Civ. No. S220926

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA HIGH-SPEED RAIL AUTHORITY *et al.*,

Petitioners

v.

THE SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SACRAMENTO

Respondent

JOHN TOS ***et al.***,

Real Parties in Interest

After a Decision of the Court of Appeal
Third Appellate District
Case Number C075668
Sacramento County Superior Court Case Numbers
34-2011-0113919-CU-MC-GDS and 34-2013-00140689-CU-MC-GDS;
Department 31, Hon. Michael P. Kenny, Judge.

REPLY OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS TO ANSWER TO PETITIONS FOR REVIEW

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INTRODUCTION

Petitioners California High-Peed Rail Authority ("Authority") *et al.* (collectively, "Petitioners") assert that the Court has no reason to accept review of this case, because the Court of Appeal's decision (*California High-Speed Rail Authority v. Superior Court ("CHSRA")* (2014) 228 Cal.App.4th 676) "is an unremarkable application of established law." (Answer to Petitions for Review ("Answer") at p.1.) In reality, that decision overturns nearly one hundred years of consistent California appellate case law holding that provisions of a bond measure placed on the ballot and approved by the voters are either a contract or its equivalent, and that the terms of the bond measure must be followed precisely as they were approved by the voters.

Instead, the Court of Appeal decision denigrates bond measure provisions, making them either unenforceable or meaningless. While offering lip service to the viability of future challenges to the Authority's compliance with the bond measure, the decision lays the groundwork for an expanded scope of permissible noncompliance; making what the court called the measure's "financial straightjacket" into no more than an illusion, to be brushed aside whenever desired.

Petitioners ignore the damage the Court of Appeal's decision wreaks on the ability of voters and investors to trust promises made in a bond measure, as well as to the long-standing framework for judicial review of

quasi-legislative decisions. Unless review is granted, the result will be serious damage to California law, as well as to the ability of California public entities to finance public projects. The shortsighted attitude of Petitioners and the Court of Appeal cannot be allowed to stand. The Court should accept review and provide a more responsible perspective.

ARGUMENT

I. CONTRARY TO PETITIONERS' ANSWER, THE COURT OF APPEAL'S DECISION IS ANYTHING BUT UNREMARKABLE.

While Petitioners' Answer asserts that the Court of Appeal's decision is "an unremarkable application of established law" (Answer at p.1), in reality it represents a major deviation from well-established law.

A. THE COURT OF APPEAL'S DECISION NEGATES A SPECIFIC REQUIREMENT OF PROPOSITION 1A AND THE BOND STATUTES.

The Court of Appeal's decision essentially renders meaningless Proposition 1A's specific requirement, at the very beginning of §2704.13, that:

> The committee shall determine whether or not it is necessary or desirable to issue bonds authorized pursuant to this chapter in order to carry out the actions specified in Sections 2704.06 and 2704.095 and, if so, the amount of bonds to be issued and sold.

This provision is taken directly from the State General Obligation Bond Law, Government Code §16720 *et seq.* In particular, Government Code §16731 specifically states, "Whenever the committee determines that

the sale of all or any part of the bonds authorized to be issued is necessary or desirable, it shall adopt a resolution to that effect." Other bond statutes also contain an identical requirement that the bond committee determine whether or not it is necessary or desirable to issue the bonds the committee is responsible for. (See, e.g., Water Code §79583, Education Code §19973, 20003, 67337, 100720, Government Code §8878.28.) The fact that this provision appears uniformly throughout California' bond statutes indicates that the Legislature apparently felt it was an important element of the procedure for issuing bonds.

It is worth noting that this provision has been considered to apply, not at the inception of the bond committee, but at the point where the committee is considering, upon request from the board responsible for requesting issuance, whether to agree to that request and authorize the bond issuance.[1] Thus is appears the intent is to require the bond committee to make a determination of whether it is necessary or desirable to issue bonds at that time.

The Court of Appeal's decision trivializes that determination, insisting that all the bond committee needed in front of it was a valid bond statute, a request from the board, including a statement that the bonds would be used for purposes authorized by the bond act, and a proposed resolution authorizing the issuance. (*CHSRA*, *supra*, 228 Cal.App.4th at

[1] That was in fact the case here. (*CHSRA*, *supra*, 228 Cal.App.4th at *692*.)

700.) The Court of appeal emphasized that the committee did not need to identify facts or express reasons for its determination. From that, the court leaped to the conclusion that the trial court should not have looked beyond that.

Petitioners go even a step further, asserting that the committee's determination is not a factual determination (Answer at p.8) and is not subject to any judicial review. (*Id.*)

Petitioners submitted, and the Court of Appeal accepted and incorporated into its decision, a hodgepodge of case citations where "necessary or desirable" language had been discussed in a variety of contexts. Only one case, *Boeltz v City of Lake Forest* (2005) 127 Cal.App.4th 116, discussed the phrase in the context of a validation action, and it was only mentioned there in dicta contained in a footnote. (*Id.* at p.128 fn.13.)

The Court of Appeal made much of the fact that there was no published appellate case holding that the "necessary or desirable" language required a factual predicate. On the other hand, neither is there any case, prior to this, holding that, in spite of its pervasive presence in bond statutes, the provision is insubstantial and requires no evidentiary support. The very prevalence of the provision strongly suggests this is not the case.

B. THE COURT OF APPEAL'S DECISION ALLOWS THE AUTHORITY TO IGNORE AN EXPRESS REQUIREMENT OF PROPOSITION 1A WITH IMPUNITY.

As with the required determination for bond issuance, the Court of Appeal's decision also did violence to another specific requirement in Proposition 1A, that the Authority's pre-appropriation funding plan include several certifications by the Authority that had to be made prior to requesting an appropriation. In fact, it is abundantly clear from the record that the Authority's certifications of having identified funding for an initial usable segment and of having completed all environmental clearances for that segment were defective.[2] (See, 1 HSR 80-84 [Tab 5 – trial court's ruling on Authority's violation of funding plan requirements].)

The Court of Appeal's response, seconded by Petitioners in their Answer, is that the pre-appropriation funding plan was only intended to provide information and advice to the Legislature prior to its making its appropriation decision. According to the court, that appropriation rendered any claims of insufficiency in that plan moot. (*Id*. at p. 684.)

Left unanswered is why the funding plan required certifications, rather than simply factual statements. As Tos et al. had emphasized in the trial court, certifications perform more than just an informational function. (13 HSR 3465-3467 [Tab 239].) They provide assurance that an act has

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[2] Petitioners even now apparently do not concede that the certifications were defective. (Answer at p.6.)

actually been done. In this case, the requirements for certification acted as conditions on submitting the funding plan. Certain acts – identification of full funding for the usable segment and completion of project-level environmental clearances – had to have been completed prior to submission of the funding plan. The authority's defective certifications failed to satisfy the conditions placed in Proposition 1A.

The Court of Appeal did not deny that the requirements for certifications were clear and mandatory (CHSRA, supra, 228 Cal.App.4th at 710), but it, and Petitioners, assert that the pre-appropriation funding plan played merely an interlocutory and advisory role midstream in the approval process. (CHSRA, supra, 228 Cal.App.4th at 713; Answer at p.15.) Yet the procedural process laid out in Proposition 1A neither stated, nor even intimated, such a subsidiary and advisory effect.

The Court of Appeal also claimed the certifications were only intended to ensure "that construction of a segment would not begin until potential financial and environmental obstacles were cleared." (*Id.*) This interpretation, however, ignores the fact that two funding plans were required, and that the first was required before even requesting an appropriation. If the only purpose of the funding plans was to prevent initiation of construction, only the second, pre-expenditure, plan would have been necessary.

Further, as the Tos et al. Petition for Review points out (at p.18), the appropriation that was made based on the defective funding plan included not only construction funds, but funds for property acquisition (and well as federal funding and funding for "bookends" construction). All of these appropriations were infected by the inadequacy of the Authority's submitted funding plan[3]. The Authority, in knowingly and willfully submitting a defective funding plan, had, in effect, committed fraud on both the voters and the Legislature. The Civil Code states, "For every wrong there is a remedy." (Civil Code §3523.) As this Court has stated, exceptions to that general principle are not to be lightly created (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 183), especially when what is involved is, in essence, intentional fraud. (*Id*.)

A proper response from the court, as with violation of a contractual condition precedent, would have been to void the subsequent act that depended upon the condition.[4] Instead, the Court of Appeal has let the Authority assert that its violations of Proposition 1A's clear requirements

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[3] Petitioners point out that the Authority did not need to submit a funding plan prior to requesting an appropriation of bond funds under Streets & Highways Code §2704.08(g). (Answer at p. 15.) That may be true, but the fact remains that the Legislature approved a single appropriation for both subdivision (g) expenditures and expenditures requiring a funding plan, and that single appropriation relied on the Authority's defective funding plan.

[4] Thus, for example, under Financial Code §21303, which requires posting of a surety bond by a pawnbroker prior to issuance or renewal of a license, such issuance or renewal would be void if the condition had knowingly been circumvented.

are inconsequential and allowed it to reap the benefits of its violation of the voters' intent. To say the least, this is not "unremarkable."

II. PETITIONERS' ARGUMENTS FAIL TO ADDRESS MAJOR CONCERNS RAISED BY THE COURT OF APPEAL DECISION.

In addition to minimizing the significance of the Court of Appeal's decision, Petitioners' Answer fails to adequately address major questions raised in the Petitions for Review, and specifically the Petitions filed by Real Parties in Interest John Tos et al. and by Real Party in Interest First Free Will Baptist Church.

A. THE ANSWER DOES NOT ADEQUATELY ADDRESS THE DECISION'S MAJOR CHANGE TO THE STANDARD OF REVIEW FOR QUASI-LEGISLATIVE DECISIONS.

Both petitions for review point to the fact that the Court of Appeal's decision undermines the fundamental requirement that quasi-legislative decisions be supported by evidence in the record. (Tos et al. Petition for Review at pp.24-26; First Free Will Baptist Church ("FFWBC") Petition for Review at pp. 14-18.) Petitioners' Answer, in response, makes the astounding assertion that a determination of whether or not it is necessary or desirable to authorize bond issuance at a specific time is <u>not</u> a factual determination. (Answer at p.11.) Petitioners go on to assert that, because this was a validation proceeding rather than one in mandamus, no supporting evidence is required, nor may the court entertain a challenge to

the determination. (*Id*. at pp. 11-12.) Contrary to Appellants' characterization, these are groundbreaking changes to the judicial review of quasi-legislative decision-making and deserve review by this Court.

As explained in the petitions for review of Tos et al. (at pp.24-26) and FFWBC (at pp.17-18), while judicial review of quasi-legislative decisions is highly deferential, it has always included asking whether the decision had evidentiary support. The assumption is that a decision not supported by at least some modicum of evidence is, almost by definition, arbitrary and capricious. (*See, e.g., Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1265 [quasi-legislative decision reviewed to determine, among other things, whether it was arbitrary, capricious, or entirely lacking in evidentiary support].) The Court of Appeal's decision would create a glaring exception to this requirement, an exception that could easily become an enormous loophole allowing agencies to evade judicial scrutiny of quasi-legislative decisions.

Petitioners, in arguing that such scrutiny is not called for in a validation action, ignore the fact that validation actions often also sound in mandamus. While it may be true that where a validation action is available to test the validity of an action, a mandamus action will fail because the complaining parties have a plain, speedy, and adequate legal remedy in the ordinary course of law (*Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 705), that is not the case unless the

validation action allows complainants to question the lack of supporting evidence, as they could in a mandamus action. (*See, e.g.*, *County of Orange v. Barratt American, Inc.* (2007) 150 Cal.App.4th 420, 441 [if validation actions are dismissed as moot, plaintiff lacks an adequate legal remedy, making mandamus appropriate].)

Further, even in a validation action, matters that are not determined *de novo* as pure questions of law are determined under the substantial evidence standard of review. (*Not About Water Com. v. Board of Supervisors* (2002) 95 Cal.App.4th 982, 986.) Indeed, in *Boeltz v. City of Lake Forest* (2005) 127 Cal.App.4th 116, the court used precisely that standard to find validation unwarranted due to a lack of supporting evidence. (*Id*. at p. 128.) The court's passing reference to the "necessary or desirable" requirement being "probably so elastic as not to impose any substantial requirements" is no more than a part of dicta commenting on issues the court did not address. In short, there is nothing in a validation action that eclipses the need for evidentiary support for a quasi-legislative determination.

B. THE ANSWER FAILS TO ADDRESS THE DECISION'S DAMAGE TO TRUST IN THE PROVISIONS OF VOTER-APPROVED BOND MEASURES.

As the Petition for Review of Tos et al. ("Tos Petition") explained in detail, almost a hundred years of consistent California appellate case law, including Supreme Court decisions, have established that requirements

included in a voter-approved bond measure are binding on the public agencies involved and cannot be changed without going back to voters for approval. (Tos Petition at pp. 11-13.) The Court of Appeal's decision would undermine those precedents by allowing a court to essentially render meaningless[5] what the court itself admitted (CHSRA, supra, 228 Cal.App.4th at 710) were clear and mandatory provisions of Proposition 1A, provisions that voters presumably relied upon in approving the measure.

The Court's, and Petitioners', excuse is that the appropriation having already been made, there is no "clear and present duty" to provide the certification that the voters required, and that any further enforcement of the bond measure requirements must await submittal and approval of the second, pre-expenditure funding plan. (*Id.* at p. 713.)

As the Court of Appeal admitted, Proposition 1A's requirement of a pre-appropriation funding plan before the Authority could even submit an appropriation request, and the specific certifications required to be made in that funding plan, were both clear and mandatory. (CHSRA, supra, 228 Cal.App.4th at 710.) Yet the Court of Appeal's decision allows the Authority's blatant noncompliance to go unaddressed.

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[5] The opinion asserts that the pre-appropriation funding plan "served its purpose" of informing the Legislature prior to an appropriation of bond funds for a usable segment (*CHSRA, supra*, 228 Cal.App.4th at pp. 684, 709, 713), but fails to explain how that purpose was accomplished when the funding plan failed to include certifications specifically required by the bond measure.

Certainly, voters reading the bond measure on the ballot would have expected the Authority to provide the required certifications to the Legislature before the Legislature approved an appropriation of bond funds for a usable segment. However, the Court of Appeal, and Petitioners, dismiss this requirement and assert there is no remedy for the Authority's noncompliance. This makes a mockery of the requirement that provisions of a voter approved bond measure be complied with.

Will future bond measures, in their ballot analyses, be required to include an asterisk and disclosure in small print that the provisions of the measure may not necessarily need to be followed? How will this affect voters' willingness to approve bonds? The answer cannot be reassuring.

Perhaps equally important, as highlighted in the Amicus letter submitted to the Court by Mr. Thomas A. Rubin, is the effect of the decision on those who rate, insure, or purchase bonds. In the past, bond rating agencies, insurers, and buyers could presume that all of a bond's provisions would be stringently adhered to. Under the Court of appeal's decision, that is no longer necessarily the case in California.

As Mr. Rubin's letter notes, in rating, insuring, or buying a bond, risk is a key measure, and uncertainty contributes to risk. If those involved with bonds cannot be certain that a bond measure's provisions will be adhered to, the cost of bond financing for California public agencies will rise. That will be particularly true where the bonds involved, like those at

issue here, include provisions intended to mitigate risk to the bond buyer – provisions that the Court of Appeal's decision indicates may have little meaning.

In short, with this decision, California public agency's bonds will be harder to get approved and harder to sell, resulting in less money being available to public agencies to finance capital projects, and at a higher cost. Petitioners' Answer totally ignores this important public policy concern. The Court should not.

III. TOS ET AL. JOINT IN AND INCORPORATE BY REFERENCE THE ARGUMENTS PRESENTED IN THE REPLIES SUBMITTED BY HOWARD JARVIS TAXPAYERS ASSOCIATION AND FFWBC.

Pursuant to Rule of Court 8.504 subd. (e)(3), Real Parties in Interest John Tos et al. incorporate by this reference the arguments presented in the replies submitted by Real Parties in Interest Howard Jarvis Taxpayers Association and First Free Will Baptist Church.

CONCLUSION

For all of the above reasons, the Petition for Review submitted by Real Parties in Interest John Tos et al. should be granted. The Petitions for Review of Real Parties in Interest Howard Jarvis Taxpayers Association and First Free Will Baptist Church for this same case, should also be granted and the matters consolidated for review.

Dated: October 2, 2014

Respectfully submitted,

Michael J Brady

Stuart M. Flashman

Attorneys for Plaintiffs/Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings

By: _____

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Respectfully submitted,

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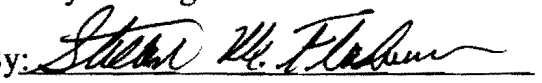
By: 

Stuart M. Flashman

PROOF OF SERVICE BY 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 October 3, 2014 I served the within REPLY OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS TO ANSWER TO PETITIONS FOR REVIEW on the parties listed on the service list shown below by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in a U.S. mailbox at Oakland, California addressed as shown on said service list.

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 October 3, 2014.

Stuart M. Flashman

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