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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

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

Case No.: 34-2010-80000679 - Filed 10/4/2010
(Cross Reference Case No.: 34-2008-80000022)
Assigned for All Purposes to HONORABLE MICHAEL P. KENNY, Department: 31

PETITIONER AND PLAINTIFF COMMUNITY COALITION ON HIGH-SPEED RAIL'S OPENING BRIEF IN SUPPORT OF MOTION FOR PEREMPTORY WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Date: August 12, 2011
Time: 9:00 AM
Dept. 31
Judge Hon. Michael P. Kenny
Trial Date: August 12, 2011

INTRODUCTION

Petitioner and Plaintiff Community Coalition on High-Speed Rail ("CC-HSR") submits this brief in support of its Petition for a Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief. Petitioner challenges the certification of a Revised Final Programmatic Environmental Impact Report ("RFPEIR") prepared and certified by Respondent

and Defendant California High-Speed Rail Authority ("Respondent"), and the subsequent approval of the Bay Area to Central Valley portion of the Respondent's statewide High-Speed Train Project ("Project").

CC-HSR is a Co-Petitioner in this action. The other Petitioners herein, along with CC-HSR, are called the "Atherton II Petitioners." CC-HSR has chosen to have separate representation, but joins in the arguments being presented by the other Atherton II Petitioners in this action, and also joins in the brief being filed by the Atherton I Petitioners in a related case, a more complete reference to which is included *infra.*

Petitioner's legal challenge is based on violations of the California Environmental Quality Act ("CEQA," Public Resources Code §21000 et seq.). It alleges procedural violations of CEQA in the preparation and approval of the RFPEIR, and further alleges that that the RFPEIR, and the associated CEQA findings made in approving the Project, are inadequate. As noted earlier, this action parallels a prior lawsuit, *Town of Atherton et al. v. California High-Speed Rail Authority*, Sacramento County Superior Court case #34-2008-80000022 ("*Atherton I*").

In that related lawsuit, the petitioners therein (hereinafter, "Atherton I Petitioners") raised objections to a prior Final Programmatic EIR ("prior FPEIR") for the Bay Area to Central Valley portion of the Respondent's statewide High-Speed Train Project. This Court found the prior FPEIR defective in some respects, and ordered that its certification be set aside, and further ordered that Respondent's prior approvals for the Project, based on the FPEIR, be rescinded (4 SAR 6359 et seq.). The Court ordered Respondent to revise the PEIR to correct the defects in accordance with the requirements of CEQA. After revising the PEIR, the Respondent reapproved the Project, based on the RFPEIR challenged in this action. Respondent then filed a supplemental return on the Court's Writ of Mandate, asking that the Writ in the Atherton I case be discharged. The Atherton I Petitioners filed objections to that return.

The two cases (Atherton I and Atherton II) have been coordinated for briefing and hearing. Both cases raise essentially identical issues about the RFPEIR, findings, and Project approval. CC-HSR joins in the listing of CEQA violations presented by the other Atherton II Petitioners in their Opening Brief, and hereby incorporates that listing by this reference.

CC-HSR will also incorporate by reference the arguments made in the Opening Brief of the other Atherton II Petitioners, including the incorporation by reference in that brief of much of the content of the brief being submitted in *Atherton I.*

STATEMENT OF FACTS AND OF THE CASE

Petitioner CC-HSR incorporates by this reference the Statement of Facts and of the Case contained in the parallel brief being filed in this proceeding by the Atherton I Petitioners, and affirms that CC-HSR fully participated in commenting on the Revised Draft Programmatic EIR ("RDPEIR") for the Project, as well as submitting objections to the RFPEIR, its certification, and the Project's re-approval (See 2 SAR 717 et seq. and 5 SAR 11304 et seq.).

ARGUMENT

I. ARGUMENTS INCORPORATED BY REFERENCE HEREIN

As noted, the allegations being raised by the Atherton I Petitioners strongly parallel those being raised in this action. For this reason, CC-HSR hereby adopts, joins in, and incorporates by this reference the arguments raised by the Atherton I Petitioners in their parallel brief being filed in this proceeding, and adopts, joins in, and incorporates by this reference the arguments raised by the other Atherton II Petitioners in their parallel brief being filed in this proceeding.

II. STANDARD OF REVIEW

This case was filed as a CEQA challenge under Public Resources Code §21168.5, which applies to projects not subject to administrative mandamus under Code of Civil Procedure §1094.5. The primary questions before the court are: (1) Were the agency's decisions supported by substantial evidence in the record; (2) Were any of the agency's actions an abuse of discretion? (Public Resources Code §21168.5; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945). Failing to conduct a fair proceeding and failing to proceed in the manner required by law (e.g., violating any of CEQA's procedural mandates) is an abuse of discretion. "Noncompliance by a public agency with CEQA's substantive requirements

constitutes a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (*Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1199).

III. FROM THE BEGINNING, RESPONDENT FAILED TO FOLLOW THE PROCEDURAL REQUIREMENTS OF CEQA WITH RESPECT TO THE CIRCULATION OF ITS REVISED FINAL PROGRAMMATIC ENVIRONMENTAL AL IMPACT REPORT, AND ITS FAILURE TO DO SO WAS A PREJUDICIAL ABUSE OF DISCRETION

On April 7, 2010, Respondent California High-Speed Rail Authority ("Authority") held a public meeting in San Jose California to receive comments on the Draft Programmatic EIR that the Authority had prepared, subsequent to this Court's decision in *Atherton I*. At that time, the public comment period on the Draft EIR was still open, and procedural and due process failures by the Authority could have been easily remedied, with a minimum of delay.

Both CC-HSR and the Planning and Conservation League ("PCL"), one of the *Atherton I* Petitioners, appeared through their attorney to object to the way the Authority was responding to the Court's directions (5 SAR 11304 et seq.). CC-HSR and PCL asked the Authority to take immediate action to comply with the Court's Order and the requirements of CEQA, so as to avoid the need for litigation, and to correct the Authority's obvious due process and procedural deficiencies in a timely way. Specifically, PCL and CC-HSR raised all of the following points:

1. Because the Court had required the Authority to rescind its earlier decision, and because the Authority had not yet completed the new EIR review mandated by the Court's decision, and because such a new EIR review was legally required before a decision on the project could be made, the Authority had no legal basis to assume that it would once again choose the Pacheco Pass/Caltrain Alignment option. Nonetheless, during the time that the Authority was mandated to conduct a fair environmental analysis under CEQA, it was spending large amounts of scarce money on the details, at the "Project Level," of the Pacheco Pass/Caltrain Alignment option that it was

supposed to be evaluating pursuant to Court Order in the then ongoing EIR process. Since large amounts of money were being expended on a choice that had not yet been made legally, the public could only conclude that the Authority had actually made up its mind in advance, and that the current CEQA review was being undertaken just to "rationalize" a decision already made, prior to the environmental analysis being completed. The Supreme Court of the State of California has specifically rejected this type of approach. An agency that makes a precommitment to a project, in advance of CEQA review, as demonstrated by its expenditure of significant amounts of money to support the particular project it has in mind, has abused its discretion and has violated CEQA (*Save Tara v. City of West Hollywood,* (2008) 45 Cal. 4th 116).

2. The Notice of Availability issued by the Authority (2 SAR 5946) suggested that members of the public should not comment on environmental issues that related to the decision about what alternative route from the Bay Area to the Central Valley was best, except to the extent that the public comment specifically referred to and referenced the "revised materials" that the Authority was circulating. This approach did not comply with the Court's commandment to revise the EIR "in accordance with CEQA," since CEQA requires the Authority to respond to all relevant comments related to the environmental impacts of the proposed project. "In the final EIR, the lead agency must evaluate and respond to all the environmental comments on the draft EIR it receives within the public review period." (*Guide To CEQA*, 11th Edition, Remy, Thomas, Moose and Manley, p. 371; Pub. Resources Code, §21091, subd. (d)(2)(A)). Furthermore, "Public participation is an essential part of the CEQA process." (CEQA Guidelines §15201). "Environmental review derives its vitality from public participation." (*Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal. App. 4th 396, 400). The Authority's procedure, as spelled out in its Notice of Availability, and as complained about by CC-HSR and PCL, was profoundly contrary to stimulating the "vital" and "essential" public participation that CEQA is intended to achieve, and this was a prejudicial abuse of discretion.

3. The Authority did not follow the Court's direction to circulate a revised Environmental Impact Report/Environmental Impact Statement. Instead, the Authority circulated "Draft Program Environmental Impact Report *Material*" (2 SAR 5946, emphasis added). CEQA doesn't have such a category. CEQA requires a three step process: Draft EIR, public comments on the Draft EIR, and responses to the comments. The "Final" EIR must contain all of these: draft, comments, and responses to comments (CEQA Guidelines §15132, §15362, subd. (b)). By its decision to circulate "Material" instead of a Draft EIR, the Authority failed to follow the requirements of CEQA, and abused its discretion, in an obvious effort to discourage comments on the totality of the project that the EIR was actually supposed to be evaluating.

4. The Notice of Availability issued by the Authority (2 SAR 5946) stated that once the comment period was closed the Authority planned to certify "the Revised Final Program EIR Material along with the Final Bay Area to Central Valley HST Program EIR for compliance with CEQA." Again, CEQA requires a Final *EIR*, not a document called "Final EIR Material." The document that the Authority had already committed to certify, prior to the completion of the environmental review currently underway, was the document previously set aside by order of the Court. Unless the Authority had already made up its mind, making a mockery of the entire CEQA process, the Authority could not, in fact, know that it would certify that document. CEQA requires public agencies to make up their mind on the projects only *after* they have received, and responded to, and then considered comments made by the public. In this case, the Authority told the public at the outset that its mind was already made up. This was an abuse of discretion, and a direct discouragement to the kind of public involvement that is one of the prime objectives of CEQA. As the *Guide To CEQA* says, concisely summarizing the law: "*Before approving the project* analyzed in the EIR, the lead agency must 'certify' the final EIR" (Guide To CEQA,

Ibid. p. 374, emphasis added). The lead agency cannot legally make a decision on a project until it has both "certified" and "considered" the Final EIR, and that means all required parts of the Final EIR, specifically including public comment, and the agency's response to those comments. By making an announcement before the public comment period was closed that the Authority already knew what it was going to certify, the Authority abused its discretion and violated CEQA.

5. The Notice of Availability issued by the Authority (2 SAR 5946) gave a further demonstration that the Authority had already "made up its mind," in advance of the required environmental review, since that document stated, as a matter of fact, that the Authority would approve "findings of fact [and] a statement of overriding considerations...." The Authority did not say that it would approve a statement of overriding considerations "if necessary." How would the Authority have known that such a statement of overriding considerations would be needed, unless the Authority already knew the project it had decided to approve? The actions that the Notice of Availability says the Authority will "take," when the comment period closed, was actually a list of the actions that the Authority should have "considered." This distinction is not just semantic. The objection goes to the heart of what the CEQA process is all about. CEQA says that a governmental agency cannot, legally, make up its mind about a proposed project until after the project has gone through the environmental review that CEQA requires. The EIR process cannot be turned into a process of simply "rationalizing" the decision that the governmental agency has already made (*Save Tara v. City of West Hollywood,* (2008) 45 Cal. 4th 116). Contrary to what CEQA demands, the process as outlined by the Authority in its Notice of Availability (2 SAR 5946) demonstrated that the Authority had already made up its mind. This was a fundamental abuse of discretion, and invalidates the RFPEIR, as ultimately certified by the Authority.

The April 7, 2010 PCL/CC-HSR letter to the Authority (5 SAR 11304 et seq.) ended with an appeal that the Authority make some relatively minor changes to its then ongoing procedure, to conform to the requirements of CEQA, and to allow (and not discourage) full public participation, which is one of the main objectives that CEQA seeks to attain. The Authority absolutely failed and refused to respond to the following appeal from CC-HSR and PCL:

> To correct the problem, the Authority should revise the Notice of Availability to be consistent with CEQA, and to address the issues identified in this letter. Then, it should extend the comment period for at least another forty-five (45) days, under the new "rules," in a new Notice of Availability, that will reflect what CEQA requires. Finally, the Authority needs to respond to any comments received, not seek artificially to restrict comments, or to refuse to respond to comments that don't meet the Authority's preconceived idea that it will definitely do, once again, what it did before.
>
> The Authority can take this action today. If the Board does not want to place the matter on its agenda as an addition, as it is authorized to do by a supermajority vote, it may consider the item in connection with the threatened litigation exception to the State's open meeting requirements.
>
> The key thing is for the Authority to act now, to avoid a violation of the CEQA process. Simply stated, we are asking for the Authority to demonstrate through its process that it will, in fact, keep an open mind until the process is concluded. This is exactly what CEQA requires (5 SAR 11304 et seq.).

It is regrettable that the Authority refused to follow the procedures specified by CEQA, even when warned on a current basis by CC-HSR and PCL that this is what the Authority was doing. But such was the choice made by the Authority. The Authority's decision, as outlined in this brief, had the effect of discouraging in every way possible the kind of vigorous public participation that CEQA is intended to achieve. Petitioner's recourse now is to the Court, which should uphold the integrity of CEQA by finding the Authority's failure to conform to the procedural requirements of CEQA to be an abuse of discretion.

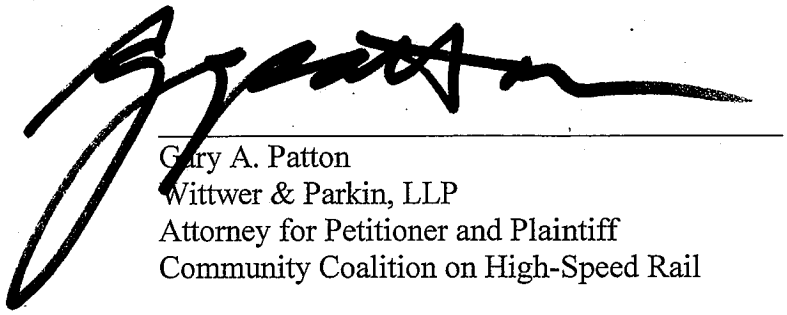
CONCLUSION

For the reasons outlined herein, and in the brief filed by the other Atherton II Petitioners, and in the brief filed by the Petitioners in the *Atherton I* case, we urge the Court to determine that the Respondent California High-Speed Rail Authority has abused its discretion, and that its

certification of the Revised Final Programmatic Environmental Impact Report, and approval of the Project, must be set aside.

Dated: April 25, 2011

Respectfully Submitted,



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PROOF OF SERVICE

I certify and declare as follows:

I am over the age of 18, and not a party to this action. My business address is 147 S. River Street, Suite 221, which is located in Santa Cruz County where the mailing described below took place.

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PETITIONER AND PLAINTIFF COMMUNITY COALITION ON HIGH-SPEED RAIL'S OPENING BRIEF IN SUPPORT OF MOTION FOR PEREMPTORY WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully paid to:

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I certify and declare under penalty of perjury that the forgoing is true and correct.

Dated: April 25, 2011

Nan Pietrowski