

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

**[PROPOSED] RESPONSE TO AMICUS CURIAE BRIEF OF
STATE BUILDING AND CONSTRUCTION TRADES
COUNCIL OF CALIFORNIA**

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TABLE OF CONTENTS

TABLE OF CONTENTSii

TABLE OF AUTHORITIES.....iii

INTRODUCTION 1

ARGUMENT2

 I, JUDICIAL REVIEW OF BOND ISSUANCE BY WAY
 OF VALIDATION INCLUDES CONSIDERATION
 THE COMMITTEE’S DETERMINATIONS.2

 II. THE STANDARD OF REVIEW FOR THE
 COMMITTEE’S DETERMINATION IS WHETHER
 IT WAS PROCEDURALLY IMPROPER OR WAS
 ARBITRARY, CAPRICIOUS, OR ENTIRELY
 LACKING IN EVIDENTIARY SUPPORT.....3

 III. THE COMMITTEE’S DETERMINATION FAILED TO
 BE SUPPORTED BY EVIDENCE IN THE RECORD.....4

 a. *The legislative appropriation could not be evidence
 supporting the committee’s determination because
 it was not evidence before the committee..*4

 b. *The legislative appropriation was not evidence
 indicating it was necessary or desirable to issue the
 bonds at that time..*5

TABLE OF AUTHORITIES

Cases

<i>Diageo-Guinness USA, Inc. v. State Board of Equalization</i> (2012) 205 Cal.App.4th 907	3
<i>San Francisco Fire Fighters Local 798 v. City and County of San Francisco</i> (2006) 38 Cal.4th 653	3
<i>Stauffer Chemical Co. v. Air Resources Bd.</i> (1982) 128 Cal.App.3d 789	1
<i>Western States Petroleum Assn. v. Superior Court</i> (1995) 9 Cal.4th 559	5

INTRODUCTION

In its brief in support of Petitioners, Amicus Curiae State Building and Construction Trades Council of California (hereinafter, “BCTC”) asserts that a bond committee’s determination that it was “necessary or desirable” to authorize issuance of bonds is subject to very limited judicial review. (Amicus Brief at pp. 10-12.) Real Parties in Interest John Tos *et al.* (“Tos *et al.*”) do not dispute that fact; nor did the trial court.

BCTC goes on to note that the standard for such review is “whether it failed to conform to procedures required by law ... or whether the action taken is arbitrary, capricious, or *entirely lacking in evidentiary support.*” (*Id.* at. P.11, quoting from *Stauffer Chemical Co. v. Air Resources Bd.* (1982) 128 Cal.App.3d 789, 794 [emphasis added here].) Again, Tos *et al.* do not disagree, other than to note that in approving the issuance of bonds pursuant to a voter-approved ballot measure, the committee must also confirm that the proposed bonds are properly authorized by the measure.

Where BCTC goes astray is in asserting that the Legislature’s approval of an appropriation to be paid out of bond funds constituted sufficient evidence to support the Committee’s determination. (Amicus Brief at pp. 12-15.) There are two problems with this argument. The first is that the approval of the appropriation was never placed before the Committee. (See, 10 HSR 2770 [Authority’s Resolution requesting

issuance of bonds].) The second is that the mere fact that an appropriation was approved does not necessarily decide whether: 1) the appropriation was proper, and 2) even if so, whether it was necessary or appropriate *at that time* to authorize bond issuance. For all these reasons, the arguments made by BCTC do not change the conclusion that the trial court was justified in refusing validation.

ARGUMENT

I, JUDICIAL REVIEW OF BOND ISSUANCE BY WAY OF VALIDATION INCLUDES CONSIDERATION THE COMMITTEE'S DETERMINATIONS.

Unlike Petitioners, BCTC concedes that it is appropriate for the courts to review the propriety of the Committee's determination that it was "necessary or desirable" to issue bonds for the high-speed rail project. (Compare, Amicus Brief at p. 10, Petitioners' Reply at p. 2.) Tos *et al.* agree with BCTC that, especially in the context of a validation proceeding that would insulate the Authority's and the Committee's action from any further judicial review of authorizing issuance of eight and a half billion dollars of State general obligation bonds, review of the propriety of the Committee's actions, including its determination that it was necessary or desirable to issue the bonds, is proper.

II. THE STANDARD OF REVIEW FOR THE COMMITTEE'S DETERMINATION IS WHETHER IT WAS PROCEDURALLY IMPROPER OR WAS ARBITRARY, CAPRICIOUS, OR ENTIRELY LACKING IN EVIDENTIARY SUPPORT.

Tos *et al.* also agree with BCTC that the appropriate standard of review for the Committee's determination of whether or not it was necessary or desirable to issue the bonds is the same standard applicable to any quasi-legislative determination: whether it was procedurally proper and whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 667-668) As BCTC points out, this relatively low standard of review is appropriate to reflect the courts' general deference to the degree of discretion accorded to quasi-legislative determinations. Nevertheless, while the standard may be low, it is not altogether lacking, and it is possible for a quasi-legislative determination to be rejected by the courts based on the failure to satisfy this standard. (*See, e.g., Diageo-Guinness USA, Inc. v. State Board of Equalization* (2012) 205 Cal.App.4th 907, 918 [BOE regulations rejected even under relaxed quasi-legislative standard of review].)

III. THE COMMITTEE'S DETERMINATION FAILED TO BE SUPPORTED BY EVIDENCE IN THE RECORD.

Where *Tos et al.* part company from BCTC is on the factual question of whether there was any evidence before the Committee to support its determination that it was necessary or desirable to issue the bonds.

BCTC notes that the Committee was not required to hold evidentiary hearings, make findings, or even offer an explanation of its reasoning. All this is true, but it doesn't negate the requirements that there be *some* evidence to support its determination. That evidence was clearly lacking.

A. THE LEGISLATIVE APPROPRIATION COULD NOT BE EVIDENCE SUPPORTING THE COMMITTEE'S DETERMINATION BECAUSE IT WAS NOT EVIDENCE BEFORE THE COMMITTEE.

BCTC points to the fact that the Legislature had approved an appropriation of bond funds as being sufficient evidence to support the Committee's determination. (Amicus Brief at 13-14.) Whether that is true or not will be discussed below, but the basic fact is that the Legislative appropriation was not placed before the Committee. (See, 3 HSR 713-718 [Tab 39] [stipulation that no documents or other evidence supporting the Committee's determination was presented to the Committee other than the Authority's resolution and the Committee's two draft resolutions¹]; 10 HSR 2770 [copy of Authority resolution requesting bond issuance, which did not

¹ The latter cannot really be considered evidence supporting anything, as they were merely proposals for Committee actions.

mention the legislative appropriation, despite stating: “the Authority’s Executive Director being authorized to present to the Committee, “such other materials and information as he deems appropriate to aid the Committee in making determinations related to the bonds,”].)

BCTC may be relying on the fact that the legislative appropriation was, “a matter of public record,” for which judicial notice was appropriate. Yet not all matters of public record can be relied upon as evidence. In *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, the California Supreme Court addressed the scope of evidence before an agency making a quasi-legislative determination. More specifically, the court noted that:

However, it would never be proper to take judicial notice of evidence that (1) is absent from the administrative record, and (2) was not before the agency at the time it made its decision. (*Id.* at p.573 fn.4.)

Because the legislative appropriation was not part of the record and was never placed before the Committee, it cannot be considered part of the evidence upon which the Committee based its decision. (*Id.* at p.573.)

B. THE LEGISLATIVE APPROPRIATION WAS NOT EVIDENCE INDICATING IT WAS NECESSARY OR DESIRABLE TO ISSUE THE BONDS AT THAT TIME.

Even if the legislative appropriation had been placed before the Committee, it would not have supported the Committee’s determination because it was not relevant to the question before the Committee – whether it was necessary or desirable to authorize bond issuance *at that time*.

Certainly the fact that the Legislature had appropriated bond funds would be evidence indicating it would be necessary or desirable *at some point*² to issue bonds. So, for that matter, would the bond measure itself. However, what was before the Committee was the question of whether or not, *as of that date*, it was necessary or desirable to authorize bond issuance. Many factors could have indicated that it was necessary or desirable to authorize bond issuance, such as then-current interest rates, the incipient start of construction, or even the need to begin matching federal grant funds. The Committee was not presented with any evidence supporting any of these, or any other, reason why issuing the bonds was necessary or desirable. If the Committee's determination was to meet the "not arbitrary or capricious" test, it could only be made with an evidentiary basis, not in a manner so arbitrary that it could have been based on the flip of a coin. (*See*, 1 HSR 122:2-27.)

CONCLUSION

Tos *et al.* do not dispute BCTC's contention that the Committee's determination of whether or not it was necessary or desirable to authorize bond issuance was to be evaluated as a quasi-legislative decision, based on whether it was procedurally proper and whether it was neither arbitrary, capricious, nor entirely lacking in evidentiary support. As the trial court

² Assuming, of course, that it would be appropriate at all to issue the bonds for the project the Authority was proposing.

properly found, however, the Committee did not meet even that low threshold. Consequently, the trial court acted properly in denying validation

Dated:

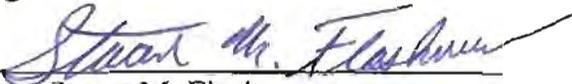
Respectfully submitted,

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

Pursuant to California Rules of Court, rule 8.204(c)(1), I, Stuart Flashman, certify that this [Proposed] Response to Brief of Amicus Curiae State Building and Construction Trades Council of California contains 1,373 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: April 14, 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 April 14, 2014 I served the within [PROPOSED] RESPONSE TO AMICUS CURIAE BRIEF OF STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA 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.

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 April 14, 2014.


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