

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made and entered into as of February 27, 2014 by and between Plaintiff/Petitioner BUILDING INDUSTRY ASSOCIATION BAY AREA and Defendants/Respondents ASSOCIATION OF BAY AREA GOVERNMENTS and METROPOLITAN TRANSPORTATION COMMISSION to settle ongoing litigation in the matter *Building Industry Association Bay Area v. Association of Bay Area Governments, et al.* (Alameda County Superior Court Case No. RG13692098).

DEFINITIONS

For purposes of this Agreement, the terms listed below are defined as follows:

1. “ABAG” shall mean Association of Bay Area Governments.
2. “Agencies” shall mean Association of Bay Area Governments and Metropolitan Transportation Commission, collectively.
3. “BIABA” shall mean Building Industry Association Bay Area.
4. “CEQA” shall mean the California Environmental Quality Act (“CEQA”) (Pub. Resources Code, § 21000 et seq.).
5. “CEQA Guidelines” shall mean the regulations adopted by the California Natural Resources Agency for implementation of CEQA (14 Cal. Code Regs., § 15000 et seq.).
6. “Effective Date” shall mean the date this Agreement takes effect. The Effective Date shall be the date the Parties sign this Agreement, as indicated below. If the Parties sign this Agreement on different dates, then the latest date of signing by a Party shall be the Effective Date.
7. “EIR” shall mean Environmental Impact Report.
8. “Feasibility Analysis” shall mean the Priority Development Area Development Feasibility and Readiness Assessment for Plan Bay Area dated March 29, 2013.
9. “Initial Vision Scenario” shall mean the Plan Bay Area Initial Vision Scenario released for public review on March 11, 2011.
10. “Lawsuit” shall mean the lawsuit initiated by the Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief filed by Petitioner, entitled *Building Industry Association Bay Area v. Association of Bay Area Governments, et al.* (Alameda County Superior Court Case No. RG13692098).

11. “MTC” shall mean Metropolitan Transportation Commission.
12. “OBAG Program” shall mean the One Bay Area Grant Program of grants distributed to local jurisdictions by MTC and ABAG to fund planning and infrastructure investments in accordance with Plan Bay Area.
13. “NOP” shall mean a notice of preparation prepared pursuant to Public Resources Code section 21080.4 and CEQA Guidelines section 15082.
14. “Parties” shall mean Petitioner and Respondents, collectively.
15. “Party” shall mean either Petitioner or Respondents.
16. “PDA” shall mean a Priority Development Area within an existing community that has been identified and approved by a local city or county for future growth.
17. “Plan Bay Area” shall mean the combined 2040 Regional Transportation Plan and Sustainable Communities Strategy for the San Francisco Bay Area region approved by ABAG and MTC on July 18, 2013 pursuant to the requirements of SB 375.
18. “Plan Bay Area EIR” shall mean the Environmental Impact Report (State Clearinghouse Number 2012062029) prepared for Plan Bay Area and certified by the Association of Bay Area Governments and the Metropolitan Transportation Commission on July 18, 2013.
19. “Petitioner” shall mean Building Industry Association Bay Area.
20. “Regional Housing Control Total” shall mean the regional housing demand over the course of the planning period of the Regional Transportation Plan pursuant to Government Code section 65080, subdivision (b)(2)(B)(ii). Regional Housing Control Total does not mean, and is distinct from, the “eight-year projection of the regional housing need” referenced in Government Code section 65080, subdivision (b)(2)(B)(iii) and determined pursuant to Government Code section 65584.
21. “Respondents” shall mean Association of Bay Area Governments and Metropolitan Transportation Commission, collectively.
22. “RTP” shall mean a Regional Transportation Plan prepared pursuant to the requirements of state and federal law.
23. “SB 375” shall mean the California Sustainable Communities and Climate Protection Act of 2008.

24. “SCS” shall mean a Sustainable Communities Strategy prepared pursuant to the requirements of SB 375 as part of the RTP.

25. “TPP” shall mean a Transit Priority Project, as defined in Public Resources Code section 21155.1.

RECITALS

A. On July 18, 2013, the Agencies held a public hearing and certified the Plan Bay Area EIR, adopted findings and a statement of overriding considerations pursuant to CEQA, and adopted a mitigation monitoring and reporting program by MTC Resolution No. 4110 and ABAG Resolution No. 05-13.

B. At the July 18, 2013 hearing, ABAG also approved Resolution No. 06-13, adopting Plan Bay Area, and Resolution No. 07-13, adopting the Final Regional Housing Need Allocation Plan (2014-2022).

C. At the July 18, 2013 hearing, MTC also approved Resolution No. 4111, adopting Plan Bay Area; Resolution No. 4075, adopting the 2013 Transportation Improvement Program; and Resolution No. 4076, adopting the Transportation-Air Quality Conformity of Plan Bay Area and 2013 Transportation Improvement Plan to the State Implementation Plan for Achieving and Maintaining National Ambient Air Quality Standards.

D. On August 16, 2013, Petitioner filed the Lawsuit challenging MTC and ABAG approvals related to Plan Bay Area, and certification of the Plan Bay Area EIR by the Agencies, alleging violations of SB 375 and CEQA.

E. The ABAG Executive Board met on January 30, 2014, and the MTC governing board met on February 26, 2014 to approve the terms of this Agreement and to delegate to the executive officers authorization to execute this Agreement on behalf of the Agencies.

F. The Parties to this Agreement believe that their mutual interests will be best served if any and all legal disputes between them involving Plan Bay Area and included in the Lawsuit are resolved without further litigation.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises and/or covenants contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Each definition and recital set forth above is incorporated herein by reference and made a part of this Agreement.

2. All Parties understand and agree that nothing in this Agreement, or in the execution of this Agreement, shall constitute or be construed as an admission by any Party of any inadequacy or impropriety in connection with the approvals by the Agencies with respect to Plan Bay Area.

3. All Parties understand and agree that nothing in this Agreement, or in the execution of this Agreement, shall constitute or be construed as superseding growth management policies or zoning regulations approved by local jurisdictions or voter initiative.

4. All Parties understand and agree that nothing in this Agreement, or in the execution of this Agreement, shall constitute or be construed as interfering with MTC's full discretion and authority to make transportation funding decisions, including the metrics and inputs required to determine how transportation funding, programming, and allocation decisions are made.

5. All Parties understand and agree that neither the Agencies, nor individual local jurisdictions have legal authority to prohibit employees who live outside the region from commuting to jobs in the region. The intent of this Agreement is to ensure that the Regional Housing Control Total adopted as part of the SCS provides housing opportunities within the region to those employees projected to work within the region during the course of the planning period.

6. Obligations of Respondents. The following obligations shall apply to the next four-year update required by Government Code section 65080, subdivision (d) to the next SCS (2017), and thereafter to major updates, as determined by the Agencies, but not less frequently than at each eight-year interval after 2017.

a. *Regional Housing Control Total and Forecasted Development Pattern.* The SCS shall set forth a forecasted development pattern for the region that includes the Regional Housing Control Total, which shall have no increase in in-commuters over the baseline year for the SCS, and shall not be based on historical housing production. The SCS will not use a "ratio" theory, which assumes the same percentage of in-commuters as historic levels of in-

commuting. The SCS must demonstrate how all of the Regional Housing Control Total can be accommodated within the boundaries of the nine counties of the Bay Area.

i. The methodology used in the forecasted development pattern to determine the Regional Housing Control Total and total number of in-commuters over the SCS planning period shall use best practices and be fully documented.

ii. The Agencies shall adopt the methodology to determine the Regional Housing Control Total and forecasted development pattern for the SCS at a public hearing, after giving the public the opportunity to review and comment, and prior to the Regional Housing Control Total being disclosed under the requirements of paragraph 6d of this Agreement. To the extent the Agencies determine a need to thereafter adjust the methodology, any such adjustment shall occur only after disclosure and an opportunity for public comment. The Agencies shall use the adopted methodology in the final SCS.

iii. The final Regional Housing Control Total must be determined and disclosed prior to issuance of an NOP for the SCS/RTP EIR or, if no EIR is prepared, then at least six (6) months before a draft SCS is released for public review.

b. *Validation.* To validate the assumptions made in Plan Bay Area, the Agencies shall implement robust monitoring of regional development patterns. The results of this monitoring shall inform each update of the SCS to which this Agreement applies. At a minimum, areas of monitoring shall include:

i. Tracking building permit issuance throughout the region for residential and non-residential development;

ii. Tracking how many units are constructed in PDAs versus outside of PDAs, with specific locations identified; and

iii. Tracking type of residential development over the planning period of Plan Bay Area, including: (A) the number of single-family versus multi-family dwelling units permitted; (B) the number of for sale versus rental units permitted; (C) residential densities for new units region-wide and by jurisdiction and county; (D) to the extent possible, based upon data availability as determined by the Agencies in their discretion, the total number of larger (5,000 square feet or more) and smaller (less than 5,000 square feet) lot single-family residential units permitted; (E) to the extent possible, based upon data availability as determined by the Agencies

in their discretion, the number and type of affordable units created by county, local jurisdiction, and PDA, including new and acquisition/rehabilitation units; (F) the units permitted in PDAs and in TPP areas that do not overlap with PDAs; and (G) the number of units permitted that utilize the CEQA streamlining provisions available under SB 375.

c. *Feasibility Analyses.* The Agencies shall update the Feasibility Analysis for the type and distribution of housing units projected in the updated SCS. The update to the Feasibility Analysis will be prepared in consultation with stakeholders, in a manner comparable to the Feasibility Analysis undertaken for Plan Bay Area, and shall include analysis of local land use policies, market demand, financial feasibility, site related issues, financing, and infrastructure needs. Any update to the Feasibility Analysis shall be published prior to issuance of an NOP for the SCS/RTP EIR, or if no EIR is prepared, then at least six (6) months before a draft SCS is released for public review. The results of the analyses shall inform each update of the SCS to which this Agreement applies.

d. *Assumptions and Disclosure.* While the Parties acknowledge that the Agencies are vested with governmental discretion, the Agencies shall disclose and accept public comment on the key assumptions and key descriptors to be used in preparation of each update of the SCS to which this Agreement applies. For the key assumptions, disclosure shall occur prior to the Agencies preparing a document comparable to the Initial Vision Scenario that sets forth potential development scenarios or assumptions for the SCS, and shall also occur following any subsequent material revisions to the key assumptions. The decision to prepare such a document is in the discretion of the Agencies. If no such document is prepared, the Agencies shall disclose and accept public comment on the key assumptions at least six (6) months prior to public release of a draft SCS, and disclose key descriptors with the public release of the draft SCS.

i. To the extent relied on by the Agencies, the following would be considered key assumptions: (A) the policies constraining or promoting particular types and intensities of real estate development in particular locations, such as zoning, urban boundary lines, CEQA tiering, the OBAG Program, development subsidies, regional development fees and subsidies, TPP redevelopment, and reduced parking minimums; and (B) assumptions related to anticipated demand for specific housing products or modes of transportation.

ii. The Agencies shall consider whether to create an advisory committee to review the key assumptions and key descriptors shortly after those assumptions and descriptors are disclosed to the public, to assist in ensuring appropriate assumptions and descriptors are used in preparation of the final SCS.

7. Obligations of Petitioner. In consideration of the commitments by Respondents set forth in paragraph 6, Petitioner shall comply with the commitments set forth in this paragraph 7.

a. *Dismissal.* Within five (5) days of the Effective Date, Petitioner shall file a request for dismissal, with prejudice, of the entire Lawsuit. A copy of the request for dismissal shall be served on all parties to the Lawsuit via fax or pdf/e-mail the same day Petitioner files the request for dismissal and shall also be served by U.S. Mail.

8. Attorneys' Fees. Each Party shall bear its own attorneys' fees and costs, and shall not seek to recover such fees and costs from any other Party.

9. Miscellaneous Provisions.

a. *Cooperation.* The Parties shall cooperate to ensure that the steps necessary to implement this Agreement are carried out.

b. *Waiver; Defenses.* Each Party expressly releases, waives, and relinquishes and forever discharges the other Parties from all claims, demands, actions, liabilities, and causes of action, of every nature and kind whatsoever, whether known or unknown, suspected or unsuspected, asserted or unasserted, or hereafter discovered or ascertained, in law or equity, by reason of any matter, cause or thing whatsoever, it has, or may have had, with respect to Plan Bay Area or the Plan Bay Area EIR and the Respondents' approval of Plan Bay Area or certification of the Plan Bay Area EIR, including but not limited to claims set forth in the petition for writ of mandate filed in the Lawsuit, and those claims Petitioner could have included in the petition. Each Party acknowledges and agrees that all rights under Section 1542 of the California Civil Code are expressly waived. That section provides:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST

HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
WITH THE DEBTOR.”

Each Party understands, acknowledges and agrees that this Agreement constitutes a complete and sufficient defense barring any such claim, and the Parties can rely upon this Agreement as a complete defense to any claim seeking to challenge, void, or set aside Plan Bay Area.

c. *Headings.* The titles and headings of the various paragraphs of this Agreement are intended solely for convenience of reference and they shall not be used to explain, limit, or extend the meaning of any part of the Agreement.

d. *Modifications.* This Agreement may not be altered or modified except in writing by a document signed by all the Parties.

e. *Entire Agreement.* This Agreement contains all of the representations and the entire understanding and Agreement among the Parties with respect to the matters described in this Agreement. Correspondence, memoranda, and oral and written agreements that originated before the date of this Agreement are replaced in total by this Agreement, unless otherwise expressly stated in this Agreement.

f. *Authority; Warranties.* The individuals signing this Agreement on behalf of each Party represent and warrant that they have full authority and are duly authorized to do so on behalf of the Party they represent.

g. *Severability.* The invalidity of any portion of this Agreement shall not invalidate the remainder. If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the Parties shall amend this Agreement and/or take other action necessary to achieve the intent of this Agreement in a manner consistent with the ruling of the court.

h. *Interpretation.* This Agreement shall be deemed to have been drafted equally by the Parties, and shall not be interpreted for or against any Party by reason of the alleged authorship of any provisions. The Parties understand and agree that the general rule that ambiguities are to be construed against the drafter shall not apply to this Agreement. Each Party acknowledges that it is represented by counsel, and has had the benefit of advice from counsel with respect to this Agreement.

i. *Specific Performance; Remedies.* The Parties agree that specific performance is an appropriate remedy for enforcement of this Agreement. In any action to enforce this Agreement, the prevailing Party shall recover its reasonable attorneys' fees and costs. Under no circumstances shall Petitioner request or be entitled to re-institute the Lawsuit. Any enforcement of this Agreement may be sought against only the Party or Parties claimed to be in breach of the Agreement, as well as the heirs, successors, assignees, and transferees of the Parties.

j. *Notice.* All notices required under this Agreement shall be in writing, and may be given either personally or by registered or certified mail (return receipt requested) or facsimile. Any Party may at any time, by giving ten (10) days' written notice to the other Party, designate any other person or address in substitution of the address to which such notice shall be given. Such notice shall be given to the Parties at their addresses set forth below:

For BIABA:

Andrew Sabey
COX, CASTLE & NICHOLSON LLP
555 California Street, 10th Floor
San Francisco, CA 94104

For MTC:

Adrienne Weil, General Counsel
METROPOLITAN TRANSPORTATION COMMISSION
101 8th Street
Oakland, CA 94607-4700

And:

Tina A. Thomas
THOMAS LAW GROUP
455 Capitol Mall, Suite 801
Sacramento, CA 95814

For ABAG:

Kenneth Moy, Legal Counsel
ASSOCIATION OF BAY AREA GOVERNMENTS
101 8th Street
Oakland, CA 94607-4700

And:

Tina A. Thomas
THOMAS LAW GROUP
455 Capitol Mall, Suite 801
Sacramento, CA 95814

k. *Execution.* This Agreement may be executed in counterparts. The counterparts shall together comprise a single Agreement.

Dated: _____, 2014 BUILDING INDUSTRY ASSOCIATION BAY AREA

By: _____

Its: _____

Dated: _____, 2014 ASSOCIATION OF BAY AREA GOVERNMENTS

By: Ezra Rapport
Its: Executive Director

Dated: _____, 2014 METROPOLITAN TRANSPORTATION COMMISSION

By: Steve Heminger
Its: Executive Director