IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

No. A143058

BAY AREA CITIZENS,
Plaintiff and Appellant,

v.

ASSOCIATION OF BAY AREA GOVERNMENTS, et al.,
Defendants and Respondents.

On Appeal from the Superior Court of Alameda County
(Case No. RG13690631, Honorable Evelio Grillo, Judge)

APPELLANT'S OPENING BRIEF

MICHAEL E. DELEHUNT,
No. 70619
Foley & Lardner LLP
555 California Street,
Suite 1700
San Francisco, CA 94104-1520
Telephone: (415) 438-6431
E-mail: mdelehunt@foley.com

DAMIEN M. SCHIFF, No. 235101
*JONATHAN WOOD, No. 285229
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dms@pacificlegal.org
E-mail: jw@pacificlegal.org

Attorneys for Plaintiff and Appellant Bay Area Citizens

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION TWO	Court of Appeal Case Number: A143058
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: Damien M. Schiff, No. 235101; Jonathan Wood, No. 285229 Pacific Legal Foundation 930 G Street Sacramento, CA 95814 TELEPHONE NO.: (916) 419-7111 FAX NO. *(Optional)*: (916) 419-7747 E-MAIL ADDRESS *(Optional)*: dms@pacificlegal.org; jw@pacificlegal.org ATTORNEY FOR *(Name)*: Plaintiff and Appellant Bay Area Citizens	Superior Court Case Number: RG13690631 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: Bay Area Citizens RESPONDENT/REAL PARTY IN INTEREST: Association of Bay Area Governments	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Plaintiff and Appellant Bay Area Citizens

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain)*:**
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 8, 2014

Jonathan Wood
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTRODUCTION AND SUMMARY OF ARGUMENT 1

BACKGROUND AND STATEMENT OF THE CASE 4

A. The Intersection of Transportation Planning and Greenhouse Gas Reduction Efforts 4

B. Environmental Impact Assessment Under the California Environmental Quality Act 7

C. Plan Bay Area 9

D. The Draft Environmental Impact Report 10

E. The Citizens' Comments on the Draft Environmental Impact Report 11

F. The Board's Evaluation of the Plan 13

G. The Final Plan and Final Environmental Impact Report 13

1. The Final Environmental Impact Report's Discussion of the "No Project" Alternative 13

2. The Final Environmental Impact Report's Rejection of the Citizens' Proposed Alternative 15

3. Statement of Overriding Considerations 15

H. The Citizens' CEQA Challenge 16

STANDARD OF REVIEW 17

Page

ARGUMENT 19

I. S.B. 375 DOES NOT COMPEL THE AGENCIES' INTERPRETATION 20

A. The Text of S.B. 375 Does Not Compel the Agencies' Interpretation 20

B. The Supposed "Purpose" of S.B. 375 Does Not Compel the Agencies' Interpretation 22

II. THE TARGETS DO NOT FORBID CONSIDERATION OF THE STATEWIDE MANDATES 25

III. THE BOARD HAS NEVER FORMALLY ADOPTED OR ENDORSED THE AGENCIES' INTERPRETATION 29

A. The Scoping Plan Does Not Compel the Agencies' Interpretation 29

B. The Board Staff's Draft Technical Evaluation Cannot Compel the Agencies' Interpretation 31

IV. THE AGENCIES' ERRONEOUS INTERPRETATION OF S.B. 375 AND THE TARGETS RENDERS THE PLAN'S ENVIRONMENTAL IMPACT REPORT LEGALLY INADEQUATE 33

A. The EIR Fails to Accurately Describe the Plan's Basic Objectives 34

B. The EIR Fails to Adequately Assess the "No Project" Alternative 35

C. The Agencies Improperly Rejected the Citizens' Proposed Alternative 36

D. The Agencies Failed to Adequately Respond to the Citizens' Comments 37

E. The Agencies' CEQA Errors Are Prejudicial 38

Page

CONCLUSION 38

CERTIFICATE OF COMPLIANCE 40

DECLARATION OF SERVICE

TABLE OF AUTHORITIES

Page

Cases

Alejo v. Torlakson, 212 Cal. App. 4th 768 (2013) 22

Armistead v. State Personnel Bd., 22 Cal. 3d 198 (1978) 33

Cal. Native Plant Soc'y v. City of Santa Cruz,
177 Cal. App. 4th 957 (2009) 17-18

California Youth Authority v. State Personnel Bd.,
104 Cal. App. 4th 575 (2002) 19

Carter v. Cal. Dep't of Veterans Affairs, 38 Cal. 4th 914 (2006) 24

Citizens for East Shore Parks v. California State Lands Comm'n, 202 Cal. App. 4th 549 (2011) 35

Citizens of Goleta Valley v. Board of Supervisors,
52 Cal. 3d 553 (1990) 18, 20, 33

Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts,
No. D063288, 2014 WL 6614394
(4th Dist. Ct. App. Nov. 24, 2014) 23

Great Oaks Water Co. v. Santa Clara Valley Water Dist.,
170 Cal. App. 4th 956 (2009) 18

In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings, 43 Cal. 4th 1143 (2008) 3

Laurel Heights Improvement Ass'n of San Francisco v. Regents of Univ. of Cal., 47 Cal. 3d 376 (1988) 33

Long Beach Police Officers Ass'n v. City of Long Beach,
46 Cal. 3d 736 (1988) 28

Mann v. Cmty. Redevelopment Agency,
233 Cal. App. 3d 1143 (1991) 37

Page

McBail & Co. v. Solano County Local Agency Formation Comm'n,
62 Cal. App. 4th 1223 (1998) 30

Mira Monte Homeowners Ass'n v. Cnty. of Ventura,
165 Cal. App. 3d 357 (1985) 35

Neighbors for Smart Rail v. Exposition Metro Line Construction Auth., 57 Cal. 4th 439 (2013) 38

Planning & Conservation League v. Dep't of Water Resources,
83 Cal. App. 4th 892 (2000) 33-35

San Joaquin Raptor Rescue Center v. County of Merced,
149 Cal. App. 4th 645 (2007) 18

San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District,
139 Cal. App. 4th 1356 (2006) 18

Torres v. Parkhouse Tire Service, Inc., 26 Cal. 4th 995 (2001) 23

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412 (2007) 17

Statutes

23 U.S.C. § 134(c) 4

§ 134(i) 4

49 U.S.C. § 5303(i) 4

Cal. Stats. 2008, ch. 728, § 1(c), at 5065 23

Gov't Code § 11340.5(a) 32

§ 11340.9(f) 33

§ 11342.600 32

§ 65080(a) 4

Page

§ 65080(b)(2) 5

§ 65080(b)(2)(A) 5

§ 65080(b)(2)(A)(i) 27

§ 65080(b)(2)(A)(iii) 5, 22-23, 30

§ 65080(b)(2)(A)(iv) 5, 22

§ 65080(b)(2)(A)(v) 20-21

§ 65080(b)(2)(B) 5

§ 65080(b)(2)(B)(vii) 20-21

§ 65080(b)(2)(J) 31

§ 65080(b)(2)(K) 7

§ 65584.04(i) 7

Health & Safety Code § 38550 4

§ 38551 4

Pub. Res. Code § 21002.1(a) 8

§ 21061 8

§ 21065(a) 7

§ 21080(a) 7

§ 21080(d) 7

§ 21081 9

§ 21081(b) 35

§ 21091 9

Page

§ 21091(d)(1)-(2) 9

§ 21092 9

§ 21100 8

§ 21168.5 17

§§ 21000-21189.3 3

Regulations

23 C.F.R. § 450.308 . . . . 4, 7

§ 450.322(e) 4

Cal. Code Regs. tit. 13, § 1900 6

§ 1956.8 6

§ 1960.1 6

§ 1961 6

§ 1961.1 6

§ 1961.2 6

§ 1961.3 6

§ 1962.1 6

§ 1962.2 6

§ 1976 6

Cal. Code Regs. tit. 14, § 15002(h) 9

§ 15087 9

§ 15088(c) 9, 37

Page

§ 15091(a) 9

§ 15092(b) 9

§ 15093(a) 35

§ 15093(c) 9

§ 15105(a) 9

§ 15126.6(a) 8, 36

§ 15126.6(e) 8, 35

§ 15126.6(e)(1) 8

§ 15126.6(e)(3)(C) 8

§ 15126.6(f) 37

§ 15357 7

§ 15358 7

§ 15378(a)(1) 7

§ 15384(a) 18

Cal. Code Regs. tit. 17, §§ 95480-95490 5

Miscellaneous

S.B. 375, ch. 728, § 1(e) 5

§ 1(i) 5

INTRODUCTION AND SUMMARY OF ARGUMENT

State law requires that the Association of Bay Area Governments (Association) and the Metropolitan Transportation Commission (Commission) (collectively "the Agencies") produce a sustainable communities strategy ("Plan Bay Area" or "the Plan") for the Bay Area that, if implemented, will achieve targeted reductions in greenhouse gas emissions from the region's car and light-duty trucks. This case concerns the interpretation of that state law, the Sustainable Communities and Climate Protection Act of 2008 ("S.B. 375"), as well as the regional targets that the California Air Resources Board has established under it.

In the Agencies' view, the Bay Area's targets—a 7% per capita reduction in greenhouse gas emissions by 2020, and a 15% reduction by 2035—should not be interpreted according to their plain text but instead should be construed so as to force far more dramatic reductions in greenhouse gas emissions. Following this approach, the Agencies crafted a Plan for the Bay Area that, in purportedly being "necessary" to reach the regional targeted emission reductions, *entirely ignores* all expected greenhouse gas reductions attributable to various statewide emission reduction programs. The Agencies argue that the targets, rather than simply requiring what they plainly state—per capita passenger vehicle emissions be reduced by 7% by 2020 and 15% by 2035 (as S.B. 375 requires)—instead demand far more. Specifically, the

Agencies contend that they must meet the regional targets *solely* through transportation planning, which to the Agencies means heavy reliance on high-density land-use zoning[1] and certain Agency-favored forms of public transportation.[2] Thus, conveniently for the Agencies, their reading of S.B. 375 and the regional targets essentially foreordains that the Plan must incorporate some version of the Agencies' preferred high-density land-use vision in order for the Bay Area to meet the regional targets.

Appellant Bay Area Citizens—a nonprofit group that supports and protects the interests of California citizens in issues such as land-use regulation, property rights, local community control, and the environment—initiated this action to stop the Agencies from foisting their living preferences on an unwilling populace. The Citizens contend that state law is *not* a straitjacket. Contrary to the Agencies' view, S.B. 375 gives regional transportation agencies ample discretion in how to construct a sustainable communities strategy. *Nothing* in that statute, the regional targets adopted thereunder, or any agency interpretation thereof, *compels* the Agencies to ignore the reductions attributable to statewide programs in formulating the Plan.

---

[1] For example, the Plan requires 78% of new housing and 62% of new jobs to be located within just 5% of the region's surface area. AR000282.

[2] Principally light and heavy rail. AR000292, AR034821-AR034825.

Yet it is this key erroneous interpretation of S.B. 375 and the regional targets—"we've got to do it this way and no other"—that vitiates the Plan's environmental impact report which the Agencies produced under the California Environmental Quality Act (CEQA), Pub. Res. Code §§ 21000-21189.3. In that report, the Agencies: (1) defined one of the Plan's basic objectives as meeting the regional targets *while ignoring* statewide emission reduction programs; (2) constructed a "no project" alternative that assumed the contrary-to-fact premise that statewide emission reduction programs do not exist and will have *no impact* on the region's ability to meet the regional targets; (3) collected an array of purportedly "reasonable" alternatives to the Plan, all of which adopted to some degree the Plan's high-density vision and none of which incorporated statewide emission reduction programs to meet the regional targets; and (4) answered the Citizens' critiques of the Plan with the question-begging response that S.B. 375 mandates the Agencies' blindered approach.

A core purpose of CEQA is to promote informed public decision-making. *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal. 4th 1143, 1162 (2008). The Agencies have violated that purpose in adopting a sustainable communities strategy and environmental impact report that do not comport with reality. The people of the Bay Area deserve better. For the reasons set forth below, the

Agencies' approval of the Plan and certification of the report should be rescinded.

BACKGROUND AND STATEMENT OF THE CASE

A. The Intersection of Transportation Planning and Greenhouse Gas Reduction Efforts

Federal and state law require that the Commission prepare and regularly update a regional "transportation plan," a planning and fiscal blueprint for transportation and road-related projects. *See* 23 U.S.C. § 134(c), (i); 49 U.S.C. § 5303(i); Gov't Code § 65080(a). Producing a legally adequate transportation plan is important for a community, because the transportation plan makes the area eligible for considerable federal highway and transportation funding. *See* 23 C.F.R. § 450.308. Federal law places various constraints on how metropolitan planning organizations such as the Commission produce their transportation plans. *See, e.g.*, 23 C.F.R. § 450.322(e) (requiring the use of the "latest planning assumptions").

State law also provides important constraints on the transportation planning process. In 2006, the Legislature passed the California Global Warming Solutions Act of 2006 (popularly known as A.B. 32), which requires California to reduce its statewide greenhouse gas emissions to 1990 levels by 2020. Health & Safety Code §§ 38550, 38551. In 2008, the Legislature passed S.B. 375, which coordinates transportation and housing planning

processes with A.B. 32's greenhouse-gas-reduction mandate. *See* S.B. 375, ch. 728, § 1(e), (i). S.B. 375 requires transportation agencies to produce a "sustainable communities strategy," which must be integrated with a region's transportation plan. Gov't Code § 65080(b)(2). For the Bay Area, the Agencies have joint responsibility for the strategy's production. *Id.* § 65080(b)(2)(B).

A strategy is supposed to set forth a course whereby the region will achieve the S.B. 375 greenhouse-gas-reduction targets that the Board has established. *See id.* § 65080(b)(2)(A). The strategy, as well as the S.B. 375 targets, are to be updated on a regular basis. Gov't Code § 65080(b)(2)(A)(iv). As previously noted, for the Bay Area the Board set targets of a 7% reduction in per capita greenhouse emissions from cars and light duty trucks by 2020, and 15% by 2035. *See* Appellant's App. at 13. Importantly, the targets must "take into account greenhouse gas emission reductions that will be achieved by improved vehicle emission standards, changes in fuel composition, and other measures [the Board] has approved that will reduce greenhouse gas emissions in the affected regions." Gov't Code § 65080(b)(2)(A)(iii).

The most prominent of these statewide greenhouse-gas-reduction measures are: (i) the Low Carbon Fuel Standard, Cal. Code Regs. tit. 17, §§ 95480-95490, which reduces the "carbon intensity" of vehicle fuel sold within California; (ii) the California Clean Cars Standards (commonly known as "Pavley I," after the sponsor of the authorizing legislation), which require

substantial miles-per-gallon improvements for California passenger vehicles through model year 2016, *see* Cal. Code Regs. tit. 13, §§ 1961, 1961.1; and (iii) the California Advanced Clean Cars Standards (commonly known as "Pavley II"), which require further miles-per-gallon improvements for California passenger vehicles after 2016, *see id.* §§ 1900, 1956.8, 1960.1, 1961, 1961.2, 1961.3, 1962.1, 1962.2, 1976 (collectively "the Statewide Mandates").

In 2008, the Board adopted a Climate Change Scoping Plan to identify measures to achieve the greenhouse-gas-reduction goals of A.B. 32. These measures were projected to reduce emissions by nearly 30 percent, or 174 million metric tons, by the year 2020. AR008779, AR000764. The Scoping Plan divides these reductions among eight sectors: transportation, electricity, commercial and residential, industry, recycling and waste, high global warming potential gases, agriculture, and forest net emissions. AR008783, AR008785. The S.B. 375 targets and the Statewide Mandates were assigned to the transportation sector, with the Board specifying that 31.7 million metric tons would come from the Pavley I & II Standards, AR008811, 15 million metric tons would come from the Low Carbon Fuel Standard, AR008817, and 5 million metric tons would come from the S.B. 375 targets, AR008821. *See* AR008787.

B. Environmental Impact Assessment Under the California Environmental Quality Act

Although it does not itself regulate the use of land, Gov't Code § 65080(b)(2)(K), a sustainable communities strategy provides powerful tools to coerce a local government to comply with the strategy's land-use prescriptions, even over the wishes of local residents, taxpayers, and their elected representatives. Therefore, the strategy has a significant impact on the region's environment, for at least two reasons. First, the strategy is incorporated into the region's transportation plan, which largely dictates which transportation projects will be funded and built. *Cf.* 23 C.F.R. § 450.308. Second, the region's housing need allocation, to which local governments must conform their general plans, must be consistent with the strategy. *See* Gov't Code § 65584.04(i). Because of these impacts, the promulgation of a strategy triggers CEQA.

Under CEQA, an agency must analyze the environmental impact of any discretionary project that will cause a direct physical change to the environment, or a reasonably foreseeable indirect physical change to the environment. *See* Pub. Res. Code §§ 21065(a), 21080(a); Cal. Code Regs. tit. 14, §§ 15378(a)(1), 15357, 15358. Where the project may have a significant impact on the environment, the lead agency must prepare an environmental impact report (EIR). Pub. Res. Code § 21080(d).

An EIR must "identify the significant effects on the environment of a project, . . . identify alternatives to the project, and . . . indicate the manner in which those significant effects can be mitigated or avoided." Pub. Res. Code § 21002.1(a); *see id.* § 21061. The EIR must also include a "detailed statement" discussing the project's significant effects, any unavoidable significant effect, any irreversible significant effect, mitigation measures, alternatives to the project, and the reasons various effects on the environment have been determined to be insignificant. *See* Pub. Res. Code § 21100.

In addition to identifying and discussing all of the project's significant environmental effects, an EIR must "describe a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." Cal. Code Regs. tit. 14, § 15126.6(a). The EIR must also consider a "no project" alternative. *Id.* § 15126.6(e). Once the "no project" alternative is identified, the lead agency must analyze its impacts by projecting what would reasonably be expected to occur in the foreseeable future if the project were not approved. *Id.* § 15126.6(e)(3)(C). The purpose of the "no project" alternative is to allow decision-makers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project. *Id.* § 15126.6(e)(1).

Following the preparation of the draft EIR, the lead agency must make that document available for public comment. Pub. Res. Code §§ 21091, 21092; Cal. Code Regs. tit. 14, §§ 15087, 15105(a). A lead agency must "consider" and "evaluate" every comment submitted on a draft EIR and prepare a written response describing the disposition of each significant environmental issue raised therein. Pub. Res. Code § 21091(d)(1)-(2); Cal. Code Regs. tit. 14, § 15088(c).

Finally, a public agency may not approve or carry out a project that will have a significant effect on the environment unless (1) the effect is mitigated to insignificance, (2) the effect is avoided through adoption of an alternative, or (3) the agency determines that mitigation is infeasible and the project's overriding benefits outweigh the significant effect. *See* Pub. Res. Code § 21081; Cal. Code Regs. tit. 14, §§ 15002(h), 15091(a), 15092(b), 15093(c).

C. Plan Bay Area

Plan Bay Area is the first sustainable communities strategy for the Bay Area. *See* AR004023. The Plan has two legislatively mandated goals. First, the Plan must set forth a system of development, based on the latest demographic predictions, that will ensure that the region will achieve the S.B. 375 targets that the Board has assigned. *See* AR034739. Second, the Plan must identify areas within the Bay Area sufficient to house the region's projected population, based on figures that the Department of Housing and Community Development has produced. *Id*. The Plan also has several

"voluntary" goals, adopted by the Agencies, pertaining to community health and safety, open space, transportation, and similar concerns. AR034753.

The Plan attempts to achieve the S.B. 375 targets primarily through reduction in the vehicle miles traveled of passenger motorcars and light trucks. *See* AR001690 ("Reducing per-capita [vehicle miles traveled] is the primary strategy for regional agencies to achieve the [greenhouse gas] reduction . . . ."). The Plan aims to reduce vehicle miles traveled principally through high-density land-use patterns. *See* AR034830. Specifically, the Plan requires that 78% of the new housing and 62% of the new jobs to be expected to be created in the Bay Area by 2040 must be located within priority development areas. *See* AR000282. There are approximately 200 such areas, AR034777, comprising only about 5% of the region's surface area.[3]

D. The Draft Environmental Impact Report

On April 2, 2014, the Agencies released the Plan's draft EIR. The draft EIR anticipates that the Plan will have 39 significant environmental impacts. *See* AR003528, AR000352-AR000414. The draft EIR also discusses five alternatives. Alternative 1 is "no project." Alternative 2 is the proposed Plan. Alternative 3, "Transit Priority Focus," call for higher densities than those found in the Plan. Alternative 4, "Enhanced Network of Communities," calls

---

[3] The Plan also seeks to reduce vehicle miles traveled by increasing mass transit ridership, principally through the construction and extension of light and heavy rail. *See* AR000292, AR034821-AR034825.

for development somewhat less dense than that proscribed in the Plan. Finally, Alternative 5, “Environment, Equity and Jobs,” seeks to maximize affordable housing while also achieving the greenhouse-gas-reduction targets. AR000346-AR000347. According to the Agencies, Alternatives 3 through 5 would meet both mandatory goals, whereas the “no project” alternative would not meet the greenhouse-gas-reduction targets of S.B. 375, because the Agencies did not consider the emissions reductions attributed to the Statewide Mandates. *See* AR034850.

E. The Citizens’ Comments on the Draft Environmental Impact Report

Throughout the process leading up to the Plan’s adoption, many citizen groups, including the Citizens and its experts, expressed strong opposition to the Plan. The Citizens’ comments highlight serious legal and policy shortcomings of the Plan as well as to the Agencies’ environmental impact analysis. Chief among these is that, by ignoring the Statewide Mandates when measuring the greenhouse-gas-emission impacts of the Plan and its alternatives, the Plan creates a false need for its draconian high-density development prescriptions. If, instead, the Plan were to take the Statewide Mandates into account, the public would understand that the S.B. 375 targets can be reached without the Plan’s drastic land-use restrictions. *See* AR003146-AR003153, AR003170-AR003171.

In their comments, the Citizens also underscored that environmentally sensitive alternatives to the Plan exist that would achieve the Plan's basic objectives of greenhouse gas reduction and housing development, without the Plan's acknowledged significant and unavoidable impacts. "The Bay Area Citizens Transportation and Housing Alternative," AR003156-AR003159, AR003381-AR003382, recommends, among several points, that the region's sustainable community strategy: (i) expand and improve the existing transit system; (ii) significantly reduce fares to encourage ridership by low- and middle-income individuals, which will reduce reliance on older, high-emission vehicles; and (iii) de-emphasize the expansion of low-cost-effective and high-carbon-footprint rail transit and ferry service. The Citizens' alternative reasonably relies on anticipated substantial greenhouse gas reductions that will occur over the planning horizon owing to the Statewide Mandates. *See* AR003153 (noting that the greenhouse gas reductions attributable to these measures are more than 16 times the reductions that allegedly will occur as a result of the Plan's housing mandates and transit subsidies). *See also* AR003381-AR003382. The Citizens' alternative has the happy consequence of achieving the Plan's housing mandates while respecting the housing preferences of Bay Area residents. *See* AR003157. Finally, by de-emphasizing rail expansion and toll roads, the Citizens' alternative will generate more money for road maintenance. *Id*.

F. The Board's Evaluation of the Plan

In June, 2013, after the public comment period concluded, the Board's staff prepared a draft technical evaluation of the Plan to determine whether it would meet the targets. AR043009. It concludes that the Plan would achieve the emissions reductions required to reach the target and also stated that the Agencies "[had] appropriately not included [greenhouse gas] emissions reductions from the [Statewide Mandates]." AR043029. The report notes, however, that it does not necessarily reflect the Board's views or policies. AR043010.

G. The Final Plan and Final Environmental Impact Report

On July 19, 2013, the Agencies certified the Plan's final EIR and adopted the Plan. The final EIR purports to assess the environmental impacts of the Plan, as well as the impact of an array of purported reasonable alternatives to the Plan. The final EIR comprises the draft EIR, along with amendments made after the comment period, comments submitted, and responses thereto. As discussed below, none of the final EIR's changes to the draft EIR remedies the Citizens' criticisms. *Cf.* AR003902.

1. The Final Environmental Impact Report's Discussion of the "No Project" Alternative

The final EIR concludes that the "no project" alternative would result in the region missing its greenhouse-gas-reduction targets. AR004008, AR001317. In reaching that conclusion, the final EIR (like the draft EIR)

excludes consideration of the Statewide Mandates in assessing compliance with the targets. *See* AR001688-AR001690. *See also* AR003644 (the final EIR "estimate[s] carbon dioxide emissions assuming a hypothetical future in which new vehicle technologies and the increased use of low carbon fuel are not present"). The final EIR asserts that S.B. 375 forbids taking into account the Statewide Mandates, explaining that to rely on the undeniable benefits of these programs would be impermissible "double counting." The final EIR asserts that the Board's Scoping Plan, as well as the Board staff's draft technical evaluation of the Plan, support the final EIR's position that the Board itself interprets the greenhouse-gas-reduction targets to exclude any consideration of the Statewide Mandates. AR001688-AR001690. The final EIR also asserts that it cannot take into account the California Advanced Clean Car Standards for any purpose, notwithstanding that these standards were formally adopted seven months before the EIR process began, and went into effect in December, 2012, months before the draft EIR was released. The final EIR reasons that the Agencies' computer modeling software—EMFAC 2011—was developed before the adoption of these standards, and that there was insufficient time to produce an update that incorporated the Advanced Standards. AR003648, AR003650.

2. The Final Environmental Impact Report's Rejection of the Citizens' Proposed Alternative

The final EIR fails to give the Citizens' proposal meaningful consideration in its response. AR003651. Instead, the final EIR states that it is not required to consider every possible alternative, and that existing alternatives adequately incorporate the main parts of the Citizens' proposal. Yet the final EIR does not explain how the existing alternatives are adequate, given that they—unlike the Citizens' proposal—ignore the greenhouse-gas-reduction benefits of the Statewide Mandates. In other words, the final EIR's rejection of the Citizens' proposal is based entirely on the Agencies' faulty interpretation of S.B. 375.

3. Statement of Overriding Considerations

In adopting the Plan and final EIR, the Agencies also approved a Statement of Overriding Considerations, given the final EIR's conclusion that the Plan will have dozens of significant environmental impacts that cannot be mitigated to insignificance. *See* AR00167-AR000170 (noting, inter alia, increased exposures to particulate matter and other exhaust pollutants because new high-density development will be located close to transportation hubs and corridors). The Statement asserts that overriding considerations—among them meeting the S.B. 375 targets and housing all the projected population—merit adoption of the Plan, notwithstanding its significant environmental impacts. *See* AR000185-AR000189.

The Statement acknowledges that the "no project" alternative "will lessen some of the proposed Plan's potentially significant and unavoidable impacts." AR00174. But the Statement goes on to reject the "no project" alternative on three grounds: (a) it is not the "environmentally superior" alternative (neither, of course, is the Plan, *see* AR000181); (b) it will not meet the S.B. 375 targets; and (c) it is otherwise legally infeasible. AR000175. The Statement does not discuss the Citizens' proposal.

H. The Citizens' CEQA Challenge

In August, 2013, the Citizens filed a petition for writ of mandate, challenging the EIR's adequacy under CEQA. Appellant's App. at 426. In March, 2014, the Citizens moved for judgment on the petition, arguing that: (a) the Agencies failed to adequately describe a basic plan objective because they relied on a legally incorrect interpretation of S.B. 375 and the targets; (b) because of the Agencies' faulty interpretation of S.B. 375, the Agencies incorrectly assessed the "no project" alternative; (c) even if the Agency were correct about S.B. 375, CEQA still requires that the "no project" alternative to be based on a factually accurate forecast (including the reductions from the Statewide Mandates); (d) because of their erroneous interpretation of S.B. 375, the Agencies failed to adequately consider the Citizens' proposed alternative; and (e) because of their faulty statutory interpretation, the Agencies failed to adequately respond to the Citizens' comments.

On July 2, 2014, the superior court denied the petition in its entirety, holding that S.B. 375 compels the Agencies' interpretation. Appellant's App. at 331. The court explained that a contrary view—one that would take account of the Statewide Mandates—would be inconsistent with the regional focus of sustainable communities strategies. *Id.* at 343-48. Moreover, a contrary reading, according to the court, would be inconsistent with how the Board, through its adoption of the Scoping Plan, has interpreted S.B. 375. *Id.* at 346-48. On September 8, 2014, the court entered final judgment in favor of the Agencies. *Id.* at 364. On September 19, 2014, the Citizens filed their notice of appeal to this Court. *Id.* at 406.

STANDARD OF REVIEW

Appellate review of a trial court's decision in a CEQA case is de novo. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 427 (2007). Judicial review of CEQA challenges to quasi-legislative decision-making, such as the Plan, are reviewed for "prejudicial abuse of discretion." Pub. Res. Code § 21168.5. *Cf. Cal. Native Plant Soc'y v. City of Santa Cruz*, 177 Cal. App. 4th 957, 984 (2009). "[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th at 435.

A court reviews de novo whether an agency has proceeded in the manner required by law, "scrupulously enforc[ing] all legislatively mandated CEQA requirements." *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 564 (1990). "[A]n agency's failure to comply with the procedural requirements of CEQA is prejudicial when the violation thwarts the [a]ct's goals by precluding informed decision-making and public participation." *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District*, 139 Cal. App. 4th 1356, 1375 (2006). Thus, an environmental impact report "will be found legally inadequate—and subject to independent review for procedural error—where it omits information that is both required by CEQA and necessary to informed discussion." *California Native Plant Society*, 177 Cal. App. 4th at 986.

In contrast, when reviewing a challenge to agency factual findings and determinations, a court applies the substantial evidence standard. *San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal. App. 4th 645, 654 (2007). Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." Cal. Code Regs. tit. 14, § 15384(a). Thus, a court must confirm that "the record contains relevant information that a reasonable mind might accept as sufficient to support the conclusion reached." *Great Oaks Water Co. v. Santa Clara Valley Water Dist.*, 170 Cal. App. 4th 956, 968 (2009). The reviewing

court must consider all relevant evidence, "including evidence that fairly detracts from the evidence supporting the agency's decision." *California Youth Authority v. State Personnel Bd.*, 104 Cal. App. 4th 575, 579 (2002).

ARGUMENT

S.B. 375 directs the Agencies to draft a sustainable communities strategy that will achieve the regional targets. The statute, however, is silent as to how the Agencies must go about meeting this obligation, and the Board—the state's principal greenhouse gas regulatory agency—has not provided any formal guidance. Thus, the law gives the Agencies considerable freedom in devising these strategies.

But what the law, particularly CEQA, does not countenance is precisely what the Agencies have done with the Plan and its EIR: give the public the false impression that the Agencies' approach is the *only* approach to target-meeting that the law countenances. Whether or not the Agencies' interpretation is supportable, the Citizens' interpretation—allowing regional transportation agencies at the very least to take account of statewide emission reduction efforts—*is* a reasonable approach, one that is not only consistent with the statute but also, like the EIR's "no project" alternative, is considerably less damaging to the physical environment. *See* AR00174 ("no project" alternative); AR003156-AR003159) (Citizens' proposed alternative).

Because the Agencies' interpretation is not *compelled* by S.B. 375 or the targets, the EIR's assessment of the Plan's basic objectives, the "no

project" alternative, the Plan's alternatives, the Citizens' proposed alternative, and the Citizens' comments, is necessarily and fundamentally flawed. And for that reason, the Plan's CEQA documentation fails to satisfy that statute's core purpose of facilitating informed public decision-making. *See Citizens of Goleta Valley*, 52 Cal. 3d at 564.

I

S.B. 375 DOES NOT COMPEL THE AGENCIES' INTERPRETATION

A. The Text of S.B. 375 Does Not Compel the Agencies' Interpretation

S.B. 375 imposes no limitation on how to achieve the targets that the Board has established. To the contrary, the statute authorizes the Board to establish the targets using *any* metric it deems appropriate, including a comprehensive measure of per capita emissions that takes into account the impact of the Statewide Mandates' implementation. *See* Gov't Code § 65080(b)(2)(A)(v) ("The greenhouse gas emission reduction targets may be expressed in gross tons, tons per capita, tons per household, or in any other metric deemed appropriate by the state board."). The statute in fact only requires that a sustainable communities strategy set forth a development forecast that, when combined with the region's transportation network, will reduce greenhouse gas emissions such that the region will meet the targets. *See id.* § 65080(b)(2)(B)(vii) (a strategy must "set forth a forecasted

development pattern for the region, which . . . will reduce the greenhouse gas emissions from automobiles and light trucks to achieve, if there is a feasible way to do so, the greenhouse gas emission reduction targets"). Thus, contrary to the Agencies' evident wish, S.B. 375 simply does *not* mandate that these requirements be met in a particular manner, *i.e.*, by excluding consideration of the Statewide Mandates.

That sustainable communities strategies are regional plans does not compel the Agencies' interpretation. The mere fact that a sustainable communities strategy is regionally focused is no reason to suppose that the Legislature intended for the Agencies to ignore the Statewide Mandates. What happens at a statewide level necessarily affects the constituent regional parts of the state. It therefore makes sense that, even with a regionally focused plan, the Agencies still should take account of the Statewide Mandates to avoid producing an arbitrary and contrary-to-fact plan. And for its part, the Legislature has made clear that the decision as to how to set the targets (and what to include within them) is left to the Board's discretion. *See* Gov't Code § 65080(b)(2)(A)(v). In short, the Legislature simply has not mandated the Agencies' hyper-regional approach.

To the contrary, the Agencies' approach is itself legally suspect, particularly given S.B. 375's mandate that the regional targets must take account of the greenhouse-gas-reduction impacts of the Statewide Mandates (among other factors) and be updated in light of changes to those same factors.

See Gov't Code § 65080(b)(2)(A)(iii)-(iv). The Agencies have never explained, either in the EIR or in the briefing below, how their ignoring of the Statewide Mandates in performing the Plan's target-reaching analysis is consistent with S.B. 375's requirement that the Board take those very same factors into account when setting the targets.

Finally, even if S.B. 375 does not compel the Citizens' interpretation, that interpretation is nevertheless a reasonable interpretation of the statute. *Cf. Alejo v. Torlakson*, 212 Cal. App. 4th 768, 788 (2013) (authorizing the application of "reason, practicality, and common sense" in interpreting statutory language). Considering regional transportation planning and the Statewide Mandates together as part of a cumulative target analysis is a sensible approach to ensure that the two factors (which necessarily affect and interact with the other) complement rather than frustrate each other. Because S.B. 375 is amenable to the Citizens' interpretation, the Plan EIR's foundational assumption—S.B. 375 *compels* the Agencies to exclude consideration of the Statewide Mandates in the Plan's target analysis, *see, e.g.*, AR001688-AR001690—is false.

B. The Supposed "Purpose" of S.B. 375 Does Not Compel the Agencies' Interpretation

Below, the Agencies supported their interpretation of S.B. 375 through reliance on the statute's uncodified findings. Those findings reveal that the

Legislature evidently assumed (incorrectly, as it turns out[4]) that the Statewide Mandates would not be sufficient to meet the state's emission reduction goals without reliance on significant land-use and transportation policy changes. *See* Cal. Stats. 2008, ch. 728, § 1(c), at 5065. *See also Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts*, No. D063288, 2014 WL 6614394, at *4 (4th Dist. Ct. App. Nov. 24, 2014) (noting the same). Based on this finding, the Agencies concluded that the Legislature wanted *only* emission reductions from land-use and transportation changes to be considered in determining whether a sustainable communities strategy will meet the regional targets. The Agencies' argument is without merit, for several reasons.

First, the Agencies' argument must be rejected because it results in a mere legislative finding trumping a clear legislative command. *Cf. Torres v. Parkhouse Tire Service, Inc.*, 26 Cal. 4th 995, 1003 (2001) (if a statute is clear, reliance on legislative purpose or history is improper). As explained above, S.B. 375 expressly requires the Board to take the Statewide Mandates into account when setting the regional targets. *See* Gov't Code § 65080(b)(2)(A)(iii). Whatever the Legislature may have *thought* would be necessary to achieve the state's emission reduction goals is legally irrelevant

---

[4] *See* AR030556-030558 (EIR comment letter citing studies noting that emission levels are already at or about 1990 levels); AR001689 (EIR observing that, had statewide greenhouse-gas-reduction policies been taken into account, the Plan "could have simply stated that the Bay Area meets its emissions reduction targets solely through statewide clean technology initiatives").

given the Legislature's plain *command* that the Statewide Mandates be taken into account as part of the greenhouse gas reduction component of a sustainable communities strategy. *See id.*

Second, the Legislature's prognostications about meeting A.B. 32's goals have no bearing on how to interpret the obligations that *S.B. 375* imposes. *Cf. Carter v. Cal. Dep't of Veterans Affairs*, 38 Cal. 4th 914, 925 (2006) (statements of legislative purpose "do not confer power, determine rights, or enlarge the scope of a measure"). The Board itself has underscored that "SB 375 exists independently of AB 32 as a means for the State to reduce greenhouse gas emissions from the transportation sector in combination with other related measures and regulations the Board has approved and will consider for fuels and vehicles." Appellant's App. at 17. Although the Legislature may have assumed that reductions attributable solely to land-use and transportation planning were necessary to achieve A.B. 32's goals, that assumption does not mean that any such reductions would be necessary to meet the *S.B. 375 targets*.

Third, the Agencies' position presupposes that the regional transportation sector *must* achieve a certain quantum reduction in emissions, regardless of anything else happening in the state. In contrast, the Board itself has acknowledged that A.B. 32 does *not* require reductions "from any particular source category (including transportation) and no absolute reduction from any particular source category." *Id.*

Finally, the Agencies' reliance on the Legislature's assumption to misinterpret S.B. 375 could actually *frustrate* S.B. 375's goal of reducing transportation-sector greenhouse gas emissions. The Statewide Mandates guarantee that the car and light trucks that will travel on Bay Area thoroughfares over the Plan's life will become increasingly more emission-efficient. Yet the Plan assumes away that improved efficiency, and, to make up for the difference, seeks among other things to incentivize the public's use of heavy rail and transit, *see* AR000292, AR034821-AR034825, modes of transportation which are *not* subject to the Statewide Mandates' most stringent efficiencies. *See* AR000763 (discussing scope of the Pavley I & II Standards). Thus, the Agencies' blind adherence to the Legislature's erroneous finding could result in the Plan's irrational dedication to producing more, not fewer, greenhouse gas emissions from the transportation sector.

In sum, nothing in the text of S.B. 375, or in its relationship to A.B. 32, can fairly be interpreted to compel the Agencies' blindered approach.

II

THE TARGETS DO NOT FORBID CONSIDERATION OF THE STATEWIDE MANDATES

In the preceding section, the Citizens explained why S.B. 375 does not compel the Agencies' interpretation. In this section, the Citizens explain how the targets themselves do not compel that interpretation. The principal support

for that latter conclusion is the plain text of the targets: their duly adopted and published version contains *no* instruction whatsoever to ignore the Statewide Mandates. Rather, the targets are stated simply in terms of total per capita percentage reduction of greenhouse gas emissions from 2005 levels. *See* Appellant's App. at 13. Notably, the metric that the Board chose for the targets is statewide in scope—on its face it includes all factors that would reduce per capita emissions from the Bay Area's transportation sector, including the Statewide Mandates.

Similarly unavailing to the Agencies' interpretation is the administrative history concerning the targets. For example, during the Board's hearing to analyze whether the Plan would meet the targets, Chair Nichols explained that the targets were intentionally set conservatively, using a comprehensive metric, both to give regions flexibility in the face of uncertainty about the best approach to reduce emissions, as well as out of fear that more ambitious targets would lead to regions revolting.[5] The Chair's view strongly implies, contrary to the Agencies' position, that the targets are *not* intended to be so drastic or draconian as to compel radical changes in regional land-use and transportation policy.

---

[5] AR043610 ("[W]e chose to use a per capita cap in order to recognize that, particularly when we were putting our toe in the water in an area that we really had never been before, as a Board, as a regulatory agency, that we should be careful about learning before we started to impose the kind of caps that might well lead to regions just rebelling. I mean, just feeling like they couldn't do what was being asked of them.").

Further, the Board's resolutions adopting the targets contain no language to compel the Agencies' interpretation. *Cf.* Appellant's App. at 7-10; *id.* at 15-148. To the contrary, these resolutions suggest that the Statewide Mandates *must* be considered. *See id.* at 17 (noting that S.B. 375 requires the Board, "in establishing Regional Targets, to take into account greenhouse gas emission reductions that will be achieved by improved vehicle emission standards, changes in fuel composition," among others); *id.* (noting that A.B. 32 does *not* require a greenhouse gas reduction "from any particular source category (including transportation) and no absolute reduction from any particular source category").

Moreover, even the regional preparatory report that preceded the proposed targets' submission to the Board for approval fails to support the Agencies' interpretation. S.B. 375 requires the Board to establish a Regional Targets Advisory Committee, which in turn must prepare a report to assist the Board in target-setting. *See* Gov't Code § 65080(b)(2)(A)(i). The Committee Report that was ultimately produced suggested limiting the targets so that "[g]reenhouse gas reductions not related to the land use and transportation sectors should not be credited towards meeting of SB 375 targets." AR0009397. But plainly the Statewide Mandates *are* related to the transportation sector, as they concern vehicle efficiency and fuel composition. Indeed, the Committee Report goes on to "recommend[] that [the Board] provide [the regional agencies] with information on the anticipated greenhouse

gas emission reduction impacts of the adopted Pavley regulation and Low Carbon Fuel Standard" as part of the Board's requirement "to take into account improved vehicle emission standards, [and] changes in the carbon-intensity of fuels," among other things. AR009399. There would be no point to provide this information if, as the Agencies contend, this information must be ignored in meeting the targets.

Finally, although the Board staff report accompanying the *draft* regional targets expressly forbade consideration of the Statewide Mandates in determining whether the targets were met, Appellant's App. at 155, the *final* staff report (as well as the targets themselves) does not contain that language, *id.* at 288-89, an emendation implying that the Board ultimately rejected the Agencies' interpretation. *Cf. Long Beach Police Officers Ass'n v. City of Long Beach*, 46 Cal. 3d 736, 744-45 (1988) (declining to interpret a statute in a way more consistent with a *prior* version of the statute than with its subsequently amended version). Thus, just as with S.B. 375, so with the regional targets: neither *compels* the Agencies' interpretation. Rather, both are consistent with the Citizens' interpretation that the Agencies have the discretion to consider to the Statewide Mandates.

III

THE BOARD HAS NEVER FORMALLY ADOPTED OR ENDORSED THE AGENCIES' INTERPRETATION

Below, the Agencies argued that they and the courts must defer to what the Agencies contend to be the Board's interpretation of S.B. 375 and the targets. The Agencies purportedly found their interpretation in the Board's Scoping Plan, as well as in the Board staff's draft technical evaluation of the Plan's target-meeting analysis. Neither, however, supports the Agencies' position. Nowhere in the Scoping Plan is there any articulation, much less endorsement, of the Agencies' interpretation. To the extent that such endorsement can be found in the Board staff's draft technical evaluation, that endorsement cannot bind this Court, in light of the California Administrative Procedure Act's prohibition on underground regulations.

A. The Scoping Plan Does Not Compel the Agencies' Interpretation

As noted previously, the Scoping Plan describes how the state will meet the A.B. 32 goal of reducing greenhouse gas emissions to 1990 levels by 2020. The Scoping Plan assigns a figure (based in million metric tons of carbon dioxide equivalent, abbreviated "$MMTCO_2E$") to a variety of reduction measures, including the Statewide Mandates. *See* AR008787. The Scoping Plan also assigns a separate reduction (5 $MMTCO_2E$) for S.B. 375 measures. *Id.* The Agencies therefore argued below that the Plan cannot take "credit" for

reductions attributable to the Statewide Mandates because the Scoping Plan presupposes that S.B. 375 will provide five units of greenhouse gas reduction over and above reductions provided by the Statewide Mandates. This argument is without merit, for two reasons.

First, fuel composition and vehicle efficiency (the factors that pertain to the Statewide Mandates) *necessarily* affect a region's transportation sector emissions, even though these factors may be regulated at the state level. In other words, given how the S.B. 375 targets have been defined, there will always be a risk of double-counting between the Scoping Plan and S.B. 375. That being the case, the way to avoid double counting is not to ignore such important determinants of regional emissions as the Statewide Mandates, but instead to set the targets in such a way that regional and statewide measures work cooperatively while also respecting the living choices of California residents.

Second, the Agencies' interpretation improperly assumes that the Board failed to satisfy its statutory obligation to take the Statewide Mandates into account when setting the targets. *Cf. McBail & Co. v. Solano County Local Agency Formation Comm'n*, 62 Cal. App. 4th 1223, 1228 (1998) (noting the presumption that agencies have acted legally); Gov't Code § 65080(b)(2)(A)(iii) (requiring the State Board to take, inter alia, the Statewide Mandates into account when setting the targets). The Board did not consider the Statewide Mandates in assigning a five-unit reduction (*i.e.*,

5 $MMTCO_2E$) for S.B. 375 measures in the Scoping Plan.[6] *See* AR008819 (considering only reductions from changed land-use patterns and similar land-use tools to reduce vehicle miles traveled in assigning 5 $MMTCO_2E$ of emissions reductions to S.B. 375). The only way that the Board could have complied with the statutory "take account of" requirement would have been (as the Citizens contend) to include the Statewide Mandates as part of its comprehensive metric for measuring the targets. Therefore, it is the Citizens' interpretation of S.B. 375—not the Agencies'—that both harmonizes with the Scoping Plan *and* maintains fidelity to the statutory text.

B. The Board Staff's Draft Technical Evaluation Cannot Compel the Agencies' Interpretation

The only Board document within the record that has expressly adopted the Agencies' interpretation is the Board's staff draft technical evaluation of the Plan. AR043029. This report, however, cannot compel the Agencies' interpretation, for two reasons. First, it expressly disclaims any attribution of its contents to the Board. Second, deferring to its interpretation of S.B. 375 is forbidden by the California Administrative Procedure Act.[7]

---

[6] In fact, the Board resolution adopting the Scoping Plan expressly defers the target-setting process and acknowledges that the Scoping Plan assignment is flexible. *See* AR008901 ("The estimated reductions in the Scoping Plan will be adjusted to reflect the outcome of the Board's decision on SB 375 targets.").

[7] A Board determination that the Plan if implemented will meet the targets would not help the Agencies. *Cf.* Gov't Code § 65080(b)(2)(J) (requiring the Board to review sustainable communities strategies for this purpose). Even (continued...)

First, the draft staff technical evaluation expressly disclaims any attribution of its contents to the Board. It provides that, although the report was reviewed by the Board's staff and approved for publication, this "[a]pproval does not signify that the contents necessarily reflect the views and policies of [the Board]." AR043010. Therefore, it would be improper for the Agencies to rely on this document as evidence of the Board's position as to its interpretation of S.B. 375 and the targets.

Second, even assuming that the draft staff technical evaluation represents the Board's views, that evaluation cannot direct this Court's interpretation of S.B. 375. The California Administrative Procedure Act forbids agencies from enforcing rules, or interpretations of rules, that have not gone through a public notice and comment process. *See* Gov't Code § 11340.5(a). Accordingly, every "regulation" must go through this process or it is void ab initio. *See id.* "Regulation" is defined broadly to include "every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it." *See id.* § 11342.600. Here, the draft staff technical evaluation represents either a rule for how to interpret the regional targets or,

---

[7] (...continued)
assuming *arguendo* that the Plan as drafted will meet the targets—or even far exceed them—it remains true that other legally and technically feasible means exist (such as the Citizens' proposed alternative, AR003156-AR003159) to achieve the targets that are far less environmentally damaging than the Plan's chosen means.

alternatively, a rule to interpret the statute's mandate that sustainable community strategies meet the targets. Unless that interpretation is patently compelled by S.B. 375, it is void as a matter of law. *Cf. id.* § 11340.9(f) (providing the only exemptions from the Administrative Procedure Act's mandate). Because the Agencies' interpretation of S.B. 375 is not compelled by the text, any reliance on the staff technical evaluation to ascribe that interpretation to the Board would result in the enforcement of an underground regulation. For that reason, judicial deference to such an interpretation would be equally unwarranted. *See Armistead v. State Personnel Bd.*, 22 Cal. 3d 198, 204-05 (1978) (to defer to an agency rule that has not been adopted consistent with the Administrative Procedure Act would permit the agency to flout the statute).

IV

THE AGENCIES' ERRONEOUS INTERPRETATION OF S.B. 375 AND THE TARGETS RENDERS THE PLAN'S ENVIRONMENTAL IMPACT REPORT LEGALLY INADEQUATE

CEQA's core purpose is to support informed public decision-making. *Cf. Citizens of Goleta Valley*, 52 Cal. 3d at 564 (an EIR "'protects not only the environment but also informed self-government' " (quoting *Laurel Heights Improvement Ass'n of San Francisco v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988))); *Planning & Conservation League v. Dep't of Water*

Resources, 83 Cal. App. 4th 892, 920 (2000) ("[T]he most important purpose of CEQA [is] to fully inform the decision makers and the public of the environmental impacts of the choices before them."). This purpose is frustrated by the Agencies' reliance, throughout the EIR, on the assertion that S.B. 375 and the targets forbid any consideration of the Statewide Mandates in assessing whether the targets will be met. As result of this errant legal assertion, the EIR is legally inadequate because it: (a) fails to accurately describe the Plan's basic objectives; (b) fails to adequately assess the "no project" alternative; (c) improperly rejects the Citizens' proposed alternative; and (d) fails to adequately consider the Citizens' comments.[8]

A. The EIR Fails to Accurately Describe the Plan's Basic Objectives

CEQA requires the accurate identification of a project's "basic objectives," a key factor for determining a project's benefits, reasonable

---

[8] Each of these claims depends solely on the proper interpretation of S.B. 375 and the targets; any facts on which they rely are undisputed. For example, the Citizens' contention that the EIR's analysis of the "no project" alternative is defective is based on the undisputed fact that the analysis does not take into account the impacts of the Statewide Mandates when predicting what the world will look like if the Plan is not implemented. *See* Appellant's App. at 326 (acknowledging that the Agencies assessed the "no project" alternative "without inclusion of the reductions under" the Statewide Mandates). Similarly, the Citizens' contention that the EIR should have analyzed the Citizens' alternative is based on the undisputed fact that the S.B. 375 targets will be met (thus fulfilling a basic Plan objective) if the Statewide Mandates are taken into account. *See id.* at 325 & n.5 (noting that the S.B. 375 targets could have been reached "solely through the statewide clean technology initiatives").

alternatives, and mitigation. *See* Pub. Res. Code § 21081(b); Cal. Code Regs. tit. 14, § 15093(a). The EIR identifies the reaching of the targets as a basic objective of the Plan, but asserts that the targets forbid consideration of the Statewide Mandates. *See* AR001688-AR001690. Because the Agencies' interpretation is not compelled by S.B. 375 or the targets, the analysis of the basic objective is legally inadequate—the Agencies did not offer a legally adequate justification for their decision to exclude consideration of the Statewide Mandates.[9]

B. The EIR Fails to Adequately Assess the "No Project" Alternative

CEQA requires every EIR to analyze a "no project" alternative—what the world would look like without the project going forward—to understand the impacts of the proposed project and its alternatives. Cal. Code Regs. tit. 14, § 15126.6(e); *see Planning & Conservation League v. Dep't of Water Resources*, 83 Cal. App. 4th at 917-18 (analysis of the "no project" alternative

---

[9] The Agencies cannot justify their failure to adequately consider the impacts of the Statewide Mandates on their inadequate computer model. Although the federal computer model (EMFAC2011) does not incorporate the California Advanced Clean Car Standards (Pavley II), the Agencies had more than a year after those Standards were adopted to develop at least some estimate of their effects, and therefore had a duty to make at least a tentative estimate of their impacts. *See Citizens for East Shore Parks v. California State Lands Comm'n*, 202 Cal. App. 4th 549, 563 (2011) ("Administrative agencies not only can, but should, make appropriate adjustments . . . as the environmental review process unfolds."); *see also Mira Monte Homeowners Ass'n v. Cnty. of Ventura*, 165 Cal. App. 3d 357, 364-66 (1985) (overturning an EIR for a new subdivision that failed to take into account impacts discovered at the last minute to a wetland area).

"is a factually based forecast of the environmental impacts of preserving the status quo" that "provides the decision makers with a base line against which they can measure the environmental advantages and disadvantages of the project and alternatives to the project"). Because the Agencies interpreted S.B. 375 to forbid consideration of the Statewide Mandates in meeting the targets, they failed to adequately assess the "no project" alternative, which, if the Statewide Mandates had been considered, would have met the targets without the Plan's dozens of significant and unavoidable environmental impacts. *See* AR001689.

C. The Agencies Improperly Rejected the Citizens' Proposed Alternative

CEQA requires consideration of a reasonable range of feasible alternative to the proposed project. Cal. Code Regs. tit. 14, § 15126.6(a). The Citizens proposed such an alternative, which would achieve the targets without the Plan's many significant and unavoidable environmental impacts. AR003156-AR003159. The Agencies rejected the Citizens' alternative, relying on their erroneous interpretation of S.B. 375 to conclude that the Citizens' alternative would not satisfy the Plan's basic objective of meeting the targets. AR003651. That rejection was in error, as the EIR otherwise failed to consider any alternative that could meet the Plan's basic objectives and yet still avoid all the significant environmental impacts attributable to the Plan's high-density land-use vision, including increased particulate matter emissions

and other toxic air contaminants, noise pollution from construction and transit, displacement of a substantial number of residents and businesses, loss of forests, and modification of habitat for protected species. *See* AR000167-AR000170; *cf.* Cal. Code Regs. tit. 14, § 15126.6(f) ("The range of alternatives required . . . is governed by a 'rule of reason' that requires . . . those alternatives necessary to permit a reasoned choice."); *Mann v. Cmty. Redevelopment Agency*, 233 Cal. App. 3d 1143, 1150 (1991) ("'The key issue is whether the selection and discussion of alternatives fosters informed decisionmaking and informed public participation.'" (citation omitted)).

D. The Agencies Failed to Adequately Respond to the Citizens' Comments

CEQA requires that public comments addressing major environmental issues be responded to using good-faith, reasoned analysis. Cal. Code Regs. tit. 14, § 15088(c). The Citizens addressed major environmental issues in their comments, arguing among other things that their proposed alternative is superior to the Plan because it meets the targets without the Plan's dozens of significant and unavoidable environmental impacts. AR003156-AR003159. But because the Agencies misinterpreted S.B. 375 and the targets so as to foreclose any consideration of the Statewide Mandates, they necessarily failed to adequately consider and respond to the Citizens' comments.

E. The Agencies' CEQA Errors Are Prejudicial

A legal error under CEQA—whether procedural or substantive—is prejudicial when it precludes informed decision-making and public participation. *Neighbors for Smart Rail v. Exposition Metro Line Construction Auth.*, 57 Cal. 4th 439, 463 (2013). As the preceding sections demonstrate, the Agencies' central legal error—its misinterpretation of S.B. 375 and the targets—infects the entire EIR. Both the EIR and the Plan's greenhouse gas analysis turn on that interpretive error. It necessarily follows that meaningful public participation and informed decision-making have been precluded, because the public has not been told that legally adequate greenhouse gas reduction regimes—such as the Citizens' alternative—exist that would avoid the Plan's and its alternatives' significant environmental impacts traceable to the Agencies' high-density land-use preferences, e.g., increased particulate matter emissions and other toxic air contaminants, noise pollution from construction and transit, displacement of a substantial number of residents and businesses, loss of forests, and modification of habitat for protected species. *See* AR000167-AR000170.

CONCLUSION

The Agencies approved the Plan, along with its dozens of significant and unavoidable adverse environmental impacts, on the faulty premise that S.B. 375 and the targets *compel* the Agencies to exclude any consideration of

the Statewide Mandates in meeting the targets. Neither S.B. 375 nor the targets force this conclusion. Rather, each can reasonably be construed to allow the Agencies to consider the Statewide Mandates. The Agencies' interpretation to the contrary renders the EIR inadequate as a matter of law, because the public has been left misinformed about one of the central purposes of the Agencies' entire endeavor.

Therefore, the judgment of the superior court denying the Citizens' petition for a writ of mandate should be reversed, and that court instructed to issue a writ to the Agencies requiring that they rescind their approval of the Plan and redo the Plan's EIR.

DATED: December 8, 2014.

Respectfully submitted,

DAMIEN M. SCHIFF
JONATHAN WOOD
MICHAEL E. DELEHUNT

By /s/ Jonathan Wood
JONATHAN WOOD

Attorneys for Plaintiff and Appellant
Bay Area Citizens

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANT'S OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 8,704 words.

DATED: December 8, 2014.

/s/ Jonathan Wood
JONATHAN WOOD

DECLARATION OF SERVICE

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On December 8, 2014, a true copy of APPELLANT'S OPENING BRIEF was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

Michael E. Delehunt
Foley & Lardner LLP
555 California Street, Suite 1700
San Francisco, CA 94104-1520
Counsel for Plaintiff and Appellant

Tina A. Thomas
Amy R. Higuera
Thomas Law Group
455 Capitol Mall, Suite 801
Sacramento, CA 95814
Counsel for Defendant and Respondent
Association of Bay Area Governments

Adrienne D. Weil
Metropolitan Transportation Commission
101 8th Street
Oakland, CA 94607-4700
Counsel for Defendant and Respondent
Metropolitan Transportation Commission

Timothy E. Sullivan
California Department of Justice
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
Counsel for The People of the State of California

Court Clerk
Alameda County Superior Court
1225 Fallon Street, Room 109
Oakland, CA 94612

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 8th day of December, 2014, at Sacramento, California.

/s/ Tawnda Elling
TAWNDA ELLING