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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE POST SUSTAINABILITY INSTITUTE; ROSA KOIRE; MICHAEL SHAW, Plaintiffs and Petitioners, v. ASSOCIATION OF BAY AREA GOVERNMENTS; METROPOLITAN TRANSPORTATION COMMISSION; and DOES 1 to 25, Defendants and Respondents.	**Case No: RG13699215** PETITIONERS' OBJECTIONS AND COMMENTS TO TENTATIVE ORDER DENYING WRIT OF MANDATE AND PROPOSED STATEMENT OF DECISION Date: November 10, 2014 Dept: 31 Judge: Hon. Evelio M. Grillo

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Petitioners Post Sustainability Institute, Rosa Koire, and Michael Shaw (Petitioners) submit their objections and comments to the Tentative Order Denying Writ of Mandate and Proposed Statement of Decision (Tentative Statement).

First, with respect to the standard of review, the question of whether Respondents' adoption of Plan Bay Area lacks substantial evidentiary support is a judicial inquiry that mandates review of the entire administrative record, including evidence that *detracts* from the findings in Plan Bay Area, particularly the independent findings of Economic & Planning Systems, Inc. (EPS.) This Court's role in the process of determining whether substantial

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evidence supports the findings in light of the record was articulated in *La Costa Beach Homeowners' Association v. California Coastal Commission* (2002) 101 Cal.App.4th 804, 814. There the court stated: "The 'in light of the whole record' language means that the court reviewing the agency's decision cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record. [Citation.] Rather, the court must consider all relevant evidence, *including evidence detracting from the decisio*n, a task which involves some weighing to fairly estimate the worth of the evidence. [Citation.]" (Emphasis added.)

Second, this Court's discussion of the "feasibility" issue fails to acknowledge and address a central component of the S.B. 375 definition of "feasibility": whether the CARB greenhouse reduction targets are not only "capable" of being accomplished, but capable of being accomplished within a "reasonable period of time." The Tentative Statement does not address the timing component of the definition. Respondents' Opposition brief and Plan Bay Area likewise fail to address the timing component. As such, the timing component is essentially deleted from the inquiry of feasibility. It is established law of statutory interpretation that all language in a statute has meaning. As the California Supreme Court recently confirmed:

> Our primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose. (*In re Greg F.* (2012) 55 Cal.4th 393, 406, 146 Cal.Rptr.3d 272, 283 P.3d 1160 (*Greg F.*).) We consider first the words of a statute, as the most reliable indicator of legislative intent. (*Pineda v. Williams–Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529, 120 Cal.Rptr.3d 531, 246 P.3d 612.) ""'Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible." [Citation.] Interpretations that lead to absurd results or render words surplusage are to be avoided. [Citation.]' [Citation.]" (*People v. Loeun* (1997) 17 Cal.4th 1, 9, 69 Cal.Rptr.2d 776, 947 P.2d 1313.)

Tuolumne Jobs & Small Business Alliance v. Superior Court (2014) 59 Cal.4th 1029, 1037.

In this case, ignoring the timing component impermissibly renders that portion of the feasibility definition mere surplusage. Indeed, this Court's analogy to the "stun gun" example at p. 9 of the Tentative Statement illustrates the impact of deleting the timing component from the definition. The Court analogizes this case to the statement in *In re Branden O.* (2009) 174 Cal.App.4th 637, 642, wherein the Court of Appeal commented that the statutory definition of

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"stun gun" contains "no requirement that a victim actually be immobilized." (Id. at 642.) Yet the timing component significantly alters the analysis. Now, the victim must be capable of immobilization within a "reasonable period of time." A stun gun that has no assurance of success at all would directly conflict with the statutory mandate. Not only that, Resolution 4111 indicates that Respondents have concluded that the victim has *in fact* been "immobilized," in direct contradiction to the independent study of Economic & Planning Systems, Inc (EPS.)[1]

The legislature hardly could have intended a radical displacement of the land use and political landscape of Northern California, with its *immediate* transformative effects, if Respondents were not tasked with producing a plan that met the CARB targets within a reasonable period of time. Not surprisingly, Plan Bay Area and the document which adopted it, Resolution 4111, do not state that the CARB targets *may* be achieved, they state unequivocally that the targets *will* be achieved. As such, this Court's task is to review the entirety of the record to determine whether there is substantial evidence to support these unequivocal conclusions. Yet there is no such substantial evidence, as conceded by Respondents in their recitation of significant legislative changes that must be made to reach the target, as well as the empirical difficulties outlined by Respondents' independent consultant, EPS. Indeed, EPS concluded that even if all assumptions are realized (*i.e.,* legislative and policy changes), the *best case scenario* is an increase from the 62 percent baseline (without legislative and policy changes) to an 80 percent figure for PDA accommodation of the Plan Bay Area development allocation. (AR 35812.) This falls 20 percent short of the amount needed for Plan Bay Area to meet its CARB target.

In short, if significant *assumptions* must be realized in order to meet the CARB targets, there is no substantial evidence for Respondents to conclude, as they do in Plan Bay Area and Resolution 4111, that the CARB targets *will* be achieved. Respondents wish to have their cake and eat it too. When it suits their purpose, they state unequivocally that the CARB targets will

[1]*See* Metropolitan Transportation Commission (MTC) Resolution 4111, wherein it was declared that Plan Bay Area "*will* reduce the greenhouse gas emissions from automobiles and light trucks to achieve the greenhouse gas emission reduction targets adopted by the California Air Resources Board CARB for the San Francisco Bay Area." (AR 261, emphasis added.)

be met, no doubt to appease the legislative mandate. Then, when pressed in this proceeding to proffer substantial evidence to support this conclusion, they can simply assert that such evidence is not necessary, that Plan Bay Area is simply a "work in progress," and that time will tell if requisite legislative changes are forthcoming.[2] As the Court may recall, at oral argument counsel for Petitioners invited counsel for Respondents to state for the record whether Respondents are contending that the CARB targets *will* be accomplished, or *may* be accomplished. This invitation was ignored, no doubt to enable Respondents to argue either position depending on the circumstances.

Third, this Court's conclusion that substantial evidence to support the adoption of Plan Bay Area exists in the form of the "implied factual finding" that 20 projected PDAs could accommodate 92% of housing units allocated to them (Tentative Statement, p. 11), is based upon a mistaken reading of the statistic. As pointed out in footnote 8, page 6 of the Reply Brief, this take on the statistic has no relevance to the feasibility issue. Each PDA has a separate and specific allocation, the vast majority of which do *not* have the current capacity of accommodating their specific allocations. (AR 35796.) EPS merely clumped all sample PDAs together and performed an average, but that is not how the allocations are meted out. Indeed, only seven of the twenty sample PDAs (35%) have the *current* capacity of accommodating their specific allocation. (Id.) Even if all of the assumptions regarding requisite legislative changes are met, EPS remarkably projects that only *four of the twenty sample PDAs* (20%) can accommodate their specific allocation. (Id.) If anything, these statistics illustrate the infeasibility of Plan Bay Area. As noted above, this Court must review the entire record in its substantial evidence inquiry, even evidence that detracts from Plan Bay Area and Resolution 4111.

Fourth, with respect to the discussion of equal protection and low income housing at pp.

[2] Respondents' late submission to this Court (without a motion to augment the record) of information relative to S.B. 628 proves the point. If Plan Bay Area is already sufficient, in and of itself, to meet the CARB targets, there should be no need to inform the Court of a new law. In any event, the new law (cited in the Tentative Statement at p.11) hardly assists Respondents. Infrastructure Financing Districts already exist. S.B. 628 authorizes the creation of infrastructure financing plans by cities and counties under certain conditions. First, the city or county must vote to create such plans. Second, they must vote to issue bonds. Third, the voters of each city or county by a 55% percent vote must approve issuance of bonds. It is unclear just how this assists Respondents in meeting the CARB targets within a reasonable period of time, if at all.

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12-13, this Court implies that Petitioners' argument must fail because the disparate treatment originates in a statute. Yet it is unclear why statutory origination somehow absolves Respondents from liability for implementing that statute in Plan Bay Area (an argument not even made by Respondents). Further, if it is true that Plan Bay Area is a "quasi-legislative act" (as stated in this Court's standard of review discussion at p.6), then its disparate treatment provisions must pass equal protection scrutiny.

Finally, with respect to the discussion of coercion (Tentative Statement at pp. 14-15), the notion that OBAG funds comprise only 5% of total funding is highly misleading. Of the 292 billion in total funding, 232 billion is considered by Plan Bay Area to be "committed" funds, meaning they are already generated locally through taxes, or have already been earmarked for specific projects. (AR 55674.) The remaining 21% percent of funds (57 billion) are discretionary, and of that amount only 33 billion are sourced from the federal government. (AR 55673, figure 11.) Of this amount, 14.6 billion come from OBAG sourced funds. Thus, approximately 50% of federal funds are at stake and 100% of the OBAG funds, not 5% of the total allocated funds. It is misleading to include in the total funds available to cities and counties those funds that were already generated by them.

For the foregoing reasons Petitioners respectfully request that this Court revise its Tentative Statement, and conclude that the writ of mandate should be granted.

November 24, 2014

Respectfully submitted,

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PROOF OF SERVICE BY OVERNIGHT DELIVERY

I am employed in the County of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 555 Capitol Mall, Suite 900, Sacramento, CA 95814.

On November 24, 2014 a true and correct copy of:

PETITIONERS' OBJECTIONS AND COMMENTS TO TENTATIVE ORDER DENYING WRIT OF MANDATE AND PROPOSED STATEMENT OF DECISION

was placed in an overnight mail envelope addressed as follows:

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which envelope was then processed for overnight mailing pursuant to this business's ordinary practice with which I am readily familiar. On this same day, it is deposited and collected for overnight delivery in Sacramento, California, in a box regularly maintained by Federal Express.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Sacramento, California, on November 24, 2014

Timothy V. Kassouni