Michael J. Brady
101 Marshall St., Ste. 500
Redwood City, CA 94063
Telephone: (650) 364-8200
Fax: (650) 780-1701
e-mail: mbrady@rmkb.com

Stuart M. Flashman (SBN 148396)
5626 Ocean View Dr.
Oakland, CA 94618-1533
Telephone/Fax: (510) 652-5373
e-mail: stu@stuflash.com

Attorneys for Defendants John Tos, Aaron Fukuda, and County of Kings

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

JOHN TOS, AARON FUKUDA, and COUNTY OF KINGS,
Plaintiffs

v.

CALIFORNIA HIGH-SPEED RAIL AUTHORITY et al.
Defendants

No. 34-2011-00113919 Filed Nov. 14, 2011
[EXEMPT FROM FILING FEES PER GOVERNMENT CODE §6103]

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PEREMPTORY WRIT OF MANDATE

Date:	May 31, 2013
Time:	9:00 AM
Dept.	31
Judge:	Hon. Michael P. Kenny
Trial Date:	May 31, 2013

INTRODUCTION

Defendants analogize the current high-speed rail project to other major capital projects in California's history. Some of these project, like the Golden Gate Bridge, have indeed been quite successful. However, this project dwarfs the Golden Gate Bridge in its scope and expense. Other past projects, such as the State Water Project, were never truly completed. (*See, In re Bay-Delta et al.* (2008) 43 Cal.4th 1143, 1154-1155.) California is still trying to address the problems created by that partially-built project. (*Id.* at 11561-1152.)

California's interstate highway system, also cited by Defendants, has been somewhat more successful, in part because it was planned to be built in usable segments with independent utility. Even there, however, portions, such as I-710 through South Pasadena and the former I-480 Embarcadero Freeway in San Francisco (which was planned to connect with an extension of I-280 through Golden Gate Park), have been halted or aborted due to overwhelming community

opposition. (*See*, Hanson & Giuliano (eds.) The Geography of Urban Transportation (Guilford Press 2004, 4th ed.) p.400 [discussion of San Francisco Freeway Revolt].) More recently, the delays and major cost overruns associated with building the new eastern section of the San Francisco Bay Bridge were fresh in the minds of state legislators when they wrote AB 3034. Thus not only the potential utility, but also the potential problems associated with very large-scale public works programs were part of the background of this measure.

Defendants assert that the legislature, in crafting the ballot measure,

> …created a basic vision for the funding and scope of the system, and left to the California High-Speed Rail Authority (the Authority) the flexibility to build it, with due fiscal oversight by the legislature. (Defendants' Opposition at p.1:15-17.)

With all due respect to that co-equal branch of state government, even the legislature's own members could not have been unaware, in 2008, after several years of multibillion dollar budget deficits and associated political in-fighting, that the public would not have had a high degree of confidence in its ability to provide fiscal oversight. It was for this very reason, as well as prodding from the governor (Exhibit H to Plaintiffs' Request for Judicial Notice, Part I, at p.28), that the various certification and fiscal review requirements were added into the measure. (*See*, Exhibit F to Plaintiffs Request for Judicial Notice, Part I, at pp.3-4 [Senate Floor amendments to AB 3034 adding independent peer review panel and certification requirements in Funding Plan].) Those fiscal review and oversight provisions were also touted in the ballot argument in favor of the Measure. (AR 6.)

Without these added assurances to the voters, it is doubtful Measure 1A would have passed. (See, Plaintiffs' Request for Judicial Notice Part I, Exhibits K and L [showing county-by-county election results for Proposition 1A, with the measure passing in only 21 of California's 58 counties].)

Defendants also make a number of surprising assertions in their opposition brief. They ignore Part II of Plaintiffs' Trial Brief and then assert that the issues addressed in that brief have been waived. (Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' "Part I" Opening Brief in Support of Petition for Writs of Mandate ["Opposition Brief"] at p.19.) They assert that the Parties, by stipulation, had limited the Court's initial consideration of the case to the mandamus causes of action (Opposition Brief at p.15:6-8.) They further assert, despite the many cases filed under Code of Civil Procedure §526a, that it cannot, in itself, define

a cause of action. (Opposition Brief at p.13 fn. 14.) Most amazingly, they disregard over 100 years of precedent in interpreting bond measures and argue that the requirements for the Funding Plan set forth in Proposition 1A and approved by California voters were merely advisory to the legislature and can be disregarded without legal consequence.

Defendants are off-base on all these assertions. The claims for declaratory relief and for relief under Code of Civil Procedure §526a are separate and non-overlapping with the mandamus claims. The latter address governmental actions which Plaintiffs allege violated Defendants' mandatory duties under Proposition 1A. The former address either legislative acts which Plaintiffs ask the court do declare invalid or impending illegal expenditures of public funds by Defendants which Plaintiffs seek to enjoin. Plaintiffs' counsel's recollection of the court's telephonic case management conference is that legal issued would be addressed at the May 31st hearing, regardless of the associated cause of action, and that where resolution of the legal issues indicated the need, further proceedings to resolve factual disputes would then be arranged. And most emphatically, 100 years of jurisprudence cannot be casually disregarded. The cases addressing voter-approved bond measures are unanimous in finding that specific requirements set in a voter-approved bond measure must be faithfully adhered to, and the failure to do so is grounds for prohibiting the expenditure of bond funds.

As already shown in Part I of Plaintiffs' trial brief, prior actions by the Authority and by various state officials associated with the Authority's approval of its November 2011 Funding Plan were improper and violated mandatory duties under the provisions of Proposition 1A. Defendants' various sophistries cannot hide the impropriety of these actions. Plaintiffs therefore respectfully request that the Court grant Plaintiffs' requests for Peremptory Writs of Mandate requiring rescission of Defendants' improper actions and ordering them to proceed properly under the mandatory requirements of Proposition 1A. Plaintiffs also ask that the Court consider other appropriate remedies, including declaratory and injunctive relief.

ARGUMENT

I. DEFENDANTS' CLAIMED VIOLATIONS OF MANDATORY DUTIES UNDER PROPOSITION 1A ARE REVIEWED UNDER A STANDARD OF SUBSTANTIAL COMPLIANCE.

Defendants argue that all of their challenged actions fall under the general category of legislative acts, which are reviewed under the relatively low standard of abuse of legislative

discretion – i.e., whether they were arbitrary, capricious, without evidentiary support, or failed to follow the procedure and give notices required by law. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35 fn.2.). While the actual approval of a legislative appropriation is clearly a legislative act (and not one of the actions sought to be rescinded by mandamus), Plaintiffs assert that the other actions of Defendants, with the possible exception of the Governor's approval of the legislative appropriation, were administrative acts implementing the provisions of the voters' legislative action in approving Proposition 1A.

There can be little question that Proposition called for the Authority to prepare and adopt a Funding Plan as one of the first steps towards implementing the voters' direction on funding and constructing a High-Speed Rail System. Streets and Highways Code §2704.08(c)(1) directs that:

> No later than 90 days prior to the submittal to the Legislature and the Governor of the initial request for appropriation of proceeds of bonds authorized by this hapter for a~v eligible capital costs on each corridor; or usable segment thereof, … … the authority shall have approved … … a detailed funding plan for that corridor or usable segment thereof.
>
> The section then goes on to specify required contents of that funding plan.

Strumsky, *supra*, provides a helpful contrast between administrative and legislative actions:

> Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts. (Id. at 35 fn.2.)

Here, Proposition 1A established the general rule of how the appropriation and use of its authorized bond funds was to proceed. The Authority's action in adopting its Funding Plan applied that rule to the specific circumstances of the proposed expenditure of bond funds towards construction of the first usable segment. However, the specific question involved in the mandamus action is whether the Authority, and the individual state official Defendants, properly complied with the mandatory requirements of Proposition 1A, and specifically Streets and Highways Code §2704.08(c), in addressing the use of bond funds towards construction of the proposed Initial Operating Segment and Initial Construction Segment. That question implicates nether legislative nor administrative application of §1085. Rather it implicates violation of a mandatory, ministerial duty, in which there is no discretion.

In particular, §2704.08(c)(2)(G) through (K) identified specific certifications that the

Authority was required to make in its Funding Plan. The Authority had no discretion in making those certifications. Either the Funding Plan met the requirements, in which case the Authority's duty was to make the certification, or the Plan did not, in which case the Authority had a duty not to make the certification, and, indeed, not to approve and submit the Funding Plan. Similarly, the individual state official defendants, faced with a Funding Plan submitted by the Authority, had a corresponding duty to consider whether the certifications were properly made. If so, they had a duty to accept the Plan; if not, they had a mandatory duty to reject it.

As explained in Plaintiffs Trial Brief Part I, the standard of review in this situation is substantial compliance – whether Defendants' actions complied with the substance of every reasonable objective of the statute.

II. PLAINTIFFS HAVE NOT WAIVED ANY OF THEIR CLAIMS IN THEIR ACTION BY NOT ADDRESSING THEM IN THE BRIEF ON MANDAMUS.

Defendants assert:

> Tos has abandoned eight of ten grounds for mandamus by failing to address all but two of ten claimed violations of statutory duties in the "part I" brief. (Opposition at p.16.)

Not so. Since the beginning of this case, Plaintiffs have raised claims for injunctive and declaratory relief. Indeed, the initial complaint contained only those causes of action. While Plaintiffs have now added causes of action in mandamus, those claims are not in derogation of the claims for injunctive and declaratory relief. Those claims remain in Plaintiffs' Second Amended Complaint (herinafter, "SAC"). Recognizing that mandamus is only appropriate when a defendant has already taken, or not taken, a specific action in violation of a mandatory duty, Plaintiffs are only pursuing as mandamus claims this claims where the evidence clearly shows that Defendants have already taken an action in violation of their mandatory duties under Proposition 1A. Many of those claims (e.g., the invalidity of the legislative appropriation for the Initial Construction Segment ("ICS") in violation of Proposition 1A) are more properly brought through declaratory or injunctive relief. While Plaintiffs are not pursuing every one of their claims by way of mandamus, those claims have not been abandoned. Rather, each claim is being pursued by way of the most appropriate avenue for obtaining redress.

III. THE REQUIREMENTS SET BY PROPOSITION 1A FOR THE INITIAL FUNDING PLAN ACTED AS CONDITIONS PRECEDENT FOR ALL FURTHER ACTS UNDER THE MEASURE, INCLUDING APPROPRIATION OF FUNDS.

Streets and Highways Code §2704.08(c)(2), enacted by the voters as part of Proposition 1A, specified eleven different elements that were required to be included in the initial Funding Plan. Five of those elements took the form of certifications that the authority was required to make, and each of those certifications was required to have a specific content. Defendants claim that these requirements were included in the bond act " …for the benefit of the legislature, to allow it to determine whether or not to fund a requested appropriation." (Opposition Brief at p.20:22-24.) Defendants go on to argue that, because the bond act itself provided for no penalty for failing to make the proper certifications, it was up to the legislature, and the legislature alone, to decide whether the certifications were adequate. According to Defendants, by approving the appropriation as requested, the legislature impliedly accepted the certifications as adequate and the Court is not entitled to second-guess that legislative determination. (Opposition Brief at 21.)

Many of the cases on ballot measures providing public funding analogize the measure to a contract between the voters and the public entity that put the measure on the ballot. (*Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1083; *Monette-Shaw v. San Francisco Bd. of Supervisors* (2006) 139 Cal.App.4th 1210, 1215; *Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 692; *O'Farrell v. Sonoma County et al*. (1922) 189 Cal. 343, 348.)

As *O'Farrell, supra*, pointed out, in specifying requirements in what they put on the ballot, the supervisors exercised their discretion "once and for all and as a finality," (*Id.* at 347) and once the bond measure, with its specific requirements, was put on the ballot and approved by the voters, its provisions became binding parts of the contract. "As to them, the board, acting alone, could not redivide the contract." (*Id.*) Just as the board of supervisors in *O'Farrell*, who wrote the measure and put it on the ballot, could not exercise any discretion as to its requirements once it had been approved by the voters, so to the legislature, having written AB 3034 and placed proposition 1A on the ballot, had no discretion to allow an appropriation to move forward based on a Funding Plan that did not meet the Measure's requirements. Further, just as in *O'Farrell*, the courts have the authority and responsibility to step in to enforce the bond measure's requirements if they are ignored.

IV. THE CERTIFICATION REQUIREMENTS IN THE FUNDING PLAN WERE INTENDED TO PROTECT THE STATE'S TAXPAYERS, NOT MERELY TO ADVISE THE LEGISLATURE.

Defendants argue that the intent of the legislature in writing Proposition 1A, and of the voters in approving it, was that the certification requirements would merely provide the legislature with useful information in deciding whether to appropriate, and eventually allow the expenditure of bond funds on the project. (Opposition Brief at p.21.) Yet the Measure, as written by the legislature and approved by the voters, does not simply ask that the Authority, in its Funding Plan, provide information about the funding status of the proposed corridor or usable segment and the status of its environmental review; it requires certifications that the corridor or usable segment can be completed as proposed, and that all necessary project-level environmental clearances have been completed so that the project can move to construction.

A certification is intended to do more than simply provide information. It is intended to instill a level of confidence in the truth and trustworthiness of the matters being certified. (*See, e.g., In re Kirk* (1999) 74 Cal.App.4th 1066, 1075 [certification of genuineness of official documents (Evid. Code §§ 1530, 1531) suffices to confirm the trustworthiness of otherwise inadmissible hearsay documents].) In particular, the certification that the corridor or usable segment could be completed as proposed in the Funding Plan was intended to assure the public, and the legislature, that the Authority was confident in its Plan's technical and financial feasibility. The certification that all project level environmental clearances had been completed was intended to assure that there would be no unnecessary problems or delays in constructing the corridor or usable segment due to unresolved environmental problems.

Even Defendants themselves admit that the bond measure imposed limits on the authority's ability to request an appropriation of state bond funds. (Defendants' Opposition at pp. 3-4.) The requirement for an initial funding plan, and the certifications required within it, were a major limitation. While Defendants concede that the required funding plan, and its certification, were a limitation on the Authority's ability to request an appropriation, they apparently think it was only a façade. Since they claim a defective Funding Plan could have no consequences. (Defendants' Opposition at p.21.) As will be explained below, this is not true.

V. PLAINTIFFS' REMEDIES IN MANDAMUS, DECLARATORY RELIEF, AND UNDER C.C.P. §526A ADDRESS THE FUNDING PLAN'S NONCOMPLIANCE WITH BOND MEASURE REQUIREMENTS.

Defendants argue that, "There is no penalty or consequence in the bond act for a failure to satisfactorily address funding plan reporting requirements." (Opposition Brief at p.21:13-15.) Based on this, Defendants argue that the bond measure's requirements were only directory and therefore there is no remedy for noncompliance. Defendants ignore more than 100 years of bond measure jurisprudence that make clear that noncompliance with a mandatory requirement in a voter-approved bond measure is actionable.

Defendants also argue that any injury that Plaintiffs may have suffered through Defendants' noncompliance with Proposition 1A was not intended to be protected against by the bond measure, and therefore Plaintiffs have no standing[1]. (*Id*. at l.1-10.) Again, this ignores the history of bond action court decisions, which uniformly hold that any taxpayer, because they would be required to pay taxes in support of a debt not conforming to what was approved by the voters, has standing to challenge noncompliance with a bond measure's requirements. (*See, O'Farrell, supra* 189 Cal. at 344 [property owner who would be taxed to pay bond interest had standing to challenge noncompliance with bond requirements];*see also, Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240 [§526a grants standing to any taxpayer to challenge wasteful or illegal public expenditures].)

VI. THE LEGISLATIVE APPROPRIATION, MADE IN THE ABSENCE OF A VALID REQUEST FOR APPROPRIATION FROM THE AUTHORITY, WAS UNTRA VIRES AND CAN BE DECLARED INVALID BY THE COURT.

Defendants also contend that, because legislative action cannot be addressed in mandamus, Plaintiffs are without a remedy even if the Authority violated Proposition 1A. However, it is clear that if the Funding Plan was approved in violation of the bond measure, this Court has the power, through mandamus, to order its rescission. It also has the authority, through declaratory relief, to declare invalid that Funding Plan and any actions taken in reliance upon that Plan, including legislative action, as *ultra vires*. (*See, e.g., Peery v. City of Los Angeles et al.* (1922) 187 Cal. 753, 769 [legislature's action allowing, after the fact of voter approval and contrary to the terms of the bond measure, a change in the allowable interest rate

[1] It should be noted that by not complying with Proposition 1A's requirement, Defendants violate not only the bond measure statute, but also Article 16 §1 of the California Constitution.

on the bonds to be issued, was *ultra vires* and therefore invalid].) Finally, the Court, through its power of injunctive relief, has the authority to prohibit the Authority, and other Defendants, from taking any further actions in reliance upon the Authority's invalid Funding Plan or the legislature's invalid appropriation.

If the Funding Plan is declared invalid and ordered rescinded as being in violation of the bond measure's requirements, it follows that the Authority's request for an appropriation, submitted in reliance on that Funding Plan, was also invalid. Further, if the request for appropriation was invalid, so to must be the appropriation madder in response to that request. Essentially, Defendants have built a house of cards upon the base of a Funding Plan that violated the terms of the bond measure. If the Funding Plan is invalid, the entire house of cards must collapse along with it.

VI. WHILE NOT ALL CONSTUCTION NEED HAPPEN AT ONCE, THE FUNDING PLAN MUST CERTIFY THAT FUNDING CAN BE PROVIDED FOR THE FULL CORRIDOR OR USABLE SEGMENT.

While Defendants argue that the project may be built in phases, and a phase need not be an entire corridor, or even an entire usable segment, the Funding Plan must be for an entire corridor or usable segment. (Streets & Highways Code §2704.08(c)(1).) Likewise, the Funding Plan must certify that construction of the entire corridor or usable segment thereof can be completed as proposed in the Funding Plan. That includes both technical and financial feasibility. Financial feasibility means being able to identify sufficient available funds or funds that can be reasonably relied upon to be available to complete the construction. While the Authority made that certification, the evidence in the Funding Plan itself shows that sufficient funds are not available. Rather, the Authority relies on speculative future funding, either from the federal government or from unspecified and uncommitted funds from future "cap and trade" auctions. This is not a sufficient basis to make the certification. It must fail.

VII. THE CERTIFICATION OF COMPLETION OF ENVIRONMENTAL CLEARANCE IS ALSO DEFECTIVE.

Defendants unconvincingly argue that the certification of environmental clearance was not intended to mean what its plain language says. The plain language clearly states that the authority must certify that all necessary project level environmental clearances necessary to proceed to construction. Note that it refers to environmental clearances, in the plural. This cannot simply mean CEQA clearance. Further, it requires all clearances to have been completed,

in the past tense. Even the Legislative Counsel's defective evaluation had to admit that this certification was defective. The Legislative Counsel excused this defect, but bond requirements are not so casually to be tossed aside.

Even if environmental clearances were only required for the ICS (which Plaintiffs do not concede), that minimal requirement had not and still has not been satisfied. (See, Declaration of Jason Holder submitted along with Plaintiffs' Trial Brief Part II.) The Authority's certification of environmental clearance was clearly and grossly defective.

CONCLUSION

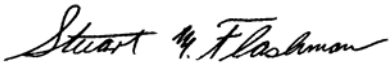
Defendants attempt to ignore or distort the language of the bond measure, and over a hundred years of jurisprudence of bond measures, to claim that they were entitled to ignore Measure 1A's clear and well-defined requirements. The Court cannot allow them to succeed. Plaintiffs respectfully request that the Court grant Petitioners' motion and order issuance of writs of mandates as requested.

Dated: April 26, 2013

Respectfully requested,

Michael J. Brady

Stuart M. Flashman
Attorneys for Petitioner John Tos et al.

By 

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 26, 2013, I served the within PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PEREMPTORY WRIT OF MANDATE on the parties listed below by placing a true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in a U.S. mailbox at Oakland, California addressed as follows:

Michele Inan, Deputy Attorney General
California Attorney General
1300 I Street, Ste. 125
Sacramento, CA 95814
Michele.Inan@doj.ca.gov

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 an electronic copy of the above-same document, converted to "pdf" format, as an e-mail attachment, to the above-same party at the e-mail address 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 April 26, 2013.

Stuart M. Flashman