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

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

The Petition of The Post 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.

///

///

///

///

FINAL STATEMENT OF DECISION

This is the court's statement of decision. (CRC 3.1590(f).) Following the hearing on November 10, 2014, the parties submitted comments or objections to the proposed statement of decision.

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 2005, the Governor issued Executive Order S-3-05, which called for California to reduce overall greenhouse gas emissions to 1990 levels by 2020 and to reduce overall emissions to 80% below 1990 levels by 2050.

---

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

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 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 content of sustainable communities strategies, Gov. Code 65080(b)(2)(B) states:

> 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.) "[S]tatutory provisions directing [an agency] to develop and prepare a ... plan and progress report are within the category of quasi-legislative acts." ... "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." (*Association of Irritated Residents v. California Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1494.)

"[W]hen an implementing regulation is challenged on the ground that it is "in conflict with the statute" ... or does not "lay within the lawmaking authority delegated by the Legislature" ... , the issue of statutory construction is a question of law on which a court exercises independent judgment. ... In determining whether an agency has incorrectly interpreted the statute it purports to implement, a court gives weight to the agency's construction. ... " Nevertheless, the proper interpretation of a statute is ultimately the court's responsibility." (*Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415-416.)

When a regulation is challenged on the ground that it is not "reasonably necessary to effectuate the purpose of the statute," [the court's] inquiry is confined to whether the rule is arbitrary, capricious, or without rational basis ... and whether substantial evidence supports the agency's determination that the rule is reasonably necessary." (*Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415-416.) See also *California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 699; *Association of Irritated Residents v. California Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1494.)

INTERPRETING GOV. CODE 65080(B)(2)(B).

Petitioners argue that the Bay Area Plan does not comply with the requirements of Gov. Code 65080(b)(2)(B). The court starts with examining the statute. Gov. Code 65080(b)(2)(B) requires the MTC to develop a "feasible" sustainable communities strategy. 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; ... .

> Gov. Code 65080.01(c) in turn states:

> (c) "*Feasible*" means *capable* of being accomplished in a successful manner within a *reasonable* period of time, taking into account economic, environmental, legal, social, and technological factors.

The court interprets the requirements of Gov. Code 65080(b)(2)(B) and Gov. Code 65080.01(c) using its independent judgment. (*Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891, 896; *Citizens for East Shore Parks v. California State Lands Com.* (2011) 202 Cal.App.4th 549, 572-573.) The court applies the established tools of statutory construction. (*Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 397-397; *Handyman Connection of Sacramento, Inc. v. Sands* (2004) 123 Cal.App.4th 867, 881-882.) The court's statutory analysis focuses on the plain meaning of four words – "shall," "will," "feasible," and "capable," and the phrase "reasonable period of time," the meaning of the words and phrase in the context of the statute as a whole, and the legislative intent.

The word "shall" is usually equivalent to "must," but it can be a mandatory or a directory requirement depending on its context. (*People v. Gray* (2014) 58 Cal.4th 901, 909-910.) "Courts must examine "whether the statutory requirement at issue was intended to provide protection or benefit to ... individuals ... or was instead simply designed to serve some collateral, administrative purpose." ... If the latter, then it is merely directory, and failure to comply with it does not invalidate later governmental action." (*Gray, supra*.) In addition, courts should consider statute's public purpose in determining whether "shall" is mandatory or directory. (*Hagopian v. State* (2014) 223

Cal.App.4th 349, 366; *Coastside Fishing Club v. California Fish and Game Commission* (2013) 215 Cal.App.4th 397, 424-425.) There is no indication that the statute was intended to provide protection or benefit to individuals. Further, there is no indication that the legislature intended a sustainable communities strategy to be void because it failed to comply with one of the eight requirement in Gov. Code 65080(b)(2)(B). The court interprets "shall" as directory.[2]

The word "will" has many meanings, and the meaning depends on the context. The Merriam-Webster on-line dictionary has many definitions of "will," including "used to express futurity," "used to express capability or sufficiency," "used to express inevitability," and "used to express a command, exhortation, or injunction." (http://www.merriam-webster.com/dictionary/will) Petitioners argue that "will" means inevitability, or a certainty that something will happen. (*Scally v. W.T. Garratt & Co.* (1909) 11 Cal.App. 138, 154 ["will" refers to "the unqualified or unconditional existence of some fact or thing" or "an existence in actuality."].) The MTC argues implicitly that "will" means futurity, capability, or sufficiency and simply refers to a reasonable expectation that something will happen . (*Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 452 [holding that "environmental conditions that *will* exist when the project begins operations" can include "a major change in environmental conditions that *is expected to* occur before project implementation"].)

---

[2] The MTC has the same obligation to comply with the law whether "shall" is mandatory or directory. The holding that "shall" is directory in Gov. Code 65080(b)(2)(B) affects the remedy. If "shall" were mandatory, then a failure to comply would void the Bay Area Plan. Because "shall" is directory, a failure would likely lead to an order that the Plan remains in effect and directing the MTC to comply with the statute.

Looking at how the word "will" is used in the context of the statute, the court interprets "will" as meaning "is expected to."

The word "feasible" is defined in Gov. Code 65080.01(c) and is identical to the definition of "feasible" in CEQA, Pub. Res. Code 21061.1. Where the legislature uses the same word or phrase in two places, the court infers that the legislature meant the same thing. (*People v. Gray* (2014) 58 Cal.4th 901, 906; *People v. Wells* (1996) 12 Cal.4th 979, 986.) This is particularly true where the statutes concern similar matters, and 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." (*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].) The court interprets "feasible" to embrace the concept of reasonableness.

The word "capable" is generally defined as having attributes required for or conducive to performance or accomplishment. The Merriam-Webster on-line dictionary states that capable can mean "susceptible," "having attributes required for performance or accomplishment." "having traits conducive to or features permitting," "having legal right to own, enjoy, or perform, " and "having or showing general efficiency and ability." (http://www.merriam-webster.com/dictionary/capable) A definition of "capable" as meaning "having the ability to" would be consistent with *In re Branden O.* (2009) 174 Cal.App.4th 637, 642, where the Court of Appeal interpreted the phrase "capable of temporarily immobilizing a person" in Penal Code 244.5 and held "There is no requirement that a victim actually be immobilized." A definition of "capable" as meaning

"having the ability to" would also be consistent with the plain meaning of "capable of employment" in Welf. & Inst. Code § 11325.5, which suggests that a person have the ability to be employed even if they are not actually employed. The court interprets "capable" as "having the ability to."

The phrase "reasonable period of time" or "reasonable time" is context specific. What might be reasonable under one statute or in one set of circumstances might be different under another statute or set of circumstances. Statutes, regulations, and case law state that the maximum "reasonable time" can be 5 days (CCP 1174.2), 4 months (Gov. Code 12945), 6 months (CCP 473(b)), 1 year after after accrual of cause of action (Gov Code 946.6), 3 years (5 CCR 53006), and several years (Family Code 4320(l); *In re Shaughnessy* (2006) 139 Cal.App.4th 1225, 1249). "Reasonable" describes any result that has a rational basis and is not arbitrary or capricious. (*American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 460.) As used by the legislature and the courts, the word "reasonable" permits consideration of a wide range of factors. (*California Insurance Guarantee Association v. Workers' Compensation Appeals Board* (2014) 2014 WL 7183206 [board may consider "a wide array of factors" in determining a "reasonable" fee]; *Lawrence v. La Jolla Beach and Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 23 [in determining existence of duty "the question of what is reasonable will depend in each case on the particular circumstances"].)

Looking specifically at Gov. Code 65080(b)(2)(B), the phrase "reasonable period of time" concerns "the greenhouse gas emission reduction targets approved by the state board," and CARB's targets are 2020 and 2035. The specific time periods for greenhouse gas emission reduction targets inform, if not control, the how the court

defines “feasible” in the context of section 65080(b)(2)(B). (*Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 993 [a “more specific statute controls over a more general one” touching on the same subject].)

Looking more generally at California law of greenhouse gas emissions, the relevant periods of time are consistently measured in years or decades. Executive Order S-3-05 called for California to reduce overall greenhouse gas emissions to 1990 levels by 2020 and to reduce overall emissions to 80% below 1990 levels by 2050. AB 32 made law the goal of reducing overall greenhouse gas emissions to 1990 levels by 2020. SB 375 required the CARB set greenhouse gas emission reduction targets for the automobile and light truck sector for 2020 and 2035. (Gov. Code, § 65080, subd. (b)(2)(A).) SB 375 also required CARB to revisit these targets every eight years through 2050. (Gov. Code, § 65080, subd. (b)(2)(A)(iv).) CARB Resolution 10-31 approved the greenhouse gas reduction targets for the Bay Area using a baseline of 2005 and set target reductions of 7% for 2020 and 15% for 2035. See also (*Cleveland National Forest Foundation v. San Diego Association of Governments* (2014) 231 Cal.App.4th 1056, 1073 [Climate Action Strategy stated, “Once in place, land use patterns and transportation infrastructure typically remain part of the built environment and influence travel behavior and greenhouse gas emissions for several decades, perhaps longer.”].) Therefore, any definition of the phrase “reasonable period of time” would be measured in years or decades.

Reading Gov. Code 65080(b)(2)(B) in light of these interpretations, the section states:

> The sustainable communities strategy *is directed to* ... (vii) set forth a forecasted development pattern for the region, which, ..., *is expected to*

> reduce the greenhouse gas emissions from automobiles and light trucks to achieve the CARB greenhouse gas emission reduction targets *for 2020 and 2035,* if the strategy *is able to* accomplish that goal in a successful manner taking into account economic, environmental, legal, social, and technological factors.

This interpretation of the statute is consistent with SB 375 as a whole and with the legislative intent to develop enforceable plans that, when implemented, will decrease greenhouse gasses. Gov. Code 65080(b)(2)(B) does not require the MTC to demonstrate that the Bay Area Plan is certain to succeed. Stated otherwise, the court will not read the phrase "capable of being accomplished in a successful manner" in Gov. Code 65080(b)(2)(B)(vii) as meaning "certain to be accomplished in a successful manner."

The court has considered *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, which addressed a similar issue. In *Sierra Club*, the County had adopted a General Plan Update that included Mitigation Measure CC–1.2, which stated:

> "[Mitigation Measure] CC-l.2 requires the preparation of a County Climate Change Action Plan within six months from the adoption date of the General Plan Update. ... The County Climate Change Action Plan *will achieve comprehensive and enforceable GHG emissions reduction* of 17% (totaling 23,572 MTC02E) from County operations from 2006 by 2020 and 9% reduction (totaling 479,717 MTC02E) in community emissions from 2006 by 2020. Implementation of this Climate Change Action Plan will contribute to meeting the [Assembly Bill No.] 32 goals, in addition to the State regulatory requirements noted above."

The County thereafter adopted a Climate Change Action that expressly stated that it "does not ensure reductions." The Sierra Club sued, arguing that under Mitigation Measure CC–1.2 the County was required to develop a Climate Change Action Plan that "*will achieve comprehensive and enforceable GHG emissions reduction[s].*" The Court of Appeal found that the Plan was not effective because major programs were "not

currently funded," that the County was "not making meaningful implementation measures," and the Plan lacked detailed deadlines. (231 Cal.App.4th at 166-168.)

The Court of Appeal did not directly address the meaning of "will achieve." The Court obliquely addressed the meaning of "will achieve" when it stated:

> [T]he CAP expressly states that it does not ensure reductions. Instead, the County's evidence relates to quantification of the respective measures. Quantifying GHG reduction measures is not synonymous with implementing them. Whether a measure is effective requires more than quantification, but an assessment of the *likelihood of implementation.*

(231 Cal.App.4th at 168 [emphasis added].) The Court of Appeal later addressed the argument that it would be speculative to consider how the CAP would affect greenhouse gasses after 2020. The Court held that such projections were not necessarily speculative and noted that other agencies have, in fact, been able to prepare evaluations that were supported by substantial evidence. (231 Cal.App.4th at 172-173.) The court reads *Sierra Club* to hold that in the context of Mitigation Measure CC–1.2 at issue in that case that the phrase "will achieve comprehensive and enforceable GHG emissions reduction[s]" means "is likely to be implemented and if implemented is likely to achieve comprehensive and enforceable GHG emissions reduction[s]."

The court has also considered *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 934-941, which held that as of July 2008 there was substantial evidence to support the agency's conclusion that it was speculative to gauge a project's individual or cumulative impact on global climate change. *Rialto* is informative because it summarizes the evolving California law on efforts to limit greenhouse gas emissions. *Rialto* is distinguishable on the law because it concerns an EIR approved in July 2008 and the law changed in the five years before the MTC approved the Bay Area

Plan in July 2013. *Rialto* is also distinguishable on its procedural posture and facts because in *Rialto* there was substantial evidence to support an agency conclusion that it was speculative to gauge a project's impact on global climate change generally whereas in this case petitioners are arguing that there is no substantial evidence to support the agency's conclusion that it can reasonably predict the Bay Area Plan's ability to meet the CARB specific targets for limiting greenhouse gas emissions.

THE BAY AREA PLAN IS NOT IN CONFLICT WITH THE STATUTE.

Petitioners argue that the Bay Area Plan is in conflict with the statutory mandate because the Plan is not certain to achieve the CARB greenhouse gas emission reduction targets within a reasonable period of time. This is an attempt to recast a factual issue as a legal issue. The Plan sets forth a plan that 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).) If the Bay Area Plan is deficient, it is deficient because on the facts it fails to meet the statutory mandate and not because on the law it conflicts with or exceeds the statutory mandate.[3]

THE BAY AREA PLAN REASONABLY EFFECTUATES THE PURPOSE OF THE STATUTE.

Petitioners argue that the Bay Area Plan is deficient because it is not certain to meet the CARB greenhouse gas emission reduction targets. Petitioners argue that the Plan unrealistically assumes (1) support of PDA development with locally controlled

[3] Petitioners do not argue that the Bay Area Plan is outside the bounds of the statutory mandate.

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.)

First, as discussed above, the Bay Area Plan does not need to be certain to meet the CARB targets. The Bay Area Plan need only include a sustainable communities strategy that is able to be implemented taking into account economic, environmental, legal, social, and technological factors and that, if implemented, is reasonably expected to achieve the CARB greenhouse gas emission reduction targets for 2020 and 2035.

Second, it was not arbitrary and capricious as a matter of law, for the MTC 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.

Third, part of the Bay Area Plan is to plan for making legislative and regulatory changes. The Plan expressly states that it “is a work in progress that will be updated every four years to reflect new initiatives and priorities.” (AR 55705.) The Plan states that it is “A Platform for Advocacy” to meet the goals of SB 375 and identifies the policy goals of “Support PDA Development With Locally Controlled Funding,” “Modernize the

California Environmental Quality Act (CEQA)," and "Defiscalize Land Use Decision Making." (AR 55711-55713.) The allegedly improper "assumptions" are in fact recognized parts of the Plan.

Fourth, it was not arbitrary and capricious for the MTC to assume that it is likely to achieve most or all of its legislative goals. There is no predicting what the legislature will actually do, but it is reasonable to assume that if the MTC, the ABAG, and other regional entities support policy changes that the state legislature might implement some or all of the changes.[4]

Petitioners then argue even if the MTC achieves all of the Bay Area Plan's legislative goals that the Plan will still be deficient because it does not ensure that the Bay Area will have adequate housing. Petitioners rely on a feasibility report by Economic & Planning Systems that examined a sample of 20 representative potential PDAs. (AR48325-48377 ("EPS Feasibility Report").) The EPS Feasibility Report concluded that the 20 representative potential PDAs can currently accommodate 92% of the housing units allocated to them, can currently accommodate 62% of the housing units allocated to them for 2040, and should be able to accommodate 80% of the housing units allocated to them for 2040 with the changes proposed in the Bay Area Plan. (AR 48330.) Petitioners argue that the EPS Feasibility Report demonstrates that the Bay Area Plan is inadequate because (1) the EPS Feasibility Report shows that the Bay Area Plan is designed to

[4] The court evaluates the Bay Area Plan as of July 2013 when it was adopted and not with the benefit of hindsight. That said, the court notes that SB 628 (Gov. Code 53398.50 et al) was filed on September 29, 2014, and it permits the creation of Enhanced Infrastructure Financing Districts that can fund infrastructure projects for transportation priority projects and to implement a sustainable communities strategy.

accommodate at best 80% of the projected housing needs and (2) the 80% figure is an aggregate and does not take into account individual variations.

The first point presumes that the Bay Area Plan is a housing document. In fact, the Gov. Code 65080 concerns regional transportation plans and the Bay Area Plan sets out a "Regional Transportation Plan and Sustainable Communities Strategy." (AR 55624.) Petitioners have not pointed the court to any statute or regulation stating that the Bay Area Plan must plan for adequate housing. Housing is a local issue and Gov. Code 65080(b)(2)(K) states "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." (See also AR 55630.)

Assuming the Bay Area Plan were a housing document, there is substantial evidence to support the Bay Area Plan's factual finding that development in the PDAs can accommodate a significant percentage of the projected housing needs of the Bay Area. The EPS Feasibility Report states that "some upzoning or increase in allowable densities will be required to meet the Pan Bay Area growth allocations." (AR 48330.) This is simply a restatement of the point that the Bay Area Plan "is a work in progress" and implementation will require legislative changes over the upcoming decades. 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.[5] By focusing housing in the PDAs, the Bay Area Plan would advance its goal of limiting greenhouse gas emissions.

[5] 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,

In addition, the EPS Feasibility Report suggests that the PDAs in the Bay Area Plan will permit local cities to increase their readiness for the anticipated housing needs of 2040 from 62% to 80%. (AR 48331.) Although not a 100% percent solution, an increase from 62% to 80% represents a 29% projected increase in housing capacity in the PDAs from what is available under current conditions. This is substantial evidence that the Bay Area Plan is reasonably expected to permit the Bay Area to develop adequate housing for its regional needs.

The second point concerns the distribution of housing, and the Bay Area Plan addresses variations in the projected availability of housing in different cities by stating that it plans for housing where residents have the highest levels of transit services and access to jobs as a means of limiting vehicle miles travelled. (AR55665.) This meets the Bay Area Plan's regional goals and is not expected to address the housing goals and requirements for individual cities.[6]

Finally, Petitioners have an overarching argument that the Bay Area Plan fails to comply with Gov. Code 65080(b)(2)(B)(vii) because it is not *capable of* accomplishing its objectives within a *reasonable* period of time. There is substantial evidence that the Bay Area Plan is capable of accomplishing its objectives. The Bay Area Plan's "Introduction" explains the requirements of SB 375. (AR55631.) The Bay Area Plan's Section 1 titled "Setting Our Sights" sets out the performance targets. (AR55641.) These correspond in large part to the required components of a sustainable communities strategy. (Gov. Code 65080(b)(2)(B).) The Bay Area Plan's Section 5 titled

---

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.

[6] Petitioners argue elsewhere that the Bay Area Plan is unlawful because it unlawfully coerces local agencies to comply with the Plan.

"Performance" addresses whether the Plan is expected to meet its Required Performance Targets. Regarding Climate Protection, the Plan states:

> Through combinations of denser land use patterns focused in Priority Development Areas, increased investments in the region's public transit infrastructure, and enhanced funding of climate initiatives such as electric vehicle adoption incentives, Plan Bay Area not only meets but exceeds its greenhouse gas (GHG) emissions reduction target. By 2040, the typical Bay Area resident is expected to reduce his or her daily transportation CO2 emissions by 18 percent compared to 2005 conditions.
>
> Senate Bill 375 mandates per-capita GHG target achievements for years 2020 and 2035 as established by the California Air Resources Board. For 2035, the plan leads to a 16 percent per- capita reduction (surpassing the 15 percent target), and for 2020, the plan leads to a 10 percent per-capita reduction (also surpassing an interim 7 percent target).
>
> While MTC has considered the effects of transportation investments on GHG emissions in prior regional transportation plans, Plan Bay Area is the first regional effort with an aggressive and achievable emission reduction goal. By accelerating efforts to emphasize infill growth and to boost funding for public transit, this plan represents a bold step for the region in this era of climate change.

(AR55693.) Other than the specific arguments addressed above regarding the Plan's expectations for legislative changes and the Plan's ability to encourage adequate housing, Petitioners have not made specific arguments, or identified evidence showing, that this summary is inaccurate and that the Bay Area Plan cannot meet its targets. The Bay Area Plan's factual findings are supported by substantial evidence and its conclusions are explained by analysis.

STANDARD OF REVIEW – EQUAL PROTECTION CLAIMS

Several of Petitioners' claims are for equal protection under the law. The standard of review for equal protection claims is that the court will uphold a statute or quasi-legislative action "if there is any reasonable basis in fact to support the legislative

determination" and that "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." (*Court House Plaza Co. v. City of Palo Alto* (1981) 117 Cal.App.3d 871, 881-882.) (See also *City and County of San Francisco v. Pace* (1976) 60 Cal.App.3d 906, 910-911.) The standard of review under the United States Constitution is similar. (*City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 440 ["legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."].) 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.

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 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.

Whether in Pub Res. Pub. Res. Code 21155 et seq. and 21159.28 or in 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. If people are walking to work, to schools, or to shopping them they are not driving and creating greenhouse gas emissions. (AR 55708.) Thus, the CEQA streamlining encourages residential and commercial development that will arguably encourage walking, which will limit greenhouse gas emissions. 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.

Whether in Pub. Res. Code 21155.1(c)(1) or in the Bay Area Plan, affordable housing bears "a substantial relation to a legitimate public purpose." A legitimate public purpose is to provide "decent housing and a suitable living environment for every Californian." (Gov. Code 65580.) (See also AR 55667 [discussing Regional Housing Needs Allocation].) The CEQA streamlining bears a substantial relation to the public purpose because it encourages development of affordable housing. 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.

THE BAY AREA PLAN IS CONSISTENT WITH FEDERAL REQUIREMENTS FOR REGIONAL TRANSPORTATION PLANNING.

Petitioners 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 *within and between States and urbanized areas*, 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 urbanized 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 AND FURTHER PROCEEDINGS.

The petition includes four claims. This order resolves only the first cause of action seeking 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 first cause of action might affect the continued viability of the other claims. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 158.) It is unclear whether the court may enter a final judgment on the first cause of action while the other claims are still unresolved. (CCP 578; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 736-744.)

The court sets a case management conference for 1:30 pm on January 28, 2015, to address further proceedings in this case. The court encourages the parties to meet and

confer regarding the continuing viability of the remaining claims and how the parties want to proceed going forward.

DATED: January __, 2015

____
Evelio Grillo
Judge of the Superior Court