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ROY NAKADEGAWA, and
TRANSPORTATION SOLUTIONS
DEFENSE AND EDUCATION FUND

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

SHERMAN LEWIS, an individual, ROY
NAKADEGAWA, an individual, and
TRANSPORTATION SOLUTIONS DEFENSE AND
EDUCATION FUND, a California non-profit public
benefit corporation,

Plaintiffs,

vs.

METROPOLITAN TRANSPORTATION
COMMISSION, et al.

Defendants.

NO. RG 09438262

POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION

Unlimited Jurisdiction

Date: March 20, 2009

Time: 9:00 A.M.

Dept: 31

Judge: Hon. Frank Roesch

RESERVATION NO. 919734

Plaintiffs, Sherman Lewis, Roy Nakadegawa, and Transportation Solutions Defense and Education Fund (collectively "Plaintiffs") hereby submit the following points and authorities in support of their motion for a preliminary injunction in this case.

I.

BACKGROUND

Defendants, Metropolitan Transportation Commission ("MTC"), Bay Area Toll Authority ("BATA"), Alameda County Transportation Improvement Authority ("ACTIA"), and their respective officers and officials named as defendants herein in their official capacities, are vested with authority to make decisions regarding, and implement funding for, certain public transit projects in the San Francisco Bay Area.

One source for funds for such projects is the revenue collected by Regional Measure 2 (“RM2”). RM2 was approved in 2004 by a vote of the residents of the San Francisco Bay Area counties as authorized by California Streets and Highways Code Section 30921. (Unless otherwise noted, all further references in these points and authorities are to sections of the California Streets and Highways Code.) By approving RM2, the voters authorized the collection of supplemental bridge toll revenues to be used for specific public transportation projects and programs identified as the Regional Traffic Relief Plan (*See*, Section 30914(c) and (d)).

The MTC is the public agency charged with spending of the RM2 funds on projects identified in, and pursuant to procedures and standards mandated by, Sections 30914(c), (d), (e), (f), (g), and (h). BATA is a separate public agency that is an alter ego of the MTC and is responsible for, among other things, the allocation of all bridge toll revenues collected on the San Francisco Bay Area bridges (*See*, Sections 30950 and 30950.2).

ACTIA is a public authority responsible for the collection and allocation of supplemental sales tax revenues collected in Alameda County pursuant Measure B, approved by the voters of Alameda County in 2000. Measure B revenues are to be used to help fund specific public transit projects located in Alameda County.

On January 28, 2009, the MTC made a decision to transfer funds from one voter-approved project to another. However, the MTC failed to follow the statutory procedures for making such a reassignment.

On February 26, 2009, ACTIA proposed to make a decision on a finding required by voter-approved Measure B as a prerequisite to the release of funds for a particular project. However, ACTIA’s finding cannot be supported by the required facts.

The defendant public agencies and authorities are now preparing to spend public funds on expenditures that have not been properly authorized. The plaintiffs seek injunctive and declaratory relief pursuant to C.C.P. Section 526a to prevent the illegal expenditure of those public funds.

II.

AUTHORITIES FOR GRANTING A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

California Code of Civil Procedure Section 526a specifically provides for the issuance of an injunction to prevent the illegal expenditure of public funds. That code section states:

“An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.

“An action brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.”

The primary purpose of C.C.P. Section 526a, authorizing taxpayers’ actions, is to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing to sue requirement. C.C.P. Section 526a must be liberally construed to achieve this remedial purpose (*See, McKinny v. Board of Trustees* (1982) 31 Cal. 3d 79, 91).

Despite the language of C.C.P. Section 526a that a taxpayer’s action must be maintained by a citizen taxpayer or a corporate taxpayer, the California Supreme Court has construed C.C.P. Section 526a to allow an action by an individual nonresident taxpayer to enjoin an illegal expenditure of public funds (*See, Irwin v. Manhattan Beach* (1966) 65 Cal 2d 13, 18-20).

Although C.C.P. Section 526a, by its own terms, only provides for taxpayers’ actions against a county, town, city, or city and county, actions to enjoin the illegal expenditure of public funds have been allowed against other governmental agencies, including a public rapid transit district (*See, Mills v. San Francisco Bay Area Rapid Transit District* (1968) 261 Cal App 2d 666, 667-669).

A taxpayers’ suit can be used to test the legality of the appropriation of funds by a public agency (*See, Larsen v. City & County of San Francisco* (1957) 152 Cal App 2d 355, 360-370).

Injunctive relief may be granted when it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually (C.C.P. Section 526(a)(1)).

Injunctive relief may be granted when it appears by the complaint or declarations that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to a party to the action (C.C.P. Section 526(a)(2)).

Injunctive relief may be granted when it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual (C.C.P. Section 526(a)(3)).

III.

THE DEFENDANTS SHOULD BE ENJOINED FROM TRANSFERRING ANY FUNDS FROM THE DUMBARTON RAIL CORRIDOR PROJECT TO THE BART WARM SPRINGS EXTENSION PROJECT, AND/OR APPROVING OR PERMITTING THE EXPENDITURE OF ANY SUCH TRANSFERRED FUNDS FOR THE BART WARM SPRINGS EXTENSION PROJECT

Section 30914(c) provides that the revenues generated by the toll increases on San Francisco Bay Area bridges that were approved by the voters in as part of RM2 may be transferred to the MTC. The MTC is authorized to spend those funds on specific projects that have been determined to reduce congestion or to make improvements to travel in the toll bridge corridors. Two of those specific projects are the East to West Bay Commuter Rail Service over the Dumbarton Bridge (“Dumbarton Rail Corridor Project”), and the BART Warm Springs Extension (“WSX Project”).

Section 30914(c)(4) defines the Dumbarton Rail Corridor Project as follows:

“Provide funding for the necessary track and station improvements and rolling stock to interconnect the BART and Capitol Corridor at Union City with Caltrain service over the Dumbarton Rail Bridge, and interconnect and provide track improvements for the ACE line with the same Caltrain service at Centerville. Provide a new station at Sun Microsystems in Menlo Park. One hundred thirty-five million dollars (\$135,000,000). The project is jointly sponsored by the San Mateo County Transportation Authority, Capitol Corridor, the Alameda County Congestion Management Agency, and the Alameda County Transportation Improvement Authority.”

Section 30914(c)(31) defines the WSX Project as follows:

“Extension of the existing BART system from Fremont to Warm Springs in southern Alameda County. Ninety-five million dollars (\$95,000,000). Up to ten million dollars (\$10,000,000) shall be used for grade separation work in the City

of Fremont necessary to extend BART. The project would facilitate a future rail service extension to the Silicon Valley. The project sponsor is BART.”

As to the allocation of funds by the MTC to specific projects identified in Section 30914(c), Section 30914(f) provides, in pertinent part, as follows:

“...If a program or project identified in subdivision (c) has cost savings after completion, taking into account construction costs and an estimate of future settlement claims, or cannot be completed or cannot continue due to delivery or financing obstacles making the completion or continuation of the program or project unrealistic, the commission shall consult with the program or project sponsor. After consulting with the sponsor, the commission shall hold a public hearing concerning the program or project. After the hearing, the commission may vote to modify the program or project’s scope, decrease its level of funding, or reassign some or all of the funds to another project within the same bridge corridor. If a program or project identified in subdivision (c) is to be implemented with other funds not derived from tolls, the commission shall follow the same consultation and hearing process described above and may vote thereafter to reassign the funds to another project consistent with the intent of this chapter.”

The MTC violated the aforementioned provisions of Section 30914(f) when it made its decision on January 28, 2009 to reassign ninety-one million dollars (\$91,000,000) in RM2 funds that had been earmarked for the Dumbarton Rail Corridor Project to the WSX Project. Those violations were as follows:

1. In its January 14, 2009 staff report, the MTC stated that Section 30914(f) gave it the authority to reassign RM2 funds if a project is “...cancelled, cannot continue as scoped, or can be completed using other non-toll funds”. That report did not correctly quote or paraphrase the applicable language of Section 30914(f).

When defendant TRANSDEF challenged that rationale by letter dated January 15, 2009, MTC responded by noting in its staff memorandum dated January 28, 2009 that it was relying on the language that was added to Section 30914(f) in 2006. However, MTC has failed to properly apply that amended language.

The original language of that section, as was approved by the voters in 2004, allowed the MTC, if it found that a “...program or project cannot be completed or cannot continue due to delivery or financing obstacles making the completion or continuation of the program or project

unrealistic...”, that it could “...modify the program or the project’s scope, decrease its level of funding or to reassign all of the funds to another or an additional regional transit program or project within the same corridor...” (Emphasis added.)

In 2006, the Legislature amended the voter-approved language of Section 30914(f) to add a new alternative for reassigning funds: “If a program or project identified in subdivision (c) is to be implemented with other funds not derived from tolls, the commission shall follow the same consultation and hearing process described above and may vote thereafter to reassign the funds to another project consistent with the intent of this chapter.” (Emphasis added.) This new language deviated from the original public transportation program provisions presented to the voters in 2004, in reliance on which they approved an increase to the bridge tolls to fund that program. Moreover, the legislature did not enact a code section setting forth the “...intent of this chapter.” And as a practical matter, the new language makes the original language obsolete, inasmuch as all of the projects identified in Section 30914(c) require funds in addition to the RM2 toll revenues, and are thus “...to be implemented with other funds not derived from tolls.” The amendment thus drastically increased MTC’s discretion to reassign funds between projects beyond what the voters originally approved in 2004. And the voters have never voted to ratify or approve the changes that were made by the Legislature

2. The January 28, 2009 MTC memorandum essentially characterizes the shift of RM2 funds from the Dumbarton Rail Corridor Project to the WSX Project as a “funds swap”. In so doing, the MTC is impermissibly creating a rationale for the shift in RM2 funds that is not set forth in Section 30914(f). Any such transfer in funds based on that rationale also fails to account for the escalation in the cost of the Dumbarton Rail Corridor Project as a result of the delay in its construction occasioned by robbing it of its current funding allocation. Funds taken from the Dumbarton Rail Corridor Project now to be “swapped back” sometime between 2019 and 2027 will leave that project radically under-funded at that time, compared to what the voters approved, thus jeopardizing its construction at all.

3. MTC’s reassignment of the Dumbarton Rail Corridor Project funds, even under the authorities that they now assert, still violates Section 30914(f). First, that authority only allows

the reassignment of funds if a project is to “be implemented with other funds not derived from tolls.” It is beyond the realm of reasonableness for MTC to argue that its funding decision, that will not provide the Dumbarton Rail Corridor Project with funds allocated by the voters until sometime between 2019 and 2027, can seriously be characterized as “implementing” this project. That section requires that the any such funds be reassigned to another project “...consistent with the intent of this chapter”. The intent of this chapter is established by the original language of Section 30914(f) as approved by the voters which required that such funds be reassigned to another project “within the same corridor”. This same intent was reworded and continued in the 2006 amendment to state, “...to another project within the same bridge corridor”.

The WSX Project is not “within the same bridge corridor” as the Dumbarton Rail Corridor Project. As described in Sections 30914(c)(31) and 30914(c)(4), respectively, the WSX Project is an extension of a North-South corridor, while the Dumbarton Rail Corridor Project is an East-West corridor. Nor is there any direct connection between either end of the proposed WSX Project improvements and the Dumbarton Rail Corridor that crosses the San Francisco Bay.

4. The MTC’s reassignment of the subject RM2 funds is not consistent with the intent of Streets and Highways Code Division 17, Chapter 4, “San Francisco Bay Area Bridges” (commencing at Section 30910) as suggested by the MTC.

- First, shifting the funds to the WSX Project would not fund another project in the same bridge corridor as the Dumbarton Rail Corridor Project. Thus, it is not “consistent with the intent of this chapter” as required by Section 30914(f).

- Second, the WSX Project will not solve one of the most serious problems facing BART, namely, the inadequate capacity in the transbay corridor between the East Bay and San Francisco. In contrast, the Dumbarton Rail Corridor Project will offer a new alternative for a mass-transit link crossing the San Francisco Bay that is specifically intended to interconnect with multiple mass-transit systems, including Caltrain on the San Francisco peninsula, the existing BART station in Union City, the Capitol Corridor Amtrak train service that runs between San Jose and Sacramento, and the Altamont Commuter Express (“ACE”) train service that connects

Stockton and San Jose (*See*, Section 30914(c)(4)). Its operation will enable the existence of a flexible transit network based on conventional gauge rail, which is dramatically less expensive than BART extensions.

- Third, the WSX Project is merely an extension of the existing BART line that currently ends in Fremont. By itself, it does nothing towards meeting the goals set forth in Section 30914.5(d). That section calls for a “regional transit connectivity plan” that will improve transit system connections by creating a network of key transit hubs connecting regional rapid transit services to one another, and to feeder transit services. Once again, the Dumbarton Rail Corridor Project is intended to connect existing BART service, Capitol Corridor train service, ACE train service and Caltrain service, while the WSX Project is merely an extension of the existing BART line from Fremont, but makes no further connections to any existing regional rapid transit services.

Defendant ACTIA is quickly moving down a path towards committing the RM2 funds that the MTC has improperly reassigned from the Dumbarton Rail Corridor Project to the WSX Project. The agenda for ACTIA’s February 26, 2009 board meeting includes a proposal from its staff to approve allocations of other funds to proceed with the WSX Project based upon the MTC’s impermissible transfer of \$91 million of the Dumbarton Rail Corridor Project’s RM2 funds. Even the ACTIA staff report for that agenda item refers to those funds as being “advanced” to the WSX Project from the Dumbarton Rail Corridor Project. No such “advances” between approved projects are permitted under Section 30914(f). ACTIA’s approval of its WSX Project funding package (including the impermissibly transferred RM2 funds from the Dumbarton Rail Corridor Project) is necessary for BART to award a construction contract for the first phase of the WSX Project.

Unless the requested Temporary Restraining Order is issued, ACTIA is poised to approve a funding commitment for the WSX Project that is premised on an improper transfer of RM2 funds from the Dumbarton Rail Corridor Project. With ACTIA’s improper approval, BART is prepared to award a construction contract for the WSX Project. A Temporary Restraining Order prohibiting ACTIA from making its anticipated funding approval will prevent a potential illegal

expenditure of the \$91 million improperly transferred from the Dumbarton Rail Corridor Project that constitutes an irreparable injury to the public.

The MTC failed to comply with the statutory standards required in order for it to reassign the Dumbarton Rail Corridor Project funds. Therefore, all decisions and actions of any of the defendants that have been, or might be, based on those improperly reassigned funds should be restrained and enjoined to prevent an illegal expenditure of those public funds.

IV.

THE DEFENDANTS SHOULD BE ENJOINED FROM MAKING ANY EXPENDITURES OF THE MEASURE B FUNDS TOWARDS THE WARM SPRINGS EXTENSION PROJECT

In 2000, the voters of Alameda County adopted Measure B to provide funds for mass transit projects. Measure B extended an existing half-cent sales/use tax dedicated to local transportation projects. Section 14 of Measure B specifically provided that the proceeds of the taxes collected would be used solely for projects and purposes set forth in the Alameda County 20-Year Transportation Expenditure Plan that accompanied Measure B. One such project was the extension of BART rail service to Warm Springs. That Transportation Expenditure Plan provided, in part, “Funds for construction of the first segment of the BART rail extension to Warm Springs in Southern Fremont may not be used until full funding for the rail connection to Santa Clara County is assured.” (Emphasis added.)

No such “full funding for the rail connection to Santa Clara County” has yet been “assured” (emphasis added). To the contrary, the Santa Clara Valley Transportation Authority (“VTA”), the public agency in Santa Clara County that is attempting to extend BART train service from the Alameda County line to the City of Santa Clara, has yet to even apply for \$750,000,000 of the funds required for the construction of that project in its jurisdiction. In light of VTA’s failure to even apply for, let alone be approved for and then have Congress appropriate federal funds for BART train service in Santa Clara County, it is extremely fanciful for the ACTIA staff report for the February 26, 2009 board meeting to state that its legal counsel has determined that the full funding requirement of Measure B has been met.

Since full funding for the rail connection to Santa Clara County is not yet assured, and may never be assured, ACTIA is not entitled to make any of the Measure B funds available for the construction of the WSX Project at this time. Its decision to make such funds available and to spend them at this time in violation of the voter-approved conditions contained in Measure B would constitute an illegal expenditure of public funds that must be enjoined.

V.

CONCLUSION

For all of the aforementioned reasons, it is respectfully requested that this court grant a preliminary injunction in this case as follows:

1. Prohibiting the MTC and its officers, officials, employees, agents and anyone working in concert with it, from authorizing the transfer of, or actually transferring, the subject \$91 million from the Dumbarton Rail Corridor Project account, or, if said funds have already been transferred, prohibiting the release, expenditure, pledging or hypothecation of said funds for any purpose;

2. Prohibiting ACTIA and its officers, officials, employees, agents and anyone working in concert with it, from approving any WSX Project funding that includes the impermissible \$91 million transfer of RM2 funds from the Dumbarton Rail Corridor Project;

3. Prohibiting ACTIA and its officers, officials, employees, agents and anyone working in concert with it, from making or approving the finding required by Measure B that full funding for the BART rail connection to Santa Clara County is assured or, in the alternative, if such a finding should be made before the hearing on this motion, that ACTIA be ordered to rescind its approval of any such finding; and

4. Prohibiting ACTIA and its officers, officials, employees, agents and anyone working in concert with it, from releasing, spending, pledging or hypothecating any Measure B funds towards the construction of the WSX Project.

Dated: February 27, 2009

Respectfully submitted,
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By _____
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