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DELIVERY VIA COURIER AND ELECTRONIC DELIVERY

June 28, 2013

Hon. Vance W. Raye, Presiding Justice
Third District Court of Appeal
Stanley Mosk Library and Courts Building
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

RE: Town of Atherton et al. v. California High-Speed Rail Authority, Case No. C070877.

Dear Justice Raye,

I am writing as counsel for the appellants in the above-referenced appeal to respond to the letter of June 26, 2013 submitted to the Court by counsel for respondent. I should begin by pointing out that respondent made no attempt to communicate its concerns to appellants or to seek a stipulated agreement before unilaterally seeking to continue the current date set for oral argument.

Appellants strongly oppose respondent's request to continue, and essentially vacate, the date for oral argument as an unwarranted delay in the court's consideration of this case, which, as a case under the California Environmental Quality Act ("CEQA"), has precedence over all other civil actions in setting it for hearing, "so that the action or proceeding shall be quickly heard and decided." (Public Resource Code §21167.1.) Further, in an appeal, "to the extent feasible, the court shall commence hearings on the appeal within one year of the date of the filing of the appeal." (*Id.*) This appeal was filed on April 13, 2012. Even the current hearing date is already several months beyond the one-year deadline. For that reason alone, the court should consider respondent's request with a jaundiced eye.

Beyond that, however, there is no reason why an administrative decision by a federal agency concerning an entirely different and separate section of the statewide high-speed rail project should or could have any effect on the Court's consideration of an appeal that is based solely on violation of a state environmental law.

Indeed, respondent, in its letter to the Court, does not even assert that the Federal Surface Transportation Board's ("STB") decision concerning a sixty-five mile segment located in the Central Valley, in an area far removed from and totally separate from the Bay Area to Central Valley High-Speed Train Project at issue in this appeal, would have any legal effect on this appeal. Instead, respondent simply claims that it, "is examining the STB's jurisdictional decision to determine the potentially significant consequences that it may have in this case." (Respondent's July 25, 2013 letter to the Court at p.1.) The California High-Speed Rail Project is a major state infrastructure project extending over roughly six-hundred miles. It involves both federal and state legislative, executive, administrative, and judicial proceedings in a multitude of venues. If each decision in each of these proceedings were to be the basis for a similar delay to consider "potentially significant consequences that it may have in this case," the likelihood is that this case would never be heard.

In reality, there is little if any possibility of this STB decision having any effect on the determination of this appeal. The appeal is in a mandamus action under code of Civil Procedure §1085 concerning a quasi-legislative decision made in 2010. As the California Supreme Court noted in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, such cases are decided based on an administrative record of the proceeding that took place before the agency *at that time*. Evidence outside of the administrative record, and specifically evidence that was not in existence at the time of the agency's final decision, is, with very limited exceptions, irrelevant and therefore inadmissible. (*Id.* at 573 fn.4.) There is nothing to indicate that the STB decision falls under any of the narrow exceptions to this rule, nor would a federal agency's administrative decision be expected to have any legal effect on this appeal justifying its judicial notice. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials that are not "necessary, helpful, or relevant"]; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 760 fn.38 [judicial notice of federal court order and federal agency's report denied as irrelevant to state law mandamus claims in case].)

Respondent apparently relies on *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025 to claim federal pre-emption of California environmental laws. However, this defense was never raised in respondent's answers, nor was it raised or argued in the trial court. In *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1236 the court confronted a similar claim of federal pre-emption first raised on appeal. The court rejected the claim as not having been raised in the trial court and therefore having been waived. The court should do the same here.

In addition, and as a practical matter, counsel will be outside the country and unavailable between July 27th and August 20th. Thus, respondent's proposed schedule for submission of supplemental briefing would prejudice appellants by artificially shortening the time available for appellants to respond to respondent's supplemental brief. If the Court is inclined to grant respondent's request for supplemental briefing, appellants would ask that the briefing schedule be modified accordingly.

Appellants respectfully ask that the Court deny respondent's request for a continuance of the date set for oral argument and for supplemental briefing on the STB's administrative decision concerning the Madera to Fresno segment of the statewide project.

Most sincerely,



Stuart M. Flashman
Counsel for Appellants Town of Atherton et al.

PROOF OF SERVICE BY 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 June 28, 2013, I served the within LETTER OPPOSING CONTINUANCE OF ORAL ARGUMENT on the party 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:

Danae Aitchison, Deputy Attorney General
Office of the Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

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 June 28, 2013.

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

Stuart M. Flashman