculative issues.

I will address that a little bit more in my written comments, but that's it for today. Thank you.

THE COURT: Okay. I'll take a look at it and either decide it, or if I think I need any more briefing, I'll ask for it.

MR. KASSOUNI: Thank you.

MS. THOMAS: Thank you, Your Honor.

MR. KASSOUNI: Do you want to proceed to the  
CMC?

THE COURT: Sure. I don't think there's really  
a lot for me to do until I decide this, so let me just put  
this out 45 days for a CMC, which will be a target for me  
to make sure that I get this out.

MR. KASSOUNI: Okay. Thank you, Your Honor.

MS. THOMAS: Is that a required appearance, Your  
Honor?

THE COURT: No. It will be an administrative  
CMC.

MS. THOMAS: Great.

THE COURT: Unless I notify you otherwise.

MS. THOMAS: Thank you, Your Honor.

(Proceedings concluded.)

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REPORTER'S CERTIFICATE

STATE OF CALIFORNIA )

COUNTY OF ALAMEDA )

I, NANCY BABB CARDOZA, an Official Court Reporter of the Superior Court of the County of Alameda, State of California, do hereby certify that I correctly reported the within-entitled matter, and that the foregoing is a full, true and correct transcription of my shorthand notes of the testimony and other oral proceedings had in the said matter.

DATED: Berkeley, California, the 5th day  
of December, 2014.



NANCY BABB CARDOZA, CSR #3815  
Official Court Reporter