Civ. No. C070877

CALIFORNIA COURT OF APPEAL

THIRD APPELLATE DISTRICT

TOWN OF ATHERTON et al.,

Petitioners/Appellants

v.

CALIFORNIA HIGH SPEED RAIL

AUTHORITY, a public entity,

Respondent

On Appeal from the Judgment and Post-Judgment Order of the Sacramento County Superior Court
Honorable Michael P. Kenny, Judge

Cases No. 34-2008-80000022CUWMGDS
and 34-2010-80000679CUWMGDS

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Respondent California High-Speed Rail Authority ("Respondent") would have the Court believe that the central issue in this appeal is essentially decided by the standard of review – substantial evidence. Respondent argues that on each of the three points raised in this appeal: the impacts of the high-speed rail line's vertical alignment on the San Francisco Peninsula, the validity of the ridership model used by Respondents, and the adequacy of the alternatives analysis in the Revised Final Program EIR ("RFPEIR"), substantial evidence in the record supports Respondent's position. Frankly, if that were the case, Appellants would not have filed this appeal. If one looks behind Respondent's assertions at what the evidence in the record actually shows, however, that stubborn evidence is itself the central problem for Respondent's position.

The evidence shows the following: 1) Choosing the Pacheco alignment using the Caltrain right of way locked in an elevated vertical alignment over a significant portion of the route on the San Francisco Peninsula. Not only did the RFPEIR not disclose that fact, but it refused to address the significant impacts that followed from that fact. 2) The only "evidence" supporting the ridership model used by Respondent in the Program EIR was the "professional judgment" of Respondent's consultants. That professional judgment, however, was itself not supported by any substantial evidence in the record, and an opinion without evidentiary support, even if made by an expert, is not substantial evidence. 3) The Union Pacific Railroad's refusal to allow any of its right of way to be used by Respondent rendered virtually all of the previously analyzed alternatives infeasible. While the Authority identified one feasible new Pacheco alignment, the only new Altamont alignment it evaluated suffered major deficiencies. Yet Respondent refused to give serious consideration to the proposed Setec alternative, which not only avoided using active Union Pacific right of way but also reduced the impacts and problematic aspects of Respondent's proposed Altamont alignment. Substantial evidence did not support Respondents conclusion that this alternative did not merit serious study.

II. ARGUMENT

A. DEFERRING ANALYSIS OF ELEVATED SEGMENTS OF THE PACHECO ALIGNMENT'S PENINSULA SEGMENT VIOLATED CEQA'S TIERING PROVISIONS.

Respondent argues, as it did in the trial court, that CEQA's tiering provisions allowed it to defer considering potential impacts from elevated segments of the Pacheco alignment on the San Francisco Peninsula. According to Respondent, those impacts need not be disclosed, discussed, or mitigated until after the basic decision between Altamont and Pacheco alignments has been made; that is, until project-level environmental review.

Appellants agree with Respondent that program-level environmental review need not address impacts whose occurrence will not be determined until the project-level decision is made. However, if an impact will result from the program-level decision, it must be disclosed and analyzed at that level, even if not all project-level details are yet available. That is the situation here.

1. THE PRINCIPLES DISTINGUISHING PROGRAM FROM PROJECT LEVEL IMPACTS.

CEQA encourages tiering projects; that is, when confronted with a large project, CEQA allows the lead agency to first consider the higher-level or programmatic decision and its associated impacts in a program-level EIR, while deferring more detailed consideration of the project and its impacts to later project-level analysis. (*In re Bay-Delta Programmatic Impact Report Cases ("Bay-Delta")* (2008) 43 Cal.4th 1143, 1170.) Thus, for example, a program-level decision might leave the lead agency with a choice of two options with very different impacts, but the choice between those two option would not be made until later, at the project level. In such a case, detailed analysis of the impacts associated with the two options would properly be deferred for later project-level analysis. On the other hand, if the program-level decision leaves only one option, then impacts associated with that option must be addressed at the program level, even if at that point only limited information is available about the option. So long as analysis does not require speculation, impacts must be addressed.

(*Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283-284; *City of Antioch v. Pittsburg City Council* (1986) 187 Cal.App.3d 1325, 1335.)

The key distinction about whether analysis of an impact can be deferred to the project level is whether the program-level decision commits the lead agency to a course of action that will predictably result in an impact on the environment. "Approval occurs when a public agency decision commits to a definite course of action." (*Center for Sierra Nevada Conservation v. County of El Dorado* ("*CSNC*") (2012) 202 Cal.App.4th 1156, 1181.) That commitment may not be explicit in the formal decision ostensibly being made.

As explained in Appellants' Opening Brief, *Bay Delta, supra*, helps show the distinction. In that case, the program-level decision established an environmental water account ("EWA") but did not determine what sources would be included in that account. Consequently, as the court's opinion explains, it was not necessary for the program EIR to analyze the impacts that would result from including any particular source in the EWA. (*Bay-Delta, supra*, 43 Cal.4th at 1175-1176.) However, under different circumstances, a different result would have ensued. If the evidence available at the time the program EIR was prepared had indicated there were only just enough water sources available to complete the EWA, the decision to establish the account would have committed CALFED, the lead agency, to using those sources in the account. If that had been the case, the impacts of using those sources in the EWA would have had to be identified and discussed in the program EIR, at least to the extent possible.[1]

[1] CEQA recognizes that analysis is only possible to the extent information is reasonably available. "Where future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences." (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 372.) Conversely, however, CEQA analysis should be done at the earliest point where meaningful evaluation is possible. (*Laurel Heights Improvement Assn. Regents of University of California*, *("Laurel Heights I")* (1988) 47 Cal.3d 376, 395.)

2. INFORMATION AVAILABLE AT THE TIME OF CERTIFICATION SHOWED THAT AN ELEVATED SEGMENT ON A PORTION OF THE SAN FRANCISCO PENINSULA WOULD BE REQUIRED.

Respondent argues that this case is like the EWA issue in *Bay-Delta, supra*, where analysis of impacts could be deferred to the project level. However, there is a key difference. In *Bay-Delta*, the program-level decision did not dictate what water sources would be used in the EWA. If the only evidence before Respondent had been the information contained in the program EIR, the situation would have been analogous to that described in *Bay-Delta*. The program EIR identified a wide range of alternative vertical alignments, ranging from tunnels or trenches to ground-level to elevated berms or aerial viaducts. (AR B6540.) The Responses to Comments in the RFPEIR stated that all those options, and their associated impacts, would be studied in the future, in the project-level analysis. (2 SAR 518, 519.) Because the vertical alignment was left undefined, it could not be used to clarify the analysis of visual or noise impacts, both of which would be highly dependent on the vertical alignment.[2]

The evidence contained in the Supplemental Alternatives Analysis Report (SAAR), however, changed the picture. The SAAR was a project-level document intended to probe which project-level alternatives were actually practicable and would therefore merit inclusion in the project-level DEIR. For the segment extending from Belmont through San Carlos to Redwood City, amounting to approximately 3.5 miles, the evidence presented in the SAAR showed that neither a trenched nor tunnel option, both of which were still "on the table" in the Revised Program EIR, was practicable. (SARA at 454-455.) Even the option of leaving the alignment on an elevated berm (which would still result in increased noise and visual impacts (AR B4111[elevated structures spread sound twice as far, due to a clearer path for sound transmission]; SARA 457[higher noise impacts that

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[2] For example, the Fremont section of the Altamont alignment, which would be on an aerial viaduct, was rated high for noise and medium for visual impacts (AR B4122, B4124; B4249, B4258), compared to the Peninsula Caltrain corridor, which was rated medium for noise and low for visual impacts. (AR B4119, B4124; B4244.)

at-grade or depressed options])) was not carried forward to the DEIR because it did not "enhance connectivity and mobility as well as an aerial viaduct option." (SARA 454-455.)[3]

Despite this new information, and the increased noise and visual impacts implicit in eliminating all but elevated alignment options, the RFPEIR made no change from the impact analysis in the original FPEIS/EIR, and the responses to comments continued to insist that trench and tunnel alternatives would be considered at the project level. (AR B6480 [RTC LO 14-3], 2 SAR 518, 519 [RTC LO 02-55, 56, 66.)

3. UNDER LAUREL HEIGHTS II, RESPONDENT WAS REQUIRED TO REVISE AND RECIRCULATE THE EIR TO ADDRESS THE INCREASED IMPACT.

Respondent argues that, because the SAAR was not a final agency decision, it was under no obligation to address the increased impacts from elevating segments of the Peninsula alignment in the RPEIR. Respondent ignores what the California Supreme Court said in *Laurel Heights Improvement Assn. v. Regents of University of California (Laurel Heights II)* (1993) 6 Cal.4th 1112. In that case, the court provided definitive guidance on the lead agency's duties when new information comes to light after an EIR has been circulated, but before it has been certified. As relevant here, the court held that no change need be made unless the new information indicated a new or significantly increased project impact. However, if that requirement was satisfied, the EIR needed to be revised and recirculated so that the public could comment on the changes. (*Id* at 1130.)

Here, the SAAR was not only released, but considered and accepted by Respondent well before it took final action to certify the RFPEIR[4]. The

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[3] Respondent asserts that the aerial viaduct option was preferred based on community input. (ROB at 24.) Appellants dispute this characterization. The only input cited is from city staffs, not the community, and there is no indication that Belmont and San Carlos preferred an aerial viaduct, only that they wished a below-grade option studied in addition to elevated options. (SARA 256.)

[4] The SAAR was presented, reviewed, and accepted by Respondent's Board of Directors in August of 2010. [Actual presentation at Board's August 5th meeting – see SARA table of contents] (SARA 369 *et seq*., 402 *et seq*.)

SAAR may not have amounted to a formal commitment by Respondent to an elevated segment, but it provided substantial new information indicating that, based on cost and constructability, an elevated segment would be the only practicable alternative. (SARA 454-461.) The SAAR also indicated that either elevated option would have higher visual and noise impacts than the options being eliminated. (*Id.* at 457.) Respondent has provided no substantial evidence to counter this new evidence indicating significantly increased impacts. Under *Laurel Heights II*, the RFPEIR should have been revised and recirculated to address these impacts and to correct the RFPEIR's fallacious statement that all options, including trench and tunnel alternatives, would be studied further at the project level. (e.g., 2 SAR 519.)

4. THE RFPEIR'S ANALYSIS OF IMPACTS DID NOT ADEQUATELY ADDRESS THE NEW INFORMATION CONTAINED IN THE SAAR.

Despite the new information from the SAAR constraining practicable vertical alignments on the Peninsula, Respondent continues to assert that the impact analysis in the 2008 FPEIS/EIR remained adequate. (Respondent's Opposition Brief ["ROB"] at pp.19-22.) It was not. Respondent argues that because the FPEIS/EIR only addressed the programmatic decision between Altamont and Pacheco alignments, it was permissible to limit its analysis of impacts to "general consequences of vertical alignment variations on the Peninsula." (*Id.* at 18.) However, tiering does not distinguish between general and more specific consequences of a decision. It distinguishes between the direct impacts of the decision being made and potential future impacts that may or may not occur, depending on future project-level decisions. Analysis of the latter may be deferred, but not of the former.

Respondent claims that the 2008 FPEIS/EIR adequately identified potential vertical alignments for the Belmont to Redwood City portion of the alignment. It points to diagrams at AR B3956 and B3958. Neither map provides enough detail to allow clear identification of the Belmont to

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The RFPEIR was released on August 16, 2010 (2 SAR 138), and was certified on September 2, 2010. (1 SAR 7.)

Redwood City portion, but both include mileage scales. As noted, according to the SAAR, the elevated portion would extend 3.5 miles north from the Redwood City station. Figure 2.5-5 (AR B3958) shows the "Retained Fill" [i.e., elevated berm] segment extending somewhere between one and two miles northward from the Redwood City station. The remaining distance to Belmont is shown as "At Grade". None of the segment is indicated as "Aerial".[5] Respondent points to the typical cross sections (AR B5231 et seq,), but these are not tied to any particular location.[6]

A. VISUAL/AESTHETIC IMPACTS

Respondent cites to the 2008 FPEIS/EIR's discussion of aesthetic impacts and notes that it identified some existing elevated segments at Caltrain stations. (ROB at p.19.) While those sections discussed isolated areas where elevated structures might be needed in conjunction with specific grade separations, there was no discussion of the visual/aesthetic impacts of a 3.5 mile-long elevated segment. That was to be expected, because the analysis in the 2008 FPEIS/EIR indicated most of the section would be at-grade. Respondent asserts that its findings in support of the 2010 approvals identified a significant visual/aesthetic impact on the Peninsula and committed to mitigation at the project level. This is not the case. At 1 SAR 41, 42, the 2010 findings identify overall visual impacts along the Peninsula as "low", meaning not significant, and the only significant visual impacts are associated with station overcrossings. (*See also*, AR B4244.) While the findings did identify significant and unavoidable visual impacts, none of those impacts were due to elevated alignment segments along the Peninsula, and the addition of elevated segments could be expected to result in a significantly increased visual impact. (See, AR B4244, 4245 [elevated segment in Niles residential area results in medium visual impact], B4258 [elevated segment in Fremont

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[5] The less detailed Figure 2.5-3 (AR B3956) shows the entire distance as "Cut & Fill/At Grade" with neither retained fill nor aerial portions.

[6] The citations to responses to comments in the supplemental administrative record likewise are non-specific, and only specifically reference Palo Alto, which is not part of the segment involved here.

residential area results in medium visual impact]; see also, 1 SAR 95, 96,97,98,99, 100, 101 [identifying impacts associated with elevated segments through existing urban areas between Fremont and Oakland and through the Tri-Valley].)

B. NOISE IMPACTS

As with the visual impacts, Respondent argues that the analysis of noise impacts for the Peninsula, including the Belmont to Redwood City segment, was adequate. Respondent notes that the noise impact along the Peninsula was generally rated "Medium". (ROB atp.20; AR B4119, B4124.) By comparison, however, noise impacts for the identified elevated segments through Niles and Fremont were identified as "High". (AR B4124[map showing noise impact levels].) Respondent argues that the Medium rating along the Peninsula already takes into account the potential for parts of that alignment being elevated. That may be. Certainly, the 2008 FPEIS/EIR identified elevated stations at San Jose, and possibly Redwood City, and other segments are indicated as "Retained Fill" – i.e., construction on a berm. (2 SAR 2704.) However, those segments did not include the segment involved here, and Respondent's own documentation indicates that increasing this segment's elevation could be expected to increase noise impacts.

C. CONCLUSION

As with several other impacts, the RFPEIR simply refused to come to grips with the information provided by the SAAR. In doing so, it failed to disclose impacts that would result from the program-level decision, and actively misled the public about what to expect at the project level. This did not meet CEQA's standard of a "good faith effort at full disclosure."

B. THE RIDERSHIP MODEL USED IN THE RFPEIR WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Respondent's defense of the ridership model depends on its assertion that Cambridge Systematics ("CS"), the consultant who prepared and recommended the model, based its model, and specifically the headway coefficient within that model, on substantial evidence in the record.

Appellants, by contrast, assert that while CS may have provided various rationalizations to explain its decision to artificially constrain, or "lock in" the value for this key coefficient, there was no substantial evidence to support that decision, and the decision therefore amounted to unsupported speculation. The California Supreme Court's very recent decision in *Sargon Enterprises, Inc. v. University of Southern California ("Sargon")* (Nov. 26, 2012, S191550) ___ Cal.4th ____ [copy attached] provides valuable, and indeed dispositive, guidance.

1. *SARGON* REQUIRES THAT THE COURT EVALUATE WHETHER EXPERT OPINION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

In *Sargon*, the court confronted head-on the question of when expert opinion should be relied upon and when it should be rejected as speculative. In that case, the trial court had been presented with testimony from an expert on behalf of the plaintiff about the value of lost profits involved in a breach of contract case. (*Id,* slip opinion at 2.) As in this case, an estimate involving numerical analysis was required. The court noted, "Lost profits need not be proven with mathematical precision, but they must also not be unduly speculative." (*Id.*) Similarly here, future ridership estimates will always be somewhat inexact, but they must be meaningful, rather than speculative.

Sargon's expert had presented his opinion that, but for the defendant university's breach, the company would have become extraordinarily successful. The trial court excluded the testimony as unsupported and speculative. The Supreme Court affirmed that determination, concluding that the courts serve a "gatekeeper" function in excluding unsupported expert testimony, especially when that testimony involves complex and arcane matters well beyond a layperson's grasp. (*Id.* at 26-28.)

2. CS' CONSTRAINT OF THE HEADWAY COEFFICIENT WAS UNSUPPORTED AND THEREFORE SHOULD NOT HAVE BEEN ACCEPTED AS SUBSTANTIAL EVIDENCE.

Contrary to Respondent's assertions, Appellants are not asking the Court to weigh the value of CS' "professional judgment". As Respondent notes, the substantial evidence standard does not allow the court to reweigh

the evidence that was before the agency. (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.) Likewise, a court's evaluation of expert testimony is not a weighing of the opinion's probative value. Nor may the court substitute its own opinion for that of the expert. (*Sargon, supra*, slip opinion at 29.) However, *Sargon* makes clear that the court does have a duty to consider whether an expert opinion is itself supported by substantial evidence. This involves " … a circumscribed inquiry to determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid." (*Id.*)

Unfortunately, the trial court here never undertook this narrow but critical inquiry. Instead, the court concluded that the issues raised about the ridership modeling represented no more than a, " …classic disagreement among experts that commonly occurs in the CEQA process …" (JA 1559.) These issues included objections to CS' constraint of the headway coefficient as inappropriate, raised by Appellants' expert consultant (2 SAR 786-787; 6 SAR 12345-12347) and by the University of California, Berkeley Institute for Transportation Studies (4 SAR 10487, 10490-10491), as well as the view of Respondent's own peer review panel that while equating the headway coefficient to in-vehicle time is considered acceptable for urban transit, interregional travel needed to be treated differently. [7]

Contrary to Respondent's claims (ROB at pp.28-29, 32-34), this was not merely, "a disagreement among experts" over how to interpret data, but a far more fundamental disagreement. All of the experts addressing the issue (other than CS) agreed that the basic methodology used by CS in constraining the headway coefficient was unjustified and unsubstantiated by any evidence to support its blanket application to interregional high-speed rail.

[7] Findings from Second Peer Review Meeting, AR F004175. This was also cited, but discounted, in the trial court decision. (JA 1562 fn. 22.)

3. CS MADE UNSUPPORTED AND INAPPROPRIATE ASSUMPTIONS TO REACH ITS INFLATED HEADWAY COEFFICIENT.

One of Respondent's first quotes from CS' determination of the headway coefficient encapsulates the problems with CS' approach:

> If wait times were half the headway and valued twice as highly as in-vehicle time, then we would expect the same coefficient on headway and in-vehicle time. (F4550, F4897) [ROB at p.31]

CS came into their model formulation with an expectation, derived from its experience with urban transit modeling, that the headway coefficient should equal the in-vehicle time coefficient. When their polling results showed otherwise, they "adjusted" the value to fit their expectations. This is exactly what the peer review panel cautioned against, and what the ITS study, and other critics, objected to. The peer review panel had noted that the interregional model could not be expected to behave like an urban model (AR F4175), and the ITS study noted that a headway coefficient value appropriate for urban transit use was not appropriate for interregional travel.(4 SAR 10491.)[8]

Despite the consternation of the reviewers, Respondent has continued to insist that the CS model, including the headway coefficient, is valid. It has gone so far as to claim that its peer review panel, and even the ITS, approved of its model's application to high-speed rail. They did not. In the trial court, Respondent asserted that:

> Potential values of the headway coefficient were also discussed with the original peer review panel, and the resulting value of 1.0 was within the range of values to panel considered." (JA at 940:23-25.)

The trial court judge took Respondent at its word and attempted to find where the peer review panel considered such values. As he noted in his decision, he could find no such reference in any of the peer review reports.

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[8] Respondent cites to the Federal Transit Administration's "New Starts" guidelines as justifying the constrained value for the headway coefficient. (2 SAR 445.) However, the FTA is responsible for urban transit, not intercity transit such as high-speed rail. (4 SAR 10419 [listing of urban rail projects used as examples].) The latter is the responsibility of the Federal Railway Administration.

(Ruling on Submitted Matter, JA 1313 fn.22.) As for ITS, Respondent points to its acknowledgement that if headways were sufficiently short a headway coefficient of 1.0 might be appropriate for high-speed rail. (ROB at 34.) However, this was far from the blanket approval that Respondent presents it to be. As will be shown, short headways are more the exception than the rule, even for Respondent's favored Pacheco alignment. With longer headways, ITS' criticism remained valid.

As was pointed out in Appellants' Opening Brief, the difference between the values of 0.2 and 1.0 for the headway coefficient reflects not only good modeling practice, but also common sense. In urban transit, where travel time is relatively short, one normally chooses one's departure time to arrive at a specific time. The more frequent the service [i.e., the shorter the headway], the more likely one is to find a departure time to one's liking. With long-distance interregional travel, however, travel time is much longer and arrival time is less predictably related to departure time. Consequently, a traveler's expectation of arrival time is tempered by the length of the journey and the risk of late arrival. (Generally, passengers don't worry too much about arriving too early.) As the peer review group had cautioned, these factors mean that a headway coefficient for interregional travel cannot be presumed similar to that for urban transit. Further, reliability will vary depending on travel mode. That would therefore have to be addressed through the mode-specific constants. The headway coefficient, which would apply equally to auto, air, and conventional and high-speed rail, would need to reflect more generic expectations. There was no evidence to support setting this generic headway coefficient at such a high value.

Nevertheless, Respondent argues that the large headway coefficient reflects the value of frequent departures in being able to arrive at a specific time. (ROB at p.31.) The ITS report charitably allowed that if high-speed trains really were to routinely leave every five or ten minutes, a headway coefficient of 1.0, such as is found for intra-urban transit, might perhaps be

credible. (4 SAR 10491.)[9] However, even using the favored Pacheco alignment, headways varied greatly. At peak hours between favored stations, they were as low as six minutes[10, 11]. During non-peak hours, however, headways could be as much as 48 minutes,[12] or over two hours for travel to Sacramento on the Altamont alignment[13]. Nor, as the ITS pointed out, was the high headway coefficient appropriately applied to other modes, including specifically air travel, where higher headway values are the norm. In all of these situations, CS' use of higher urban transit values for the headway coefficient was unjustified and universally criticized.

Respondent argues that the overall calibration of the model was felt by Respondent's peer review panel to be "reasonable". (ROB at p.32.)[14] However, as was pointed out, adjusting a mode-specific constant would have been the appropriate way to adjust for problems with travel share for air trips. (4 SAR 9036.) CS instead decided to constrain the headway coefficient because adjusting the mode-specific constant "would have a greater impact on the sensitivity of the model." (*Id*.)[15] Put more bluntly, if

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[9] Even here, though, one would need to consider how important a difference of five or even fifteen minute in arrival time would be compared to an almost three hour travel time.

[10] San Jose to San Francisco, business and commuter traveler [i.e., peak commute hours] row 1, column 6 in lower part of table attached to AOB after p.40.

[11] In a footnote (ROB at p.36, fn.9), Respondent objects to the tabular material attached to Appellants' Opening Brief on the basis that it "does not accurately reproduce material Respondent agreed was considered to be part of the record." In fact, the material is precisely the same, All that has changed is reproducing it at a scale that allows it to be legible. (See, RT at p.25 [Judge's comment about difficulty of reading tabular material in format provided].)

[12] San Francisco to Gilroy or Morgan Hill, non-business travel [i.e., non-peak hours], rows ten and twelve in the lower part of the table.

[13] Column seven in the upper part of the table.

[14] This evaluation by the peer review panel, however, was made before the headway coefficient had been modified.

[15] Respondent doesn't explain why the discrepancy between observed and expected ridership was found only for air travel and not for conventional rail; yet the change in headway coefficient would affect the latter too.

the air travel mode-specific constant had been adjusted to address air travel issues, it would not have affected the model's predictions for high-speed rail. In other words, the modelers intentionally and illogically chose the option that would affect high-speed rail predictions, despite the lack of any evidence that this range of headway coefficient was generally appropriate for an interregional transportation model.

The problem can be analogized to a patient who comes to the doctor for treatment of a problem with facial acne. The doctor has choices: she can prescribe a topically-applied lotion known to be effective and specific to treating facial acne, or she can prescribe antibiotic pills that may help the face, but will certainly also affect the rest of the patient's body, where nothing else is obviously amiss. A doctor would almost certainly choose the remedy that would have the least "side effects". CS chose the option that would maximize the effect of the "treatment" on the model's overall predictions (i.e., maximize the model's predictive sensitivity for high-speed rail), without any evidence that it was appropriate. CS did so based on its feeling that high-speed rail "should" be very sensitive to frequency of service. However, as its critics noted, CS had no evidence to support this feeling, especially any evidence that such a value was applicable to interregional transportation modeling. Assuming that high-speed rail "should" behave like high-frequency urban transit systems was an unjustified assumption that was not supported by any evidence.

4. THE "EXPERT OPINIONS" RECRUITED TO DEFEND THE CS MODEL DO NOT HAVE APPROPRIATE EXPERTISE TO BE CREDIBLE.

Respondent points to the opinions of other "experts" in support of the CS model. These expert opinions have little credibility. To begin with, most are in the form of letters addressed to Respondent and written shortly before the July 8, 2010 meeting of Respondent's board where CS was to defend its model against representatives of ITS. (MTC letter dated July 7, 201 [4 SAR 9146], M.L. Outwater letter dated June 28, 2010 [4 SAR 9147], Mark Bradley letter dated June 22, 2010 [4 SAR 9150.) The endorsement from a representative of the Los Angeles MTA was actually given at the hearing itself. (4 SAR 9123.) Further, each was from a source

involved in working with or for CS. Putting two and two together, once can surmise that the endorsements were recruited by CS to support its position with Respondent's board. Given endorsers' connections to CS, there is a legitimate question of bias, or at least conflict of interest.

Far more importantly, while all of the letters lavish praise on the CS modeling, none of them directly address the appropriateness of CS' modification to the headway coefficient. This latter is perhaps not surprising, because for the most part the endorsements come from sources whose experience with modeling is focused on urban, rather than interregional, transit systems. In urban systems, of course, CS' headway coefficient would be considered not only acceptable but routine. Yet the lack of most of the endorsers' experience with interregional travel modeling makes their endorsements meaningless.

5. RESPONDENT'S PROCEDURAL EFFORTS CANNOT MAKE UP FOR THE LACK OF SUBSTANTIAL EVIDENCE TO SUPPORT ITS MODELING CHOICE.

Respondent points to the extensive airing of critiques of the modeling, and specifically of the change to the headway coefficient, as being an appropriate procedural response to the controversy surrounding that issue. That would have been appropriate if all that was involved was a dispute between professionals over the interpretation of evidence. However, public airing of a dispute is of no help if the problem is not the interpretation of evidence but the lack of evidence. *Sargon*, *supra*, is helpful in this regard as well. In *Sargon*, the plaintiff's consultant actually testified in the trial court, where he was subject to cross-examination on his testimony. (*Id.* slip opinion at 3-12.) In addition, two other witnesses corroborated the expert's testimony. (*Id.*)

The trial court, in rejecting the testimony of the plaintiff's experts, had found that the methodology underlying the opinions had no evidentiary basis. Consequently, those opinions were essentially unsupported speculation. The Supreme Court agreed entirely with the trial court's determination, as well as with its reasoning. (*Id.* at pp. 34-35.) It agreed with the trial court that the expert's testimony, "was too speculative for the evidence to be admissible." (*Id.*) Bearing in mind that in that case the

opinion was given in open court and subject to cross-examination under the rules of evidence, that standard is equally applicable here, and full disclosure of both sides of the dispute does not cure or replace the lack of supporting evidence for CS' decision to increase the headway coefficient by a factor of five.

C. THE TRIAL COURT ERRED IN REFUSING TO REQUIRE MORE DETAILED CONSIDERATION OF THE SETEC ALTERNATIVE.

1. CONSIDERATION OF THE SETEC ALTERNATIVE WAS NOT PRECLUDED BY COLLATERAL ESTOPPEL.

Respondent begins its argument by claiming that consideration of the Setec alternative was precluded by collateral estoppel. (ROB at pp. 42-44.) This argument was rejected by the trial court (6 JA 1326-1330)[16], and Respondent has chosen not to cross-appeal on that issue. Consequently, having failed to raise the issue for the Court's consideration, Respondent is precluded from arguing it in the appeal. (*See, e.g., Fuller-Austin Insulation Co. v. Highlands Ins. Co*. (2006) 135 Cal.App.4th 958, 985 fn. 9.) However, if the Court chooses to consider this argument, it should reject Respondent's argument.

As stated in *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 8-9:

> Collateral estoppel has been held to bar relitigation of an issue decided at a previous trial if (1) the issue necessarily decided at the previous trial is identical to the one which is sought to be relitigated; if (2) the previous trial resulted in a final judgment on the merits; and if (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior trial. [quoting from *People v. Taylor* (1974) 12 Cal.3d 686, 691]

The fatal problem for Respondent is the question of whether the issues upon which they claim estoppel: train-splitting and the use of part of the Highway 101 corridor as part of the Setec alternative, are identical to issues raised previously in the previous Atherton I litigation. For collateral

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[16] The trial court did comment on the possible application of collateral estoppel to the specific issue of train-splitting. However, even there, the court did not reject that issue based on collateral estoppel, but on the merits. (6 JA 1334.) However, Appellants address this issue *infra*.

estoppel to apply, identical factual allegations must have been at stake in the prior litigation. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 512.)

The *Atherton I* determinations on both train-splitting and use of the U.S. 101 corridor were made in the context of considering Altamont and Pacheco alignment alternatives that used portions of Union Pacific Railroad right of way. At the conclusion of that litigation, the court ruled that assuming Union Pacific right of way could be used in spite of Union Pacific's strong objections made those alignment choices highly problematic, if not flatly infeasible. Consequently, the EIR was remanded to Respondent to address how the high-speed rail line could be routed without use of Union Pacific right of way. Respondent argues that the inability to use Union Pacific right of way did not materially change any of the facts involved in the train-splitting or U.S. 101 corridor issues. Not so.

Not only did the inability to use the Union Pacific right of way require Respondent to look at how to access Pacheco Pass without that key segment, it also precluded as infeasible most, if not all, of the Altamont alternatives considered in the 2008 FPEIS/EIR. (See AOB at p.27.) Consequently, by re-opening Respondent's consideration of project alternatives, it also re-opened related issues, including how alternatives could generate sufficient ridership to be financially feasible. The feasibility of train-splitting was a key part of answering that question for both new Altamont and Pacheco alternatives.

Once the question of alternatives and ridership was re-opened, it was appropriate to submit additional evidence that might result in a different decision on the train-splitting issue. In particular, in conjunction with the Setec proposal, Setec also submitted new information about the current use of train-splitting in European high-speed rail systems. This information included extensive analyses of train-splitting's feasibility in current European systems as well as technological advances that made train-splitting (and coupling) simpler and faster than had been assumed in the prior analysis. (2 SAR 783, 825.) This new information made the factual issue substantially different from that addressed in the prior Atherton I decision.

The Setec proposal's use of the U.S. 101 corridor on the Peninsula is even more obviously substantially different from the issue considered in the Atherton I litigation. The 2008 FPEIS/EIR had considered and rejected an alternative running the entire distance from San Jose to San Francisco within the highway's right of way. (AR B3968, B3971 [map],B5485.) The trial court agreed with Respondent's rejection of this alternative as infeasible. (2 SAR 309 *et seq*.) However, the Setec proposal involved a much shorter segment of the 101 corridor, from slightly north of the Dumbarton crossing's entry onto the Peninsula to just north of the San Francisco airport. (2 SAR 806, 813-814.) Further, while the U.S. 101 alternative considered and rejected in the 2008 FPEIS/EIR was placed primarily in the right of way of U.S. 101 (AR B5485), the Setec alternative only generally proposed using the U.S. 101 corridor, leaving the exact location, whether inside or outside of the U.S. 101 right of way, for later determination. Thus, the factual predicate of the Setec alternative's use of a portion of the U.S. 101 corridor was substantially different from the proposal for an alternative running the entire length of the U.S. 101 that was rejected in the 2008 FPEIS/EIR and whose rejection was validated by the court. Again, collateral estoppel does not apply.

2. RESPONDENT HAS FAILED TO SHOW THAT SUBSTANTIAL EVIDENCE SUPPORTS ITS DECISION NOT TO ANALYZE THE SETEC ALTERNATIVE IN THE RFPEIR

As explained in Appellants' Opening Brief at p. 25, *Laurel Heights II, supra,* and CEQA Guidelines §15088.5 set several standards for requiring recirculation of an EIR based on new information provided after circulation of the draft EIR. One of those standards is if a feasible new alternative is proposed that would substantially decrease the project's impacts, but which the project sponsor refuses to adopt. The Setec proposal was such a new alternative. Respondent, however, argues that either: 1) the Setec proposal did not differ substantially from alternatives already considered, or 2) the Setec proposal was infeasible. Respondent therefore refused to either analyze the proposal or recirculate the EIR to allow further public comment on the new proposal. The burden is on

Respondent to show that substantial evidence supports these decisions. Respondent has failed to do so.

A. THE SETEC PROPOSAL DIFFERED SIGNIFICANTLY FROM ALTERNATIVES THAT THE PRIOR EIR HAD EITHER DISCUSSED OR REJECTED AS INFEASIBLE.

As Respondent notes (ROB at p.45), an EIR need not consider alternatives that are substantially similar to those it has already addressed. (*Cherry Valley Pass Acres and Neighbors v. City of Beaumont ("Cherry Valley")* (2010) 190 Cal.App.4th 316, 355.) Respondent argues that the Setec proposal did not differ substantially from other alternatives that the EIR had either already discussed or had dismissed as infeasible. Substantial evidence does not support this assertion. The Setec proposal was a feasible proposal that differed significantly from any of the alternatives considered in the prior 2008 FPEIS/EIR. It therefore merited further consideration.

1. THE SOUTH OF LIVERMORE SEGMENT DIFFERED SUBSTANTIALLY FROM THE ALTERNATIVE RESPONDENT HAD PREVIOUSLY CONSIDERED AND REJECTED.

Starting from the easternmost segment of the Setec proposal, Respondent points to the prior 2008 FPEIS/EIR's conclusion that the South of Livermore alignment it had considered and rejected as infeasible "passed through a chokepoint of parkland and land under agricultural easements, and thus had high impacts to biological resources and agricultural lands." (ROB at 49-50.)

To begin with, Respondent's consultants did not properly document the South of Livermore route they claim corresponded to the Setec proposal. Their report (4 SAR 10283 et seq.) includes a map purporting to show the previously-rejected South of Livermore alignment (4 SAR 10290). Instead, however, the map shows alignment that pass either through or to the north of Downtown Livermore (labeled Livermore DT on the map).

Presumably, the consultants intended to show Figure 2.G-4 from the 2008 FPEIS/EIR (AR B5501, also shown as Trial Exhibits p.15.) This map is at such a small scale that no useful comparison with the Setec proposal is possible, at least not using the evidence in the record. However,

comparison of Figure 2-G-5[17] from the 2008 FPEIS/EIR (AR B5502) with the route for the Setec proposal (2 SAR 812, 828, 829) does not show the two routes to be substantially similar[18]. Further, as noted both in the EIR comment letter (2 SAR 815, 816) and in the letter submitted to Respondent just prior to the project approval (6 SAR 12325) the Setec proposal noted that the remaining impacts in the area could easily be mitigated through a combination of physical modifications to the project (e.g., the use of elevated structures to avoid severing farmland or migration corridors) and mitigation through purchase of replacement easements. Between the ability to avoid problematic areas in Respondent's prior South of Livermore alignment and the ability to mitigate, impacts should not have been used as an excuse to label this segment as infeasible.

Respondent dismisses the fact that the Altamont Corridor Rail Project ("ACRP") is also considering the same general corridor for its routing by arguing that the ACRP has different, less stringent criteria, and the ACRP alignment might not support true high-speed rail speeds. (ROB at 50.) However, Setec did identify an alignment supporting high-speed rail speeds in this same corridor. "The route is relatively straight, and allows maximum speed of 217 mph on the entire alignment between Fremont and Tracy." (2 SAR 813.) Respondent doesn't explain why this corridor could not be used as the ACRP corridor. Regardless, if the ACRP determined that its alignment through this area was feasible with appropriate mitigation, it only stands to reason that with similar mitigation the Setec proposal should also have been considered feasible.

Respondent also points to the fact that the South of Livermore Setec segment does not have stations in downtown Livermore or Pleasanton. Ironically, such downtown stations were identified as a source of major

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[17] At AR B5493, Respondent erroneously references Figure 2-D-5. There is no such figure. Presumably, Respondent intended to cite Figure 2-G-5.

[18] Note that an alignment running slightly south of Respondent's South of Livermore option would avoid much of the parklands and easement area. Given the scale of Respondent's figure, it is not possible to accurately compare Respondent's alignment with the Setec proposal and reach any conclusions beyond a general similarity, which would not address the similarity of impacts.

impacts and local opposition to the Altamont alignments that did include these stations. (1 SAR 99 [opposition of Tri-Valley PAC and City of Pleasanton to Altamont alternatives].) The Setec proposal is given no credit for avoiding the impacts (6 SAR 12325 [Setec proposal avoids community impacts to downtown Livermore and Pleasanton].) In short, none of the issues raised by Respondent constituted substantial evidence justifying refusal to study this segment of the Setec proposal.

2. FREMONT AREA.

Respondent continues to assert that it was justified in rejecting the Centerville line as infeasible because it might involve the purchase of Union Pacific right of way. (ROB at p.51.) However, it fails to address the internal inconsistency of the RFPEIR. While the RFPEIR rejected the Centerville line as infeasible because it involved purchase of a little-used segment of Union Pacific right of way, that same RFPEIR did not find infeasible alternatives using the Union Pacific alignment south of San Jose (or, for that matter, use of the Caltrain right of way, where Union Pacific can exercise a veto power over Respondent's use of the right of way). Instead, Respondent approved pursuing a "two-track" approach of considering a less attractive and higher impact alternative that avoided the use of Union Pacific right of way while at the same time also pursuing negotiations with Union Pacific about joint use. Given that the short stretch of Union Pacific right of way involved in the Centerville line is seldom used, it was all the more unreasonable to take this option off the table, especially as it was the only practicable Altamont option that avoided any joint use of Union Pacific right of way, instead proposing outright purchase of a short, little used segment; something that Union Pacific has never specifically rejected.

3. DUMBARTON BRIDGE

The prior EIR had rejected joint use of a Dumbarton rail bridge by both high-speed rail and Caltrain's proposed transbay service. The Setec proposal not only further discussed joint use of the existing bridge, but also provided a detailed discussion of a new joint use "high" rail bridge. By eliminating a parallel Dumbarton rail bridge for exclusive Caltrain use, this

new option would reduce impacts compared to the high bridge option that Respondent had considered in the 2008 FPEIS/EIR. It would also allow removal of the remaining portions of the existing rail bridge, providing significant environmental benefits to the Don Edwards Wildlife Refuge.

Respondent never directly addresses the differences between what Setec proposed and what had been studied in the 2008 FPEIS/EIR. Instead, it simply states that, "the new evidence was reviewed and determined not to alter the Authority's conclusions." (ROB at p.52.) Given that the new proposal would have used a lower impact bridge location and provided greater benefits and lower impact than the bridge proposals evaluated in the 2008 FPEIS/EIR, Respondent's refusal to study it was not supported by substantial evidence.

4. FREMONT TO SAN JOSE.

Respondent argues that joint use of the Altamont Corridor Regional Rail alignment (4 SAR 10435-10457 [maps]) did not merit study. It does this solely on the basis that Appellants had proposed treating that corridor as the equivalent of high-speed rail. Appellants made no such assumption. It is essentially a given, based on the urban nature of the Fremont to San Jose corridor, that true high-speed rail at 220 mph would not be possible, regardless of the corridor. The same is, of course, also true of the Caltrain corridor, as well as the proposed corridor through San Jose south of Diridon Station. In all of these areas, the chosen Pacheco alignment would only be proposed to run at approximately 110 mph. (AR B4113.) That is the same speed assumed for the Altamont alternatives that Respondent had previously analyzed. (*Id.*)

While it may be that the purpose and need for the Altamont Corridor Regional Rail Project would be different from that of high-speed rail, the project is proposed to have design criteria compatible with those used for the high-speed rail statewide system. (4 SAR 8816[map showing expected operating speeds].) This would put it in the same category as the Caltrain Corridor, and one may presume that similar opportunities and constraints would be presented. If planning for joint use of the Caltrain corridor is considered feasible, it is hard to understand, and indeed unreasonable to

think that joint use of the Altamont Corridor would be considered infeasible.

5. THE U.S. 101 PORTION OF THE ALIGNMENT

The Setec proposal called for running the high-speed rail line along the U.S. 101 corridor for the distance between where the new Dumbarton rail bridge would touch down to north of San Francisco International Airport, where the line would join the Caltrain corridor for the final distance into San Francisco. (2 SAR 813-814.) Respondent argues that this alignment was considered and eliminated in the 2008 FPEIS/EIR. Not so. The 2008 FPEIS/EIR looked at an alignment running in the U.S. 101 right of way from San Jose northward all the way to San Francisco. (AR B5485, B5497[map].) Several of the problematic issues for Respondent's 101 alternative, including a tunnel from the Transbay Terminal to 17th Street and visual impacts along the residential areas of U.S. 101 would not occur in the Setec alternative. In addition, while elevated structures would still be needed, the length of such structures would be considerably shorter because this section would only extend approximately 17 miles, as opposed to the roughly fifty miles of Respondent's rejected U.S. 101 alignment. Further, as Respondent has stated many times, using an existing transportation corridor will generally reduce overall impacts, but there is a big difference between a corridor and a right of way, something that at this point Respondent should be well aware of. The Setec U.S. 101 corridor routing maintains considerable flexibility to veer away from the strict right of way when that would avoid problematic overpasses and other highway-associated issues. This is not very different from the approach Respondent itself used south of San Jose where it was required to look for a right of way outside of the Union Pacific right of way. It should not have been dismissed out of hand.

CONCLUSION

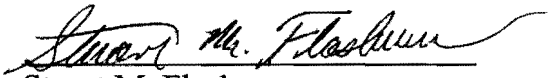
The Setec proposal represented an attempt to learn from past mistakes; to examine those parts of the Altamont that had proven most problematic and look for creative alternatives. That is, or is supposed to be, one of the main principles behind CEQA. In this case, however,

Respondent's rigid allegiance to it favorite – the Pacheco alignment – distorted its perspective and led it to reject the Setec proposal without the serious consideration it deserved.

With the extraordinarily high cost and high importance of this project, full compliance with CEQA is all the more important. Respondent cut corners and twisted the normal CEQA process to ensure it got the answer it wanted. In doing so, it produced what was not a good faith effort at full disclosure, but rather a post hoc rationalization of decisions already made. Appellants respectfully request that the appeal be granted and the case be remanded with instruction that Respondent once again revise and recirculate the EIR, and this time do it right.

Dated: January 22, 2013

Respectfully submitted,

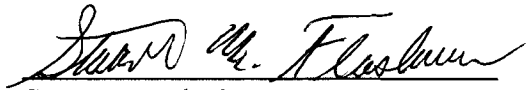


Stuart M. Flashman
Attorney for Appellants

CERTIFICATION

I, Stuart M. Flashman, as the attorney for the appellants herein, hereby certify that the above brief, exclusive of caption, tables, exhibits, and this certification, contains 8159 words, as determined by the word-counting function of my word processor, Microsoft Word for Windows 2002.

Dated: January 22, 2013



Stuart M. Flashman

PROOF OF SERVICE BY MAIL AND ELECTRONIC MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On January 22, 2013, I served the within APPELLANTS' REPLY BRIEF on the parties listed below by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

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In addition, on the above-same day, I served a copy of the above-same document, converted to "pdf" format, on the California Supreme Court through the Court's electronic website electronic filing address.

In addition, on the above-same day, I also sent an electronic copy of the above-same document, converted to "pdf" format, as an e-mail attachment, to the parties shown by an asterisk at the e-mail addresses shown above.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on January 22, 2013.

Stuart M. Flashman