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' REPLY BRIEF

Trial Court Case No. RG 13699215
The Honorable Evelio Grillo

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INTRODUCTION

It is undisputed that Respondents cannot possibly achieve the greenhouse gas reduction targets set by the California Air Resources Board (CARB) without seismic shifts in California's political and economic landscape, including repeal of Proposition 13. Respondents engaged the services of an independent consultant, Economic & Planning Services, Inc. (EPS), to assess the feasibility of Plan Bay Area, and its conclusion is dispositive: "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 range of state legislative changes, resource allocation changes, and interagency coordination efforts that will be required." AR at 35835.

Faced with this unavoidable fact, Respondents should have informed CARB that an alternative strategy is needed, as S.B. 375 expressly allows. They declined to do so, and are now doubling down on their bet that this Court will rewrite S.B. 375 by softening its mandates, and share in their crystal ball prognostication of future political changes.

This Court should decline the invitation. First, the mandates of S.B. 375 are clear and unambiguous. Second, this Court is not in the business of fortune telling. Third, the factual conclusions of EPS cannot be whitewashed or ignored. Indeed, even if all the requisite political hurdles are met, Plan Bay Area will not have reduced greenhouse gas emissions enough to meet the CARB targets.

Appellants request that the trial court judgment be reversed, and that a peremptory writ of mandate be issued directing Respondents to rescind the approval of the Plan.

I. RESPONDENTS OVERSTATE THE DEGREE OF DEFERENCE TO WHICH THEY ARE ENTITLED

A. Respondents' Factual Determinations and Findings Must Be Supported by Substantial Evidence in the Record

Respondents urge this Court to apply a "highly deferential" standard of review regarding Petitioners' contention that Respondents failed to comply with the feasibility mandate of S.B. 375. RB at 16. As authority for this proposition, Respondents quote language from *California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676 (*California High-Speed Rail*). However, *California High-Speed Rail* is not applicable to this case.

California High-Speed Rail involved a validation action to determine, *inter alia*, whether the High-Speed Passenger Train Finance Committee had exceeded its authority by finding it "necessary or desirable" to issue bonds to finance construction of a high-speed rail system. *See id*. at 692. The Third District Court of Appeal upheld the Committee's action, noting that in doing so the court applied "highly deferential and limited review"— the standard Respondents ask this Court to apply in this case. *Id*. at 699.

However, the *California High-Speed Rail* Court was explicit that the reason for extreme deference was because the agency was exercising discretion that had been directly and specifically delegated to it by the voters. *See id*. at 697-698. In other words, the Finance Committee—established by Proposition 1A (the High-Speed Passenger Train Bond Act of 2008)—was empowered to determine, *wholly at its own discretion*, whether it was necessary or desirable to issue bonds to finance construction of the high-speed rail system. When the Committee exercised this discretionary quasi-legislative authority, its decision was judicially reviewable only under a highly deferential standard. *Id*. at 699. But that standard is inapplicable to the present case, which involves Respondents' performance of a *mandatory* duty delegated by the Legislature, not an exercise of *discretionary* authority assigned by the electorate.

Moreover, the *California High-Speed Rail* Court distinguished the standard of review applicable in that case from the appropriate level of scrutiny in the present case on a second ground. The Court cited *Poway Royal Mobilehome Owners Assn. v. City of Poway* (2007) 149 Cal.App.4th 1460 (*City of Poway*) as a case in which an agency's decision to issue bonds was subject to a stricter level of scrutiny. *See California High-Speed Rail, supra*, 228 Cal.App.4th at 698-699. Because the law required a public hearing before the city's bonds could be authorized, deferential review was inappropriate. *"Because the city was compelled by law to hold a hearing*, the Court of Appeal invoked the substantial evidence standard of review. 'We examine the administrative record to determine whether substantial evidence supports the trial court's findings.'" *Id*. at 699, quoting *City of Poway, supra*, 149 Cal.App.4th at 1479 (emphasis added).

Reiterating the importance of this distinction, the *California High-Speed Rail* Court emphasized that highly deferential review was appropriate in that case because "[f]inance committees under the Bond Law, and the Finance Committee established by the Bond Act, are given the statutory charge to determine when the issuance of bonds is 'necessary or desirable,' but they are not required to conduct a hearing, take evidence, or make findings." *California High-Speed Rail*, *supra*, 228 Cal.App.4th at 699. In contrast, when public hearings are required by law, as in *City of Poway*, the appropriate standard of review is whether the agency's findings and determinations are supported by substantial evidence in the record. *Id*.

In this case, Respondents were required by law to hold not one but *three public hearings*. *See* Gov. Code §65080(b)(2)(F)(v) (requiring "[a]t least three public hearings on the draft sustainable communities strategy"). Under such circumstances, "[t]here is no practical difference between the standards of review applied under traditional or administrative mandamus." *Friends of Old Trees v. Dept. of Forestry & Fire Protection* (1997) 52 Cal. App. 4th 1383, 1389. The administrative record of those proceedings is before this Court, which must

determine whether Respondents' factual determinations, assumptions, and findings are supported by substantial evidence.

B. The Substantial Evidence Standard Requires this Court to Review the Whole Record, Including Evidence that Detracts from Respondents' Findings and Conclusions

The substantial evidence standard of review requires both trial and appellate courts to review the administrative record as a whole, evaluating both the evidence that supports the agency's determination and the evidence that detracts from it. "Unlike the former practice, reviewing courts will now, in determining the existence of substantial evidence, look to the entire record of the appeal, and will not limit their appraisal 'to isolated bits of evidence selected by the respondent.'" *Bowers v. Bernards* (1984) 150 Cal. App. 3d 870, 874 (citations omitted).

The current interpretation of the standard is set forth in *La Costa Beach Homeowners' Assn. v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 814: "[T]he 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…..Rather, the court must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence." *See also* James C. Martin, *New Bite for an Old Maxim: Appellate Courts Put Some Teeth Into the Substantial Evidence Rule*, 10 Cal Law. 73 (1990) ("The cases leave no doubt that the substantial evidence rule imposes an affirmative obligation on the appellate court to consider the whole record, at counsel's invitation, in order to ensure that the evidence allegedly supporting a finding is indeed substantial.")

In *Bowman v. California Coastal Com.* (2014) 230 Cal.App.4th 1146, 1150-51, the court recognized the need to "consider all relevant evidence, including evidence detracting from the decision," before applying the substantial evidence standard to reverse a trial court judgment in favor of the Coastal Commission. Other

California appellate courts are in agreement. *See Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 (Appellate courts may not "blindly seize any evidence in support of the respondent in order to affirm the judgment"); *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal. App. 4th 575, 585 (Courts may not uphold agencies' decisions by isolating evidence supporting the agency's findings and disregarding conflicting relevant evidence in the record); *Rivard v. Board of Pension Commissioners* (1985) 164 Cal. App. 3d 405, 410 ("To base a determination solely on the supporting evidence in isolation would lead to a stultified review for substantial evidence, if not an actual 'any evidence' rule."); *County of San Diego v. Assessment Appeals Bd. No. 2* (1983)148 Cal. App. 3rd 548, 554 ("[B]oth the trial and appellate courts have broader responsibility to consider all relevant evidence in the administrative record, both contradicted and uncontradicted. This consideration involves some weighing of the evidence to fairly estimate its worth.") (citations omitted).

C. This Court Reviews De Novo All Issues Involving the Proper Interpretation of S.B. 375

Finally, the decision below turned in part on the trial court's idiosyncratic definitions of key terms in S.B. 375. Those definitions are matters of statutory interpretation which are considered questions of law, subject to de novo review on appeal. See *California Chamber of Commerce v. Brown* (2011) 196 Cal.App. 4th 233, 248 n.11 ("in a traditional mandamus proceeding, in the trial court and on appeal…legal issues, such as issues of statutory construction, are reviewed de novo"). Respondents are entitled to no deference whatsoever on those issues. *See California High-Speed Rail*, *supra,* 228 Cal.App. 4th at 707 ("Statutory construction is an inherently judicial task and our review is de novo") (citing *Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1266).

II. THIS COURT SHOULD DECLINE RESPONDENTS' INVITATION TO DEPART FROM THE PLAIN MEANING OF S.B. 375

It is a fundamental principle of statutory interpretation that the Legislature is presumed to use ordinary English words in their ordinary senses. *See, e.g., Perrin v. United States* (1979) 444 U.S. 37, 42 ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") If the text of a statute is plain and unambiguous on its face, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States* (1917) 242 U.S. 470, 485. In such cases, "the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." *Id.*

Additionally, in construing a statute, the duty of the court "'is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted.'" *In Re Rudy L* (1994) 29 Cal.App.4th 1007, 1010 (citing Code Civ. Proc. § 1858). The court must follow the language used in a statute and give it its plain meaning "'even if it appears probable that a different object was in the mind of the legislature.'" *People v. Weidert* (1985) 39 Cal.3d 836, 843.

The Legislative mandate of S.B. 375 is plain and unambiguous: Respondents "shall prepare a sustainable communities strategy . . . [which] 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 targets approved by the state board." Gov. Code §65080(b)(2)(B). Nevertheless, Respondents ask this Court to revise the plain meaning of S.B. 375 to lighten—indeed, to eliminate—their burden of demonstrating that the implementation of Plan Bay Area *will* in fact reduce emissions sufficiently to meet CARB's targets. RB at 19.

Instead of requiring them to comply with the Legislature's mandate of adopting a plan that *will* achieve the targeted reduction in greenhouse gas emissions, Respondents urge this Court to require only that the Plan can be "expected to" have that effect, at some unspecified time, perhaps decades in the future. RB at 19.

Although they have manifestly failed to adopt the blueprint required by the Legislature, Respondents ask this Court to approve in its place their adoption of an "aspirational document" (RB at 20) that may or may not approach its objectives, to a greater or lesser degree, as may or may not be revealed only with the passage of time.

Missing from Respondents' argument is any explanation of why the Legislature did not use this terminology when drafting S.B. 375. Nowhere do the words "aspiration," "aspirational," or "aspirational document" appear, although its drafters must be presumed to have been familiar with those words, and could have used them if they wished. The fact that the Legislature chose not to employ that terminology must be taken to mean that it is not what the Legislature intended. Adopting an "aspirational document" is quite different than adopting a plan that *will* achieve specified results. Instead of reinterpreting S.B. 375 to require something closer to what Respondents have actually adopted, this Court should simply enforce S.B. 375 according to its terms, reverse the ruling of the court below, and order the writ to issue.

III. RESPONDENT'S ASSERTION THAT PLAN BAY AREA IS LIKELY TO ACHIEVE ITS OBJECTIVES IS BASED ON COUNTERFACTUAL ASSUMPTIONS WITH NO SUPPORT IN THE RECORD

As noted above and in Appellants' Opening Brief (AOB), S.B. 375 unequivocally requires Respondents to adopt a plan that "*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 [CARB]." Gov. Code §65080(b)(2)(B) (emphasis added). The court below effectively rewrote this Legislative mandate to require only that the Plan can be *reasonably expected to* reduce greenhouse gas emissions to CARB's targets. Order at 9-10.

Alternatively, the trial court read "will" to mean that the necessary reduction in emissions is *likely to be achieved*. AA at 223. Yet Respondents' assertions that Plan Bay Area meets even those modest standards is not supported by evidence in the record, and rests on fanciful speculations that are contrary to common understandings of reality.

The myriad political, legislative, and financing assumptions built into Plan Bay Area render it infeasible as the mechanism to achieve CARB's greenhouse reduction targets in light of the unambiguous mandate of S.B. 375. As the Court of Appeal held in *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1168-1169, a governmental entity cannot rely on "unfunded programs" to support required greenhouse gas emission targets. Respondents attempt to distinguish *Sierra Club* by asserting that the mitigation measure in that 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." RB at p. 21.

This attempt at a "distinction" to the instant case is meritless. S.B. 375 ***requires*** a plan that will achieve CARB greenhouse emission reductions of seven percent per capita from 2005 levels by 2020, and a fifteen percent reduction by 2035, as elsewhere conceded by Respondents. *See* RB at p.12. This is no different than the mandate in *Sierra Club*. If the reductions cannot be achieved as a result of unfunded programs and an inadequate legislative framework, as is the case here, Respondents should have so advised the legislature and CARB, an option expressly outlined in S.B. 375. *See* Gov't Code § 65080, subdivision (b)(2)(I).

A. Assumptions, Possibilities, and Speculation Are Not Substantial Evidence That the Plan Meets the Legislative Mandate of S.B. 375

Under the substantial evidence standard, "inferences that are the result of mere speculation or conjecture cannot support a finding." *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633. This applies even to expert

opinion testimony. "Where an expert bases his conclusion upon assumptions which are not supported by the record…or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence." *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal. App. 3d 1113, 1135 (citations omitted). *See also Regents of Univ. of California v. Public Employment Relations Bd.* (1990) 220 Cal. App. 3d 346, 359 ("A finding must rest on more than a hypothesis. A conditional premise is not a fact, and ***a mere possibility is not substantial evidence***") (emphasis added.)

As an example of reliance on speculation as evidence, Respondents offer the Feasibility Report itself as "substantial evidence" that the Plan's growth allocations can feasibly be achieved. RB at 24. But Respondents refer to mere conclusory statements that are not only unsupported, but are actually contradicted by hard evidence within the Report. For example, as was pointed out in the opening brief, the Feasibility Report documents that Plan Bay Area cannot achieve the emissions reduction required by S.B. 375 unless **redevelopment agencies or their equivalent are reinstituted** (AOB at 22-24); **Proposition 13 is repealed or substantially weakened** (AOB at 24-25); and **new statewide infrastructure financing is provided** (AOB at 25-26). Even if all these institutional obstacles are assumed away, the Report's substantive analysis shows that the growth allocated to the Bay Area by the Plan still cannot be accommodated. AOB at 27-28.

B. No Substantial Evidence in the Record Supports Respondents' Assumption that Proposition 13 Is Likely to Be Repealed or Significantly Weakened, As Required If the Plan Is to Achieve Its Objectives

Respondents contend that the Plan is a "feasible" means of achieving the reductions in greenhouse gas emissions required by S.B. 375. RB at 17-31. Yet Respondents fail to acknowledge that, as was highlighted in the Feasibility Report, the existence of Proposition 13 is not just an obstacle to the Plan's achievement of

its objectives, it is a "major" obstacle. AR 035836. Simply stated, the record indicates that it is highly *unlikely* that the Plan can achieve its required reductions in greenhouse gas emissions without a fundamental change in the "structure of property taxes in California"—i.e., repealing or substantially revising Proposition 13. AR 055712.

Given this reality, any assertion that the Plan is "likely" to achieve its objectives, or "can reasonably be expected" to do so, must rest in part on evidence that a major upheaval in California's long-standing property tax structure is likely to occur in the foreseeable future. Yet no such evidence is identified in the Respondents' Brief, just as none was cited by the court below. Indeed, the trial court expressly recognized that any likelihood that the Plan could succeed turned on "*assumptions* about future legislative actions," without reference to any evidence concerning the realism of those assumptions. Order at 16. (Emphasis added).

Proposition 13 is enshrined as Article XIII A of the California Constitution. Adopted by a 2-to-1 margin as an initiative constitutional amendment, the measure cannot be repealed or amended except by a vote of the people. See California Constitution, Article II, § 8. It is a matter of common knowledge that Proposition 13 "has long been considered the untouchable 'third rail' of California politics." [1] Despite the sustained opposition of state and local governments over most of the past 38 years, Proposition 13 remains as popular with California property owners today as when it was enacted. *See, e.g*., Bruce Bartlett, *Proposition 13: 35 Years Later*, 139 Tax Notes 801, 803 (2013): "Proposition 13 remains overwhelmingly popular in California. A 2008 poll found that 59% of Californians support it, including 67% of homeowners. *Proposition 13 is about as politically entrenched as*

[1] *California Democrats Hesitant after Call to Unwind Prop 13 Tax Curb*, available at http://www.reuters.com/article/us-usa-california-taxes-prop- idUSBRE93F04520130416 (last viewed 2/15/16).

anything can be." (Emphasis added.) (Citing Public Policy Institute of California, *Proposition 13: 30 Years Later* (June, 2008).[2]

In the face of this formidable institutional obstacle to the feasibility of the Plan, neither the record below nor the Respondents' Brief advances a single concrete proposal that Respondents consider "likely" to overturn or undermine this popular cornerstone of California's tax structure. Instead, Respondents offer repeated vague references to generalized "legislative changes" or "policy changes" that will be required if the Plan is to have any hope of achieving its objectives—as if an initiative constitutional amendment to fundamentally restructure the state's fiscal system, contrary to the documented, strongly-held preferences of the electorate, need only be imagined to make it likely to occur. RB at 25-29.

Extending the utmost deference to Respondents' speculations, the trial court held that "it is reasonable to assume that if the MTC, the ABAG, and other regional entities support policy changes that the state legislature might implement some or all of the changes." Order at 17. Beyond its embodiment of an inappropriately deferential standard of review, this passage suggests that the court below was unaware that the state legislature has no authority to repeal or amend Proposition 13. Similarly, neither the court below nor Respondents mention the fact that virtually all planning agencies in California, like virtually all other local government entities, have lobbied for the elimination of Proposition 13 since its inception, with no discernible effect on the electorate's support of the measure. To simply *assume* a complete, 180-degree turnaround on this issue, with no supporting evidence that this is likely to occur, requires a degree of deference to Respondent's speculations that is unacceptable under the "substantial evidence" standard of review.

Because there is no substantial evidence in the record supporting Respondents' assumption that the "major obstacle" presented by Proposition 13 will

[2] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2266894 (last viewed 2/15/16.)

simply go away, Respondents have failed to demonstrate that Plan Bay Area is likely to, or can reasonably be expected to, achieve the objectives required for compliance with S.B. 375.

C. No Substantial Evidence in the Record Supports Respondents' Assumption that Redevelopment Agencies Will Be Reestablished in California

It is undisputed that, according to the Feasibility Report commissioned by Respondents, achieving the Plan's required population densities will require changes in existing land uses that can only be accomplished through formal redevelopment. AR 035797, AR 035830. Yet, as pointed out in the opening brief, redevelopment agencies have been abolished in California, thereby rendering achievement of this aspect of the Plan not just unlikely, but effectively impossible. AOB at 22. The Plan recognizes this obstacle, but figuratively shrugs it off, breezily assuming that "[a] replacement mechanism will be found." AR 055654.

Under the substantial evidence standard of review, this Court cannot simply close its eyes to the fact that, at the time the Plan was adopted, no mechanism existed capable of achieving the regionally coordinated assembly and redevelopment of privately-owned commercial property envisioned by the Plan. Nor is there any evidence in the record from which the Court could reasonably evaluate the likelihood that any specific "replacement mechanism" will be adopted in time to accomplish the Plan's redevelopment objectives.

The Respondents' Brief is silent on this point, although it goes outside the record to cite the recent passage of two bills dealing with tax increment financing. RB at 26-27. Neither of these measures could have gone into an objective evaluation of whether the Plan as adopted in 2013 was likely to accomplish its objectives. And even more importantly, no evidence has been proffered to date, even outside the record, by which to evaluate the likelihood that these recently-passed bills could

significantly contribute to the accomplishment of the Plan's objectives. (*See* Section III D., infra.)

D. The Documents Submitted by Respondents for Judicial Notice Are Not Part of the Administrative Record at the Time of the Plan's Adoption, and In Any Case Do Not Support Respondent's Position

Respondents cite to the documents submitted with their Request for Judicial Notice (RJN) as evidence that, *inter alia*, the new development required by the Plan is in fact feasible. RB at 27. It must first be noted that none of the noticed material constitutes part of the administrative record. Each of the documents relates to matters that are asserted to have occurred after the Plan was adopted; and in any case, Respondents did not submit a motion to augment the record.

Thus, although judicial notice recognizes the existence of each of the documents in question, it cannot go into a calculus of substantial evidence in the record on which the board based its actions. *See City of Poway, supra,* 149 Cal.App.4th at 1479 ("'The scope of judicial review of a legislative type activity is limited to an examination of the record before the authorized decision makers to test for sufficiency with legal requirements . . . A substantial evidence review is limited to the record before the [agency]'") (citations omitted).

Even if this Court does consider the documents included in the RJN as part of the administrative record in the absence of a proper motion to augment, Respondents provide only a truncated, superficial analysis of their relevance. Indeed, Respondents' one sentence discussion of S.B. 628 (RB at p. 26) ignores the fine details. Infrastructure Financing Districts *already exist*. S.B. 628 authorizes the creation of infrastructure financing plans by cities and counties *under certain conditions*. First, the city or county must vote to create such plans. Second, they must vote to issue bonds. Third, the voters of each city or county by a 55% percent vote must approve issuance of bonds. It is unclear just how this assists

Respondents in meeting the CARB targets within a reasonable period of time, if at all, when the electorate voting is a precondition to implementation. Once again, we are back to unsupported assumptions about what may happen if the stars align.

Respondents fare no better with their equally sparse discussion of A.B. 2 (RB at p. 27.) That bill hardly resurrects redevelopment agencies. For example, although Community Revitalization and Investment Authorities (CRIA's) may adopt a community revitalization and investment plan, there are conditions not required under the prior framework. Under A.B. 2, a CRIA could be created by a local government or special district, but the area must have an annual median household income that is less than 80 percent of the statewide median. Additionally, three of the following four conditions must be met: 1) unemployment that is at least 3 percent higher than the statewide median unemployment rate; 2) a crime rate that is 5 percent higher than the statewide median crime rate; 3) deteriorated or inadequate infrastructure such as streets, sidewalks, water supply, sewer treatment or processing, and parks; and 4) deteriorated commercial or residential structures. Further, although A.B. 2 enables CRIAs to use tax increment financing, the taxing entities in the proposed project area must agree to divert the tax increment to the CRIA, which limits their power. (See Government Code Section 6200, et seq.)

Curiously, Respondents ignore recent local legislative attempts to enact measures which would facilitate compliance with Plan Bay Area, but *failed* to do so. For example, subsequent to the preparation of its report, EPS drafted a letter to Respondent Metropolitan Transportation Commission lamenting the defeat of Measure M in Alameda County, which would have "significantly improve[d] the achievable outcomes in the PDA's." AR 38425.

It should be emphasized that this EPS letter to Respondent Metropolitan Transportation Commission was prompted by understandable concerns that the findings of EPS render Plan Bay Area infeasible, based upon "public commentary." AR 38425. As this case illustrates, that public commentary was prescient. Although EPS characterizes these concerns as "overly pessimistic" (RB at pp. 25-26), it had

no choice but to concede that the growth allocations in Plan Bay Area are "not easy." AR 38426. This is a far cry from the S.B. 375 mandate that the greenhouse gas reductions targets "will" be met, and if they cannot to so inform CARB and develop an alternative as required by Gov. Code § 65080, subdivision (b)(2)(I).

In short, the question of whether these bills have any factually quantifiable impact on the issue of feasibility is beyond the realm of this Court. They were not considered at the administrative level, nor were they analyzed by EPS. If anything, they illustrate the rather desperate attempt by Respondents to find something that will support, however incrementally if at all, the substantial assumptions upon which Plan Bay Area was premised—a tacit admission that the Plan is not feasible. Moreover, as explained in the opening brief and in Section V, *infra*, even if the assumptions are realized the Plan will fall short of the needed growth allocations.

E. CARB's Acceptance of the Plan Is Not Substantial Evidence That the Required Upheaval in California's Political Economy Is Likely to Occur

Apparently conceding the absence of any evidence in the record supporting the Plan's assumptions that radical upheavals in California's political economy will be forthcoming, Respondents cite to CARB's acceptance of the Plan under the provisions of S.B. 375 as somehow constituting, in itself, substantial evidence that Respondents' speculations were reasonable. RB 29-31.[3] But CARB's acceptance of the Plan, including its administrative staff's opinion that Respondents' assumptions were "reasonable," constitutes evidence that CARB accepted the Plan, nothing more. Neither CARB's acceptance of the Plan, nor its staff's "technical evaluation" of the Plan, can comprise independent evidence that the Plan's assumptions were in fact supported by substantial evidence in the record.

In effect, Respondents ask this Court to delegate the responsibility of judicial

[3] Examples cited by Respondents include statements of CARB Board members Roberts and Gioia that "[T]he plan looks terrific," and "We're looking forward to the adoption of this plan in July." RB at 29, fn.7. Statements of this sort are not evidence of anything.

review to CARB's staff. Quite aside from the fact that CARB has no special expertise on California's tax structure or the likelihood that it will be fundamentally altered, delegating to an administrative agency the determination of whether another agency's assumptions are legally supportable would represent a degree of deference so extreme as to conflict with the doctrine of separation of powers.

As discussed above, such total deference—if it could ever be warranted—is misplaced in a case such as this. This Court must make an independent determination as to whether substantial evidence in the record supported Respondents' assumptions at the time the Plan was adopted, *not* whether there is evidence that CARB subsequently accepted those assumptions. CARB's post-adoption acceptance of the Plan carries no weight on the legal issue of whether Respondents have met their burden of demonstrating that the Plan will achieve its objectives.

F. The Legislature's Recognition That "Policy Changes" Will Be Required to Achieve CARB's Greenhouse Gas Targets Does Not Excuse Respondents From Proffering Substantial Evidence That the Radical Restructuring of California's Tax System Is Likely or Can Reasonably Be Expected to Occur

Respondents contend that no evidence is needed to support the realism of the speculations underlying Plan Bay Area, because the Legislature recognized that "policy changes" will be required to meet CARB's greenhouse-gas emission targets. RB at 24-25. At this stage of the argument, Respondents seem to have completely lost sight of the Legislature's requirement that the Plan *"will"* reduce greenhouse gas emissions to achieve those targets. Even as that phrase was interpreted by the trial court, Respondents have the burden of demonstrating that the specific policy changes the Plan requires can be reasonably expected to occur, for otherwise there can be no reasonable expectation that the Plan can meet its objectives.

Not only that, S.B. 375 specifically directs Respondents to inform the legislature if a sustainable communities strategy (in this case Plan Bay Area) is

incapable of meeting the requisite CARB greenhouse reduction targets: "If the sustainable communities strategy…is unable to reduce gas emissions to achieve the greenhouse gas emission reduction targets established by the state board, the metropolitan planning organization ***shall prepare an alternative planning strategy***…." Gov. Code § 65080, subdivision (b)(2)(H). (Emphasis added.) If, as Respondents suggest, all of the assumptions inherent in Plan Bay Area have no impact on the issue of feasibility, this section is rendered meaningless surplusage as there would be no imaginable circumstance in which a strategy would fail to reduce gas emissions. (See *In Re Rudy L, supra,* 29 Cal.App.4th at 1010 [statutory construction which renders some words surplusage should be avoided].) That cannot be the intent of the legislature, as evidenced by the firm requirements of the feasibility mandate.

Respondents also cite the Court of Appeal case *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2008) 164 Cal.App.4th 1, 16 for the proposition that agency assumptions about future legislative actions are not arbitrary or capricious. RB at p. 24-25. Yet that case did not involve assumptions about future legislative acts. Rather, it involved factual forecasts of airport activity by the Solano County Airport Land Use Commission in connection with its adoption of an airport land use compatibility plan, similar to the role provided by EPS herein. Even if that case had involved assumptions of future legislative activity it cannot be analogized to the instant action, as S.B. 375 requires that the Plan *"will"* reduce greenhouse gas emissions to achieve the CARB targets.

IV. LOCAL JURISDICTIONS HAVE NO LEGAL AUTHORITY TO "IMPLEMENT" PLAN BAY AREA BY PASSING STATEWIDE LEGISLATION AND BY AMENDING THE STATE CONSTITUTION

Respondents repeatedly contend, and indeed emphasize, that Plan Bay Area "must be capable of achieving the targets *if implemented* [emphasis in original] by local jurisdictions….And the Agencies cannot mandate local implementation; the

Agencies create a blueprint that, ***if implemented by local jurisdictions*** [emphasis added], will achieve the CARB greenhouse gas reduction targets. " RB at p. 18. *See also* RB at p. 20, wherein Respondents state that "the Agencies must determine whether the Plan, 'if implemented,' would achieve the targets."

This contention places Respondents in a logical and factual quandary, and evidences a disturbing misrepresentation of the feasibility of Plan Bay Area to CARB prior to its approval.

Neither Respondents nor local jurisdictions have the ability to "implement" the statewide legislative and constitutional amendments necessary for the target reductions to be met, and the implication that they do is meritless on its face. In particular, Proposition 13 is a State Constitutional provision that may only be amended or repealed upon compliance with Article 18 of the State Constitution. Plan Bay Area cannot be fully "implemented" even if every one of the "local jurisdictions" subject to Plan Bay Area desired to do so. Thus, even if it *assumed* that all local jurisdictions implement what is in their power to implement (namely purely local land use matters), that leaves the gaping hole of the myriad statewide legislative changes upon which Plan Bay Area relies.

Moreover, the term "implementation" refers to CARB approval, which is predicated on its legislatively mandated determination that Plan Bay Area would, if implemented, achieve the greenhouse reduction targets. (*See* Government Code § 65080, subdivision (b)(2)(J)(ii).) Respondents' representation that they presented Plan Bay Area to CARB as a document that "could be implemented" by local land use jurisdictions raises additional questions about the integrity of the entire process.

It is possible (giving Respondents the benefit of a doubt) that they merely represented to CARB that "implementation" encompassed only those land use matters within the control of local jurisdictions. Yet in this scenario the central claim in this appeal remains unanswered: that Plan Bay Area is infeasible because the CARB reductions targets are premised upon the mere hope that someday, at some undetermined time (years or decades, if at all), requisite statewide legislation and

State Constitutional amendments will be forthcoming. This case should not hinge on crystal ball speculation.

V. PLAN BAY AREA WILL NOT MEET THE CARB GREENHOUSE GAS EMISSION REDUCTION TARGETS EVEN IF ITS MYRIAD ASSUMPTIONS ARE REALIZED, AS TACITLY ADMITTED BY RESPONDENTS

Even if it is assumed, arguendo, that a judicial rewrite of S.B.375 is necessary to soften Respondents' feasibility mandate, and that all requisite legislative and constitutional amendments have been realized, Plan Bay Area still falls well short of the required CARB greenhouse gas emission targets according to the EPS Feasibility Report. (*See* Section I.D. of AOB, pp. 27-28.) The passage from Respondents' Brief cited in the preceding section bears repeating, but with a different emphasis. Respondents contend that Plan Bay Area "must be capable of achieving the targets *if implemented* [emphasis in original] by local jurisdictions….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*** [emphasis added]. " RB at p. 18.[4] Yet the EPS Report never concluded that the greenhouse gas emission targets will be achieved, and acknowledged that the evidence indicated otherwise.

EPS determined that under the base scenario (reflecting current conditions) the 20 sample PDAs are able to accommodate only *62 percent* of the growth

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[4] As in the trial court and administrative proceedings, Respondents once again make inconsistent arguments regarding the S.B. 375 mandate, depending on the audience. In this quote, Respondents use the unequivocal phrase "***will achieve*** the CARB greenhouse reduction targets," whereas in their introduction Respondents contend that the they are required to prepare a plan that, if implemented by local agencies, "***can achieve*** the greenhouse gas emission reduction goals set for the region." RB at p. 8, emphasis added. Consistent with Government Code Section 65080, subdivision (b)(2)(J)(ii), which references the role of CARB in reviewing Plan Bay Area, Petitioners contend that the phrase "will achieve" most accurately reflects Respondents' task in preparing and approving Plan Bay Area. This issue is more fully addressed in AOB at pp. 18-19.

allocated by Plan Bay Area. The EPS Report provides: "In aggregate EPS has estimated that the sample PDAs have base readiness to accommodate 62 percent of the growth allocated to them in Plan Bay Area." AR 35812. This is conceded by Respondents: "…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 PDA's as of today." RB at p. 22.

EPS further determined that under the amended scenario (reflecting an assumption that legislative and policy changes will be realized, and that all local jurisdictions will enact requisite land use legislation), the 20 sample PDAs are able to accommodate only 80 percent of the growth allocated by Plan Bay Area. AR 35812. Plan Bay Area ignores these findings and fails to assess their impact on the ability to meet the CARB reduction targets.

Notwithstanding these independent findings, Respondents simply assert, without any citation to the record let alone citation to the EPS Report, that "a cooperative effort by local, regional, and state stakeholders will be required to accommodate the remaining 38 percent," and that this somehow renders Plan Bay Area "'feasible' as defined in Gov. Code § 65080.01, subdivision (c).'" RB at 22. This attempt to invent a statistic without evidentiary support is indicative of Respondents' modus operandi, and fails to pass muster under even the most lenient standard of review.

Not only that, Respondents misleadingly contend (with no citation to the record) that the current physical capacity of PDA's based on zoning and land supply "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 PDA's." RB at 23. To the extent that Respondents base this argument on the EPS Report (AR 35795), the argument fails for several reasons.

First, the 92 percent figure cited by Respondents 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 to accommodate their assigned 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.) The EPS Report acknowledges this point in language conveniently omitted by Respondents:

> Table 1 indicates that, ***in 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. However there is substantial variation among PDA's; in some cases current capacity greatly exceeds the *Plan Bay Area* growth forecast ***while it falls substantially short in others***.

AR 35795. (Emphasis added.) The EPS Report did not state that only "minor adjustments" in allowable densities would be required to accommodate all growth, as claimed by Respondents. (*See* RB at p. 23.)

Second, Respondents elsewhere concede that the EPS Report concluded, in the best case scenario with all assumptions realized, that the 20 sample PDAs are able to accommodate only 80 percent of the growth allocated by Plan Bay Area: "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 PDA's to accommodate 80 percent or more of the housing growth allocated to them by 2040. RB at p. 26, citing AR 48333.

It should be noted that Respondents embellished the EPS Report by citing a figure of 80 percent "*or more*." The actual quote from the EPS Report is the following: "EPS has estimated that these policy actions can over time substantially improve PDA development readiness increasing from 62 percent of the forecast under the base conditions to 80 percent under the amended conditions as shown in Table 1." AR 48333.

The factual conclusions of Respondents' own independent consultant unequivocally render Plan Bay Area infeasible. With all assumptions realized in a best case scenario, including resolution of policy, market, infrastructure, site location, financing, and financial feasibility constraints as outlined by EPS (AR 035797), the best case scenario is accommodation of only 80 percent of the growth allocated by Plan Bay Area. There is no evidence at all, let alone substantial evidence, that the CARB greenhouse reduction targets will be met under these facts.

VI. BY REQUIRING LOCAL GOVERNMENTS TO ADOPT LAND USE RESTRICTIONS CONSISTENT WITH THE PLAN IN ORDER TO MAINTAIN ELIGIBILITY FOR OBAG FUNDING, THE PLAN CONSTITUTES AN UNCONSTITUTIONAL "UNDUE INTERFERENCE" WITH LOCAL DECISION MAKING

It is not in dispute that under the Plan local governments that refuse to adopt land-use regulations consistent with the Plan will lose eligibility for OBAG funding. How one calculates the amount of funding at stake is a matter of dispute that is discussed more fully in section VI. C. below. Appellants contend that this threat of lost funding is, in effect, coercion, and that such coercion constitutes an "undue interference" with local decision making in violation of California's Home Rule provision.

Whether coercive financial inducements from the State can violate the Home Rule guaranty is an issue of first impression in this Court. However, there is ample federal case law holding that the Tenth Amendment prohibits similar coercion when carried out between the Federal government and the States. As explained in section VI. D., this Court should hold that California's Home Rule provision creates a similar prohibition of coercion between the State and home rule cities

A. Withholding OBAG Funding is Coercive

Respondents claim that the Plan cannot co-opt local land-use authority because it explicitly states that "[n]othing in a sustainable communities strategy shall be interpreted as superseding the exercise of the land use authority of cities

and counties within the region." RB at 40. Yet this self-serving pronouncement does not end the inquiry.

It is established that financial inducements can reach a point where persuasion gives way to coercion. *See, e.g.*, *National Federation of Independent Business v. Sebelius* (2012) 132 S.Ct. 2566, 2601 (*Sebelius*); *South Dakota v. Dole* (1987) 483 U.S. 203, 211 (*Dole*); *Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 590.) This is particularly true with government funding because state and local officials have a strong incentive to see taxpayers' dollars returned to their districts.

The seminal case is *Sebelius,* wherein the Supreme Court struck down a portion of the Affordable Care Act (ACA) that required states to expand Medicaid coverage in order to maintain eligibility for federal Medicaid funding. Under the challenged law, States could refuse to comply with the mandate, but doing so would cost them substantial amounts of money. The Court found this choice to be illusory, explaining that when a sufficient percentage of the recipient's funds is at stake, the threat to withhold that funding "is much more than 'relatively mild encouragement'—it is a gun to the head." *Sebelius, supra*, 132 S.Ct. at 2604.[5]

Similarly here, the language of the Plan does not technically force local governments to adopt policies consistent with the Plan. But, as in *Sebelius*, "the financial inducement" offered to local governments in return for compliance with the Plan, along with the practical costs associated with noncompliance, are "so coercive as to pass the point at which pressure turns into compulsion." (*South Dakota v. Dole, supra,* 483 U.S. at 211.)

B. The Funding at Stake is Substantial

Funding schemes that threaten to withhold 100 percent of program funding for minor deviations from the central authority's mandates are automatically suspect on coercion grounds. *See West Virginia v. U.S. Dep't of Health & Human*

[5] Respondents point out that *Sebelius* dealt with the loss of existing funding and therefore cannot be read to preclude conditions placed on new funding. Yet the Court did not suggest that *any* condition on new funding, no matter how severe, would pass constitutional muster.

Servs.(2002) 289 F.3d 281, 291; *Com. of Va., Dept. of Educ. v. Riley* (1997) 106 F.3d 559, 569 (*Riley*). In *Riley*, the Federal Government withheld from Virginia 100% of an annual special education grant of $60 million because Virginia failed to adopt student suspension policies that were in line with federal mandates. In striking down the law, the Federal Court of Appeals (adopting the opinion of one judge upon en banc reversal) held:

> if the Court meant what it said in *Dole,* then I would think that a Tenth Amendment claim of the highest order lies where, as here, the Federal Government withholds the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States. ***In such a circumstance, the argument as to coercion is much more than rhetoric; it is an argument of fact.***

Riley, supra, 106 F.3d. at 570[emphasis added].)

Similarly here, refusing to adopt local land use policies in accord with the Plan would cost local governments, not a portion of their OBAG funding, but all of it. In such a circumstance, "the argument as to coercion is much more than rhetoric; it is an argument of fact." *See id*.

The coercive nature of this denial is increased by the political environment in which OBAG funds must be used. S.B. 375 sets regional, as opposed to local, greenhouse gas reduction goals. Under this system, regional development becomes a zero-sum game. If one city expands its infrastructure, there is necessarily less room for neighboring cities to expand without exceeding the greenhouse gas limits. Thus, in a strange tragedy of the commons, regional greenhouse gas limits provide a perverse incentive for cities to develop as much as possible before their neighbors beat them to it. In this use-it-or-lose-it environment, the availability of OBAG funding is extremely precious. The threat of losing eligibility for such programs is therefore highly coercive.

C. Respondents Misrepresent the Amount of Funding at Stake

In determining whether a financial inducement is coercive, courts must look to the percentage of the local government's funds that are at stake. For example, in *Dole* the Court rejected a challenge to a federal law that would have made South Dakota ineligible for certain federal highway grant dollars unless it adopted a higher drinking age for its citizens. In rejecting South Dakota's coercion challenge, the Court noted that the potential loss for non-compliance amounted to a mere five percent of *that state's* highway grant funds and less than one percent of *the state's* total budget. *Dole, supra*, 483 U.S. at 211. The Court thus characterized the loss as "relatively mild encouragement," not coercion. *Id.* Notably, the Court made this determination based on the effect to South Dakota's budget, not the federal highway funding budget as a whole.

Nonetheless, Respondents rely on *Dole* to argue that the funding scheme here 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 ***[for the entire Bay Area]***." RB at 20. But that flips the coercion issue on its head. The relevant percentage is the budget of the local jurisdiction, not the *entire* Bay Area. The loss of all OBAG funding for a small town may be a mere drop in the bucket of total OBAG funds for the Bay Area, but that loss would nonetheless have a significant coercive effect on that small town.

Not surprisingly, Respondents' inventive math has been rejected by the courts. In *Riley, supra,* 106 F.3d at 569 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.

To illustrate the failure of Respondents' approach one need only look at the Supreme Court's recent treatment of Medicaid funding in *Sebelius*. In 2012, the Federal government allocated a total of $238,674,801,818 in federal funds to the states for Medicaid spending.[6] By refusing to comply with the ACA's mandates, Nebraska stood to lose all of its Medicaid funding, a total of $979,787,073. Applying Respondents' theory of coercion to those numbers, it would have been impossible for the Court to find that the ACA interfered with state decision making, as the funds at issue for Nebraska only constituted 0.4% of the total federal expenditures for Medicaid. But the Court did not apply such a standard. Instead, it looked at the effect the loss of funds would have on Nebraska—not national funding—and found the threatened loss of funds coercive.

Here, as in *Sebelius* and *Riley*, local governments stand to lose *all* of their OBAG funding if they refuse to comply with the Plan. That is a far cry from the "relatively mild encouragement" at issue in *Dole*.

D. The Rationale of the Coercion Standard in Tenth Amendment Cases Applies Even More Forcefully to California's Home Rule Provision

The Home Rule provision of the California Constitution, like the Tenth Amendment to the United States Constitution before it, is founded on the principle that local control is preferable to rule by a centralized authority. The California Supreme Court has recognized this principle is at the heart of the Home Rule provision, noting that it was "enacted upon the principle that the municipality itself knew better what it wanted and needed than did 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.

[6] *See* http://kff.org/medicaid/state-indicator/federalstate-share-of-spending/

383, 387.

The Court reaffirmed this view nearly a century later in *Johnson v. Bradley* (1992) 4 Cal.4th 389, 395-96, citing the language above word-for-word. Subsequent lower courts have repeated these principles, noting that the "benefits of home rule are numerous, because cities are familiar with their own local problems and can often act more promptly to address [them.]" *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 599. For these reasons, among others, the Home Rule provision wisely forbids "undue interference" with local decision making by central authorities. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 224-225.

This reasoning parallels that of the courts when applying the Tenth Amendment to strike down financial inducements that coerce states into adopting federal programs. As the Supreme Court explained, "State sovereignty is not just an end in itself." *New York v. United States* (1992) 505 U.S. 144, 181. The "facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed." *Sebelius, supra,* 132 S. Ct. at 2578. The Framers thus "ensured that powers which in the ordinary course of affairs, concern the lives, liberties, and properties of the people were held by governments *more local and more accountable* than a distant federal bureaucracy." *Id*. [emphasis added].

Because the purposes of the Tenth Amendment and the Home Rule Provision are virtually identical—the protection of local control over local matters—it makes sense that Tenth Amendment and the Home rule provision should be similarly applied to stop financial inducements that infringe on local control. If an offer of substantial funds from the federal government can impermissibly interfere with the sovereignty of a State, then it stands to reason that an offer of substantial funds from the state can impermissibly interfere with the sovereignty of a home rule city.

Indeed, to the extent the nature of the two provisions differ, the likelihood that conditional funding is being used for coercion is *greater* in cases such as the

one at bar than in federal funding of State programs. That is because Article IX, Sect. 5(a) of the California Constitution is an express constitutional guarantee. Charter cities are expressly bestowed with autonomous authority free of direct intrusion or undue influence by the State. By contrast, the Tenth Amendment, important as it is, amounts to a grant of residual powers: any authority not exercised by the federal government is "reserved to the states respectively, or to the people." U.S. Const. 10th Amend. As such, it is possible to regard the Amendment as no more than the "truism that all is retained which has not been surrendered." *United States v. Darby* (1941) 312 U.S. 100, 124.

At one time, the Supreme Court was prepared to interpret the Tenth Amendment as guaranteeing to the States a realm of autonomy comparable to that granted to California cities by our State's Constitution. In *National League of Cities v. Usery* (1976) 426 U.S. 833, 845, the Court held that the Amendment insulated state governments from federal regulation of functions that were "essential to [their] separate and independent existence." However, that decision was subsequently overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, (1985) 469 U.S. 528, and since then, "states are able to maintain their structural independence only where they can exert political influence to persuade Congress to stay its regulatory hand." Richard Epstein, *Bargaining with the State* (1993) p. 154.

The conditional nature of the autonomy enjoyed by States under the Tenth Amendment has been further weakened by the judicial expansion of federal authority under the Commerce Clause. "[O]nce all productive activities became swallowed under the [Commerce Clause], the states could not create a clear, implied immunity which allowed them to escape direct regulation and control." Epstein, *supra,* p. 157. Thus, when the federal government desires the states to adopt certain policies related to commercial activity, it does not *need* to coerce them by means of conditionally granting or withholding funds. The federal commerce power has been interpreted so broadly as to permit Congress to directly regulate economic activity occurring within the States. *See United States v. Wrightwood Dairy Co.* (1942) 315

U.S. 110, 119 ("The commerce power is not confined in its exercise to the regulation of commerce among the states."). The option of direct federal regulation of intrastate activity means that Congress need not rely on coercion to achieve desired changes in State laws and policies. Respondents and the State Legislature, on the other hand, do not have the option of directly imposing their regulatory preferences upon Bay Area jurisdictions. Coercive financial incentives may be their only practical means of bringing independent-minded local governments to heel.

Thus, Respondents are simply wrong when they assert that there is no distinction between Congress attaching conditions to taxing and spending programs on the one hand, and Respondents offering or withholding tax revenues to induce Bay Area cities to "cooperate" with the Plan's regulatory mandates. RB at 40, 45. In the former case, the States are not being asked to yield constitutionally-guaranteed autonomy in exchange for favorable financial treatment, and in any case, Congress has the fallback option of achieving its goals through direct regulation. With Plan Bay Area, however, Respondents are seeking to influence policy in areas over which California cities enjoy express constitutional autonomy, and their only means of doing so is to condition funding so as to convince cities that it is in their best interest to waive their autonomy and "help the state achieve the goals set forth in SB 375." RB at 42.

Under these circumstances, the Court should apply the closest scrutiny to determine whether, as Appellants contend, the Plan is relying on thinly-disguised coercion as a means of pursuing its objectives.

VII. THE PLAN VIOLATES EQUAL PROTECTION BY SUBJECTING LOW INCOME HOUSING TO A LOWER STANDARD OF ENVIRONMENTAL REVIEW THAN OTHER DEVELOPMENT

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 a direction that all persons similarly situated should be treated alike.

Plyler v. Doe (1982) 457 U. S. 202, 216. "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally." *Lawrence v. Texas* (2003) 539 U.S. 558 [citing, *Railway Express Agency, Inc. v. New York* (1949) 336 U.S. 106, 112-113 [concurring opinion].] Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Id.*

There is no question that the Plan creates discrimination in favor of low-income housing with regards to CEQA streamlining. Consistency with the Plan is a prerequisite for at least two types of streamlining benefits under CEQA— an exemption under Public Resources Code section 21155.1, and reduced CEQA review under Public Resources Code section 21155.2. RB at 34. To be consistent with the Plan, however, a proposed structure must be consistent with the Plan's low-income housing goals. Because these benefits are triggered by compliance with the Plan, it is the Plan—and not CEQA streamlining itself—that creates the disparate treatment.

This chain of reasoning seems to have caused some confusion with Respondents, who continue to assert that there is no causal connection between the discrimination in favor of low-income housing in the Plan and discrimination in favor of low-income housing under CEQA. RB at 32. Instead, Respondents continue to assert that it is CEQA, and not the Plan, that is at issue despite the fact that Public Resources Code section 21155.2 does not "include an affordable housing component" other than that required by the Plan. RB at 32, 35.

Accordingly, a hypothetical is helpful. Imagine that a builder applies for CEQA streamlining under section 21155.2. She is denied. She asks for the reason, and is told that her project is not consistent with the local Sustainable Communities

Strategy—*i.e.*, the Plan. She asks why, and is told that her project is not consistent with the Plan's low-income housing goals. She is denied because her proposed project is not a low-income development. Now it cannot be that the discrimination took place under section 21155.2, because Respondents concede that it "has no affordable housing component." RB at 35. The only source of discrimination is the Plan.

The question before this Court is whether that discrimination is sufficiently related to a legitimate state interest to satisfy rational basis scrutiny. More specifically, the question in this case (as expressed by both parties) is whether subjecting low-income housing to lower environmental oversight under CEQA is rationally related to reducing greenhouse gas emissions. *See Brown* v. *Merlo* (1973) 8 Ca1.3d 855, 861 ["a statute may single out a class for distinctive treatment only if such classification bears a rational relation *to the purposes of the legislation*."] (Emphasis added.) It is not.

In *Cleburne* v. *Cleburne Living Center, Inc.* (1980) 473 U.S. 432, 449 the Supreme Court struck down a law that required assisted living centers to get a permit in order to build in the floodplain. The law did not require a permit for other uses. The stated purpose of the restriction was to limit development in the "floodplain"—clearly a legitimate state interest. In striking down the law, the Court noted that the proposed occupants of the building—those with special needs—did not alter the building's effect on the environment therefore the restriction was not sufficiently related to protecting the floodplain to survive rational basis scrutiny. (*Id.*) Similarly here, the income level of the occupants of a proposed structure does not, of itself, change that structure's impact on greenhouse gas emissions. Accordingly, the discrimination in favor of low-income developments is not sufficiently related to greenhouse gas reductions to satisfy rational-basis review.

Respondents counter this argument in two ways. First, Respondents claim *for the first time on appeal* that reduced oversight for low income-housing is rationally related to greenhouse gas reductions because low-income individuals are

more likely to walk than their more affluent counterparts. Second, Respondents claim that Petitioners cannot challenge the discrimination contained in the Plan because S.B. 375 allegedly *mandates* that the Plan discriminate in favor of low-income housing. Both of these arguments fail.

A. This Court is not required to accept Respondents' tenuous *post-hoc* justification for the Plan's discrimination.

While rational basis scrutiny is historically lenient, it is not "toothless." *Mathews v. Lucas* (1976) 427 US 495,510. "The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or . . . nonsensical explanations for regulation." *St. Joseph Abbey v. Castille* (5th Cir. 2013) 712 F.3d 215, 226-27. Courts must conduct "a serious and genuine judicial inquiry" into the correspondence between the classification and *the actual* legislative goals. *King v. McMahon* (1986)186 Cal.App.3d 648, 663. This Court is not required to rubberstamp whatever post-hoc justification for their discrimination that Respondents can manufacture on appeal.

For example, in *Craigmiles v. Giles* (6th Cir. 2002) 312 F. 3d 220, 222, the Sixth Circuit invalidated a licensing law that prohibited any person from selling a coffin without a funeral director's license. Defendants argued, amongst other things, that the regulation was designed to protect the public health, because licensed funeral directors would make sure the coffins were adequate to protect the public from disease—a clearly legitimate state interest. The court nonetheless rejected the government's post-hoc justification for the restriction, noting that the law had a "more obvious illegitimate purpose," which was to "impose[] a significant barrier to competition in the casket market." *Id.* at 228.

Here, there is little reason to believe that the reduced oversight for low-income developments was realistically aimed at reducing greenhouse gases. Even assuming arguendo that low-income residents produce less carbon than middle-

class residents, reduced oversight for low-income structures (independent of such structures' actual carbon footprints) is a strange mechanism of achieving CO^2 reductions. Indeed, this type of discrimination would result in low-income housing structures with higher carbon footprints being subjected to lesser oversight than low-impact structures that happen to house middle class residents.

Not surprisingly, Respondents failed at the trial court level to explain how the reduction of environmental oversight of low-income housing projects under CEQA was rationally related to reducing greenhouse gases. Respondents merely claimed, *ipse-dixit*, that there was a rational relationship.

"This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld* (1975) 420 U.S. 636, 648 n.16.

Despite not briefing it at the trial court, Respondents have now "discovered"—years after the Plan was adopted—that the real purpose for subjecting low-income development to lessened environmental oversight is because individuals with low incomes are more likely to walk and use public transportation, thus reducing emissions. Yet there is no evidence to support the contention that this was the actual purpose of the discrimination.

B. S.B. 375 Does Not Require the Plan to Discriminate, or to Set Quotas in Favor of Low-Income Housing

S.B. 375 requires that the sustainable communities strategy identify areas "sufficient to house *all the population* of the region, including *all* economic segments of the population." Gov. Code, § 65080, subdivision (b)(2)(B)(ii) [emphasis added]. S.B. 375 further requires that the strategy identify areas sufficient to house the State Department of Housing and Community Development's eight-year projection of *the region's* need for housing. Gov. Code §§ 65080, subdivision

(b)(2)(B)(iii), 65584, subdivisions (d)–(e); AR 55667.

In addition, the strategy must collect data on housing needs and calculate the amount of development and area necessary to house *everyone*, *regardless of income*, that the State estimates will move into the area in the next eight years. They do not mandate, either implicitly or explicitly, that a strategy develop quotas to discriminate in favor of low-income housing. Nonetheless, Respondents ask this court to read such a mandate into these statutes. RB at 36-37.

Likewise, S.B. 375 requires that agencies *consider* State goals for adequate and affordable housing when formulating an sustainable communities strategy. (Gov. Code, § 65080, subdivision (b)(2)(B)(vi)). Again, in common parlance, requiring *consideration* of low-income housing while developing a region wide transportation and development plan is a giant leap from requiring that the Plan enact any particular standard, much less a standard that discriminates in favor of low-income housing. By way of example, Respondents 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.

Our nation's equal protection jurisprudence draws a bright line between consideration and quotas. (Compare *Regents of the University of California v. Bakke* (1978) 438 U.S. 265 [striking down racial quota in college admissions], with *Grutter v. Bollinger* (2003) 539 U.S. 306 [upholding "consideration" of race in college admissions under some circumstances.]) While these cases were decided under strict scrutiny, it is instructive that the Supreme Court has recognized the commonsense distinction between consideration and a mandate. Nonetheless, Respondents ask this court to read "consider" to mean "mandate" and in so doing create a constitutional controversy where none exists. (RB. at 36-37). This court should not accept that invitation.

CONCLUSION

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: February 16, 2016 KASSOUNI LAW

By: _____/s/___________________________
Timothy V. Kassouni

Attorneys for Appellants

CERTIFICATE OF WORD COUNT

I certify that the foregoing Appellants' Reply Brief contains 11,107 words based upon the electronic word count of my computer word processing program.

________/s/______________________

Timothy V. Kassouni

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 621 Capitol Mall, Suite 2025, Sacramento, CA 95814.

On February 16, 2016, a true copy of APPELLANTS' REPLY 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 e-filing system. Those not registered will receive a hard copy via first class mail, postage prepaid and deposited in a mailbox maintained by the U.S. Postal service in Sacramento, CA.

addressed as shown below, and placed it for collection and mailing following ordinary business practices to be deposited with the United States Postal Service on the date indicated below.

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

Executed at Sacramento, California, on February 16, 2016.

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