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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE POST SUSTAINABILTY INSTITUTE et al., Plaintiffs and Appellants, v. ASSOCIATION OF BAY AREA GOVERNMENTS et al., Defendants and Respondents.	A144815 (Alameda County Super. Ct. No. RG13699215)

This is an appeal by the Post Sustainability Institute, Rosa Koire and Michael Shaw (petitioners) from the Alameda County Superior Court's judgment denying their petition for a writ of mandate and dismissing their complaint for declaratory and injunctive relief. Petitioners challenged the 2013 adoption of "Plan Bay Area," a statutorily required, long-term sustainable community strategy to reduce greenhouse gas emissions in the Bay Area that was prepared by respondents Metropolitan Transportation Commission (MTC) and the Association of Bay Area Governments (ABAG) (together, respondents). Petitioners claim Plan Bay Area was unlawful in several respects.

Respondents have moved to dismiss this appeal as moot because in 2017 they replaced Plan Bay Area with an updated plan entitled "Plan Bay Area 2040," as provided by law. Petitioners argue that even if we determine the adoption of Plan Bay Area 2040 moots their appeal, we should exercise our discretionary authority to decide its merits because they raise issues of continuing public interest that are likely to recur and

important declaratory relief issues. We agree that the adoption of Plan Bay Area 2040 moots this appeal. We decline to exercise our discretion to address the appeal for reasons we will discuss.

BACKGROUND

As we explained in *Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966 (*Bay Area Citizens*), the Legislature enacted the "Sustainable Communities and Climate Protection Act of 2008" (Sen. Bill. No. 375 (2007–2008 Reg. Sess.)), which we refer to as Senate Bill 375. Under Senate Bill 375, the State Air Resources Board (Board) sets targets for each of California's regional planning agencies to reduce emissions from automobiles and light trucks in its region; each regional agency, after engaging in an extensive planning process, develops a sustainable community strategy to meet the Board's targets using regional land use and transportation policies. (*Bay Area Citizens*, at pp. 975–976.) Each regional metropolitan planning organization must consider, among other things, household formation and employment growth in setting forth a forecasted development pattern for the region. This pattern, when integrated with the transportation network and other transportation measures and policies, should be designed to reduce the greenhouse gas emissions from automobiles and light trucks to achieve the Board's targets if there is a feasible way to do so. (Gov. Code, § 65080, subd. (b)(2)(B)(i), (ii), (iv), (vii).[1]) (*Bay Area Citizens*, at pp. 981-982.)

In 2010, the Board called for respondents to develop land use and transportation strategies that would result in regional per capita percentage emissions reductions of 7 percent by 2020 and 15 percent by 2035, as compared to emissions in 2005. In 2013, respondents prepared an update to the Bay Area's regional transportation plan and their first sustainable communities strategy in "Plan Bay Area." (*Bay Area Citizens, supra*, 248 Cal.App.4th at pp. 982–993.) Respondents planned for the Bay Area's growth to occur in "Priority Development Areas"—transit-oriented, infill development opportunity areas within existing communities intended to accommodate the majority of future

[1] All statutory references are to the Government Code unless otherwise noted.

development. (*Id*. at p. 983.) Plan Bay Area's final environmental impact statement projected it would reduce light-duty vehicle greenhouse gas emissions from 2005 levels by 10.4 percent per capita by 2020 and 16.2 percent per capita by 2035. (*Bay Area Citizens*, at p. 983 and fn. 8.) The Board accepted respondents' determination that the plan would meet the Board's emission reduction targets for the Bay Area. (*Bay Area Citizens*, at p. 976.)

In March 2014, petitioners filed a first amended verified petition for writ of mandate and complaint for declaratory and injunctive relief. They alleged respondents' adoption of Plan Bay Area violated provisions of the California Constitution, the United States Constitution, and Senate Bill 375. The complaint sought a writ of mandate directing respondents to set aside certain resolutions relating to the approval of the plan, an injunction barring enforcement of the plan, and declaratory relief.

The trial court, after considering briefing and oral argument, rejected petitioners' contentions and issued a final judgment disposing of all claims in February 2015. Petitioners filed a timely notice of appeal from this final judgment. As we have discussed, respondents have moved to dismiss this appeal as moot. Respondents have also requested that we take judicial notice of certain documents related to their approval of Plan Bay Area 2040. Petitioners do not oppose this motion, although they object to certain uses of the documents by respondents. We grant respondents' request for judicial notice.

DISCUSSION

Petitioners claim respondents erred in adopting Plan Bay Area because it could not have "feasibly" met the Board's greenhouse gas emissions reduction targets although this was statutorily required; it violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by permitting the "streamlining" of certain requirements under the California Environmental Quality Act (CEQA) for housing developers who included low-income housing in their plans; and it was replete with coercive mandates that impermissibly usurped local land use autonomy in violation of state statutory and constitutional law.

Respondents oppose these claims and argue this appeal is moot because all of petitioners' claims and contentions relate specifically to Plan Bay Area, adopted in 2013, which respondents replaced in 2017 with an updated plan, Plan Bay Area 2040. " 'It is well settled that an appellate court will decide only actual controversies and that a live appeal may be rendered moot by events occurring after the notice of appeal was filed. [An appellate court] will not render opinions on moot questions or abstract propositions, or declare principles of law which cannot affect the matter at issue on appeal.' " (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 866 (*Building a Better Redondo, Inc.*).) "If the issues on appeal are rendered moot, a reversal would be without practical effect, and the appeal will be dismissed." (*Ibid.*) Petitioners are correct that Plan Bay Area is no longer in effect; therefore, petitioners cannot obtain any effective relief and the appeal is therefore moot.

Petitioners do not challenge this part of respondents' mootness analysis. Instead, they urge us to exercise our discretionary authority to consider their appeal despite Plan Bay Area's replacement. However, as we will now discuss, petitioners have not shown their claims are likely to recur or raise important declaratory relief issues. Therefore, we decline to exercise our discretionary authority to consider this appeal.

Even when a circumstance renders an issue technically moot, a court may exercise its "discretion to decide it because the issue is likely to recur, might otherwise evade appellate review, and is of continuing public interest." (*People v. Morales* (2016) 63 Cal.4th 399, 409.) Also, courts have exercised this discretion when, despite the happening of a subsequent event, material questions of declaratory relief remain for the court's determination in order to do complete justice. (*Building a Better Redondo, Inc., supra,* 203 Cal.App.4th at p. 867.) Courts are disinclined to exercise this discretion when a claim "is a particularly factual determination that must be resolved on a case-by-case basis, dependent upon the specific facts of a given situation." (*Giles v. Horn* (2002) 100 Cal.App.4th 206, 228 [declining to consider an appeal alleging contracts violated a county charter after the contracts had expired].)

Petitioners' first claim is that respondents erred in concluding Plan Bay Area could have feasibly met the Board's greenhouse gas emissions reduction targets.[2] According to petitioners, this conclusion was directly contradicted by indications in an independent feasibility study of Plan Bay Area that the plan's goals would have required many legislative changes, and that most of the Priority Development Areas identified in the plan did not have the capacity to accommodate the plan's housing allocations. Petitioners also assert the statutory language regarding "feasibility" in Senate Bill 375 requires more certainty than respondents assert it requires, but nonetheless argue Plan Bay Area was not feasible under any interpretation.

In other words, although petitioners raise an issue about the meaning of "feasible," they ultimately assert that Plan Bay Area's specified strategies could not have feasibly met the Board's greenhouse gas emissions reduction targets.[3] Such a challenge undoubtedly raises issues of public interest to the Bay Area community. Nonetheless, we are disinclined to consider questions that are dependent on the specific facts of a given situation (*Giles v. Horn*, *supra*, 100 Cal.App.4th at p. 228), and resolution of the petitioners' infeasibility claim depends on Plan Bay Area's specific assumptions and strategies. Petitioners do not establish that their infeasibility claim is likely to recur or that it raises ongoing and material questions of declaratory relief that require our

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[2] "The sustainable communities strategy shall . . . (vii) set forth a forecasted development pattern for the region, which, when integrated with the transportation network, and other transportation measures and policies, will reduce the greenhouse gas emissions from automobiles and light trucks to achieve, *if there is a feasible way to do so*, the greenhouse gas emission reduction targets approved by the state board . . . ." (§ 65080, subd. (b)(2)(B), italics added.) "Feasible" "means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (§ 65080.01, subd. (c).)

[3] We could consider the meaning of "feasible" without consideration of the specific strategies and goals of Plan Bay Area. However, this would be just the kind of advisory opinion on an abstract proposition that the law abhors. (See *Building a Better Redondo, Inc.*, *supra,* 203 Cal.App.4th at p. 866.)

attention. They do not attempt to show their infeasibility claim applies equally to Plan Bay Area 2040 or that any of their infeasibility contentions were raised—by them or anyone else—in public comments during Plan Bay Area 2040's preparation, which would have gone a long way toward establishing that their claims are likely to recur.[4]

We are disinclined to analyze petitioners' infeasibility claim regarding a plan that has been replaced by another that contains meaningful changes without petitioners explaining the impact of these changes on their analyses. For example, petitioners ignore that, however limited and focused the changes in Plan Bay Area 2040 might be, it contains significantly higher regional housing and job growth projections than did Plan Bay Area. These changes are relevant to petitioners' main appellate claim—that Plan Bay Area could not "feasibly" have met the Board's targets as required by Senate Bill 375. As we have discussed, respondents are statutorily required to consider the housing and jobs growth in the Bay Area in developing their sustainable community strategy. (§ 65080, subd. (b)(2)(B)(i), (ii), (iv), (vii).) Plan Bay Area projected the Bay Area would increase by 700,000 households by 2040, but Plan Bay Area 2040 projects the Bay Area will increase by 820,000 households in that time. In other words, Plan Bay Area 2040 projects a household growth of 120,000 units more than Plan Bay Area projected, an increase of over 17 percent. Similarly, Plan Bay Area projected an increase of 1.1 million jobs in the Bay Area by 2040, while Plan Bay Area 2040 projects an increase of 1.3 million jobs by that time, an increase of 200,000 jobs or more than 18 percent. These are not insignificant changes to core assumptions of respondents' strategic planning, and respondents contend that "because of the differences in the assumptions and strategies contained in the two plans, the results, as evaluated by the

[4] Respondents refer to portions of documents that they included in their request for judicial notice summarizing the public comments received regarding Plan Bay Area 2040 to show neither petitioners nor anyone else raised petitioners' infeasibility challenge to Plan Bay Area 2040. Petitioners object to our consideration of these documents for the truth of the matters asserted therein in the absence of supporting declarations, hearing transcripts and requisite foundational facts. We need not resolve this dispute in light of our conclusions.

performance targets, vary." Petitioners do not meaningfully discuss whether or how their claims about Plan Bay Area remain relevant in light of these changes.

Instead, petitioners argue the negative—that respondents "do not identify with specificity" anything in Plan Bay Area 2040 that could call petitioners' claims into question, do not indicate a new feasibility study was prepared for Plan Bay Area 2040, do not show that Plan Bay Area 2040 is capable of feasibly meeting the Board's targets, do not establish that respondents' statutory construction of "feasibility" "will never arise in subsequent plan updates," and do not show that there were no public comments about Plan Bay Area 2040 relevant to the appeal. Respondents have established that the appeal is moot and it is petitioners who request that we exercise our discretion to decide the appeal. Thus, petitioners have assumed the burden of showing the factors that would support our exercise of discretion. Petitioners fail to meet this burden. Specifically, they do not establish that their infeasibility claim regarding Plan Bay Area is likely to recur. Other than stating unproven generalities about the "routine" nature of the updates in Plan Bay Area 2040, they make no attempt to show that the new plan is infeasible for the reasons they argue the old plan was infeasible, or that there are important declaratory relief issues that should be resolved even though Plan Bay Area has been replaced. Under these circumstances, we will not exercise our discretion to consider this moot claim. (See *Bell v. Board of Supervisors* (1976) 55 Cal.App.3d 629, 636 [dismissing an appeal as moot because the challenged legislation had been repealed and replaced by a new law that was materially different]; *East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 305–306 [adoption of new general plan that eliminated a material condition mooted appellate claim regarding the old general plan that contained this condition]; *La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586 [adoption of an amended neighborhood plan rendered challenge to exceptions that were allowed only in the old plan moot].)

Petitioners also give us no reason to conclude their second and third appellate claims are likely to recur or raise declaratory relief questions that we should address. Petitioners' second claim is that Plan Bay Area violated the Equal Protection Clause of

the Fourteenth Amendment of the United States Constitution by providing CEQA "streamlining" to housing developers that included a certain amount of low-income housing in their development plans. According to petitioners, pursuant to Public Resources Code section 21159.28 and Plan Bay Area, developers whose projects met Plan Bay Area's specified criteria would be exempt from addressing in their environmental impact reports the environmental effects of the growth entailed in their projects or the effects of increased car and light duty truck trips on global warming or the regional transportation network. Nor would they be required to outline a reduced density alternative to their proposed project. Petitioners characterize the question as "whether non-environmental/non-EIR related requirements that [r]espondents chose to adopt as a condition for CEQA streamlining under [Plan Bay Area] violate the Equal Protection Clause."

Petitioners' third claim is that Plan Bay Area was "replete" with coercive mandates that usurped local land use autonomy in violation of state statutory and constitutional law. According to petitioners, "[i]n contravention of the home rule guaranty," Plan Bay Area coerced local governments into adopting land use enactments that were consistent with its goals "in order to establish a regionalist government of non-elected agencies." Any local entity that failed to comply would have lost eligibility for funding through the One Bay Area Grant Program and for CEQA streamlining benefits. Plan Bay Area estimated total One Bay Area Grant Program funding for local governments at $14.6 billion over the course of the plan from federal surface transportation legislation currently known as MAP-21.

These two appellate claims are also specific to Plan Bay Area's goals and strategies. Yet petitioners make no attempt to show they remain relevant after the plan's replacement. Nor do petitioners establish these claims were raised in public comments by them or anyone else during Plan Bay Area 2040's preparation. Again, petitioners give us no reason to conclude these claims, while of obvious public interest, are likely to recur or raise important declaratory relief issues. Therefore, we decline to exercise our discretion to consider them.

Petitioners also argue that we should not dismiss their appeal because the issues they raise are likely to evade judicial review, given that under Senate Bill 375, the Bay Area's regional transportation plan must be updated every four years. (See § 65080, subd. (d).) We have some sympathy for this argument, given the time that has been required to review this matter. (See *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 511 [despite adoption of a successor regional transportation plan, court exercised its discretion to decide whether an environmental impact report for the previous plan should have analyzed the plan's consistency with greenhouse gas emission reduction goals in Executive Order No. S-3-05 in part "because of the relatively short period between adoption of a [plan] and adoption of a successor plan"].) Nonetheless, in the absence of any meaningful indication by petitioners that they have made claims that are likely to recur or implicate important declaratory relief issues, this part of their argument is not persuasive.

DISPOSITION

The appeal is dismissed as moot. The parties shall bear their own costs of appeal.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.

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