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EXEMPT FROM FEES PER GOVERNMENT CODE §6103

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

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' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF 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

Pursuant to Evidence Code §§ 451 subd. (a) and 452 subd.(a) and(d), Plaintiffs John Tos *et al.* request that the Court take judicial notice of the attached pages from the Court's Ruling on Submitted Matter dated February 25, 2013 in the case *Town of Atherton et al. v. California High-Speed Rail Authority ("Atherton")*, Sacramento County Superior Court Case No. 34-2008-80000022, which ruling granted Respondent's Motion for Discharge of Writ of Mandate. A true and correct copy of said pages is attached hereto as Exhibit A.

MEMORANDUM OF POINTS AND AUTHORITIES

I. JUDICIAL NOTICE OF THE REQUESTED DOCUMENT IS PROPER.

Under Evidence Code §451 subd. (a), upon request, judicial notice shall be taken of, "The decisional, constitutional, and public statutory law of this state … ." The requested document is part of this Court's decision in the above-referenced case. As such, it is part of California's decisional law and subject to mandatory judicial notice. (*Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1173 fn.11 [court took judicial notice, under §451 subd. (a) of trial court order in unrelated case].)

Even if that were not the case, the document would be subject to judicial notice under §452 subd. (a) and (d) as a decision and part of the case file for the above-referenced case. Judicial notice of that document would be especially proper given that the respondent in that case is the lead defendant in this case, that the document is an order granting a motion of that respondent, and that the subject matter of that decision is relevant to the issue before the Court here. (See infra.)

II. THE REQUESTED DOCUMENT IS RELEVANT TO WHETHER RESPONDENTS' CHOICE OF ITS CURRENT HSR SYSTEM RESULTED FROM A FORMAL DECISION THAT UNDERWENT CEQA REVIEW.

Respondents herein argue that Plaintiffs' Code of Civil Procedure §526a claims arose from a series of formal quasi-legislative decisions made by Defendant California High-Speed Rail Authority ("CHSRA"). From that, they argue that the evidence available to the Court must be restricted to the documents in the administrative records for those decisions. (See, Defendants' Memorandum of Points and Authorities in support of their motion at pp. 8-9.)

Plaintiffs, by contrast, argue that CHSRA's cited decisions could not have committed Defendants to the challenged system because, among other things, they were not subjected to environmental review under CEQA. This request for judicial notice addresses Defendants' expected argument that the HSR system being challenged had been reviewed in the Program EIR for the Bay Area to Central Valley High-Speed Train Project ("PEIR") that was the subject of the *Atherton* case.

The document for which judicial notice is requested is part of an order granting Respondent California High-Speed Rail Authority's Motion to discharge the writ of mandate that had been issued by the Court in the *Atherton* case. As the excerpt explains, that order was based

in part on the PEIR having been prepared to address a program-level decision on route selection (i.e., Altamont versus Pacheco Pass). The PEIR did not address more detailed project-level decisions (such as full high-speed rail versus blended system) involved in choosing a final HSR system for construction. The document is therefore relevant to the decision now before the Court of whether admissible evidence should be restricted to an administrative record.

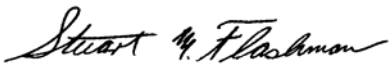
Judicial notice should therefore be granted.

Dated: July 13, 2014

Michael J. Brady

Law Offices of Stuart M. Flashman
Stuart M. Flashman

Attorneys for Plaintiffs John Tos *et al.*

By: 

Stuart M. Flashman

Exhibit A

Even applying the rule that less specificity is required to preserve issues for judicial review in administrative proceedings to this letter written by petitioners' counsel, the Court finds that the letter did not give notice to respondent that its responses to comments were inadequate. The letter does not identify any specific responses that were found to be inadequate, and refers only generally to other comments. Instead, the letter focuses on substantive defects in the EIR which were identified in public comments, but not corrected. The letter thus preserves issues regarding those substantive defects for review, but not the issue of whether specific responses to the comments were adequate. The Court accordingly does not address the issue of the adequacy of responses to comments further in this Ruling.

3. Project Description:

The critical importance of the project description to the CEQA environmental review process has been described in the case law as follows: "[A]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. The defined project and not some different project must be the EIR's bona fide subject. The CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the original project; indeed, new and unforeseen insights may emerge during investigation, evoking revision of the original proposal." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal. App. 3rd 185, 199.)

Petitioners contend that the environmental review in this case violates these principles because the new information regarding the alleged infeasibility of the four-track full-build system is fundamentally at odds with the project description, and requires further revision of the EIR.

The Court finds this contention to be unpersuasive. As respondent argues convincingly, the project description for this first-tier environmental review always has been the selection of a route into the Bay Area from the Altamont Pass and Pacheco Pass alternatives, along with the selection of general track alignments and station locations based on that choice. This project has not changed in any fundamental way during the environmental review process. The new information regarding the unwillingness of the Peninsula Corridor Joint Powers Board to consider a four-track system concerns the implementation of the project as described, and not the nature of the project itself. Moreover, in the Project Description section

of the final EIR, the alignment between San Francisco and San Jose is stated to be "Caltrain Corridor (Shared Use)", which is consistent with the concept of phased implementation or the blended, two-track system.[8]

In essence, petitioners argue that the new information regarding the unavailability of the Caltrain right of way for a four-track, full-build system could have influenced the choice of routing between Altamont Pass and Pacheco Pass, and that the EIR should be reopened and recirculated to deal with that issue. This argument fails, because Chapter 6 of the final EIR addresses the 2012 Business Plan and the impact of a phased or blended system in relation to the choice of the Altamont or Pacheco alignments. The conclusion expressed in the final EIR is that a phased or blended system may be implemented under either alignment, and that phasing or adoption of a blended system makes no difference to the choice of alignments, which has been based on other factors.[9] Petitioners have not demonstrated that this conclusion is invalid.

The Court accordingly concludes that petitioners have not demonstrated that the environmental review of the project should be invalidated on the ground that it is based on an inaccurate or unstable project description.

4. <u>Unavailability of Caltrain Right of Way:</u>

Petitioners contend that the final EIR fails to address the issue of the unavailability of the Caltrain right of way for a four-track, full-build system, and thus fails to address the infeasibility of the Project as described.

This contention is also unpersuasive. As stated above, the Project under review is (and always has been) the selection of a general route into the Bay Area through Pacheco Pass. Petitioners have not demonstrated that this Project is not feasible as a result of the unavailability of the Caltrain right of way for a four-track system. To the contrary, Chapter 5 of the final EIR discusses implementation of the Project through phased construction of a blended system in the Caltrain right of way, thus concluding that the

[8] See, 2012 A.R., page 12.

[9] See, e.g., 2012 A.R., pages 249, 259, 264, 266-267, 269-270.

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 July 14, 2014, I served the within PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR ORDER LIMITING SCOPE OF EIDENCE AT TRIAL TO ADMINISTRATIVE RECORD and PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSITION TO DEFENDANTS MOTION FOR ORDER LIMITING SCOPE OF EVIDENCE AT TRIAL TO ADMINISTRATIVE RECORD on the parties listed below by depositing true copies thereof enclosed in sealed envelopes with next day priority mail postage thereon fully prepaid, at a U.S. Postal Service station at Oakland, California addressed as follows:

Sharon O'Grady, Deputy Attorney General
Tamar Pachtar, Supervising Deputy Attorney General
Office of California Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-7004
Sharon.OGrady@doj.com
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Raymond L. Carlson, Esq.
Griswold, LaSalle, Cobb, Dowd & Gin LLP
111 East Seventh Street
Hanford, CA 93230
carlson@griswoldlasalle.com

In addition, on the above-same day, I also sent electronic copies of the above-same documents, converted to "pdf" format, as e-mail attachments, to the above-same parties at the e-mail addresses shown above.

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 July 14, 2014.

Stuart M. Flashman