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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF ALAMEDA
12

13 BUILDING INDUSTRY ASSOCIATION BAY
AREA,

14 Plaintiff and Petitioner,
15

16 vs.

17 ASSOCIATION OF BAY AREA
GOVERNMENTS, METROPOLITAN
TRANSPORTATION COMMISSION, and
18 DOES 1-25, inclusive,
19

20 Defendants and Respondents.
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CASE NO. **RG13692098**
22 VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
23 DECLARATORY AND INJUNCTIVE
RELIEF
24

(California Environmental Quality Act
(CEQA); Government Code § 65080, et seq.
Code of Civil Procedure §§ 1060,
1085/1094.5)
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ENDORSED
FILED
ALAMEDA COUNTY

AUG 16 2013

CLERK OF THE SUPERIOR COURT

Anita Dhir

1 Petitioner and Plaintiff BUILDING INDUSTRY ASSOCIATION BAY AREA

2 (“Petitioner,” “Plaintiff” or “BIA Bay Area”) hereby alleges as follows:

3 1. SB 375—the Sustainable Communities and Climate Protection Act of 2008—
4 charged Respondents and Defendants Metropolitan Transportation Commission (MTC) and
5 Association of Bay Area Governments (ABAG) (together “Respondents”) with the duty to develop a
6 long-range plan for land use and transportation that would accommodate the region’s projected
7 housing needs while achieving a reduction in the region’s contribution to greenhouse gas (GHG)
8 emissions. SB 375 contains two primary mandates: (1) an unqualified obligation to plan for housing
9 the entire population of the region over the planning period; and (2) a qualified obligation to reduce
10 GHG emissions, if feasible. Pursuant to SB 375, Respondents were asked to adopt a “sustainable
11 communities strategy” (SCS) based on a realistic assessment of the Bay Area’s land use planning
12 policies. Instead of delivering a realistic and feasible plan, Respondents have prepared an SCS, called
13 “Plan Bay Area,” that fails to solve the Bay Area’s bad habit of exporting its housing needs to
14 outlying areas, condemning more of its workforce to lengthy commutes.

15 2. When ABAG and MTC began the process of implementing SB 375, they
16 acknowledged the basic mandate in SB 375 that the Bay Area’s SCS must accommodate its entire
17 housing need within the region. Respondents called it one of the “rules of the game” that the Bay
18 Area could no longer rely on areas outside the region to house the growing Bay Area workforce.
19 Further increases to the number of in-commuters had to come to an end.

20 3. After initially recognizing the clear mandate of SB 375, Respondents
21 abandoned their duties, giving in to the Bay Area’s longstanding resistance to housing, and instead
22 adopted a plan that perpetuates the Bay Area’s role as an exporter of housing and an importer of
23 workers while turning a blind eye to the adverse environmental impacts of condemning more than
24 100,000 more to commute to Bay Area job centers from outside the region workers (more than 14
25 million additional inter-regional vehicle trips a year).

26 4. The history of Plan Bay Area is essentially a tale of two processes. Initially, the
27 agencies conducted an open and public process as they wrestled with the Bay Area’s chronic history
28 of outsourcing the housing needed for its growing workforce. At some point in the Spring of 2012,

1 Respondents caved in to political opposition to providing housing for all, and the process became
2 shrouded and result-oriented as the Respondents hunkered down to defend their defective plan.

3 5. Respondents did not consider the environmental impacts of their proposed SCS
4 until this second phase of the process, which helps explain why the environmental impact review
5 violates the most basic tenets of the California Environmental Quality Act (CEQA). Respondents
6 essentially adopted the SCS in May 2012, *before* conducting any environmental impact analysis.
7 Then, after deciding on the project they would adopt, their environmental review amounted to a post
8 hoc rationalization of the decision they had reached in advance.

9 6. Bound by a pre-determined outcome and a fixed deadline, Respondents rushed
10 the Environmental Impact Report (EIR) to completion, providing an enigmatic and incomplete
11 description of their “project,” giving only feigned consideration to other alternatives and refusing to
12 respond in good faith to comments, questions, and criticisms. Respondents’ unwillingness to look
13 critically at their plan stood in contrast to the intense public debate and controversy it engendered.
14 Cities, counties, labor, smart-growth advocates, technical experts, the building industry, business
15 organizations, affordable housing and equity advocates, and others submitted comments outlining
16 opposition or concern about the flawed assumptions, reasoning, and conclusions that underpin Plan
17 Bay Area. Those attacking the feasibility of the Plan or the adequacy of the EIR included: the Cities
18 of Burlingame, Lafayette, Larkspur, Oakland, Orinda, Santa Clara, and Windsor; groups such as
19 California Affordable Housing Law Project, California Rural Legal Assistance, Earthjustice, Marin
20 Audubon Society, The Non Profit Housing Association of Northern California, Public Advocates,
21 Sierra Club, and Urban Habitat; and agencies including the Alameda County Community
22 Development Agency, Caltrans, East Bay Regional Park District, and the Los Altos Community
23 Development Department. Given the disparate viewpoints represented by these groups, it is notable
24 that they often recognized the same fundamental flaws in Respondents’ analyses. Multiple
25 commenters recognized that the Plan is divorced from any realistic projection of the Bay Area’s
26 development plans or current trends.

27 7. Respondents, however, refused to give adequate consideration to alternatives
28 actually grounded in real world assumptions, and they failed to honor CEQA’s purpose of ensuring

1 informed decision-making. They refused to alter their plan, which calls for only 660,000 new housing
2 units, with 80 percent of them in high density “priority development areas” (PDAs). This despite
3 Respondents’ acknowledgement that SB 375 compliance demanded 770,000 units and the conclusion
4 of Respondents’ expert consultant that 80 percent of new housing in PDAs was unrealistic. Indeed,
5 Respondents’ own modeling software, UrbanSim, showed that the scheme was infeasible. But neither
6 man nor machine could stop Respondents from pressing forward to approve Plan Bay Area.

7 I.

8 THE PARTIES

9 8. Petitioner BIA Bay Area is a non-profit association representing builders,
10 developers, and other professionals, both individuals and organizations, involved in the residential
11 development and construction industries in the San Francisco Bay Area. BIA Bay Area’s purposes are,
12 among others, to monitor legal and regulatory developments and to advocate and intervene when
13 appropriate to improve the legal climate for its members, the building industry in general, and the
14 public interest in the provision of adequate housing for all Bay Area residents.

15 9. Respondent ABAG is a regional planning agency incorporating various local
16 governments in the San Francisco Bay Area in California. While its members consist of both non-
17 profit organizations and governmental organizations, ABAG’s primarily serves the economic, social,
18 and environmental needs of its constituent counties, cities, and towns. ABAG’s duties generally relate
19 to land use, housing, environmental quality, and economic development. All nine Bay Area counties
20 and 101 cities within the Bay Area are voluntary members of ABAG. ABAG is the Council of
21 Governments for the Bay Area as set forth in state housing element law.

22 10. Respondent MTC is the transportation planning, coordinating, and financing
23 agency for the nine-county Bay Area region. MTC functions as both the regional transportation
24 planning agency — a state designation — and, for federal purposes, as the region’s Metropolitan
25 Planning Organization (MPO). As such, it is responsible for regularly updating the Regional
26 Transportation Plan, a comprehensive blueprint for the development of mass transit, highway, airport,
27 seaport, railroad, bicycle, and pedestrian facilities.

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V.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

22. Petitioner and/or its representatives, agents, and members, participated in ABAG/MTC's public process for the approval Plan Bay Area, culminating in adoption of Resolution No. 4111. Petitioner, itself and/or through its representatives, agents, and members, as well as other interested parties, submitted timely written and/or oral comments on the issues and legal deficiencies raised in this petition.

23. The Notice of Determination was filed with OPR on July 19, 2013. This action is timely filed within CEQA's 30 day statute of limitations and all other applicable statutes of limitation, including those applicable to claims under SB 375 and claims applicable to ABAG's duties related to Regional Housing Need Allocations.

VI.

NOTICE OF COMMENCEMENT OF CEQA PROCEEDING

24. Prior to filing this petition and complaint, Petitioner served ABAG and MTC with notice of intention to commence a proceeding against them for violation of CEQA in connection with each agency's approval of Plan Bay Area. A copy of the notice is attached to this petition and incorporated herein by this reference. By serving the notice, Petition has complied with California Public Resources Code section 21167.5.

VII.

STATUTORY FRAMEWORK

25. In 2006, the Legislature passed AB 32—The Global Warming Solutions Act of 2006—to require the State of California to reduce GHG emissions to 1990 levels no later than 2020.

26. In California, the single largest source of GHG emissions is cars and light trucks, which contribute approximately 30 percent of the State's GHG emissions. AB 32 grants the California Air Resources Board (CARB) broad authority to regulate any source of GHG emissions, including those caused by cars and light trucks.

27. In 2008, the Legislature passed SB 375, mandating a comprehensive and integrated regional land use and transportation planning approach to reducing GHG emissions caused

1 by cars and light trucks, intended in part to help meet AB 32 goals. SB 375 requires each region to
2 accommodate its entire population, including all economic groups, for 25 years and requires local
3 governments, within three years of updating their respective general plan housing elements, to adopt
4 zoning to implement those housing elements.

5 28. CARB's regional target for the Bay Area (as defined by MTC's nine-county
6 jurisdiction) requires per capita reductions of passenger vehicle GHG emissions of 7 percent by 2020
7 and 15 percent by 2035, relative to 2005 emission levels.

8 29. SB 375 requires each of the State's regional MPO to prepare an SCS that sets
9 forth a regional land use and transportation plan that, if feasible, will attain CARB's GHG target.

10 30. Per SB 375, the SCS must also (1) identify the general location of land uses,
11 residential densities, and building intensities within the region, identify areas within the region
12 sufficient to house "all" of the region's population, including all economic groups, taking into account
13 net migration into the region, population growth, household information, and employment growth; (2)
14 identify areas within the region sufficient to house an eight-year projection of the regional housing
15 need; (3) identify a transportation network to accommodate the region's transportation needs, and,
16 critically; and (4) forecast a land use and transportation development pattern for the region that will
17 achieve, to the greatest extent practicable, the targeted GHG emission reductions from cars and light
18 trucks. The SCS must also serve as an RTP and comply with federal law.

19 31. SB 375 prohibits adoption of an SCS that is not feasible, or "capable of being
20 accomplished in a successful manner within a reasonable period of time, taking into account,
21 economic, environmental, legal, social, and technological factors." (Gov. Code § 65080.01.)
22 "Feasible" does not mean, as Respondents contend, that a plan is merely possible.

23 32. SB 375 provides that if the MPO is unable to prepare an SCS capable of
24 producing GHG emissions to achieve reduction targets, it shall prepare an alternative planning
25 strategy to the SCS showing how GHG targets would be achieved through alternative development
26 patterns, infrastructure, or additional transportation measures or policies.

27 33. While Plan Bay Area is the first RTP to incorporate the requirements of SB
28 375, MTC has historically prepared an RTP every four years to reflect changing conditions and new

1 planning priorities for a 25-year period. For an MPO to receive federal transportation funding, it must
2 develop an RTP that meets the federal requirements set forth in Part 450 of Title 23 and Part 613 of
3 Title 49 of the Code of Federal Regulations. The MPO also must show that the RTP is in conformity
4 with the Clean Air Act air quality goals established by the State Implementation Plan. Because Clean
5 Air Act conformity hinges on the RTP actually coming to pass, rather than merely setting aspirational
6 goals, it is critically important that the MPO can show the reasonable likelihood the plan will be
7 achieved. Respondents' assertion that the Plan is merely advisory and not mandatory suggests that the
8 required conformity finding cannot be made.

9 VIII.

10 FACTUAL AND PROCEDURAL BACKGROUND

11 SB 375 Planning in the Bay Area

12 34. In the Bay Area, MTC and the ABAG are jointly responsible for preparing the
13 region's SCS. The record will demonstrate that MTC and ABAG made arbitrary assumptions, failed
14 to comply with their own policies, and deviated from the plain meaning of SB 375 in constructing
15 their Plan Bay Area SCS. Moreover, before Respondents undertook any CEQA review, they had
16 already agreed on a preferred project that violates SB 375's basic mandates, foreclosing any real
17 consideration of alternatives to the project. The CEQA review represented a post hoc rationalization
18 for decisions already made and partially implemented.

19 35. Before the adoption of SB 375, the regional agencies in the Bay Area
20 consistently planned for insufficient housing to accommodate projected job growth, and relied on
21 exporting part of the region's housing needs to other regions, causing significant and persistent in-
22 commuting with its attendant environmental and other impacts. ABAG conceded that in its prior
23 analyses, "staff assum[ed] that there will continue to be a regional imbalance of jobs and housing and
24 an insufficient number of homes to fully accommodate regional employment growth and population
25 increase."

26 36. The most recent manifestation of this prior approach is the existing RTP
27 (T2035), which preceded SB 375 and the SCS process. T2035 planned for a 25-year housing increase
28

1 of 634,000 new housing units supporting 1,190,000 new jobs. This is a ratio of 1.74 new jobs for each
2 new housing unit.

3 37. This historical practice allowed the regional agency governing bodies to
4 represent to the public that they were maximizing Bay Area job growth while minimizing the need for
5 the region to plan for more housing.

6 38. At the outset of the SCS development process, Respondents acknowledged that
7 the Bay Area's chronic failure to plan for and produce adequate housing to support its job growth
8 specifically inspired SB 375's housing requirements. In Respondents' own document, entitled
9 "Policies for the Bay Area's Implementation of Senate Bill 375," adopted September 18, 2009 by
10 Respondents, the Bay Area Air Quality Management District, and the Bay Conservation and
11 Development Commission, they stated that the SCS shall, "Identify areas within the region sufficient
12 to house *all* the population of the region." (Emphasis in original.) Respondents acknowledged that
13 post-SB 375, "we must demonstrate how all of the region's growth in housing demand can be met
14 within our borders, not by surrounding counties via 'spillover' demand" and that "this requirement
15 marks a fundamental change in how our region and surrounding communities have been planned and
16 developed over the last several decades. Over the last 30 years, surrounding counties have been
17 planning and building homes for Bay Area workers."

18 39. Respondents declared their understanding that compliance with the housing
19 requirement meant the region's SCS must be based on "no increase in in-commuting." Their clearly
20 articulated position was that the SCS must not be based on a projection that future Bay Area job and
21 housing growth will result in an increase in the number of current in-commuters beyond the existing
22 baseline which was the cumulative result of decades of insufficient housing in the region. Equally
23 clear is that Respondents did not interpret SB 375 as simply requiring the region to maintain the
24 existing "ratio" of commuting into the region, as that would result in significant increases in the actual
25 level of in-commuting during the relevant planning period, thereby worsening the pre-existing on-the-
26 ground condition—the very target of the statutory requirement.

27 40. On November 18, 2010, ABAG's Executive Board established this
28 interpretation of the housing requirement as the governing principle for developing the SCS in

1 compliance with SB 375. The Executive Board approved a Resolution that fundamentally changed
2 the regional agencies' planning methodologies concerning jobs, housing, and the relationship between
3 the two. First, it changed the method for projecting regional job growth from the "current economic
4 (IMPLAN) model" to a "shift share" method. As the staff memorandum accompanying the
5 Resolution explained, the econometric methodology consistently vastly overstated the number of jobs
6 the region can create without significantly increasing housing production, while the new methodology
7 more accurately reflected the amount of housing needed to support a given level of job growth. The
8 memorandum described the change as a "vast departure." Second, it established that Respondents
9 would comply with SB 375 by adopting an SCS that accommodates sufficient housing within the
10 region such that the SCS does not project an increase in the number of in-commuters over the
11 planning period.

12 41. Critically important, the staff analysis illustrated the implications of the
13 jobs/housing methodological shift. The analysis compared the jobs and housing projections through
14 2035 contained in T2035 (using the prior methodology) to the results that would occur under the new
15 shift share method. The conclusions were remarkable: using the new methodology, the region would
16 see about an 8 percent increase in housing production and a 16 percent decrease in jobs (707,390
17 fewer jobs). This analysis is significant because the regional agencies conceded that the region had
18 historically engaged in "paper planning" that promised high levels of job growth with low levels of
19 housing production within the region, and relied on other regions to provide part of the region's
20 housing need. ABAG staff recognized the sensitivity of this admission: "While staff acknowledge
21 that the amount of housing in these assumptions may cause some temporary conclusions and
22 consternation, we believe it is more important to 'get the numbers right.'"

23 42. ABAG and MTC admitted that SB 375 required them to develop a plan that
24 would "house 100% of the region's projected 25-year growth" in order to "to prevent growth in in-
25 commuting." Plans that would require some households to "live outside the Bay-Area . . . and
26 commute into the region for employment" would not, in ABAG and MTC's opinion in 2011, meet the
27 requirements of SB 375.
28

1 43. ABAG and MTC repeatedly represented prior to initiating their CEQA review
2 of the SCS that the appropriate way to determine “the number of units needed to ‘house all of the
3 population of the region” was through a simple formula: $((\text{Births} - \text{Deaths}) + (\text{New Jobs})) \times$
4 $(\text{Household Formation})$. If this number of units was provided, ABAG and MTC concluded that the
5 need to perpetuate “inter-regional commuting would be obviated. If the total need is not supplied,
6 then people will continue to choose to live just outside of the region, and commute in to their place of
7 employment. Therefore, the amount of housing supplied by a region has a direct impact on the
8 numbers of people who commute into the region.”

9 44. Following the establishment of these key methodological and legal “rules of the
10 game,” Respondents prepared the first version of the SCS—the Initial Vision Scenario (IVS)—in
11 spring 2011. The IVS determined that complying with SB 375’s housing requirement requires the
12 SCS to plan for 903,000 new housing units through 2040. Using the new “rule of the game” regarding
13 the relationship between housing production and job growth, the IVS projected this level of housing
14 would support 1,222,000 new jobs—a ratio of 1.35 new jobs for each new housing unit.

15 45. Bearing out staff’s earlier apprehension, cities and counties opposed planning
16 for this amount of new housing. In response, Respondents prepared new SCS scenarios, each with a
17 dramatically lower housing projection of 770,000 new units. Again in keeping with the new “rule of
18 the game” regarding the relationship between housing production and job growth, these scenarios
19 projected that this level of housing would support 995,000 new jobs—a ratio of 1.29 new jobs for each
20 new housing unit. Importantly, when presenting the new SCS scenarios, Respondents expressly
21 recognized that the IVS housing number remained the actual need as defined by SB 375.

22 46. The regional agencies described the rationale for the 770,000 figure as follows:
23 “The expected growth of 770,000 housing units by 2040 in the scenarios under discussion is lower
24 than the equivalent one million units in Initial Vision Scenario. The former is the expected housing
25 production while the latter reflects the housing need. The expected housing production addresses
26 lower 2010 household and population counts (Census 2010), lower employment growth than previous
27 forecasts, and reasonable assumptions on market trends, local and regional policies, and infrastructure.
28 This level of housing reflects a reasonable job to household ratio for the Bay Area and would consider

1 a reasonable pace of recovery of the housing market.” Respondents described these scenarios as
2 representing “moderate” housing and job growth.

3 47. When Respondents presented the final performance results for the three new
4 scenarios based on 770,000 new housing units, they expressly found they were inadequate to satisfy
5 SB 375’s housing requirement.

6 48. Just as Bay Area communities have long opposed housing to accommodate the
7 population demand created by the Bay Area’s employment demand, they once again opposed planning
8 for 770,000 new housing units. While both SB 375 and the Regional Housing Need Allocation
9 (RHNA) demanded that resistant Bay Area communities welcome new housing to meet the region’s
10 projected need, many of these communities maintained their historic opposition to such development.

11 49. Without explaining how they rationalized a further reduction in Bay Area
12 housing need, Respondents adopted the Proposed Project, arbitrarily cutting the projected need for
13 new housing units to 660,000. To achieve this reduction, Respondents departed from the basic rule of
14 SB 375, that they must provide housing for all, and instead projected that this reduced number of
15 housing units would support 1,120,000 new jobs—far more jobs than Respondents had just
16 determined would be supported by a higher housing figure. This second downward revision of the
17 housing need represents a ratio of 1.69 new jobs for each new housing unit, and fails to meet the ratio
18 of 1.5 jobs for every household that Respondents had earlier stated was their goal.

19 50. Business, affordable housing, and social equity organizations that had been
20 heavily involved in the SCS process objected to the reduction in planned housing, and testified that it
21 was inconsistent with SB 375’s housing requirement and would exacerbate the existing in-commuting
22 problems.

23 **ABAG and MTC Abandon Any Attempt to Meet SB 375’s Requirement to House All of the**
24 **Region’s Need**

25 51. On June 11, 2012, ABAG and MTC issued a Notice of Preparation for an EIR
26 for the SCS. The notice stated that the Proposed Project was based on the assumption that Bay Area is
27 projected to add over two million people, 1.1 million jobs, but only 660,000 new housing units
28 between 2010 and 2040.

1 52. In response to the strong concerns expressed by Petitioner and others, the
2 Notice of Preparation (NOP) and the Draft EIR (DEIR), published in the Spring of 2013, included an
3 alternative that plans for about 778,000 new housing units within the region. In the NOP response to
4 comments, Respondents indicated that 778,000 units was a reasonable projection and the Bay Area
5 has the capacity to build that number of units. Moreover, Respondents also acknowledged that the
6 provision of 778,000 units was intended to comply with SB 375.

7 53. The DEIR represents that this Alternative 4 was the only alternative that
8 satisfies SB 375's housing requirement: "Compared to the Proposed Plan, it [Alternative 4] includes
9 four percent more households and one percent more jobs. This higher growth total reflects the Senate
10 Bill 375 requirement to house the region's entire population (i.e., provide a house for every household
11 employed in the region.)" (DEIR, p. 3.1-10); "One alternative, the Enhanced Network of
12 Communities [Alternative 4], is designed to accommodate more growth as it is intended to identify
13 areas sufficient to allow the region to meet the housing demand to meet projected employment growth
14 projection, thereby reducing the in-commute." (DEIR, p. 1.1-9.) When these candid admissions were
15 brought to Respondents' attention, they removed the language from the DEIR. They simply struck it
16 out without any explanation of how it was they could withdraw their long-expressed understanding of
17 their duty under SB 375.

18 54. As late as March 2013, Respondents issued statements that "SB 375 requires
19 regions to plan for housing that can accommodate all projected population growth . . . to reduce the
20 pressures that lead to in-commuting from outside the nine-county region." This ongoing
21 acknowledgement of Respondents' legal obligations demonstrates that the SCS violates SB 375.

22 55. The overwhelming evidence, including statements in the Proposed Project and
23 DEIR themselves, shows that the Proposed Project does not meet SB 375's housing requirement or the
24 corresponding project objective. Respondents appear to recognize this inconvenient truth belatedly,
25 and attempt to redefine what it means to meet SB 375's housing requirement. They assert that
26 compliance with SB 375 only requires the SCS to show that the "ratio" of in-commuting to the region
27 will not increase over the planning period. The DEIR even goes so far as to question the entire
28 premise of in-commuting, and posits that since it is illegal to stop people from commuting into the

1 Bay Area, the in-commuting issue is not a legitimate one. (DEIR at 1.2-33.) Apparently, Respondents
2 want to reduce SB 375's ambitious mandate to a mere reauthorization of the status quo.

3 56. The DEIR's newly minted "ratio" theory not only violates SB 375, but is also
4 precisely the sort of cumulative impact methodology CEQA prohibits because speaking in terms of
5 ratios masks worsening of actual on-the-ground impacts and conditions over time. Holding the in-
6 commuting ratio constant over 25 years of population growth necessarily entails a significant actual
7 increase in the overall number of in-commuters and resulting impacts.

8 57. Respondents' ratio theory represents an arbitrary and inappropriate changing of
9 a key "rule of the game," signaling that there has not been a stable and finite project description for the
10 SCS through the development process. Combined with the other changed positions, the cumulative
11 effect has been to make it impossible for the public and decision-makers to make informed
12 assessments of what Respondents are proposing.

13 58. Moreover, the EIR explicitly highlights the failure of the ratio theory in Table
14 3.1-8, explaining that the Proposed Project would result in 14.6 million additional inter-regional car
15 trips per year compared to Alternative 4 because the Proposed Project fails to meet the all of the
16 region's housing need. The EIR buries, or perhaps ignores, what this dramatic volume of presumably
17 lengthy commuting from outside the Bay Area to core job centers would mean for GHG, traffic, and
18 other critical impact criteria.

19 **The Proposed Project Does Not Meet SB 375's Requirement that a Land Use Plan Be Realistic**

20 59. The Proposed Project is neither feasible nor reasonable due to its reliance on
21 radical assumptions about the market viability of high density (averaging 80 units/acre) housing
22 crowded into narrow locations to support the needs of the region. Throughout the SCS development
23 process, commentators warned the regional agencies that the density levels and concentration of future
24 housing reflected in the Proposed Project are infeasible and unrealistic. BIA Bay Area and others
25 communicated to the regional agencies strong support for an SCS that would maximize the region's
26 potential to house future growth in infill and TOD areas. However, all of the available evidence
27 shows that it is patently unrealistic to project—as the Proposed Project does—that 80 percent of all
28 future housing growth in the region (528,000 units) will be developed at an average density of 80

1 units/acre. Or that almost 50 percent of all new housing units will be concentrated in just three cities:
2 San Francisco, Oakland, and San Jose.

3 60. ABAG and MTC abandoned their own policy, formally adopted in 2009, that
4 would have prevented their speculative assumptions regarding potential development within PDAs.
5 ABAG and MTC were clear that a criterion for judging realistic attainability of a land use plan would
6 be congruence with local government general plans, specific plans, and zoning. “Meeting the realism
7 test for the SCS requires two preconditions: (1) alignment of local land-use policy with the preferred
8 land-use pattern in the SCS and (2) authority and resources to undertake the required transportation
9 policies and measures.” ABAG and MTC committed to seek resolutions from local agencies with
10 PDAs that “they understand the implications for their jurisdictions in the context of the realism criteria
11 that will be applied to the RTP and SCS.”

12 61. For almost two years, BIA and others urged the regional agencies to assess the
13 feasibility of accommodating 80 percent of the region’s future housing in the PDAs identified by the
14 Proposed Project. Such an assessment is essential to support a fully informed decision on the final
15 SCS—as Respondents themselves acknowledged. However, it was not until late 2012—long after the
16 agency’s decision-makers had already decided on the Proposed Project’s growth pattern—that
17 Respondents commissioned a feasibility assessment.

18 62. The PDA Development Feasibility & Readiness Assessment represents the only
19 investigation of the feasibility of the PDA development assumptions that underlie the Proposed
20 Project. The results show unequivocally that the Proposed Project vastly overstates the feasible
21 housing capacity of the PDAs.

22 63. Of 660,000 planned housing units, the Proposed Project relies on 528,000 in
23 PDAs (80 percent of the total). The study indicates that 62 percent of the 528,000 PDA units can
24 reasonably be considered feasible through 2040—roughly 328,000 feasible units. This figure
25 improves to 80 percent of the PDA units—422,400—but only if major changes are made across the
26 spectrum of applicable law, from local general plans, to state statutes, and to the California
27 Constitution. It is patently unreasonable and unlawful to rely on enactment of significant CEQA
28 reform, redevelopment replacement, and constitutional amendments such as revisions to Proposition

1 13. In any case, the study's results suggest that between 105,000 and 200,000 of the 528,000 PDA
2 units the Proposed Project relies upon are not feasible.

3 64. These numbers overstate overall feasibility because the study drew its PDA
4 sample exclusively from the 69 "planned" PDAs. The 100 other PDAs remain "potential" PDAs
5 because they do not have any assurance that they are anything more than theoretical and no real
6 indicia of congruence with actual local general plans and zoning.

7 65. The PDA feasibility study fully accounted for all of the policy levers at MTC's
8 and ABAG's disposal, including transportation incentives and funding such as the OBAG funding
9 program specifically directed at supporting PDA development. To date, Respondents have simply
10 disclosed no evidence or analysis supporting the determination that 80 percent of future housing can
11 reasonably be expected to be built in the PDAs. Indeed, Respondents would face a daunting task, as
12 some PDAs they rely on for future high density residential development include cemeteries, high
13 value commercial centers essential to local communities, and other built-out areas.

14 66. To claim that the extremely dense urban growth pattern Respondents envisioned
15 was reasonable, Respondents offered various unfounded assumptions, including the notion that certain
16 minority groups preferred cramped housing and not owning a car, and that those groups would drive
17 demand for multi-family housing and public transportation. Then, suddenly, a week before the
18 adoption of Plan Bay Area and certification of its EIR, Respondents abandoned the assumption by
19 crossing out:

20 Latinos will emerge as the largest ethnic group, increasing from 23
21 percent to 35 percent of the total population. The number of Asians also
22 will increase, growing from 21 percent to about 24 percent of the
23 population. Both population groups have demonstrated an historic
24 preference for multifamily housing, and they form multigenerational
25 households at a higher rate than the general population. This is expected
26 to drive higher demand for multifamily housing, in contrast to the
27 historic development pattern of building primarily single-family homes.
28 Likewise, many Latinos and Asians rely more on public transit than

1 non-Hispanic whites. This, too, is expected to increase demand for a
2 robust transit system that makes it easier for people who don't own cars
3 to commute, shop and access essential services.

4 67. Perhaps ABAG and MTC removed the language and other similar statements
5 because they realized the assumptions were baseless and offensive. Yet, Respondents did not explain
6 the removal of these assumptions, which they previously characterized as significant, and they failed
7 to explain how the deletion would affect the feasibility or viability of the Plan. Thus, the public is
8 unaware if MTC and ABAG are still relying on cultural and racial "preferences" but are now
9 unwilling to say so aloud.

10 68. Respondent buried other unrealistic assumptions, such as outrageous returns on
11 investments never seen before in the United States, constitutional amendments, and other legislative
12 changes necessary for the Plan to pencil out, in technical reports and appendices and failed to include
13 these assumptions in the EIR or Plan itself.

14 69. Throughout the process, ABAG and MTC have given the false impression that
15 Plan Bay Area is substantially consistent with local general and specific plans because it is so heavily
16 based on PDAs. However, while it is technically true that PDAs are applications submitted by local
17 governments, as already noted, PDA status does not mean that the projected development is consistent
18 with the local general plan or any other local planning or zoning regulation. The repeated
19 mischaracterization of the Plan as being "consistent with," "based on," and/or "reflecting" local
20 general plans has precluded informed decision-making.

21 70. The Respondents repeatedly and incorrectly represented in the Plan, the CEQA
22 process, public presentations, and public hearings, and prominent online postings such as the
23 "Frequently Asked Questions" document that the Plan is based on local general plans, and that with
24 "few exceptions," the PDAs "conform to local general and specific plans." At the same time, they
25 represented that the alternatives studied in the EIR (with the possible exception of the No Project
26 Alternative), are each inconsistent with local general plans to a materially greater degree than the Plan.
27 This false impression prejudiced consideration of the alternatives by the public and decision-makers
28 because they were given the false impression that the alternatives are materially "less" consistent with

1 local general plans. Local governmental agencies and representatives in particular expressed
2 opposition to alternatives based on an alleged higher degree of inconsistency with local general plans.

3 71. The record shows that the Plan is patently inconsistent with a significant
4 number of local general plans and is arguably the “most” inconsistent of the alternatives presented, as
5 evidenced by comparing the percentage of total projected units projected in PDAs among the
6 alternatives. The Plan is a clear outlier compared to all the alternatives and in particular the No
7 Project Alternative, which by definition should represent current local general plans. Also, the
8 projected share of rental versus ownership housing, attached versus single family, and the projected
9 densities for the Plan show it is a clear outlier and radically different than the No Project (existing
10 local general plans) alternative. The EIR did not explain these fundamentally important issues to the
11 public or decision-makers. Instead, the EIR misleads the reader into believing that the Plan is largely
12 consistent with local general plans and zoning.

13 72. The PDA-centric nature of the Plan violates SB 375 because designation of a
14 PDA does not represent adequate identification of land as contemplated by SB 375. As noted, PDAs
15 are essentially mere applications for accessing certain regional transportation grants. They do not
16 commit a local government to approve any actual development; they can be unilaterally withdrawn.
17 This means that where a local government withdraws a PDA application, and the PDA designation is
18 legally extinguished, the Plan nonetheless continues to rely on the projected housing units to satisfy
19 SB 375’s long-term housing requirements. Absent some other meaningful indicia of a realistic
20 expectation of development as envisioned by a PDA application, it is arbitrary and capricious for
21 Respondents to base compliance with SB 375’s long-term housing requirement on PDAs.

22 73. The Plan Bay Area is not reasonable and feasible as required by SB 375.
23 **ABAG and MTC Failed to Inform the Public Regarding the Proposed Project, and Misinformed**
24 **the Public Regarding the Nature and Impacts of the Alternatives to the Proposed Project, all of**
25 **Which Precluded Informed Decision-Making**

26 74. A meaningful project description is the foundation of an EIR. “An accurate,
27 stable and finite project description is the sine qua non of an informative and legally sufficient EIR.”
28 (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) Moreover, an ill-defined
project description thwarts one of CEQA’s most fundamental goals of facilitating informed public

1 participation. (*Id.* at 198, stating, “[a] curtailed, enigmatic or unsealed project description draws a red
2 herring across the path of public input.”) It is impossible for an EIR to adequately inform the public
3 and decision-makers about the impacts of a project unless the EIR clearly and consistently describes
4 the project in the first place. This EIR fails that test – its description of the project is curtailed,
5 enigmatic, and unstable.

6 75. Unlike every other EIR that has been prepared for SB 375 plans, and for that
7 matter almost every EIR prepared for any purpose, this EIR does not have a separate chapter, or
8 section, entitled “Project Description.” Instead, Chapter 1.2 of the EIR is called “Overview of the
9 Proposed Plan Bay Area.” As its title suggests, it provides a curtailed overview of certain features of
10 the Plan, but not a complete project description. Indeed, the Overview Chapter does not even mention
11 the land use policy measures the Plan would employ to achieve its focused growth objectives. For
12 “details” about the SCS, Respondents directed EIR readers to the draft Plan document, which in turn
13 directs readers to the “Jobs-Housing Connection Strategy” published a year before the DEIR.
14 However, these documents do not clearly delineate what policy measures constitute the Plan.

15 76. The scope of the SCS component of the project is unclear from the EIR.
16 Respondents are unclear and inconsistent as to whether the project includes the policy and
17 implementation measures used as inputs to its models, or whether the project simply includes the
18 housing and jobs outcome (the number and location of housing units).

19 77. The Plan and its EIR fail to distinguish between potential and planned PDAs,
20 fail to state the number of each, and fail to explain how many housing units have been allocated to
21 each of these two PDA types. This is especially problematic because potential PDAs are highly
22 speculative. Potential PDAs reflect the decision by a local government to apply for PDA status, likely
23 because of the potential for receiving transportation grants, but they lack any formal approval or
24 consideration in that jurisdiction’s planning documents.

25 78. The EIR’s analysis of Alternative 4 significantly departs from the established
26 “rule of the game.” While the alternative has about 778,000 new housing units (18 percent more than
27 the Proposed Project’s 660,000), the EIR projects that this level of housing will support 1,165,000
28 million new jobs—only 45,000 more new jobs than projected for the Proposed Project and the other

1 alternatives, all of which include a proportionately much lower housing figure. In effect, the EIR
2 assumes a radically lower marginal (incremental) jobs-housing relationship of 0.38 new jobs for each
3 new housing unit uniquely for Alternative 4. Again, this presents a highly flawed and misleading
4 characterization of the one alternative that at least makes an effort to meet the region's actual housing
5 need.

6 79. Respondents rejected Alternative 4 in the EIR as failing to meet the required
7 GHG threshold reduction of 15 percent. In the final EIR, Respondents were forced to acknowledge
8 that the projected 14.8 percent reduction that Alternative 4 would generate was within its model's
9 margin of error, such that Alternative 4 did meet the project objectives. Despite having heavily relied
10 on this supposed failure to meet the threshold to reject Alternative 4, Respondents failed to recirculate
11 the DEIR or to otherwise reconsider this Alternative upon recognizing this critical error.

12 80. Respondents also failed to disclose and explain the significant departure from
13 prior practice in constructing the No Project Alternative's housing development pattern. Consistent
14 prior practice has been to use the land pattern developed in the existing RTP as the No Project
15 Alternative. The failure to explain the change precludes informed decision-making; it also improperly
16 portrays key characteristics of the No Project Alternative to the public and decision-makers because
17 the "sprawl" nature of the assumed No Project Alternative contributes to its failure to meet the GHG
18 targets and objectives. Without any substantial evidence, Respondents assume local agencies will
19 amend or violate their local planning and zoning ordinances and breach their Urban Growth
20 Boundaries – even if that would require a vote of the people.

21 81. The EIR plainly acknowledges the omission of analysis of the displacement that
22 will result from the Plan, stating that "displacement as a result of affordability is addressed in the
23 proposed Plan as part of the equity analysis, rather than in this EIR." (DEIR at 2.3-32.) Moreover, the
24 equity analysis concludes that implementation of the draft Plan would lead to significant displacement
25 of lower-income households — placing 36 percent of struggling lower-income renters at high risk of
26 displacement. Ignoring this finding and omitting altogether any analysis of economic displacement in
27 the DEIR violates CEQA.

1 82. Respondents also assumed that expenditures from the OBAG grant program
2 (\$300 million over the life of the Plan) will yield about \$16 billion in net profit to residential
3 developers associated with the projected housing development pattern. This fundamental assumption
4 is crucial to Respondents' feasibility finding, yet Respondents provided no substantial evidence to
5 support it. Rather, the methodology employed to arrive at the assumption was not in accordance with
6 standard accepted industry modeling practices. The other alternatives did not benefit from this
7 unsupported assumption.

8 **The Adopted RHNA is Unlawful Because it Does Not Require Wealthy Communities to**
9 **Contribute Their Fair Share of the Region's Housing Needs**

10 83. Respondents violated SB 375 by failing to identify areas needed to comply with
11 state housing element law, as set forth by HCD and HUD. They also violated the requirement set forth
12 in Government Code § 65080(b)(2)(B) that an adopted SCS be reasonable and realistic as required by
13 Part 450 of Title 23 and Part 93 of Title 40 of the Code of Federal Regulations and administrative
14 guidance under those regulations. The applicability and nature of these federally identified planning
15 requirements were clearly set forth and acknowledged by the ABAG and MTC in the Policies for the
16 Bay Area's Implementation of Senate Bill 375.

17 84. On April 9, 2013, HUD contacted ABAG to warn of possible violations to
18 RHNA should ABAG go forward without doing more to analyze how its Plan will affect different
19 classes protected under fair housing law. HUD asserted that the Plan may lead to discriminatory land
20 use development because many neighborhoods may foreclose participation in the PDA program,
21 leading to racially-concentrated areas of poverty, the perpetuation of segregation within city
22 boundaries, and other adverse consequences.

23 85. On June 21, 2013, HCD informed ABAG that it had failed to "adequately
24 address our concerns regarding the RHNA allocation process." HCD recognized that ABAG's
25 proposed final RHNA is inconsistent with Government Code sections 65584(d), 66584.04(d), and
26 65584.04(f). HCD advised ABAG "to make RHNA adjustments to fully comply with statutory
27 requirements to treat jurisdictions which chose not to nominate PDAs (but that have PDA-like areas)
28 to the same criteria applied to jurisdictions that chose to nominate PDAs." HCD also noted that the

1 RHNA could be adopted as late as January 31, 2014; yet, ABAG adopted the RHNA without making
2 the recommended changes, in violation of fair housing law.

3 **IX.**

4 **FIRST CLAIM FOR RELIEF**

5 (Violation of SB 375)

6 86. Petitioner hereby realleges and incorporates by reference paragraphs 1 through
7 85 as if fully set forth herein.

8 87. Respondents violated SB 375 by adopting an SCS that fails to identify areas
9 within the Bay Area sufficient to house all the population of the region, including all economic
10 segments of the population, over the course of the planning period of the RTP taking into account net
11 migration into the region, population growth, household formation, and employment growth.

12 88. Respondents violated SB 375 by failing to adopt a feasible SCS.

13 89. Respondents violated SB 375 by failing to adopt a reasonable and realistic SCS,
14 as required by Part 450 of Title 23 and Part 93 of Title 40 of the Code of Federal Regulations and
15 administrative guidance under those regulations.

16 90. Wherefore, Petitioner prays for relief as set forth below.

17 **SECOND CLAIM FOR RELIEF**

18 (Violation of CEQA)

19 91. Petitioner hereby realleges and incorporates by reference paragraphs 1 through
20 85 as if fully set forth herein.

21 **Inadequate Project Description**

22 92. Respondents' description of the project is curtailed, enigmatic, and unstable. It
23 fails to provide sufficient detail to the public and decision-makers of the components that make up the
24 Plan or to assess the potential environmental impacts of the project. A project description that omits
25 integral components of the project results in an inadequate EIR if it fails to disclose the actual impacts
26 of the project. Respondents committed this error. For example, the policy levers that are purported to
27 be necessary to achieve the land use plan—and therefore integral project components—are only
28 described in technical appendices. In other instances, purported components of the project were not

1 inputted into Respondents modeling of the Plan’s impacts and therefore are either illusory or the
2 impact analyses failed to analyze the impacts of the Project – either error is prejudicial.

3 **Inadequate Alternatives Analysis**

4 93. CEQA requires a thoughtful analysis of a reasonable range of potentially
5 feasible alternatives to the Project to ensure informed decision-making and public participation. An
6 EIR must consider those alternatives that will “attain most of the basic objectives” while avoiding or
7 substantially lessening environmental impacts. The purpose of an EIR is not to identify alleged
8 alternatives that meet few, if any, of the project’s objectives, so that these alleged alternatives may be
9 readily eliminated. Since the purpose of the alternatives analysis is to allow the decision-maker to
10 determine whether there is an environmentally superior alternative that will meet most of the project’s
11 objectives, the key to the selection of the range of alternatives is to identify alternatives that meet most
12 of the project’s objectives but have a reduced level of environmental impacts.

13 94. The alternatives analysis in the EIR fails to meet these requirements for, among
14 other things, the following reasons.

15 (i) The analysis of the No Project Alternative violates CEQA. Under the
16 CEQA Guidelines, the No Project Alternative should identify what would happen if the Project is not
17 built, the agency does not issue any permits or discretionary approvals, and current uses and
18 operations continue under existing conditions. (CEQA Guidelines, § 15126.6(e).) The description of
19 the No Project Alternative must be straightforward and intelligible, assisting the decision-maker and
20 the public in ascertaining the environmental consequences of doing nothing; requiring the reader to
21 painstakingly ferret out information from appendices and technical reports is not enough. The EIR
22 does not meet these standards.

23 (1) The EIR should have assumed that the existing T2035 would
24 remain in place if the Project were not approved, rather than constructing a No Project Alternative that
25 did not accurately reflect the outcome of not approving the Project.

26 (2) Respondents impermissibly manipulated the No Project
27 Alternative, resulting in a materially misleading presentation of the likely conditions that will occur if
28 the Project was not approved.

1 (3) Respondents failed to follow guidance on how to analyze RTP
2 alternatives by applying different land use models to the alternatives and to the Project.

3 (4) Respondents impermissibly, and without substantial evidence,
4 assume that the No Project Alternative, the existing RTP they themselves adopted, would violate the
5 law by, among other things, causing local agencies to approve development that breaches urban
6 growth boundaries.

7 (ii) The analysis of Alternative 4 misrepresented to the public and decision-
8 makers that the alternative would eliminate all in-commuting into the Bay Area, including all existing
9 in-commuters. Many commenters relied on this misrepresentation in expressing opposition to
10 Alternative 4. Respondents did nothing to correct this misconception. The EIR also made several
11 assumptions regarding Alternative 4 that are not based on substantial evidence. While the alternative
12 has about 778,000 new housing units (18 percent more than the Proposed Project's 660,000), the EIR
13 projects that this level of housing will support 1,165,000 million new jobs—only 45,000 more new
14 jobs than projected for the Proposed Project and the other alternatives, all of which include a
15 proportionately much lower housing figure. In effect, the EIR assumes a radically lower marginal
16 (incremental) jobs-housing relationship of 0.38 new jobs for each new housing unit uniquely for
17 Alternative 4. This presents a highly flawed and misleading characterization of the one alternative
18 that actually attempts to meet the region's actual housing need.

19 (iii) Respondents misled the public and failed to provide a reasonable range
20 of alternatives to the public by failing to allow for the available alternative of preparing an APS
21 instead of an SCS, if the SCS was not feasible.

22 **Respondents Foreclosed Alternatives Through Actions Taken Prior to Conducting
23 Environmental Review and Through a Results-Driven Analysis of the Proposed Project**

24 95. Respondents undertook a results-driven analysis. Respondents' assertion that it
25 is reasonable to rely on a plan for 80 percent of housing units to be built in PDAs is unreasonable, not
26 supported by substantial evidence, and is contrary to the record in this case. The unreasonable
27 assumptions made regarding the Project led to a host of CEQA violations, including at least the
28 following:

1 (i) Respondents overstated the GHG reductions that will be achieved by the
2 Plan, improperly concluded that the Plan will not result in net increases in emissions, and failed to
3 analyze the GHG emissions impact of in-commuters.

4 (ii) Respondents failed to provide a fair and complete representation of their
5 prior practices, assumptions, determinations, and methodologies, as well as a reasonable explanation
6 for why they substantially departed from them.

7 (iii) Respondents' decision to reduce the housing units needed to meet SCS
8 requirements from 900,000 to 660,000 is not based upon substantial evidence.

9 (iv) Respondents' determination to limit the scope of their analysis to
10 activity occurring within the region, without accounting for activity the Project will cause in
11 neighboring regions, especially given that regional housing need, climate change, and total air quality
12 emissions are not issues isolated to the Bay Area region, is an abuse of discretion.

13 (v) Respondents' assumption that maintaining the ratio of in-commuters to
14 total Bay Area workers means it may ignore the impacts of a Plan that will cause an increase in in-
15 commuters is impermissible under CEQA.

16 (vi) Respondents' conclusion that the ratio of in-commuters to total Bay
17 Area workers will remain constant under the Plan is not based on substantial evidence.

18 (vii) Respondents' actions violated their own adopted resolutions and the
19 "rules of the game" they established in November 2010.

20 96. Respondents predetermined the outcome of the EIR's analysis and foreclosed
21 alternatives to the Project by committing to a definite course of action prior to undertaking any
22 environmental review.

23 EIR Fails as an Informational Document

24 97. The EIR has been aptly described as the "heart of CEQA." Its purpose is to
25 inform the public and its responsible officials of the environmental consequences of their decisions
26 before they are made. Thus, the EIR protects not only the environment but also informed self-
27 government. An adequate EIR must be prepared with a sufficient degree of analysis to provide
28 decision-makers with information which enables them to make a decision which intelligently takes

1 account of environmental consequences. It must include detail sufficient to enable those who did not
2 participate in its preparation to understand and to consider meaningfully the issues raised by the
3 proposed project. A prejudicial abuse of discretion occurs under CEQA if the failure to include
4 relevant information in an EIR precludes informed decision-making and informed public participation,
5 thereby thwarting the statutory goals of the EIR process. The EIR includes numerous omissions,
6 misstatements, and faulty analytic routes that cause it to fail to meet its purpose of supporting
7 informed decision-making and public participation. These include:

8 (i) Respondents' conclusion that 770,000 housing units would not be
9 feasible is not based upon substantial evidence.

10 (ii) Respondents failed to disclose modeling information and other key
11 assumptions and conclusions that underpin the EIR.

12 (iii) Respondents misrepresented the GHG impact of Alternative 4 as failing
13 to meet the GHG target for the Bay Area region, and then failed to take any affirmative action to
14 correct their misrepresentation.

15 (iv) Respondents failed to adequately disclose key assumptions, reasoning,
16 and conclusions in the EIR, instead burying the information in appendices and technical reports.

17 (v) Respondents impermissibly adopted a pattern and practice of failing to
18 distinguish between planned PDAs and potential PDAs.

19 (vi) Respondents' false statements regarding the general plan consistency of
20 potential PDAs precluded informed decision-making.

21 (vii) Respondents eliminated a key assumption regarding preferences of
22 certain ethnic groups, which played a key part in its analysis, and then failed to make any
23 corresponding changes to their conclusions or to explain the implications of the omission.

24 Inadequate Response to Comments

25 98. A lead agency must evaluate timely comments on environmental issues and
26 must prepare a written response. The written response must describe the disposition of significant
27 environmental issues raised. When a comment raises major environmental issues that conflict with
28 the agency's view, recommendations and objections must be addressed in detail giving reasons why

1 specific comments and suggestions were not accepted. There must be a good faith, reasoned analysis
2 in response; conclusory statements unsupported by factual information will not suffice. Respondents
3 repeatedly failed to meet this standard. For example:

4 (i) Respondents failed to provide a good faith response to comments
5 regarding their decision to remove their admission Alternative 4 is the only alternative that complies
6 with SB 375's requirement to identify areas within the region sufficient to house all the population of
7 the region.

8 (ii) Respondents failed to provide a good faith response to comments
9 regarding the feasibility of placing 80 percent of new housing in PDAs.

10 (iii) Respondents failed to provide a good faith response to comments
11 regarding the meaning of the requirement that Respondents identify areas within the region sufficient
12 to house all the population of the region.

13 (iv) Respondents failed to provide a good faith response to comments
14 regarding Respondents' assumption that the No Project Alternative would lead to the expansion or
15 breaching of urban growth boundaries.

16 (v) Respondents failed to provide a good faith response to comments
17 regarding requests by commenters to change housing redistributions.

18 (vi) Respondents failed to provide a good faith response to the criticisms of
19 Respondents' assumptions related to feasibility detailed in *A Review of the San Francisco Bay Area's*
20 *Draft Plan Bay Area/Sustainable Communities Strategy* prepared by the nationally recognized expert
21 firm John Burns Consulting. These criticisms include the lack of substantial evidence supporting
22 Respondents' assertion that foreclosed homes can be assumed to be vacant and other assumptions and
23 conclusions with respect to "macro" regional issues including housing location, housing demand,
24 consumer preferences, builder costs, single-family housing inventory.

25 (vii) Respondents failed to provide a good faith response to comments
26 regarding the lack of substantial evidence in support of Respondents' reduction of the required
27 housing under SB 375 from 900,000 to 770,000 to 660,000.

28

1 **Failure to Recirculate the DEIR**

2 99. Recirculation of an EIR is necessary when “significant new information is
3 added to an environmental impact report after notice has been given pursuant to Section 21092 and
4 consultation has occurred pursuant to Sections 21104 and 21153, but prior to certification.” (Pub. Res.
5 Code § 21092.1.) Significant new information includes disclosures showing that (1) a new significant
6 environmental impact would result from the project or from a new mitigation measures proposed to be
7 implemented; (2) a substantial increase in the severity of an environmental impact that would result
8 unless mitigation measures are adopted that reduce the impact to a level of insignificance; (3) a
9 feasible project alternative or mitigation measure considerably different from others previously
10 analyzed would clearly lessen the environmental impacts of the project, but the project’s proponents
11 decline to adopt it; or (4) the draft EIR was so fundamentally and basically inadequate and conclusory
12 in nature that meaningful public review and comment were precluded. The “public [shall not be
13 deprived] of a meaningful opportunity to comment upon a substantial adverse environmental effect of
14 the project or a feasible way to mitigate or avoid such an effect (including a feasible project
15 alternative) that the project’s proponents have declined to implement.” (*Laurel Heights Improvement*
16 *Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1129.)

17 100. Respondents failed to recirculate the EIR despite the existence of significant
18 new information. Among other things:

19 (i) Respondents did not disclose key assumptions underpinning their
20 findings, reasoning, and conclusions, and they disclosed certain key assumptions after the publication
21 of the DEIR, including the unreasonable assumptions used in their UrbanSim modeling.

22 (ii) Respondents revised appendices to the EIR after it was published
23 without resetting the comment period, thus foreclosing adequate time for the public to review the data
24 underpinning the EIR’s conclusions.

25 (iii) The DEIR applies CEQA in reverse by treating as proper CEQA topics
26 the impacts of sea level rise and existing Toxic Air Contaminants from already-existing sources, and
27 then finding these “impacts” significant and unavoidable after adopting mitigation measures for them.
28 These are not proper CEQA issues. Indeed, Respondents themselves confuse the reader by accurately

1 stating in their responses to comments that these impact analyses are not CEQA impacts and are
2 included for informational purposes only. Future lead agencies that must rely on the EIR and are
3 required to impose its mitigation measures to the extent feasible have been provided inconsistent
4 guidance whether the mitigation measures included in the Mitigation Monitoring and Reporting
5 Program are real or for “informational purposes only” and not properly included as CEQA matters.
6 The internal inconsistency within the EIR on whether these impacts are CEQA impacts precludes
7 meaningful public review and informed decision-making.

8 (iv) Respondents failed to disclose that Alternative 4 would meet CARB’s
9 GHG reduction target until publication of the Final EIR. This precluded decision-makers and the
10 public from making an informed decision on whether to adopt the Proposed Project or an alternative to
11 the Project. The EIR should have been recirculated to provide for meaningful public review of the
12 fact that Alternative 4 meets SB 375’s mandate to house all population growth, while also meeting the
13 GHG reduction target.

14 (v) The Draft EIR failed to disclose that 30,000 people likely will be
15 displaced as a result of the Plan.

16 **Failure to Designate a Lead Agency Pursuant to CEQA**

17 101. While SB 375 charges both ABAG and MTC with various responsibilities,
18 some separately and some together, CEQA requires designation of a single lead agency. When more
19 than one public agency is involved, the lead agency is the public agency that has the primary
20 responsibility for approving a project that may have a significant impact upon the environment. In
21 such a case, once the lead agency is chosen, other agencies involved in the review process may be
22 deemed “responsible agencies,” or agencies responsible for the project but not serving as the lead
23 agency. In the event of a dispute, Guidelines section 15053 indicates that agencies should consult with
24 each other, and should proceed to submit the dispute to OPR if they are unable to reach a resolution.

25 102. Rather than perform the critical task of designating a single lead agency, or
26 forming a joint powers authority to act as a single lead or submitting to OPR, Respondents instead
27 purported to act as “co-leads,” thereby defeating the purpose of CEQA’s requirement for a single lead
28 agency. By not designating a lead agency, Respondents created an arrangement where neither MTC

1 nor ABAG was fully responsible for the EIR and the public process of evaluating its contents. Further,
2 by forming this unpredictable co-lead situation, Respondents created a dynamic where neither ABAG
3 nor MTC could take meaningful action without risking a situation where the two agencies considered
4 and approved two different versions of the EIR. Had Respondents approved two different versions, it
5 is unclear which of the two would be the operative document. CEQA requires a single lead agency to
6 prevent such a confusing and problematic situation. By failing to determine which of the two agencies
7 would serve as the lead agency for CEQA purposes and instead acting as “co-leads,” Respondents
8 failed to proceed in the manner required by law.

9 **Inadequate Time to Review the EIR**

10 103. Respondents provided only the minimum time required to review the EIR
11 before they approved it, which was inappropriate here given the length and complexity of the
12 document and its importance in setting forth a growth pattern for the Bay Area.

13 **THIRD CLAIM FOR RELIEF**

14 (Violation of RHNA)

15 104. Petitioner hereby realleges and incorporates by reference paragraphs 1 through
16 90 as if fully set forth herein.

17 105. Respondents failed to identify areas needed to comply with state housing
18 element law, as set forth by HCD and HUD.

19 106. Respondents violated Government Code section 65584 by failing to ensure that
20 each city and county provides for an equitable share of the housing need of persons at all income
21 levels.

22 107. Respondents’ Plan will lead to discriminatory housing practices, in violation of
23 Government Code sections 65584(d), 66584.04(d), and 65584.04(f).

24 **FOURTH CLAIM FOR RELIEF**

25 (Declaratory Relief against Respondents)

26 108. Petitioner hereby realleges and incorporates by reference paragraphs 1 through
27 85 as if fully set forth herein.

28

1 Respondents were obligated to ensure that the SCS was both reasonable and feasible as those terms
2 are understood under RTP precedents. Respondents cannot meet that standard by asserting that the
3 SCS may be potentially feasible or by suggesting that the SCS could be feasible if local, state, and
4 federal laws were changed.

5 CEQA

6 114. Petitioner contends that CEQA requires consideration of the impacts on the
7 project on the environment, not consideration of the impacts of the environment on the project. (See,
8 e.g., *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464; *Ballona Wetlands Land Trust v.*
9 *City of Los Angeles* (2011) 201 Cal.App.4th 455.) Respondents' Mitigation Measures, adopted
10 pursuant to CEQA, and which Respondents expect will be used by all local agencies considering
11 projects consistent with the SCS, violate this basic CEQA precept. Respondents have violated CEQA
12 by imposing mitigation measures based on the existing environment's impacts on the project. For
13 example, Impacts 2.25(a) and 2.25(b) state that locating new inhabitants in areas affected by existing
14 toxic air contaminants would cause "significant and unavoidable" impacts, such that local agencies
15 will need to apply mitigation measures to the extent feasible to take advantage of CEQA streamlining.
16 Respondents have assumed for purposes of their feasibility analysis that every project with the
17 opportunity to apply CEQA streamlining will do so. In other words, Respondents have adopted
18 mitigation measures they assume every affected project will comply with, including those that violate
19 CEQA. Accordingly, Respondents have imposed on local agencies and applicants to misapply CEQA.

20 115. Moreover, just adopting the view that such mitigation measures are required
21 essentially requires that these issues be addressed in each local agency's CEQA review for projects
22 because Respondents have asserted that the existence of ambient air pollution in an area slated for
23 development requires CEQA analysis and mitigation. Any local agency or applicant who tries to
24 avoid CEQA analysis of these issues in the face of Respondents' SCS and mitigation measures will be
25 subject to litigation (often initiated by neighbors, local activists opposed to new development,
26 opponents of affordable housing, and labor groups seeking favorable labor agreements).

27 116. Increasing the risk of CEQA burdens and CEQA litigation on urban infill
28 projects, especially those for affordable housing, can thwart the development because affordable

1 extent such mitigation measures are intended to mitigate for impacts of the existing environment on a
2 project, which is a reverse application of CEQA.

3 (4) If upon remand, Respondents are unable to propose a feasible SCS, they must adopt an
4 alternative planning strategy;

5 (5) Award Petitioners their costs and reasonable attorneys' fees as permitted by law,
6 including without limitation Code of Civil Procedure section 1021.5;

7 and

8 (6) Grant such other and further relief as the Court may deem just and proper.

9 DATED: August 16, 2013

COX, CASTLE & NICHOLSON LLP

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11 By: _____

12 Andrew B. Sabey
13 Attorneys for Plaintiff and Petitioner
14 Building Industry Association Bay Area
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VERIFICATION

I, Paul Campos, declare:

I am Senior Vice President, Governmental Affairs, and General Counsel for Building Industry Association of the Bay Area. My principal place of business is located in San Francisco, California.

I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and know its contents. The facts set forth in the forgoing document are within my knowledge. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

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

Executed this 16th day of August, 2013, in San Francisco, California.



Paul Campos



Cox, Castle & Nicholson LLP
555 California Street, 10th Floor
San Francisco, California 94104-1513
P 415.392.4200 F 415.392.4250

Andrew B. Sabey
415.262.5103
asabey@coxcastle.com

August 15, 2013

Via U.S. Mail

Mark Luce, Chair
Association of Bay Area Governments
101 Eighth Street
Oakland, CA 94607

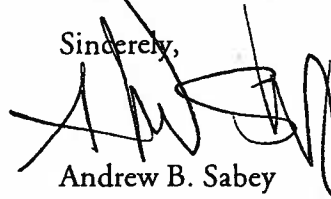
Amy Worth, Chair
Metropolitan Transportation Commission
101 Eighth Street
Oakland, CA 94607

Re: Notice of Commencement of CEQA Litigation Challenging
Approval of Plan Bay Area and the Environmental Impact Report for the Project

Dear Mr. Luce & Ms. Worth:

This letter is to notify you that BIA Bay Area intends to file suit against the Association of Bay Area Governments and the Metropolitan Transportation Commission for failing to comply with the requirements of the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 et seq.; the CEQA Guidelines, California Code of Regulations section 15000 et seq.; SB 375, Government Code § 65080 et seq.; and the Regional Housing Needs Allocation, Government Code § 65584 et seq, in approving the above-referenced Plan Bay Area (MTC Resolution No. 4111 and ABAG Resolution No. 06-13) and certifying the EIR for the Project (MTC Resolution No. 4110 and ABAG Resolution No. 05-13), related approvals adopted July 20, 2013. This notice is given pursuant to Public Resources Code section 21167.5.

Sincerely,



Andrew B. Sabey

AS/gfc

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