No. 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.

On Appeal from the Superior Court of Alameda County
Case No. RG13699215, Hon. Evelio Grillo, Presiding

RESPONDENTS' BRIEF

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INTRODUCTION

Appellants THE POST SUSTAINABILITY INSTITUTE, et al. ("Appellants") challenge the decision of the ASSOCIATION OF BAY AREA GOVERNMENTS ("ABAG") and METROPOLITAN TRANSPORTATION COMMISSION ("MTC") (collectively, "the Agencies") to approve Plan Bay Area, the combined regional transportation plan and sustainable communities strategy for the nine-county San Francisco Bay Area (the "Plan"). On appeal of the trial court's denial of its Petition for Writ of Mandate, Appellants argue that the Agencies' approval of the Plan will initiate "dangerously experimental social engineering" that relies on "extortion tactics" to force the population into "densely packed" areas, while jobs and economic growth are "throttled" under "the fuzzy guise of sustainability." (Appellants' Opening Brief ("AOB"), pp. 10-11.)

While Appellant's doomsday predictions are attention-grabbing, they are premised on the misguided notion that the Agencies have the ability to usurp local land use control. This is simply not the case. In preparing the Plan, the Agencies fully complied with the law. The Plan meets all of the requirements of Senate Bill 375, the Sustainable Communities and Climate Protection Act ("SB 375") (Gov. Code, § 65080 et seq.), which requires the Agencies to prepare a plan that, *if implemented by local agencies*, can achieve the greenhouse gas emission reduction goals set for the region. As the trial court concluded, the Plan effectuates the purpose of SB 375 and further does not violate equal protection by exempting certain projects from review under the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000, et seq.); nor does it unlawfully compel local jurisdictions to make land use decisions consistent with the Plan. Local land use planning remains within the sole discretion of local agencies.

STATEMENT OF FACTS

Plan Bay Area constitutes the Agencies' plan to reduce the region's greenhouse gas emissions attributed to cars and light duty trucks by sixteen percent by 2040 by setting forth a forecasted development pattern for the region, which, when integrated with the transportation network and transportation measures and policies, will reduce greenhouse gas emissions by reducing vehicle miles travelled. The Plan is statutorily mandated and a key component of the State's overall plan to reduce greenhouse gas emissions. In order to implement this development pattern, local jurisdictions are incentivized (but not obligated) to integrate their land use planning consistent with the Agencies' Plan to achieve the anticipated greenhouse gas reductions. Neither SB 375 nor Plan Bay Area is a local land use planning mandate; the Agencies can only encourage and incentivize local jurisdictions to make planning decisions consistent with the Plan.

I. Legal Framework

The Agencies developed Plan Bay Area pursuant to federal and state laws that require each metropolitan planning organization ("MPO") to prepare a combined regional transportation plan ("RTP") and sustainable communities strategy ("SCS"). (23 U.S.C. § 134; Gov. Code, § 65080 et seq.) This integrated, long-range land use and transportation plan links the location of housing and jobs with transit, thus creating the blueprint for reducing vehicle miles traveled and greenhouse gas emissions. (23 U.S.C. § 134(a)(1); Gov. Code, § 65080, subd. (b)(2)(B).) The following federal and state regulations are relevant to this case.

A. Federal regional transportation planning law

Since the 1970's, federal law has mandated that MTC prepare an RTP and update it every four years. (23 U.S.C. § 134(c); 49 U.S.C. §§ 5303(i), 5303(i)(1)(B)(i).) The primary purpose of the RTP is to identify

transportation projects, programs, and services necessary to address current conditions and future regional growth, as well as to specify needed transportation projects given the available financial resources. (AR 9826.) Developed for a time period of at least 20 years, the RTP must reflect the most recent assumptions for population, travel, land use, congestion, employment, and economic activity. (23 C.F.R. § 450.322(a), (e); AR 554.) It is essential for the RTP to be prepared in coordination with local planning agencies, as it must consider (although not mimic) planning decisions, such as general plans, within each jurisdiction. (23 U.S.C. § 134 (g)(3); 23 C.F.R. § 450.316(b).)

B. State greenhouse gas reduction law

1. Assembly Bill 32

Assembly Bill 32, the Global Warming Solutions Act ("AB 32") (Health & Saf. Code, § 38500 et seq.) adopted by the Legislature and signed by the Governor in 2006, set into law a statewide greenhouse gas emissions reduction goal of achieving 1990 levels by the year 2020. AB 32 also directs the California Air Resources Board ("CARB") to develop and implement regulations to reduce greenhouse gas emissions from both stationary sources and vehicles. (Health & Saf. Code, §§ 38560, 38561.)

2. The Scoping Plan

CARB adopted its Climate Change Scoping Plan ("Scoping Plan") in 2008 as a roadmap to achieve the statewide greenhouse gas reductions required under AB 32.[1] The Scoping Plan identifies measures to reduce

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[1]/ The Scoping Plan has been upheld in *Association of Irritated Residents v. Cal. Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1495, 1505 (*Assn. of Irritated Residents*). As explained in that case, the trial court required CARB to comply with CEQA but found that the Scoping Plan did not violate the requirements of AB 32 and that, in selecting the measures included in the Scoping Plan, CARB had not acted arbitrarily or capriciously. (*Id*. at p. 1493.) Following preparation of supplemental

statewide emissions by 30 percent by the year 2020 as compared to projected 2020 "business as usual" emissions levels. (AR 764, 8779.) In developing the Scoping Plan, CARB evaluated "a comprehensive array of approaches and tools" to achieve emissions reductions in each of eight sectors, including transportation. (AR 8785; see also 8783.) In this category, the "Regional Transportation-Related GHG Targets" represents CARB's estimate of emissions reduction to be achieved from local land use changes and improved transportation planning expected from implementation of SB 375. (AR 8821, 8787, 8791; see also 11545.) In adopting the Scoping Plan, CARB specifically recognized local governments and transportation agencies as "key partners" in CARB's efforts to reduce emissions. (AR 8900.) The Scoping Plan also includes measures to "put the state on a path to meet the long-term 2050 goal of reducing California's greenhouse gas emissions to 80 percent below 1990 levels." (AR 8785, 764.)

AB 32 requires CARB to update the Scoping Plan every five years. (Health & Saf. Code, § 38561, subd. (h).) CARB has undertaken one update since the Agencies adopted Plan Bay Area, which builds on the 2008 Scoping Plan with new strategies and recommendations. (Respondents' Request for Judicial Notice ("RJN"), Exhibit A.)

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CEQA review, the Plan was readopted in 2011 without change. (*Id*. at p. 1494.) On appeal of the trial court's decision that the Scoping Plan satisfies the requirements of AB 32, the court found that the measures CARB recommended in the Scoping Plan "reflect the exercise of sound judgment based upon substantial evidence" and the Scoping Plan's adoption "was in no respect arbitrary or capricious." (*Id*. at p. 1505.)

C. Senate Bill 375 – State law combining the federal requirements for transportation planning with the state greenhouse gas reduction goals

SB 375, adopted in 2008, requires MPOs to integrate land use planning into the federally mandated RTP with the goal of reducing greenhouse gas emissions by reducing vehicle miles traveled. SB 375 directs CARB to set regional greenhouse gas reduction targets for each metropolitan region in California and to update these targets every eight years. (Gov. Code, § 65080, subd. (b)(2)(A); AR 8817.) The forecasted development pattern, which is part of the SCS/RTP, must support achievement of the CARB targets, if there is a feasible way to do so. (Gov. Code, § 65080, subd. (b)(2)(B); AR 55631.) SB 375 specifically states that nothing in an SCS may "be interpreted as superseding the exercise of the land use authority of cities and counties within the region" and implementation therefore requires the cooperation of local governments. (Gov. Code, § 65080, subd. (b)(2)(K).)

After adoption, the MPO must submit the SCS to CARB for review, including the MPO's quantification of the greenhouse gas emission reductions the SCS will achieve and a description of the technical methodology used to obtain that result. (Gov. Code, § 65080, subd. (b)(2)(J)(ii).) CARB reviews the MPO's determination that the SCS, "if implemented," would "achieve the greenhouse gas emission targets" established by CARB. (*Ibid*.)

Pursuant to SB 375, CARB set greenhouse gas reduction targets for the Bay Area at a seven percent per capita emission reduction from 2005 levels by 2020, and a fifteen percent per capita emission reduction from 2005 levels by 2035. (AR 1689, 11625-11626, 43509-43510.) The Plan actually achieves a ten percent reduction in per capita emissions from 2005

levels by 2020, and a sixteen percent reduction by 2035, exceeding the targets set by CARB. (AR 789.)

II. Plan Bay Area

Plan Bay Area, adopted by the Agencies on July 18, 2013, constitutes the combined RTP and SCS for the nine-county San Francisco Bay Area. By 2040, the Bay Area is expecting an increase in population by 30 percent from the 2010 level, adding over 2.1 million residents, with a corresponding increase in employment by 33 percent, adding over 1.1 million jobs. This population growth will require the construction of approximately 660,000 new housing units in the same timeframe (AR 438), as well as a review and update of the region's complex transportation network. (AR 55650-55655.) The Plan relies on a strategy of concentrating growth around the region's existing and planned public transit system, primarily through the Priority Development Area ("PDA") framework, to house the growing population and to achieve the regional greenhouse gas emissions targets set by CARB. (AR 457, 1690.)

A. Priority Development Areas – the core of the Plan

At the core of Plan Bay Area are the Priority Development Areas. (AR 1711, 55658-55660.) PDAs are transit-oriented, infill development opportunity areas within existing communities that local agencies expect will accommodate the majority of future development. Each Bay Area county and more than half of the Bay Area's cities have at least one PDA. (AR 48337.) In order to designate a PDA, the local jurisdiction must identify an area where new homes could be located. These neighborhoods must be served by at least one transit stop, be supported by local plans that provide a wide range of housing options, and include amenities to meet the day-to-day needs of residents in a pedestrian-friendly environment. (AR 43022.) If the location meets these criteria, the local agency may nominate the area as a PDA. The Agencies review the nominations and determine

which areas qualify as PDAs. The Agencies sought input from all local governments in the Bay Area to designate PDAs and prepare the Plan. (Gov. Code, § 65080, subd. (b)(2)(E); AR 55630, 55631, 55636, 55641, 55643, 55644, 55658.)

B. Achieving the greenhouse gas targets through local land use planning

The Plan's focused growth pattern, reliance on the PDA framework, and associated public transit and land use investments, are expected to change the region's travel patterns. This, in turn, is expected to result in a projected reduction of per capita light-duty vehicle greenhouse gas emissions by 16 percent between 2005 and 2035, achieving the CARB target. (AR 789, 1690, 55693.)

The Plan's proposed transportation and land use pattern for the region "*if implemented*, [would] achieve the greenhouse gas emission reduction targets." (Pub. Resources Code, § 21155, subd. (a), emphasis added.) Local jurisdictions are ultimately responsible for the manner in which their communities develop, and retain their discretion to carry out or deny projects regardless of consistency with the Plan. (Gov. Code, § 65080, subd. (b)(2)(K); AR 1675.)

III. OneBayArea Grant Program

Plan Bay Area invests $292 billion from federal, regional, state, and local sources over the Plan's 27-year period. The OneBayArea Grant ("OBAG") Program commits $14.6 billion (or approximately 5 percent) of the discretionary funds available under the federal surface transportation legislation known as Moving Ahead for Progress in the 21st Century ("MAP-21") to integrate the region's federal transportation program with the goals of SB 375.[2] (AR 29292-29329, 42892-42903, 55679.) Over the

[2]/ These funds are available subject to MAP-21 mandates for Surface Transportation Programs and Congestion Mitigation and Air Quality Improvement funds. (23 U.S.C. §§ 133, 149; AR 42892-42903.)

first four years of the Plan, $320 million in OBAG funds will be distributed to local jurisdictions based on a formula that takes into account existing populations and considers past housing production, future housing commitments, and efforts to produce low-income housing. (AR 55679 [See Figure 20 which shows specific amounts available to each county].) OBAG funding supports jurisdictions that focus housing growth in PDAs through their planning and zoning policies.

OBAG provides flexibility for communities to invest in transportation infrastructure that supports infill development by providing specific funding opportunities for Safe Routes to Schools projects and Priority Conservation Areas.[3] By promoting transportation investments in PDAs, the OBAG program bolsters the attainment of the greenhouse gas emission reduction targets in Plan Bay Area. (AR 55679.)

IV. Trial Court History

On October 15, 2013, Appellants filed their lawsuit challenging the Agencies' adoption of the Plan and alleging violations of SB 375, the State Constitution, State and Federal Equal Protection guarantees, and the Federal mandate of considering and respecting the economic interest of all metropolitan areas. (AA027.) The parties submitted briefing to the trial court in late 2014. A hearing on the merits was held on November 10, 2014. (AA208.) On January 7, 2015, the trial court issued its Final Statement of Decision, denying the petition in its entirety and upholding both the Agencies' interpretation of Government Code, section 65080, subdivision (b)(2)(B), and the Agencies' adoption of Plan Bay Area, finding that the Plan reasonably effectuated the authorizing statute. (AA208.) On February 11, 2015, the trial court entered its Judgment

[3]/ A Safe Routes to School project "encourages children to bike and walk to school." (AR 55685). The Priority Conservation Areas are "regionally significant open spaces for which there exists broad consensus for long-term protection but nearer-term development pressure." (AR 55630.)

denying the Petition for Writ of Mandate. (AA206.) Appellants filed this appeal on April 10, 2015. (AA248.)

STANDARD OF REVIEW

I. The Standard of Review for Appellants' Challenges to the Agencies' Application of the Statutory Requirements of SB 375 in Preparing the Plan Requires Deference to the Agencies.

Adoption of Plan Bay Area is a quasi-legislative act subject to traditional mandamus review under Code of Civil Procedure, section 1085. (*Carrancho v. Cal. Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1266 ["statutory provisions directing [an agency] to prepare a . . . plan and progress report are within the category of quasi-legislative acts."].) Quasi-legislative acts "represent an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power." (*Western States Petroleum Assn. v. Bd. of Equalization* (2013) 57 Cal.4th 401, 415 (*Western States*).) Because the California courts view this exercise of granted power as the agencies "truly 'making law,' their quasi-legislative rules have the dignity of statutes." (*Assn. of Irritated Residents, supra,* 206 Cal.App.4th at p. 1494). Accordingly, the judicial review afforded these quasi-legislative acts is highly deferential. (See *California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 699 [explaining that highly deferential judicial review is necessary "out of [respect] to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority"].)

II. The Standard of Review for Appellants' Equal Protection Claims is also Deferential to the Agencies.

In land use decisions, when a classification is challenged under the equal protection clause, the courts must apply the "rational basis" standard of review unless the distinctive treatment of the party involves either a

fundamental right or a suspect classification. (*Santa Monica Beach v. Superior Court* (1999) 19 Cal.4th 952, 980-981 (*Santa Monica Beach*); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey* (9th Cir. 1990) 920 F.2d 1496, 1508 (*Del Monte Dunes*); *American Tower Corp. v. City of San Diego* (9th Cir. 2014) 763 F.3d 1035, 1059-1060 (*American Tower*); see also *City of New Orleans v. Dukes* (1976) 427 U.S. 297, 303 ["states are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude"].) Appellants acknowledge that rational basis review is appropriate. (AOB, pp. 17, 34-35.) Under this standard of review, it is Appellants who bear the burden of proving that "'no reasonably conceivable set of facts could establish a rational relationship between the regulation and the government's legitimate ends.'" (*Santa Monica Beach*, *supra*, 19 Cal.4th at p. 967.)

LEGAL ARGUMENT

I. Plan Bay Area is a Feasible Plan to Achieve the CARB Greenhouse Gas Emission Reduction Targets.

Appellants argue that Plan Bay Area does not comply with the requirement of SB 375 to develop an SCS that can feasibly achieve the greenhouse gas emission reduction targets set by CARB. (AOB, pp. 17-20.) According to Appellants, because implementation of the Plan requires subsequent action at the federal, state, and local level, the Plan is infeasible. (AOB, pp. 21-26.) Appellants are wrong. SB 375 requires that the Plan identify areas within the region to meet its housing need, including all economic segments of the population; meet the region's transportation network needs; and reduce greenhouse gas emissions from cars and light duty trucks to achieve the region's greenhouse gas reduction targets if there is a feasible way to do so. (Gov. Code, § 65080, subd. (b)(2)(B).) SB 375 does not require that the Plan achieve the greenhouse gas reduction targets

with absolute certainty; rather, the Plan must be capable of achieving the targets *if implemented* by local jurisdictions. (Gov. Code, § 65080, subd. (b)(2)(J)(ii).) And the Agencies cannot mandate local implementation; the Agencies create a blueprint that, if implemented by local jurisdictions, will achieve the CARB greenhouse gas reduction targets. (Gov. Code, § 65080, subd. (b)(2)(K).)

The record shows that significant projected housing and job growth can be accommodated under Plan Bay Area, but that changes in existing policies are necessary to accommodate the balance. The fact that subsequent action is required is entirely consistent with the requirements of SB 375 and does not render the Plan infeasible. Here, Plan Bay Area proposes a forecasted development pattern that "if implemented" by local jurisdictions will achieve the greenhouse gas targets through 2040.

The record further shows that CARB, the agency tasked with accepting or rejecting the Agencies' determination that the Plan represents a feasible way to achieve the greenhouse gas reduction goals if implemented, indicated its initial concurrence that the Plan can achieve the CARB targets. (Gov. Code, § 65080, subd. (b)(2)(J)(ii); see also AR 43033, 43498-43617 [transcript of CARB Board meeting during which staff presented its initial determination to the Board].) Substantial evidence in the record therefore supports the Agencies' determination that the Plan fully complies with Government Code section 65080, subdivision (b), including the requirement that the Plan set forth a forecasted development pattern that can feasibly achieve the greenhouse gas targets. (AR 264 [MTC Resolution adopting the Plan and finding "that the Plan, including the SCS, meets the requirements of [SB 375] as codified in California Government Code § 65080, subdivision (b)"]; see also AR 1684.)

A. Considering the plain words of the statute in context, SB 375 does not require that the land use pattern be "shovel ready" upon adoption.

The trial court applied established canons of statutory interpretation and looked to the words of SB 375 to determine whether the Agencies had complied with the statute's requirements. (AA218-225.) The court's statutory analysis focused on four words—"shall," "will," "feasible," and "capable"—as well as the phrase "reasonable period of time," considering the plain meaning of those words in the context of the statute as a whole, and the legislative intent. (AA218; *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037 (*Tuolumne Jobs*); *Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 397; *Handyman Connection of Sacramento, Inc. v. Sands* (2004) 123 Cal.App.4th 867, 881-882.) The trial court also noted that the Plan is in a constant state of flux in that it must be updated every four years. (AA226.)

As explained in the Statement of Decision, the court interpreted the word "shall" to be directory rather than mandatory, the word "will" as meaning "is expected to" rather than is inevitable or certain, the word "feasible" to "embrace a concept of reasonableness," and the word "capable" as "having the ability to." (AA218-221.) The trial court further found that the phrase "reasonable period of time" in the context of SB 375 must be "measured in years or decades" given that the relevant periods of time for laws related to greenhouse gas emissions are consistently measured in this way. (AA221-222 [citing Executive Order S-3-05, which calls for a reduction of overall greenhouse gas emissions to 80 percent below 1990 levels by 2050, AB 32, which calls for a reduction to 1990 levels by 2020, and SB 375, which requires that greenhouse gas targets be set for 2020 and 2035].)

Reading the requirements of section 65080, subdivision (b)(2)(B) in light of the above interpretations, the trial court concluded that the statute directs the Agencies to prepare a sustainable communities strategy that includes a forecasted development pattern, which "is expected to" reduce greenhouse gas emissions to achieve the CARB 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. (AA222-223.)

The trial court did not rewrite the statutory requirements, as alleged by Appellants. (AOB, p. 29.) Instead, the trial court looked at the plain meaning of the words of the statute to determine that the statute does not require the level of absolute certainty Appellants urge. Under SB 375, the success of an RTP/SCS inherently relies on independent actions taken by local agencies with land use authority. (Gov. Code, § 65080, subd. (a) [RTP, including the SCS, must provide "clear, concise policy guidance to local and state officials"].) In order to achieve the goals set forth under SB 375, Plan Bay Area is necessarily an aspirational document, buttressed by monetary "carrots" such as transportation spending and grants under the OBAG program. SB 375 acknowledges this, stating in several places that the Agencies must determine whether the Plan, "if implemented," would achieve the targets. (Gov. Code, § 65080, subd. (b)(2)(J)(ii); Pub. Resources Code, §§ 21155, subd. (a), 21159.28, subd. (a).) This will require cooperation and action from other stakeholders.

Appellants cite to the decision in *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, attempting to apply the holding that the climate action plan at issue in the case did not achieve required greenhouse gas emissions reductions because a lack of funding made its implementation uncertain. (*Id.* at p. 1168-1169.) The case is easily distinguished. At issue in *Sierra Club* was a mitigation measure included

in an EIR prepared for the County's general plan update that committed the County to preparing a climate action plan with "comprehensive and enforceable" greenhouse gas emissions reductions measures. However, the climate action plan the County actually prepared expressly did "not ensure reductions." (*Id*. at p. 1156.) Particularly troubling to the court in *Sierra Club* was the fact that the County promised to prepare a climate action plan described as "the most critical component of the County's climate change mitigation efforts" that would provide specific details not available at the time the general plan EIR was adopted, but did not follow through on that promise. (*Id*. at p. 1168.) As discussed by the trial court, the language of the mitigation measure at issue in the *Sierra Club* case required that the climate action plan achieve greenhouse gas emissions reductions of a specified amount by a specified date, thus requiring a level of certainty not required under the language of SB 375 given the sovereign land use authority of local jurisdictions. (AA223-224.)

After interpreting the requirements of Government Code section 65080, subdivision (b)(2)(B), the trial court correctly determined that 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." (AA225 [citing Gov. Code, § 65080, subd. (b)(2)(B)].) This conclusion is supported by substantial evidence in the record, as discussed below.

B. Appellants misinterpret the findings of the Feasibility Report.

As Appellants note, the Agencies commissioned preparation of an independent assessment of the "readiness and feasibility of PDAs to accommodate the number of housing units envisioned by Plan Bay Area." (AR 35794, 48329; AOB, pp. 20-21.) Economic & Planning Systems ("EPS") prepared the in-depth Priority Development Area Development Feasibility and Readiness Assessment ("Feasibility Report") to evaluate the

ability of 20 representative PDAs to accommodate new residential development, consistent with housing forecasts in Plan Bay Area. (AR 48325-48371.)

1. The reasonableness of the Plan's growth allocations.

EPS considered a variety of factors, including: the current applicable zoning and development regulations, the quality and quantity of developable sites, the political environment, market factors, infrastructure needs, and development financing capacity and opportunities. (AR 38424, 48330.) After evaluating these factors, EPS concluded the growth allocations in the Plan represent an achievable outcome. (AR 38426.)

Appellants wrongly allege the Feasibility Report concluded that the Plan is infeasible because it cannot accommodate the number of housing units anticipated by the Plan. (AOB, p. 21.) In fact, the Feasibility Report shows that well over half of the development allocated to them over the 27-year planning horizon of Plan Bay Area is "ready" to be accommodated in the sample PDAs as of today. (AR 48330-48334.) While a cooperative effort by local, regional, and state stakeholders will be required to accommodate the remaining 38 percent, the Plan is "feasible" as defined in Government Code section 65080.01, subdivision (c).

As pointed out by the trial court, Appellants' arguments are based on the flawed assumption that Plan Bay Area is intended to be akin to a housing element update under State Housing Element law. (Gov. Code, § 65580, et seq.) In fact, it is a regional transportation plan that must "identify areas" within the region sufficient to house the population, while acknowledging that housing remains a local issue. (AA228 [citing Gov. Code, § 65080, subd. (b)(2)(K) for the proposition that "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"].)

Appellants rely on a statement in the Feasibility Report that, while

substantial development capacity exists in the PDAs given current local land use policy, "some upzoning or increase in allowable densities will be required" to meet the Plan's ultimate growth allocations. (AR 48330.) Appellants argue that "the reference to required 'upzoning' or 'increase in allowable densities' renders the Plan infeasible." (AOB, p. 21.) Appellants ignore the Feasibility Report's conclusion that the *current* physical capacity based on zoning and land supply in the sample PDAs would accommodate 92 percent of the housing units allocated to them, meaning that only minor adjustments in allowable densities would be required to accommodate all the growth allocated to the sample PDAs. This is logical given that local jurisdictions recommended PDAs to the Agencies and, in many cases, have already adopted consistent densities into their general plans and zoning codes. (AR 48330, 48356.) The Feasibility Report also states that local planning processes and political circumstances do not represent a major constraint on growth. (AR 48356 [noting that elected officials and community stakeholders have been supportive of planning efforts and development project applications consistent with the PDA designations].) The Plan's growth allocations are consistent with the scope and purpose of any comprehensive regional plan. (AR 38426.) Moreover, the Plan's assumptions are consistent with applicable law and guidance. (See Sen. Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (c) [changes in land use patterns will be required to achieve the greenhouse gas reduction goals]; AR 9829-9830 [2010 California Transportation Commission RTP Guidelines acknowledging the appropriateness of an SCS including planning assumptions not based on existing local plans].)

2. The "readiness" of the Plan's Priority Development Areas.

The Feasibility Report also considered overall "readiness" of the sample PDAs, which reflects the number of housing units that can be expected based on multiple factors, including policy, market, infrastructure,

financing, and other related constraints. The Feasibility Report concludes that 62 percent of the housing units identified for the PDAs included in the sample are "ready" to be developed under current conditions, considering these constraints.[4] Thus, more than half of the growth allocated through the Plan Bay Area horizon of 2040 in the sample PDAs could be developed today considering policy, market, infrastructure, financing, and related factors. (AR 48332-48333.)[5]

Sixty two percent is not an insignificant number, given that the Plan identifies housing to support the expected population growth of over 2 million more residents with 660,000 new housing units through 2040. (AR 48329.) And, of course, all of these units will not be required in the next four years, at which time the Plan must be updated and development patterns modified to reflect evolving policy priorities, changing economic conditions, and lessons learned from the first four years of Plan implementation. (Gov. Code, § 65080, subd. (d); AR 38426, 55705 ["Plan Bay Area is a work in progress that will be updated every four years to reflect new initiatives and policies"].)

In sum, the Feasibility Report provides substantial evidence that the Plan's growth allocations can be feasibly achieved.

C. Implementation of Plan Bay Area is achievable, despite the need for legislative change.

Appellants argue that, because the Plan and the Feasibility Report acknowledges legislative changes will be required to achieve the Plan's ultimate goals, it must be infeasible. (AOB, pp. 24-26.) As determined by

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[4]/ This is distinct from the estimated 92% of allocated housing units that could be accommodated considering current physical capacity based on zoning and land supply, which does not take into account the policy, market, infrastructure, financing, and related constraints. (See AR 48330.)

[5]/ The Feasibility Report acknowledges that the results of its readiness assessment vary widely among the sample PDAs, but the overall results show that 62 percent of the proposed housing in the PDAs analyzed meet the readiness criteria described in the Feasibility Report. (AR 48347.)

the trial court, it was neither arbitrary nor capricious "as a matter of law, for the agencies to make assumptions about future legislative actions." (AA226; *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2008) 164 Cal.App.4th 1, 16 [land use plan assumed "future operations at double the current level"].) Indeed, that policy changes are required is entirely consistent with SB 375, which acknowledges that achieving a region's greenhouse gas target will require a departure from the business-as-usual model. (Sen. Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (c) ["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"]; see also Sen. Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (d) [noting that "*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"].) This recognition is further consistent with AB 32 and the Scoping Plan. (AR 8771 [Scoping Plan calls AB 32 "groundbreaking legislation" that "makes it clear that a business-as-usual approach toward greenhouse gas emissions is no longer acceptable"], 8779 [noting that the "foundation of the Scoping Plan's strategy is a set of measures that will cut greenhouse gas emissions by nearly 30 percent by the year 2020 as compared to business as usual"].)

Appellants misquote the record, stating that "EPS outlined a number of constraints rendering Plan Bay Area infeasible: policy, market, infrastructure, site location, financing, and financial feasibility constraints." (AOB, p. 21.) EPS did outline challenges to full implementation of the Plan, but did not conclude that these challenges rendered the Plan infeasible. (AR 38425 [letter from EPS stating that comment letters alleging the Feasibility Report concluded the Plan was infeasible

"represented an overly pessimistic interpretation of our results"].) Instead, EPS stated its belief that "the growth allocations in Plan Bay Area represent an achievable, if not easy, outcome consistent with the scope and purpose of any comprehensive regional plan." (AR 38426.)

The Feasibility Report also concludes that implementation of "a range of policy actions to be pursued at the local, regional, state, and federal levels" would allow the sample PDAs to accommodate 80 percent or more of the housing growth allocated to them by 2040. (AR 48333.) The policy actions include: reinstating some form of redevelopment authority to provide development financing, modernizing CEQA, supporting long-term adjustment of tax rates to balance financial incentives for new development, stabilizing federal funding levels for housing development, supporting transportation funding policies that encourage Plan Bay Area development patterns, and refining local land use policies to improve flexibility, predictability, and efficiency of land use regulations. (AR 48333.) These potential policy actions were based on suggestions made by local agency staff and private developers who participated in preparation of the Feasibility Report, EPS's own experience with planning and implementing urban development, and actions identified in the Plan. (AR 48364.) Notably, even with these policy changes, EPS did not "arrive at or accept the conclusion that housing in the PDAs cannot possibly grow beyond the figures" included in the Feasibility Report. (AR 38425.)

Importantly, since the Agencies adopted Plan Bay Area, there have been several new pieces of legislation that promote infrastructure financing for transit oriented projects, including new legislation that would replace the redevelopment laws with other methods of tax increment financing. For example, on September 29, 2014, Governor Jerry Brown signed into law Senate Bill 628, which allows cities and counties to establish enhanced infrastructure financing districts for public capital facilities. (Gov. Code, §

53398.50.) And on September 22, 2015, Governor Brown signed Assembly Bill 2, which permits cities to create "community redevelopment investment authorities" to issue bonds serviced by tax increment revenues to finance infrastructure, affordable housing, and economic revitalization projects in low-to-moderate-income neighborhoods. (Gov. Code, § 62000, et seq.)[6] Appellants claim that a lack of infrastructure financing renders the Plan infeasible falls flat. (AOB, pp. 25-26.)

In addition, now that the Plan has been adopted, local jurisdictions are beginning to take advantage of the streamlining provisions under SB 375 for development consistent with the Plan, illustrating that such development is feasible. (Respondents' RJN, Exhibit C [Staff Report from City of Daly City Planning Commission consideration of a mixed-use apartment building project relying on a Sustainable Communities Environmental Assessment pursuant to Public Resources Code section 21155.2].)

1. The Plan's approach to encourage policy change is consistent with SB 375.

The Plan includes the Agencies' strategies to address these funding concerns through advocacy, implementation of best practices, public education campaigns, grant programs, and partnerships. (AR 43031, 55711-55713.) Five out of seven advocacy objectives identified in the Plan relate to the financial tools necessary to fund the housing, infrastructure and transportation goals of Plan Bay Area, thus recognizing the necessity of continuing to support legislative changes. SB 375 explicitly acknowledges

[6]/ In addition, the California Strategic Growth Council has proposed using $30 million in new money to provide additional funding for transit-oriented infill and compact development projects that were not fully funded by the Affordable Housing and Sustainable Communities program last year. (Pub. Resources Code, § 75200 et seq.; Respondents' RJN, Exhibit B [Strategic Growth Council Staff Report for approval of a Notice of Funding Availability].)

that funding sources for local agencies are not currently available, but are needed to accommodate growth in a way that will achieve the greenhouse gas reduction goals. (Sen. Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (i) [stating that "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"].) The 2010 RTP Guidelines also recognize that local and state legislation is often required to implement various funding mechanisms and recommends that MPOs research the possibility for new funding legislation. (AR 9838-9839, 9930.)

Further, while the Plan includes legislative changes that the Agencies will advocate for at the state and federal level, the Feasibility Report notes that there are a number of ways cities and counties can address the need for funding attributable to changes in redevelopment law. (AR 48365-48366.) Specifically, the Feasibility Report notes that local agencies can incentivize redevelopment by providing land use planning incentives and bonuses, allowing sale or leasing of public lands for private uses, and using capital improvement programs or other public revenues to fund or subsidize infrastructure costs otherwise borne by the private sector. (AR 48365-48366.) None of these potential mechanisms reflect unreasonable assumptions as characterized by Appellants. (AOB, pp. 27-28; AR 38425 [Feasibility Report "does not assume that major new county, regional, state, or federal funding resources would be made available"].) Rather, these mechanisms are reasonable and within the power of local jurisdictions.

2. Policy constraints apply to both PDA and non-PDA development.

Plan Bay Area also acknowledges that single-family homes will continue to be in demand and that residential land will continue to be available in non-PDAs. (AR 48360-48361, 55655.) The Feasibility Report

considered whether development in non-PDAs could "more easily or feasibly" be provided given the constraints identified for development in the PDAs. (AR 48358-48362.) The Feasibility Report concluded that capacity constraints, as well as the same policy, market, infrastructure, and financing constraints, would also affect development in non-PDAs. (AR 48358-48362; see also AR 38425 [EPS letter stating that "many of the same political, regulatory, market, and infrastructure challenges [that must be addressed in PDAs] will constrain growth outside the PDAs"].) For example, EPS notes that non-PDAs typically have less existing infrastructure to accommodate new growth and new suburban subdivisions frequently carry significant costs to install new roadways, utility extensions, parks, schools, etc. (AR 48361.) Regulatory, market, and infrastructure planning changes are required to overcome such obstacles in non-PDA areas. (AR 48361.) Appellants' argument that SB 375 requires housing identified in an SCS to be one hundred percent "shovel ready" today for a 2040 Plan is not consistent with the statute.

D. The Agencies properly relied on CARB's acceptance of their determination that the Plan can feasibly achieve the greenhouse gas emission reduction targets as substantial evidence.

SB 375 requires that CARB review Plan Bay Area and accept or reject the Agencies' determination that the Plan represents a feasible way to achieve the greenhouse gas emission reduction targets. (Gov. Code, § 65080, subd. (b)(2)(J)(ii).) CARB accepted the Agencies' determination by Executive Order on April 10, 204, stating that the Plan, if implemented, would achieve the greenhouse gas reduction targets CARB established for the region. (Respondents' RJN, Exhibit D; AR 43033.)[7] The Executive

[7]/ While the Technical Evaluation does not "necessarily reflect the views and polices of the Air Resources Board" (Respondents' RJN, Exhibit E, p. 2; AR 43010), CARB staff's findings in the Technical Evaluation were presented to the Board, and several Board members also indicated support for the CARB staff report. (AR 43502 [Chairperson Nichols: "this is just

Order attaches a final Technical Evaluation, which confirms that the Agencies "used reasonable model inputs and assumptions" in preparing the Plan. (Respondents' RJN, Exhibit E, p. 25; AR 43033.) Notably, CARB staff had the information in the Feasibility Report when making its determination. (Respondents' RJN, Exhibit E, p. 91; AR 43089.) The Technical Evaluation also found the process used by the Agencies to develop the Plan's land use pattern consistent with federal air quality regulations requiring that the assumptions "reflect the growth pattern that is most likely to occur, based on the best information available." (AR 43049 [citing 40 C.F.R. 93.122].) The Technical Evaluation further concluded the Agencies' development of the land use scenario was consistent with guidance in the California Transportation Commission's 2010 RTP Guidelines.[8] (AR 43049; see also AR 9828-9835 [RTP Guidelines setting forth best practices for designing a forecasted development pattern that considers local context].)

The Technical Evaluation also notes that the Plan includes strategies to "address challenges in transportation financing, affordable housing, governance, climate adaptation, natural disasters, and economic analysis."

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another accomplishment in terms of adding transportation to housing, to land use, to the environment, and social equality as part of the overall approach to finding mutual benefits from individual steps that need to be taken to solve individual problems"]; AR 43553 [Board Member Balmes: "I appreciate all the efforts that [the Agencies] involved in this plan have made. And I really agree with you that the integration of transportation policy with land-use policy is [an]. . . incredibly important thing"]; AR 43506 [Board Member Gioia: "We're looking forward to the adoption of this plan in July"]; AR 43566 [Board Member Mitchell: "I want to commend you on your SCS. I think you've done a very fine job . . . I think what we are seeing now is that this can be done successfully, and it has great promise"]; AR 43569 [Board Member Roberts: "[T]he plan looks terrific"]; AR 43556 [Board Member Sperling: "I want to say this has been one of the most inspiring set of presentations I've heard in a long time. I was – I'm very impressed"].)

[8]/ SB 375 requires that the RTP Guidelines include guidance for preparation of an SCS. (Gov. Code, § 14522.1.)

(Respondents' RJN, Exhibit E, p. 23; AR 43031.) The Technical Evaluation further acknowledges that, because of their land use authority, "local governments will also play an essential role in implementing Plan Bay Area." (Respondents' RJN, Exhibit E, p. 23; AR 43031; see also Respondents' RJN, Exhibit E, p. 24; 43032 [noting that local governments "will be critical to the success of Plan Bay Area at reducing [greenhouse gas] emissions from passenger vehicle demand"].) CARB's analysis thus provides substantial evidence that the Plan can achieve the greenhouse gas targets *if implemented*, and the fact that implementation requires local agency cooperation does not render it infeasible.

Based on the substantial evidence in the record, including the information prepared by EPS, CARB's Technical Evaluation and testimony from CARB Board members, the Agencies concluded that the Plan constitutes a feasible land use development pattern that can achieve the SB 375 goals. This decision was neither arbitrary nor capricious. (AA225-230.)

II. Plan Bay Area Does Not Violate the Equal Protection Clause.

Appellants next argue that Plan Bay Area violates the Fourteenth Amendment's Equal Protection Clause[9] because "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." (AOB, p. 35.) Under the applicable standard of review, as discussed above, "decisions like those at issue here 'are presumptively constitutional and, therefore, need only be rationally related to a legitimate state interest.'" (*American Tower, supra,* 763 F.3d at p. 1059 [quoting *Del Monte Dunes,*

[9]/ Appellants focus solely on the federal guarantee and therefore that is what the Agencies address. However, in the context of this case, California's independent state constitutional equal protection guarantee is applied in an identical manner. (*DeRonde v. Regents of University of California* (1981) 28 Cal. 3d 875, 889-890.)

supra, 920 F.2d at p. 1508].)

Appellants base their argument on the premise that the Agencies made an impermissible distinction between affordable and market rate housing, and that this was done in violation of the Equal Protection Clause. However, the Agencies contend, and the trial court agreed, that this distinction was made in the legislation itself, and not in Plan Bay Area. As stated by the trial court, "[Appellants'] 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." (AA232.) And, because their challenge is to the provisions of SB 375 that allow for streamlined CEQA review of projects that provide affordable housing, Appellants are making a facial challenge to the legislation, which requires a showing that SB 375 "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions." (*Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 852.) Appellants have not met this burden.

The trial court correctly determined that neither SB 375 nor Plan Bay Area violate the Equal Protection Clause. (AA231-233.) SB 375 is intended to achieve a certain goal – reducing greenhouse gas emissions through a reduction in vehicle miles travelled. (Sen. Bill No. 375 (2008-2009 Reg. Sess. § 1, subds. (a)-(c).)[10] The Plan will allow local agencies to implement the CEQA streamlining incentive created by SB 375 to help achieve that goal. Plan Bay Area's application of this incentive is rationally related to a legitimate public purpose of achieving the greenhouse gas reduction goal of SB 375, and the environmental protection goals of CEQA.

[10]/ Although Appellants acknowledge that the Agencies have an "interest" in greenhouse gas reduction, Appellants never contend that this goal lacks legitimacy. (AOB, p. 36.)

A. SB 375 authorizes CEQA streamlining benefits for projects consistent with the Plan.

Contrary to Appellants' arguments, the Plan does not favor development based on the income level of future residents; rather the CEQA streamlining benefits available under the Plan favor projects consistent with the uses, densities, intensities, and applicable policies identified in the Plan regardless of wealth, as provided under SB 375. (Pub. Resources Code, §§ 21155, 21159.28; AR 428, 55630, 55631, 55668.) This is consistent with equal protection law, including the case cited by Appellants, which allows some disparate treatment if rationally related to a legitimate interest of the state; here, reducing greenhouse gas emissions by reducing vehicle miles travelled is a legitimate state interest. (Sen. Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (f); see *Cleburne v. Cleburne Living Center, Inc.* (1980) 473 U.S. 432, 447-450 [requiring a special permit for a group care facility invalid where requirement not rationally related to a legitimate purpose].)

The CEQA streamlining benefits authorized by SB 375 and effectuated through the Plan are rationally related to the State's legitimate public purpose of reducing greenhouse gas emissions. The Legislative findings of SB 375 specifically address this purpose, stating the CEQA streamlining provisions were enacted to "encourage 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 achievement of state and federal air quality standards, and increase petroleum conservation." (Sen. Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (f).) SB 375 therefore provides that, after adoption of an SCS, a project that is consistent with the land use designation, density, building intensity, and applicable policies specified for the project area in the SCS is eligible for the following CEQA streamlining benefits. (Pub. Resources Code, §§

21155, subd. (a), 21159.28, subd. (a).)

1. Public Resources Code section 21155.1 — the CEQA exemption

Projects that are consistent with the SCS and meet a detailed list of additional criteria set forth in Public Resources Code section 21155.1 are statutorily exempt from CEQA. Importantly, the exemption criteria include consideration of whether the project impedes the provision of affordable housing.[11] All of the criteria included in section 21155.1 for the CEQA exemption are intended to ensure that the individual project will not have additional impacts not considered in the SCS Environmental Impact Report ("EIR"). (Pub. Resources Code, § 21155.1; AR 428.)

2. Public Resources Code section 21155.2, subdivision (a) — the Sustainable Communities Strategy

A project that does not qualify for the exemption may be eligible to comply with CEQA using a Sustainable Communities Environmental Assessment ("SCEA"), which is available for projects that do not result in any potentially significant environmental impacts after mitigation, based on substantial evidence in the record, and have incorporated all feasible mitigation measures, performance standards, or criteria set forth in prior applicable EIRs, including the EIR for the SCS. (Pub. Resources Code, § 21155.2 subd. (a).) The provisions of SB 375 for streamlined review using

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[11]/ See Public Resources Code section 21155.1, subdivision (b)(3), which requires that the project not result in any net loss in the number of affordable housing units within the project area. See also Public Resources Code section 21155.1, subdivision (c)(1), which requires that the project either: (1) include at least 20 percent moderate income housing, or not less than 10 percent low income rental housing, or not less than 5 percent very low income rental housing and provide sufficient legal commitments 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 for at least 55 years, or (2) pay in lieu fees in an amount sufficient to result in the development of an equivalent number of units that would otherwise be required pursuant to option (1), or (3) provide public open space equal to or greater than five acres per 1,000 residents of the project.

an SCEA do not include an affordable housing component. (*Ibid*.)

3. Public Resources Code sections 21155.2, subdivision (c) and 21159.28 — the tiered EIR

A project that will result in one or more potentially significant impacts after mitigation may be reviewed using a tiered EIR, which is only required to address the significant or potentially significant effects of the project and is not required to include discussion of growth-inducing impacts, any project specific or cumulative impacts from cars and light-duty truck trips on global warming or the regional transportation network, cumulative effects that have been adequately addressed and mitigated in prior applicable certified EIRs, off-site alternatives, or a reduced density alternative to address effects of car and light truck trips. (Pub. Resources Code, § 21155.2, subd. (c).) In addition, EIRs for qualifying residential or mixed-use residential projects are not required to include discussion of growth inducing impacts, any project specific or cumulative impacts from cars and light-duty truck trips generated by the project on global warming or the regional transportation network, or reduced density alternative to address effects of car and light truck trips generated by the project. (Pub. Resources Code, § 21159.28, subds. (a)–(b).) The provisions of SB 375 that allow for streamlined CEQA review using a tiered EIR do not include an affordable housing component.

4. The Plan Bay Area EIR

To facilitate reliance on these CEQA streamlining provisions, the Plan Bay Area EIR provides substantial evaluation of cumulative and growth-inducing impacts and climate change impacts related to cars and light duty trucks on a regional level, based on the uses, densities, building intensities and policies included in the Plan. (AR 428; see also AR 565-572, 600-659, 734-739, 844-861, 883-844, 917-934, 991-1015, 1031-1049, 1060-1068, 1116-1130, 1158-1173, 1184-1189, 1356-1354 [cumulative

discussions], 1342-1357 [growth-inducing], 788-823 [climate change].) These analyses relate to how land use and transportation choices influence individual and household transportation behavior, and the resulting effects on air quality, greenhouse gas emissions, transportation, and noise. To the extent a project is consistent with the uses, densities, intensities, and applicable policies of the SCS, it may rely on the analysis in the Plan Bay Area EIR for impacts related to climate change, growth-inducement, and cumulative effects in its environmental analysis. (Pub. Resources Code, §§ 21155.2, subd. (b)(1), 21159.28, subd. (a); AR 428.)

As determined by the trial court, the CEQA streamlining provisions of SB 375 bear a rational relation to the public purpose of reducing greenhouse gas emissions because they encourage development "that will arguably encourage walking, which will limit greenhouse gas emissions." (AA232.) The Plan provisions allowing for CEQA streamlining therefore do not violate equal protection.

B. SB 375 requires that the Plan consider the State's affordable housing goals.

In addition to the CEQA exemption created by SB 375 that recognizes and incentivizes affordable housing discussed above, SB 375 also specifically requires that the SCS identify areas "sufficient to house all the population of the region, including all economic segments of the population." (Gov. Code, § 65080, subd. (b)(2)(B)(ii).) SB 375 further requires that the SCS identify areas sufficient to house the 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, low, moderate, and above-moderate incomes. (Gov. Code, §§ 65080, subd. (b)(2)(B)(iii), 65584, subds. (d)–(e); AR 55667.) And, SB 375 requires that the Plan consider State goals for adequate and affordable housing. (Gov. 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].)

While Appellants argue that "consider" and "identify" are not the same as requiring consistency, the Legislature clearly intended that there be consistency between housing policy and transportation policy. SB 375 simultaneously updated the state's housing planning provisions as follows: "It is the intent of the Legislature that housing planning be coordinated and integrated with the regional transportation plan. To achieve this goal, the allocation plan shall allocate housing units within the region consistent with the development pattern included in the sustainable communities strategy." (Gov. Code, § 65584.04, subd. (i)(1).)

C. Incentivizing affordable housing is rationally related to reducing greenhouse gas emissions.

Appellants contend that "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." (AOB, p. 35.) However, as noted in the record, lower-income households are more likely to use transit or walk when living in transit-rich neighborhoods than those with higher incomes, thus creating fewer greenhouse gas emissions. (AR 55694 [noting that affordable housing in PDAs and high-quality transit corridors "helps achieve the GHG emissions reduction target"]; AR 53571 [noting that "[l]ower-income residents often represent the core of transit riders"].) Additionally, when lower income households are forced to move from transit-rich areas to outlying areas due to displacement, they create more greenhouse gas emissions than a high income household commuting the same distance because they are more likely to drive older and less-efficient vehicles. (AR 55693 [noting that low-income residents commuting longer distances to find affordable housing "increase[s] emissions"].)

That is why the promotion of affordable housing is a strategy used by greenhouse gas emissions reductions programs that have been adopted by administrative agencies. For example, proceeds from CARB's Cap-and-Trade Auction were used to create the Affordable Housing and Sustainable Communities Program (AHSC). (See Pub. Resources Code, § 75210.) Like SB 375, the purpose of the AHSC program is to reduce greenhouse gas emissions. (See Pub. Resources Code, § section 75210 [Strategic Growth Council "shall develop and administer the Affordable Housing and Sustainable Communities Program to reduce greenhouse gas emissions . . . "]; § 75211 [only a project that demonstrates "that it will achieve a reduction in greenhouse gas emissions" will be eligible for AHSC grant funding]. To evaluate whether a project will be eligible for AHSC funding, projects must "implement land-use, housing, transportation, and agricultural land preservation practices to support infill and compact development, and that support *related and coordinated public policy objectives*, including preserving and developing affordable housing for lower income households, as defined in Section 50079.5 of the Health and Safety Code." (See Respondents' RJN, Exhibit F, p. 4 [emphasis added].)

This established connection between household income and greenhouse gas emissions is more than enough to meet the low standard of rational basis level of scrutiny. (See *Belle Terre v. Boraas* (1974) 416 U.S. 1, 9-10 [equal protection guarantee not violated where definition of what constitutes "family" under a zoning ordinance rationally related to a permissible state objective of providing "the blessings of quiet seclusion and clean air"]; *County Bd. of Arlington County v. Richards* (1977) 434 U.S. 5, 7 [county zoning ordinance prohibiting parking without a permit rationally related to permissible state objective of reducing traffic in residential neighborhoods]; *Pennell v. San Jose* (1987) 485 U.S. 1, 14-15 [city's rent control ordinance, allowing for rent adjustments based on tenant

hardship, was a legitimate and rational use of city's police powers]; *Great American Houseboat Co. v. United States* (9th Cir. 1986) 780 F.2d 741, 748 (*Great American Houseboat*) [denial of boating permit rationally related to a desire to avoid overcrowding and environmental concerns]; *American Tower, supra,* 763 F.3d at pp. 1059-1060 [denial of conditional use permit for telecommunication facility rationally related to minimizing aesthetic impact of wireless facilities]; see also *Lehnhausen v. Lake Shore Auto Parts Co.* (1973) 410 U.S. 356, 364 [Petitioners have burden of disproving every conceivable basis for supporting the classification].)

"Where a statute draws a classification rational on its face, official action purportedly in conformity with that classification is not without more, a denial of equal protection." (*Great American Houseboat, supra,* 780 F.2d at p. 748.) Accordingly, the Court should uphold the trial court's denial of Appellants' challenge to SB 375 and Plan Bay Area based on the Equal Protection Clause.

III. Plan Bay Area Does Not Usurp Local Land Use Control.

Appellants next allege that 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."[12] (AOB, p. 41.) Appellants further allege that the Plan thereby violates the "home rule" guarantee of Article XI, section 5 of the California Constitution, which allows local government entities to "make and enforce all ordinances and regulations in respect to municipal affairs . . . ." (AOB, pp. 40-41.) Where a violation of the "home rule" guarantee is alleged, the court must initially inquire whether the case presents a conflict between state statute and local rule. If it does not, the inquiry need go no further. (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 398-399.)

[12]/ Notably, this argument is in tension with Appellants' argument that the Plan is infeasible because local action is required to achieve the greenhouse gas emission reductions.

The Agencies do not dispute that land use regulation is a "municipal affair." (AOB, p. 41.) But contrary to Appellants' assertions, there is no conflict here between the state statute and local rule as the Plan does not "strong arm" local governments into complying with its policies. (AOB, p. 45.) Rather, as Appellants acknowledge: "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." (AOB, p. 39 [citing Gov. Code, § 65080, subd. (b)(2)(K)].) SB 375 contemplates that the Plan must therefore rely on the cooperation of local jurisdictions to implement development consistent with the growth allocations in the Plan. If the Plan is implemented by local jurisdictions, then the greenhouse gas reduction goals of SB 375 can be achieved, as noted in the Feasibility Study. Providing funding for projects that are consistent with the Plan is a permissible incentive to achieve the goals of SB 375 and is not coercive.

A. Local governments retain discretion to make land use decisions under the Plan.

Under SB 375 and the Plan, local governments are ultimately responsible for the manner in which their communities are built. Cities and counties are not required to revise their "land use policies and regulations, including [their] general plan, to be consistent with the regional transportation plan or an alternative planning strategy." (Gov. Code, § 65080, subd. (b)(2)(K).) The land use portion of the Plan will only be implemented insofar as local jurisdictions act upon the Plan's policies and recommendations. (Pub. Resources Code, §21155, subd. (a) [Plan Bay Area provides a transportation and land use vision that "*if implemented*" would achieve the greenhouse gas reduction targets for the region], emphasis added.) Cities and counties in the Bay Area retain discretion to: (1) carry out or approve projects that are not consistent with the Plan; (2) deny approval of projects even if they are consistent with the Plan; and (3)

reach environmental conclusions and/or adopt mitigation measures that differ from those identified in the Plan Bay Area EIR. (AR 1675.) In short, the Plan is advisory and not binding on local government.

While the Plan provides additional funding as a financial incentives for local governments to develop in PDAs, local governments are involved in the determination of what constitutes a "Priority Development Area." As previously discussed, the 169 PDAs included in the Plan are "existing neighborhoods *nominated by the local jurisdictions* as appropriate places to concentrate future growth that will support the day-to-day needs of residents and workers in a pedestrian-friendly environment served by transit." (AR 55660, emphasis added.) Furthermore, these local jurisdictions will not be forced to rezone any land or change any land use policies in order to accommodate growth within these PDAs. The Feasibility Report concludes that there is physical capacity, based on current zoning and land supply, to accommodate 92 percent of the housing units allocated to the sample PDAs.

Moreover, not all of these additional funds are required to be used in PDAs. The OBAG program requires that local Congestion Management Agencies ("CMA") develop a PDA Investment and Growth Strategy for their respective counties to guide future transportation investments. As stated in the Plan, the CMAs in larger counties (Alameda, Contra Costa, San Mateo, San Francisco, and Santa Clara) must direct 70 percent of their OBAG investments to projects in the PDAs. For the North Bay Counties (Marin, Napa, Solano, and Sonoma), the requirement is 50 percent. (AR 55679.) Thus, OBAG funds are available to projects outside of the PDAs––in the larger counties, 30 percent of funds are available, and in the less urban counties, half of the available OBAG funds may be used outside of the PDAs. (AR 55679.) In addition, the Plan allows that a project outside the limits of a PDA may count toward the minimums described above,

provided that it directly connects to or provides proximate access to a PDA. (AR 55679.) The Plan therefore allows for flexibility in spending and local governments retain discretion to direct funding to projects outside of the PDAs. Local agency autonomy is neither destroyed nor impaired.

B. The availability of OBAG funding acts as a permissible incentive.

The OBAG program was created "[t]o encourage more development near high-quality transit and reward jurisdictions that produce housing and jobs" by directing 5 percent of the funds available under the Plan to transportation investments in PDAs. (AR 55679). Thus, OBAG funding is used to *incentivize* development of projects that will help the state achieve the goals set forth in SB 375.

The purpose of SB 375 is, in part, to "*encourage* developers to submit applications and local governments to make land use decisions that will help the state achieve its climate change goals under AB 32, assist in the achievement of state and federal air quality standards, and increase petroleum conservation." (Sen. Bill No. 375 (2008-2009 Reg. Sess.) § 1, subd. (f), emphasis added.) SB 375 explicitly acknowledges that financial incentives will be necessary to achieve the greenhouse gas reduction goals. (See, e.g., Gov. Code, § 65080, subd. (b)(4)(C) [stating that MPOs "shall consider financial incentives" for cities and counties that have resource areas or farmland," and "shall also consider financial assistance" to counties that "contribute toward the greenhouse gas emission reduction targets by implementing policies for growth to occur within their cities"]; Sen. Bill. No. 375 (2008-2009 Reg. Sess.) § 1, subd. (g) [noting that the modeling tools used to make transportation infrastructure decisions can also "assess the effects of policy choices, such as residential development patterns . . . and the use of economic incentives and disincentives"].)[13] This

[13]/ The Legislature has enacted several statutes that provide incentives for

is also consistent with AB 32, which explicitly directs that CARB's Scoping Plan "identify and make recommendations on . . . potential monetary and nonmonetary incentives [that are] necessary and desirable to facilitate the achievement of the maximum feasible and cost-effective reductions of greenhouse gas emissions by 2020." (Health & Saf. Code, § 38561, subd. (b); see also *Assn. of Irritated Residents, supra*, 206 Cal.App.4th at p. 1495.)

These incentives do not in any way limit the existing land use authority of any city or county. (Gov. Code, § 65080, subd. (b)(2)(K).)

C. The Plan is not coercive under federal law.

Appellants rely on federal case law regarding the limits of Congressional power under the Spending Clause. These cases have found that financial inducements offered by Congress to state governments with legislative conditions might be so coercive as to pass the point at which "pressure turns into compulsion." (*Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 590 (*Steward Machine*).) This limitation, which was developed to ensure that Congress does not "conscript state [agencies] into the national bureaucratic army," is inapplicable to the relationship between the regional Agencies and local government in the Bay Area. (*National Federation of Independent Business v. Sebelius* (2012) 132 S.Ct. 2566, 2607 (*Sebelius*).) Appellants have cited no authority showing that that the reach of these cases extends beyond the state-federal relationship. Regardless, the funding mechanisms in the Plan are clearly not coercive.

The recent *Sebelius* decision relied upon by Appellants clarified that the threatened withholding of existing funding sources on which states have

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development that meets specified criteria. (See, e.g., *Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 770 [finding the State Density Bonus Law and other Government Code provisions authorizing incentives for residential development "clearly show an important state policy to promote the construction of low income housing and to remove impediments to the same"].)

come to rely is constitutionally suspect, while the offering of new funding is not. (See *Sebelius*, 132 S.Ct. at p. 2607 ["Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding."].)

As noted by the trial court, the funds at issue here are not funds on which local governments have come to rely, but are funds that are being issued for the first time in conjunction with the Plan and the Plan's objective of reducing greenhouse gas emissions. (AA235.) The federal Moving Ahead for Progress in the 21st Century Act took effect October 1, 2012 and the OBAG Program distributed the first MAP-21 funds for the 2012-2013 fiscal year. (AR 29292-29329, 42892-42903, 55679.) Therefore, any conditions placed on the funds were in relation to a voluntary new financial incentive and did not threaten an existing funding source on which a local government was reliant.

Additionally, like the highway grants at issue in *South Dakota v. Dole* (1987) 483 U.S. 203 (*Dole*), OBAG funding is a small percentage of the overall funding available under Plan Bay Area. (*Id.* at p. 211.) Specifically, the Plan allocates $292 billion over the Plan horizon. 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. (AR 55679; see also AR 48367 [Feasibility Report notes that Plan Bay Area allocates $340 million to Congestion Management Agencies through OBAG and the "amount of funding allocated by the CMAs from other resources, such as their respective sales tax measure funding or regional traffic impact fees, far exceeds the OBAG grants"].) The trial court correctly held that given its small amount, the OBAG funding was "not an

offer that local governments cannot refuse." (AA235.) Thus, no local government should feel compelled to accept the OBAG funding.

Just as Congress may attach appropriate conditions to taxing and spending programs to preserve control over use of federal funds, the Agencies may attach conditions to grant of OBAG funds to ensure achievement of Plan Bay Area goals. Appellants have not met their burden to show that these financial inducements in the Plan are being used as "weapons of coercion, destroying or impairing the autonomy" of the local governments. (*Steward Machine, supra,* 301 U.S. at p. 586.)

CONCLUSION

In light of the foregoing, the Agencies respectfully request that the Court uphold the trial court's denial of Appellants' request for a writ of mandate and complaint for declaratory and injunctive relief.

Dated: November 23, 2015

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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that, pursuant to rule 8.204(c) of the California Rules of Court, the text of this brief was produced using 13 point Roman type and contains 11,376 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 23, 2015

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The Post Sustainability Institute v. ABAG
State of California First Appellate Dist., Division Two, Case No. A144815
Alameda County Superior Court, Case No. RG13699215

PROOF OF SERVICE

I am a resident of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 801, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

On November 23, 2015, a true copy of the RESPONDENTS' BRIEF was electronically filed with the Court of Appeal, First Appellate District, Division Two through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid and deposited in a mailbox maintained by the United States Postal Service in Sacramento, California.

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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 23rd day of November 2015, at Sacramento, California.

_____/s/_____
Stephanie Richburg