C075668

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, *ET AL.*,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO,

Respondent,

JOHN TOS, HOWARD JARVIS TAXPAYERS ASSN., *ET AL.*,

Real Parties in Interest.

Petition for Writ of Mandate and Stay of Judgment
after a Judgment by the Superior Court, Sacramento County
Case No. 34-2013-00140689, Hon. Michael P. Kenny

JOINT PETITION FOR REHEARING BY REAL PARTIES HOWARD JARVIS TAXPAYERS ASSN. AND FIRST FREE WILL BAPTIST CHURCH

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PETITION FOR REHEARING

Pursuant to California Rules of Court, Rule 8.268, Real Parties Howard Jarvis Taxpayers Association and First Free Will Baptist Church hereby petition this Court for a rehearing of the two issues described below, one that was erroneously decided due to a mistake in fact; and one that was left undecided.

ARGUMENT

I

DENYING VALIDATION IS NOT A PREMATURE REMEDY BECAUSE THE PLAN FOR SPENDING BOND PROCEEDS HAS SOLIDIFIED IN KEY RESPECTS

Real Parties seek a rehearing on the question of whether the denial of validation as a remedy is premature because, as the Opinion states, "there is no final funding plan and the design of the [rail project] remains in flux ... ." (Opinion at 29.) The Opinion also "reject[s]" the contention that Senate Bill No. 1029 and the revised business plan set forth the uses of the bond proceeds ... ." (*Id.* at 29, footnote 7.)

In fact, S.B. 1029 does lay down some clear markers for how to spend proceeds from the bonds that the state seeks to validate.

Consider, for instance, the $1.1 billion "bookend funding" appropriation "for local assistance ... payable from the High-Speed Passenger Train Bond Fund." (Stats. 2012, ch. 152, Section 1, Provision 5; and Section 3 (hereafter, designations are by "Section")).

It is true that funds appropriated in Section 3 for "local assistance" may not be "encumbered" prior to the High-Speed Rail Authority (Authority) "submitting a detailed funding plan" to the Department of Finance and other officials (*id.* at Section 3, Provision 5); and this is consistent with this court's observation that "more reports, approvals, and certifications, and ... [a] final

funding plan" must precede the expenditure of bond proceeds. (Opinion at 29, 30, footnote 7.) Nevertheless, the $1.1 billion appropriation commits the project to the so-called blended design whereby "high-speed rail" trains would share tracks with commuter trains in certain urban areas. It makes that commitment through two interrelated provisions in Section 3. First, Section 3, Provision 1 makes funds in Section 3 "[a]vailable for early improvement projects in the Phase 1 blended system ... ." Second, Section 3, Provision 3 prohibits the use of certain of these funds for any design other than a "blended" design whereby certain tracks are shared by high- speed rail trains and commuter trains:

> Any funds appropriated in this item for projects in the San Francisco to San Jose corridor, consistent with the blended system strategy identified in the April 2012 California High-Speed Rail Program Revised 2012 Business Plan, shall not be used to expand the blended system to a dedicated four-track system.

In addition to embracing the "blended system," S.B. 1029 also specifies, in Section 3, Provision 1, that appropriations for "local assistance" projects must be "consistent with" designated "purposes" that have already been agreed upon through Memoranda of Understanding with local transportation authorities in both the Bay Area and the greater Los Angeles area.

Further, S.B. 1029, in Section 5, makes funds "payable from the High--Speed Passenger Train Bond Fund" for "capital outlay" within the bookend regions. A total of $5,135,000 is payable for "San Francisco to San Jose – acquisition," $2,566,000 for "Palmdale to Los Angeles – Acquisition," $4,299,000 for "Los Angeles to Anaheim – Acquisition," and $37,055,000 for "Los Angeles to San Diego – Acquisition."

In sum, the specific guidelines and requirements in S.B. 1029 create a spending plan that moves decisively beyond what the Opinion, at 28 and 29, calls "fluidity" and "flux." The plan for spending bond proceeds has congealed to the extent that key elements are capable of being measured against criteria promised to voters in Proposition 1A. For instance, they are capable of being reviewed for consistency with Proposition 1A's promise that no more than $950,000,000 of bond proceeds would be spent on local, commuter non-"High-Speed Rail" projects, and that those projects would be designed for purposes of organic "connectivity" with High-Speed Rail. (St. & Hwy. Code § 2704.095.)[1]

II

THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE FINANCE COMMITTEE FAILED TO MAKE ONE OF TWO FINDINGS REQUIRED BY STATUTE

Real Parties also seek a rehearing to resolve one of their theories which this Court neglected to address regarding the High-Speed Passenger Train Finance Committee's resolution of necessity; namely Real Parties' theory that the Committee failed to make one of two findings required by statute.

Among the issues before the Court in this case was whether the trial

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[1] The Opinion states that First Free Will Baptist Church ("Church") contended "the high-speed rail system to be built is not the same project approved by the voters." Opinion at 29, footnote. 7. In fact, Church did not offer a hard-and-fast contention, in its brief to this court, as to the current project's consistency with Proposition 1A. Rather, Church argued that validation should be withheld because it was the Authority's procedural burden, as the validation plaintiff, to demonstrate that all statutory and constitutional elements have been satisfied, but the Authority did not "even attempt[]" to argue for the current spending plan's constitutional validity, so it did not carry its burden on that crucial element. (Church's Answer and Memorandum of Points and Authorities, p. 34).

court erred in denying bond validation on the grounds that the High-Speed Passenger Train Finance Committee (Finance Committee) failed to support its decision to issue $8.6 billion in new state debt with findings based on substantial evidence.

The Finance Committee, "like all administrative agencies, has no inherent powers; it possesses ... only such authority as is delegated by the legislature." (*Security Nat. Guar., Inc. v. California Coastal Com'n* (2008) 159 Cal.App.4th 402, 419.) The statute by which the Legislature set forth the authority delegated to the Finance Committee is Streets and Highways Code[2] section 2704.13, which provides in relevant part: "The committee shall determine whether or not it is necessary or desirable to issue bonds authorized pursuant to this chapter in order to carry out the actions specified in Sections 2704.06 and 2704.095 and, if so, the amount of bonds to be issued and sold. Successive issues of bonds may be issued and sold to carry out those actions progressively, and it is not necessary that all of the bonds authorized be issued and sold at any one time."

As this Court noted, the above statute makes the Finance Committee primarily responsible for authorizing any issuance of bonds requested by the Authority for the construction of the high-speed rail system. (Slip Op. at 9.)

Real Parties argued that, in exercising its authority, the Finance Committee's discretion is not unfettered, but is limited by two requirements in the above statute delegating that authority; specifically the requirements that the committee "determine [1] whether or not it is necessary or desirable" to issue bonds, and "[2] if so, the amount of bonds to be issued and sold." (Answer to Alternative Writ of Mandate by Real Party Howard Jarvis

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[2] All statutory references hereafter are to the Streets and Highways Code.

Taxpayers Assn. at 2 et seq.)

This Court considered and rejected Real Parties' argument on the first point. Real Parties argued that the lack of any specific findings or evidence relating to the "necess[ity] or desirab[ility]" of issuing bonds for the project as currently proposed left the courts unable to verify that the Committee did not act *pro forma*, but did indeed exercise its own independent discretion. As the trial court explained, "[t]his requirement is essential in order to protect against administrative action that is merely arbitrary or capricious." (Tab 1,[3] HSR00025:7.)

This Court, however, held that the "necessary or desirable" language confers the broadest possible discretion on the Finance Committee. Quoting *Boelts v. City of Lake Forest* (2005) 127 Cal.App.4th 116, 128, footnote 13, this Court wrote, "the words 'are probably so elastic as not to impose any substantive requirements.'" (Slip Op. at 21.) Quoting *Perez v. Board of Police Commrs.* (1947) 78 Cal.App.2d 638, 643, this Court concluded, "'That the [Committee] deemed the [bond issuance] desirable is evidenced conclusively by its adoption.'" (Slip Op. at 21.)

This Court (and the State Petitioners) conceded, however, that if an administrative agency were required by statute to make a determination that was more demanding or detailed than simply finding that its action was "necessary or desirable," the courts would not overstep the separation of powers by requiring the agency to show proof in its record that it did indeed consider evidence and make the finding required by statute.

> The Authority does not suggest that the validity of bond authorization is never subject to judicial review, that a bond finance committee can or should approve every request for bond

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[3] All "tab" citations are to Petitioners' Appendix of Exhibits.

> authorization as a matter of course, or that courts must validate every authorization of bonds for which validation is sought. Rather, the Authority focuses on the exceptionally broad discretion conferred on any administrative or legislative body charged with making *the mere determination that an action is desirable*.[4] (Slip Op. at 21-22.)

In fact, this Court cited *City of Monrovia v. Black* (1928) 88 Cal.App. 686, for that very proposition: "*In the absence of any such requirement in the statute*, the determination of the legislative body that the fact exists on which their power to act depends is sufficiently indicated by their proceeding to act." (*Id.* at 690.)

And this Court distinguished *Boelts* (*supra*) and *Poway Royal Mobilehome Owners Assn. v. City of Poway* (2007) 149 Cal.App.4th 1460 on the grounds that the statutes in those cases required more than just a finding of necessity or desirability. (Slip Op. at 22.)

Unfortunately, this Court stopped its analysis at that point, never proceeding to Real Parties' second contention–that the statute in this case does require more than just a finding of necessity or desirability.

The statute in this case not only requires the Finance Committee to "determine whether or not it is necessary or desirable to issue bonds," but then, "if so," to also determine "the amount of bonds to be issued and sold" because "[s]uccessive issues of bonds may be issued and sold to carry out [construction] progressively, [for] it is not necessary that all of the bonds authorized be issued and sold at any one time." (St. & Hwy. Code § 2704.13.)

The Finance Committee, without any deliberation or findings to justify its action, approved the Authority's request to sell all $8.6 billion in Proposi-

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[4] Unless noted otherwise, all emphasis is added.

tion 1A bonds even though, as this Court observed, the Bond Act authorizes the issuance and sale of bonds only "upon appropriation by the Legislature" (Slip Op. at 4, quoting section 2704.04(b)(1)) and the Legislature has appropriated only about $4.7 billion at this point in time:

> [T]he Legislature enacted Senate Bill No. 1029 (Stats. 2012, ch. 152), thereby appropriating state funds ... for high-speed rail as follows: [1] A total of $819,333,000 "for capital improvement projects to intercity and commuter rail lines ..." [2] "Bookend" funding of $1.1 billion ... [3] A total of $204,173,000 "[f]or capital outlay, High-Speed Rail Authority ..." [4] To acquire and build the IOS, $2,609,076,000. ... If our arithmetic is correct, therefore, in 2012 the Legislature appropriated a total of $4,732,582,000 in Bond Act funds. (Slip Op. at 13-14.)

The duty imposed on the Finance Committee by section 2704.13, to determine not only if *an* issuance of bonds is necessary or desirable, but then, "if so, *the amount* of bonds to be issued and sold" because "[s]uccessive issues of bonds may be issued and sold to carry out [construction] progressively, [for] it is not necessary that all of the bonds authorized be issued and sold at any one time," is not imbued with the same broad discretion or entitled to the same judicial deference that would apply if the Committee were required merely to decide whether the issuance was necessary or desirable.

In fact, it appears that the Legislature has curtailed this Court's deference by making its own legislative finding in the statute that "it is *not necessary* that all of the bonds authorized be issued and sold at any one time." Since the Legislature has thus erected a presumption that "it is *not necessary* that all of the bonds authorized be issued and sold at any one time," the Court cannot assume, simply from the Finance Committee's "proceeding to act"

(*City of Monrovia v. Black*, 88 Cal.App. at 690) that the presumption has been overcome by substantial evidence. The Committee's record must contain some evidence showing why it *is necessary* that all $8.6 billion of the bonds authorized be issued and sold at this point in time, especially given the fact that the bonds are to be sold only "upon appropriation by the Legislature" (section 2704.04(b)(1)) and the Legislature has appropriated only about $4.7 billion to date.

The necessity of selling all of the bonds today is certainly not obvious. Section 2704.08(a) provides: "Proceeds of [Proposition 1A] bonds ... shall not be used for more than 50 percent of the total cost of construction of each corridor or usable segment thereof of the high-speed train system." And Proposition 1A itself promised that the State would not fund high-speed rail by itself, but "with private and public *matching* funds required." (Tab 87, HSR01760.) To date, however, the only non-State contribution to California's high-speed rail project is a $3.3 billion one-time federal grant. (Tab 323, HSR05185.) The other matching funds needed to issue more bonds than the amount appropriated by the Legislature, as this Court recited, are "not fully identified." Rather, "the mix, timing, and amount of federal funding for later sections of the [high-speed rail system] is not known at this time." (Slip Op. at 16.) In this Court's own words, because the construction of high-speed rail depends on funding that "remains in flux ... we simply cannot determine whether the project will comply with the specific requirements of the Bond Act and whether any future deviations will be considered significant or trivial." (Slip Op. at 29.)

Why is it necessary to sell all $8.6 billion in bonds, thus putting the taxpayers of California in debt an extra $3.9 billion over the amount appropriated by the Legislature, with the associated monthly interest charges that

commence upon sale, when the Authority has not secured the matching funds needed to release those bonds for appropriation and expenditure? The Finance Committee did not answer these questions. Yet the statute required it to determine "the amount of bonds to be issued and sold" because "[s]uccessive issues of bonds may be issued and sold to carry out [construction] progressively, [since] it is not necessary that all of the bonds authorized be issued and sold at any one time." (St. & Hwy. Code § 2704.13.)

The Court should rehear this aspect of the appeal and rule that, because the Finance Committee did not support its decision regarding the amount of bonds with a finding based on substantial evidence, issuance of the full $8.6 billion in bonds cannot be validated.

CONCLUSION

For these reasons, the Court should order a rehearing of the issues discussed above.

DATED: August 12, 2014.

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WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached brief, including footnotes, but excluding the caption page, tables, the verification and this certification, as measured by the word count of the computer program used to prepare the brief, contains 2,451 words.

DATED: August 12, 2014.

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