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9 **(Exempt from filing fees – Gov. Code §6103)**

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

TOWN OF ATHERTON *et al.*,
Petitioners and Plaintiffs
v.
CALIFORNIA HIGH SPEED RAIL
AUTHORITY, a public entity, and DOES 1-20,
Respondents and Defendants

No. 34-2008-8000022 filed 8/8/08
Judge Assigned for All Purposes:
HONORABLE MICHAEL P. KENNY
Department: 31

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF ERROR *CORAM*
NOBIS

Date: August 20, 2010
Time: 9:00 AM
Dept. 31
Judge: Hon. Michael P. Kenny

INTRODUCTION

Petitioners Town of Atherton, City of Menlo Park, California Rail Foundation, Planning and Conservation League, and Transportation Defense and Education Fund (hereinafter, “Petitioners”) submit herewith a Petition for Writ of Error *Coram Nobis*. This is, to say the least, highly unusual. The case was fully briefed on a certified administrative record, a final judgment was entered, and the time for reconsideration or for appeal has expired. However, the circumstances involved are equally unusual, as might be expected if this seldom-used writ is to be granted. In essence, Petitioners, the Court, and the public were deprived of an important piece of evidence. That evidence, if available, would have led to a different result. This is

1 precisely the situation that this type of writ was intended to address. For that reason, the petition
2 is appropriate and should be granted.

3 4 **STATEMENT OF FACTS**

5 This case involves the decision-making process by which Respondent California High-
6 Speed Rail Authority (hereinafter, "Respondent") chose an alignment for the Bay Area to
7 Central Valley High-Speed Train Project (hereinafter, "Project") to enter the Bay Area. The case
8 was originally filed in August of 2008, a little less than a month after Respondent certified a
9 Final Programmatic Environmental Impact Report/Environmental Impact Statement
10 ("FPEIR/EIS") for the Project. The approval culminated a two and a half year process that
11 began with approval of the FPEIR/EIS for the statewide high-speed rail system.

12 A key part of that process was a study of the ridership and revenue that might be
13 expected for different alternative alignment routings from the Central Valley to the system's San
14 Francisco terminus. System ridership and revenue were of crucial importance because the
15 legislative mandate for the high-speed rail system required that the system be self-supporting.
16 (Streets & Highways Code §2704.08(c)(2)(J).) Consequently, any alignment alternative that
17 could not produce sufficient ridership and revenue to break even would have to be rejected as
18 infeasible. Beyond that, however, ridership and revenue were important in determining how
19 much financial expense could feasibly be incurred in constructing the system along a given
20 alignment. Finally, and perhaps most importantly, ridership and revenue were a crucial element
21 in determining each alternative's potential benefits. Since the PEIR/EIS identified significant
22 and unavoidable impacts for each of the potential project alternatives, weighing project benefits
23 against project impacts was a crucial step in determining which project alternative to choose and
24 justifying the necessary statement of overriding considerations. (CEQA Guidelines¹ §15093;

25 ¹ The CEQA Guidelines (California Code of Regulations, Title 14, §§15000 et seq.) are
26 administrative regulations governing the implementation of CEQA. While their exact status has
27 never been determined by the courts, "In interpreting CEQA, we accord the CEQA Guidelines
28 great weight except where they are clearly unauthorized or erroneous." (*Sunset Sky Ranch Pilots
29 Assoc. v. County of Sacramento* (2009) 47 Cal.4th 902, 907 fn.3.)

1 See, AR A00106-00107 [explanation of ridership and revenue benefits of constructing Pacheco
2 alternative as part of statement of overriding considerations].)

3 Respondent delegated analysis of the ridership and revenue to the Metropolitan
4 Transportation Commission (hereinafter, “MTC”), the regional transportation planning agency
5 for the San Francisco Bay region². (AR F [tab]³ Cambridge Systematics, Report TM3B, *Bay*
6 *Area/California HSR Ridership and Revenue Forecasting Study – Model Design* (May 1995),
7 p.1.) MTC, in turn, contracted with Cambridge Systematics, Inc. a transportation consulting
8 firm, to do the mathematical modeling needed to produce ridership and revenue figures.⁴ (*Id.*)

9 In July and August 2006, Cambridge Systematics produced a series of reports on its
10 modeling efforts. (AR D000153 – 000223, 000224 – 000295, 000519 - 000557.) These were
11 then followed in 2007 by a second series of reports on the modeling results. (AR C 001879 –
12 001964, D 000296 – 000372; 000373 – 000431, 000432 – 000518; see also AR D000558 –
13 000581 [March 2007 presentation on modeling results], AR C 021260 – 0021263 [modeling
14 outputs, dated 5/7/07 and 5/11/07])⁵ The reports were provided to Respondent and were
15 included as reference materials supporting the PEIR/EIS for the Project. The ridership and
16 revenue results from the modeling were incorporated into the PEIR/EIS for the Project. (See,
17 AR B 004062, 004997, 004998, 004999, 005002, 5010) [citing the report as the basis for
18 ridership and revenue figures included in the PEIR/EIS].) It was presumed at the time that the
19 model presented in the Cambridge Systematics model development report (AR D000187-222)
20 was used to obtain the results presented in the final report for the study and included in the
21 PEIR/EIS, and the PEIR/EIS gave no information to the contrary.

22 _____
23 ² See, Government Code §§66500 et seq. [Metropolitan Transportation Commission Act].

24 ³ This section of the administrative record was not Bates Stamped.

25 ⁴ For the prior systemwide PEIR/EIS, Respondent had contracted with Charles River Associates,
26 a Boston-based company, to do analogous modeling studies. (AR C 001278 – 1451, 002338 -
27 002512.)

28 ⁵ See also, generally, Volume F of the Administrative Record, which includes a full set of
29 Cambridge Systematics reports extending from 2005 through 2007, not all of which were
30 paginated.

1 While Petitioners and others had their doubts about the modeling results, there was
2 nothing to suggest that the peer-reviewed model was in itself questionable. Rather, Petitioners
3 focused on some of the assumptions used for the data input into the model, notably the
4 assumption that trains could not be split and therefore the train frequency for the Altamont
5 would be significantly lower than for Pacheco. (See, e.g., Petitioners’ Opening Brief in Support
6 of Motion for Writ of Mandate at pp. 16-20)

7 Meanwhile, under Proposition 1A, the High-Speed Rail Bond Measure approved by
8 California voters in November 2008, Respondent was required to prepare a business plan.
9 (Streets & Highways Code §2704.08(c).)⁶ The initial business plan was published in November
10 2008 but was not considered in compliance with the mandate of the ballot measure. A second,
11 more detailed, business plan was released in December 2009. That plan included detailed
12 ridership and revenue figures based on the modeling included in the PEIR/EIS. Questions arose
13 about those figures, leading to inquiries as to the details of the model.

14 One of the groups skeptical of the modeling was Californians Advocating for
15 Responsible Rail Design (“CARRD”), a group made up primarily of San Francisco Peninsula
16 area residents with a professional interest in rail design issues. One of CARRD’s founding
17 members, Elizabeth Alexis, a professional econometric analyst, took a particular interest in
18 reviewing and understanding the ridership and revenue modeling. (Declaration of Elizabeth
19 Alexis in Support of Petition for Writ of Error Coram Nobis [“Alexis Declaration”], ¶¶ 1-5.) In
20 particular, Ms. Alexis sought to obtain the actual modeling parameters used to obtain the results
21 included in the PEIR/EIS and the updated business plan. (Alexis Declaration, ¶¶12-18.)
22 Eventually, in response, she received an e-mail from Respondent’s Deputy Executive Director,
23 indicating that there was no document containing the final modeling parameters, but that a
24 document containing that information was being assembled. (Alexis Declaration, ¶16 and
25 Exhibit G.) She subsequently received from CS, through Respondent, a document containing the

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28 ⁶ The text of the bond measure is codified in Streets & Highways Code §§2704-2704.21.)

1 final model parameters, along with a transmittal memo from CS. (Alexis Declaration, ¶18 and
2 Exhibit I.) Upon examining the parameters, Ms. Alexis concluded that the model had serious
3 flaws. (Alexis Declaration, ¶19.) She was also disturbed that the transmittal memo indicated
4 that not only had the final model parameters apparently not been published or subjected to peer
5 review (see, AR F004118-4148; F004149-004187; F004188-004197 [peer review results for an
6 earlier version of the model]), but that MTC had apparently “elected” not to include the final
7 model parameters in any of the published reports on the modeling. (Alexis Declaration, ¶19.)

8 Ms. Alexis immediately contacted counsel for Petitioners and relayed her concerns. (*Id.*)
9 She also forwarded the modeling parameter information and the transmittal memo. (*Id.*)
10 Petitioners forwarded the information received from Ms. Alexis to a professional travel modeling
11 consultant for his analysis. (Declaration of Norman Marshall in Support of Petition for Writ of
12 Error *Coram Nobis* [“Marshall Declaration”], ¶3.) Mr. Marshall’s analysis confirmed Ms.
13 Alexis’ concerns and identified other serious problems with the final model as well. (Marshall
14 Declaration, ¶ 5.)

15 Based on this evidence, Petitioners’ counsel contacted counsel for Respondent and
16 expressed to her Petitioners’ concerns about the modeling. At the same time, Petitioners’
17 counsel raised the potential for seeking review of the newly-discovered evidence through a writ
18 of error *coram nobis*. (Declaration of Stuart Flashman in Support of Petition for Writ of Error
19 *Coram Nobis* [“Flashman Declaration”], ¶6.) Respondent’s counsel indicated that she would
20 discuss the evidence with her client and investigate its possible concealment. (*Id.*) While
21 Petitioners’ counsel has periodically checked back with Respondent’s counsel, no further
22 information has been forthcoming. (*Id.*)

23 Seeking to independently confirm the evidence through official government documents,
24 on February 10th, 2010, Petitioners submitted requests for additional documentation pursuant to
25 the California Public Records Act (Government Code §§ 6250 *et seq.*) to both Respondent and
26 MTC. (Flashman Declaration, ¶7 and Exhibit A.) Both agencies’ responses requested additional
27 time to respond. (Flashman Declaration, ¶¶ 8, 9 and Exhibits B and C.) On March 8, 2010,

1 Petitioners received documentation from MTC. On March 8, 2010, Petitioners received an
2 additional letter from Respondent, indicating that the requested documentation would not be
3 available for another week. (Flashman Declaration ¶12 and Exhibit F.) Respondent finally
4 provided some of the requested documents to Petitioners on March 27, 2010. After initial
5 review of the documents, Petitioners forwarded relevant documentation to their consultant for
6 analysis. (Flashman Declaration, ¶13.) The Consultant’s analysis confirmed the problems with
7 the modeling. (Marshall Declaration, ¶4, 5 and Exhibit B.) Petitioners thereupon promptly filed
8 their petition.

9
10 **ARGUMENT**

11 **I. UNDER SPECIFIC CIRCUMSTANCES, A WRIT OF ERROR CORAM NOBIS**
12 **ALLOWS THE COURT TO REOPEN A “CLOSED” CASE TO CORRECT A**
13 **FACTUAL ERROR RESULTING IN AN ERRONEOUS JUDGMENT.**

14 The writ of error *coram nobis* (and its sister writ for appellate relief, the writ of *coram*
15 *vobis*) is a venerable common law remedy where evidence critical to a case’s determination is
16 only discovered after the trial court’s final judgment has been entered. (*See, Los Angeles*
17 *Airways, Inc. v. Hughes Tool Co.* (1979) 95 Cal.App.3d 1, 8.) The writ, where issued, allows the
18 trial court to vacate the judgment and reopen the case to consider the newly-discovered evidence.

19 Because of the strong interest in finality, the standards for granting a writ of error *coram*
20 *nobis* are exacting:

21 The writ of *coram nobis* is granted only when three requirements are met.

22 (1) Petitioner must “show that some fact existed which, without any fault or
23 negligence on his part, was not presented to the court at the trial on the merits,
24 and which if presented would have prevented the rendition of the judgment.”

25 (2) Petitioner must also show that the “newly discovered evidence ... [does not
26 go] to the merits of issues tried; issues of fact, once adjudicated, even though
27 incorrectly, cannot be reopened except on motion for new trial.” This second
28 requirement applies even though the evidence in question is not discovered
29 until after the time for moving for a new trial has elapsed or the motion has
30 been denied.

(3) Petitioner “must show that the facts upon which he relies were not known to
him and could not in the exercise of due diligence have been discovered by
him at any time substantially earlier than the time of his motion for the writ.

1 ...” (*People v. Shipman* (1965) 62 Cal.2^d 226, 230 [citation omitted] *accord*,
2 *People v. Kim* (2009) 45 Cal.4th 1078, 1092-1093.)⁷

3 With its stringent requirements, the writ is rarely sought, and even more rarely granted.
4 (See, e.g., *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218
5 Cal.App.3d 1050, 1088-1089 [writ denied because newly-discovered evidence was on issues
6 already litigated at trial]; *Mullen v. Department of Real Estate* (1988) 204 Cal.App.3d 295, 301
7 [evidence of intrinsic fraud in case did not warrant granting writ].) It should be noted, however,
8 that although the grounds for issuance of the writ are sometimes stated as extrinsic fraud (see,
9 e.g., *Philippine Export & Loan Guarantee Corp.*, *supra*), and there is no question that extrinsic
10 fraud can justify its issuance, actual fraudulent intent is not required. It is enough that the
11 evidence was hidden from the petitioner, regardless of any intent to deceive. (*People v. Kim*,
12 *supra*, 45 Cal.4th at 1094.)

13 **II. UNDER THE FACTS ALLEGED IN THE PETITION, ISSUANCE OF THE WRIT
14 IS PROPER.**

15 In this case, the basis for requesting issuance of the writ is the concealment of the fact
16 that the model used to obtain the ridership figures included in the PEIR/EIS was not the model
17 that had been presented to the public in the documentation supporting the PEIR/EIS. (See, AR
18 F004477-004554.) Instead, the consultant conducting the ridership modeling studies modified
19 the published model extensively, and the Metropolitan Transportation Commission, which had
20 contracted with Respondent to conduct the studies, “elected” not to make the revised model
21 public. (Exhibit I to Alexis Declaration.) As a result, the public, including Petitioners,
22 reasonably assumed that the EIR’s ridership figures had been derived from the published model,
23 which had been subjected to peer review by a panel of experts.⁸ (AR F004118-4148; F004149-

24 _____
25 ⁷ While the referenced case, and the vast majority of cases involving a writ of error *coram nobis*,
26 involved a criminal prosecution, the same standard applies to its application to civil cases.

27 ⁸ The report on the third peer review panel was erroneously entitled as a report on the first peer
28 review panel. Further, unlike the first and second peer review panels, there was no actual
29 meeting of the panel, and the peer review was conducted among only three members, by way of
30 e-mail exchanges. (AR F004191.)

1 004187; F004188-004197.) The final ridership model, by contrast, was not subjected to peer
2 review. (Alexis Declaration, ¶19; Marshall Declaration, ¶5c.)

3 What is the effect of this newly-found evidence? Petitioners provided the newly-
4 discovered ridership model to an expert on transportation modeling. His analysis of the model
5 concludes that it is highly flawed, and that any person reasonably well-versed in transportation
6 modeling, viewing the final model parameters, would have had serious questions about the
7 model's validity. (Marshall Declaration, ¶ 5.) Indeed, Elizabeth Alexis, who was the first
8 member of the public to see the final model and who does similar mathematical modeling,
9 immediately recognized problems with the model, leading her to forward it to Petitioners.
10 (Alexis Declaration, ¶19.) If this evidence, the final model parameters, had been made available
11 during the comment period on the DPEIR/EIS, there can be little doubt that questions would
12 have been raised about the model's validity. If Respondent had chosen to proceed forward in
13 spite of the model's flaws, there is also little doubt that a successful challenge to the ridership
14 data could and would have been raised. Thus, the situation here satisfies the first set of
15 requirements for issuing the writ.

16 As to the second requirement, that the evidence not go to any issue actually litigated in
17 the case, because of MTC's action⁹ in not revealing the model changes, Petitioners had no
18 inkling of the problems with the model, and the issue was therefore neither raised in comments
19 on the DPEIR/EIS nor litigated in the subsequently filed case. While Petitioners did raise issues
20 about the ridership figures included in the PEIR/EIS, those issues related to the assumptions
21 about the situation being modeled – e.g., Respondent's refusal to consider train splitting as a
22 viable option – not to the model used to derive ridership and revenue estimates from the situation
23 and system characteristics.

24 It was only with the publication of Respondent's revised business plan in December
25 2009, more than a year after the record closed for this case, that anomalous ridership and revenue

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27 ⁹ Petitioners have, at this point, no evidence as to whether Respondent was involved in
concealing the change in the ridership model.


1 release of the previously-hidden model. (Alexis Declaration ,¶9.) These facts satisfy the third
2 requirement for issuance of the writ.

3 Since the initial discovery of the flawed model, Petitioners have only delayed filing long
4 enough to substantiate, through a series of Public Records Act requests, the facts on which this
5 petition is based. (Flashman Declaration, ¶¶ 7-15.)

6 **CONCLUSION**

7 While the requirements for issuance of a writ of error *coram nobis* are stringent, they
8 have clearly been satisfied here. Because of MTC's concealment of the final ridership/revenue
9 model parameters, Petitioners were deprived of the right to either comment on or litigate this
10 important issue, thereby depriving them of their right to a fair trial. Consequently, the writ of
11 error should issue and the case should be ordered reopened. Given that Respondent's governing
12 board was also apparently never provided with the final model parameters or with the public's
13 comments on those parameters, the proper course, by analogy with Code of Civil Procedure
14 §1094.5(e) and (f), would appear to be to remand the matter to Respondent with direction to
15 reopen the CEQA proceedings and reconsider the validity of the ridership/revenue model and the
16 data derived from it prior to revisiting its decision on the choice of a high-speed rail alignment.
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18 Dated: May 5, 2010

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21 Stuart M. Flashman
22 Attorney for Petitioners
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