A144815

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE POST SUSTAINABILITY INSTITUTE, et al.
Plaintiffs and Appellants,

v.

ASSOCIATION OF BAY AREA GOVERNMENTS, et al.,
Defendants and Respondents.

APPELLANTS' OPENING BRIEF

Trial Court Case No. RG 13699215
The Honorable Evelio Grillo

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APP-008

COURT OF APPEAL, First **APPELLATE DISTRICT, DIVISION** Two	Court of Appeal Case Number: A144815
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APPELLANT/PETITIONER: The Post Sustainability Institute, et al. RESPONDENT/REAL PARTY IN INTEREST: Assn. of Bay Area Governments, et al.	

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Date: October 9, 2015

Timothy V. Kassouni
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INTRODUCTION

In 2006 the California Legislature enacted A.B. 32, the Global Warming Solutions Act, which among other things articulated the goal of reducing greenhouse gas emissions to 1990 levels by 2020. The following year the legislature enacted S.B. 375, the Sustainable Communities and Climate Protection Act. S.B. 375 required Respondents Association of Bay Area Governments (ABAG) and Metropolitan Transportation Commission (MTC) to adopt a "sustainable communities strategy" to reduce greenhouse gas emissions to target levels determined by the California Air Resources Board (CARB). CARB set targets of 7% reductions by 2020, and 15% percent reductions by 2035. The S.B. 375 mandate is unequivocal: Respondents "shall" adopt a strategy that "will" reduce greenhouse gas emissions to CARB's target levels.

Regrettably, as revealed by their own paid independent study, the "Plan Bay Area" (Plan) adopted by Respondents will not come close to the CARB targets. That did not prevent Respondents from passing a resolution affirmatively declaring that the CARB targets *will* be met without qualification and without reference to the conclusions of the independent study. Court proceedings below have fleshed out the motivation behind this sleight of hand. On the one hand Respondents were required to affirmatively represent that the CARB targets would be met in order to obtain final CARB approval. On the other hand Respondents must concede in this action that there is no assurance that the CARB targets will be met, and that the Plan is nothing other than an "aspirational document." Appellants'Appendix (AA) 120, line 4. *Both cannot be true*.

The losers are the residents of the Bay Area. The Plan's dangerously experimental social engineering will *immediately* initiate the most comprehensive land use transformation in the history of the Bay Area (comprising nine counties and 101 cities) with close to zero environmental benefit. The populace will be forced into densely packed Priority Development Areas (PDAs) which are already

at or near capacity, while development in 95% of the remaining land will either be prohibited or made so expensive that jobs and economic growth will be throttled.

This transformation is predicated on an infeasible and wildly speculative Plan, the usurpation of local land use autonomy in violation of the State Constitution, the use of extortion tactics to withhold federal funds from those cities and counties that do not toe the line, and "streamlined" environmental review for favored developers in violation of Federal and State Equal Protection guarantees.

Respondents have conceded that without substantial legislative and State Constitutional amendments, just over *one-half* of its development allocations can be accommodated. Even *assuming* that these legislative and State Constitutional amendments are adopted within a reasonable period of time (with no evidence proffered that they will), only 80 percent of the development allocations can be accommodated. It is equal parts troubling and mysterious just how Respondents' can assert that the CARB targets "will" be met under these circumstances.

Our Federal and State Constitutions are premised upon a republican form of government which preserves the autonomy of local control, not a "regionalism" governed by unelected officials. This bedrock principle should not be sacrificed under the fuzzy guise of sustainability. This Court should ensure that the State's unambiguous mandate be enforced as an essential check and balance on the power granted Respondents, who have placed ideology over the law and pre-ordained agendas over independent analysis.

In short, Respondents' should have simply informed the State that the mandate is not feasible, as S.B. 375 requires.

Petitioners request that the trial court judgment be reversed, with direction that a peremptory writ of mandate be issued directing Respondents to rescind their approval of the Plan.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Regional Transportation Plans

Federal and state law requires that MTC, as the designated metropolitan planning organization, prepare and regularly update a regional "transportation plan." See 23 U.S.C. § 134(c), (i); 49 U.S.C. § 5303(i); Gov't Code § 65080(a). This plan "provide[s] for the development and integrated management and operation of transportation systems and facilities" that "will function as an intermodal transportation system for the metropolitan planning area" as well as "an integral part of an intermodal transportation system for the State and the United States." 23 U.S.C. § 134(c)(2); Government Code § 65080(b)(1). Related thereto, The California Global Warming Solutions Act of 2006 (popularly known as A.B. 32), mandates a reduction of greenhouse gas emissions to 1990 levels by 2020. Health & Safety Code §§ 38550, 38551.

To implement A.B. 32's policy, the legislature passed S.B. 375, the Sustainable Communities and Climate Protection Act of 2008. S.B. 375 seeks to ensure that the existing transportation planning process be coordinated with A.B. 32's greenhouse reduction mandate and integrated with the existing state-mandated housing planning process.

B. Greenhouse Gas Reduction Targets and Plan Bay Area

S.B. 375 seeks to implement A.B. 32 by requiring metropolitan planning organizations such as MTC to produce a "sustainable communities strategy," which must be integrated with a region's transportation plan. Government Code §

65080(b)(2). For the Bay Area, MTC and ABAG have joint responsibility for production of this strategy. Government Code § 65080(b)(2)(B).

On July 18, 2013, MTC and ABAG adopted Plan Bay Area, the Regional Transportation Plan and Sustainable Communities Strategy for the San Francisco Bay Area 2013-2040 (the Plan). The Plan was adopted by means of Resolution No. 4111 (Resolution). Administrative Record (AR) 000257. CARB accepted the Plan, pursuant to Government Code § 65080(b)(2)(J)(ii). AA 120, line 21-AA 121, lines 1-4.

The Plan is a 150-plus page document covering various aspects of transportation, zoning, and property development within nine Bay Area counties, including Alameda County and Sonoma County (where Petitioners Rosa Koire and Michael Shaw reside and have businesses), and 101 cities. However, Government Code § 65080(b)(2)(K) provides that "nothing in [the Plan] shall be interpreted as superseding the exercise of the land use authority of cities and counties within the region." Therefore on paper the Plan cannot usurp local autonomy. As will be shown that is not the case.

A key component of the Plan is the relationship between A.B. 32, S.B. 375, and federal funding of state and local transportation programs. In July 2012 a federal law known as MAP-21 (Moving Ahead For Progress in the 21st Century Act), P.L. 112-141, H.R.4348, was enacted, which provides $105 billion in transportation funding.[1] These funds are allocated to the MTC, which functions as the Bay Area's state regional transportation planning agency, as well as the Bay Area's federal Metropolitan Planning Organization (MPO.)

[1] MAP-21 is available at http://www.gpo.gov/fdsys/pkg/PLAW-112publ141/pdf/PLAW-112publ141.pdf. MAP¬21 adopts a number of provisions of the United States Code, including provisions in Title 23 and Title 49.

C. Priority Development and Priority Conservation Areas

For the Bay Area, CARB established target greenhouse gas reductions of 7% per capita by 2020, and 15% by 2035. AR 055631. The Plan purports to achieve the greenhouse targets by reducing vehicular traffic. This in tum is purportedly achieved by concentrating future land development in designated high density PDAs, which are described as "transit oriented, infill development opportunity areas within existing communities that are expected to host the majority of future development." AR 055679. The Plan anticipates the need for 660,000 housing units to accommodate future growth. AR 055650. Of these units, 509,000 (or 78 percent) are to be contained in PDAs, although PDAs comprise only 5 percent of the Bay Area. AR 055635, 055666.

Certain areas outside of PDAs are referred to as Priority Conservation Areas (PCAs). These are described as "over 100 regionally significant open spaces…which face nearer-term development pressures," although the term "development pressure" is undefined. AR 055660. The Plan seeks to drastically limit, if not ban, any development within PCAs in order to force the populace to work and live in PDAs.

D. One Bay Area Grant Program Funds

The primary means by which the Plan purports to limit future development to PDAs is by coercing constitutionally autonomous governmental entities (cities and counties) into mapping PDAs and PCAs in their general plans and zoning ordinances in order to receive One Bay Area Grant Program (OBAG) funds. OBAG, adopted and implemented by MTC, is the state program by which certain federal transportation funds are allocated to local governments in the Bay Area, estimated to be $14.6 billion over the life of the Plan. AR 055679. OBAG "rewards jurisdictions that focus housing growth in [PDAs] through their planning

and zoning policies, and actual production of housing units" (AR 055636), and is designed to "support jurisdictions that focus housing growth in Priority Development Areas through their planning and zoning policies, and their production of housing units" (AR 055679).

II. PROCEDURAL BACKGROUND

Petitioners are an organization and two individual taxpayers and residents of the Bay Area who are dedicated to the support of property rights and matters of land use of interest to the general public. AA 003-004. Petitioners timely filed comments to the Draft Plan Bay Area (AR 039453, 039025, 037499), and commenced this petition for writ of mandate and complaint for declaratory and injunctive relief. AA 002.

The initial administrative record and the supplemental administrative record were lodged with the trial court in the form of two flash drives. Those flash drives have been provided to this Court by counsel for Appellants, the receipt of which was telephonically confirmed by the clerk of court.

After trial court briefing and oral argument the parties filed their respective comments on the tentative ruling at the suggestion of the trial court. AA 187, 194.

The trial court subsequently issued a revised final decision which was incorporated into the judgment. Notice of entry of the final judgment was entered on February 26, 2015, and disposed of all claims. AA 202.

Subsequent law and motion proceedings related to Petitioners' motion to tax costs were held, and are not the subject of this appeal

Petitioners' filed a timely notice of appeal of the final judgment on April 10, 2015. AA 248.

STANDARD OF REVIEW

Code of Civil Procedure § 1094.5(b) provides that the inquiry in mandamus cases shall extend to the question of whether there was prejudicial abuse of discretion, which is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. The trial court need not defer to the administrative agency, and retains final authority for the interpretation of the law under which an administrative agency acts. *Kaiser Found. Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018, 1028.

Findings must be supported by substantial evidence, and the question of whether the findings support ultimate agency determinations is one of law for de novo review. *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515. The question of whether Respondents failed to proceed in a manner required by law is likewise reviewed de novo. *California Teachers Ass'n. v. Butte Community College Dist.* (1996) 48 Cal.App.4th 1293, 1299.

The question of whether the Plan lacks substantial evidence to support the findings of compliance with S.B. 375 is a judicial inquiry that mandates review of the entire administrative record, including evidence that *detracts* from the findings in the Plan, particularly the independent findings of Economic & Planning Systems, Inc. (EPS.) This Court's role in the process of determining whether substantial 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.)

Appellants contend that Respondents failed to proceed in a manner required by law as to all arguments. Additionally, as to Sections I and III, Petitioners contend that the Plan is not supported by the findings, and that the findings are not supported by the evidence.

The equal protection claim is subject to the rational basis standard of review. *(Santa Monica Beach v. Superior Court* (1999) 19 Cal.4th 952, 980-981.)

ARGUMENT

I. S.B. 375 REQUIRES RESPONDENTS TO ADOPT A PLAN WHICH WILL ACHIEVE THE CARB GREENHOUSE GAS REDUCTION TARGETS, OR PREPARE AN ALTERNATIVE PLANNING STRATEGY; RESPONDENTS DID NEITHER

S.B. 375 sets forth a four step process for achieving the CARB greenhouse gas reductions targets. First, the bill mandates preparation and adoption of a "sustainable communities strategy." S.B. 375 provides in part:

> 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.

Government Code § 65080(b)(2)(B) [emphasis added]. Government Code § 65080.01(c) in turn defines the term "feasible":

> '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.

Second, S.B. 375 provides that if the sustainable communities strategy is "unable" to achieve the requisite CARB greenhouse gas reduction targets, an alternative planning strategy is required:

> If the sustainable communities strategy, prepared in compliance with subparagraph (B) or (D), is unable to reduce greenhouse gas emissions to achieve the greenhouse gas emission reduction targets established by the state board [CARB], the metropolitan planning organization shall prepare an alternative planning strategy to the sustainable communities strategy showing how those greenhouse gas emission targets would be achieved through alternative development patterns, infrastructure, or additional transportation measures or policies.

Government Code § 65080(b)(2)(I).

If the alternative planning strategy is necessary, S.B. 375 requires, among other things, the submission of specific information regarding the "principal impediments to achieving the targets" and a description of "how the greenhouse gas emission reduction targets would be achieved by the alternative planning strategy…." Government Code § 65080(b)(2)(I), subdivisions (ii) and (iii.)

Third, as is the case here, if Respondents conclude that the alternative planning strategy is not necessary, the procedure for final implementation of the Plan is CARB approval. Note that there is no gray area involved, such as whether the Plan simply "aspires" to, "might," or "could" achieve the CARB greenhouse gas emission targets. Review is limited to the question of whether the Plan will or will not achieve those targets:

> After adoption, a metropolitan planning organization shall submit a sustainable communities strategy or an alternative planning strategy, if one has been adopted, to the state board for review, including the quantification of the greenhouse gas emission reductions the strategy would achieve and a description of the technical methodology used to obtain that result**. *Review by the state board shall be limited to acceptance or rejection of the metropolitan planning organization's determination that the strategy submitted would, if implemented, achieve the greenhouse gas emission reduction targets established by the state board***. The state board shall complete its review within 60 days.

Government Code § 65080(b)(2)(J)(ii) [emphasis added.]

Finally, if CARB determines that the strategy would not achieve the targets, Respondents would be tasked with revising that strategy or adopt an alternative strategy, neither of which occurred in this case. (See Government Code § 65080(b)(2)(J)(iii).)

The Plan acknowledges Respondents' mandate to meet the target reductions: "Senate Bill 375 mandates per-capita GHG target achievements for years 2020 and 2035 as established by the California Air Resources Board." AR 055693.

Lest there be any doubt that Respondents understood the SB 375 mandate, MTC Resolution 4111 unequivocally declared that the Plan "***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].[2] The Resolution does not state that the Plan simply *aspires* to achieve the reductions, or acknowledge the myriad assumptions necessary for success. The Plan similarly concludes that the CARB targets will be achieved:

> 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***.

[2] Even if the target is met, the effect on the environment will be close to nothing. In 2007 the Environmental Protection Agency estimated total global greenhouse emissions at approximately 32 billion tons per year. (See http://www.epa.gov/climatechange/ghgemissions/global.html). That same year, Respondent MTC estimated Bay Area greenhouse emissions at approximately 95.8 million tons. (See page 7 of http://www.mtc.ca.gov/planning/climate/Bay_Area_Greenhouse_Gas_Emissions_2-10.pdf.) A 15 percent reduction in that amount would amount to a reduction of 14.4 million tons per year, or .045 percent reduction in global emissions. AR 39470, fn. 17.

AR 55693 [emphasis added].

After adoption of MTC Resolution 4111, CARB approved the Plan. As noted above, S.B. 375 characterized CARB approval as an endorsement that the Plan *will* achieve the greenhouse gas emission reduction targets.

Yet the Plan's conclusion that it will achieve CARB's reduction targets is directly contradicted by the independent feasibility study commissioned by Respondents to ensure compliance with S.B. 375. The Plan acknowledges that in order to make "progress" toward land use performance targets, no less than four discrete federal and state legislative changes are needed: 1) support of PDA development with "locally controlled funding" (i.e., the need for new legislation to establish redevelopment agencies); 2) the "defiscalization" of land use decision making (i.e., the extinguishment of Proposition 13 as now embodied in the State Constitution); 3) stabilization of federal funding levels; and 4) modernization of CEQA. AR 055711-055712.

Not surprisingly, the findings of that study are nowhere to be found in the Plan or in Resolution 4111, nor is there acknowledgment that these assumptions undercut the Plan's compliance with S.B. 375.

A. The Independent "Priority Development Area Development Feasibility and Readiness Assessment Report" Recognizes that Redevelopment Will Be Needed to Achieve Development Objectives, Yet Redevelopment Agencies Do Not Exist

In conjunction with Plan Bay Area, Respondents commissioned the preparation of an independent "Priority Development Area Development Feasibility and Readiness Assessment Report" (Feasibility Report.) AR 35790. The express purpose of this report is to "provide a deeper understanding and independent assessment of the readiness and feasibility of PDA's to accommodate the number of housing units envisioned by Plan Bay Area." AR 035794. It is

referenced as a background document in Plan Bay Area (AR 055716). It was prepared by the Berkeley urban economics consulting firm Economic Planning Systems, Inc. (EPS.) AR 035792. The Plan otherwise does not mention, reference, or refer to the Feasibility Report—a telling omission.

In the opening page of the Feasibility Report, EPS acknowledges that the Plan relies upon "legislative changes needed to support the proposed pattern of growth." AR 035794. The Feasibility Report also sets forth its analytical framework:

> The new assessment estimates the ability of the PDA's in the sample to accommodate new residential development consistent with Plan Bay Area residential forecasts. The report estimates the amount of housing that can be produced assuming baseline current conditions and the increase in the number of housing units that could be produced if select key barriers to development can be addressed by policy or financial interventions over the 30 year time horizon of Plan Bay Area.

AR at 035794-035795.

EPS outlined a number of constraints rendering Plan Bay Area infeasible: policy, market, infrastructure, site location, financing, and financial feasibility constraints. AR 035797. In its Summary of Findings and Recommendations, EPS found:

> Substantial development capacity exists in the PDAs given current local land use policy as applied to identified 'opportunity sites' (potential development sites) but some upzoning or increase in allowable densities will be required to meet the *Plan Bay Area* growth allocations ... [I]n aggregate the current land use policies for the 20 PDAs in the sample currently represent physical capacity for 92 percent of the housing growth that has been allocated to them in Plan Bay Area.

AR 035795.

The reference to required "upzoning" or "increase in allowable densities" renders the Plan infeasible, as all nine counties and 101 cities must adopt the requisite legislation to amend their general plans, specific plans, and zoning ordinances to establish the PDAs and PCAs desired by Respondents, all within a

"reasonable period of time" as mandated by Government Code § 65080.01(c). This assumes in the first instance that all 110 local jurisdictions initiate the process for legislative amendments, a point on which Plan Bay Area is silent.[3] Further, most of these jurisdictions must comply with Government Code provisions regarding requisite procedural requirements for such legislation. (See Government Code § 65853 et seq.) There must also be requisite consistency between the zoning ordinance, the specific plan, and the general plan of each local jurisdiction, which the Plan fails to address.

More specifically, with respect to site location constraints, EPS found that "[w]hile there are some vacant sites in most PDA's much of the development capacity in the PDAs will be derived from redeveloping existing commercial land uses with new multifamily or mixed use development." AR 035797. Elsewhere EPS found that "[i]n most PDA's the majority of the new development envisioned will be built within an existing urban framework including on existing developed sites that will need to be assembled and redeveloped." AR 035830.

Thus it is acknowledged that only through the "redevelopment" of existing commercial land uses, along with other legislative changes, can the Plan achieve its objectives. However, redevelopment agencies in California have been abolished. Echoing the feasibility concern raised by EPS, the Plan acknowledges the need for a legislative redevelopment solution:

> The Association of Bay Area Governments based its housing production forecast on expected house hold income and demand, past housing production trends, and local plans (including planned zoning changes). It also assumed the following:
>
> > • Existing policies and programs to produce housing will be retained and enhanced.

[3] The Feasibility Report cited two examples of local policy restraints which directly conflict with Plan Bay Area: the City of Alameda's "Measure A" prohibition of multifamily housing development and San Jose's phasing requirement linking housing development to net new non-residential square footage in North San Jose. AR 035797.

> • A replacement mechanism will be found to fund and implement many of the functions that were performed by California redevelopment agencies before Gov. Jerry Brown signed legislation abolishing those agencies in June 2011.

AR 055654.

Yet the assumption that a "replacement mechanism" will be found hardly satisfies the S.B. 375 mandate. There is no evidence to support the assumption that at some indefinite time the political process will remedy this deficiency. Redevelopment, among other legislative changes, will be necessary if the Plan is to reach its stated objective of the creation of 509,000 new multi-family housing units in PDAs by 2040. There is no existing redevelopment alternative available to subsidize housing costs, and most PDAs are in redevelopment areas. Thus, there is admittedly no existing feasible substitute for the admitted loss of $1 billion per year in tax-increment financing to support affordable housing projects. Plan Bay Area acknowledges as much:

> Until last year, Bay Area jurisdictions could count on redevelopment programs for over $1 billion per year in tax-increment financing to support affordable housing projects, critical infrastructure improvements, and economic development projects in designated areas of many cities and counties. This funding stream was lost in 2012 as a result of the elimination of redevelopment agencies throughout the state.

AR 055711.

With PDAs already at full or near full capacity (EPS cites an average capacity of 92 percent (AR 035795)), a redevelopment replacement mechanism is not just desirable, it will be essential if Respondents are to take the first step in fashioning a feasible strategy. It must be emphasized that the 92 percent figure is misleading to the extent it suggests that each PDA has room for growth. 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.)

B. Plan Bay Area Further Relies on the Assumption that the Political Process Will Extinguish the Super Majority Voting and Property Tax Components of Proposition 13

The Plan further relies on the assumption that the political process will extinguish the super voting majority requirement of Proposition 13, which is codified into law as Art. XIII A, Sec. 2(a) of the California Constitution. The Feasibility Report highlights this flaw: "to achieve the transportation and land use patterns included in Plan Bay Area so that the region can achieve its greenhouse gas emission reductions ***there are a range of state legislative changes, resource allocation changes, and interagency coordination efforts that will be required***." AR 035835 [emphasis added]. Among these required legislative changes is local government fiscal reform:

> ***The structure of property taxes in California is a major obstacle to creating a balanced regional growth pattern*** primarily because new housing is frequently perceived as generating more municipal service costs than municipal revenues….Fiscal reform efforts should support long-term adjustment to commercial or residential tax rates to balance the financial incentives for new development.

AR 035836 [emphasis added].

The Plan echoes the necessity of an adjustment to commercial or residential tax rates: "[t]he structure of property taxes in California is a major obstacle to creating a balanced regional growth pattern." AR 055712. Yet the only possible legislative change to residential tax rates is the extinguishment of Proposition 13, the State Constitutional provision which ties property taxes to a percentage of the cash value of a property at the time of purchase, and which establishes a super-majority voting requirement for new taxes. Cal. Const. Art. XIII A, Sec. 2(a).

The Plan must rely on the amendment of our State Constitution in order to satisfy the CARB greenhouse gas emissions mandate of Government Code section 65080(b)(2)(B), with no discussion of the feasibility or time frame of that ever happening.[4]

C. The Feasibility Report Concludes that New Infrastructure Spending is Required to Implement the Plan

In addition to the need for a redevelopment agency replacement mechanism and a Constitutional amendment to extinguish Proposition 13, the Feasibility Report outlined the need for a "new state infrastructure funding program for local governments pursuing S.B. 375 objectives." AR 035836. This is crucial, as elsewhere the Feasibility Report noted that "[m]ost of the PDAs will require substantial new investment in infrastructure. In some instances, funding capacity from the local government or supportable amounts from housing developers is simply not adequate to pay for this infrastructure, *thus regional, state or federal funding will be required to support desired PDA development*." AR 035828.[5]

As a solution, the Feasibility Report highlighted the possibility of a bond measure to be adopted by California voters as a mechanism to enhance feasibility:

> To support the implementation of S.B. 375 the state could provide new funding for infrastructure required to achieve or promote implementation of the Sustainable Communities Strategies. A bond measure (similar to the special-purpose competitive funding program created by Proposition 40) could be put before the voters. The resulting funding could be administered independently or through the currently unfunded State Infrastructure Bank

[4] There are three procedures by which the State Constitution can be amended: 1) by legislatively referred amendment (Art. XVIII, sec. 1); 2) through an initiated amended (Art. XVIII, sec. 3; Art. II, sec. 8); and 3) by constitutional convention (Art. XVIII, sec. 2).

[5] The Plan acknowledges that stabilization of federal funding levels is needed to accomplish its objectives in light of the abolishment of the HOME Investment Partnership Program and the Community Development Block Grant (CDBG) program. AR 055711. There is no discussion of the effect of this on the Plan's feasibility.

> and further directed as part of the PDA Investment and Growth Strategies prepared by the CMA's.

AR 035836.

There are simply insufficient funds to finance the broad policy objectives of the Plan. The Feasibility Report highlights this deficiency by citing the need for major legislative changes and constitutional amendments to satisfy the Plan's greenhouse emissions reduction targets. As will be discussed in section II, *infra*, the Fourth District Court of Appeal in *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, a case with similar facts, recently held that a governmental entity cannot rely on unfunded programs to support greenhouse gas emissions targets.

Lest there be any remaining doubt that the Plan does not meet the S.B. 375 mandate, EPS emphasized the practical and legal impossibility of the greenhouse emissions targets being met when PDA's are already developed to capacity:

> Most of the PDAs are largely developed and also exhibit a fragmented pattern of small parcels in independent ownership. ***Parcel assembly and redevelopment will be needed to achieve development objectives in virtually all PDAs. This land assembly process is time consuming, risky, and expensive and will thus represent one of the largest obstacles to achieving Plan Bay Area and local planning objectives.***

AR 035828 [emphasis added].

The Feasibility Plan unequivocally undercuts Plan Bay Area's conclusory assertion that it "meets" and even "exceeds" the SB 375 greenhouse emissions mandate. Unsurprisingly, the Plan can only reach this conclusion by ignoring the feasibility component of S.B. 375. There is a dearth of evidence to support the notion that requisite state, county, and city legislative changes, bond measures, and constitutional amendments can be accomplished at all, let alone accomplished "in a successful manner within a reasonable period of time" as required by Government Code § 65080.01(c). A "time consuming, risky, and expensive" process is antithetical to the S.B. 375 mandate.

D. Plan Bay Area Cannot Meet the CARB Target Reductions Even if its Assumptions are Realized

Even if the Plan's assumptions are realized, the feasibility requirement cannot be met. EPS analyzed 20 sample PDAs and concluded that only three (Fremont, Hayward, and San Rafael) have either the existing or projected capacity to accommodate Plan Bay Area's housing allocation. This is a mere 15 percent of the sample PDAs analyzed by EPS. The other seventeen sample PDAs (85 percent) fail miserably in this regard, even if the Plan's assumptions are realized. AR 035812-035821. EPS analyzed a base scenario generally without assumptions, and an amended scenario with the assumptions built in. As an example, EPS determined that the Redwood City Downtown PDA is only capable of accommodating 36 percent of its allocation under the base scenario, and only 58 percent under the amended scenario:

> In the base scenario EPS has estimated that 1,902 new units may be achievable by 2040, which represents only 36 percent of the Plan Bay Area allocation to this PDA. In the amended scenario redevelopment-type authority and financing tools are assumed to be re-established enhancing the viability of new development on smaller and/or currently utilized parcels. The PDA is projected to be able to accommodate 3,059 new units or 58 percent of the Plan Bay Area allocation.

AR 035814.

The two largest regional PDA centers located in San Francisco and San Jose fall over 20 percent short of the Plan Bay Area housing allocations even with the assumptions having been realized in the amended scenario. AR 035812-035813. In the case of San Francisco, the base scenario already included an EPS "assumption" of a 40 percent "increase in zoning capacity." AR 035812. Even with this base scenario assumption, the San Francisco regional PDA fails to accommodate the Plan Bay Area housing allocation by 35 percent. Id. Other examples include the Oakland/BART and South San Francisco transit town centers, and the Antioch and Walnut Creek suburban centers, which EPS estimates

will fall over 40 percent short of the Plan Bay Area housing allocations even with the assumptions built in under the amended scenario.

EPS determined that under the base scenario (reflecting current conditions without the need for legislative changes, etc.) the 20 sample PDAs are able to accommodate only 62 percent of the growth allocated by Plan Bay Area. AR 35812. ***Even if all amended scenarios and their assumptions are realized, the 20 sample PDAs are able to accommodate only 80 percent of the growth allocated by Plan Bay Area.*** Id. The Plan ignores these findings and fails assess their impact on the ability to meet the CARB reduction targets. Respondents have failed to proceed in a manner required by law, and the Plan's conclusory assumption that those targets will be met lacks substantial evidence.

II. THE PLAIN LANGUAGE OF S.B. 375 SHOULD NOT BE REWRITTEN TO SALVAGE A FUNDAMENTALLY FLAWED PLAN

In denying the petition for writ of mandate, the trial court did not specifically address the myriad infeasible assumptions upon which the Plan's success is premised. Rather, the trial court concluded that S.B. 375 should be rewritten to soften the words "will" and "shall," and that a "reasonable period of time" can mean decades (notwithstanding Respondents' failure to even advance these arguments). That approach should not be followed by this Court.

With respect to the S.B. 375 mandate that the Plan "will" reduce emissions to achieve the CARB targets, the trial court concluded that the term should be modified to read "is expected to." AA 220. The Court reasoned that the term, when taken in the context of S.B. 375 as a whole, is not a mandatory direction but rather encompasses "futurity, capability, or sufficiency and simply refers to a reasonable expectation that something will happen." Id. Yet the term "will" is not ambiguous, and has a plain meaning in the context of S.B. 375. Had the legislature

chosen to soften its directive to Respondents, it could have simply used the term "capable of" instead of "will."

Indeed, one of the cases cited by the trial court, *Scally v. W.T. Garratt & Co*. (1909) 11 Cal.App.138, 154, accurately referred to the term "will" as "the *unqualified or unconditional* existence of some fact or thing" or an "existence in actuality." [Emphasis added.] As noted above, the Plan contains a number of assumptions, qualifications, and conditions which are at odds with the S.B. 375 mandate.

Even if it is assumed, arguendo, that "will" should be rewritten to the phrase "is expected to," the Plan cannot be salvaged. There is no substantial evidence in the Plan which provides a timeline for the "expected" realization of its assumptions. Not only that, even if the assumptions are realized (*i.e.,* legislative and policy changes), the Feasibility Report concluded that 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. (See section I.D., *supra*.)

The trial court also failed to account for other integral aspects of S.B. 375 which repeat the word "will" and "would" without qualification or equivocation. As noted above, CARB approval of the Plan is predicated upon its acceptance of the determination that "the strategy submitted would, if implemented, achieve the targets established by the state board." Government Code § 65080(b)(2)(J)(ii). It is difficult to imagine a clearer mandate. Not only that, it is wholly inconsistent with the trial court's conclusion that SB 375 "does not require the MTC to demonstrate that the Bay Area Plan is certain to succeed." AA 223. If that is the case, the legislature could have changed to the word "would" to "could" or "may."

In short, if this Court were to accept the trial court's reasoning, the wholesale transformation of the Bay Area's land use and economic structure will commence with no assurance of success, and with myriad assumptions that have

no timeframe for realization. That is inconsistent with the plain language of SB 375.

This conclusion is buttressed by the Court of Appeal's recent decision in *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152. In that case, much like the facts here, an environmental organization sought a writ of mandate against the County of San Diego to enforce an A.B. 32 related climate change mitigation measure. The County committed to preparing a climate change action plan with "'more detailed greenhouse gas [GHG] emissions reduction [GHG] targets and deadlines'" and "'comprehensive and enforceable GHG emissions reductions measures that will achieve'" specified quantities of GHG reductions by the year 2020. (Id. at 1156.) However, instead of preparing a climate change action plan that included comprehensive and enforceable GHG emission reduction measures that would achieve GHG reductions by 2020, the County prepared a climate action plan (CAP) as a plan-level document that expressly "does not ensure reductions." (Id.)

The trial court granted the writ of mandate, concluding that the CAP "neither contained enforceable GHG reduction measures that will achieve the specified emissions reductions, nor detailed deadlines for GHG emission reductions." (Id. at 1163.) The Court of Appeal affirmed, citing the reasoning of the trial court as well as evidence in the record of unfunded mitigation measures:

> Further, the record demonstrates that many of the mitigation measures set forth in the MMRP ***are not likely to achieve GHG emissions reductions by 2020 as promised by Mitigation Measure CC–1.2 because they are not currently funded.*** The record show that the County has not funded essential programs like replacing its own vehicle fleet, implementing water conservation programs, preparing town center plans, and reducing water demand. ***The County cannot rely on unfunded programs to support the required GHG emissions reductions by 2020***, as Mitigation Measure CC–1.2 requires.

(Id. at 1168-1169 [emphasis added].)

The Feasibility Report exposed the Plan's lack of funding and the legislative enactments necessary to even come close to the CARB reduction targets.

III. EVEN IF IT IS ASSUMED THAT S.B. 375 SHOULD BE REWRITTEN, THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE PLAN'S CONCLUSION THAT CARB TARGETS ARE LIKELY TO BE ACHIEVED

Even if it is further assumed, as the trial court suggested, that the term "will" can alternatively be read as "likely to be implemented and likely to be achieved" (AA at 223), the Plan does not provide evidence that the myriad legislative changes are "likely" to be implemented, nor evidence that the changes are "likely" to be achieved within a reasonable period of time as required by Government Code § 65080.01(c). Nowhere in the trial court's decision is there citation to any evidence, let alone substantial evidence, that all of the legislative changes proposed by Respondents are likely to be achieved, and the timeframe for achievement. The trial court also failed to address the conclusion of the Feasibility Report that development allocations will be far short of goal even if all assumptions are realized.

In the trial court Respondents ignored the issue of whether the requisite legislative changes were likely to be achieved (assuming again that term "will" should be rewritten to the term "likely to"). Respondents further failed to even address the question of whether these changes could be achieved within a reasonable time. Respondents did, however, concede that the Plan fell well short of ensuring that the CARB reduction would be met: "The record shows that significant growth allocated under the Plan can be accommodated under current conditions, *but that changes in existing policies are necessary to accommodate the balance.*" AA 120, lines 12-13 [emphasis added].

In light of the S.B. 375 mandate that these changes in existing policies be accomplished within a "reasonable period of time," it is Respondents' burden to cite to substantial evidence in the record wherein this timing analysis was done. Not only did Respondents fail to proffer substantial evidence on this paramount issue, they failed to proffer any evidence at all.

Respondents also conceded that success of its plan "inherently relies on independent actions by local agencies with land use authority, as well as actions taken by other stakeholders" (AA 120, lines 7-8, citing Government Code § 65080, subdivision (a). Yet again, the Plan is silent as to the timing of the "independent actions" necessary for its success, even assuming that the local agencies uniformly adopt every land use modification proposed.

The purported "substantial evidence" in support of the feasibility mandate proffered by Respondents at trial consisted of a citation to one sentence of its own Resolution No. 4111, one page of a draft technical evaluation by CARB, and a one page excerpt from the Final Environmental Impact Report (FEIR). (AA 121, page 7:4-9.) Yet none of those documents address the feasibility mandate in S.B. 375 and its timing component. The portion of Resolution No. 4111 cited by Respondents contained nothing but a one sentence self-serving conclusion that the plan "meets the requirements of [S.B. 375]." AR 264. The Resolution otherwise does not reference the feasibility mandate and definition, let alone cite any evidence upon which MTC concluded that the mandate had been met.

The trial court did not specifically address each of the assumptions upon which the Plan is premised, nor did it determine whether substantial evidence supported the Plan's conclusion that the CARB targets will be met. The trial court simply concluded that the Plan is a "work in progress," and that "implementation will require legislative changes over the upcoming decades" even though "*there is no predicting what the legislature will actually do***.**" AA at 227 [emphasis added]. S.B. 375 requires more than conclusory assertions and unhinged speculation. It requires a strategy that "will" achieve the CARB reduction targets.

IV. THE PLAN'S CEQA STREAMLINING PROVISIONS VIOLATE THE EQUAL PROTECTION CLAUSE

A. The Plan Treats Similarly Situated Developers Differently When Determining Eligibility For CEQA Streamlining

The California Environmental Quality Act (CEQA) is California's premier environmental statute. Its stated purpose is the "maintenance of a quality environment" and the regulation of activities "so that major consideration is given to preventing environmental damage." Public Resources Code §§ 21000 (a) and (g). Under CEQA, all development projects in California must undergo an extensive review process to ensure compliance with various environmental protection goals.

Over time, Californians objected that the review process was more costly and time consuming than necessary for most low-risk projects. Indeed, Respondents concede that CEQA rules are inefficient, hinder development, and are "commonly used as a tool by project opponents who are more interested in halting a project than minimizing its harm to the environment." AR 055711.

The legislature adopted portions of S.B. 375 to allow for a streamlined review process for low-risk projects. Under those provisions, projects that are consistent with a regional "Sustainable Communities Strategy" (SCS) are not required to undergo certain costly and time consuming elements of the CEQA review process. For example, eligible projects do not have to produce EIR evidence of: 1) growth inducing impacts of the project; 2) impacts from car and light duty truck trips on global warming or the regional transportation network; or 3) a reduced density alternative to the proposed project. (Public Resources Code § 21159.28).

The justification given for this reduced oversight is that any SCS will have already submitted an EIR dealing with similar issues. Not requiring projects consistent with the Plan to submit an additional EIR in traditional CEQA review is therefore not so much a circumvention of *all* environmental oversight as it is allowing such projects to rely on similar environmental oversight that has already been conducted under the EIR for the SCS.

However, S.B. 375 does not provide all of the criteria for eligibility. Instead, regional planning agencies like Respondents are granted free rein to determine some of the qualifications for CEQA streamlining by adopting them into their SCS—in this case, the Plan. (Public Resources Code § 21159.28). If a project is not compliant with the Plan, then it is not eligible for CEQA streamlining. Id.

The question before this Court is whether non-environmental/non-EIR related requirements that Respondents chose to adopt as a condition for CEQA streamlining under the Plan violate the Equal Protection Clause. In particular, whether subjecting low-income housing to a lower standard under CEQA than other similarly situated development is constitutional. It is not.

B. The Classification Created for Developers Under The Plan is Not Rationally Related to CEQA Streamlining's Legitimate Purpose

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe* (1982) 457 U. S. 202, 216. When the government creates classifications in the land use process that do not turn on suspect characteristics (e.g. race, national origin, etc.), equal protection challenges to those classifications are generally subject to rational basis scrutiny. (See *Santa Monica Beach v. Superior Court* (1999) 19 Cal.4th 952, 980-981.)

Under rational basis scrutiny, "a statute may single out a class for distinctive treatment only if such classification bears a rational relation ***to the purposes of the legislation***." *Brown v. Merlo* (1973) 8 Cal.3d 855, 861[emphasis added]. While this standard is historically lenient, it is not "toothless." *Mathews v. Lucas* (1976) 427 US 495,510. The court must conduct "a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals." *King v. McMahon* (1986) 186 Cal.App.3d 648, 663. A classification will only be upheld if it rests "upon some ground of difference having a fair and substantial relation to the object of the legislation." *Reed v. Reed* (1971) 404 U.S. 71, 75-76. In short, the classification drawn and the benefit or burden imposed must be a conceivably rational means to achieve the stated purpose of the legislation.

In the present case, Respondents created several criteria for compliance with the Plan, and compliance with the Plan is necessary for Streamlined CEQA review. (Public Resources Code § 21159.28). One of the criteria is that a project must be consistent with the adequate and affordable housing goals set forth in Government Code sections 65580 and 65581, including housing units for households with very low, lower, moderate, and above-moderate incomes. AR 055668. Whether a project is compliant with the Plan and thus eligible for streamlined review turns in part on whether the project is designed for low income residents, or not. Under the Plan, two identical structures in the same neighborhood will receive different treatment under CEQA based solely on whether they are intended for use by low-income individuals.

The question is whether this disparate treatment is rationally related to the purpose of the CEQA exemption—namely, to allow low-environmental risk developments that are consistent with an existing EIR to move forward with reduced review. It is not.

There is simply no evidence or rational reason to believe that identical structures in the same area will have a different environmental impact solely

because of the wealth of their residents. Indeed, the United States Supreme Court has rejected such reasoning.

In *Cleburne* v. *Cleburne Living Center, Inc.* (1980) 473 U.S. 432, the Supreme Court struck down a zoning ordinance which required group care homes for the mentally disabled to get a special use permit from the city, but allowed other multi-family developments to open without a special permit. The City claimed that the permits were necessary because, among other things, it wanted to limit development in the flood plain. Yet, as the Court pointed out, the ordinance did nothing to limit developments in the floodplain per se, but instead based permitting decisions on whether the building would be intended or designed to be occupied by the disabled or some other group. Thus, the law was deemed unconstitutional.

In explaining its holding, the Court noted that it didn't make sense to treat assisted living centers differently than other facilities as a means to address concerns with building in the floodplain. (Id. at 449.) "This concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit." (Id.) The City's legitimate interest in limiting development in the floodplain did not give it carte blanche to draw distinctions between developments that bore no relationship to flood mitigation.

Similarly here, neither Respondents' interest in greenhouse gas reduction, nor its interest in allowing low-environmental-risk projects to move forward with less restriction, justifies treating low-income housing differently than other similarly situated development projects. The state could, and does, incentivize low-income housing in various ways. However, it may not do so under the guise of environmental protection. The text of the CEQA streamlining provision has nothing to do with poverty. Its focus is efficiency in environmental protection.

Respondents, as unelected multi-jurisdictional bureaucracies, may not use the SCS consistency requirement of CEQA streamlining as a Trojan horse to legislate on whatever social issue it chooses.

C. Petitioners Need Not Challenge S.B. 375 In Order to Challenge Respondents' CEQA Streamlining Criteria

Rather than address the arguments above, the trial court denied Petitioners' Equal Protection argument by holding that:

> The legislature [under S.B. 375] decided to permit CEQA streamlining to support moderate 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.

AA 232. In doing so, the court misunderstood Petitioners' claims and departed from established law.

First, Petitioners made it clear that they were not challenging S.B. 375, which on its face does not create the classifications for CEQA streamlining at issue. Instead, S.B. 375 delegates the authority to create those classifications to the local administrative bodies by deferring to the local SCS. (Public Resources Code § 21159.28). There is nothing unconstitutional about that delegation. Respondents, not the legislature, created the constitutional issue by placing the challenged restrictions in the Plan.

Second, there is nothing unusual about challenging an implementing rule or statute without challenging the parent statute. Courts have repeatedly struck down implementing rules or statutes without addressing the constitutionality of the parent statute. (See, e.g., *Michigan v. E.P.A.* (2015) 135 S. Ct. 2699 [striking down EPA rule under the Clean Air Act without challenging the Clean Air Act itself]; *Hamer v. Town of Ross* (1963) 59 Cal.2d 776 [striking down spot zoning decision without challenging City's statutory authority to make zoning decisions].

Moreover, the Supreme Court has held that a plaintiff need not challenge every statute that may create obstacles in order to challenge the constitutionality of one statute. (*Village of Arlington Heights v. Metro. Hous. Dev. Corp.* (1977) 429 U.S. 252, 260-264; *PETPO v. United States* (2014) 57 F.Supp.3d 1337, 1342 ["a plaintiff can seek redress even if the challenged regulation is one of multiple obstacles to her desired action."]).

Under the lower court's reasoning, Respondents could have included a provision in the Plan requiring racial segregation as a condition of CEQA streamlining, and that clearly unconstitutional provision would be shielded from review because the entire CEQA streamlining process—which contains no racial preference—had not been challenged. That cannot be the case.

D. S.B. 375's Reference In Other Contexts to Low-Income Housing Does Not Alter this Court's Analysis of the CEQA Streamlining Requirements

Respondents may point to the fact that S.B. 375 mentions that the SCS identify areas sufficient to house State Department of Housing and Community Development's eight-year projection of the region's need for housing, which includes housing units for households with very low, lower, moderate, and above-moderate incomes. (Government Code §§ 65080, subd. (b)(2)(B)(iii), 65584, subds. (d) & (e); AR 55667.) In addition, S.B. 375 requires that the Plan consider state goals for adequate and affordable housing. (Government Code § 65080, subd. (b)(2)(B)(vi) [requiring that the SCS consider the adequate and affordable housing goals set forth in Government Code sections 65580 and 65581].)

Yet these provisions do not change the equal protection analysis. First, these provisions are not being challenged. Second, and more importantly, the use of low-income housing goals as a requirement for CEQA streamlining presents a fundamentally different question than merely taking low-income housing goals into account in other contexts.

For example Respondents could have complied with the mandate to "identify" a sufficient area for low income housing needs without making CEQA streamlining contingent on meeting arbitrary low-income housing goals. Likewise, Defendants could have "considered" low-income housing goals by adopting a plan that allowed for broader development, thus lowering the cost of housing, rather than making environmental review contingent on a project's proposed inhabitants.

The questions this Court must address under an Equal Protection Clause challenge are: 1) what is the purpose of the challenged classification; 2) is that purpose a legitimate state interest; and 3) is the classification rationally related to achieving that purpose. (See *Brown*, *supra*, 8 Cal.3d 855, 861). In the present case, the questions can be phrased as: 1) what is the purpose of CEQA streamlining; 2) is that purpose a legitimate state interest; and 3) is treating low-income housing developments differently than other developments rationally related to that purpose.

The purpose of CEQA streamlining is to allow low-environmental risk projects to move forward with reduced oversight. Low-income housing goals have nothing to do with that purpose.

V. PLAN BAY AREA IMPERMISSABLY USURPS LOCAL LAND USE AUTONOMY

A. Article XI of the California Constitution Guarantees Home Rule

S.B. 375 purports to ensure local autonomy over the use of land use decision making process: "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." Government Code § 65080(b)(2)(K). Similarly, Resolution 4111 expressly states that Plan Bay Area "***is not intended to create direct or indirect obstacles*** to a local government's decision to approve

development projects that are not included in, or consistent with, PDA's identified in the Plan." AR 00263 [emphasis added].

Even in the absence of these admonitions, Respondents have no authority to interfere with local land use decision making authority. The California Constitution, Article XI, Section 5(a) provides:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

This provision is commonly called the "home rule" guarantee: chartered cities are "specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs." *State Building and Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555. The provision dates back more than 100 years, and was "enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs." *Fragley v. Phelan* (1899) 126 Cal. 383, 387; see also *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 599 [benefits of home rule are numerous, since cities are familiar with their own local problems and can often act more promptly to address problems than the state legislature] .

The California Supreme Court has recognized that the guarantee applies to all local governmental entities, including counties: "The principle of home rule involves, essentially, the ability of local government (technically, chartered cities, counties, and cities and counties) to control and finance local affairs without undue interference by the Legislature." *Amador Valley Joint Union High School Dist. v. State Board of Equalization* (1978) 22 Ca1.3d 208, 245.

In determining whether a particular matter is a "municipal affair" or an issue of "statewide concern," courts must evaluate each case on its own merits. That state legislation exists which arguably infringes upon, or conflicts with, a local regulation does not automatically trump the municipality's right for its home rule to prevail:

> The fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than of statewide concern; stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.

Bishop v. San Jose (1969) 1 Ca1.3d 56, 63.

B. The Plan Is Replete With Coercive Mandates

In contravention of the home rule guaranty, the Plan coerces local governments into adopting land use enactments that are consistent with its goals in order to establish a regionalist government of non-elected agencies. Any local entity that fails to comply will lose eligibility for funding through OBAG as well as its eligibility for CEQA streamlining benefits. The Plan estimates total OBAG funding for local governments at $14.6 billion over the course of the plan, and $320 million over the next four years, from federal surface transportation legislation currently known as MAP-21. AR 055679.

Plan Bay Area is thus replete with coercive language designed to punish local land use authorities who fail to toe the line, including the following:

- "The OBAG program rewards jurisdictions that focus housing growth in Priority Development Areas (PDAs) through their planning and zoning policies, and actual production of housing units."

AR 055636.

- [OBAG] "rewards jurisdictions that accept housing allocations through the Regional Housing Need Allocation [RHNA] process"; "Per OBAG requirements, Congestion Management Agencies [CMAs] will develop a PDA Investment and Growth Strategy for their respective counties; this will be used to guide future transportation investments that are supportive of PDA-focused development";

- "The CMAs in larger counties ... must direct at least 70 percent of their OBAG investments to the PDAs";

- "In addition to providing funding to support Priority Development Areas, OBAG requires each jurisdiction to adopt policies to support complete streets and planning and zoning policies that are adequate to provide housing at various income levels, as required by the [RHNA] process."

AR 055679-055680.

The Plan also states that the following "requirements" must be met before a jurisdiction is eligible for OBAG funding or CEQA streamlining:

- In addition to meeting MTC's 2005 complete streets requirements, a jurisdiction will now need to adopt a complete streets resolution. A jurisdiction can also meet this requirement by having a general plan that complies with the California Complete Streets Act of2008. All jurisdictions seeking future rounds of OBAG funding will be required to have the updated general plan language adopted.

- A jurisdiction is required to have its general plan housing element adopted and certified by the State Department of Housing and Community Development [HCD] to be eligible for OBAG funding.

- In concert with Senate Bill 375, the plan provides some jurisdictions with the opportunity to reduce the scope of environmental analysis required under CEQA for certain projects that are consistent with the plan.

AR 055680; 055668 [emphasis added].

It is difficult to fathom a more "direct or indirect" obstacle to local governmental autonomy than withholding federal MAP-21 funds unless cities and counties comply with the Plan's policy mandates, Resolution 4111 notwithstanding. Moreover, MAP-21 does not grant MTC or ABAG the authority to withhold funds to cities and counties unless there is compliance with regional transportation policies. On the contrary, it expressly mandates that the metropolitan planning process support the economic vitality of *all metropolitan areas*, not just PDAs. (See 49 U.S.C. 5303(h).)

Supreme Court authority regarding the Spending Clause of the United States Constitution (Art. I, sec. 8) and the Tenth Amendment, is instructive. In *South Dakota v. Dole* (1987) 483 U.S. 203, 211 the Court recognized than in certain circumstances a financial inducement offered by Congress is "so coercive as to pass the point at which pressure turns into compulsion." (*See also Steward Machine Co. v. Davis (*1937) 301 U.S. 548, 590 (1937) [courts should scrutinize legislation to ensure that Congress is not using financial inducements to exert a "power akin to undue influence"].)

While the Supreme Court has declined to the "fix the outermost line where persuasion gives way to coercion," its recent decision in *National Federation of Independent Business v. Sebelius* (2012) 132 S.Ct. 2566, is insightful. There the Court struck down a portion of the Affordable Care Act that required states to expand Medicaid coverage to include additional classes of individuals or face a complete withdrawal of federal funding from their Medicaid programs. Likening this requirement to a "gun to the head" proposition, the Supreme Court held that the requirement violated the Tenth Amendment. Id. at 2604.

The Supreme Court distinguished the Medicaid expansion from other federal requirements that were approved in previous cases by pointing to the amount of funding at stake. In *Dole,* for example, the amount of funding withheld for refusing to adopt Congress's proposed drinking age amounted to a "loss of less than half of one percent of South Dakota's budget." (Id. at 2604-2605.) By

contrast, a state that opted out of the Affordable Care Act's expansion in health care coverage would stand to lose "not merely 'a relatively small percentage' of its existing Medicaid funding, but all of it." Id. In most states, that would result in a loss of more than 10 percent of their total state budget. Such draconian measures crossed the line from incentive to coercion.

During trial court proceedings, Respondents contended that the funding scheme herein is not coercive because "OBAG funds over the Plan horizon are expected to be $14.6 billion, representing roughly 5 percent of the overall dollars available under the Plan." AA 134. This argument misinterprets case law in two important ways.

Unlike *Dole*, 100 percent of OBAG funding is at stake, not a mere 5 percent. In *Com. of Va., Dept. of Educ. v. Riley* (4th Cir. 1996) 106 F.3d 559, the government attempted to compare a 100% withholding of that State's funding under a federal special education grant to the 5% withholding in *Dole* "by noting that the $60 million in special education funds [potentially lost] constitutes only approximately five percent of the funds needed to educate Virginia's disabled children." The court rejected this argument, noting that the difference between withholding five percent and withholding one-hundred percent is obvious. Id. at 569-570.

Second, Respondents skewer the numbers. In *Dole*, the Court looked at the percentage of its budget South Dakota stood to lose if it lost eligibility for the federal grants at issue. The Court noted that the loss would amount to five percent of South Dakota's regular allocation of Federal Transportation grant dollars and approximately one percent of South Dakota's overall budget. The Court never considered the percentage of total federal transportation expenditures that South Dakota's lost grant money would constitute. Nor should it have. It is the effect on the party being denied the funds, not the party allocating funds, which determines whether an offer is coercive.

The Plan is coercive. Local jurisdictions must adopt land use and zoning laws consistent with the Plan or they will lose *all* OBAG funding.. While the percentage of the city or county budget that is made up of OBAG funds certainly varies, it will be uniformly substantial. Withholding these funds leaves cities with a "prerogative" to reject the Plan's desired policy "merely in theory but [not] in fact." *Sebelius, supra*, 132 S.Ct. at 2604.

CONCLUSION

Respondents should not be given carte blanche to transform the Bay Area's land use and economic structure, particularly when they rely on strong arm tactics against local governments and flippant disregard for the mandates of S.B. 375. Respondents should also be called out for their diametrically opposed representations regarding the effect of the Plan, which vary depending on the audience.

The judgment should be reversed and the trial court directed to provide for issuance of a peremptory writ of mandate directing Respondents to rescind their approval of Plan Bay Area.

Dated: October 9, 2015

KASSOUNI LAW

By: _____/s/_____
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CERTIFICATE OF WORD COUNT

I certify that the foregoing Appellants' Opening Brief contains 10,751 words based upon the electronic word count of my computer word processing program.

_____/s/_____

Timothy V. Kassouni