

Transportation Solutions Defense and Education Fund

P.O. Box 151439 San Rafael, CA 94915 415-331-1982

April 23, 2013
By E-Mail

Steve Heminger
Metropolitan Transportation Commission
101 Eighth Street
Oakland, CA 94607

Re: Proposed Amendments to Regional Measure 2

Dear Mr. Heminger:

The Transportation Solutions Defense and Education Fund, TRANSDEF, is an environmental non-profit advocating the regional planning of transportation, land use and air quality. Our focus in recent years has been on reducing the impacts of transportation on climate change. We are writing today to express our opposition to proposed transfers that would eliminate the Dumbarton Rail Corridor Project as an RM 2-funded project. The legal arguments for why MTC is not authorized to amend RM 2 in this manner are contained in a letter from our attorney, Stuart Flashman, Esq., attached hereto. We provide below the transportation planning and public policy arguments for why eliminating the Dumbarton Rail Corridor project is unwise.

We object to the transfer of nearly \$3 million in alleged project savings from the Regional Express Bus Service for San Mateo, Dumbarton, and Bay Bridge Corridors to other corridors. Unless documentation can be provided to demonstrate actual savings in the San Mateo and Bay Bridge Corridors, these so-called "savings" are merely an obfuscation of a further diversion of funds from the Dumbarton project.

The full \$14,843,000 transferred from Dumbarton Rail must be explicitly acknowledged in Resolution 3801, Revised, as remaining in the Dumbarton Bridge corridor. (See attached letter for legal arguments supporting the demand that the funds remain in the corridor.) If savings are recognized in the Dumbarton Bus capital program, they must be banked for future operations funding in the same corridor.

Finally, we also write to support the proposed transfers from Marin's Greenbrae Interchange project to SMART and to the North-South bikeway.

Transportation Planning

The Bay Area's most expensive long-term challenge is the lack of capacity for future growth in BART's Transbay Tube. A second tube would cost many billions of dollars.

The Dumbarton Rail Corridor project has the potential to offer a fast trip to San Francisco for residents of the Tri-Valley and the Southern East Bay, including Newark and Fremont, thereby taking a portion of the load off the Transbay Tube. That in turn would make capacity available for further growth in the Northern East Bay, at a dramatically lower cost than a second tube.

Unfortunately, MTC staff only considered the project through the narrow lens of the Dumbarton Rail Corridor project. They missed the fact that the Dumbarton Rail Bridge opens up possibilities considerably beyond the Dumbarton Rail Corridor project. For example, ACE could be linked to the Dumbarton Rail Bridge for a direct connection from San Francisco to the San Joaquin and Sacramento Valleys. Once its ridership was proven, that route would be an obvious candidate for upgrading to high-speed status.

From a regional transportation planning perspective, the following points need to be considered:

- Traffic on Highway 101 is bad, especially around the approaches to the Dumbarton highway bridge. Express bus service over the bridge is caught in traffic congestion.
- Major new employment has been sited in the area that would be served by a Dumbarton Rail Corridor project.
- These two facts are strongly supportive of the continuing purpose and need for the project.
- Conventional-gauge rail is a far more cost-effective technology than BART heavy rail. As such, it is much better suited to commuter and intercity rail service in suburbs.
- BART's new focus on its Metro program makes best use of BART's strength: its ability to serve urban areas.
- A network of conventional-gauge rail properties would be far more cost-effective when extending service into low-density suburbs.
- In effect, this would create a Northern California version of Metrolink, acting as a complement to BART.
- Southern California has adopted an approach like that: a well-connected multi-modal transportation plan that includes both heavy rail and commuter rail, leveraging the strengths of each technology.
- The Bay Area would benefit from an integrated rail network that gave at least equal emphasis to commuter rail.
- The Dumbarton Rail Corridor project would act as a nucleus for the formation of a conventional-gauge rail network tying together the East Bay and West Bay. It is worth preserving the funding of this project.

High-Speed Rail

There is a probability greater than zero that the current high-speed rail project will be dead by summer. That said, there's clearly no urgency to move the \$20 million to Caltrain, or to remove the payback provision to the \$91 million loan to ACCMA, as those projects are not up against any funding deadlines. Why not let this proposal marinate for several months, while the fate of HSR is determined? The only downside to MTC would be the need to bring RM 2 back before the Commission later this year. If HSR stalls, the Dumbarton Rail Corridor would be a great project to build a fallback plan around.

At a minimum, TRANSDEF urges MTC to hold onto the \$20 million and leave the status of the \$91 million loan unchanged, while studying the potential for a Dumbarton Rail Bridge-based network of conventional-gauge properties to reduce the load on the Transbay Tube.

Public Policy Considerations

The Dumbarton Rail Corridor project was promised to the voters as a "new Transbay commuter rail crossing south of the San Francisco Oakland Bay Bridge." It is the only new transbay crossing in RM 2. That alone would make the proposed elimination of the project especially offensive to voters. Several issues should be carefully considered by MTC before proceeding with the proposed action:

- How important is it to MTC to be trusted by the public? Being seen as playing fast and loose with the public's toll money will damage public support for any future regional measure.
- MTC knew from polling before the RM 2 election that voters would not give MTC a toll increase to allocate however it wished. That is why RM 2 sought authorization for a specific list of projects, rather than complete discretion over allocations.
- It looks like an exercise in bad faith when MTC invites voters to support a specific list of projects, and then overrides the voters' project selections, substituting its preferences instead. This is a classic bait-and-switch.
- It looks like an exercise in bad faith when MTC succeeds in getting the Legislature to adopt seemingly innocuous amendments to the mechanics of the ballot measure, which it then later interpreted as giving MTC discretion to move money around as it sees fit.
- What is the test for a project being "realistic"? MTC has always considered the BART extension to San Jose to be realistic, despite that project's many billions of dollars of funding shortfalls. The Oakland Airport Connector, another BART project, continued to be "realistic" even after the FTA rescinded a \$70 million grant. MTC scraped together replacement funds to make the project happen.
- Because of MTC's role as the region's financing agency, project infeasibility cannot credibly be the result of project funding shortfalls, at least for a project with the relatively modest funding needs (as compared to BART extensions) of

the Dumbarton Rail Corridor project. If MTC wants a project completed, it has the financial resources to see it done.

- It is not permissible under RM 2 to assert a project's completion is unrealistic due to financing obstacles, when the financing obstacle is MTC's unwillingness to fund it. (See attached letter.)

Conclusion

TRANSDEF requests the Commission carefully consider the arguments contained herein and in the attached attorney's letter, and put a halt to its proposal 1) to transfer funds to Caltrain electrification; 2) to transfer "project savings" out of the Dumbarton Bus project; and 3) to offer loan forgiveness to ACCMA for the BART Warm Springs Extension project.

Sincerely,

/s/ DAVID SCHONBRUNN

David Schonbrunn,
President

Attachment

Letter from Stuart Flashman, Esq., with exhibits

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April 23, 2014

Steve Heminger, Executive Director
Metropolitan Transportation
Commission
101 Eighth Street
Oakland, CA 94607

RE: Proposed transfer of RM 2 funds from the Dumbarton Rail Project.

Dear Mr. Heminger:

I am writing to you on behalf of my client, the Transportation Solutions Defense and Education Fund ("TRANSDEF") regarding the MTC staff proposal to reallocate funding provided under Regional Measure 2 ("RM 2") and Streets & Highways Code §30914 subd.(c) from the Dumbarton Rail Project to Caltrain electrification and forgiveness of the loan of funds to the Alameda County Congestion Management Agency¹ ("ACCMA") for the construction of the BART Warm Springs extension. This proposal is in violation of both RM2 and §30914.

I. The Proposed Action Violates the Provisions of RM 2.

RM 2 was placed on the ballot in accordance with the provisions of Streets & Highways Code §30914 subd.(c) and §30921 as enacted by the Legislature in 2003 as SB 916 (Stat. 2003 Ch. 715). That statute called for placing before Bay Area voters a ballot measure authorizing an increase in tolls on Bay Area bridges for the specific purpose of funding a specifically identified group of projects, including the Caltrain Dumbarton Rail Corridor Project (subparagraph (4) under subd.(c)).

The ballot materials for RM 2 (See ballot pamphlet for Measure RM 2, attached hereto as Exhibit A) identified specific provisions about when and how funds could be transferred from any of the specified projects. Those provisions, parts of Streets & Highways Code §30914 as subd.(f), stated as follows:

If an operating program or project cannot achieve its performance objectives described in subdivision (a) of Section 30914.5 or if a program or project cannot be completed or cannot continue due to delivery or financing obstacles making the completion or

¹ That agency has since been amalgamated into the Alameda County Transportation Commission ("ACTC"). The loan transferred to the successor agency.

continuation of the program or project unrealistic, the commission shall consult with the program or the project sponsor. After consulting with the sponsor, the commission shall hold a public hearing concerning the project. After the hearing, the commission may vote to 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 approving RM2, the voters were presumed to be aware of the provisions of subd.(f), and to have given their approval to the measure subject to those provisions. Indeed, the description of RM 2 in the ballot handbook (p.9) also stated:

Specifically, the law provides that MTC may amend the level of funding for a project or reassign the funds to another regional transit project *within the same corridor*, but only after the project sponsor is consulted and a public hearing is held. [emphasis added]

It is obvious that the Dumbarton Rail Corridor and the BART Warm Springs Extension, while both included as projects under §30914 subd. (c), are not in the same corridor. The Dumbarton Rail Project is an east-west Transbay corridor project, while the BART Warm Springs Extension is an East Bay north-south corridor project. Thus, the transfer of funds does not satisfy the provisions of RM 2 as understood and approved by the voters.

It is equally obvious that Caltrain electrification is a West Bay north-south corridor project and again is not in the same corridor as the Dumbarton Rail Project. The proposed transfer of \$20 million to that project, which was not even listed in §30914 subd. (c) as presented to the voters, cannot satisfy the provisions of RM 2 as understood and approved by the voters.

2. The Commission's Proposed Action is Improper Even with the Legislative Amendments to §30914 Enacted in 2006.

Staff may argue that although the voters' approval relied upon the statutorily mandated amendment provisions in effect at the time of the ballot measure, the Legislature retained the right to change those procedures later. Even if that were the case, the proposed action would be improper because the action is not justified under a reasonable interpretation of the amended procedures.

In 2006, after the voters had approved RM 2, the Legislature, at the prompting of MTC, approved amendments to §30914. Among those amendments was an amendment to subd.(f) of that section. As amended, the new subdivision reads:

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 the 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. If an operating program or project as identified in subdivision (d) cannot achieve its performance objectives described in subdivision (a) of Section 30914.5 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 the 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 the project's scope, decrease its level of funding, or to reassign some or all of the funds to another or an additional regional transit program or project within the same corridor. [emphasis added]

The Dumbarton Rail Corridor project is the only new transbay crossing proposed in RM 2 -- a regional bridge toll measure intended to improve transbay travel.

Defunding that project therefore bears particularly close scrutiny to ensure that the voters' intent is being followed. MTC needs to show, based on substantial evidence, that the project truly cannot be continued or completed. While there may be a current funding shortfall for the project, because MTC could fill that funding shortfall in the next regional transportation plan if it chose to do so, the claim that project cannot be continued or completed is highly questionable if not downright fallacious. RM 2 placed before the voters a specific list of projects it was intended to fund. For MTC to substitute its own current preferences for those considered and approved by the voters using the subterfuge of claiming that the Dumbarton Rail Project cannot be continued or completed would be a violation of the voters' intent.

While the 2006 legislative amendments somewhat modified the provisions of §30914 regarding a program or project no longer deemed realistic, those provisions still require that any project to which the funds are to be transferred be in the same bridge corridor. A bridge corridor is not specifically defined in the legislation, but the provisions of §30914 subd. (c) require that revenue from the 2004 toll increase be used for projects which, "have been determined to reduce congestion or to make improvements to travel

in the toll bridge corridors.” The Dumbarton Rail Project being in the bridge corridor for the Dumbarton toll bridge, funds from that project could only be transferred to another project in that corridor – that is, which would reduce congestion or make improvements to that corridor. Neither Caltrain electrification nor the BART Warm Springs Extension qualify as such projects. Providing forgiveness for the loan of RM 2 funds set aside for the Dumbarton Rail Corridor to the BART Warm Springs Project would amount to a transfer of those funds to that project, and would violate §30914.

As already noted, both Caltrain electrification and the BART Warm Springs Extension are north-south corridor projects, rather than transbay corridor projects. In the absence of the Dumbarton Rail Project, neither project would even connect to the Dumbarton Toll Bridge corridor and neither would either improve that corridor or reduce congestion on it. At best, they would improve the north-south transit connections with San Jose and perhaps reduce commuter traffic along north-south highways, but that would not help the Dumbarton Toll Bridge corridor in the slightest.

MTC staff has argued that a more lenient standard can be applied to the funds transfer under the provision addressing programs or projects “to be implemented with other funds not derived from tolls.” Staff argues that because bridge tolls are not the sole source of Dumbarton Rail Project funding, this provision applies. That interpretation is unreasonable.

A statute must be interpreted reasonably and in the context of the surrounding provisions. The overall intent of subdivision (f) is to provide for situations where later post-election events may make it advisable to reallocate project funds. The Assembly Bill Analysis (attached hereto as Exhibit B) states that the 2006 AB 1407 amendments would “Establish procedures to reprogram Regional Measure 2 (RM2) when cost savings occur...” Neither the text nor the legislative history of the 2006 amendments indicate that they were intended to allow MTC to eliminate an RM 2 project based on the unsupported claim that its completion is unrealistic and replace it with an unrelated project.

Events contemplated by subdivision (f) include 1) savings that reduce the need for toll funds for a project; 2) a project being found infeasible; and 3) a project receiving sufficient funding from another source that toll funds are no longer needed for it. The mere fact that a project may be receiving some funding from a non-toll source is not, in itself, a sufficient reason to remove the project's toll funding. Indeed, multiple-source funding is the rule, rather than the exception, for major transportation projects. Rather, the purpose of the provision was to transfer the toll funding if it was no longer needed by the project.

While the Dumbarton Rail Project may have some funding beyond that provided by tolls, its funding situation has not changed significantly since the passage of RM 2. It certainly cannot be said that toll funds are no longer necessary for the project to be completed. Consequently, the provision concerning other funding sources cannot be pointed to as allowing MTC free rein to transfer Dumbarton Rail Corridor funds to other projects regardless of their connection to the Dumbarton Toll Bridge corridor. The transfer of funds from the Dumbarton Rail Project to Caltrain electrification and forgiveness of the BART Warm Springs extension loan are therefore improper under §30914 subd. (f) and violate MTC's mandatory duties under that section.

Most sincerely,

A handwritten signature in cursive script that reads "Stuart M. Flashman".

Stuart M. Flashman