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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA; AND COUNTY OF KINGS, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY; JEFF MORALES, CEO OF THE CHSRA; GOVERNOR JERRY BROWN; STATE TREASURER, BILL LOCKYER; DIRECTOR OF FINANCE, ANA MATASANTOS; SECRETARY (ACTING) OF BUSINESS, TRANSPORTATION AND HOUSING, BRIAN KELLY; STATE CONTROLLER, JOHN CHIANG; AND DOES I-V, INCLUSIVE,

Defendants.

Case No. 34-2011-00113919

DEFENDANTS/RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS/PETITIONERS' REQUEST FOR REMEDIES

Date: November 8, 2013
Time: 9:00 a.m.
Dept: 54
Judge: Hon. Michael P. Kenny
Trial Date: May 31, 2013
Action Filed: November 14, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

INTRODUCTION

The Court directed petitioners (collectively, Tos) to brief whether the California High-Speed Rail Authority (Authority) has (1) committed or expended bond funds for construction purposes specified in subdivision (d) of Streets and Highways Code section 2704.08 without preparing the required funding plan, or (2) spent funds in excess of the limit on preliminary activities set forth in subdivision (g) of section 2704.08.[1] The Court requested that briefing so that it could determine whether a writ of mandate should issue to invalidate the initial funding plan approved by the Authority pursuant to subdivision (c) because subsequent approvals by the Authority or other respondents were outside the scope of these provisions. Tos has identified just two construction contracts that he alleges unlawfully committed bond funds. Rather than respond to the Court's questions, Tos spends the bulk of his brief revisiting the Court's ruling that no remedy exists to invalidate the Legislature's appropriation of federal grant money and bond funds. Additionally, Tos uses his opening brief to make an inappropriate request for new remedies not properly before the Court.

A writ of mandate should not issue invalidating either the subdivision (c) funding plan or the two contracts Tos has identified because neither contract expends bond funds exceeding the spending limit in subdivision (g) or requires a funding plan under subdivision (d). The contracts are being funded not by bond funds, but by a valid legislative appropriation of federal money, which is not governed by subdivision (d). Nor has the Authority exceeded the spending limits of subdivision (g). There being no evidence of any unlawful commitments or expenditures of bond funds pursuant to subdivisions (d) or (g) of section 2704.08, Tos is not entitled to a writ invalidating the funding plan or any subsequent approvals, and his petition for writs of mandate must be denied.

[1] All statutory references are to the Streets and Highway Code, and to section 2704.08 thereof, unless otherwise stated.

THE COURT'S RULING

The Court's ruling on the writ claims can be broken down into four key parts:

First, the Court ruled that the Authority's funding plan did not comply with subdivision (c)(2) in two respects: (1) the plan failed to identify funds available for completion of the entire Initial Operating Segment (hereinafter IOS); and (2) the plan failed to certify completion of environmental clearances for the IOS. (Ruling, p. 9:11-13 & 14-22.)[2]

Second, the Court ruled that a writ directing the Authority to rescind the subdivision (c) funding plan could not issue unless it would have "real, practical effect." Specifically, the Court ruled that a writ cannot issue unless the writ would also invalidate either the appropriation for the high-speed rail program, or subsequent approvals (such as contracts) made in furtherance of the funding plan that committed or expended bond funds outside the scope of subdivisions (d) or (g). (*Id.*, pp. 12:15-21; 14:24-15:2.) The Court noted that subdivision (g) provides a safe harbor that allows the commitment or expenditure of bond funds for specified preliminary activities – without the preparation of a preliminary funding plan under subdivision (c). (See *id.*, p. 14:11-14.) In contrast, the Court noted, subdivision (d) requires the Authority to obtain approval of a "detailed funding plan" before it commits bond money for construction activities, which the Authority has not yet even proposed. (*Id.*, p. 14:15-23.)

Third, the Court ruled that it could not invalidate the legislative appropriation because the bond act did not provide any legal consequence for a failure to comply with funding plan

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[2] The full body of evidence the Legislature considered prior to the appropriation in July 2012 went far beyond the information provided in the funding plan approved in November 2011, and included, but was not limited to, information in the 2012 Revised Business Plan, an opinion of Legislative Counsel dated June 8, 2012, and testimony at the legislative hearings. (Defs' Memo. In Opposition to Pltfs' Phase I Opening Brief filed April 15, 2013, pp. 9:14-12:22.) The Court's ruling does not determine whether the funding sources identified for investment in the IOS as set forth in the 2012 Revised Business Plan complied with Proposition 1A because this issue was outside the scope of Tos' allegations. Those allegations were limited to the sufficiency of the funding plan as supplemented by the 2011 *draft* Business Plan. In considering the adequacy of the funding plan's certification addressing completion of environmental clearances, the Legislature was fully aware of existing environmental compliance requirements in both state and federal statutes requiring the Authority to comply with these requirements before proceeding to construction. The stated commitment of the Authority in the funding plan to complete all necessary project level environmental clearances necessary to proceed to construction assured the Legislature of Proposition 1A compliance.

requirements set forth in subdivision (c) and the Legislature acted within its authority in appropriating bond funds. Further, Tos had failed to pray for invalidation of the appropriation in the second amended complaint (hereinafter SAC), and only belatedly suggested invalidation as a possible remedy in his reply brief addressing the merits of his mandamus claims. (*Id.*, pp. 13:4-14:4.)

Fourth, the Court ruled that it could not determine whether there were subsequent approvals that committed or expended bond funds in violation of subdivision (d) or (g). The Court therefore requested briefing identifying subsequent approvals made in furtherance of the subdivision (c) funding plan, and whether such approvals involve commitments or expenditures of bond proceeds outside the scope of subdivisions (d) or (g). (*Id.*, pp. 14:24-15:2.)

FACTUAL BACKGROUND

In response to the Court's ruling, Tos identified just two subsequent approvals (contracts), portions of which he contends should be invalidated by writ. These contracts are the Caltrans contract and the Tutor-Perini contract. According to Tos, both include work that falls into categories governed by both subdivision (d) (capital construction) and subdivision (g) (environmental studies, planning, preliminary engineering and real property or right-of-way acquisition).[3] The evidence shows that neither of these contracts violates the requirements of the bond act.

In November 2011, the Authority approved the subdivision (c) funding plan and submitted it to the Legislature as the first step to request an appropriation to begin construction on a usable segment of high-speed rail. (Defs' Memo. In Opposition to Pltfs' Phase I Opening Brief filed April 15, 2013, p. 9:12-17.) After the funding plan was submitted, the Authority made

[3] We limit our response to the two "subsequent approvals" that Tos challenges in his opening brief. However, there were six others Tos did not identify or challenge: the approvals of the request for proposals that resulted in the award of the Tutor-Perini contract, the related decision to pay stipends to unsuccessful bidders (both of which were alleged in the SAC, but are abandoned here) (SAC, ¶¶ 59-64), and four other contracts amounting to $32 million for the purchase of rights of way, all of which also comply with the provisions of the bond act.

modifications to its 2011 draft Business Plan, and ultimately adopted the 2012 Revised Business Plan in April 2012, which it also submitted to the Legislature. (*Id.*, pp. 10:4-11:2.)

On July 18, 2012, the Legislature appropriated $2.609 billion of *bond funding* in reliance on the funding plan and the 2012 Revised Business Plan, an opinion of Legislative Counsel and other information received at the legislative hearings. (Stats. 2012, ch. 152, § 9.)[4] At the same time, in the same bill, the Legislature separately appropriated $3.24 billion of *federal funds* granted to the State. (*Id.*, § 8.) These two appropriations were made to begin construction of a segment of rail in the Central Valley. (*Id.*, §§ 8, 9.)

In addition to the funds appropriated above, in the same bill, the Legislature separately appropriated both state bond funds and federal grant funds for continuing environmental studies, planning, preliminary engineering and acquisition of land and rights-of-way (Stats. 2012, ch. 152, §§ 4-7.)

Before submitting its subdivision (c) funding plan and appropriation request to the Legislature in November 2011, the Authority had entered into two grant agreements with the Federal Railroad Administration to provide federal funds to implement the high-speed rail program in the Central Valley. Proposition 1A expressly authorizes the Authority to obtain federal funds, but does not regulate how federal funds are to be appropriated or spent. (Compare § 2704.07 with § 2704.08.) The first federal grant was executed in September 2010, over one year before the funding plan was approved and submitted to the Legislature, and was later amended five times to provide a total of $2.466 billion of federal funds pursuant to the American Recovery and Reinvestment Act of 2009 (ARRA grant).[5] The second federal grant was executed in November 2011, the same month the subdivision (c) funding plan was approved, and it

[4] This appropriation specifically directed use of the bond funds for design-build contracts "to commence construction of the first construction segment of the initial operating section of the high-speed rail system, as described in the California High-Speed Rail Program Revised 2012 Business Plan adopted by the Authority on April 12, 2012." (Stats. 2012, ch. 152, § 9, provision 5.)

[5] The ARRA grant and first four amendments are part of the administrative record lodged in this action (hereinafter AR). (See AR 3690-3746 [original grant]; AR 3747-3809 [first amendment]; 3810-3865 [second amendment]; 3866-3883 [third amendment]; 3884-3887 [fourth amendment]). A fifth amendment was executed on December 5, 2012 after the July 2012 legislative appropriation and is provided herein. (See Def's Request for Judicial Notice, Exh. 1.)

provided $928,620,000 of federal funding pursuant to the Omnibus Appropriation Act of 2010 (2010 grant).[6] Both grants provided the funding to develop high-speed rail in the Central Valley in phases beginning with environmental studies and preliminary engineering, and concluding with construction and preparation for operations and system testing and commission. (AR 3716-3735, 3919; AR 3919-3936.) The ARRA grant provided federal funding of between 50-80 percent of specified project tasks (AR 3691);[7] the 2010 Grant provided federal funding of between 70-80 percent of specified project tasks (AR 3934). Both grants required the Authority to provide matching funds to complete the cost of the identified tasks. (AR 3701, 3901.)

The Authority must spend the ARRA grant funds before they expire. The federal appropriation account for these funds closes on September 30, 2017, and any remaining balance in the account will be cancelled and therefore not available for obligation or expenditure for any purpose. (31 U.S.C., § 1552; High-Speed Intercity Passenger Rail Interim Guidance (74 Fed.Reg. 29900), June 23, 2009; see AR 3747, 3810, 3866, 3884; Defs' RJN, Exh.1, p. 1.)

After securing a legislative appropriation of both bond funds and federal grant funds in July 2012, the Authority entered into two contracts to begin the project. The first contract was executed with Caltrans on January 24, 2013, and committed $225,900,000 to design and realign SR 99 in the City of Fresno including right-of-way acquisition. (Defs' RJN, Exh. 2 [contract].) The second contract was executed with Tutor-Perini on August 16, 2013, and committed $969,988,000 to design from 15 percent to final and to construct the initial section of rail segment within the counties of Madera and Fresno. (Defs' RJN, Exh. 3 [contract scope of work provisions].)[8]

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[6] This grant is at AR 3888-3937.

[7] $194 million and later $86.38 million of granted funds were dedicated to performance of environmental studies, planning, preliminary engineering, and acquisition of interests in real property and right-of-way improvements thereof. (AR 3690, 3716-3743, 3810, 3816-3848.)

[8] Tos assigns $61 million of the Caltrans contract to preliminary planning activities governed by subdivision (g), and the balance to construction activities governed by subdivision (d). Tos assigns $69 million of the Tutor-Perini contract to preliminary planning activities governed by subdivision (g), and the balance to construction activities governed by subdivision (d). (OB, p. 9:1-3.) Thus, the total amount of the contracts that Tos assigns to subdivision (g) activities is $130 million, and by his analysis the balance of $1.066 billion would be assigned for subdivision (d) activities. Tos' logic also assumes that every contract task was required to be matched at the 50 percent level; thus the Authority's 50 percent share of the cost of the $1.066 (continued...)

The Authority entered into the Caltrans and Tutor-Perini contracts based on the $3.2 billion in federal dollars that the Legislature appropriated in July 2012. (See Declaration of Dennis Trujillo, ¶ 2.) The fifth amendment to the ARRA grant is significant because it allows the Authority to spend federal dollars before it spends any state money (49 C.F.R. § 18.21(c)) in an acceleration of ARRA funding known as a "tapered match" arrangement. (Defs' RJN, Exh. 1, pp. 4, 93.) Under earlier versions of the ARRA grant, the Authority was required to spend state money first (49 C.F.R. §18.21(d)) and then seek reimbursement for the federal share of project costs (see AR 3704, 3691). Under the terms of the fifth amendment, the Federal Railroad Administration is essentially advancing federal grant payments until the Authority is allowed to commit Proposition 1A bond funds to construct the IOS. (Defs' RJN, Exh. 1, p. 4.) Consistent with the requirement that ARRA grant proceeds be spent by September 2017, the tapered match arrangement also allows greater federal spending early in the project to assure full use of the ARRA monies. The arrangement allows use of the federal funds to cover up to 100 percent of project costs at the outset of project development to be tapered downward as the grantee's contribution is increased, so long as overall funding ratios are met at project completion. (Trujillo Decl., ¶¶ 3-4.)

ARGUMENT

I. THE AUTHORITY HAS NOT COMMITTED OR EXPENDED BOND FUNDS IN VIOLATION OF SUBDIVISIONS (D) OR (G)

Tos argues that this Court should invalidate the portions of the Caltrans and Tutor-Perini contracts that are governed by subdivision (d) because the Authority has committed federal grant funds to those contracts for construction-related activities.[9] This is plainly wrong because federal

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(...continued)
billion of subdivision (d) activities would be $533 million. Yet Tos estimates the Authority's share is even lower, $470 million. (OB, p. 9:2-7.)

[9] Tos does not challenge the portions of these contracts he assigns to subdivision (g) activities, but because the Court's ruling directed the parties to address whether the approvals committed bond funds outside the scope of subdivision (g), we address it here. Tos argues that the two contracts unlawfully commit bond funds as a source of payment for construction costs governed by subdivision (d), but he assigns some of the contract costs to tasks for which bond funds may be lawfully committed and expended pursuant to subdivision (g) (OB, pp. 8:15-9:7 (continued...)

funds are not governed by section 2704.08, they are governed by section 2704.07. Accordingly, subdivision (d) does not apply.

As a threshold matter, it would be inappropriate for this Court to invalidate contracts made as a result of and in compliance with a valid appropriation. The Authority entered into these contracts based on an appropriation that is presumptively valid, and that this Court has appropriately declined to invalidate. The Authority did not enter into either contract until it successfully obtained that appropriation. As this Court found, the appropriation functions independently of requirements in the bond act that the Authority submit a funding plan before it may ask for an appropriation to spend bond money. Because this Court has found that it lacks authority to invalidate the appropriation, it similarly lacks authority to invalidate contracts validly entered into based on that appropriation merely because of inadequacies in the funding plan that the Authority was required to submit before requesting an appropriation.

A. The Authority Has Not Spent Any Bond Funds in Violation of Subdivision (d)

In any event, the Authority has not spent any Proposition 1A bond funds to pay for capital costs of construction of high-speed rail as defined in section 2704.04, subdivisions (b)(1) and (c).

(...continued)
[conceding that the contracts lawfully commit bond funds of $130 million for subdivision (g) purposes]). Under subdivision (g), bond funds may be lawfully expended for a broad category of pre-construction activities, such as environmental studies, planning, preliminary engineering and acquisitions of interests in real property and right-of-way acquisition and improvement. subdivision (g), however, limits the total amount of spending that can fund these pre-construction activities up to an amount equal to 7.5 percent of the total amount of bonds described in subdivision (b)(1) of Section 2704.04. The total amount of the bonds described in subdivision (b)(1) of Section 2704.04 being $9 billion, the amount that can be lawfully spent for subdivision (g) purposes is $675 million. Between April 2009 through the close of the state's fiscal year on June 30, 2013, the total amount of bond funds expended for subdivision (g) purposes was $331,493,567, or 49.11 percent of $675 million. (Trujillo Decl., ¶ 5; Defs' RJN, Exh. 4.) The $130 million is well within the amount allowed in subdivision (g). Adding this amount of spending pursuant to the contracts for subdivision (g) purposes that Tos concedes is authorized ($130 million) to the amount of bond funds already expended for subdivision (g) purposes ($331,493,567), the total amount of bond funds expended is $481,493,567 million. This amount too is well within the total amount of bond funds allowed to be expended for subdivision (g) purposes.

These are the costs that cannot be incurred until there is an approved subdivision (d) funding plan authorizing the commitment of any proceeds of bonds for these purposes. (§ 2704.08, subd. (d).)

The Legislature appropriated $2.609 billion of bond funds to pay for the capital costs of construction in section 9 of Senate Bill 1029, enacted on July 18, 2012. (Stats. 2012, ch. 152, § 9.)[10] Before the enactment of Senate Bill 1029, the Authority could not expend bond funds for capital construction costs as defined in section 2704.04, subds. (b)(1) and (c) because there was no appropriation of bond funds in place to cover capital construction costs. (Cal. Const., art. XVI, §§ 1, 7 [requiring an appropriation before money can be drawn to pay for a contract]; Trujillo Decl., ¶ 6.) Since the appropriation, the Authority has not spent bond funds to fund such capital construction costs because it has not prepared or obtained approval of a subdivision (d) funding plan. Accordingly, since the enactment of Senate Bill 1029, the Authority has not spent *any* of the bond funds appropriated in section 9 for capital costs – not one dollar. (*Id.*; see Defs' RJN, Exh. 4.)

B. The Authority Has Not Committed Any Bond Funds in Violation of Subsection (d)

The argument that the Authority's expenditure of federal funds necessarily commits the Authority to spend bond proceeds in violation of subdivision (d) is also without merit. First, the federal grants themselves do not commit the Authority to spend bond proceeds, they only require the state to provide matching funds. Second, the state can pay for the Caltrans and Tutor-Perini contracts entirely without bond proceeds.

Tos argues that the Caltrans and Tutor-Perini contracts unlawfully commit $470 million in bond funds (or one-half of the total of funds for capital costs of construction) because: (1) the federal grant agreements fund only 50 percent of project tasks set forth in the contracts leaving the remainder of the contract costs to be funded by the state (*id.*, 8:20-22, fn. 11); and (2) "[n]o significant amount of non-Proposition 1A bond state funds have been allocated" to the project.

[10] Additional federal funds for construction were appropriated in section 8. (Stats 2012, ch. 152, § 8.)

(*Id.*, pp. 8:21-9:1, n.12.) The claim is based on a mistaken belief that spending federal money necessarily commits repayment with bond proceeds – it does not.

Initially, the Authority's use of federal funds is irrelevant. The SAC does not allege that the Authority's use of federal funds to pay project costs unlawfully commits bond funds (see e.g., SAC, ¶¶ 17, 17a, 17(b), 17a, 18, 19), and Proposition 1A does not restrict the Authority's use of the federal funds. (§ 2704.04, et seq.) In Senate Bill 1029, the Legislature appropriated $3.24 billion of federal funds to construct high-speed rail pursuant to contracts to design and build the rail system (Stats 2012, ch. 152, § 8) and $48 million of federal funds for continuing environmental studies and planning. (*Id.*, §§ 4 & 6.) The Authority may use these federal funds for the purposes for which they were granted and appropriated without restriction.

Second, the Authority's use of federal funds to pay for the costs of the Caltrans and Tutor-Perini contracts did not commit bond funds to construction or require an approved subdivision (d) funding plan. The grant agreements were executed in September 2010 and November 2011 before the subdivision (c) funding plan was submitted to the Legislature and before the contracts were executed. The ARRA grant does not identify a specific source of matching funding; it states only that the grantee agrees to complete all actions necessary to provide "matching contributory funds or cost share." (AR 3701.) The 2010 grant also does not identify a specific source of state funding; it too states that the grantee agrees to complete all actions necessary to provide "matching contributory funds or cost share," without identifying the source of state funding. (AR 3901, 3934-3935.) The fifth amendment to the ARRA grant (which was executed in December 2012 following the Legislature's appropriation of Proposition 1A bond funds to construct high-speed rail in July 2012) reflected the parties contemplation that appropriated bond funds be the *preferred* source of the state's match (see Defs' RJN, Exh. 3, pp. 3, 6, 58, 95-96), but it expressly allows the Authority to match from any state funds should bond funds not be then available to provide the match (*id.*, pp. 3, 4, 24, 58). Thus, the terms of the grants do not commit bond funds to match the state's share of project costs, including project costs authorized in the contracts.

Third, the tapered matching feature of the fifth amendment to the ARRA grant allows the Authority to use the federal grant funds at a higher rate than required by the matching ratio at the

beginning of project development in order to ensure that the federal funds are spent before they expire in September 2017. Tapered matching looks at project costs as a whole, rather than contract by contract. Tos ignores these features of the grant. In his brief, Tos mistakenly views these contracts in isolation, and estimates the state's share of the cost of the Caltrans and Tutor-Perini contracts is $470 million. (OB, p. 9:2-7.) But under tapered matching, the amount of granted federal funds is more than sufficient to cover the entire cost of the two contracts without committing *any* state funds to those contracts, let alone state bond funds specifically.

Finally, as a practical matter, a real-time assessment of federal-state spending ratios to date shows that a state matching obligation will not be triggered any time soon. Since 1996 when high-speed rail planning first began through June 30, 2013, the Authority has expended $450 million of state funds, including bond funds, for tasks authorized for federal funding, but actually spent only $275 million of the federal funds. (Trujillo Decl., ¶ 7.) The Authority estimates that it can continue to spend federal funds to fund the project in the Central Valley, including the costs of the Caltrans and Tutor-Perini contracts, until approximately April 2014 before federal-state funding ratio levels out and any state funds would even theoretically be required to match federal spending. (*Id.*.)

Tos may argue that it is not appropriate for the Authority to use federal funds that incur a matching obligation without first having identified a source of matching state funding to be used for subsequent contracts. But this is not required by Proposition 1A; it is a discretionary decision that is permitted by Proposition 1A and that will ultimately be addressed by the executive branch and/or the Legislature, depending on the source of state funds. Mandate should never issue to compel an action unless it is shown that the duty to do the thing asked for is purely ministerial and "unmixed with discretionary power or the exercise of discretion." (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 596.) The extent to which the state chooses to spend the federal funds obligating a future state funding match, as well as how to potentially address those obligations in the short- and long-term, are policy matters that rest within the sole discretion of its appointed and elected officials, and the Federal Railroad Administration as the state's funding partner. In the future, after a bond sale, and after the Authority identifies a

contract to which it wants to commit bond funds that will serve to match the federal funds earlier expended, it will be appropriate at that time to seek approval of a subdivision (d) funding plan.

II. TOS IS NOT ENTITLED TO THE OTHER REMEDIES HE SEEKS

The other relief Tos seeks (both in his supplemental brief and his proposed order) were not previously sought in the SAC or raised in his opening or reply briefs on the merits of the writ claims. The Court ruled that basic considerations of fairness preclude belated requests for a remedy. (Ruling, pp. 13:16-14:4.) That ruling applies equally to Tos' new claims for relief. In addition, that relief is not justified for the reasons set forth below.

A. There Are No Grounds for a Temporary Restraining Order

There are no grounds for an order "temporarily restraining" the expenditure of federal funds until the Court resolves the allegations brought pursuant to Code of Civil Procedure section 526a in the SAC. (See Proposed Order, p. 3:7-10.) As demonstrated above, the factual and legal grounds for such an order are entirely lacking. The SAC does not even allege waste on the ground that the use of federal funds unlawfully commits bond funds. (SAC, ¶¶ 17, 17a, 17(b), 17a, 18, 19; ¶¶ 59-64) [seventh cause of action]; ¶¶ 65-69 [eighth cause of action]); ¶¶ 70-73 [ninth cause of action]); ¶¶ 74-79 [tenth cause of action].)[11] In any event, preliminary injunctive relief generally is unavailable in a taxpayer standing case. In *White v. Davis* (2003) 30 Cal.4th 528, 556-557, the California Supreme Court held that a taxpayer's general interest in not having public funds spent unlawfully ordinarily does not in itself constitute the type of irreparable harm that warrants the granting of preliminary injunctive relief. And, as a matter of procedure, temporary restraining orders may only be granted upon noticed motion presenting admissible, evidentiary facts. (Cal. Rules of Court, rule 3.1150; *Bank of American Nat'l Trust & Sav. Ass'n v. Williams* (1948) 89 Cal.App.2d 21, 23.) Tos has not filed a noticed motion; nor has he presented admissible evidentiary facts that could support an application for restraining order. And finally, a restraining order cannot be granted without a bond to cover the Authority's damages. (Code Civ.

[11] The twelfth cause of action is also brought pursuant to Code of Civil Procedure 526a but does allege illegal expenditures not previously alleged. (SAC, ¶¶ 87-91.)

Proc., § 529, subd. (a).) If the Authority is restrained from using federal funds, it estimates its damages covering a six-month period by such an order would be $300.2 million and requests a bond in that amount in the event the relief is granted. (Trujillo Decl., ¶ 8.) A restraining order without a bond would be void. (*Oksner v. Superior Court* (1964) 229 Cal.App.2d 672, 687; *Miller v. Santa Margarita Land* (1963) 217 Cal.App.2d 764, 765-766.)

B. Proposition 1A Does Not Require a Flawless Subdivision (c) Funding Plan Before the Authority Can Submit a Subdivision (d) Funding Plan

The bulk of the new remedies sought are based on the contention that under Proposition 1A the Authority cannot approve or submit a subdivision (d) funding plan until it has first submitted a flawless subdivision (c) funding plan. (OB, pp. 3:18-4:2; 6:17-22 [alleging that voter pamphlet language referring to a subdivision (d) funding plan as an "updated funding plan" means that a subdivision (d) funding plan cannot be approved until there is a legal funding plan pursuant to subdivision (c) in place]; see OB, p. 7:6-8 & 11-16, p. 9:9-13; Proposed Order, pp. 2:16-20; 3:2-6 & 20-26, 4:1-4, 4:5-9.) Tos is not entitled to any remedies based on this claim.

The two funding plans serve different purposes, and are not interdependent. In fact, the subdivision (d) funding plan may, as a matter of necessity, be quite different from the subdivision (c) funding plan. That is, the subdivision (d) funding plan must reflect and implement the specific terms of the appropriation of bond funds, regardless of how the program is reflected in the subdivision (c) funding plan. Planning for a program like the high-speed rail will change over time, and Proposition 1A anticipates these changes. Proposition 1A requires that a subdivision (d) funding plan provide a report "describing *any material changes* from the plan submitted pursuant to subdivision (c) for this corridor or usable segment thereof." (§ 2704.08, subd. (d)(1)(E), emphasis added.) This provision expressly contemplates that a subdivision (d) funding plan may be materially different from a subdivision (c) plan, including a change in the corridor or usable segment selected for funding, or changes in project planning that may be required by a legal ruling. Proposition 1A also requires that the Authority promptly inform the Governor and the Legislature "of any material changes in plans or project conditions that would jeopardize completion of the corridor or usable segment as previously planned" subsequent to approval of a

subdivision (d) funding plan. (*Id.*, subd. (e).) This language too indicates that program changes are permissible and contemplated.

Tos identifies no useful purpose that would be served by requiring the Authority to re-submit a subdivision (c) funding plan before submitting a subdivision (d) funding plan. Any deviation between the two plans may simply be acknowledged in the subdivision (d) plan. Particularly since the Authority has not begun to prepare a subdivision (d) funding plan, redoing a subdivision (c) funding plan simply to show the changes in the subsequent plan would serve only to elevate form over substance.

Finally, the remedies requested would have no practical effect because, as the Court has ruled, the appropriation is valid. Mandamus is not appropriate when it will have no practical effect. (*Concerned Citizens of Palm Desert v. Bd. of Supervisors* (1974) 38 Cal App.3d 257, 270.)

C. Tos Cannot Rebut the Presumption that the Authority Will Follow the Law

There is also no ground for remedies that would simply reiterate the Authority's obligation to comply with Proposition 1A. (Evid. Code, § 664 [presuming that official duties are regularly performed].) This relief is too general to be of any substantial or practical benefit to Tos. (*Concerned Citizens of Palm Desert v. Bd. of Supervisors*, *supra*, 38 Cal App.3d at p. 270.) This relief is also not properly granted because one party speculates that the other party will refuse to comply with the law. (*Terminal Plaza Corp. v. City* (1986) 186 Cal.App.3d 814, 835-836 [court refused to grant writ in anticipation that a party will refuse to perform the duty when the time comes].)

CONCLUSION

There is no legal or factual ground that could justify a writ of mandamus invalidating the subdivision (c) funding plan. Moreover, the subsequent approvals identified by Tos are in full compliance with subdivision (d) and (g). Tos has not proved his entitlement to a writ.

In addition, the Authority requests that the Court's ruling address whether the writ claims that Tos plead in the SAC but failed to address in his briefing on the merits should be dismissed as requested by the Authority. The Authority has also requested dismissal of the individual respondents.

Dated: October 11, 2013

Respectfully Submitted,

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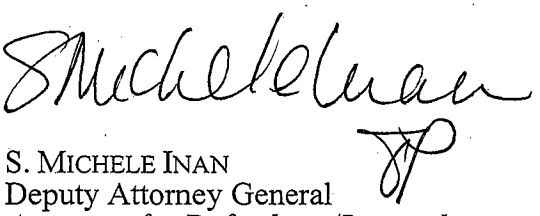

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Deputy Attorney General
Attorneys for Defendants/Respondents California High-Speed Rail Authority, Chief Executive Officer Jeff Morales, Governor Edmund G. Brown Jr., State Treasurer Bill Lockyer, Director of Finance Ana Matosantos, Secretary of California State Transportation Agency Brian P. Kelly and State Controller John Chiang

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Tos, et al. v. California High Speed Rail Authority, et al.**
No.: **34-2011-00113919**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 11, 2013, I served the attached

DEFENDANTS/RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS/PETITIONERS' REQUEST FOR REMEDIES

DECLARATION OF DENNIS TRUJILLO IN OPPOSITION TO PLAINTIFFS/PETITIONERS' REQUEST FOR REMEDIES

DEFENDANTS/RESPONDENTS' REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO PLAINTIFFS/PETITIONERS' REQUEST FOR REMEDIES; DECLARATION OF COUNSEL

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 11, 2013, at San Francisco, California.

Sandy Shum
Declarant

Sandy Shum
Signature

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