



## KASSOUNI LAW

May 15, 2013

Metropolitan Transportation Commission  
Association of Bay Area Governments  
101 8th St.  
Oakland, CA 94607

This letter addresses and comments upon the Draft Bay Area Plan (Draft Plan) dated March, 2013, subtitled "Strategy For a Sustainable Region," prepared by the Association of Bay Area Governments (ABAG) and the Metropolitan Transportation Commission (MTC). These comments are submitted on behalf of Freedom Advocates and the Post Sustainability Institute, both of which are non-profit organizations dedicated to the preservation of private property rights, consistent with the Fifth and Fourteenth Amendments of the United States Constitution.

As will be shown, the Draft Plan is infeasible, will lead to increased housing costs, will economically cripple a vast portion of local Bay Area jurisdictions, will result in equal protection violations by granting CEQA favors to select developers, restricts local autonomy over the land use process, is inconsistent with federal law, and wreaks havoc on the Fifth and Fourteenth Amendments of the United States Constitution, as well as the substantive due process rights of property owners. This is all accomplished by the fiat of two unelected, unaccountable entities. SB 375 in no way mandated a full scale Orwellian assault on our Republican form of government guaranteed by Article 4, Sec. 4 of the United States Constitution, nor did it mandate the usurpation of local governmental autonomy. To make matters worse, the Draft Plan will have no environmental benefit. On the contrary, the gutting of CEQA will result in environmental harm.

It is readily apparent that SB 375 is the mechanism by which ABAG and MTC seek to impose collectivist social engineering on the people of the Bay Area. This philosophy has its genesis in the 1992 United Nations Conference on Environment and Development, which in turn generated a Commission on Sustainable Development. This Commission was created as a component of a larger UN sustainable development manifesto, referred to as Agenda 21 (the "21" referring to the 21st Century). The Draft Plan endorses and adopts the objectives of Agenda 21 at the local level with striking accuracy. One such Agenda 21 objective is the centralization of



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populations in "zones of cooperation" which are virtually identical geographically to the Priority Development Areas identified in the Draft Plan. Implementation of the United Nations sustainable development philosophy at our state level is expressly referenced in SB 375, which has directed ABAG and MTC to create a "sustainable communities strategy."

Indeed, Metropolitan Transportation Commissions and Associations of Governments are typically members of the International Council for Local Environmental Initiatives. In turn the members and representatives of MTC and ABAG act on behalf of cities and counties which have impermissibly binded themselves to the objectives of ICLEI and its UN based directives.<sup>1</sup> The UN in turn has made very clear its position on private property: "Land... cannot be treated as an ordinary asset, controlled by individuals and subject to the pressures and inefficiencies of the market. Private land ownership is also a principal instrument of accumulation and concentration of wealth and therefore contributes to social injustice..." The Draft Plan accomplishes this objective through its environmental justice manifesto, and its massive deprivation of the economic use of private property.

The Draft Plan's failure to acknowledge the impact on our Republican form of government, and the pervasive violations of individual rights guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution which will ensue, is disturbing to say the least.

### **1. The Draft Plan utterly fails to provide information regarding the input of the public**

One aspect of the Draft Plan should be addressed up front, namely the "public participation plan" with a "minimum number of workshops" in each County. (P. 3.) Indeed, the Draft Plan affirmatively states that "[t]housands of people participated in stakeholder sessions, public workshops, telephone and internet surveys, and more." (P.4.) Appendix 1 references further materials identified as "Public Outreach and Participation Program" yet as of the date of this letter there is no such additional material on the web site.<sup>2</sup> Myriad problems surround this

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<sup>1</sup> <http://www.icleiusa.org/about-iclei/members/member-list>

<sup>2</sup> The One Bay Area website has a number of missing supplementary materials, and denotes that "[a]dditional documents will be posted to this web page as soon as available." Objection is made to submission of a Draft Plan that is incomplete and which provides no opportunity for full comment within the 55 day comment period. (See



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purported "outreach." There is a dearth of information in the Draft Plan detailing the *results* of this "outreach." It is apparent that the outreach was undertaken not for the purpose of actually listening and responding to objections and concerns. SB 375 mandated outreach, but it is apparent that the process had no impact whatsoever on the pre-ordained conclusions and recommendations in the Draft Plan, notwithstanding the objections of the people who will be affected by its provisions.

Curiously, the only reference to the actual results of the "outreach" is contained at p. 24, which references a vocal *opposition* to the Draft Plan: "Nineteen well-attended public workshops that attracted nearly 2,000 residents (two each in all nine Bay Area counties, with an extra meeting in Alameda County). *A vocal contingent of participants at the public meetings expressed strong opposition to regional planning in general and to Plan Bay Area in particular.*" (Emphasis added.)

Reference is also made to two telephone polls conducted between 2010-2012, and a third scheduled at or about the present time. In total, over 6,000 residents have been polled, yet there is no information in the Draft Plan indicating what questions were asked, who conducted the polls, what the poll results were, and demographic of those polled (i.e, in-state, out-of-state, in-Bay Area, out-of-Bay Area, etc.). There is likewise no information provided regarding the demographic location of those who responded to on-line polling.

Further evidence that this "public outreach" effort was a sham, it appears to have been orchestrated in lock-step with the Delphi technique of only considering comments and observations that support the pre-approved plan.<sup>3</sup> All others will be written on a pad of paper and discarded later. The illusion of public buy-in is all that is needed. The organizers can later point to the fact that they held a public meeting, a certain number of residents attended, public comment was taken, and the community approved the plan. The facilitator is often a private consultant who has been professionally trained in running and managing a meeting. As the Draft Plan does not reveal the results of its "public outreach" it is impossible to know the true pulse of the community.

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<http://onebayarea.org/regional-initiatives/plan-bay-area/draft-plan-bay-area/supplementary-reports.html>, viewed May 14, 2013.)

<sup>3</sup> This is a cold war technique of channeling a group of people to accept a point of view that is imposed on them while convincing them that it was their idea.



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The dearth of information regarding the actual feedback provided by the public raises a red flag, and indicates that such feedback was considered irrelevant to the pre-determined conclusions stated in the Draft Plan, SB 375 notwithstanding.

### **2. The Draft Plan Impermissibly Interferes With The Local Land Use Decision Making Process**

Pursuant to the demands of SB 375<sup>4</sup>, the Draft Plan outlines numerous recommended land use policies for local governments within the Bay Area. While SB 375 asserts that such recommendations do not directly force local governments to alter their existing zoning and land use ordinances,<sup>5</sup> the state law "incentives" for towing the line do just that. Pursuant to state law, any municipality or county that fails to adopt land use and zoning plans consistent with the Plan's recommendations will lose eligibility for any funding through One Bay Area Grant Program (OBAG) as well as its eligibility for other benefits. (Plan at 75 (OBAG funding)); *Id.* at 58 (CEQA relief). Given the tight budgets many cities in California currently labor under, refusing this additional funding could be financially ruinous. Indeed, the Draft Plan concedes at p. 75 that "OBAG *requires* each jurisdiction to adopt policies to support complete streets and planning and zoning policies that are adequate to provide housing at various income levels, as required by the Regional Housing Needs Allocation (RHNA) process." (Emphasis added.) (This OBAG mandate is strikingly inconsistent with the directive in SB 375 that "[n]othing in this section shall require a city's or county's land use policies and regulations, including its general plan, to be consistent with the regional transportation plan or an alternative planning strategy." (Government Code section 65080(b)(K)).

As explained below, this sort of "money or your life" coercion has raised serious constitutional concerns when carried out between the Federal Government and the States and applies with equal force when carried out between States and local jurisdictions. The notion that

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<sup>4</sup> See Cal. Gov. Code. § 65080 et seq ("Each transportation planning agency ... shall prepare and adopt a regional transportation plan... including... [a] sustainable communities strategy prepared by each metropolitan planning organization.")

<sup>5</sup> See Cal. Gov. Code. § 14522.2 (b) ("cities, and counties are *encouraged*, but *not required*, to utilize travel demand models that are consistent with the guidelines in the development of their regional transportation plans.") (emphasis added); Cal. Gov. Code § 65080 (b)(2)(K) ("Nothing in a sustainable communities strategy shall be interpreted as superseding the exercise of the land use authority of cities and counties within the region.")



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the Draft Plan does not supersede local land use authority is meaningless in light of the mandate that policies be adopted by local land use authorities in order to obtain a piece of the discretionary funding pie, which is estimated to be \$14.6 billion over the life of the plan. (P. 73.)

It is well accepted that under the Spending Clause of the U.S. Constitution, Congress may grant federal funds to the States, and may condition such a grant upon the States “taking certain actions that Congress could not [otherwise] require them to take.” *College Savings Bank*, 527 U.S., at 686, 119 S.Ct. 2219. For example, in *South Dakota v. Dole*, 483 U.S. 203, 206, (1987), the Court found no constitutional flaw in a federal statute directing the Secretary of Transportation to withhold federal highway funds from States failing to adopt Congress' choice of a minimum drinking age. Similar examples abound. See, e.g., *Lau v. Nichols*, 414 U.S. 563, 568–569, (1974) (conditioning federal funding on the adoption of anti-discrimination measures); *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 142–144 (1947) (conditioning federal highway funding on state's agreement that its highway officials would not participate in politics).

However, Congress' authority to withhold funds in order to encourage states to comply with its wishes is not absolute. Under the Constitution, the Federal Government's conditioning of funds is permissible only if (1) the spending is in furtherance of the general welfare; (2) Congress does so unambiguously to the end that states may knowingly exercise their choice to either accept or reject the funds; (3) the conditions imposed are reasonably related to the federal interest in the particular program and; (4) no other constitutional provision “provide[s] an independent bar to the conditional grant of federal funds.” *State of Cal. v. U.S.*, 104 F.3d 1086, 1092 (9<sup>th</sup> Cir. 1997) (citing *Dole*, 483 U.S. at 207-08). Moreover, even if these conditions are met, the condition may still be unconstitutional if “the financial inducement offered by Congress” is “so coercive as to pass the point at which pressure turns into compulsion.” *Dole*, 483 U.S. at 211.

This additional restriction stems from the theory that conditional federal funding is only permissible because it is a contract between a state and the federal government. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) ( “We have repeatedly characterized ... Spending Clause legislation as much in the nature of a contract.” ). If the contract is not entered into freely (i.e. there is coercion or duress) then there is no valid contract and the Federal government is



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essentially conscripting state workers. *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937) (courts should scrutinize legislation to ensure that Congress is not using financial inducements to exert a “power akin to undue influence.”).

While the Court has repeatedly refused to the “fix the outermost line where persuasion gives way to coercion,” its recent decision in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012), gives us some valuable insight as to where that line may be. There the Court struck down a portion of the Affordable Care Act that required states to expand Medicaid coverage to include additional classes of individuals or face a complete withdrawal of federal funding from their Medicaid programs. *Id.* at 2601. Likening this requirement to a “gun to the head” proposition, the Court found that the requirement violated the Tenth Amendment. *Id.* at 2604.

The Court distinguished the Medicaid expansion from other federal requirements that were approved in previous cases by pointing to the amount of funding at stake. In *Dole*, for example, the amount of funding withheld for refusing to adopt Congress’s proposed drinking age amounted to a “loss of less than half of one percent of South Dakota’s budget.” *Id.* at 2604-2605. By contrast, a State that opted out of the Affordable Care Act’s expansion in health care coverage would stand to lose “not merely ‘a relatively small percentage’ of its existing Medicaid funding, but *all* of it.” *Id.* In most states, that would result in a loss of more than 10 percent of their total state budget. *Id.* Such draconian measures crossed the line from incentive to coercion.

The Draft Plan is similarly coercive. Local jurisdictions must adopt land use and zoning laws consistent with the Plan or they will lose *all* OBAG funding. Plan at 75. While the percentage of the city or county budget that is made up of OBAG funds certainly varies, it will be uniformly substantial. Thus, as was the case with Medicare funding in *Sebelius*, the withholding of these funds leaves cities with a “prerogative” to reject the Plan’s desired policy “merely in theory but [not] in fact.” *Sebelius*, 132 S.Ct. at 2604.

Many of the arguments which support protecting states from federal overreach apply with equal force in the context of city and state disputes. As Justice Roberts explained in *Sebelius*, the federal system “rests on what might at first seem a counter-intuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’” *Sebelius*, 132 S.Ct. at 2602 (quoting



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*Alden v. Maine*, 527 U.S. 706, 758 (1999)). A system with one central government is less responsive to the people and more dangerous to freedom. (*Id.* at 2602-3.)

Similar concerns are raised when states attempt to strong-arm their cities. Indeed, it was these concerns, among others, that gave rise to Cal. Const., art. XI, § 5 (section 5) -- the “home rule” provision of the California Constitution. (see article). Under the California Constitution of 1849, cities were “but subordinate subdivisions of the State Government,” and the Legislature had power to “enlarge or restrict” city powers. *San Francisco v. Canavan* (1872) 42 Cal. 541, 557. After the Constitution of 1879 was adopted, however, the Court declared it was “manifestly the intent” of the drafters “to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature.” *People v. Hoge* (1880) 55 Cal. 612, 618. But, cities gained but little nourishment from this statement, for on its face the constitution of 1879 still provided that general laws should override municipal charters and local laws. Thus, the state was able to continuously interfere with cities decision making on everything from spending to land management. Based on a belief that two governments would govern better than one, and that the municipality itself “knew better what it wanted and needed than the state at large,” the people enacted section 5. *Fragley v. Phelan* (1899) 126 Cal. 383, 387.

Under section 5, municipalities have exclusive authority to “make and enforce all ordinances and regulations in respect to municipal affairs.” Cal. Const., art. XI, § 5. Moreover, municipal decisions regarding municipal affairs “shall supersede all laws inconsistent therewith.” *Id.* Thus, because land use and zoning decisions are generally considered municipal affairs under home rule, it is apparent that the drafters of section 5 intended it to insulate local land use decisions from state bullying. Indeed, it is the legislature's intent to “provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.” Cal. Gov. Code. § 65800.

### **3. CEQA Will Be Effectively Neutered Under the Draft Plan**

The Draft Plan contains multiple provisions aimed at reforming and streamlining the CEQA process. Reforms to CEQA are greatly needed. As the Draft Plan points out, current CEQA rules are inefficient, hinder needed development, and are “commonly used as a tool by



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project opponents who are more interested in halting a project than minimizing its harm to the environment.” (Draft Plan at p. 130.)

However, the Draft Plan’s proposed reforms raise issues of their own. As explained below, the Draft Plan’s proposed CEQA streamlining provisions undermine the credibility of CEQA by gutting its provisions for development within the Bay Area and raise serious concerns under the Equal Protection Clause of the United States Constitution and the California Constitution by offering reduced environmental restrictions for favored developers.

In conjunction with SB 375 the Draft Plan’s proposed CEQA streamlining provisions provide for reduced CEQA oversight development projects within PDAs, including but not limited to the reduced requirements for environmental impact reports. (P. 58.) Because the Plan calls for limiting the vast majority of new development to PDAs, this would eliminate traditional CEQA requirements for the vast majority of new development projects over the next thirty years. *See* Plan p. 55 (“over two thirds of all regional growth by 2040 is allocated within [PDA’s]”).

In doing so, the Draft Plan calls the continuing necessity and validity of those requirements into question for all projects across the state. If, as we have been told for the past several decades, current CEQA requirements are necessary to protect the environment, then the Plan’s elimination of these procedures for the vast majority of new developments should raise serious environmental concerns. If, on the other hand, these burdensome CEQA procedures are not necessary to protect the environment, and are detrimental to a “more economically vibrant state” then one must wonder why they should not be eliminated for *all* new development and not merely the Plan’s favored projects. (*See* Draft Plan at p. 130.) The answer is quite clear: *allow streamlining as a carrot-incentive for the "favored" developers and local governmental jurisdictions who buy into the Draft Plan and wish to drink from the government trough.* Indeed, as explained below, subjecting an isolated class of property owners to additional burdens which have no rational justification raises constitutional concerns. Either way, the Plan’s CEQA streamlining provisions create serious questions about the continuing validity of CEQA as well as the Draft Plan’s true motives.<sup>6</sup>

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<sup>6</sup> It is unclear just how the “streamlining” will be effectuated, and which portions of CEQA will be gutted. This flies in the face of decades of consistent environmentalist trumpeting of CEQA and its purported necessity. The dearth of information in the Draft Plan renders it hopelessly defective as a policy instrument.



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### 4. The Plan's CEQA Streamlining Provisions Violate the Equal Protection Clause.

The Equal Protection Clause requires that the government treat similarly situated individuals alike. *Plyler v. Doe*, 457 U. S. 202, 216 (1982). When the government crafts laws which treat individuals differently who appear to be similarly situated, it must provide a reason for the disparate treatment that is rationally related to the protection of the public, and consistent with the general purpose of the law. *Reed v. Reed*, 404 U. S. 71, 75-76 (1971). In the case of development projects or zoning restrictions, that means that any designation or classification which causes one developer or development to bear a greater regulatory burden than another, must further a legitimate purpose of the law. *Cleburne v. Cleburne Living Center, Inc.*, 473 US 432, 446-447. The stated purpose of CEQA is to protect the environment. Thus, pursuant to the Equal Protection Clause of the United States Constitution, and Article I, Section 7a of the California Constitution<sup>7</sup>, any distinctions drawn between property owners under CEQA should be rationally related to that end.

The Plan's proposed CEQA streamlining provisions fail to meet that test. Under the Draft Plan, property owners whose development plans are consistent with the Draft Plan, or those who choose to develop within a preferred area, will be able to circumvent many of the costly and burdensome procedures that make up the CEQA review process. Those who do not fall into one of these categories will remain subject to traditional CEQA procedures. Yet many of the factors that would allow a person to circumvent CEQA under the Draft Plan's proposed reforms have nothing to do with protecting the environment, and may even increase environmental risk.

For example, under the Draft Plan, development projects aimed at increasing low-income housing are eligible for lessened CEQA review.<sup>8</sup> Plan p. 43. Yet whether a building is occupied by low income families or more affluent individuals has nothing to do with that building's

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<sup>7</sup> That section provides: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

<sup>8</sup> A development that is consistent with the Bay Area Plan may be eligible for CEQA streamlining. As shown on page 43 and elsewhere, a development may become consistent with the Plan if it provides low-income housing near certain forms of transit.



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environmental impact. Indeed, the United Supreme Court has rejected laws drawing similarly meaningless classifications in the past. In *Cleburne v. Cleburne Living Center, Inc.*, 473 US 432 (1980), the Court struck down a zoning ordinance which required group care homes for the mentally disabled to get a special use permit from the city, but allowed other multifamily developments to open without a special permit. The City claimed that the permits were necessary because, among other things, it wanted to limit development in the flood plain. *Id.* at 449. Yet, as the Court pointed out, the ordinance did nothing to limit developments in the floodplain *per se*, but instead based permitting decisions on whether the building would be occupied by the disabled or some other group. *Id.* Thus, because a home for the mentally challenged was no more likely to cause a danger to the flood plain than would an apartment or fraternity house of the same size, the Court found that the zoning ordinance and special use permit requirement were irrational and therefore violated the Equal Protection Clause. *Id.*

Here, the discrimination is not against the disabled but in favor of low income housing. Yet the principle remains the same. Just as the inhabitants of the development at issue in *Cleburne* had no relevance to the flood plain, there is no coherent argument that low-income construction will have less effect on the environment. Thus, the special rules for low-income housing are irrational and violate the Equal Protection Clause.

Other criteria set forth in the Plan for CEQA streamlining eligibility are similarly irrational when viewed as a means to protect the environment. For example, under the Plan, those who choose to develop within a preferred area will be able to circumvent many of the costly and burdensome procedures that make up the CEQA review process. Plan p. 3. Those who do not will remain subject to traditional CEQA procedures. *Id.* This remains true regardless of the proposed projects potential environmental impact.<sup>9</sup> In fact, under the Plan's proposed rules, an environmentally risky project within a preferred area could be subject to less CEQA oversight than a low risk project only a few hundred yards away simply because the latter

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<sup>9</sup> The plan makes clear that development in preferred areas will be eligible for CEQA streamlining. It does not state that there will be any eligibility determination based the environmental risk of the project. Nor could it, the environmental risk of the project is only determined after CEQA review.



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project happens to fall outside of a preferred area. Such arbitrary line-drawing does nothing to protect the environment, and likely violates the Federal and State Constitutions.<sup>10</sup>

In *Zobel v. Williams*, 457 US 55 (1982) the Court struck down a law which granted state funds to citizens based on how long they had been a resident of the state. The state argued that the discrimination in favor of longtime residents served the rational purpose of encouraging “prudent management of the state’s funds.” *Id.* at 61. The Court rejected this justification, noting that there was nothing about basing grants amounts on the amount of time spent as a resident of the state that ensured that state funds would be more wisely invested. *Id.* at 62-63. In fact, the Court explained, under certain circumstances, doing so would be likely to lead to poor investments. *Id.* Thus, the discrimination in favor of long-time residents not only failed to serve its stated purpose, but could have run counter to it. Accordingly the Court found the classification to be unconstitutional.

Similarly here, by reducing oversight on developments within preferred areas, even if those developments may be risky, while maintaining burdensome rules for potentially mild projects outside of preferred areas, the Plan’s proposed provisions could actually prove more detrimental to CEQA’s stated goals than the status quo. Thus, like the law at issue in *Zobel*, the proposed provisions likely violate the Equal Protection Clause.

Given these equal protection concerns, any future enactment of the Plan’s proposed streamlining provisions would almost certainly result in years of costly litigation. Accordingly, there should be reconsideration of the proposed CEQA streamlining provisions. In short, there is no possible justification for treating projects within PDA's as having any less need for environmental review than projects located outside of PDA's.

### **5. The Draft Plan Is Premised Upon Appallingly Racist Assumptions Which Should Be Disregarded Outright**

One of the key factual premises of the Draft Plan is the unsupported assumption that "Increased Racial and Ethnic Diversity Will Increase Demand for Multifamily Housing" (P. 7.) This assumption is based solely on the proposition that Asian and Hispanic ethnicities have

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<sup>10</sup> Under the Draft Plan, permits will be distributed in grossly disproportionate numbers. Property owners within PDA's will obtain permits at 80 times the rate of owners in non-PDA's.



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"demonstrated an historic preference for multifamily housing" and that they "rely more on public transit than non-Hispanic whites." (*Id.*) This same unsupported assertion is directed toward those aged 34 and younger.

In order to rationalize its "zero new development strategy," the Draft Plan relies on assumptions about future housing needs that are both unjustified and tinged with racism. According to the Plan, future changes in the Bay Area's demographics—primarily an increase in Hispanic and Asian households in the area—will result in an increased demand for multi-family dwellings in urban centers and a decrease in demand for single family homes in commuter neighborhoods. Plan p. 7-8. The Plan provides no empirical data supporting this conclusion. Nor could it, as the Plan concedes that single family homes continue to be in demand and constitute the majority of housing production. *See Id.* at 38. Instead, the Plan bases its claim on the absurd assumption that Hispanics and Asians *prefer* to live in multifamily units (e.g. apartments) located in urban centers. *Id.* at 7-8.

Such broad assumptions about the role that race plays in housing preferences should make all Californians uneasy, to say the least. While it may be true that Hispanics and Asians often live in multi-family buildings located in urban centers, these patterns are explained by income, not some inherent racial attribute which results in a preference for cramped living. Those with low incomes are less likely to have a car, to be able to afford the gas to commute, or to have the income necessary for a mortgage. Should it be assumed that those with low incomes *prefer* not to have a car? Should it be assumed that those with low incomes *prefer* to buy used cars as opposed to new cars? Should it be assumed that younger adults (under 34 per the Draft Plan) *prefer* to live in cramped multifamily dwellings, even if they could afford the down payment for a house and the monthly payments? The obvious answer is no. The application of basic economic principles (as well as common sense) predicts that low income individuals would be more likely to choose cheaper apartments closer to urban centers, regardless of whether or not they might (all things being equal) prefer a house in the suburbs.

Given this information, it is unsurprising that Hispanics and Asians – who, on average, tend to make less money than whites<sup>11</sup> – would be more likely to live in apartments. To

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<sup>11</sup> Available at: <http://www.usa.com/san-francisco-ca-income-and-careers--historical-median-household-income-by-races-data.htm>



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assume, instead, that this disparity is a product of some inherent racial characteristic, or some race or age-based contingent preference for apartment living, would be little different than assuming that Chinese immigrants in the 1800's preferred tenement living and sweatshop labor to more traditional homes and jobs, merely because they occupied those positions in greater numbers than other races. Californians have long ago jettisoned such notions of racial superiority from the public dialogue. That the Plan is premised upon such racist presumptions is astonishing.

**6. The Draft Plan is Patently Infeasible and Will Have a Draconian Economic Effect on Non-PDA's, Including Dramatic Reductions in the Availability of Low Income Housing and Property Tax Revenues**

The Draft Plan admits at p. 37 that Bay Area homebuyers will continue to struggle due to high housing costs. It is also admitted that surrounding regions provide more affordable housing. (P. 97.) However, rather than promote economic development, industry, and multi-family construction in surrounding regions where workers can afford to live, the plan exacerbates the problem of high housing costs by effectively leaving these surrounding regions "no-build" zones, thus *eliminating* any incentive for development, industry, job growth, and continued housing construction in these areas. Developers and businesses will avoid non-PDA's in light of the added CEQA burdens, which will be streamlined in PDA's to reward those who "toe the line." Workers will then be *forced* into PDA's for employment opportunities, and the Draft Plan has absolutely no funding mechanism for ensuring that new housing within PDA's for low-income workers will be affordable. Indeed, it is obvious that land within PDA's is fully developed or near full development capacity and simply cannot sustain the creation 521,000 new multi-family housing units by 2040. There is no redevelopment alternative available to subsidize housing costs, and most PDA's are in redevelopment areas. Thus there is no concrete substitute for the admitted loss of \$1 billion per year in tax-increment financing to support affordable housing projects. (P. 129.)

On this issue the Draft Plan's wild assumption that the political process will gut Proposition 13's super-majority voting requirement for new taxes should be rejected outright as infeasible. (Pp. 131-132.) Reliance on the political process to materially modify federal MAP 21



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legislation to obtain requisite funding is likewise wildly speculative. (Id.)<sup>12</sup> Indeed, the entire "housing production forecast" is premised on the *assumption* that "a replacement mechanism will be found to fund and implement many of the functions that were performed by California Redevelopment agencies before Gov. Jerry Brown signed legislation abolishing those agencies in June 2011." (P. 37.) Indeed the March 29, 2013 Priority Development Area and Feasibility and Readiness Assessment appendix report (Readiness Report) repeatedly cites the speculative nature of potential funding, that some form of fiscal reform is necessary, and that the infrastructure is currently inadequate. New bond measures are proposed, as well as a "long terms adjustment to commercial or residential tax rates to balance the financial incentives for new development." (I.e., gutting Proposition 13.)<sup>13</sup>

Absent such a replacement plan, which is the likely scenario, redevelopment-style land restrictions will be imposed without essential protections for property owners, including oversight boards, requisite blight findings, relocation procedures, and assurance that displaced business owners and tenants will be made whole.

Indeed, the Draft Plan's *infeasibility* is highlighted at length in the Readiness Report, which is curiously omitted from the text of the Draft Plan, and is located only the appendix document found on-line. Among other things, the Readiness Report labels the Draft Plan "aggressive" and contains the following admissions of infeasibility at p. 35:

While most PDAs in the sample analysis have land use plans and regulations consistent with *Plan Bay Area*, there is a need for continued innovation in all PDAs – new policies and forms of development regulation that achieve desired public purposes in ways that simultaneously improve incentives for, and reduce the risks of, private investment.

***Most of the PDAs will require substantial new investment in infrastructure.*** In some instances, funding capacity from the local government or supportable amounts from housing developers is simply not adequate to pay for this infrastructure, thus regional, state or federal funding will be required to support desired PDA development. In all cases, care will need to be taken to assure that related financial burdens placed on the private sector through local development impact fees, inclusionary housing policies, special taxes, and other development-related charges do not render desired PDA development financially infeasible.

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<sup>12</sup> The Draft Plan expresses surprise that federal transportation funds are allotted to non-PDA's, yet the federal policy is to "foster" economic growth in *all* urbanized areas. (See 23 U.S.C. 134.)

<sup>13</sup> Of the 20 PDAs examined and analyzed for readiness in the Appendix, only 3 (15%) met or exceeded the target number of units required (by 2040) to satisfy Plan Bay Area. The other 17 PDAs are projected to fail by 3 to 54%. Majority fail by at least 35%. (Readiness Assessment at pp. 19-28.)



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***Most of the PDAs are largely developed and also exhibit a fragmented pattern of small parcels in independent ownership. Parcel assembly and redevelopment will be needed to achieve development objectives in virtually all PDAs. This landassembly process is time consuming, risky, and expensive*** and will thus represent one of the largest obstacles to achieving *Plan Bay Area* and local planning objectives.<sup>14</sup>

(Emphasis added.)

Further, as more and more workers are herded into PDA's as the only source of employment, an artificially created higher cost of housing will be the result. Demand will far outstrip supply, as is already the case in PDA's, and which is the obvious reason why housing in PDA's is and will continue to be far higher than in surrounding regions. Commutes will be shorter and there will be no need to rely on public transit if economic growth and industry is encouraged, rather than demonized, in non-PDA's. In short, the Draft Plan simply eliminates through government fiat a level competitive playing field for businesses who wish to expand growth and employment opportunities in non-PDA's. As non-PDA's comprise 95% of the land area in the nine-county, 101 city "region," the economic effects will be draconian.

The restriction and outright prohibition of commercial and residential development in non-PDA's will result in decreased property tax revenues, which are essential sources of revenue for local jurisdictions, including the payment of essential services such as roads, police, schools, etc. The Draft Plan has no remedy whatsoever for offsetting this loss, and indeed appears to be encouraging such a result in order to force more and more people into PDA's, willingly or not. The net result will be economic stagnation of PDA's, with lower tax revenues. It would not be surprising if this is the desired result, allowing the government to create depressed values and blight conditions for cheap acquisition.<sup>15</sup> Indeed, the Draft Plan states that land will be acquired with allocated funds. Government Code section 65913.1 also mandates cities to zone vacant land for residential use to meet the housing needs of all income categories. This mandate will be upended under the Draft Plan.<sup>16</sup>

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<sup>14</sup> The Readiness Report also concedes the necessity of a new TIF in the form of bond measures as a potential funding source, and that upzoning will be required. (Pp. 35-43.)

<sup>15</sup> Under the Health and Safety Code, lack of new investment is a criteria for a blight finding. By blocking new investment in areas both inside and outside PDA's, the Draft Plan, blight conditions are inevitable.

<sup>16</sup> The terms "housing unit" and "jobs" are not defined in the Draft Plan, which preclude the reader from evaluating the merit of the projections and allocations.



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The Draft Plan further contains the false premise that "aging baby boomers will move to residential care facilities or other group housing." (P. 37.) Yet this assumption fails if the cost of housing in PDA's is more expensive than in surrounding areas, which no doubt will be the future scenario if development in non-PDA's is severely restricted. The elderly must be provided the option of living in non-PDA's in order to provide a stable source of low-cost housing, especially in light of the fact that the elderly will not be commuting to and from work.

### **7. SB 375 and the Federal Code of Regulations Mandate Consideration of Economic Growth in all Urbanized Areas, not just PDA's**

Government Code Section 65080(a) provides in part that the regional transportation plan ( of which the sustainable communities strategy is a component) "shall consider factors specified in section 134 of Title 23 of the United States Code." Government Code Section 65080(b) further provides that the regional transportation plan shall be an "internally consistent document."

23 U.S.C. 134 in turn sets forth the requirements of the metropolitan planning process for metropolitan planning areas. Among other things, federal law under this section mandates that the process "shall provide for consideration of ... strategies that will...support the economic vitality of the metropolitan area..." and that it is the federal policy to "foster economic growth and development within...urbanized areas." Contrary to the artificially created PDA's in the Draft Plan, section 134 does not define urbanized areas so narrowly. Indeed, the Draft Plan acknowledges in its "Transportation and Land Uses" chart that "urbanized areas" are vastly greater than the scant areas containing PDA's. Yet there is not even an acknowledgment of the federal and state mandate to consider and promote economic growth in *all* urbanized areas. As shown in the preceding section, the draconian restriction on development within non-PDA urbanized areas is directly at odds with the state and federal mandate.

It must also be emphasized that nothing in SB 375 mandates draconian PDA designations. It is transparently obvious that the unelected members of MTC and ABAG have latched onto SB375 as the vehicle by which to impose globalist economic, social, and environmental policy dictates on the people of California, with no consideration of the voices of property owners within the 95% of the land located outside of PDA's, or elsewhere for that matter.



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Further, the Draft Plan's own statistics reveal that roughly one-third of the projected 1.1 million new jobs created by the year 2040 (approximately 363,000 jobs) will be located within *non-PDA's*. (P. 50.) Yet the Draft Plan simply ignores the housing, transportation, and infrastructure needs of this massive demographic by 1) severely restricting if not outright prohibiting commercial development; 2) severely restricting if not outright prohibiting residential development, whether single family or multi-family; and 3) for those few developers willing and able to provide necessary commercial and residential development within non PDA's, impose further punishment by subjecting them to the full array of CEQA red tape, which by the Draft Plan's own admission is "commonly used as a tool by project opponents who are more interested in halting a project than minimizing its harm to the environment." (P. 130.)

It is especially ironic that the Draft Plan devotes special care and attention to "communities of concern," which comprise roughly one-fifth of the total Bay Area population (p. 111), while utterly ignoring the effect on this demographic as a result of the economic stagnation in non-PDA's, and further ignoring the needs of 360,000 future workers in non-PDA's. The graphic illustrating the location of "communities of concern" (p. 110) indicates that they are substantially larger in geographic area than PDA's. The solution for these people is the promotion of economic development and job growth, not the stifling of economic development and job growth which will be the result under the Draft Plan's PDA oriented focus.

Similar concerns regarding non-compliance with federal law are related to the mandate in SB 375 that "[e]ach metropolitan planning organization shall prepare a sustainable communities strategy, subject to the requirements of Part 450 of Title 23 of, and Part 93 of Title 40 of, the Code of Federal Regulations, including the requirement to utilize the most recent planning assumptions considering local general plans and other factors." (Government Code section 65080(a)(b)(1)(B)). The Draft Plan utterly fails to provide this requisite information, and there is nothing at all referencing general plans and the economic impacts on all areas within the Bay Area as mandated by federal law.

In short, the Draft Plan dismally fails to even acknowledge, let alone address, the draconian negative economic impact on non-PDA's in violation of the letter and spirit of state and federal law.



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### **8. The Greenhouse Emissions Objective Will Cripple A Vast Segment of California's Economy With No Environmental Benefit**

The Plan sets the lofty goal of reducing man-made climate change by reducing local greenhouse gas emissions. Yet however noble that goal may be, the Plan must exist in a reality occupied by scarce resources and competing needs. As famed economist Thomas Sowell explained, in a world of finite resources, all economic decisions involve tradeoffs between competing values. (Thomas Sowell, *Knowledge and Decisions* (1996) 45-47.) Resources spent on one project necessarily reduce resources that could have been used for other noble ends. For example, money spent building a bridge downtown, cannot be spent feeding starving children, providing clean drinking water, or building a different road elsewhere. Accordingly, when decisions about any use of resources are made, the decision-maker must look beyond a policy's obvious goals to determine whether or not the harm created by the policy outweighs any good that it might accomplish.

The Plan fails to do this at even the most basic level. The stated goal of the Plan is a 15% reduction in local greenhouse gas emissions by the year 2035. The general justification for this goal is that reducing emissions to such a degree would do something substantial to reduce the likelihood of man-made climate change. Yet, even if the Plan were to hit that target, it would only reduce global greenhouse gas emissions by less than one-half of one percent.<sup>17</sup> A miniscule drop in global emissions would do nothing to affect man-made climate change, even assuming humanity is the cause, which is a hotly debated subject. Indeed, some climate scientists argue that anything short of a 50 percent reduction in emissions throughout the industrialized world would be ineffective in preventing catastrophic climate change.<sup>18</sup> In short there is no evidence

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<sup>17</sup> In 2007 the Environmental Protection Agency estimated total global greenhouse emissions at approximately 32 billion tons per year. (See <http://www.epa.gov/climatechange/ghgemissions/global.html>). That same year, the California government estimated Bay Area greenhouse emissions at approximately 95.8 million tons. (See [http://www.mtc.ca.gov/planning/climate/Bay\\_Area\\_Greenhouse\\_Gas\\_Emissions\\_2-10.pdf](http://www.mtc.ca.gov/planning/climate/Bay_Area_Greenhouse_Gas_Emissions_2-10.pdf)). A 15 percent reduction in that amount would amount to a reduction of 14.4 million tons per year, or .045 percent reduction in global emissions.

<sup>18</sup> Available at: <http://insights.wri.org/news/2013/03/developed-nations-must-reduce-emissions-half-2020-says-new-study>



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that the Plan would do anything more than allow Bay Area officials to pat themselves on the back for being environmentally conscious at the expense of a devastated economy, and the denial of Equal Protection and Fifth Amendment Constitutional civil rights.

Such miniscule gains simply cannot justify the concrete costs of the Plan. The Plan's own estimates place its price at approximately \$289 billion -- all of which could be spent on alternative uses, like schools, roads, or garbage clean-up. Plan p. 62. Those numbers are in addition to the loss in time and money for the individual tax-payer who will suffer delayed commutes and reduced spending money due to the proposed increases in the number of toll-stations in the Bay Area under the Plan. Additionally, under the Plan's proposed development rules, thousands of Bay Area property owners will lose the freedom to develop their property in personally or economically beneficial ways merely because they fall outside of a preferred development zone, in violation of the Fifth Amendment. To the family that wants to build a house on its property, or the small business owner that wishes to develop her property in a small town outside a PDA, this loss is very real. It is nothing less than the loss of their ability to pursue their American dream. Worse, as explained below, there are legitimate concerns that the Plan's CEQA reforms could harm the very environment the Plan aims to protect.

Yet, the Plan does not address any of these concerns. Instead it presumes the need for a 15% reduction as an absolute truth independent of its real value to the environment or the practical effects that reaching that target through the Plan's proposals could have on the citizens of the Bay Area. However important combating climate change may or may not be, it simply does not make sense to unleash so much devastation to real human interest for environmental gains that are illusory at best.

**9. There Is No Analysis Of The Feasibility of Each City And County Adopting the Requisite Legislation to Establish PDA's and PCA's, Nor Is There An Analysis of the Cost and Timeframe For Such Legislation**

SB 375 mandates submission of a Bay Area Plan that is "feasible," and if it is not than an alternative plan must be proposed. The Draft Plan is woefully inadequate in this regard. No attention is given to the "elephant in the room," namely the feasibility (or lack thereof) of nine counties and 101 cities adopting the requisite legislation to amend their general plans, specific plans, and zoning ordinances to establish the PDA's and PCA's desired by ABAG and MTC.



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This assumes in the first instance that these 110 local jurisdictions all agree to initiate the process for such legislative amendment. Let there be no doubt that such amendments are indeed legislative acts. (*See Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511.) Further, most of these jurisdictions must comply with Government Code provisions regarding requisite procedural requirements for such legislation. (*See Sounhein v. City of San Dimas* (1992) 207 Cal.App.3d 1180; Government Code section 65853 et seq.) There must also be requisite consistency between the zoning ordinance, the specific plan, and the general plan of each local jurisdiction. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 772.)

With this framework in mind, it is alarming that the Draft Plan fails to address the paramount issue of just how many local jurisdictions already have the PDA's and PCA's in place consistent with the chart in the Draft Plan (located in the page after the Table of Contents).<sup>19</sup> If all or some of the PDA's and PCA's are proposed by MTC and ABAG, but not yet enacted into law, then the Draft Plan must clearly articulate this fact to provide full disclosure. Its failure to do so is telling, particularly in light of the fact that SB 375 mandates greenhouse reductions within a certain timeframe.

Further, there is no discussion whatsoever of the timeframe and cost of such legislative enactments. The Draft Plan misleadingly implies that massive legislative process is already in place, and that a mere vote to adopt the Bay Area Plan will magically result in all of its desired PDA's and PCA's. That is simply not the case.

### **10. Many local jurisdictions have zoning ordinances which cannot be amended without voter approval, another factor which renders the Draft Plan Infeasible**

In addition to the fatal defects outlined in the preceding section, the Draft Plan utterly fails to acknowledge that many local jurisdictions throughout the Bay Area have zoning ordinances which cannot be amended without a vote of the people. (Alameda County's Measure D is but one example.) The Draft Plan will result in the violation of these Urban Growth Boundary (UGB) ordinances, and there is no analysis of the severe impediment to its objectives if voter approval is a prerequisite to implementation. The proposed PDA's are within UGB's but

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<sup>19</sup> The Draft Plan is actually imprecise on the exact boundaries of the PDA's and PCA's. With respect to the PCA's, they are imply dots on a map. With respect to the PDA's, there is nothing indicating the source of PDA boundaries (zoning? general plan?). The reader must simply assume that all land outside of the Urban Growth Boundaries are targeted for conservation without compensation to the landowner.



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smaller in geographical scope. These UGB's also typically provide that development is to be *encouraged* out to the limit of city services. Simply put, the development restrictions cannot be harmonized with existing zoning designations. Once again the feasibility of Draft Plan is severely impacted, and it is troubling that this fact was completely ignored.<sup>20</sup>

### **11. The Draft Plan Violates California's Second Unit Law**

Plan Bay Area violates California's second unit law, AB 1866 (Chapter 1062, Statutes of 2002), Government Code section 65852.2 (second-unit law) and Government Code section 65583.1 (a portion of State housing element law), effective January 1, 2003. The Draft Plan bans residential development from rural areas even though second units are permitted under state law. The Draft Plan severely restricts residential development in residential areas outside of PDAs and violates second-unit law permitting second units wherever physically possible.

Under limited circumstances, a locality may prohibit the development of second-units in single family or multifamily zones. (Government Code Section 65852.2(c)). This prohibition may only be enacted if a local jurisdiction adopts formal written findings based on substantial evidence identifying the adverse impact of second-units on the public health, safety, and welfare and acknowledging such action may limit housing opportunities in the region. (Government Code section 65852.2(c)). Prior to making findings of specific adverse impact, the agency should explore feasible alternatives to mitigate and avoid the impact. Written findings should also acknowledge efforts to adopt an ordinance consistent with the intent of second-unit law.

### **12. The Draft Plan Tramples the Constitutional Property Rights of Landowners**

The Draft Plan is a 160 page collectivist social engineering manifesto which grafts upon SB 375's narrow emissions objective as an excuse for nothing short of the complete overhaul of

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<sup>20</sup> An inherent flaw of the Draft Plan is the myth that it can comply with the SB 375 mandate, while at the same time conceding that MTC and ABAG have no control over the local land use decision making process. ("Each of the Bay Area's nine counties and 101 cities must decide for themselves what is best for their citizens and their communities." P. 2) The only exception is the extortionate nature of the ABAG discretionary funding, as discussed above.



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the Bay Area's land use process, and with it the autonomy of local governmental jurisdictions.<sup>21</sup> All undertaken by two unelected, unaccountable entities. The absurdly vague and malleable reference to the three "equities" is nowhere mandated by SB 375. Even it did, equity call for the establishment of low income housing in all areas of the Bay Area. PDA's are located in the most expensive, and most highly compacted and developed areas.

Tellingly, there is not one reference to the Constitutional ramifications of the plan. The Constitution is an essential safeguard of individual liberty against government encroachment. The purposeful disregard of the Constitution is really all one needs to know in order to assess the true motives of its authors.

The Fifth Amendment of the United States Constitution mandates just compensation for a taking of private property for public use. The Draft Plan imposes a draconian requirement that *all* non-agricultural development be crammed into the "existing urban footprint." (P. 101.) Of this, it appears that 80% of all non-nonagricultural development must be crammed into PDA's. (P.43.)<sup>22</sup> This results in a de facto taking of the economically viable use and the reasonable investment backed expectations of property owners in areas both inside and outside of the urban growth boundary areas. In particular, the Draft Plan only allows "working farms" in agricultural areas, yet existing zoning allows for rural residential and residential subdivisions. As noted above, these areas are an important source of affordable housing for workers, as opposed to the exorbitant housing costs in PDA's. There is likewise no provision for just compensation to the owners of land subject to PCA's, for the severe if not complete deprivation of economically viable use and investment backed expectations.<sup>23</sup>

The government has no authority to restrict such economic use without the payment of just compensation. Appeal to the "natural beauty of the Bay Area" (p. 101) is hardly a substitute for the payment of just compensation. If MTC and ABAG desire the property of landowners to advance its social engineering philosophy (which as shown above will *not* remotely advance job

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<sup>21</sup> Nothing in SB 375 mandates the creation of PDA's or PCA's, nor could it as it would violate local land use autonomy.

<sup>22</sup> The Draft Plan does not demonstrate that there is sufficient vacant land within PDA's to accommodate projected population increases for 28 years in accordance with the 80% development allocation. Further, the Draft Plan will require infrastructure to accommodate increased development, at great undisclosed cost.

<sup>23</sup> Fifth Amendment and due process concerns are also triggered by the likely creation of non-conforming uses if and when PDA's are actually created by the local legislative process. Most buildings within PDA's are not currently constructed in the Smart Growth design and will be non-conforming to the Draft Plan's model.



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growth, affordable housing, or the environment), they should ensure that the government pays for the privilege. As stated 50 years ago by the United States Supreme Court in *Armstrong v. United States* (1960) 364 U.S. 40, 49, constitutional protections for property rights exist “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” The Draft Plan also runs afoul of the substantive due process rights of landowners under the state and federal Constitutions.

Further, the Draft Plan fails to acknowledge the massive expense of eminent domain proceedings to convert existing PDA's to multi-family residential zones. Neither MTC nor ABAG have the power of eminent domain. The Draft Plan fails to address precisely how fully developed PDA's will house 80% of future residential development 66% of future commercial development over the next 28 years. Where will the money come from?

The true undisclosed cost of the Draft Plan's grand social engineering experiment will be astronomical in light of the Fifth Amendment's Just Compensation mandate.

### **13. SB 375 Improperly Delegates Legislation Functions to ABAG and MTC**

Article IV of the U.S. Constitution provides that “Congress shall guarantee to every state in this union a republican form of government.” “Republican government”, as that term is used in Article 4, has three distinct characteristics: popular rule, the lack of a monarchy, and the rule of law. It is presumed, for judicial purposes, that all of the existing state governments at the time of the Constitution’s ratification met these three criteria. (*In re Pfahler*, 150 Cal. 71, 78 (1906).)

It is a “cardinal principle” of California law that “the legislature cannot delegate the power to make laws to any other authority or body.” *Board of Harbor Comm'rs v. Excelsior Redwood Co.*, 88 Cal. 491,493 (1891); *See also, Davidson v. County of San Diego*, 49 Cal. App. 4th 639, 648 (1996) (“A governmental entity may not, through contract or legislation, abdicate its police power.”) Any delegation of legislative power must be accompanied by safeguards “adequate to prevent an abuse of that power.” *State Bd. of Education v. Honig*, 13 Cal.App.4th 720, 750 (1993).

Far from complying with its narrow mandate to reduce greenhouse emissions, the Draft Plan upends the entire local land use process as described at length above. This is improper legislation by unelected, unaccountable entities.



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### 14. Procedural Concerns

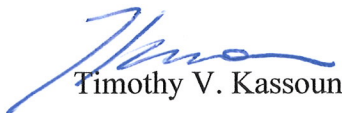
First, the Draft Plan is not a final document, and any changes to the document must trigger another comment and review period. Second, the document does not state who will vote for the plan, or in what manner the vote will be taken. Third, the document does not name the citizens' representative for Sonoma County's nine cities, and no contact person is identified.

### Conclusion

The concept of "sustainable development" is not new. It has been utilized, in one form or another, as a subterfuge for the deprivation of individual liberty. In 1977 a Constitution was drafted that contained the requirement that "property owned or used by citizens shall not...be employed to the detriment of the interests of society." It also mandated that "in the interests of the present and future generations" necessary steps are taken to protect "rational use of land" and the preservation of air and water. These words could easily be lifted from language in the Draft Plan and from SB 375, but that is not their source. The document is the 1977 Constitution of the Union of Soviet Socialist Republics.

In light of the foregoing, the Draft Plan must be substantially modified. Thank you for your attention.

Sincerely,



Timothy V. Kassouni