MICHAEL J. BRADY (SBN 40693)
1001 Marshall Street, Ste. 500
Redwood City, CA 94063-2052
Telephone (650) 364-8200
Facsimile: (650) 780-1701
Email: mbrady@rmkb.com

LAW OFFICES OF STUART M. FLASHMAN
STUART M. FLASHMAN (SBN 148396)
5626 Ocean View Drive
Oakland, CA 94618-1533
TEL/FAX (510) 652-5373
Email: stu@stuflash.com

Attorneys for Plaintiffs
JON TOS; AARON FUKUDA;
AND COUNTY OF KINGS

EXEMPT FROM FEES PER
GOVERNMENT CODE §6103

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

JON TOS, AARON FUKUDA, and COUNTY OF KINGS,
Plaintiffs
v.
CALIFORNIA HIGH SPEED RAIL AUTHORITY *et al.*,
Defendants

No. 34-2011-00113919 filed 11/14/2011
Judge Assigned for All Purposes:
HONORABLE MICHAEL P. KENNY
Department: 31

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR ORDER LIMITING SCOPE OF EVIDENCE AT TRIAL TO ADMINISTRATIVE RECORD

Date: July 25, 2014
Time: 9:00 AM
Dept. 31
Judge: Hon. Michael P. Kenny
Trial Date: Not Yet Set

INTRODUCTION

Defendants California High-Speed Rail Authority *et al*. ("Defendants") have repeatedly sought to prevent Plaintiffs John Tos *et al* ("Plaintiffs") from moving forward and bringing their claims to trial. Those claims are that Defendants are attempting to spend Proposition 1A bond funds in violation of that measure's mandatory provisions and therefore are subject to injunctive and declaratory relief under Code of Civil Procedure §526a. Plaintiffs additionally claim mandamus relief under C.C.P. §1085. Defendants now claim that even if Plaintiffs are entitled to bring their claims, they may only do so through a mandamus challenge to Defendant

California High-Speed Rail Authority's ("CHSRA") approval of quasi-legislative decisions, based on a prescribed administrative record.

Plaintiffs have repeatedly explained that the actions being challenged herein are not CHSRA's adoption of business or funding plans, neither of which commit the Authority to constructing the high-speed rail ("HSR") system being challenged. Instead, Defendants have pursued a much broader course of conduct, including informal actions by CHSRA and its officials as well as actions by other defendants. It is that overall course of conduct that has committed Defendants to the system being challenged and made Plaintiffs' claims ripe for adjudication. Given that informality, any administrative record involved would be an inadequate basis for determining whether Defendants' commitment to building this specific HSR system violates Proposition 1A and therefore justifies the relief requested by Plaintiffs.

Plaintiffs are hopeful that, by denying this motion, the Court will clear the path for these claims to finally move forward towards trial – a trial that has already been delayed far too long.

STATEMENT OF FACTS

I. GENERAL BACKGROUND OF THE HSR SYSTEM AND THE CASE.

Over the two years since this case was assigned to it, the Court has undoubtedly, become very familiar with the issues involved. Those issues focus on whether Defendants are complying with the statutory mandates established by Proposition 1A[1] ("Prop 1A" or "Measure"), an almost $10 billion general obligation bond measure approved by California voters in November 2008. The Measure established both procedural and substantive requirements for the funding and construction of a HSR system within California.

Plaintiffs' Second Amended Complaint ("SAC") identified several violations of both the Measure's procedural and substantive requirements. One part of the case asserted procedural violations. It was brought as a mandamus challenge under C.C.P. §1085, based on an extensive administrative record, to CHSRA's approval of a Funding Plan for the first usable segment proposed for construction. That portion of the case was briefed and heard by the Court in 2013.[2]

The second portion of the case, what Plaintiffs have called the "§526a Action," challenges whether the HSR system proposed to be funded by Prop 1A complies with

[1] California Streets & Highways Code §2704 *et seq.*

[2] That decision is currently under review by the Third District Court of Appeal.

substantive requirements set by the Measure; specifically: 1) the maximum allowable nonstop service travel time between San Francisco (Transbay Terminal) and Los Angeles (Union Station)[3], 2) the financial viability of the proposed system (including not requiring a public operating subsidy)[4], and 3) whether the system qualifies as a true high-speed rail system[5]. In addition, the SAC asserts that if the proposed HSR system does not comply with Prop 1A requirements and therefore cannot use Prop 1A bond funds for its construction, CHSRA's expenditure of federal grant funds to construct a portion of a usable segment – without sufficient funding available to build a project that could serve a useful purpose – constitutes a waste of public funds subject to injunction under C.C.P. §526a.

II. DEFENDANTS' ACTIONS RELEVANT TO THE §526A ACTION.

Defendants' description of "The Challenged Planning Decisions" focuses on CHSRA's approval of its 2011 Funding Plan and its 2012 and 2014 Business Plans. (Defendants' Memo of Points & Authorities in Support of Motion etc. [hereinafter, "Defendants' P&As"] at pp. 8-10.) In fact, the acts demonstrating that Defendants have committed themselves to a HSR system that does not comply with Prop 1A involve much more than that, including not just CHSRA's formal quasi-legislative decisions[6] but a variety of acts by both CHSRA and other defendants, none of which involved public hearings or an administrative record. These include:

- CHSRA's 2012 submission to the Director of Finance of a request for funds to construct portions of the HSR system, including the "bookends";
- The Director of Finance's submission to the Legislature of CHSRA's appropriation request as part of the proposed FY 2012-2013 budget;
- The Legislature's approval of that appropriation;
- The Governor's signing of the FY 2012-2013 budget;
- CHSRA's submission of federal grant applications for construction funding;
- CHSRA's direction to its consultants that the Project-level EIR for the San Francisco to San Jose portion of its HSR project focus on a blended system;
- CHSRA's issuance of requests for proposals for construction;

[3] Streets & Highways Code §2704.09 subd. (b)(1).

[4] Streets & Highways Code §2704.09 subd. (g); see also §2704.08 subd. (c)(2)(J).

[5] Streets & Highways Code §2704.04(a).

[6] Plaintiffs contend that none of these three approvals, in themselves, committed CHSRA, or any other defendant, to anything.

- CHSRA's execution of construction contracts;
- Sworn statements before legislative committees by CHSRA representatives, including the Chair of its Board of Directors and its Executive Director, about the nature of the HSR system that CHSRA intends to construct.

None of these actions resulted from a formal public process with public hearings, public participation, and creation of an administrative record of evidence presented. Yet all of these actions contributed to and collectively demonstrate the ripeness of Plaintiffs challenges to the HSR system.

Significantly, Defendants, in their motion, do not deny that they have committed themselves to constructing the HSR system described in Plaintiffs' complaint. Rather, they argue that the commitment was made through CHSRA's approval of its 2011 Funding Plan and its 2012 and 2014 Business Plans. As Plaintiffs will show, the commitment, although real, was not made by way of those approvals. Therefore, the Court's consideration of evidence cannot be limited to an administrative record.

ARGUMENT

I. EVIDENCE MAY ONLY BE RESTRICTED TO AN ADMINISTRATIVE RECORD WHEN THE DETERMINATIONS INVOLVED ARE THE RESULT OF FORMAL PROCEEDINGS CREATING SUCH A RECORD.

Defendants' motion is based on two premises. First, it asserts that the only relevant actions are formal quasi-legislative decisions of CHSRA: adoption of the 2011 pre-appropriation Funding Plan and of the 2012 and 2014 Business Plans. Second, it asserts that because these decisions involved public hearings and administrative records, the evidence in this case must be limited to those records. However, both of Defendants' premises are erroneous.

As will be shown, the decisions Defendants point to did not commit Defendants to constructing any specific HSR system. At most, they indicated to the Legislature CHSRA's preliminary intentions. It was other informal actions, made without public hearings or administrative records, that actually committed Defendants to the course of conduct being challenged.

Of equal importance, the kind of informal actions that resulted in Defendants' commitment are not the kind that can be reviewed based on an administrative record, because no such record exists. This was specifically discussed on *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559. In that case, what was at issue was the California Air

Resources Board's CEQA determination in adopting an air quality regulation. As the Supreme Court noted, that proceeding had involved a public hearing and extensive public process, resulting in an equally extensive administrative record. (*Id*. at pp. 565-566.) The court held that, given the extensive public process, it would contrary to the Legislature's intent to allow additional post-decision evidence to be considered by the court to challenge the evidentiary basis of decisions that had been made based on that evidentiary record. (*Id.* at p. 573.)

In the course of discussing the parties' contentions, the court noted that extra-record evidence would be admissible if the decision had been made informally, without the extensive public process, and had involved disputed facts. (*Id*. at p. 576.) Other cases have confirmed this distinction. Thus, in *California Oak Foundation v. The Regents of the University of California* (2010) 188 Cal.App.4th 227, 254-256, the court of appeal concluded that the trial court had properly allowed presentation of extra-record evidence on an athletic center's design and its relationship to a pre-existing structure. Similarly, in *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 238, the court held that the trial court properly allowed submission of additional evidence when the administrative process had not involved any public hearing. (*See also*, *Hayward Area Planning Assn. v. Alameda County Transportation Authority("HAPA v ACTA")* (1999) 72 Cal.App.4th 95, 110 fn. 9 [highly material disputed factual issues were not susceptible to resolution by summary judgment or adjudication].)

II. NONE OF CHSRA'S FORMAL QUASI-LEGISLATIVE DECISIONS COMMITTED DEFENDANTS TO THE CHALLENGED HIGH-SPEED RAIL SYSTEM.

Defendants argue that their commitment to CHSRA's current high-speed rail system was made through three formal quasi-legislative decisions: approval of its 2011 pre-appropriation funding plan, approval of its Revised 2012 Business Plan, and approval of its Final 2014 Business Plan. (Defendants P&As at p.8.) In fact, none of these approvals committed Defendants to the high-speed rail system being challenged. This is shown both by the legislative intent underlying those approvals and the lack of any environmental review before granting the approvals.

A. THE LEGISLATURE DID NOT INTEND FOR ANY OF THE THREE FORMAL APPROVALS IDENTIFIED BY DEFENDANTS TO COMMIT CHSRA TO THE CHALLENGED HIGH-SPEED RAIL SYSTEM.

1. THE LEGISLATURE DID NOT INTEND CHSRA'S BUSINESS PLANS TO COMMIT IT TO CONSTRUCTION OF A FUTURE PROJECT.

As part of AB 3034, in 2008 the Legislature enacted Public Utilities Code §185033, which called for CHSRA to prepare, publish, and submit to the Legislature a revised Business Plan, which was required to identify, "the type of service it *anticipates* it will develop, …" [Emphasis added.] In 2009, that section was modified to require CHSRA to prepare, publish, adopt, and submit a business plan to the legislature by January 2012 and every two years thereafter. The required contents of the business plan, however, remained unchanged. (Stat. 2009 Ch. 618 Sect. 1.) In 2013, the Legislature again amended the statute, modifying the contents of the business plan to include "A description of the type of service the authority *is developing and the proposed chronology* for the construction of the statewide high-speed rail system, and the estimated capital costs for each segment or combination of segments." (Stat. 2013 Ch.237 Sect. 6 [Emphasis added.].) What all of these versions of §185033 have in common is that none of them commit CHSRA to any action. They are intended to indicate to the Legislature, and the public, what CHSRA *anticipates*, or what it *is developing*, but they are basically informational documents, and do not commit CHSRA to any particular course of action.

2. THE LEGISLATURE DID NOT INTEND CHSRA'S FUNDING PLANS TO COMMIT IT TO CONSTRUCTION OF A FUTURE PROJECT.

The legislative history of the funding plans tells a similar story. The funding plans were proposed in Streets & Highways Code §2704.08 as part of Prop 1A. Again, these are reports providing what the Legislature and the voters felt was necessary information to the Legislature, the peer review committee, the Director of Finance, and the public; but while they describe potential future plans, they are informational reports – not decisions. Further, the funding plans are to focus on a specific corridor or usable segment intended to be constructed in the near term, not on the overall system. (Streets & Highways Code §2704.08 subd. (c) and (d).)

The only funding plan CHSRA has produced and approved thus far is a pre-appropriation Funding Plan for a usable segment extending through part of the Central Valley. That Funding Plan did not even specify the startpoint and endpoint of the segment, leaving it undetermined

whether it would run from San Jose to Bakersfield [IOS North] or from Merced to an endpoint somewhere in the San Fernando Valley [IOS South]. (1 AG 60; 115, 118.)[7] The only part defined with any specificity was the Initial Construction Section ("ICS"), running roughly from Madera to Bakersfield Even there, the funding plan did not specify whether the ICS would go through the cities along its route or would bypass the cities themselves, with stations located on the cities' peripheries. Nor does the Funding Plan provide any information on how it would connect to the remainder of the HSR system; not even where the ""Wye" would be indicating the branch-point between Phase I service and HSR service to Sacramento. It could not do so because at that point (November 2011) no decision had yet been made between Altamont and Pacheco Pass alignments for the routing of Phase I into the Bay Area. (See, 2 AG 1925 [CHSRA Board Meeting of April 12, 2012 - agenda item 7 – rescission of CHSRA resolution selecting Pacheco Pass alignment].)

B. THE LACK OF CEQA REVIEW PRIOR TO ANY OF CHSRA'S THREE FORMAL APPROVALS CONFIRMS THE LACK OF COMMITMENT.

The California Environmental Quality Act ("CEQA") requires that, prior to considering approval of a course of action that could result in significant environmental impacts, the public agency that would grant approval conduct an environmental review of the proposed action. (Public Resources Code §21002; CEQA Guidelines §15002; *Stockton Citizens for Sensible Planning v. City of Stockton ("Stockton Citizens")* (2010) 48 Cal.4th 481, 498.) A project approval is a public agency's decision "which commits the agency to a definite course of action in regard to a project." (CEQA Guidelines §15352 subd. (a); *Stockton Citizens, supra,* 48 Cal.4th at pp. 505-506.)

There can be little doubt that a decision formally adopting the specific system complained of in the SAC, including the "blended system," could result in significant impacts on the environment. Indeed, CHSRA's formal approval of each segment of the HSR system approved thus far has required preparation and approval of both an EIR and EIS. If, as asserted by Defendants, the approval of the 2012 and/or 2014 Business Plan and/or the 2011 Funding

[7] The funding plan incorporated by reference the attached Draft 2012 Business Plan, but that Business Plan likewise contained no further specifics about the proposed usable segment. While the Revised 2012 Business Plan (and the 2014 Business Plan) did specify IOS South as the usable segment, neither was incorporated into the funding plan.

Plan committed the CHSRA to the challenged system, one would have expected those approvals to be preceded by preparation and accompanied by the approval of CEQA document analyzing the decision's expected environmental impacts. In fact, however, none of the aforementioned approvals involved any environmental review under either CEQA or NEPA.[8]

II. DEFENDANTS' ACTIONS COMMITTING THEM TO THE CHALLENGED HSR SYSTEM, AND MAKING PLAINTIFFS' CLAIMS RIPE FOR JUDICIAL DETERMINATION, WERE ALL INFORMAL ACTIONS.

Defendants do not claim that they remain undecided about the nature of the HSR system they intend to construct. As pointed out above, none of Defendants' formal Quasi-legislative decisions have made such a commitment, as evidenced by the lack of CEQA review. Nevertheless, just as in *HAPA v. ACTA, supra*, 72 Cal.App.4th at 104, Defendants' actions and admissions, even though not the result of formal determinations with associated administrative records and CEQA review, demonstrate that Plaintiffs' claims are ripe for determination.

A. ACTIONS RELATED TO THE 2012 APPROPRIATION FOR THE "BOOKENDS" SEGMENTS.

Several actions took place in 2012 that indicated Defendants' commitment to the proposed HSR system, and specifically to the "bookends" segments involving the San Jose to San Francisco and Palmdale to Los Angeles "blended system." These included:

- CHSRA's submission of an appropriation request to the Director of Finance that included "bookends" construction funding;
- The Director of Finance's submitting that request to the Legislature as part of the 2012-2013 budget appropriation request;
- Testimony of CHSRA representatives at legislative hearings on the budget;
- The Legislature's approval of the appropriation for CHSRA, including funding for "bookends" construction;
- The Governor's approval of that appropriation as part of his overall approval of the 2012-2013 budget act;
- The Authority's issuing RFPs for construction of the system as proposed in the budget act.

[8] Nor were any of these decisions accompanied by a parallel approval decision by the Federal Railroad Administration, which would be required to give federal approval to any decision committing CHSRA to a particular HSR system.

All of these actions occurred without formal public hearings or substantial opportunities for public comment. Yet these actions, especially taken together, indicated Defendants' commitment to constructing the bookends as part of the blended system, and as part of the overall HSR system being challenged herein.

B. FURTHER ACTIONS SHOWING DEFENDANTS' COMMITMENT TO THE HSR SYSTEM BEING CHALLENGED.

In addition to the budget-related actions identified above, there were other actions that also demonstrated Defendants commitment to the HSR system being challenged, and the ripeness of these claims for adjudication. These included:

- CHSRA's direction to its staff in Resolution HSRA 12-17 that the project-level EIR for the San Francisco to San Jose portion of the HSR system focus solely on a blended system approach;[9] (3 AG 3141.)
- The Legislature's passage of legislation requiring that HSR funding be used only to construct a blended system unless all of the jurisdictions that would be affected by that choice agreed to allow construction of a non-blended system;
- The submission by CHSRA of federal grant applications premised on construction of the system being challenged herein, the federal government's approving those grants, and the CHSRA accepting those grant funds;
- Statements by representatives of the CHSRA and other state government officials in a variety of public fora, including state and federal legislative hearings, indication a commitment to constructing the HSR system being challenged herein.

Again, all of these actions further demonstrated Defendants' commitment to building the HSR system being challenged herein, and the ripeness of those claims for adjudication. Further, none of these actions involved the type of formal quasi-legislative proceeding, with public hearing and an administrative record, that Defendants argue was involved in the decision committing Defendants to the challenged HSR system.

CONCLUSION

Defendants' quest to sharply circumscribe the evidence that may be presented to this Court rests on a fundamentally flawed premise – that Defendants' commitment to the challenged

[9] This action was done in the context of certifying a program-level EIR that focused on the choice between Altamont and Pacheco Pass alignments, rather than on whether to construct a blended system, and left the latter decision to the project-level EIR. (See, Exhibit A to Plaintiffs' Request for Judicial Notice.)

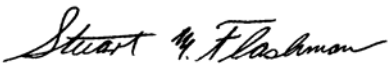
HSR system resulted from a series of formal quasi-legislative decisions. As Plaintiffs have shown, this was not the case. As in *HAPA v ACTA*, the commitment was made informally and without the type of public process that would result in an administrative record. Perhaps if Defendants had made their commitments formally, a limited evidentiary record would be appropriate. Defendants have chosen to proceed otherwise, and that choice precludes granting Defendants' motion.

Dated: July 13, 2014

Michael J. Brady

Law Offices of Stuart M. Flashman
Stuart M. Flashman

Attorneys for Plaintiffs Jon Tos *et al.*

By: 

Stuart M. Flashman