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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, Respondent and Defendant	Case No.: 34-2008-80000022 Filed 8/8/08. (consolidated with: 34-2010-80000679 (10/4/2010)) Assigned for All Purposes to HONORABLE MICHAEL P. KENNY, Department: 31 PETITIONERS' JOINT SUPPLEMENTAL BRIEF IN OPPOSITION TO RESPONDENT'S RETURN AND MOTION TO DISCHARGE PEREMPTORY WRITS OF MANDATE
TOWN OF ATHERTON et al., Petitioners and Plaintiffs v. CALIFORNIA HIGH-SPEED RAIL AUTHORITY, Respondent and Defendant	Date: November 9, 2012 Time: 9:00 AM Dept. 31 Judge Hon. Michael P. Kenny

I. PETITIONERS ADEQUATELY EXHAUSTED THEIR ADMINISTRATIVE REMEDIES UNDER PUBLIC RESOURCES CODE §21177 FOR THE ISSUES RAISED BY THE PENINSULA CORRIDOR JOINT POWERS BOARD COMMENT LETTER.

Petitioners and Plaintiffs Town of Atherton ("Atherton"), City of Menlo Park ("Menlo Park"), California Rail Foundation ("CRF"), Planning and Conservation League ("PCL"), and Transportation Solutions Defense and Education Fund ("TRANSDEF", and the foregoing, collectively, "Atherton I Petitioners"), and City of Palo Alto ("Palo Alto"), Community Coalition on High-Speed Rail ("CC-HSR"), Mid-Peninsula Residents for Civic Sanity ("Residents"), and Patricia Louis Hogan-Giorni ("Giorni", and the foregoing, collectively "Atherton II Petitioners" and all of the foregoing, collectively, "Petitioners") submit this

supplemental brief in opposition to the return on this Court's Peremptory Writ of Mandate and supplemental Peremptory Writ of Mandate (collectively, "Writs") submitted by Respondent and Defendant California High-Speed Rail Authority ("Respondent").

The brief specifically addresses the question of whether Petitioners adequately exhausted their administrative remedies on issues related to the Peninsula Corridor Joint Powers Board's ("PCJPB") comment letter on the Partially-Revised Draft Program Environmental Impact Report ("PRDPEIR") on the Bay Area to Central Valley High-Speed Train Project ("Project"). That letter had indicated the PCJPB's unwillingness to allow Respondent to use the Caltrain right of way for anything other than the two-track "blended" high-speed rail system, and their specific unwillingness to allow it to be used for Respondent's proposed four-track full build system.

A. PUBLIC RESOURCES CODE §21177 SETS A LENIENT STANDARD FOR EXHAUSTION OF ADMINISTRATIVE REMEDIES.

The standard for exhaustion of administrative remedies, and for standing to bring a CEQA action, is set by Public Resources Code §21177. (*Santa Clarita Organization for Planning the Environment v. City of Santa Clarita ("SCOPE")* (2011) 197 Cal.App.4th 1042, 1050.) Under that statute, a petitioner may raise an issue in a CEQA challenge,

> " …only if "the alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 289 [quoting §21177].)

As explained in *SCOPE*:

> [T]he objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them. This requirement serves to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. (*Id.* at 1051 [citing *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 926 and *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 384].)

However, *SCOPE* went on to note that,

> … while CEQA does require petitioners to raise their concerns with a lead agency before filing a lawsuit, less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. This is because "'[i]n administrative proceedings, [parties] generally are not represented by counsel. To hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would

> be unfair to them. (*Id.* [citing *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo ("Citizens")* (1985) 172 Cal.App.3d 151, 163].)

The *SCOPE* court questioned whether a group such as SCOPE, with extensive experience in the administrative process and in litigation, should be able to rely on this rule. Nevertheless, the court declined to depart from precedent and evaluated the exhaustion question using the less than stringent standard articulated in *Citizens*. (*Scope, supra,* 197 Cal.App.4th at 1052.)

A similar situation applies here. It is true that a number of the Petitioners have participated in both administrative and judicial proceedings, including prior proceedings involving this project. Nevertheless, as with SCOPE, the Court should bear in mind that 1) most of those commenting on the PRDPEIR, and even some of the Petitioners, were not represented by legal counsel, 2) even those who had been represented by counsel in prior proceedings were not represented by counsel through most of the present administrative proceedings, and 3) Only a very limited time was allotted between the release of the PRFPEIR and Respondent's hearings on the project, and Petitioners' attention was predictably focused on evaluating Respondent's responses to the comments Petitioners themselves had submitted. (*See* attached Declaration of Stuart Flashman, ¶¶ 2, 3.) For all these reason, the Court should evaluate exhaustion here using the criteria set forth in *Citizens*, rather than departing from precedent and attempting to enforce a harsher standard.

The PCJPB comment letter implicates several of the claimed inadequacies of the Partially Revised Final Program EIR ("PRFPEIR") for the Project. These include the inadequate and shifting project description in the PRFPEIR, Respondent's refusal to consider a blended system alternative in the PRFPEIR, Respondent's refusal to recirculate the PRDPEIR in response to new information added to the EIR after it had been circulated for public review and comment, and the PRFPEIR's inadequate responses to comments on the PRDPEIR. Each of these inadequacies had been adequately raised by Petitioners and/or other parties, in addition to being raised by the PCJPB letter itself.

B. THE PCJPB LETTER ITSELF EXHAUSTED ADMINISTRATIVE REMEDIES ON SEVERAL ISSUES.

As explained in *SCOPE, supra*, 197 Cal.App.4th at 1051, the purpose of the exhaustion requirement is to present issues to the agency during the administrative process so that it has the opportunity to address and correct the problems. That was in fact done here.

1. THE PCJPB LETTER ADEQUATELY PRESENTED THE ISSUE OF THE UNAVAILABILITY OF THE CALTRAIN RIGHT OF WAY FOR RESPONDENT'S PROPOSED FOUR-TRACK FULL BUILD SYSTEM AND THE INFEASIBILITY OF RESPONDENT'S PROPOSED PROJECT.

In this case, the fundamental issue raised by the PCJPB letter was that the PCJPB was unwilling to allow Respondent to use the Caltrain right of way for the proposed four-track full-build high-speed rail project. (1 2012AR 409.)

> Throughout the partially revised draft program EIR, there is continued discussion of a full-build project in the Caltrain corridor and associated impacts. As stated in our comment letter on the draft high-speed rail business plan, we are not willing to pursue a planning process that contemplates a full-build project.

Removal of the four-track full-build project was also requested by Petitioners City of Menlo Park (1 2012AR 431), City of Palo Alto (1 2012AR 358, 359, 360), and Town of Atherton (1 2012AR 454) in their comment letters. Respondent's answer to this issue was … silence. The specific response to the PCJPB letter in the PRFPEIR (1 2012AR 410) simply referred to the general response on the blended system alternative. However, that response did not even mention PCJPB's rejection of the four-track full-build project.[1] (1 2012AR 301-309.) In its reply brief, Respondent admits that the response, "…may have been lacking in some respect." (California High-Speed Rail Authority's Reply Brief in Support of Return and Motion to Discharge Writs ("Respondent's Reply") at 16:25.) That is, to say the least, an understatement.

As a legal, as opposed to a factual issue, the PCJPB letter pointed to the infeasibility of Respondent's only fully-analyzed alternative. However, under §21177, it is well-recognized that

[1] Indeed, the response to Palo Alto's comment letter explicitly contradicts the PCJPB letter by asserting that the PCJPB, "…has expressed its willingness to cooperate with the Authority on HST service on this corridor." (1 2012AR 401.) This grossly misstates PCJPB's position.

presentation of technical legal issues is not what is required. It is the factual issues that must be presented. "It is no hardship, however, to require a layman to make known what facts are contested." (*Citizens, supra*, 172 Cal.App.3d at 163 [emphasis added].) The underlying factual issue was fairly and fully presented to Respondent in the PCJPB letter. Nothing further was necessary to exhaust remedies on this issue.

2. THE PCJPB LETTER CONTRIBUTED TO RAISING THE ISSUE OF THE ADEQUACY OF THE ALTERNATIVES ANALYSIS.

As with the earlier comment letter submitted by the Union Pacific Railroad, the PCJPB letter raised the issue of the adequacy of the PRFPEIR's alternatives analysis. The PRFPEIR did not identify or analyze any additional alternatives beyond those already discussed in the 2008 and 2010 Final Program EIRs. It specifically refused to consider the blended system approach as an independent alternative, insisting that it was only an "implementation strategy" on the way to completing the four-track full-build system. (1 2012AR 301-304.) Yet the PCJPB letter called into question the basic feasibility of the four-track full-build system considered and ultimately approved by Respondent. (1 2012AR 6, 247 [description of approved project as including, "The four-track shared use alignment on the San Francisco Peninsula … ."]; *see also* 1 2012AR 685 ["The Partially Revised Final Program EIR proposed a four-track, shared use configuration on the Caltrain Corridor."].)

An EIR is required to consider a reasonable range of feasible alternatives (CEQA Guidelines §15126.6(a); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553 [emphasis added]) and to focus on alternatives that would avoid or substantially lessen the project's potentially significant impacts. (*Id*.) By making the adopted Pacheco Pass four-track full-build alternative infeasible, the PCJPB letter should have required Respondent to re-open its consideration of alternatives, as had the earlier Union Pacific letter. The need to reopen the consideration of alternatives was repeatedly raised by both Petitioners and others. (1 2012AR 359, 370, 371, 373, 552-553, 655, 661, 671,674 [calling for the PCJPB to rescind its 2004 MOU with Respondent and withdraw the Caltrain right of way from consideration for joint operations

unless the blended system was the endpoint for the high-speed rail project]) Again, this issue was emphatically brought before Respondent during the administrative process. Nothing more is required.

3. THE PCJPB LETTER IMPLICATES THE PRFPEIR'S UNSTABLE AND SHIFTING PROJECT DESCRIPTION.

The PCJPB letter also ties in with the complaints raised by many comments on the PRDPEIR that the project description was unclear and unstable. (See, e.g., 3 2012AR 19145, 19149.) The PCJPB letter attempted to clarify the nature of the project by making it clear that the only project it will allow to use the Caltrain right of way was the blended system project identified in the Revised 2012 Business Plan. Respondent steadfastly refused to clarify the nature of the project, insisting that no clarification was needed at the program level. (See, 1 AR 301-304.) Respondent continued to insist that it need not distinguish whether the project would ultimately be a two-track blended system or a four-track full build system until the project level environmental review. The PCJPB letter made it clear that this approach was untenable.

C. PETITIONERS' REMAINING ISSUES WERE ALSO ADEQUATELY EXHAUSTED WITH RESPECT TO THE PCJPB LETTER.

1. PETITIONERS ADEQUATELY EXHAUSTED THE ISSUE OF THE FAILURE TO RECIRCULATE THE EIR IN RESPONSE TO NEW INFORMATION.

In a letter submitted prior to the close of the public hearing on the project approval, Petitioners PCL, CRF, and TRANSDEF specifically stated, "We urge the Authority to revise and recirculate this environmental document." (3 2012AR 19151.) The earlier contents of the letter made clear that the reasons for recirculating included the release of new information subsequent to the circulation of the PRDPEIR. (*See also*, 3 AR 19146, 19038:3-9 [pointing to the release of the Revised 2012 Business Plan and testimony of CHSRA Board Chair Dan Richards before a California legislative committee the previous day as indicating the availability of a new feasible alternative with lower impact which Respondent was refusing to adopt or even consider]; 3 2012AR 19033:19-22 [staff response rejecting recirculation in response to new information].) The PCJPB letter constituted an additional piece of new information meriting recirculation, but

the issue of recirculation based on new information was already before the Board for its consideration.

2. PETITIONERS ADEQUATELY EXHAUSTED THEIR ADMINISTRATIVE REMEDIES ON THE INADEQUACY OF RESPONDENT'S RESPONSES TO COMMENTS ON THE PRDPEIR.

Respondent, in its reply brief, states,

> Petitioners' counsel and one petitioner submitted letters on the day of the meeting. (2012AR_019145-47; 019148-52.) None of these communications identified any fault with the Authority's responses to comments. Since neither Petitioners themselves nor any other member of the public exhausted administrative remedies on the adequacy of the responses to comments, this claim is barred. (Respondent's Reply at 15:3-7.)

Respondent is mistaken. The letter submitted by Petitioners' counsel at the hearing on the project states as follows:

> There are numerous other flaws in the PRFPEIR that have been pointed out in the various comment letters submitted by my clients and others. I will not go into their details. Suffice it to say that these comments have identified problems in the draft PRPEIR, and those defects remain uncorrected in the PRFPEIR. (3 2012AR 19146.)

Given the large number of comments submitted, even considering only the refusal of the PRFPEIR to study the blended system as an alternative, and the short time available to review the PRFPEIR prior to the hearing, this comment was adequate to raise the issue of the inadequacy of Respondent's response to the comments it had received. If Respondent had a serious interest in correcting the deficiencies, Petitioners' counsel was present at the hearing and could have been asked to identify more specifically what needed to be done to correct the problems, but no such clarification was requested, because Respondent very clearly had no interest in correcting anything. Given that situation, any attempt to provide further details would have been futile, and futility excuses the failure to exhaust remedies. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Releations Bd.* (2005) 35 Cal.4th 1072, 1080.)

CONCLUSION

Petitioners, through their own comments and those of others, more than adequately exhausted their administrative remedies in accordance with Public Resources Code §21177 on all

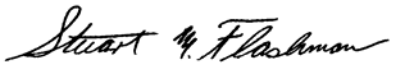
of the factual and legal issues raised in this case. For this reason, the Court should proceed to consider those issues on their merits.

Dated: November 19, 2012

Respectfully Submitted

Stuart M. Flashman
Law Offices of Stuart Flashman

Attorney for Petitioners and Plaintiffs

By 
Stuart M. Flashman

SUPPORTING DECLARATION OF STUART M. FLASHMAN

I, Stuart Flashman, hereby declare as follows:

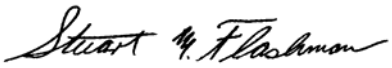
1. I am an attorney licensed to practice in the State of California. I currently represent the Petitioners and Plaintiffs in case 34-2008-80000022 and 34-2010-80000679. During the time in 2012 between the issuance of the writ of mandate in case 34-2010-80000679 and the supplemental writ of mandate in case number 34-2008-80000022 and mid-April of 2012, however, I was not representing any of the petitioners in either case in the administrative proceedings before Respondent California High-Speed Rail Authority on the Partially Revised Draft Programmatic EIR for the Bay Area to Central Valley High-Speed Train Project ("Project"). I have personal knowledge of the facts stated in this declaration and am competent to testify as to them if called as a witness.

2. Shortly after the issuance of the Partially Revised Final EIR for the Project on April 5, 2012, I re-assumed representation of the Petitioners in the two above-named cases in the administrative proceedings, although that representation was only on an unpaid, informal basis.

3. While I had other matters I was working on at the same time and therefore could not devote a large amount of time to reviewing the Partially Revised Final EIR, I did attempt to review that document. Because my time was limited, I focused my attention on the responses to comment letters my clients had submitted, as well as the Standard Responses, and especially the standard response on the Blended System Approach.

4. In my review of the Partially Revised Final EIR, I noted that there were comment letters on a variety of topics that did not appear to have been adequately addressed in the responses to comments. I therefore included in the letter I submitted to Respondent just prior to the final public hearing on the project a comment protesting the inadequacy of those responses. Because of the short amount of time I had available to prepare the letter, I was unable to single out each individual comment that had not been adequately addressed, but many of them had to do with the desire for the Authority to study the blended system as a full alternative and objections to the continued study of the four-track full build system, especially in light of the public comments made by state and federal legislators rejecting that proposed system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed in Oakland, California on November 19, 2012.



Stuart M. Flashman

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 November 19, 2012, I served the within PETITIONERS' JOINT SUPPLEMENTAL BRIEF IN OPPOSITION TO RESPONDENT'S RETURN AND MOTION TO DISCHARGE PEREMPTORY WRITS OF MANDATE; SUPPORTING DECLARATION OF STAURT M. FLASHMAN on the party listed below by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

Danae Aitchison, Deputy Attorney General
Jessica Tucker-Mohl, Deputy Attorney General
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P.O. Box 944255
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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 November 19, 2012.

Stuart M. Flashman