Civ. No. C075668

CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

CALIFORNIA HIGH-SPEED RAIL AUTHORITY *et al.*,

Petitioners

v.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

Respondent

JOHN TOS *et al.*,

Real Parties in Interest

Sacramento County Superior Court Case Number 34-2011-0113919-CU-MC-GDS and 34-2013-00140689-CU-MC-GDS; Department 31, Hon. Michael P. Kenny, Judge. Tel.: 916-874-6353

PETITION FOR REHEARING OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS

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JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS

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INTRODUCTION

Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings ("Tos et al.") hereby petition the Court, pursuant to California Rule of Court 8.268, for rehearing of the above-entitled case.

Rehearing is requested for two reasons:

1) The Court's Decision, issued on July 31, 2014, included issues of fact and law that were neither proposed nor briefed by any party to the proceeding. First, the Court's Decision asserted that the Preliminary Funding Plan was only an "interlocutory and preliminary step in a multistep process" and denied relief on that basis. Yet that issue had neither been proposed nor briefed by any party. Additionally, the Court's Decision asserted that the ballot measure's requirement for environmental clearances had been substantially complied with because a condition placed on the appropriation made through SB 1029 requires completing all environmental clearances prior to encumbering appropriation funds for the "bookends" segments. Again, however, that issue was not proposed or briefed by any party. Accordingly, under Government Code §68081, rehearing must be granted.

2) The Court's Decision relied on incorrect and inaccurate factual information and analysis in four respects that may have affected the Court's determinations. First, the Decision asserted that Proposition 1A did not in any way constrain the Legislature's discretion in approving an appropriation for the high-speed rail project (Decision at p. 44), regardless of the "glaring

deficiencies" (Decision at p. 37) in the preliminary funding plan. Second, the Decision cited to a provision incorporated into SB 1029's appropriation for the "bookends" segments. The Decision appeared to assume that the provision apply to the entire project. Yet the provision only requires that environmental clearances necessary to proceed to construction of "a project"[1] [within the "bookends" segments] be completed prior to encumbering funds appropriated "*in this item*," [i.e., for the "bookends" segments], (Decision at pp. 46-47; see also, Decision at p. 14 ["the Legislature itself enforced the rigid reporting requirements of section 2704.08, subdivision (c) of the Bond Act"].) Further, there is no analogous provision in Section 9 of the bill, which appropriated $2.6 billion of Proposition 1A bond funds for acquisition and construction of the Initial Operating Segment, Section 1. Third, the Decision erroneously accepted the trial court's assertion that the Legislature's appropriation was not challenged until the reply brief in the writ proceeding, when in fact both the Second Amended Complaint, as amended pursuant to the parties' stipulation, and the opening trial court brief challenged the appropriation. Finally, the Decision misapprehended Tos et al.'s, and the trial court's, concern about the failure of the preliminary funding plan to satisfy § 2704.08 subd. (c)(2)(K). The Decision asserted that the trial court's concern was about whether the project would evade

[1] Paragraph 1 of this item calls for the funds to be "available for early improvement projects in the Phase 1 blended system," and be covered by MOUs with either MTC or Southern California rail operators for conventional rail improvements in the "bookends" segments. The "project" reference in paragraph 6 presumably references those same projects.

environmental review. (Decision at p.46.) In reality, the trial court, and Tos et al., were concerned that if that provision was not rigorously enforced prior to the legislative appropriation, construction of a portion of the IOS could commence without environmental clearances for the entire IOS having first been completed, with potentially dire consequences.

Tos et al. also join in the Petition for Rehearing being filed by Real Parties in Interest Howard Jarvis Taxpayers' Association and First Free Will Baptist Church

STATEMENT OF FACTS AND OF THE CASE

This case was brought in the trial court as a combination of mandamus under Code of Civil Procedure §1085, declaratory relief under Code of Civil Procedure §1060, and injunctive relief for threatened illegal expenditure of public funds under Code of Civil Procedure §526a.

Mandamus claims based on the Authority's violations of provisions of Proposition 1A in preparing and approving its initial funding plan were heard in the trial court in May and November 2013. On November 25, 2013, the trial court issued its Ruling on Submitted Matter, finding that the Authority had violated provisions of Streets and Highways Code §2704.08 subd. (c)(2) in preparing and approving its first funding plan for the Initial Operating Segment of the proposed high-speed rail system. On January 3, 2014, the trial court entered its Order Granting Petition for Peremptory Writ of Mandate.

Petitioners California High-Speed Rail Authority et al. filed their Petition for Extraordinary Writ of Mandate with the California Supreme Court on January 24, 2014. That court transferred the petition to the Third District Court of Appeal, which granted an alternative writ and ordered full briefing on the issues raised.

After full briefing, including several amici briefs and answers thereto, the Court heard oral argument on May 23, 2014 and issued its Decision on July 31, 2014.

ARGUMENT

I, THE PETITION MUST BE GRANTED BECAUSE THE COURT RAISED NEW ISSUES IN ITS DECISION.

Government Code §68081 states:

> Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

The Court's Decision granting the petition for writ of mandate was based on two issues that had neither been proposed nor briefed by any party (or amicus) in the proceeding. Yet the Court did not provide the parties an opportunity to present their views through supplemental briefing. Consequently, under §68081, the petition must be granted so that the parties are given that opportunity.

A. THE COURT'S DECISION RELIED ON THE THEORY THAT THE HIGH-SPEED RAIL AUTHORITY'S DECISION TO ISSUE ITS "PRELIMINARY" FUNDING PLAN WAS AN INTERLOCUTORY ACTION NOT SUBJECT TO JUDICIAL REVIEW.

The Court's Decision herein asserted that the California High-Speed Rail Authority's ("Authority") pre-appropriation "preliminary" funding plan was only "an interlocutory and preliminary step in [a multistep] process," (Decision at p. 41) and on that basis concluded it was not subject to judicial review. That issue and the associated theory and supporting case law were, however, neither proposed nor briefed by any party to the proceeding. Nor was the issue raised at oral argument. Instead, it emerged for the first time in the Court's published Decision. The circumstances here appear to precisely match those identified in §68081 as requiring that rehearing be granted. Tos et al therefore request that their petition be granted and the parties allowed to address this issue.

B. THE COURT'S DECISION RELIED ON AN INTERPRETATION OF A PROVISION OF THE LEGISLATIVE APPROPRIATION THAT HAD NEITHER BEEN PROPOSED NOR BRIEFED BY ANY PARTY.

Similarly, the Court's Decision raised a new issue in contending that the Legislature's appropriation of funds for the high-speed rail project (SB 1021) included a condition predicating the encumbrance of those funds by the project upon completion of all project-level environmental clearances. (Decision at p.14.) The Court asserted that this condition fulfilled the requirement set in the Bond Measure by Streets & Highways Code

§2704.08 subd. (c)(2)(K), even though the Authority's funding plan had not.

This issue was first raised by the Court itself at oral argument, and, at that point, was inaccurately stated.[2] Again, the parties were not provided an opportunity to respond to this issue through supplemental briefing. Consequently, the petition for review must be granted to allow the parties the opportunity to address the issue.

II. THE PETITION SHOULD BE GRANTED TO CORRECT FACTUAL INACCURACIES IN THE COURT'S DECISION AND RECONSIDER THE DECISION BASED ON THOSE CORRECTIONS.

In addition to the above newly-raised issues requiring that rehearing be granted, there are also errors in the Decision in its identification and discussion of facts. These errors affect the validity of the Decision. The Court should therefore correct the facts and reconsider its Decision. (Rule of Court 8.268; *see, e.g., Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal.App.3d 692, 695* [after petition for rehearing was denied, Supreme Court granted review, vacated Court of Appeal's decision, and remanded to Court of Appeal for reconsideration based on supplemental briefing].)

[2] At oral argument, the Court presented the condition as applying to the entire appropriation, rather than solely to the funding for the "bookend" segments.

A. THE DECISION MISSTATED THE EFFECT OF PROPOSITION 1A'S PROVISIONS ON THE LEGISLATURE'S POWER TO APPROPRIATE FUNDS.

In its Decision, the Court asserts that Proposition 1A did not affect the Legislature's discretion in deciding whether to appropriate funds for the Authority's high-speed rail project. (Decision at p. 44.) This is incorrect.

It has long been held that a bond measure is, in essence, a contract between the government and the voters. (*O'Farrell v. County of Sonoma* (1922) 189 Cal. 343; *Peery v. City of Los Angeles* (1922) 187 Cal. 753; *Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070.) Streets & Highways Code §2704.08 subd. (c)(2) requires that the Legislature receive certain assurances from the Authority as part of the "preliminary" funding plan. Receiving those assurances is thus a condition precedent for legislative action appropriating funds for the Authority's proposed project.

That these provisions are requirements/conditions on approving an appropriation is evident from several provisions of the ballot measure: the requirement that the funding plan be presented to the Legislature at least sixty days prior to the submission of an appropriation request for the Authority's project; the specific requirement that the funding plan contain certifications that various hurdles considered critical for the project's successful completion, including identifying funding and completing all project-level environmental clearances for the full usable segment, had been surmounted; and, perhaps most importantly, the fact that these

requirements, and the requirement for funding plan itself, had been placed before the voters. This shows that the Legislature had understood, in writing the ballot measure, that voters needed assurance not only that the Legislature would be fully and properly informed, but that these significant obstacles would have been surmounted before the Legislature considered approving an appropriation.

The Court's Decision failed to acknowledge these important facts about the bond measure, which are central to considering whether the ballot measure's provisions, like those of Proposition 116 at issue in *Shaw v. People Ex Rel. Chiang* (2009) 175 Cal.App.4th 577, restricted the Legislature's discretion in approving an appropriation for high-speed rail. Because the Court's factual context was inaccurate, the resulting ruling should be reconsidered.

B. THE DECISION MISSTATED THE PROVISIONS OF THE LEGISLATIVE APPROPRIATION.

The Court's Decision pointed to provisions of SB 1029 appropriating funds for the Authority's project as satisfying the requirement of Streets & Highways Code §2704.08 subd. (c)(2)(K). (Decision at p. 47.) Those provisions, which placed conditions on the ability of funds designated for use in the "bookends" segments to be encumbered, were accurately stated at one point in the Court's Decision. (Decision at p. 39.) However, elsewhere in the Decision, and specifically at p. 14 and pp. 46-

47, the Decision indicated that the conditions applied to the entirety of the appropriation, rather than just that for the "bookends." That assertion was factually incorrect and led the Court in a wrong direction. The error should be corrected and additional briefing and argument allowed on the implications of the accurately stated facts.

C. THE DECISION ERRONEOUSLY STATED THAT TOS ET AL. DID NOT CHALLENGE THE VALIDITY OF THE LEGISLATIVE APPROPRIATION UNTIL THEIR TRIAL COURT REPLY BRIEF.

As did the trial court, the Court's Decision raises two separate arguments about why the Court should not invalidate the legislative appropriation for the high-speed rail project. As already discussed, one argument, violation of the separation of powers doctrine, is based on misstating and misinterpreting the ballot measure's provisions. The other argument, the supposedly belated assertion of the challenge to the appropriation, is based on erroneous factual statements about the content of the pleadings and opening trial court brief submitted by Tos et al. As the Court notes, Tos et al. filed a Second Amended Complaint ("SAC"), which remains, for the most part, the operative pleading in that case. (Decision at p.15.) However, the Decision fails to note that, in the aftermath of the Legislature's adoption of SB 1029, *Tos et al* further amended their complaint (by stipulation) to allege the passage of that measure, which had only been threatened in the SAC. (15 HSR 4021 [Tab 263].) The effect of

this amendment was to convert the allegations of a threatened illegal appropriation (18 HSR 4832-4833) into an actual illegal appropriation from which *Tos et al*. sought relief via injunction, mandamus, and declaratory relief. (18 HSR 4835-4836.)

Further, in their opening trial court brief in the mandamus action, Tos et al. directly challenged the legislative appropriation. (18 HSR 4759.) While that challenge was framed in a mandamus context, the essence of the challenge was that the appropriation was made in violation of Proposition 1A. That challenge having been raised, Defendants could not properly claim it was unfair for them to have to defend against that challenge.

Again, the factual misstatements should be corrected and the parties should be allowed to readdress the issue in its proper factual context.

D. THE DECISION MISSTATED THE NATURE OF THE CONCERN EXPRESSED BY TOS ET AL. AND THE TRIAL COURT ABOUT THE CONSEQUENCES OF THE AUTHORITY'S VIOLATION OF §2704.08 SUBD. (c)(2)(K).

In its Decision, the Court formulated the concern about the violation of Streets & Highways Code §2704.08 subd. (c)(2)(K) as being that the project might be allowed to evade environmental review. (Decision at pp. 46-47.) In reality, the concern of Tos et. al., and of the trial court, was something quite different.

As explained in the trial court opening brief (18 HSR 4753-4755) and acknowledged in the trial court's order (1 HSR 44), the environmental

clearances certification was intended to protect not only the environment, but, perhaps even more importantly, the public fisc. In the absence of a proper certification, completion of the construction of the IOS could be delayed, and its cost greatly increased, by problems in obtaining environmental clearances after construction of a portion of the IOS had already been initiated.[3] The purpose of the certification was to *ensure* that such delays, and increased costs, would not occur because the environmental clearances for the entire IOS had already been completed. As the trial court correctly stated:

> As plaintiffs argue, proceeding to construction without all required project-level environmental clearances could result in substantial delays in the project, or even a need to redesign or relocate portions of the project, potentially at great cost to the State and its taxpayers. Streets and Highways Code section 2704.08 is carefully designed to prevent that from happening, but that design is frustrated if obvious deficiencies in the first funding plan are essentially ignored. (1 HSR 44.)

The Court's misstatement of the requirement and its consequences may well have affected its analysis of the significance of failing to comply with this ballot measure requirement. In addition, the misstatement may have led the Court to overemphasize the value of the condition placed on the "bookends" appropriation and conclude that the condition satisfied the

[3], CEQA and NEPA would require that environmental clearances for any specific section of the IOS be completed before that section's construction was initiated. However, construction could still be stalled between different sections of the IOS (the IOS includes multiple sections, each requiring separate project-level environmental clearances) if all clearances had not yet been completed for the full IOS.

ballot measure's intent. Consequently, rehearing should be granted and the parties allowed to address the effect of noncompliance in a factually accurate context.

III. TOS ET AL. JOIN IN THE PETITION FOR REHEARING BEING FILED BY REAL PARTIES IN INTEREST HOWARD JARVIS TAXPAYERS ASSOCIATION AND FIRST FREE WILL BAPTIST CHURCH.

In parallel with this petition, Real Parties in Interest Howard Jarvis Taxpayers Association and First Free Will Baptist Church are filing a separate Petition for Rehearing on the validation claims involved in this case. Tos et al. join in the arguments being raised in that petition.

CONCLUSION

For all of the above reasons, the petition for rehearing should be granted, the parties should be ordered to submit supplemental briefing on the points raised herein, and the matter scheduled for rehearing based on the supplemental briefing.

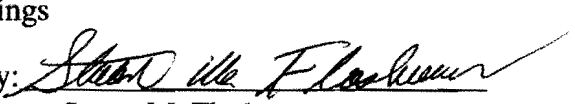
Dated: August 12, 2014

Respectfully submitted,

Michael J Brady

Stuart M. Flashman

Attorneys for Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings

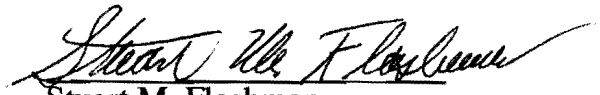
By: 

Stuart M. Flashman

CERTIFICATE OF COMPLIANCE
[CRC 8.204(c)(1)]

Pursuant to California Rules of Court, rule 8.204(c)(1), I, Stuart M. Flashman, certify that this PETITION FOR REHEARING OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS contains 2,764 words, including footnotes, as determined by the word count function of my word processor, Microsoft Word 2002, and is printed in a 13-point typeface.

Dated: August 12, 2014



Stuart M. Flashman

PROOF OF SERVICE BY MAIL AND ELECTRONIC MAIL

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

On August 13, 2014 I served the within PETITION FOR REHEARING OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS on the parties listed on the attached service list by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in a U.S. mailbox at Oakland, California addressed as shown on said service list.

In addition, on the above-same day, I served the above-same document on the parties indicated with an asterisk on the attached service list by electronic delivery by attaching a copy of said document, converted to "pdf" file format, to e-mails sent to the e-mail addresses shown on the attached service list.

In addition, on the above-same day, I also served the above-same document on the California Supreme Court by submitting an electronic copy of said document, converted to "pdf" format, on the Court of Appeal's internet website.

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 August 13, 2014.

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