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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA; AND COUNTY OF KINGS, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY; JEFF MORALES, CEO OF THE CHSRA; GOVERNOR JERRY BROWN; STATE TREASURER, BILL LOCKYER; DIRECTOR OF FINANCE, ANA MATASANTOS; SECRETARY (ACTING) OF BUSINESS, TRANSPORTATION AND HOUSING, BRIAN KELLY; STATE CONTROLLER, JOHN CHIANG; AND DOES I-V, INCLUSIVE,

Defendants.

Case No. 34-2011-00113919

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Date: February 14, 2014
Time: 9:00 a.m.
Dept: 31
Judge: Hon. Michael P. Kenny

Trial Date: May 13, 2013
Action Filed: November 14, 2011

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INTRODUCTION

Defendants moved for judgment on the pleadings on two grounds, the same advanced since before the writ proceedings were held: First, Plaintiffs cannot state a cause of action under Code of Civil Procedure section 526a (Section 526a) to challenge agency decision-making. As a matter of law, agency action can only be reviewed by mandamus, based on an administrative record. Second, even if Plaintiffs could state a claim, those claims were either resolved in the writ proceeding, because all the claims are based on the same operative allegations, or they were never alleged. Because Plaintiffs have not overcome the first argument, there is no need to reach the second.

In opposition to the point that they cannot state a cause of action, most of Plaintiffs' arguments are non-responsive. Plaintiffs argue that they are entitled to pursue any appropriate remedies for any cause of action they may have. (Opposition at p. 5.) Defendants do not disagree with that premise, it is just irrelevant to the argument that they cannot state a cause of action. The parties' disagreement is not about remedies; it is about whether, as a matter of law, a cause of action can be stated under Section 526a to challenge the Authority's decisions, and whether such claims can be tried. Plaintiffs also argue that formal legislative or quasi-legislative action is not the only way that a waste of public funds may occur. (Opposition at pp. 6-7.) Similarly, Defendants do not disagree with that general premise, it is just irrelevant. Here, the actions being challenged *are* quasi-legislative actions—the adoption of a funding plan and business plans to begin building the first phase of the system—that can only be reviewed based on the administrative record. Plaintiffs also argue that under fact pleading, they need not accurately identify the legal theory giving rise to their causes of action. (Opposition at pp. 7-8.) Again, Defendants do not disagree with that premise, but it is legally irrelevant to whether any facts can be alleged in this case to state a cognizable cause of action under Section 526a. Because the action challenged is quasi-legislative action by an administrative agency based on an administrative record, they cannot.

Plaintiffs' only responsive argument is that their claims fall into a narrow exception. However, the cases on which they rely are inapposite; accordingly, the purported Section 526a claims should be dismissed for failure to state a cognizable claim, and judgment should be entered.

ARGUMENT

I. PLAINTIFFS CANNOT CHALLENGE A DISCRETIONARY AGENCY ACTION MADE ON AN ADMINISTRATIVE RECORD IN AN ACTION FOR WASTE.

A. The Challenged Actions Are Discretionary Decisions Which Must Be Tried in a Mandamus Proceeding Based on the Administrative Record.

Proposition 1A empowers the Authority to make the discretionary decisions challenged in this case, including but not limited to selection of an initial corridor or usable segment, decisions about agreements for construction and operation of the system, estimating the cost of completing the corridor and section, and approval of funding plans. (Sts. & Hy. Code, §§ 2704.08, subds. (c), (d).) Challenges to these discretionary decisions must be made in mandamus proceedings based on the administrative record. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 567, 575-576; *Californians for Native Salmon, etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1428-29.)

Plaintiffs allege that the Authority approved a project that cannot meet certain design specifications in Streets and Highway Code section 2704.09, and that will require a government subsidy in violation of Streets and Highway Code section 2704.08, subdivision (c)(2). (Flashman letter, Claims One and Two.) Plaintiffs also allege that the project approved incorporates a blended rail system (identified in the revised business plan) that violates Proposition 1A. (*Id.*, Claim Three; Opposition at p. 5 fn. 2.)[1] These are all discrete, discretionary decisions that the Authority made by action of its board at public meetings, and that are supported by an administrative record. Accordingly, they may be challenged only on mandamus.

Western States Petroleum Assn. v. Superior Court, *supra*, governs this case and prohibits Plaintiffs—even in the context of a mandamus action—from introducing expert testimony, or any

[1] Plaintiffs' final claim, Claim Four, is derivative of Claims One through Three.

other evidence not a part of the administrative record. In that case, plaintiff sued the Air Resources Board claiming that the board had adopted regulations based on bad data and in so doing violated CEQA. (9 Cal.4th at pp. 564-565.) The court of appeal issued a writ of mandamus ordering the trial court to admit evidence that was not part of the administrative record, relating to the scientific basis for the regulations. (*Id.* at p. 565.) The Supreme Court reversed, holding that extra-record evidence was not admissible, either to show that substantial evidence did not support the agency's decision because it had not considered all relevant factors, or to show the agency had "not proceeded in a manner required by law." (*Id.* at pp. 576-570, 573-578.) While the Court agreed that evidence that could not have been produced at the administrative level "in the exercise of reasonable diligence" conceivably could be admitted in mandamus proceedings, it held that exception applied narrowly—only to evidence in existence ***before*** the agency decision—and ***could not include expert witness testimony and reports prepared after the agency decision.*** (*Id.* at p. 578.) Under this standard, Plaintiffs' proposed expert testimony, or any other extra-record evidence, is clearly not admissible in this case.

Plaintiffs filed this action immediately after the Authority approved the funding plan. They could have participated in the public meetings the Authority held, and submitted material to the Authority for consideration, which would have then become part of that record. Plaintiffs may not now rely on evidence that was not before the Authority when it made its decisions to approve the funding plan and the business plans. (*See Western States, supra*, 9 Cal.4th at p. 575 [noting that one reason for a rule that extra-record evidence will not be considered in an action challenging a quasi-legislative action is so that interested parties will present their evidence to the administrative agency in the first instance].)

B. Plaintiffs Do Not Fall Within the Limited Exception to the Rule

Plaintiffs concede—as they must—that a court reviewing an agency's quasi-legislative decisions is generally limited to a review of the administrative record. (See Opposition at pp. 5-6.) But they argue that their claims fall within a narrow exception to the rule. Plaintiffs argue that they fall within an exception for a "controversy involving a broader policy or course of conduct" (*id.* at p. 6), because their claims are based on "informal or ministerial actions," which

do not involve quasi-legislative conduct. (*Ibid.*) This argument fails, as there is no overarching policy, no informal or ministerial actions, and no lack of an administrative record alleged.

Plaintiffs argue that their Section 526a claims presents "broader issues" (Opposition at p. 5), but the issues they identify are factual issues, not legal ones. They rely on cases in which courts have allowed a declaratory relief action to challenge an agency's overarching construction of a statute or policy in violation of a statute. In these cases, there is no administrative record of the interpretation or policy at issue; the question under review is one of law. The interpretation or policy at issue influences, but sits apart from, the agency's decisions in discrete cases (in which there is an administrative record), and a determination of that legal question is necessary to avoid multiple lawsuits. (See *Californians for Native Salmon, etc. Assn. v. Department of Forestry, supra,* 221 Cal.App.3d at p. 1429-1431; *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1566-67.)

These cases are inapposite. Here, Plaintiffs acknowledge that their remaining claims depend on the resolution of disputed facts (for which they seek a trial), and that the legal questions and mixed questions of fact and law were resolved in the writ proceeding. (Plaintiffs' Informal Case Management Statement at p. 2.) There is no allegation in the operative complaint, the Flashman letter, or elsewhere challenging any overarching administrative interpretation of law by the Authority, or any other defendant. Unlike these cases, the challenged actions here are discrete, and do not relate to an overarching administrative interpretation of law. The narrow exception identified by plaintiffs cannot so easily swallow the rule that administrative decisions are reviewable only on mandamus and only on the basis of the administrative record.

Nor are there any allegations challenging informal or ministerial actions. Although they mysteriously allude to the Authority's "more informal, but still well-defined, determination of the nature of the high-speed rail system, as well as past, present and future actions of the other defendants" (Opposition at p. 4), Plaintiffs fail to identify any such actions, either in the Second Amended Complaint, the Flashman letter or their Opposition.[2] The only decisions challenged in

[2] Extra-record evidence may sometimes be used to challenge informal or ministerial actions because there is little or no administrative record. (See *Western States Petroleum Assn. v.* (continued...)

this case arise precisely from the Authority's adoption of the funding plan, the draft business plan and the revised business plan. Plaintiffs have failed to demonstrate that any exception encompasses their purported Section 526a claims, and those claims should now be dismissed and judgment entered.

II. PLAINTIFFS SHOULD NOT BE GRANTED LEAVE TO AMEND.

The Court should deny Plaintiffs' request for leave to amend the Second Amended Complaint. Their writ claims have been resolved or dismissed as unripe. There are no remaining cognizable claims that can be cured by amendment. Moreover, Plaintiffs expressly agreed that the remaining issues to be tried (if trial there be) are limited to the four set forth in Mr. Flashman's January 8, 2014 letter. Their remaining claims should stand or fall as they now are presented. Not counting Mr. Flashman's letter, Plaintiffs have amended their complaint four times, most recently in May 2013. This case has been pending more than two years. Plaintiffs should not be allowed to continue to use their complaint as a moving target.

(...continued)
Superior Court, supra, 9 Cal.4th at pp. 575.) Here, what are being challenged are not bureaucratic decisions by staff, for which there is no administrative record, but decisions of the Board of Directors of the Authority, made in open sessions, pursuant to the Bagley Keene Act, (Gov. Code, §§ 11120-11132), for which there is a voluminous administrative record.

CONCLUSION

For the foregoing reasons and those presented in Defendants' opening memorandum, Defendants respectfully request that the Court dismiss Plaintiffs' remaining claims and enter a final judgment in this matter.

Dated: January 31, 2014

Respectfully Submitted,

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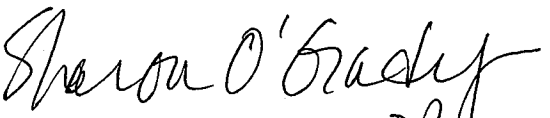

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DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: ***Tos, et al. v. California High Speed Rail Authority, et al.***

No.: **34-2011-00113919**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 31, 2014, I served the attached

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 31, 2014, at San Francisco, California.

A. Bermudez
Declarant

A. Bermudez
Signature

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