SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

THE TWO HUNDRED, an unincorporated association of civil rights leaders, including LETICIA RODRIGUEZ, TERESA MURILLO, and EUGENIA PEREZ Petitioners/Plaintiffs, v. CALIFORNIA AIR RESOURCES BOARD, RICHARD COREY, in his official capacity, and DOES 1-50. Respondents/Defendants.	No. 18CECG01494 Dept. 52 Hearing Date: October 26, 2018 Time: 9:00 a.m. ORDER AFTER HEARING ON RESPONDENTS/DEFENDANTS' DEMURRER TO COMPLAINT/PETITION

I.

Introduction

This matter came on for hearing on October 26, 2018 at 9:00 a.m. in Department 52 of the Fresno Superior Court, the Honorable Jane Cardoza presiding, on the respondents/defendants' [hereinafter "defendants"] demurrer to the complaint/petition filed by petitioners/plaintiffs [hereinafter "plaintiffs"] The Two Hundred. Attorney Jennifer Hernandez appeared on behalf of plaintiffs. Deputy Attorney General John Sasaki appeared on behalf of defendants. After hearing oral argument from both

parties, the court took the matter under submission. Having read the briefs and considered the parties' arguments, the court now takes the matter out from under submission and makes the following ruling.

II.

Analysis

First and Second Causes of Action: CARB demurs to the first and second causes of action for violation of California's FEHA and the federal FHA, in which plaintiffs allege that the CARB's new GHG measures will create a disparate impact on minority communities and are discriminatory against those communities and their members. (Complaint, ¶ 273.) Defendants contend that plaintiffs have misconstrued the provisions of the 2017 Scoping Plan, which CARB contends are only non-binding "recommendations" or "guidelines" and not mandatory regulations.

Much of the language of the Scoping Plan seems to support defendants' position, as the Plan refers to offering "guidance" to local agencies and planners. (Scoping Plan, p. 99. The court intends to take judicial notice of the Scoping Plan as an official government act under Evidence Code section 452, subdivision (c).) "This guidance should be used in coordination with the OPR's General Plan Guidelines guidance in Chapter 8, Climate Change. While this guidance is provided out of the recognition that local policy makers are critical in reducing the carbon footprint of cities and counties, *the decision to follow this guidance is voluntary and should not be interpreted as a directive or mandate to local governments.*" (*Ibid*, italics added.) Most of the following proposed actions and goals are couched as

"recommendations" or "advice" rather than being phrased in mandatory terms. (*Id.* at pp. 99-102.) For example, the GHG reduction goals are described as "recommendations", and CARB states that "it is appropriate for local jurisdictions to derive evidence-based local per capita goals based on local emissions sectors and population projections that are consistent with the framework used to develop the statewide per capita targets." (*Id.* at p. 100.) "Lead agencies have the discretion to develop evidence-based numeric thresholds... consistent with this Scoping Plan, the State's long-term GHG goals, and climate change science." (*Id.* at p. 102.)

However, while much of the Scoping Plan's language is couched in non-mandatory language, in general the courts have treated such plans as quasi-legislative acts. For example, in *Association of Irritated Residents v. State Air Resources Board* (2012) 206 Cal.App.4th 1487, the Court of Appeal noted that the parties did not dispute that the prior version of the Scoping Plan adopted by the CARB constituted quasi-legislative action, and thus the Plan was subject to court review. (*Id.* at p. 1494.) The same result would seem to apply here, as the new Scoping Plan was also adopted after a lengthy review and public comment process, and generally purports to impose specific standards for implementing the legislation regarding GHG emissions.

While CARB argues that the specific portions of the Plan cited by plaintiffs are non-mandatory, this appears to be an issue of fact that cannot be resolved on demurrer. In fact, the CARB stated in the Scoping Plan that "The [California Supreme] Court also recognized that GHG determinations in CEQA should be

consistent with the statewide Scoping Plan goals..." (Scoping Plan, p. 101, citing *Center for Biological Diversity v. Cal. Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 229-230.) This language seems to at least raise an issue of fact as to whether the "recommendations" in the Plan are truly non-mandatory as CARB now contends, and therefore the court will not sustain the demurrer on the basis of CARB's claim that the Plan only sets forth optional recommendations.

Defendants also argue that plaintiffs have not alleged sufficient facts to show that there is a causal link between the challenged Scoping Plan and the alleged disparate impact. "[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create." (*Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2523, internal citation omitted.)

"Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts *at the pleading stage* or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact... [I]f the [plaintiff] cannot show a causal connection between the [defendant's] policy and a disparate impact - for instance, because federal law substantially limits

the [defendant's] discretion - that should result in dismissal of this case." (*Id.* at pp. 2523-2524, internal citation omitted, italics added.)

Here, plaintiffs allege that the new GHG housing measures promulgated by CARB will "actually and predictably have a disparate negative impact on minority communities and are discriminatory against minority communities and their members, including but not limited to Petitioners..." (Complaint, ¶¶ 273, 282.) In addition, plaintiffs allege that the CARB's policy to reduce Vehicle Miles Traveled (VMT) will disproportionately affect minorities by increasing congestion and commute times, the "net zero" GHG policy will make housing less affordable for minorities by increasing CEQA litigation risks, the per capita GHG targets for local climate action plans policy are unlawful and would cause loss of middle and low-income jobs that will have a disparate impact on minorities, and the CARB's "Vibrant Communities" policies that incorporate the first three policies are also unlawful. In addition, plaintiffs allege that at least one housing project has already been threatened with CEQA litigation based on the local agency's purported failure to comply with the new Scoping Plan. (Complaint, ¶ 42.)

Thus, plaintiffs have alleged sufficient facts to raise an inference of causation between the Scoping Plan and the alleged disparate impact on minority communities. For example, plaintiffs have alleged that opponents of new housing projects will be able to use the new Plan as a reason to file CEQA lawsuits challenging new developments that would provide affordable housing for minorities. While it is somewhat unclear whether the new Scoping

Plan actually increases the risk that such new lawsuits will be filed or whether they will succeed, especially since plaintiffs concede that CEQA lawsuits are already easily filed and pose a serious problem for new development (Complaint, ¶ 164), this is an issue of fact that cannot be resolved on demurrer.

Defendants also argue that plaintiffs are merely speculating that housing costs will be increased by new CEQA litigation based on the Scoping Plan, and that the chain of causation is too remote and speculative to demonstrate that the Plan is a proximate cause of the disparate impact. Yet plaintiffs have alleged that the Plan will encourage new CEQA litigation based on the new and difficult-to-meet standards it sets forth, which will lead to increased housing costs and reduced availability of affordable housing for minorities. This chain of causation is not so attenuated or speculative as to constitute a complete failure to allege proximate cause. Again, this appears to be a factual issue that cannot be resolved on demurrer. Therefore, the court finds that plaintiffs have adequately alleged causation with regard to the first two causes of action.

Next, defendants argue that the matter is not sufficiently ripe for adjudication. "The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However,

the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy. On the other hand, the requirement should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170, internal citations omitted.)

"A logical starting point for a discussion of the concept of ripeness is the following general statement from *Aetna Life Ins. Co. v. Haworth*: 'The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' ... 'A controversy is "ripe" when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.'" (*Id.* at pp. 170-171, internal citations omitted.)

"The federal courts have frequently addressed the issue of ripeness in the precise context here presented - an attempt to obtain review of the propriety of administrative regulations prior to their application to the party challenging them. The approach that has developed is summed up in the following passage from

Abbott Laboratories v. Gardner (1967) 387 U.S. 136, 148-149 [18 L.Ed.2 681, 691, 87 S.Ct. 1507]: 'The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" (*Id.* at p. 171, some internal citations omitted, italics in original.)

"Under the first prong, the courts will decline to adjudicate a dispute if 'the abstract posture of [the] proceeding makes it difficult to evaluate ... the issues' [citation], if the court is asked to speculate on the resolution of hypothetical situations [citation], or if the case presents a 'contrived inquiry' [citation]. Under the second prong, the courts will not intervene merely to settle a difference of opinion; there must be an imminent and significant hardship inherent in further delay. [Citation.]" (*Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 502.) The court should also consider whether the issue is purely a legal one, and whether

the regulation at issue is a "final agency action." (*Abbott Laboratories*, *supra*, 387 U.S. at pp. 149-150.)

Also, with regard to the "hardship" prong of the test, the court should look at whether the regulation at issue commands anyone to do anything or refrain from doing anything, whether it grants or revokes a license, power or authority, whether it subjects anyone to criminal liability, or whether it creates legal rights or obligations. (*Ohio Forestry Ass'n, Inc. v. Sierra Club* (1998) 523 U.S. 726, 733.)

Here, it does not appear that the controversy is sufficiently ripe for adjudication at this time. The dispute is still abstract and speculative, as plaintiffs have not shown that most of the problems that they believe will take place have yet occurred or are likely to occur anytime in the near future. They claim, for example, that the Scoping Plan will encourage the filing of more CEQA actions against new developments, which will in turn lead to higher housing prices and less affordable housing for minorities. However, it does not appear that any such lawsuits have yet been filed, although at least one has been threatened, and even if such lawsuits are filed, it will be years before they are resolved. Even if more CEQA lawsuits are filed, it may be many years before the cost of such litigation causes housing prices to rise, if it happens at all.

Likewise, while the plaintiffs claim that the Scoping Plan will lead to greater traffic congestion and longer commutes for minorities, there is no allegation that this situation has happened yet, or that it will happen anytime in the near future even assuming that the Plan does actually include a mandate to

limit road construction. Thus, plaintiffs are seeking a court ruling on what is essentially still a hypothetical set of facts, rather than a concrete dispute. It is unclear whether any of the events that they predict will ever happen, and if so, how long it will be before there is any harm to the minority communities they seek to protect.

Plaintiffs' claims also raise fact-intensive issues rather than purely legal questions, including whether the Scoping Plan will lead to higher housing prices due to increased CEQA litigation against projects, and whether the Plan will require less road construction and thus increased traffic congestion. Again, the problems that plaintiffs believe will happen if the Plan is implemented have not yet occurred, and may take years to occur if they happen at all. It will be very difficult for the court to rule on the merits of plaintiffs' claims at the present time as the events that they predict have not happened yet. Thus, it would be beneficial to wait until the Scoping Plan has been in effect for some time to assess what the full effects of its implementation might be.

Furthermore, plaintiffs have not shown that they will suffer any immediate hardship if their claims are not heard immediately, as the harm they predict is still years away. The Scoping Plan itself does not require or forbid plaintiffs from doing anything, and they will not be subjected to any criminal or civil penalties if the Plan is allowed to go forward. While plaintiffs do allege that they will suffer harm if housing prices continue to go up due to CEQA litigation, they do not allege that they have been denied affordable housing yet because of the Plan's effects. It appears

that they will not suffer any direct harm for several years, at the earliest.

Therefore, the court finds that the first and second causes of action are not yet ripe for adjudication, and it will sustain the demurrer to those claims for failure to state facts sufficient to constitute a cause of action. However, based on plaintiffs' counsel's representations at the hearing that she can allege new facts showing the existence of a present, existing or imminent controversy if she is given a chance to do so, the court will allow plaintiffs leave to amend their first and second causes of action.

Third Cause of Action: Defendants next demur to the third cause of action for violation of the substantive due process clauses of the California and United States Constitutions.

"Generally, the constitutional guaranty of substantive due process protects against arbitrary legislative action; it requires legislation not to be 'unreasonable, arbitrary or capricious' but to have 'a real and substantial relation to the object sought to be attained.' Thus, legislation does not violate substantive due process so long as it reasonably relates 'to a proper legislative goal.'" (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125, internal citations omitted.)

Defendants argue that the State clearly has a legitimate interest in limiting GHG emissions, and the Scoping Plan is rationally related to this legitimate goal. As a result, defendants claim that plaintiffs have not stated a valid substantive due process claim.

However, plaintiffs have clearly alleged that the Scoping

Plan is not rationally related to the legitimate goal of reducing GHG emissions, and thus violates the due process clause. (Complaint, ¶ 289.) Plaintiffs contend that the Plan arbitrarily discriminates against minorities by denying them affordable housing and forcing them to endure longer commutes, among other things. (Complaint, ¶¶ 7, 50, 52, 59, 191, 193.) Thus, plaintiffs allege that the Plan denies them their fundamental right to housing free from racially disparate impacts. The court must assume the truth of the properly pled allegations of the complaint. As a result, plaintiffs have sufficiently alleged their due process claim, and the court intends to overrule the demurrer to the third cause of action.

Also, while defendants argue that there is no constitutionally protected right to housing free of discrimination and thus plaintiffs have not stated a valid due process claim, the court notes that it is well-established that there is a constitutional right to be free of discrimination based on race. (*United States v. Carolene Prods. Co.* (1938) 304 U.S. 144, 153 n.4.) Here, it appears that plaintiffs are alleging that the Scoping Plan would effectively discriminate against them based on their status as racial minorities by denying them access to affordable housing, which is sufficient to support their due process claim.

Fourth Cause of Action: Next, defendants demur to the fourth cause of action for violation of the equal protection clauses of the California and United States Constitutions. Defendants argue that plaintiffs have not adequately alleged facts showing that CARB had any discriminatory intent when it adopted the Scoping

Plan, and thus the cause of action fails to state a claim.

"[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.' Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (*Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 264-265, internal citations omitted.)

However, it is rarely possible to offer direct evidence of discriminatory intent. Instead, circumstantial evidence of discriminatory impact may used to infer intent. (*Washington v. Davis* (1976) 426 U.S. 229, 253.) Also, since the case is still in its early stages, it would not be reasonable to expect plaintiffs to be able to cite to specific evidence in their complaint, whether direct or circumstantial, that the CARB intended to discriminate against racial minorities when it adopted the Scoping Plan.

On the other hand, at this point plaintiffs have not even alleged that the CARB intended to discriminate against minorities in adopting the Scoping Plan. They merely allege that the Plan will have the effect of making new housing less affordable and accessible to minorities. (Complaint, ¶¶ 297, 298.) Thus, at this time plaintiffs have failed to allege even the basic element of intent to discriminate, and as a result the court will sustain the demurrer to the fourth cause of action. The court will, however, grant leave to amend, as it is possible that plaintiffs can allege that the CARB acted intentionally to discriminate

against racial minorities when it adopted the Plan.

Sixth and Tenth Causes of Action: Defendants next demur to the sixth and tenth causes of action, which both allege violations of the Administrative Procedures Act (APA) because the CARB adopted the Scoping Plan without following the APA's rulemaking procedures. Defendants contend that plaintiffs have not stated, and cannot state, a valid claim for violation of the APA because the Scoping Plan is not a "regulation" under the definition set forth in the APA, as it does not contain any binding rules or procedures, but only sets forth optional recommendations to reduce GHG emissions.

"The APA ... defines 'regulation' very broadly to include 'every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.' (Gov. Code, § 11342, subd. (g).) A regulation subject to the APA thus has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure.'" (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571, some internal citations omitted.)

As discussed above with regard to the first and second causes of action, there is language in the Scoping Plan that indicates that it merely sets forth non-mandatory recommendations and advice for local agencies to reduce GHG emissions. Also, in *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, the California Supreme Court held that a prior version of the Scoping Plan did not establish regulations for implementing the Legislature's goals for reducing greenhouse gas emissions. (*Id.* at p. 222-223.)

"The Scoping Plan adopted pursuant to A.B. 32 is a plan for reducing greenhouse gas emissions, but does not itself establish the regulations by which it is to be implemented; rather, it sets out how existing regulations, and new ones yet to be adopted at the time of the Scoping Plan, will be used to reach A.B. 32's emission reduction goal." (*Id.* at p. 222.)

In light of this language from the California Supreme Court, it does not appear that plaintiffs have stated any claims for violation of the APA based on the adoption of the new Scoping Plan. If the Scoping Plan is not a "regulation" for purposes of the APA, then it follows that the CARB was not required to follow the APA's procedures to adopt the Plan, and their alleged failure to do so does not constitute the basis for a cause of action. Therefore, the court sustains the demurrer to the sixth and tenth causes of action for failure to state facts sufficient to constitute a cause of action. However, the court grants leave to amend the causes of action based on plaintiffs' counsel's representation at the hearing that plaintiffs can allege more facts to cure the defect.

Eighth Cause of Action: Defendants next demur to the eighth cause of action for violation of Health and Safety Code section 39000 and the California Clean Air Act. They contend that plaintiffs' allegation that the Plan proposes to "intentionally increase congestion" is untrue, and is contradicted by the Scoping Plan itself, which contains no language indicating that the Plan intends to increase congestion. They also argue that the strategies set forth in the Plan to reduce VMT's will actually result in reduced emissions, which is consistent with the goals of the Clean Air Act, and that plaintiffs never allege that the VMT reduction strategy would result in increased emissions of pollutants.

However, plaintiffs do allege that "the VMT reduction requirements in the 2017 Scoping Plan will result in increased congestion in California." (Complaint, ¶ 342.) They also allege that "increasing congestion increases emissions of multiple pollutants including NOx, CO, and PM. This would increase ozone and inhibit California's ability to meet the CAAQs [California Ambient Air Quality Standards] for ozone, NO2, and PM, among others." (*Id.* at ¶ 343.) Thus, plaintiffs allege that CARB is violating its statutory duty to ensure that every reasonable action is taken to expeditiously achieve the attainment of the CAAQS. (*Id.* at ¶ 344.)

Also, while defendants contend that the Scoping Plan has no language indicating a deliberate attempt to increase congestion, plaintiffs have alleged that the VMS limitation strategy will have the effect of increasing congestion by limiting construction of new roads and traffic lanes. (Complaint, ¶ 52.) Thus, plaintiffs

have sufficiently alleged that CARB has violated the Clean Air Act by adopting the Scoping Plan. The issue of whether plaintiffs' interpretation of the Scoping Plan's effect on emissions is true and correct cannot be resolved on demurrer, and must be determined at a later time. As a result, the court overrules the demurrer to the eighth cause of action.

Ninth Cause of Action: Plaintiffs do not contest the demurrer to the ninth cause of action, and thus they concede that it should be sustained. As a result, the court sustains the demurrer to the ninth cause of action, without leave to amend.

Eleventh Cause of Action: Finally, defendants demur to the eleventh cause of action for *ultra vires* agency action. Again, defendants contend that the Scoping Plan cannot constitute an *ultra vires* action, because it is expressly non-binding and only makes recommendations, which is well within CARB's authority under AB 32 to make recommendations to reduce GHG emissions. However, plaintiffs have alleged that the Scoping Plan sets forth requirements that are beyond CARB's statutory authority, including the "net zero" GHG threshold, the 2050 GHG emission reduction goal, the VMT reduction requirements, and the "net zero" new house building standards. (Complaint, ¶¶ 369-385.)

While much of the language in the Scoping Plan appears to support the CARB's interpretation that the Plan only sets forth non-binding advice and recommendations for reducing GHG emissions, there is also some language that seems to support plaintiffs' position. For example, the Plan states that, "The [California Supreme] Court also recognized that GHG determinations in CEQA should be consistent with the statewide Scoping Plan goals, and

that CEQA documents taking a goal-consistency approach may soon need to consider a project's effects on meeting the State's longer term post-2020 goals." (Scoping Plan, p. 101, citing *Center for Biological Diversity v. California Dept. of Fish and Wildlife*, *supra*, 62 Cal.4th at pp. 229-230.) This language seems to imply that the Plan's goals may be more than simply recommendations, and may constitute mandatory standards. Thus, the court finds that plaintiffs have adequately alleged their eleventh cause of action and therefore the court overrules the demurrer to that claim.

III.

Disposition

The demurrer is sustained in part and overruled in part, as discussed in detail above. Plaintiffs shall file their first amended complaint by November 23, 2018. It is so ordered.

DATED this 26 day of October, 2018.

Hon. Jane Cardoza,
Judge of the Superior Court