CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

JOHN TOS *et al.*

Appellants

v.

STATE OF CALIFORNIA *et al.*

Respondents

Sacramento County Superior Court Case Number 34-2016-00204740
On appeal from the final judgment of Hon. Richard Sueyoshi
Additional judges: Hon. Michael P. Kenny, Hon Raymond M. Cadei

APPELLANTS' REPLY BRIEF

Stuart M. Flashman, SBN 148396 Law Offices of Stuart M. Flashman 5626 Ocean View Drive Oakland, CA 94618-1533 Tel. / fax: (510) 652-5373 e-mail: stu@stuflash.com	Michael J. Brady, SBN 40693 1001 Marshall Street, Ste 500 Redwood City, CA 94063-2052 Telephone: (650) 364-8200 Facsimile: (650) 780-1701 e- mail: mbrady@rmkb.com

Attorneys for Appellants
JOHN TOS, QUENTIN KOPP, TOWN OF ATHERTON, PATRICIA LOUISE HOGAN-GIORNI, ANTHONY WYNNE, COMMUNITY COALITION ON HIGH-SPEED RAIL, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, and CALIFORNIA RAIL FOUNDATION

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INTRODUCTION

Respondent California High-Speed Rail Authority ("Authority") [1] bases its opposition on one simple-minded premise – that the voters' intent in enacting Proposition 1A ("Prop. 1A"), the Safe, Reliable High-Speed Passenger Rail Bond Act for the 21st Century, was encapsulated in and limited to the express purpose stated in Streets & Highways Code § 2704.04(a)[2]. (Respondent's Opposition Brief ["ROB"] at p. 11, 2nd paragraph.)

According to the Authority (ROB at p. 13), that intent was nothing more than to:

> ... *initiate* the construction of a high-speed train system that connects the San Francisco Transbay Terminal to Los Angeles Union Station and Anaheim, and links the state's major population centers, including Sacramento, the San Francisco Bay Area, the Central Valley, Los Angeles, the Inland Empire, Orange County, and San Diego consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008. [Emphasis added in ROB quote.]

The Authority contends that all that preceded or followed this sentence was essentially irrelevant to the voters who read, thought about, and ultimately voted to approve the bond measure. In particular, the

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[1] While the State of California is also a respondent herein, the opposition has been submitted solely by the Authority. Respondent State of California has therefore waived any opposition arguments.

[2] As in Appellants' Opening Brief, unless otherwise stated, all statutory references are to the California Streets & Highways Code.

various definitions set forth in § 2704.01, including "High-speed train" (capable of sustained revenue operating speeds of at least 200 miles per hour), "High-speed train system" (a system of high-speed trains), "corridor" (a portion of the high-speed train system linking at least two major cities), and perhaps most importantly "usable segment" (a portion of a corridor containing at least two stations) had no implications about what would be constructed. Nor did the fact that Section 2704.08, which, according to the Authority, had no special significance, was the single longest and most intricate section of the entire bond measure, with subsection (d) alone taking up half a column – about 7% – of the three and a half page bond measure.

According to the Authority, neither the Legislature that wrote this complex provision, nor the voters who were asked to wade through and understand it, considered it of any importance. Thus, the Authority's position is that the voters' intent was neither changed nor undermined by AB 1889 proclaiming that all a final funding plan needed to do in order to spend bond funds on construction was show that the construction would benefit passenger train service providers in the near term and might, at some unspecified future time, with "additional planned investments," eventually become part of a workable high-speed rail segment.[3]

[3] The Authority points to statements found in an interlocutory decision in the trial court denying a preliminary injunction. (ROB at p. 18.) However, a decision denying a preliminary injunction is not a decision on the merits,

Indeed, the Authority goes so far as to bluntly state that,

> [B]ond funds may may be used to construct improvements to conventional rail that will in the future *connect to* or be shared with the high-speed rail system. (ROB at p. 28 [emphasis added].)

The Authority provides no specific citation to language in Prop. 1A justifying this audacious assertion, which would go well beyond even AB 1889 by allowing high-speed rail construction bond funds to be used for conventional rail improvements that will, at some future date, merely "connect to" the high-speed rail system.

By this standard, high-speed rail bond funds could be used to make improvements to BART, which uses a different track gauge, a different form of electric power (third-rail versus overhead catenary), and is strictly a local commuter rail line. The expenditure could be justified because BART would connect to the high-speed rail line at the proposed Millbrae station. One wonders how many voters would have endorsed the bond measure if this had been what was placed before them.[4]

In essence, this case is about truth in advertising. Article XVI Section 1 of the California Constitution promises California's taxpayers

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even in the trial court, and therefore carries no weight. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 75 [even an appellate decision upholding a trial court decision on issuing a preliminary injunction is not a decision on the merits]; *Jomicra, Inc. v. California Mobile Home Dealers Assn.* (1970) 12 Cal.App.3d 396, 401 [same]. For that same reason, Respondent's Appendix – consisting of the record of the trial court proceedings on that preliminary injunction – is irrelevant and should be ignored.)

[4] The bond measure passed by 52.7% to 47.3%. Thus a 3% change would have resulted in the measure's defeat.

and bondholders that if a bond measure is approved, they will get what they had been promised. With AB 1889, the Legislature essentially told voters, "Never mind what you were promised eight years ago. You gave us the money, now just trust our judgment that we'll spend it wisely."

Of course, this ignores the requirements of Article XVI Section 1, as interpreted by numerous appellate cases, that the Legislature may not later significantly alter the requirements for spending bond funds. Further, as a practical matter, in this era of "fake news" and rampant cynicism, this also doesn't seem like a good approach to convincing voters to approve future bond measures – or anything else that is placed on the ballot.

ARGUMENT

I. AB 1889 VIOLATED ARTICLE XVI SECTION 1 OF THE CALIFORNIA CONSTITUTION BY EFFECTING A PARTIAL REPEAL OF PROP. 1A.

The Authority argues that there has not been a partial repeal of Prop. 1A, and hence no violation of Article XVI Section 1 of the California Constitution. It does so based on the premise that the "single object or work" identified in Prop. 1A is the *initiation* of construction of a high-speed rail system, and so long as that remains true, there has been no partial repeal. (ROB at p. 11.) However, as the cases have made abundantly clear, the single *object* or work specified in a bond measure (or, for that matter, any other ballot measure) is not necessarily fully encapsulated in the sections of the measure explicitly labeled as "purpose" or "intent." *Howard*

Jarvis Taxpayers Assn. v. Newson (2919) 39 Cal.App.5th 158, 170; *accord*, *Amwest Surety Ins. Co. v. Wilson ("Amwest")* (1995) 11 Cal.4th 1243, 1256 [evidence for the purpose of a measure may be found from many sources].) Indeed, the "object" of a bond measure may not be an actual physical object, but the goal that the measure seeks to accomplish.

A. THE LANGUAGE OF PROP. 1A, AND THE CIRCUMSTANCES SURROUNDING ITS ENACTMENT, SHOW THAT THE MEASURE'S "OBJECT" INCLUDED REQUIRING THAT EXPERT ANALYSIS SUPPORT FINDING EACH USABLE SEGMENT, WHEN FULLY CONSTRUCTED, TRULY SUITABLE AND READY FOR HIGH-SPEED TRAIN OPERATION.

1. A Measure's object may be determined by resort to the Measure's actual language, or circumstances surrounding its enactment.

As noted above, the object of a measure is not limited to statements of intent or purpose in the measure. Among other things, the object –i.e., purpose, of a measure may be found by examination of the actual language of the measure, including what it requires or prohibits. (*See, e.g.*, *O'Farrell v. County of Sonoma* (1922) 189 Cal. 343, 347 [measure's specification of a four-mile road to be built with bond proceeds required that road actually be four miles long]; *Jenkins v. Williams* (1910) 14 Cal.App. 89, 96-97 [when bond measure specifically limited amount that could be spent on a specific bridge repair, further expenditure of bond funds on that repair beyond that amount was improper, even though sufficient funds remained in the bond account]; *but see, El Dorado Irr. District v. Browne* (1932) 216 Cal 269, 273-274 [where ballot language for bond measure only broadly stated

bond's purpose as providing funds to construct or acquire whatever facilities were needed to accomplish irrigation district's purpose, no further limitation could be inferred].)

2. The circumstances surrounding Prop. 1A's drafting and enactment show that the object of Prop. 1A was not just to initiate construction of a high-speed rail system, but to construct complete "usable segments" of that system.

As detailed in Appellants' Opening Brief (pp. 24-26, 41-42), Governor Schwarzenegger's May 2008 budget message to the Legislature, accompanying the May budget revise, commented specifically on the need to amend AB 3034, the high-speed rail bond bill, to address what the Governor saw as voter concerns that could defeat the bond measure at the polls. His concerns, addressed to the entire Legislature, met a receptive audience in the Senate Housing and Transportation Committee.[5] The result was the addition of new provisions to AB 3034 – notably, definitions of corridor and usable segment and § 2704.08 subsections (c) and (d). Those provisions implemented, and presumably reflected, the Governor's intended amendments.[6] The way these provisions were added to AB 3034,

[5] The Authority argues that the Governor's budget message is not appropriately included in Prop. 1A's legislative history. (ROB at p. 37.) The authorities it cites are inapposite here. Unlike those cases, the Governor's message – containing his personal comments on budget issues – was addressed to the entire Legislature during its consideration of the bill. It is therefore appropriately part of the bill's legislative history and may be consulted in determining the object of the bond measure.

[6] The Governor will, on occasion, submit amendments, and indeed entire bills to the Legislature; most often, as here, in connection with the adoption

as well as their content, indicate that they formed part of the object of Prop. 1A, as presented to and understood by the voters.

3. The language of Section 2704.08(d) placed specific requirements on both the final funding plan for construction of a corridor or usable segment and the expert analysis of that plan.

While § 2704.09 placed a number of specific requirements on the fully-built high-speed rail system towards whose construction the bond funds were directed, § 2704.08(c) and (d), added in response to the Governor's message, focused on requirements for fully constructing a specific corridor or usable segment using Prop. 1A bond funds.[7] As this Court noted in *California High Speed Rail Authority v. Superior Court ("CHSRA v. Sup.Ct.")* (2014) 228 Cal.App.4th 676, 713:

> But it is the second and final funding plan, like the final EIR, that will provide the ultimate decision maker with the most important and expansive information necessary to make the final determination whether the high-speed rail project is financially viable.

Only if the ultimate decision maker, the Director of Finance, could properly make this determination would bond funds then become available for actual construction of the segment. More particularly, § 2704.08(d) placed requirements on both the final funding plan intended to direct construction of such a corridor/segment, and on the analysis of that funding plan to be done by one or more independent financial consultants. Those requirements were designed to ensure that the Director of Finance had

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of the state budget. (*See, e.g., Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1002.)

[7] Obviously, these requirements only apply to corridors/segments constructed using Prop. 1A funds.

everything he or she needed to make a fully informed decision

The funding plan was required to give details of what would be constructed, how much it would cost, including cost escalation during construction, the funds and funding sources that would be used for the segment's construction, including anticipated time of receipt and what commitments, authorizations, allocations, or other assurances there were that the funds would be available when needed, ridership and revenue projections for the proposed segment, and a discussion of any changes made since approval of the preliminary funding plan. All of this defined what the completed segment would consist of and how and where it would be built –the items necessary for the consultant's analysis of whether the required conditions for giving final approval to the segment had been met.

The independent consultant's report(s) required an analysis of the final funding plan in order to reach several crucial conclusions: 1) The corridor/segment could be successfully completed as proposed in the funding plan – i.e., not only would it be technically feasible to build the corridor/segment, but sufficient funds would be available to actually complete it. 2) If so completed, the corridor/segment would be suitable and ready for high-speed train operation. This was perhaps the heart of the analysis. Even if the segment wasn't immediately put into commercial service for high-speed rail, its construction had been completed. No further work (or money) would be needed to allow its use for high-speed rail. 3)

Upon the segment's completion, one or more [rail] passenger service providers would be able to use the tracks and/or stations constructed to provide train service. Again, even if the segment wasn't immediately put into service for high-speed rail, it could immediately be used for some kind of rail service. 4) Finally, when passenger train service *was* provided by the Authority or under its authority,[8] that service would not require an operating subsidy. While interim use of the completed segment was allowed for non-high-speed rail, when the segment *was* put into commercial high-speed rail service, that service would have to be self-supporting.[9]

Beyond these requirements, the report also needed to assess any risks involved in implementing the funding plan and explain how those risks would be mitigated. Based on all this, the Director of Finance could decide whether the project described in the funding plan, which would construct a high-speed train-usable segment, could be successfully completed as proposed.

In short, Prop. 1A, as designed by the Legislature and approved by the voters, was intended to assure voters that if they approved the measure, the results would not be a hodge-podge of useless make-work projects, but

[8] Under Public Utilities Code § 185032(a) the Authority was the sole authorized passenger train service provider for speeds exceeding 125 mph.

[9] It was for this reason that the expected ridership and revenue figures *for the eventual high-speed rail service* were important elements of the final funding plan.

a series of high-speed-rail-ready segments that could be put together to produce a working high-speed rail system.

As this Court emphasized in *CHSRA v. Sup.Ct., supra,* 228 Cal.App.4th at p. 713:

> The Authority now has a clear, present, and mandatory duty to include or certify to all the information required in subdivision (d) of section 2704.08 in its final funding plan and, together with the report of the independent financial consultant, to provide the Director of the Department of Finance *with the assurances the voters intended that the high-speed rail system can and will be completed as provided in the Bond Act.* [emphasis added]

Thus, contrary to the Authority's contention, the object of Prop. 1A was not simply to *initiate* construction of a high-speed rail system. Rather, the object was to plan for, design, construct, *and complete* one or more corridors/usable segments – pursuant to fully compliant final funding plans – that could survive critical expert analysis and meet specific objective criteria, including being high-speed rail-ready. In this way, the provisions of Prop. 1A and specifically § 2704.08(d) promised voters that, in approving the Prop. 1A bond funding, they would be assuring production of *working* building blocks of the future high-speed rail system.

B. BY RENDERING INEFFECTUAL THE PROVISIONS OF § 2704.08(d), AB 1889 UNDERCUT THE SETTLED EXPECTATIONS OF BONDHOLDERS AND VOTERS ABOUT PROP. 1A AND RESULTED IN A PARTIAL REPEAL OF THE BOND ACT'S PROVISIONS.

1. AB 1889 rendered ineffectual the provisions of § 2704.08(d) intended to ensure production of complete working high-speed rail segments.

Together, the requirements that § 2704.08(d) placed in the final funding plan and the analysis and conclusions required from the independent financial consultant were intended to ensure, so far as possible, that construction funded by Prop.1A's high-speed rail construction funds (as distinct from the $950 million designated for connecting rail service) would result in *usable* high-speed rail segments.

Contrary to the Authority's argument, there was nothing mysterious or ambiguous in the meaning of the phrase "suitable and ready for high-speed train operation," requiring its "clarification." As explained in Appellants' Opening Brief, the plain meaning of the phrase was self-evident. The dictionary definitions of the two key terms, "suitable" and "ready," were clear and unambiguous, as was the phrase they completed.

The Authority can point to no provision of Prop. 1A that contradicts the simple plain meaning of that phrase. The independent consultant needed to determine that the corridor or usable segment, when completed as set forth in the final funding plan (i.e., in its length, location and available

funding[10]) would at that point be "suitable and ready for high-speed train operation." No mention was made of the need for "additional planned investments" to be made to the corridor/segment, and neither voters nor bondholders, looking at Prop. 1A, would have expected them to be needed. Indeed, a primary purpose of § 2704.08(d) was to ensure that no additional funding or work beyond that described in the funding plan would be needed to complete a high-speed train-ready segment, once its funding plan received final approval.

Yet AB 1889, in order "to allow eligible projects to 'proceed to construction in the near-term to provide economic benefits, create jobs and advance safer, cleaner rail transportation,'[11] and to 'enable passenger service providers to begin using the improvements . . . *while additional work is completed to enable high-speed train service*,'" (ROB at p. 16-17, quoting from AB 1889, § 1, subds. (g) and (h)) [emphasis added], redefined "suitable and ready" to mean something that did not at all comport with the voters' or bondholders' understanding.

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[10] The consultant would also presumably need to confirm the actual availability of the specified funding.

[11] All of these points, while they might be beneficial, at least in some people's opinion, were not part of what the voters approved in Prop. 1A. Yes, some may have been mentioned in the arguments in favor of the measure, but only the ballot language itself is part of the "contract" approved by the voters. (*Associated Students of North Peralta Community College v. Board of Trustees* (1979) 92 Cal.App.3d 672, 678-679; Mills v. *S. F. Bay Area Rapid Transit Dist.* (1968) 261 Cal.App.2d 666, 668-669.)

Under AB 1889, any project that would benefit a passenger rail provider in the near term would pass muster, so long as eventually, "after additional planned investments are made in the corridor or usable segment thereof," a truly usable high-speed train corridor or segment would result. A project as trivial and inconsequential as updating the restrooms or ticket office of an existing commuter rail station could allow the Director of Finance to approve its final funding plan, so long as that station might eventually, at some undefined future time, be included in one of the segments for which SB 1029 provided funding.

In its opposition brief, the Authority argues that the trial court's decision was correct. Prop. 1A neither truncated the project nor diverted bond funds to a tenuously connected separate project, or otherwise made a substantial change to the scheme or design that induced voter approval. (ROB at pp. 20, 30.) The Authority is badly mistaken.

Prop. 1A, as approved by the voters, required that any corridor or usable segment constructed with bond funds would, when completed in accordance with the funding plan, be suitable and ready for high-speed train operation. The time the segment would be suitable and ready was when construction pursuant to the funding plan was complete; not at some later date after further planned investments had been added to the segment. AB 1889 essentially divided construction of a truly suitable and ready segment into two parts. The first part, completed under the funding plan, would

improve service for a conventional rail passenger carrier. The second part, with as-yet undetermined timing and funding, would produce the segment that could be used for high-speed rail.

It is as if the project approved in *O'Farrell, supra*, was, after voter passage, divided by the supervisors into two segments: an initial section of 1.93 miles, sufficient perhaps to reach the intersection with Sexton Road, and a second segment, to be built later, that would extend the road the remaining 2.07 miles to Freestone. The Supervisors might justify building only the first segment because it would extend the usable road up to that intersection. Nevertheless, the project would have been truncated from what the voters had approved and had expected.

Or, using the example of *Veterans of Foreign Wars v. State of California ("VFW")* (1974) 36 Cal.App.3d 688, AB 1889 would allow diverting bond funds from constructing a high-speed rail segment to making improvements to a conventional rail line. The fact that the rail line might, at some future undefined time, connect to a future high-speed rail segment doesn't make it the same project, any more than opening county veterans' offices could be magically transformed into providing mortgages to veterans, even if the mortgages were negotiated at those offices.

The Authority also claims that AB 1889 did not change any of the oversight provisions touted in the Legislative Analyst's analysis of Prop. 1A. (ROB at p. 34.) However, AB 1889 changed how the independent

consultant would analyze the funding plan. No longer would that consultant be looking for completion of a high-speed-rail-ready segment. Under AB 1889, all the consultant needed is a project that would, in the near term, benefit a passenger train service provider and eventually, "after additional planned investments," produce an actually high-speed-rail-ready segment. When one changes what the overseer is looking for, one is changing the oversight provisions.

2. AB 1889 prejudiced the rights of voters and bondholders by undercutting their settled expectations about how the funds provided by Prop. 1A would be used.

One of several tests identified in appellate cases deciding whether a post-voter-approval change in a bond measure's provisions violates the requirements of bond law[12] is whether the change prejudices the rights of the bondholders or of the voters who approved the measure. The Authority asserts that Appellants never claimed that AB 1889 created such prejudice. The Authority is wrong. In response to the Authority raising this same issue in its opposition to Appellants' motion on the pleadings, Appellants specifically asserted that AB 1889 would prejudice both bondholders and voters. (4 AA 1139:23-26 [fn.7].)

[12] Several of the cases the Authority cites in support of the validity of AB 1889 involve bond measures not proposed by the Legislature, and therefore not subject to the requirements of Article XVI Section 1. Nevertheless, because the law restricting the use of funds from voter-approved bond measures tends to be similar regardless of the agency involved, Appellants will address those cases.

When voters approve a bond measure placed on the ballot, and when bondholders buy the bonds from a voter-approved measure, they rely primarily on the text of the measure to make their decisions. That reliance results in settled expectations of what will happen with the bond funds so approved and so invested.

Voters who approved Prop. 1A were voting for the "Safe, Reliable, High-Speed Passenger Train Bond Act for the 21st Century" (§ 2704). They expected that they were voting for funding to produce a California high-speed train system. They further expected that $9 billion of the $9.95 billion of bond funds being approved would be used for the planning, design, engineering, and construction of that system. (§2704.04(b).)

Under the provisions of § 2704.08, they would also have expected that any proposal for using bond funds towards high-speed rail construction would be carefully scrutinized to assure that the construction would actually result in a usable high-speed-rail-capable segment. One can further presume, based on the ballot materials provided to voters (see 3 AA 764-768) that those who voted in favor of Prop. 1A expected it to help fund the initial high-speed rail construction effort that would result in the first working high-speed rail system in the U.S. One wonders what the result would have been if the bond act had been entitled the "Safe, Reliable Conventional Passenger Train Improvement Bond Act for the 21st Century." Passage of that act would be far from assured.

Bondholders who bought bonds issued under the bond act likewise would have expected that the vast majority of their investment would be used towards the planning, design, engineering, and construction of a high-speed rail system. Based on the provisions of § 2704.08, bondholders, like voters, would have expected that the utmost efforts would be made to ensure that use of the bond funds for construction would result in one or more usable high-speed-rail-capable segments.

It is often assumed that bondholders' only interest in a bond investment is ensuring that they receive their interest payments, and that, at the end of the bond's term, they recover their investment. However, for the California High-Speed Passenger Train System, the ballot materials (see, e.g., 3 AR 765 [bullet point listing of the benefits of building the California High-Speed Train System]) offered potential investors the opportunity to invest in a project that would appreciably reduce production of greenhouse gases while adding an exciting new transportation system to the state.

The very mention of these factors would lure socially responsible investors, an increasingly important group, to buy the bonds with the expectation that they were helping to fund completion of America's first high-speed rail system, with its associated beneficial effects. More specifically, upon reading the measure's provisions, investors would be led to conclude that bond proceeds would be used to fully construct nothing

less than one or more usable high-speed rail-ready segments – building blocks for a full high-speed rail system.

What was the effect of AB 1889 on these expectations? As noted above, under AB 1889, any project that would benefit one or more passenger train provider in the near-term would now be eligible to receive Prop. 1A construction funding. There would be absolutely no guarantee (and at this point, perhaps little expectation) that what was constructed with that funding would ever become part of a usable high-speed rail segment, never mind an entire working high-speed rail system.

For any voter who was a true-believer in high-speed rail, this would impair the promises made to them through the bond measure. (*See, Harris v. Superior Court* (2016) 1 Cal.5th 984, 992 [proposed interpretation of ballot measure would be contrary to expectations of those who voted for it].) For an investor concerned about making environmentally beneficial use of their money, it would prejudice their right to have their investment dollars used as had been promised.

C. THE CHANGE TO PROP. 1A EFFECTED BY AB 1889 EXCEEDED THAT ALLOWED WITHOUT VOTER APPROVAL.

The Authority argues that, especially for a project as large, complex, and expensive as the high-speed rail system, post-election changes to the use of bond funds "are generally permissible, so long as they do not

impliedly repeal the fundamental scheme or design that induced voter approval."[13] (ROB at p. 24.)

1. Changes that are permissible.

Whether a post-voter approval change in a bond measure is permissible would depend on a number of factors, including: 1) whether the existing language was directive or merely descriptive; 2) whether the measure was broadly written to encompass a wide variety of related uses, activities, or structures; 3) whether the proposed change is required due to a change in law; 4) whether the proposed change would significantly alter the nature of what the funds are being used for; 5) whether the proposed change would significantly alter the location where the funds would be used; 6) whether the proposed change would significantly increase the cost of the project using the funds. (*City of San Diego v. Millan ("Millan")* (1932) 127 Cal.App. 521, 536.)

Millan, one of the cases cited by the Authority, exemplifies the type of change that is permissible. In that case, a bond measure had stated that the bond funds would be used to build, among many other things, an arched, gravity section, masonry-type dam. Nothing in the measure, however, indicated that the specific identified characteristics of the dam were mandatory, rather than just descriptive terms. The full set of funded projects would improve the City's drinking water system.

[13] The Authority significantly distorts the holding in *VFW*, *supra*, by adding the word "fundamental" – not found in the original case.

Before the time came to build the dam, however, the law changed, and the dam's structure now had to be approved by the state engineer. That approval was withheld. Instead, the state engineer approved a different, hydraulic, earth-filled rock embankment type dam. (*Id.* at p. 524.) A lawsuit ensued, in which one contention was that money authorized to build a masonry-type dam could not, instead, be used to build the earth-filled rock embankment dam that the state engineer had approved.

The court noted that, under the Municipal Bonding Act used to issue the bonds, bond proceeds "shall be applied exclusively to the purposes and objects mentioned in the ordinance." (*Id.* at p. 533.) In the ordinance calling the election, that purpose was very general – developing, impounding, conserving, storing, and distributing the waters of the San Diego River … The court noted that the question before it was:

> [W]hether or not the change in the type of dam, which change was made necessary by a law passed by the legislature after the bonds were issued, and by the lawful action of an officer of the state, could be considered such a departure from the purposes for which the bonds had been authorized as to prohibit the use of the bond money for such a type of dam. (*Id*. at p. 534.)

The court held that in this case, where the state's exercise of its proper police power prohibited the initial proposed use of the money, and where the bond had been passed to meet a variety of uses, not just the one specific dam identified, and where the alternative dam would be located in

the same place, would fulfill the same function, and would cost no more than the voter-approved dam, the change did not violate the electoral contract between the taxpayers and the City. (*Id.* at p. 536.)

2. Impermissible changes.

But, what if, instead, the bond had been approved to build a single dam to store river water for farmers in the Central Valley; the dam had been rejected by the state engineer; and the state engineer had instead recommended using groundwater banking (i.e., conjunctive use – AKA Aquifer Storage & Recovery) to store the water. Would the answer be the same? Careful analysis indicates that the answer would be no.

Unlike *Millan*, the new storage would not be at the same site, nor would it be the same kind of storage. Indeed, for farmers who often rely on pumping natural groundwater, groundwater storage would raise a host of issues not raised by a surface dam, including potentially requiring adjudication of the groundwater basin or some other means to track the storage and use of the added water. For many farmers, initiating government regulation of what had always been considered "free" water would be anathema. While the general purpose, water storage, might be the same, it cannot be said that the nature and effects of the storage were similar. Nor could it be said with any degree of certainty that the farmers

who approved the dam project would have also approved such a groundwater banking project.[14]

Similarly here, while building a high-speed rail system and making improvements to conventional passenger rail service would both accomplish the general goal of improving rail transportation, it cannot be said with any certainty that voters who approved the former would also have approved the latter. The change effected by AB 1889 substantially changed the scheme that induced voter approval, and thereby exceeded the bounds of modifications that may be made to a voter-approved state bond measure without returning to the voters. In short, AB 1889 effected a partial repeal of the bond measure. In doing so, it violated Article XVI Section 1 of the California Constitution, requiring its invalidation.

II. THE AUTHORITY'S ARGUMENTS ABOUT THE IMPROPRIETY OF POSSIBLE RELIEF ARE PREMATURE

The Authority has leaped ahead to argue against relief that Appellants *may* be entitled to *if* the Authority has improperly spent bond funds on segments that do not comply with § 2704.08(d). (ROB at pp. 45-47; see AOB at p. 57.) These arguments are not yet ripe for the Court's

[14] Indeed, the history of agricultural groundwater banking projects is evidence of how controversial that concept has been for farmers. (See, e.g., *Rosedale-Rio Bravo Water Storage Dist. et al. v. Calif. Dept. of Water Resources* (2014) (Sacramento Cty. Sup. Ct. case # 34-2010-80000703) [challenge to EIR for Kern Water Bank]; Article on Groundwater Banking in "Aquapedia" – Water Education Foundation: https://www.watereducation.org/aquapedia/groundwater-banking [accessed on 1/17/ 2020].)

consideration. It is for the trial court, in the first instance, to determine under the mandamus causes of action in this case whether or not past decisions of the Authority and the Director of Finance were improper, and if so, what the appropriate remedies would be. The current appeal addresses only the declaratory relief cause of action.

If the Court reverses the trial court's decision on the declaratory relief cause of action and finds that AB 1889 violates Article XVI Section 1 of the California Constitution, it should, as Appellants requested, remand the case to the trial court. (See AOB at p. 62.) The trial court would then need to determine, based on the administrative record, whether Respondents' approvals of the Final Funding Plans were contrary to their mandatory duties under Prop. 1A. Only then would it be appropriate for the trial court to consider appropriate relief, including potentially the reimbursement of improperly spent funds from the State's general fund.

CONCLUSION

It is perhaps significant that until the passage of AB 1889, the Authority had not tried to spend Prop 1A bond funds on any of its supposed usable segments. The passage of AB 1889 triggered the Authority's preparation of its first two final funding plans, which were given final approval literally days after AB 1889 took effect. At this point the Authority has approved multiple final funding plans; all for "segments" (one consisting of a single grade separation) that, when completed, will not

be even close to being suitable and ready for high-speed train operation. In fact, literally billions of dollars of Proposition 1A bond funds are currently being spent on these segments.

In the past few years, the state's legislative majority (perhaps with some prodding from the Governor) has been "feeling its oats." It has approved several legislative acts that this Court has found violate California's laws or its Constitution, requiring the Court to rein it in. (*See, Howard Jarvis Taxpayer Assn. v. Newsom* (2019) 39 Cal.App.5th 158; *National Asian American Coalition v. Newsom* (2019) 33 Cal.App.5th 993; *See also, Shaw v. People ex rel Chiang* (2009) 175 Cal.App.4th 577.) The Legislature in now poised to enact further expansions of the principle behind AB 1889 – that high-speed rail bond funds can be used for virtually any rail improvement project in the state, so long as that project is, however tenuously, connected to a proposed high-speed rail segment. (See Appellants Motion for Calendar Preference, submitted herewith.) It is now up to this Court to determine whether Article XVI Section 1 retains any vitality as a limitation on the Legislature's making post-election changes to how the government uses voter-approved bond funds.

Dated: January 21, 2020

Respectfully submitted,

Michael J. Brady
Stuart M. Flashman

Attorneys for Appellants John Tos et al.

by: /s/ Stuart M. Flashman

CERTIFICATION

I, Stuart M. Flashman, as one of the attorneys for Plaintiffs/ Appellants, hereby certify that the above brief, exclusive of caption, tables, exhibits, and this certification, contains 5,285 words, as determined by the word-counting function of my word processor, Microsoft Word for Mac 2011 (version 14.7.7).

Dated: January 21, 2020

/s/ Stuart M. Flashman
Stuart M. Flashman

PROOF OF SERVICE BY MAIL OR ELECTRONIC SERVICE

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 January 21, 2020, I served the within APPELLANTS' REPLY BRIEF on the party listed below by placing a true copy thereof, enclosed in a sealed envelope with first class mail postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

Hon. Richard Sueyoshi
c/o Clerk, Sacramento County Superior Court
720 – 9th Street
Sacramento, CA 95814

In addition, on the above-same day, I also served electronic versions of the above-same document, as well as APPELLANTS' MOTION FOR CALENDAR PREFERENCE, upon counsel for the parties to this appeal, and on the California Supreme Court as pdf files through the Court of Appeal's website electronic filing vendor, Imagesoft TrueFiling.

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 January 21, 2020.