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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

TOWN OF ATHERTON, et al., Petitioners v. PENINSULA CORRIDOR JOINT POWERS BOARD, Respondent	No. MSN15-0573 Filed 2/9/2015 Case filed under CEQA Assigned for all purposes to Hon. Barry P. Goode, Dept. 17 PETITIONERS' REPLY BRIEF Date: July 22, 2016, 2016 Time: 9:00 AM Dept. 17 Judge Hon. Barry P. Goode Trial Date – July 22, 2016

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INTRODUCTION

Respondent's Opposition to Petition for Writ of Mandate ("Opposition") makes several arguments about why Petitioners' challenge to Respondent's Peninsula Corridor Electrification Project ("Project") must fail. First, they argue that Petitioners are really attacking the California High Speed Rail Authority's ("CHSRA's") high-speed rail project, not Respondent's Project. They say that CHSRA's project will have its own EIR and any discussion of that project beyond the "conceptual" level would be speculative and is therefore unnecessary. Second, Respondent points to the many benefits it claims its Project will bring with it. Petitioners do not contest that the Project may bring some benefits with it[1]; but CEQA is about identifying project impacts, not benefits. Benefits only enter the picture in justifying significant unavoidable impacts through a statement of overriding consideration. Third, Respondent claims that, because the Court must give deference to Respondent's determinations, it must uphold those determinations based on Respondent's claimed evidence. According to Respondent, the Court may not even reevaluate the evidence in the record. (Opposition at 8-9.) Yet such reevaluation may be necessary, even if only to confirm its substantiality and its support for the stated conclusions.

While Petitioners acknowledge that the standard Respondent must meet in order for the Court to sustain its conclusions is not a high one, nevertheless, the record must contain substantial evidence that actually supports the conclusions Respondents reached. Critical evaluation by the Court is necessary to determine: 1) whether the evidence is actually substantial, and 2) whether it does indeed support Respondent's determinations. Further, not all of the issues in this case are to be decided on the deferential substantial evidence standard. Some issues, such as whether improper project segmentation occurred, while fact-dependent, are issues of law that the Court determines independently. *(Banning Ranch Conservancy v. City of Newport Beach (2012) 211 Cal.App.4th 1209, 1224.)* When the Court gives the legal issues and the evidence the

[1] Petitioners do believe that the EIR overstated some of the project benefits, such as its effect in reducing greenhouse gas production. That, however, is irrelevant to the issues in the case.

required scrutiny, it will find that Respondent's determinations were flawed and must be overturned.

ARGUMENT

I. The Project and CHSRA's blended system project are so integrally connected that they must be analyzed together.

Respondent argues that while the Project and CHSRA's blended system project may be related projects, they "are each stand-alone projects and are not dependent upon one another." (Opposition at p. 2:22-23.)[2] Such is not the case. When the facts and circumstances of the two projects are properly considered, they are not independent and therefore must be evaluated in a single EIR.[3]

A. THE DECISION ON WHETHER THE RESPONDENT ENGAGED IN "PIECEMEALING" BY NOT CONSIDERING THE LARGER CALTRAIN ELECTRIFICATION/BLENDED SYSTEM PROJECT AS A TWO-PHASED LARGER PROJECT IS DETERMINED IN THE COURT'S INDEPENDENT JUDGMENT.

Respondent's argument on segmentation ("piecemealing") in its EIR for the Project begins by assuming the issue should be decided based on the "substantial evidence standard. (Opposition at p. 9:20-21.) The cases say otherwise. *Laurel Heights Improvement Assn. v. Board of Regents ("Laurel Heights I")* (1988) 47 Cal.3d 376, 396, which Respondent admits is the seminal case on this issue, set a specific legal standard for when future activities must be considered in an EIR being prepared. While that case also acknowledged that the analysis needed to be done on a case-by-case basis and would often be highly fact-specific (*Id.* at p. 396), the determination is nonetheless a legal one, which the Court determines independently, and that

[2] While clearly part of Respondent's argument, this assertion is placed in Respondent's "Statement of Facts."

[3] In many ways, it can be argued that CHSRA should have been the lead agency for both projects. However, that is an issue that is not before the Court. The EIR was cooperatively prepared between the two agencies and either could have been designated the lead agency. (cite) Further, whether the issue is defined as an improper project description or inadequate analysis of cumulative impacts, the underlying flaw of piecemealing is the same. (*See*, Laurel Heights I, supra, 47 Cal.3d at p. 394 fn.6.)

conclusion is explicitly confirmed in *Banning Ranch Conservancy, supra*, 211 Cal.App.4th at p. 1224.)

B. RESPONDENT MISCONSTRUED THE MEANING OF THE COURT OF APPEAL'S DECISION IN *BANNING RANCH CONSERVANCY*.

Respondent asserts that the court of appeal's decision in *Banning Ranch Conservancy*, *supra*, requires this Court to reject Petitioners' claim of improper project segmentation. (Opposition at p. 10-12.) Respondent bases its analysis on a single sentence in that decision, to wit, "…two projects may properly undergo separate environmental review (i.e., there is no piecemealing) when the projects have different proponents, serve different purposes, or can be implemented independently." (Opposition at p. 10:23-25, quoting from *Banning Ranch Conservancy, supra*, 211 Cal.App.4th at p. 1223.) Based on this one sentence, Respondent asserts that if any of the three attributes apply [different sponsor, different purpose, independent implementation], project segmentation has not occurred. However, the meaning of a court of appeal decision may not necessarily be gleaned from a single sentence. A single sentence may be included as a convenient shorthand, but its meaning must be determined in the context of the entire decision. (*In Re Pope* (2010) 50 Cal.4th 777, 783-784, *cf. DuBois v. Workers Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388 [same principle as applied to statutes].)

Even a cursory consideration of decisions finding project segmentation shows that Respondent misconstrued the sentence in *Banning Ranch Conservancy*. For example, the first California case to discuss project segmentation under CEQA, *Bozung v. LAFCO* (1975) 13 Cal.3d 263, involved a Local Agency Formation Commission's decision[4] not to require environmental review under CEQA before making a decision on annexing a property to a city. (*Id.* at p. 267.) The California Supreme Court decided that it did, even thought the next approval

[4] In *Banning Ranch Conservancy, supra*, 211 Cal.App.4th at p. 1223, the court mischaracterized the *Bozung* annexation approval as being the city's project. While the city may have initiated the annexation request, it was LAFCO, not the city, that made the decision to approve the annexation. The annexation approval was LAFCO's project, not the city's.

to be granted, whatever it was, would be given by the city involved, not the LAFCO. The question was whether the environmental effects of the two decisions, on annexation and on approving a specific development project, should have been analyzed together. The Supreme Court decided they should have been. Yet under Respondent's interpretation of the single sentence from *Banning Ranch Conservancy, supra*, LAFCO would have been correct in finding its approval exempt from CEQA.

Similarly, in *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, the court held that a county's EIR for approving a mining reclamation plan should have included consideration of the mining operations, even though the mining operations would occur on federal (Bureau of land Management) land and would be approved by a federal agency, not the county. Again, since approval of the reclamation plan was a county project, while approval of the mining operation was not, under Respondent's interpretation of *Banning Ranch Conservancy*, one would have to conclude that no project segmentation had occurred. Yet the discussion in *Banning Ranch Conservancy, supra*, 211 Cal.App.4th at p. 1223 pointed to these two cases as demonstrating situations where project segmentation had properly been found. Clearly, something is wrong with Respondent's interpretation of the sentence.

The sentence in *Banning Ranch Conservancy* is consistent with these cases, however, if it is read as indicating that the three attributes pointed to "*may*" indicate that project segmentation has not occurred; i.e., they indicate the *possibility* that there was no project segmentation.[5] This meaning is confirmed by comparison with the parallel construction in the topic sentence of the preceding paragraph in that decision, "And there *may* be improper piecemealing when the reviewed project legally compels or practically presumes completion of another action." [emphasis added.] In that sentence as well, "may" here means a possibility rather than permission. This also fits with the Supreme Court's comment in *Laurel Heights I* that the

[5] One definition of "may" [Riverside Webster's II New College Dictionary, 1995 ed.] is "Used to indicate a certain measure of likelihood or possibility."

analysis must be done on a case-by-case basis. In short, all three factors must be looked at together to determine whether improper segmentation occurred.

C. BASED ON A FACTUAL ANALYSIS USING THE FACTORS IDENTIFIED IN BANNING RANCH CONSERVANCY, THE FAILURE TO FULLY INCLUDE THE BLENDED SYSTEM IN THE ANALYSIS OF PROJECT IMPACTS VIOLATED CEQA.

As was already explained in Petitioners' Opening brief, and is not contradicted by Respondent, the blended system is certainly reasonably foreseeable. Nor can it be argued with a straight face that the blended system will not likely change the scope or nature of the initial project or its environmental effects. Even the "conceptual" cumulative impact analysis included in the Project's EIR makes that clear. (e.g., AR 00968-00969 *et seq.*)

Respondent argues, however, that, as in *Banning Ranch Conservancy, supra*, the second project is not a consequence of the first, and therefore need only be considered in the less detailed analysis of overall cumulative impacts, rather than as a subsequent phase of the same project. (Opposition at pp. 10-12.) It claims that the projects are separate under all of the three criteria identified in Banning Ranch Conservancy. (*Id.*) Even if that were the case, the ultimate test is that set forth in *Laurel Heights I*, but, consideration of *Banning Ranch Conservancy*'s factors leads to the same conclusion – that the two projects are both really phases of a larger transportation improvement project for the Peninsula.

Respondent argues that because the Joint Powers Board is the proponent of the electrification project, while CHSRA has proposed, and will approve, the blended system project, the two projects have different proponents. That is *partially* true. However, CHSRA's blended system is entirely dependent on the Project, *and CHSRA has dictated to Respondent* certain Project elements that are needed for implementation of the blended system. Foremost among these is that the electrification system chosen by Respondent must be compatible for joint use by the blended system. Indeed, serving high-speed rail was explicitly the first-stated purpose for the Project. (AR 00208 [first bulleted paragraph].) The EIR acknowledges that this "would set the stage for" CHSRA's follow-up blended system construction. (*Id.*) This was the tacit *quid pro*

quo for the hundreds of millions of dollars of Proposition 1A bond funds that CHSRA has pledged to provide to Respondent's Project.

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The Project EIR also acknowledges that beyond the electrification infrastructure itself, the overall Project had been "designed to accommodate HSR service, as well as Caltrain service." (AR 00207.) CHSRA would be required to add or modify certain elements of the Caltrain system, such as straightening excessively curved segments so they could accommodate speeds of 110 mph, adding passing tracks, and adding new station platforms and other infrastructure to those Caltrain stations that would double as blended system stations. It was understood that Respondent would not modify its Caltrain system in any ways that might interfere with CHSRA's implementation of the blended system. While Respondent may claim to be the primary architect of the Project, CHSRA was, at the very least, a "junior partner" in both its design and funding. Thus the Project, while nominally Respondent's, was in reality a joint project of the two agencies. [6]

As for the Project's purpose, Respondent focuses on the fact that electrification was a Caltrain goal before the blended system was conceived of and approved by CHSRA, and that Caltrain is focused on providing local commuter rail service, while the blended system would be part of a longer distance intercity passenger rail system; but a project may have more than one purpose. That is the case here. There can be little doubt that both Caltrain electrification and the blended system are parts of a larger overall project of enlarging and improving passenger rail functions and facilities between San Francisco and San Jose. Indeed, the Caltrain improvements can be seen as developing a "feeder" system that would funnel passengers from the entire

[6] In fact, looking at the combined project, it would seem that CHSRA is actually the "senior partner," with Respondent little more than a contractor implementing the electrification element of CHSRA's plans. By that standard, it would appear CHSRA should have been the lead agency for a combined project EIR.

Peninsula into the longer distance high-speed rail system, particularly at the San Jose terminus of the Project.[7]

Finally, Respondent rewrites the third criterion – whether the projects can be implemented independently – as whether they have independent utility; a very different question. If properly phrased, the answer to the question must be "no" for both the electrification and blended system projects. Without the blended system, the Project would not have sufficient funding and, unlike some of the rejected alternatives, would be financially infeasible. As for the blended system, it will require that the Caltrain tracks be electrified for it to operate. Without the electrification project, or something else functionally equivalent to it, the blended system cannot happen; hence CHSRA's willingness to contribute over $700 million towards making the Project happen on terms it dictated.

Respondent asserts:

> Similarly, here, Caltrain will install an electrification system that can be used by both the Caltrain Project and the Blended System project. But, like in *Banning Ranch*, Caltrain will install the Electrification Project regardless of whether the Blended System ever materializes. It would require a giant leap in logic to say that the Blended System is somehow an inevitable consequence of the Project (see Banning Ranch, supra, 211 Cal.App.4th at pp. 1225-1226), and the two projects are in no way inseparable as Petitioners assert. (Opposition at p. 12:7-12.)

Respondent has the relationship backwards. It is not that the Blended System is the inevitable consequence of the Project. Rather, the Project, as approved, has been designed by CHSRA as the precursor to the Blended System. Without the project funding that CHSRA is committing to the Project, Caltrain in the future would continue as it has been since its inception – unelectrified. As the EIR admits, for the past twenty-five years, JPB has sought to electrify its system. However, until the blended system came along, it had been unable to obtain adequate funding to accomplish that goal. Respondent's claim that "Put simply, with or without HSR, the

[7] Respondent and CHSRA are also joint sponsors of the DTX project, a tunnel extending Caltrain (and high-speed rail) service to the new downtown San Francisco Transbay Transit Center, ("TTC"), making it the northern terminus for both systems.

Electrification Project is needed and will go on," (Opposition at p. 13) is hand waving, and nothing more. Nothing in the record substantiates that claim.

Unlike the situation in *Banning Ranch Conservancy*, electrification of the Caltrain tracks between San Francisco and San Jose is far more than "a baby step" towards the blended system. While the record does not appear to contain a separate cost estimate for the blended system *per se*, the preliminary alternatives analysis, prepared in 2010 while CHSRA was still planning for fully separate high-speed rail tracks in the Caltrain right of way, included rough cost estimates for construction of a San Francisco – San Jose high-speed rail line. (Appendix L to Preliminary Alternatives Analysis, AR 06733 et seq.) They provide a general idea of the relative cost of the various components that would make up the blended system. Per mile costs were provided for various components, including at-grade track (approx. $1.5 million per mile), signaling, communication and wayside protection system (approx. $2.7 million per mile), and power supply and distribution (approx. $2.65 million per mile). (AR 06738, 06739[8].) The total cost for a single track plus the other necessary components would be approximately $6.85 million per mile. Thus electrification would be 2.65/6.85 = 38.6% of total cost. Further, new track would only be needed for the passing track and curve straightening sections. Thus total track costs would be less than for other components, which would be needed throughout, so electrification would be well over 40% of total capital costs for the blended system. Despite the obvious approximations inherent in this analysis, it indicates that electrification would be far more than a "baby step" towards the blended system. It is more like a "giant step." Thus, by all three of the *Banning Ranch Conservancy* criteria, as well as by comparison with the project discussed in that case itself, the Project is not a separate, independent project from the blended system. Hence the EIR engaged in improper project segmentation in its analysis of impacts.

II. The "temporary" relocation of the northern terminus of high-speed rail service to the 4th and King Street Caltrain station was a change to the project that would

[8] The unit costs provided are from one segment, but the costs were uniform across all segments.

result in new or significantly increased impacts, therefore requiring revision and recirculation of the EIR.

As noted in Petitioners' Opening Brief at p. 19, very late in the EIR process, CHSRA informed Respondent that it was likely that all blended system high-speed rail trains would "temporarily" terminate at Caltrain's 4th and King Street station until the DTX tunnel could be fully funded and constructed.[9] This change would affect the layout of the 4th and King station, requiring additional gates for CHSRA trains. It would also change the operation of that station and the traffic impacts surrounding the station. In response, the EIR was modified to indicate that changes would be needed and impacts would likely increase, but deferred any analysis, including identification of new or significantly increased impacts, to CHSRA's separate blended system EIR. (AR 0940.) Respondent defends this posture by arguing that this change is too speculative to be analyzed now, and might not even happen. (Opposition at pp. 14, 21.)

As explained in Section I, *supra*, the Project and CHSRA's blended system project are far more closely linked than Respondent cares to admit. With that linkage comes an obligation to discuss and analyze reasonably foreseeable future phases of the linked project if they would change the project's scope or impacts. (*See, Laurel Heights I, supra*, 47 Cal.3d at p.395.)

Under *Laurel Heights Improvement Assn. v. Regents of University of California ("Laurel Heights II)* (1993) 6 Cal.4th 1112, changes to a future phase must be identified and discussed in the EIR even if they are made after the draft EIR had already been circulated for public comments. Further, if those changes would result in new or significantly increased impacts, the revised EIR must be recirculated for additional public review and comment. (*Id.* at pp. 1129-1130.)

[9] In a comment letter of the DEIR, CHSRA noted that blended system trains might use the 4th and King station as an "interim" terminus "due to prolonged delay of the Downtown Extension Project [DTX]." (AR 01226.) The Transportation Analysis for the Project EIR noted that the DTX project was, at present, "partially funded." (AR 03041.) This explained the need for an interim northern terminal.

Laurel Heights I, supra, also addressed Respondents' complaint that too little is known to allow analysis of the effects of the terminus change. In *Laurel Heights I*, the University had formally decided to occupy a new Laurel Heights campus. Some activities had already been moved to the campus. Other decisions on future activities had not yet been made, but:

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> [T]he University, by the time it prepared the EIR, had either made decisions or formulated reasonably definite proposals as to future uses of the building. At a minimum, it is clear that the future expansion and the general types of future activity at the facility are reasonably foreseeable. (*Laurel Height I, supra*, 47 Cal.3d at p. 397.)

As with Respondent here, the Regents complained that predicting the impacts of future activities would be speculative and too difficult. The court disagreed. It noted that, while speculation about what was "merely a gleam in a planner's eye" was not called for, preparing an EIR required a certain degree of prediction (*Id.* at p. 398), and that "an agency must use its best efforts to find out and disclose all that it reasonably can." (*Id.* at p. 399.) The court went on to state:

> We find no authority that exempts an agency from complying with the law, environmental or otherwise, merely because the agency's task may be difficult. If CEQA is unduly burdensome, the solution lies with the Legislature, not with this court. (*Id.*)

The Legislature has not, in response, seen fit to reduce an agency's duty to analyze impacts from a reasonably foreseeable future project phase.

The EIR acknowledged that the DTX was not fully funded, and could provide no information as to when (if ever) full funding allowing construction of the DTX would be achieved. Without that information, it is the completion of the DTX, not its non-completion, that is speculative.[10] CHSRA properly disclosed that, in the absence of funding and construction of

[10] Lack of funding is not uncommonly the cause for long delays, and even abandonment of a project. (*See, e.g., Monterey Peninsula Taxpayers Assn. v. County of Monterey* (1992) 8

the DTX, it would need to terminate blended system trains at the 4th and King Caltrain station. At that point, the burden shifted, at least partially, to Respondent to analyze and discuss the expected change in impacts, which could be expected to be considerable. Given Respondent's close cooperative relationship with CHSRA, it is not unreasonable to expect the two agencies to cooperate in evaluating the impacts to be expected while the 4th and King station is required to serve as an interim terminus for blended system trains; and that analysis should be done now, so that the cumulative impacts can be disclosed before Respondent makes its decision on the Project.

III. The EIR failed to disclose significant direct and cumulative emergency vehicle access impacts.

A. THE ISSUE OF EMERGENCY VEHICLE ACCESS IMPACTS DUE TO "GATE DOWN" TIME WAS ADEQUATELY EXHAUSTED.

Respondent attempts to dispose of the emergency vehicle access issue by claiming failure to exhaust administrative remedies. Respondent complains that the specific issue the inadequacy of the EIR's analysis was not raised by Petitioners, or by anyone else. (Opposition at p. 15.) However, in an administrative process, such as that involved here, where those commenting on an EIR are typically laymen not represented by legal counsel, the standard for exhaustion of is somewhat relaxed. (*Citizens Assn. For Sensible Development of Bishop Area v. County of Inyo ("Citizens Association")* (1985) 172 Cal.App.3d 151, 163; *accord, Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 872 fn.8.)

In a legal proceeding, exhaustion requires a party to state with specificity the legal issue being place before the court. In an administrative proceeding, however, such specificity is not required, but, "It is no hardship, however, to require a layman to make known what facts are contested." (*Citizens Association, supra*, 172 Cal.App.3d at p. 163.) Here, as Respondent acknowledges, commenters on the Draft EIR expressed concern that, with the increase in trains

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Cal.App.4th 1520, 1532 [county acknowledges that it "has a large backlog of public works projects that are languishing for lack of funding."].)

and consequent increase in "gate-down" time at crossings, emergency vehicle access across the tracks could be adversely affected. (Opposition at p.15, citing to [AR 1348, 1943].) That concern adequately raised the question of whether the increase in gate-down time, and its effect on emergency vehicle access, should have been considered a significant impact. It certainly raised the issue sufficiently that Respondent could have revised its analysis to acknowledge that impact if it had chosen to.

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B. THE EFFECT OF GATE-DOWN TIME IN INCREASING DELAY AT SOME CROSSINGS WAS A SIGNIFICANT IMPACT THAT SHOULD HAVE BEEN DISCLOSED, REGARDLESS OF WHETHER OVERALL EMERGENCY VEHICLE ACCESS WAS AFFECTED.

Respondent argues that the dispute over emergency vehicle access delay impacts is merely a dispute over the methodology used to measure delay. Respondent asserts that, even if delay at specific crossing gates were significantly increased (e.g., 2-3 minute increase in delay at the Fair Oaks Lane crossing), the EIR was justified in only looking at the overall delay in the city where the crossings were located (in that case, Atherton), and using that as the criterion for identifying a significant impact. (Opposition at p. 16.)

Under Thresholds of Significance, the EIR stated that, for emergency vehicle access, the threshold was, "Result in inadequate emergency access." (AR 00878.) Nothing stated that this threshold only applied to entire cities. The question, then, is whether a 2-3 minute delay at a specific crossing gate could result in "inadequate emergency access." Respondent argues that emergency vehicle drivers would know which crossings would have extended delays and would avoid those crossings in favor of others. However, Respondent confuses total delay versus increase in delay. Some crossings might have little change in delay because the delay time is already so large that vehicles already tend to avoid that crossing if possible, so the delay under project conditions might not increase. In fact, the crossings with the largest increase in delay might well be those that currently have the least delay.

In any case, if the destination of the emergency vehicles, be it a crime, a fire, or a medical emergency, is close to an impacted crossing, but on the other side of the crossing from the emergency vehicles, inadequate emergency access, and a significant impact, would result. The public deserved to have that impact disclosed, not buried in an "overall" evaluation of access. This would hold equally for both direct and cumulative emergency vehicle access impacts. Both evaluations were flawed and must be rejected.

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IV. The EIR's analysis of the cumulative station safety impact from the Project and the blended system was inadequate as to center-platform stations.

In addition to the other cumulative impacts discussed above, the EIR was deficient in its analysis of the cumulative safety impacts at two center-platform stations on the Caltrain San Francisco-San Jose line: Broadway-Burlingame and Atherton. These two stations differ from other Caltrain stations in that passengers wait for the northbound train on a platform situated between the northbound and southbound tracks. Passengers can only reach the center platform by crossing one or the other sets of tracks.

Respondent's response to the cumulative safety concerns due to the combination of Respondent's Project and the blended system project is that their discussion be deferred to CHSRA's environmental review of its project. (Opposition at p. 20.) Respondent argues that since it is not designing the blended system, it cannot speculate about the effects that system may have on Caltrain passengers' safety.

While the design of the blended system and its stations may not yet have been completed, neither the Atherton nor Broadway-Burlingame station will be a station for the blended system. The expectation is that for stations where high-speed rail trains do not stop, the trains will simply

travel through the station on the Caltrain tracks, without reducing speed.[11] (See, e.g., AR 07829 [graph showing nonstop blended system train speeds traveling from San Francisco to San Jose, going at a constant 110 mile per hour through the entire mid-peninsula], AR 02250.)

Respondent argues, as it does for virtually all the cumulative impacts, that without project details, any discussion of these impacts would be premature and speculative. Yet it is clear that current plans indicate that CHSRA has no intention of increasing its costs by including bypass tracks for these two center platform stations or by redesigning the stations to make them side-platform stations. By the time CHSRA undertakes a project-level EIR for the blended system, the electrification project may already be complete, making it much more difficult and expensive to change the platform configurations for these two stations and potentially locking in the current configuration. If the cumulative safety impacts are to be studied and mitigated, it should be now, not after the electrification project has been completed.

V. Preliminary evaluation of cumulative impacts from straightening extreme curves in the Caltrain alignment to accommodate the blended system is not premature.

The last cumulative impact deficiency in the EIR is its failure to do even a preliminary analysis of the impact resulting from CHSRA having to straighten sharp curves in Caltrain's current alignment to accommodate the 110 mph speed of blended system trains. Again, Respondents claim such an analysis is premature, and that while it is clear such straightening will be needed, the curves needing straightening cannot be identified until CHSRA conducts its project-level environmental review. (Opposition at p. 22.) Respondent also claims that Petitioners failed to exhaust their administrative remedies. (*Id*.) The latter assertion can be disposed of quickly. Petitioners' Opening Brief cited to comments on the Draft EIR, found at AR 01963, which specifically point to the need for track straightening to accommodate high-

[11] There are no plans to add bypass tracks for these stations, only passing tracks that include neither station. (See, AR 12731, 12735 [schematic track layouts for combined Caltrain/blended system infrastructure, with and without passing tracks].)

speed rail trains. It is hard to imagine a more specific comment on the need to discuss this improvement in the EIR.

As for such an analysis being premature, Respondent argues that only CHSRA, through its project-level EIR, can identify the segments needing straightening. Yet even the maps provided with the EIR suffice to identify the parts of Caltrain's current alignment where curved segments will obviously need straightening. (E.g., AR 05087 [segments 3-5], 05088 [segments 53-57], 05096 [segments 336-341, 342-344]. While such a preliminary analysis might not coincide with the results of a more rigorous analysis, it would suffice to at least identify roughly the areas involved and the nature and extent of the impacts to be expected. Given Respondent's duty to address the foreseeable impacts from the entire project (*see, Laurel Heights I, supra,* 47 Cal.3d at p. 399), at least this level of preliminary analysis and disclosure is required. Respondent may not simply defer all analysis of impacts to the later phase when the impacts can be identified and analyzed, at least as a preliminary level, now.

VI. The EIR's analysis of project alternatives failed to adequately consider the economic feasibility of alternatives, given the current funding situation.

Respondent asserts that, despite the then-current funding shortfall,[12] the EIR's consideration of alternatives did not need to evaluate the effects of that shortfall on the potential economic feasibility of different alternatives. (Opposition at pp. 23-24.) Yet Respondent admits that, "The analysis may take into account *economic*, environmental, social, and technological factors." (*Id.* at p. 23 [emphasis added].)

To begin with, Respondent argues that the trial court's very recent decision[13] in the case *John Tos et al. v. California High-Speed Rail Authority et al.* showed that the legality of CHSRA's funding contribution is no longer in doubt. (*Id.*) That judgment, however, post-dates

[12] Although beyond the scope of the current case, that shortfall has only worsened since the Project's approval, with no additional funding, but sharply increasing project costs.

[13] Indeed, the appeal period for that decision has, at the moment, not yet even expired.

the Project's approval by more than a year and is, for that reason alone, irrelevant.[14] Beyond that, the decision concluded only that a challenge to CHSRA's use of Proposition 1A funds for the blended system, based on noncompliance with the provisions of Streets & Highways Code §2704.09, was premature, as the final funding plan required prior to such expenditures had not yet been approved. It did not address whether such a challenge, once ripe, might be successful, other than to note that, as of the moment, the evidence seemed to indicate noncompliance. Thus the question of the economic feasibility of Respondent's approved electrification project remains at least as much in doubt now as when the EIR was certified.

Regardless of whether the reasons underlying a project alternative's economic problems are legal or otherwise, economic feasibility is both a legitimate and important factor that must be considered, especially under the Project's economically precarious circumstances. Respondent simply brushed it aside for its preferred alternative. The EIR did, by contrast, consider the economic feasibility of two other alternatives, BART and third-rail electrification, and reject them on that very basis. (Opposition at p. 32.) Respondent's behavior was not only unwise and improper, it was also inconsistent.

The failure to fully and fairly consider the economic feasibility of all Project alternatives prior to choosing full electrification with exclusively electric multiple unit trains biased Respondent's choice, as did including compatibility with CHSRA's electrified blended system project and its associated over $700 million as a prime project objective. For these reasons, Respondent's decision-making process was flawed and in violation of CEQA.

VII. Respondent's defense of its responses to EIR comments fails to show that those responses were adequate.

In response to Petitioners' claim of inadequate responses to comments, Respondent raises two defenses. First, it claims that, so long as it gave "a good faith reasoned response," that response is adequate. That may be true, but the key term is good faith. In general, an EIR is

[14] See, Petitioners' Opposition to Respondent's Request for Judicial Notice.

required to demonstrate a "good faith effort at full disclosure." (*In re Bay-Delta et al*. (2008) 43 Cal.4th 1143, 1175.) In other words, as was explained in *Laurel Heights I, supra*, 47 Cal.3d at p. 399, the agency preparing the EIR must use its best efforts to find out and disclose all that it reasonably can.

In its responses to numerous comments, which have been detailed in both this brief and Petitioners' Opening Brief, Respondent refused to address the issue raised. Instead it insisted that discussion of the issue could and would be deferred to CHSRA's project-level environmental review of the blended system. As has already been explained, that response was improper and violated Respondent's duty to make a good faith attempt at full disclosure.

As an example, one comment expressed concern about increased congestion, due to the Project, at the El Camino Real/Alma intersection, but also worried about that exacerbation interfering with emergency vehicle access. As Respondent points out, the response did discuss problems with the intersection and possible mitigation measures, but failed to indicate whether the proposed improvements – signal preemption and addition of a turn lane, would, if implemented, sufficiently mitigate the delay to avoid affecting emergency vehicles. (AR 02390-91.)

While the response to a comment from Petitioner TRANSDEF expressing concern about passenger safety on station platforms when blended system trains passed through at full speed referred the commenter to CHSRA's station guidelines, that response would not address the main focus of the concern – stations where blended system trains would not stop, and particularly center platform stations like Atherton and Broadway-Burlingame. As explained earlier, as to those stations, where the risk is highest, the concern went totally unanswered.

CONCLUSION

Respondent, in its EIR on the Project, masterfully "hid the ball" in refusing to fully disclose the ways in which this project, in combination with CHSRA's blended system project, could result in massive negative impacts on the areas along the Caltrain corridor through the San Francisco Peninsula. If allowed to stand, the Project's approval will lock in those impacts and

create just the kind of momentum for moving forward with the blended system that has been warned about by the California Supreme Court since it first decided *Bozung v. LAFCO, supra*.

Both Caltrain electrification and CHSRA's blended system project are large and important projects. They will affect their surrounding communities in myriad ways. They are also inextricably intertwined. For both these reasons, their environmental review needed to be taken seriously and considered together, rather than putting off analysis of one project while moving ahead with the other. Respondent's environmental review of its Peninsula Corridor Electrification Project failed to provide the good faith effort at full disclosure that CEQA demands. For this reason, and all those stated in Petitioners' briefs, Petitioners respectfully request that their petition be granted.

DATE: May 23, 2016

Respectfully submitted,

/s/ Stuart M. Flashman
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