SUPERIOR COURT OF THE STATE OF CALIFORNIA

CONTRA COSTA COUNTY

TOWN OF ATHERTON, a Municipal Corporation; TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation; and COMMUNITY COALITION ON HIGH-SPEED RAIL, a California nonprofit corporation, Petitioners V. PENINSULA CORRIDOR JOINT POWERS BOARD, a public entity, and DOES 1-20, Respondent	Case No. MSN15-0573 OPINION AND ORDER

I. Introduction

Petitioners, Town of Atherton, Transportation Solutions Defense and Education Fund, and Community Coalition on High-Speed Rail challenge the adequacy of the Environmental Impact Report ("EIR") prepared by Respondent, Peninsula Corridor Joint Powers Board ("PCJPB"), in connection with the approval of the Caltrain Peninsula Corridor Electrification Project (the "Electrification Project" or "PCEP").[1]

The PCJPB operates Caltrain, which runs commuter trains along the San Francisco Peninsula -- as far north as San Francisco, and through the South Bay region -- as far south as Gilroy. Its trains are pulled by diesel locomotives.

[1] Petitioners did not seek to name any Doe defendants prior to the hearing on the writ. The Doe defendants are, therefore, dismissed.

Since at least 1992, the PCJPB has sought to electrify its rail system so it could replace the diesel locomotives with railcars driven by electricity. It finds diesel engines are costly, polluting and noisy. In addition, electric trains would permit improved system performance and increased ridership. See AR 208-209.[2] It has studied that a number of times, but never before been able to bring the project to fruition.

The Electrification Project which is the subject of the EIR in question, would finally succeed in realizing the PCJPB's long-held goal. It would convert approximately three-quarters of its trains to Electric Multiple Units ("EMU") by roughly 2019 or 2020.

Petitioners challenge the Electrification Project's EIR. The gravamen of the challenge involves the relationship between the Electrification Project and the California High Speed Rail ("HSR") project which is being developed by the California High Speed Rail Authority ("CHSRA" or the "Authority").

In simplest terms, CHSRA plans to build track where it must, but will seek to use existing track (modified to accommodate high speed rail) where it can. Its plans call for running high-speed trains on electrified track. If the Caltrain track is electrified, then, with significant modifications to the Caltrain system, it will be able to accommodate high speed rail.[3]

In 2012, PCJPB, CHSRA and seven other agencies entered into a Memorandum of Understanding ("MOU") describing how they would work towards a "blended system in the San Francisco to San Jose segment known as the Peninsula Corridor of the Statewide High-Speed Rail System." AR 15652. It described a number of projects including (i) the "CBOSS/PTC" project to improve communications and signal systems, (ii) the Electrification Project, and (iii)

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[2] All citations to the Administrative Record are identified as "AR _____." The Bates stamps on the record's pages contain a number of leading zeros. Those have been dropped for clarity.

[3] "An electrified Caltrain system would set the stage for an expanded modern regional express service and for Blended Service. While the Proposed Project would not include all infrastructure necessary to implement HSR service in the corridor (such as HSR maintenance facilities, station platform improvements, or passing tracks), the electrical infrastructure (such as overhead wire systems) would accommodate future Blended Service and the Proposed Project would not preclude HSR." AR 208. See below, for a further discussion of what would be needed to bring HSR to the Caltrain tracks.

the creation and implementation of a "blended service" between Caltrain and CHSRA. Each of the three projects has a distinct timetable, as is discussed further below.

In 2013, PCJPB and CHSRA entered into another "Agreement." AR 15639. That outlined how the two agencies would work together to improve Caltrain rail service with implementation of the blended service model as an ultimate objective.

The MOU and the Agreement made it clear that each of the three projects identified in the 2012 MOU were to be implemented on different timetables, each with its own set of environmental documentation and permits. The 2013 Agreement said that:

- PCJCB shall continue to serve as the lead agency for the CBOSS Project. AR 15643, ¶ C. The CBOSS project was to be completed by 2015 as required by the Federal Railroad Administration.
- PCJCB shall continue to serve as the lead agency for the Electrification Project. AR 15643, ¶ D. That project is expected to be completed by 2019. *Id.*
- CHSRA shall continue to serve as the lead agency for the Blended System project which has a "longer term perspective." AR 15644, ¶ H. At oral argument, the parties said that the blended system would lag the Electrification Project by several years, and was not expected to be operational until at least 2027.

These agreements describe three separate projects and identify a lead agency and timetable for each.

Nonetheless, from Petitioners' standpoint, the salient fact is that substantial funding for the Electrification Project will come from CHSRA. At oral argument it was said that the Electrification Project will cost approximately $2 billion. Approximately $600 million of that will be contributed by the CHSRA bond fund.[4]

[4] The numbers are neither precise nor critical to the resolution of the issue. There are various estimates in the record. See for example, AR 348. No doubt the estimates change over time.

As a result, Petitioners say, the Electrification Project is inextricably tied to high speed rail. They conclude Caltrain's EIR for the Electrification Project is lacking because it does not, in effect, serve as an EIR for the HSR "blended system" in the Peninsula Corridor.

Most of their arguments are premised on this point. So, for example, the headings of their arguments in the Table of Contents, include:

- "The Project Description failed to include both Caltrain and HSR components of the combined electrified system"
- "The EIR failed to modify the project description to account for the change in the San Francisco terminus for CHSRA trains"
- "The EIR's analysis of cumulative impacts from the CHSRA blended system was inadequate"
- "The EIR failed to acknowledge or analyze the cumulative noise and safety impact of HSR trains transitioning center-platform stations like Atherton"
- "The EIR failed to acknowledge or analyze the cumulative emergency vehicle access impacts associated with the blended system"
- The EIR failed to identify or analyze the cumulative impact of the change in the San Francisco terminus for blended system HSR trains"
- "The EIR failed to identify or analyze the cumulative impacts involved in changing the Caltrain alignment to straighten curves to (sic ["*too*"]) extreme to accommodate blended system HSR travel."

There are other arguments, addressed below. But most of Petitioners' arguments depend on the link between the Electrification Project and high speed rail. So, that is addressed first.

II. Piecemealing

Whether an EIR correctly describes a project, whether a project is "the whole of an action," and whether there has been piecemealing, are related matters that raise a question of law, not fact, and are therefore reviewed de novo. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard)*; *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1223-24.

Petitioners argue that "Neither project can be implemented successfully without the other." Petitioners' Opening Brief ("POB") 8:19. They explain:

> Without PCJPB's cooperation in allowing track-sharing, providing a compatible electric power source, and facilitating and coordinating the updating of signaling, station and alignment changes, and other system improvements needed for HSR, the blended system could not happen. Conversely, without the $705 million of Proposition 1A funding provided by CHSRA, conditioned on providing compatible electrification of the Caltrain tracks between San Francisco and San Jose, the PCEP would be financially infeasible." *Id.*[5]

In effect, Petitioners state a "but for" test. "But for the funding provided by CHSRA, the Electrification Project could not go forward" and "but for the Electrification Project, HSR could not go forward." Therefore, the EIR must encompass both. Petitioners charge PCJPB with "piecemealing" the high speed rail project by examining only the Electrification Project in the EIR.

There are a number of things wrong with Petitioners' argument. But the first point is that its "but for" view is not the entirety of the appropriate legal test. The law is much more nuanced and fact-dependent than that.

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[5] At oral argument, the parties seemed to agree that about $600 million of the $705 million was to be used for the Electrification Project. Counsel were not certain about these numbers.

Banning Ranch Conservancy v. City of Newport Beach (2012) 211 Cal. App. 4th 1209 ("*Banning Ranch*") sought to categorize the "murky" precedent regarding piecemealing under CEQA. The Court of Appeal wrote,

> First, there may be improper piecemealing when the purpose of the reviewed project is to be the first step toward future development. (See, e.g., *Laurel Heights, supra*, 47 Cal.3d at p. 398 [university planned to occupy entire building eventually]; *Bozung, supra*, 13 Cal.3d at pp. 269–270 [city annexed land so it could rezone it for development]; *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 244 [227 Cal. Rptr. 899] [county rezoned land as "a necessary first step to approval of a specific development project"]; *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1337 [232 Cal. Rptr. 507] (*Antioch*) [negative declaration wrongly issued; "the sole reason" city approved road and sewer construction was "to provide a catalyst for further development"]; see also *Antioch*, at p. 1336 ["[c]onstruction of the roadway and utilities cannot be considered in isolation from the development it presages"].) And there may be improper piecemealing when the reviewed project legally compels or practically presumes completion of another action. (*Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 272 [118 Cal. Rptr. 3d 736] [EIR for reclamation plan should have included mining operations that necessitated it]; *Tuolumne County, supra*, 155 Cal.App.4th at p. 1231 [home improvement center "cannot be completed and opened legally without the completion of [a] road realignment"]; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 732 [32 Cal. Rptr. 2d 704] [EIR for residential development should have included sewer expansion that was a "crucial element[]" of development]; *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726 [117 Cal. Rptr. 96] (*Plan for Arcadia*) [shopping

center, parking lot, and adjacent road widening "should be regarded as a single project"].)

On the other hand, two projects may properly undergo separate environmental review (*i.e.*, no piecemealing) when the projects have different proponents, serve different purposes, or can be implemented independently. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 99 [108 Cal. Rptr. 3d 478] (*CBE*) [refinery upgrade and construction of pipeline exporting excess hydrogen from upgraded refinery were "independently justified separate projects with different project proponents"]; *Planning & Conservation League v. Castaic Lake Water Agency* 2009) 180 Cal.App.4th 210, 237 [103 Cal. Rptr. 3d 124] (*Castaic Lake*) [water transfer had "significant independent or local utility" from broader water supply agreement, and would be implemented with or without it]; *Sierra Club v. West Side Irrigation Dist*. (2005) 128 Cal.App.4th 690, 699 [27 Cal. Rptr. 3d 223] (*West Side Irrigation*) [two water rights assignments to city were "approved by different independent agencies" and "could be implemented independently of each other"]; *Plan for Arcadia, supra*, 42 Cal.App.3d at p. 724 [shopping center EIR could exclude road work the city had "long before" decided would be needed due to new freeway].)

Banning Ranch, 211 Cal. App. 4th at 1223-1224.

This case fits more neatly into the latter category ("on the other hand…") than the former. It is true that the Electrification Project may be a step toward future development of high speed rail. In that case, *Banning Ranch* says, "there *may* be improper piecemealing." *Id.*

But here "the reviewed project [does not] legally compel…or practically presume…completion of another action." *Id.* Petitioners are simply wrong when they say "[n]either project can be implemented successfully without the other." POB 8:19. The Electrification Project can be implemented successfully even if the HSR project never takes

another step forward. It is a project of independent utility that Caltrain has been seeking to implement for nearly twenty-five years. The fact that the CHSRA is willing to fund it does not change that fundamental fact.

Indeed, at bottom, CHSRA is providing funds to Caltrain while *hoping* that the rest of CHSRA's plans work out well enough that, someday, it can bring the blended system to fruition. But if CHSRA is unable to do that, Caltrain will still have a successful project. Put another way, HSR may need to have Caltrain's Electrification Project completed. But Caltrain does not need to have High Speed Rail completed for the Electrification Project to be a success.

In the words of *Banning Ranch* and the cases it cites, the Electrification Project and HSR "have different proponents, serve different purposes, or can be implemented independently" (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal. App. 4th 70, 99), the Electrification Project has "significant independent or local utility" (*Planning and Conservation League v. Castaic Lake Water Agency* (2009) 188 Cal. App 4th 210, 237) and can be "implemented independently" of any ultimate high speed rail project. (*Sierra Club v. West Side Irrigation District* (2005) 128 Cal. App. 4th 690, 699.) *Banning Ranch at* 211 Cal. App. 4th 1223-24.

Here, the project is the electrification of Caltrain's system. The EIR addresses that fully. Indeed, with only one exception discussed below, Petitioners do not fault the EIR's discussion of the Electrification Project itself. Instead, they focus on high-speed rail.

Respondent is not the proponent of high-speed rail; CHSRA is. Still, the PCJBP's EIR does not ignore the relationship between its Electrification Project and CHSRA's High Speed Rail blended system; nor does it minimize future developments. It properly discusses HSR in a number of places. It is forthright in describing the CHSRA's plans for a blended system, explaining why it is able to obtain funding from HSR, and describing, appropriately, the potential cumulative effects in conformance with 14 CCR 15130(b) ("…the discussion need not provide as great detail as is provided for the effect attributable to the project alone….)

It is quite clear that a high-speed train cannot simply be placed on an electrified Caltrain track. Many other changes and improvements will be required to implement the blended system and bring high speed rail to the Peninsula.

The Final EIR explained this in, among other places, Master Response 1 – Segmentation and Independent Utility (AR 2007):

> Review and approval of the PCEP does not provide the improvements necessary to operate Blended Service on the Caltrain corridor. With the PCEP, there is no physical way for HSR to connect to the Caltrain corridor from the south; additional improvements are necessary. Second, the PCEP does not include any platform improvements (such as at Diridon Station in San Jose or at Millbrae Station) to allow for separate HSR platforms that would allow for passengers to access HSR or any improvements to platforms to allow HSR passengers to access HSR trains at existing Caltrain stations. Third, as described in the cumulative analysis in the Draft EIR, passing tracks (at locations yet to be determined, would be necessary for operation of Blended Service with 6 Caltrain trains and up to 4 HSR trains per peak hour per direction (which is the current conceptual plan for Blended Service). Fourth, in order to meet service goals for HSR, which envisions speeds faster than the current allowable speeds of 79 mph up to 110 mph on the Caltrain corridor, system improvements to be determined later would be necessary on the route to allow for an increase in top speed.
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> Further, it is premature to analyze HSR service along the Caltrain corridor at this time given the conceptual level of definition of HSR service and necessary physical improvements. There is no design for blended system improvements that could support a project level analysis and it will take a number of years of further planning and design in order to actually frame the blended system and the project

details. In contrast, there is already a preliminary engineering design for the PCEP that does allow for project-level analysis.

Or, as the EIR summarized in the Cumulative Impacts analysis,

> Additional "Core Capacity" projects… including needed upgrades to stations, tunnel, bridges, potential passing tracks, other track modifications and rail crossing improvements including selected grade separations will be required to accommodate the mixed traffic capacity requirements of high-speed rail service and commuter services on the Caltrain corridor. However the specific Core Capacity projects have not been identified or defined at this time. These projects would be identified in future discussions and evaluations between CHSRA and Caltrain and other agencies. Core Capacity projects would be subject to separate, project-level environmental evaluation by the implementing agency/agencies. AR 936 (footnotes omitted).

The Electrification Project may be a step on the path to high-speed rail on the Peninsula. But there is a very long journey ahead. And while Caltrain is responsible for that first step, and has prepared an EIR to describe that step, CHSRA is responsible for the rest of the journey. CHSRA will have to define, in considerably more detail, the physical changes that will be necessary to enable the Caltrain tracks to be used for high speed rail. CHSRA will have to prepare one or more EIRs to describe that project (or those projects) if and when it is ready to bring them to fruition. In fact, CHSRA said forthrightly, "[t]he Authority agrees that…separate, additional environmental impact analysis and documentation will be necessary for improvements that are not proposed by the PCEP." AR 1225.

In short, the EIR addresses this issue adequately in the Project Description (AR 295-299), the Cumulative Impacts analysis (AR 935 et seq.) and the Response to Comments (AR 2005-2008).

Thus, each of Petitioners' arguments whose headings are listed on page 4 above, fail. Each asserts that Caltrain failed to analyze high speed rail adequately. The Court has considered and rejects each.

III. Petitioners' Other Arguments

At oral argument, Petitioners conceded that only one other argument is not dependent on the premise that the EIR must examine impacts from the implementation of the high speed rail blended system. That is the analysis of the impact of the Electrification Project on emergency vehicle access along the Caltrain route.

In addition, Petitioners' Opening Brief contains a few arguments, beginning at page 21, that are addressed separately below. (These do not have headings that refer specifically to high speed rail or the blended system.)

A. Emergency Vehicle Access

1. Exhaustion

Petitioners argue that the EIR's discussion of emergency vehicle access is deficient. As an initial matter, Respondent asserts this issue was not exhausted in the administrative proceedings.

To preserve an issue, it is not necessary that Petitioners themselves have raised it during the administrative proceedings. But someone must have done so. Public Resources Code § 21177(a).

Here, Petitioners point to only two comments in the record that even touch on this issue. One is at AR 1348 which says that the City of Mountain View has identified "the following potential traffic delay and congestion at the Castro Street/Moffett Boulevard/Central Expressway intersection that may result from the PCEP…Potential increase in emergency response time for Fire and Police first responders." AR 1348. The other is a letter from a citizen that says "…the

street crossing from El Camino to Alma…is frequently blocked by cars…I wonder how long it will be before it is so blocked that when a train comes through the effect will keep cars piled up in the intersection, blocking any emergency vehicles." AR 1943.

Each of these discussed just one specific intersection ("the Castro Street/Moffett Boulevard/Central Expressway intersection" and "the crossing from El Camino to Alma"), neither of which is discussed in Petitioners' Opening Brief. It appeared that each commentator was addressing a rather local concern pertinent to his or her own neighborhood. There appears to be nothing in the record that raised the general concern that Petitioners now brief. Thus, there is a substantial argument that this argument was not exhausted during the administrative process.

2. The EIR's Discussion Is Supported by Substantial Evidence

But even if one were to consider Petitioners' arguments, they are clearly unavailing. The standard of review of an agency's determination of such a question of fact is "substantial evidence." *Vineyard*, 40 Cal. 4th at 426-427, 435. In addition,

> "[w]here the alleged defect is that the agency's conclusions are not supported by substantial evidence, we must accord deference to the agency's factual conclusions....We may not weigh conflicting evidence to determine who has the better argument…. Thus we may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable…." *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal. App. 4th 149, 158 (citations omitted).

Of course, Petitioners have the burden of proof. *Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal. App. 4th 1609, 1617.

"Substantial evidence" is defined in Section 15384 of the Guidelines.[6] It is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." Guidelines, §15384(a). "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." Guidelines, §15384(b).

Here, the EIR contains an extensive analysis of "Transportation and Traffic." AR 836-916 includes a detailed discussion (with tables) of the intersections in question. That analysis is supported by a very detailed study by the expert consulting firm of Fehr & Peers. Appendix D, AR 2984- 4608.

The EIR and the Appendix analyze the impact at many intersections, including the two raised by commenters; see AR 860, 888, 890-891. It also considers alternate routes of travel for emergency vehicles and concludes, on balance that "some minor delays" to emergency vehicles "would not substantially differ from typical congestion that already occurs" but that given the "entire path [of travel] from their base to the incident location" and especially given the reduction in vehicle miles traveled as a result of implementation of the Electrification Project" (*i.e.* fewer other cars on the road) there will be "a net improvement…in the emergency response times." AR 904. This is "expert opinion supported by facts," *i.e.* substantial evidence.

Even where there is a disagreement among experts, that does not make the EIR inadequate. Guidelines, §15151. But here, there was not even a disagreement among experts. Neither Petitioners nor any other commenter put forward any analysis of these impacts. The *only* expert information before the lead agency was a detailed study by its consultant. That is sufficient.

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[6] The CEQA Guidelines are found at 14 CCR 15000 et seq. In this Opinion and Order they are cited as "Guidelines, § _____." "Courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 391 n.2; accord, *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal. 4th 204, 217, n.4.

It is not for the Court to second-guess this factual determination which is based on extensive analysis constituting substantial evidence. Certainly Petitioners have not met their burden of showing it lacks foundation or that there is no substantial evidence to support the EIR's conclusions.

B. Mitigation

In their opening brief, Petitioners say "[t]he EIR failed to identify mitigation for significant project impacts." POB 21:21. As noted above, Petitioners conceded at oral argument that this argument is really a variation on the notion that the Electrification Project cannot be divorced from the High-Speed Rail project. The argument simply amounts to a claim that were the EIR to evaluate all of the impacts from the High-Speed Rail project in the categories identified in its Opening Brief, then it must evaluate mitigation for all of those impacts. But since the Court has rejected Petitioners' premise, this argument about mitigation also fails.

C. Alternatives

Petitioners make a brief argument about alternatives. POB 22-23. They seem to acknowledge that the EIR considered and rejected four alternatives: Diesel Multiple Units, Dual-Mode Multiple Units, OCS Installation by Factory Train, and Tier 4 Diesel Locomotives. They do not challenge the lead agency's rejection of those alternatives. POB 22:18-24.

Instead, they argue that the EIR improperly failed to consider "the potential effect of failing to obtain full funding for the proposed project." In effect, under the heading "*alternatives*" they are asserting that the lead agency did not sufficiently consider the economic feasibility of the *project itself.* They cite no law that says that an alternatives analysis is the place to consider the economic feasibility of a project.

Instead, they note that "two potential *alternatives* – a BART extension from San Francisco to San Jose and an electrified third rail alternative – were in fact rejected for not being

financially feasible." POB 23:6-8 (emphasis supplied). Of course, that is not authority for the proposition that the EIR must examine the feasibility of the *project.*

At oral argument, Petitioners were granted the opportunity to submit a post-hearing brief identifying authority for the proposition that there must be some showing of the economic feasibility of the *project.* They cited only *Preservation Action Council v. City of San Jose* (2006) 141 Cal. App. 4th 1336. That case is concerned with the feasibility of *alternatives;* not the *project itself.*

Economic feasibility is a consideration when positing *alternatives.* See, *e.g*. *Preservation Action Council*; Guidelines, §§ 15126.6(f)(1); 15091(a)(3), 15091(c). But that does not support the argument that Petitioners make, almost in passing, that there must be a financial analysis of the *project.*

Even if there were some such obligation, Respondents contend there was substantial evidence in the record to show a reasonable basis for the lead agency to believe the project would be fully funded. See "Respondent's Response to Petitioners' Post-Hearing Case Citation and Discussion" dated September 9, 2016, 1:21-2:8. There is, indeed, substantial evidence to support that.

Petitioners' argument is unpersuasive.

D. Response to Comments

Petitioners argue – for the most part without specific citation – that the responses to comments were inadequate. POB 23-24. Where Petitioners are specific, most of the issues raised relate, again, to the premise that the EIR should have studied the entire High Speed Rail system. (See POB 24:1-11, comments re "blended system," center platforms, and track straightening.)

The only other comment discussed by Petitioners is related to the possible delay of emergency vehicles at grade crossings. For this they cite AR 1943. That is the letter that

discusses the intersection of El Camino and Alma in Palo Alto discussed above. The Response to Comments reproduced and responded to that letter. See AR 1943 (the letter) and AR 2390-2391 (the response). The response was adequate.

E. Failure to Recirculate the EIR

Petitioners argue the EIR should have been recirculated for two reasons. POB 24-26.

1. The 4th and King Terminus

One relates, again, to high speed rail. In their opening brief, Petitioners asserted, "CHSRA announced…the San Francisco terminus for all HSR trains *would* be the 4th and King St. Caltrain station" for an indefinite period of time, rather than the new Transbay Terminal. They cited nothing to support that statement. POB 25:13-14 (emphasis supplied).

In their closing brief, they softened it to say "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…" Petitioners' Reply Brief ("PRB") 9:2-4 (emphasis supplied). For that, they cited AR 1226, a letter from the California High Speed Rail Authority.

That letter notes a possible delay in the completion of the "Downtown Extension Project" (which would enable high speed rail to extend to the new Transbay Terminal) and says, "if necessary, the [California High Speed Rail] Authority would evaluate this interim terminal station in a subsequent, project level environmental impact analysis and document." AR 1226.

This then, is a possible change to the high-speed rail project; not to the Electrification Project. It is simply a caution that if the Downtown Extension Project is not completed by sometime in the second half of the third decade of this century (when high-speed rail is supposed to be operational) then there may be additional congestion at the 4th and King Station – something that the High Speed Rail Authority will analyze if and when the time comes.

That is not a function of the Electrification Project. And as noted several times, this EIR was not required to examine the entire high-speed rail project. This is simply another example of that.

2. Tier Four Diesel Locomotives

Petitioners' other argument relates to the fact that the final EIR included an analysis of a new alternative: Tier Four diesel locomotives ("T4DL").

The standard for when to recirculate an EIR is stated in the Guidelines at §15088.5(a).

> (a) A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification. As used in this section, the term "information" can include changes in the project or environmental setting as well as additional data or other information. New information added to an EIR is not "significant" unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement. "Significant new information" requiring recirculation include, for example, a disclosure showing that…
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> (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it…

That standard is not met here. The T4DL is not "a *feasible* project alternative" according to the findings made by the PCJPB. AR 121-123.

Petitioners urge, and Respondents do not dispute, that whether an alternative is "feasible" is a question of fact and the lead agency's decision will be sustained if there is substantial evidence to support it. Here, Petitioners do not argue that substantial evidence is lacking. Indeed, they seem to concede that point:

> "…in the Final EIR, PCJRB added a new alternative [T4DL] … and provided extensive analysis of that new option. In the end, however it rejected the option. While it is true that in some aspects, such as attracting increased ridership, the T4DL alternative, might be less attractive than the proposed project, it would nevertheless have eliminated the need for OCS installation and therefore the significant aesthetic impact of removing or severely pruning several thousand mature trees along the right of way, as well as the cultural impact at the S.F. tunnel entrance." POB 25:23-26:1.

Petitioners do not argue that there is a lack of substantial evidence to sustain a finding that the T4DL alternative is infeasible. Instead, they simply weigh the costs and benefits differently. That is not a basis for invalidating a factual finding of infeasibility. Recirculation is not required.

IV. Requests for Judicial Notice

Petitioners filed a Request for Judicial Notice on April 1, 2016. Respondent did not oppose that. The request is granted.

Respondent filed a Request for Judicial Notice on May 2, 2016. Petitioner opposed that on the grounds of relevance. The request is granted, because it meets the standards of Evidence Code §451, although, as can be seen from the analysis contained in this Opinion and Order, the Court ultimately found it unnecessary to its decision.

V. Conclusion

Judgment shall be entered for Respondent. It shall submit a proposed form of judgment to the complex litigation mailbox (showing a copy to Petitioner's counsel) after seeking approval as to form in the usual manner.

Date: September 26, 2016

Hon. Barry Goode
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Barry P. Goode
Judge, Superior Court