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EXEMPT FROM FEES PER GOVERNMENT CODE §6103

Attorneys for Plaintiffs and Plaintiffs
JON TOS; AARON FUKUDA;
AND COUNTY OF KINGS

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

JON TOS, AARON FUKUDA, and COUNTY OF KINGS,
Plaintiffs and Plaintiffs
v.
CALIFORNIA HIGH SPEED RAIL AUTHORITY *et al.*,
Defendants and Defendants

No. 34-2011-00113919 filed 11/14/2011
Judge Assigned for All Purposes:
HONORABLE MICHAEL P. KENNY
Department: 31

PLAINTIFFS' TRIAL BRIEF, PART I - OPENING BRIEF IN SUPPORT OF MOTION FOR PEREMPTORY WRIT OF MANDATE

Date:	May 31, 2013
Time:	9:00 AM
Dept.	31
Judge:	Hon. Michael P. Kenny

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INTRODUCTION AND SUMMARY OF ARGUMENT

In 2008, the California legislature passed AB 3034. That bill placed on the ballot a bond measure entitled Proposition 1A to provide nine billion dollars in state funding towards the construction of a high-speed rail system in the state. The system was to extend from San Diego and Los Angeles on the south to San Francisco and Sacramento on the north. In November 2008, Proposition 1A was narrowly approved by California voters.

In the course of the election campaign, proponents of the measure, including the members of the Board of Directors of Defendant and Defendant California High-Speed Rail Authority (hereinafter, "Authority") told the voters that fares for the trip from Los Angeles to San Francisco would be, "about $50 a person;" and that there would be, "Matching private and federal funding to be identified BEFORE state bond funds are spent."(AR 6 [emphasis in original].)[1] These assertions have turned out not to be true.

More importantly, the bond measure itself made specific promises to California's voters to convince them to support the measure. The measure promised:

- That bond funds would provide no more than half of the costs to construct any corridor or usable segment[2] within the system, with the remainder to come from private and other public sources;
- The Authority would prepare and submit to the legislature and the Department of Finance a detailed funding plan for each corridor or usable segment proposed for construction at least 90 days before funds would be appropriated for construction of that corridor or segment;
- An updated funding plan would be prepared, submitted to, and approved by the Director of Finance before any bond funds could actually be expended towards construction of a corridor or usable segment;

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[1] The Attorney General has prepared and certified an administrative record for the mandamus potion of the case. That record will be referred to by the format "AR XXXX" where XXXX indicates the Bates-stamped page number. The Attorney General has used AG XXXX in the record, but Plaintiffs believe AR is the more usual designation.

[2] Streets and Highways Code §2704.01(g) defines a "usable segment" as a portion of a corridor that includes at least two stations. §2704.01(f) defines a corridor as a portion of the overall high-speed rail system connecting the San Francisco Transbay terminal to Los Angeles Union Station and Anaheim and linking the state's major population centers.

- Prior to submitting a request for bond funds, and prior to those bond funds actually being spent, the Authority would have to certify that it could complete construction of the proposed corridor or usable segment in accordance with the funding plan.
- Each corridor or usable segment for which bond funds were appropriated and used would be suitable and ready for high-speed train operation when that corridor or segment was completed;
- One or more passenger service providers could begin using the tracks or stations in that corridor or segment for passenger train service;
- Passengers would not be required to change trains when traveling within any one corridor;
- Passenger service by Authority in the corridor or usable segment would not require a local, state, or federal operating subsidy;
- All project-level environmental clearances necessary to proceed with construction of the corridor or usable segment would be completed prior to the submission of a funding plan.

Unfortunately, as will be shown, when Authority prepared and approved its funding plan for an Initial Operating Section ("IOS") in November 2011, as well as when it later requested an appropriation of bond funds, it was clear that the plan failed to satisfy many of the requirements of AB 3034, and even more importantly, the promises made to the voters in Proposition 1A. Consequently, Authority's actions in approving that funding plan, submitting it to the legislature and to the Department of Finance, and requesting bond funds violated its duty to the voters of California under Proposition 1A and the California Constitution. In addition, the actions of the other defendants in allowing appropriation of Proposition 1A bond funds for the construction proposed in the Funding Plan also violated the terms of the Proposition, and those actions were therefore also improper. Consequently, the Authority's approval of the funding plan, request for appropriation of bond funds and the appropriations made in reliance upon that funding plan, must be overturned, as must all subsequent approvals that depended on those approvals for their validity.[3]

[3] This includes, but is not limited to, any contracts approved by the Authority for work on the construction proposed in the Funding Plan.

This case also includes causes of action for injunctive and declaratory relief under Code of Civil Procedure §526a for illegal or improper expenditure of public funds. Obviously, any such actual expenditures would create a separate, although related, mandamus cause of action. No such action has been pled, because no bond fund expenditures have yet occurred and hence no violation of the mandatory duty to avoid illegal expenditures has occurred either. A cause of action under §526a, however, can relate to an illegal expenditure that has not yet happened, but is only threatened. (*Stanson v. Mott* (1976) 17 Cal.3d 206, 223.) The claims under §526a are addressed in Part II of the Trial Brief, which is being filed concurrently.[4]

STATEMENT OF FACTS AND OF THE CASE

I. THE DEVELOPMENT OF AB 3034 AND PROPOSITION 1A.

Although the Authority was established in 1996 (AR 4), the facts necessary to understand this case begin with the legislature's deliberations in 2008 prior to enacting AB 3034, the legislation that placed Proposition 1A on the ballot. At that time, the Authority represented to the legislature and the public that build-out of a fully-operational high-speed rail line extending from Los Angeles to San Francisco, the so-called Phase I System, would cost approximately 32.6 billion dollars (AR 611, 616 [cost comparisons between 2009 Authority report to legislature and Draft 2012 Business Plan], AR 1911) and build-out of the entire system, including extensions to Sacramento and San Diego, would cost about 45 billion dollars. (AR 5.) This already made the high-speed rail project one of the most expensive public infrastructure proposals in the state's history.

Legislators were understandably nervous about proposing such a large amount of public spending. Realizing this, the Authority and its supporters in the legislature did not propose that the project be funded entirely by the state. Instead, the Authority put forward a proposal for 9 billion dollars in state general obligation bond funding.[5] This funding was to be matched by

[4] Unlike this mandamus cause of action, a claim under §526a is not based on an administrative record. Hence a trial may well be needed to resolve disputed factual issues.

[5] Plus an additional 950 million dollars in bond funding for other rail systems that would enhance those systems' capacity or safety or improve their connectivity to the high-speed rail system. (AR 5.)

federal and private funding to reach the full cost for building the system. (See, AR 6 [ballot argument in favor of Proposition 1A.)

In the course of the legislative process, the legislature added constraints and requirements to the bond measure. The likely impetus for this was Governor Schwarzenegger's May 2008 budget message, and specifically the section addressing Business, Transportation and Housing (Plaintiffs' Request for Judicial Notice ¶4 and Exhibit J.) In that message, the Governor made the following specific comment about the high-speed rail project:

> Before any construction or equipment purchase contracts can be signed for a portion of the system, there must be a complete funding plan that provides assurance that all funding needed to provide service on that portion of the system is secured. (*Id*. at p. 28.)

In direct response to this, the legislature added a comprehensive taxpayer protection scheme in the form of a series of requirements to the bond act. Those provisions generally require that the high-speed rail system be constructed as a series of modular corridors or usable segments, with required criteria for each corridor/segment that would ensure they would each be fully funded, could be built expeditiously, would be ready and usable for high-speed rail, and would grow into an economically self-sufficient full high-speed rail system. In addition to addressing the Governor's concerns, the requirements were added to satisfy the legislature itself that the project's use of bond funds would be prudent and successful, and to reassure the voters on those same points. Added requirements included:

- Certification that, upon completion, the corridor or usable segment would be suitable and ready for high-speed rail operations;
- Certification that construction of the corridor or usable segment could be completed as proposed in the funding plan prepared and approved by the Authority
- Certification that the planned passenger service by the Authority on the corridor or usable segment would not require a local, state, or federal operating subsidy;
- Certification that the Authority had completed all project-level environmental clearances necessary to proceed with construction of the corridor or usable segment.

(Plaintiffs' Request for Judicial Notice, ¶ 3 and Exhibits E through G; AR 10-11.)

AB 3034 was passed by the legislature and signed by the governor, and Proposition 1A was placed on the ballot and narrowly approved by the voters, by a margin of 52.6 to 47.4%.[6] (Plaintiffs' Request for Judicial Notice, ¶5 and Exhibit K and L.)

II. THE 2011 FUNDING PLAN AND THE DRAFT 2012 BUSINESS PLAN

After the passage of Proposition 1A, the Authority continued to work on what it saw as its goal of building a high-speed rail system, although the specifics of how it saw that goal changed over time, sometimes in minor ways but sometimes quickly and dramatically.

Among other things, the Authority had already contracted with the Metropolitan Transportation Commission to develop a ridership/revenue model with which to determine ridership and associated revenue (AR 781 *et seq.*, 2401 *et seq.*, 2642 *et seq.*), although that model had been criticized as unreliable. The Authority developed estimates of projected construction, operating, and maintenance expenses for its proposed system, although those estimates varied widely. (AR 741 *et seq.*, 2331 *et seq.*) It attempted, largely unsuccessfully, to obtain additional funding to build the system. (AR 3690 *et seq.* [U.S. Dept. of transportation, Federal Railroad Administration Cooperative Agreement]; *see also, e.g.*, AR 34 *et seq.*, AR 54 *et seq.*)

The nature of the Authority's project underwent major changes after it applied for and received High-Speed Intercity Passenger Rail Program funding, an element of the American Recovery and Reinvestment Act of 2009, (AR 40.) That funding ultimately amounted to $3.3 billion and focused, at the Federal Railroad Administration's insistence, on building an Initial Construction Section in the Central Valley. (AR 34.) In connection with this change, the Authority made arrangements with Amtrak to potentially provide conventional passenger rail service along an initial section in the Central Valley in the event it was forced to abandon a partly built system. (AR 72, 82, 113.)[7] It also continued working on completing environmental clearance for the system, although this proved an elusive goal.

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[6] The narrowness of the margin suggests that the assurances and protections provided in the legislation were important in obtaining the measure's passage.

[7] The Revised 2012 Business Plan (see below) further modified these plans to make interim conventional rail use of the ICS integral to the plan. (AR 1938, 1983, 1984.)

Among the environmental approvals and permits it would need were Corps of Engineers permits under the federal Rivers and Harbors and Clean Water Acts, Endangered Species Act permits or sign-offs from both the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife[8], and completing and obtaining certification for the project-level environmental documents under the California Environmental Quality Act and the National Environmental Policy Act. These were all important tasks, as Proposition 1A had promised the voters that the Authority would certify that it had already completed all these project level clearances when it submitted its funding plan for a corridor or usable segment. As will be shown, however, none of the required clearances had been obtained when the Funding Plan was prepared, approved, and submitted.

In 2011 the Authority prepared, and on November 3rd of that year approved, its initial[9] Funding Plan, along with a Draft 2012 Business Plan[10], which it proceeded to submit to the Director of Finance, the involved legislative committees, and the legislatively mandated[11] peer review group, purportedly in compliance with the provisions of Proposition 1A. (AR 54.) The Funding Plan purported to include all of the elements required by Proposition 1A, including specifically the five required certifications.

As will be shown here and in Part II of Plaintiffs' Trial Brief, many of these certifications were defective. While none of the Defendants, or the legislative committees with oversight responsibility, objected to the funding plan as being invalid (*See, e.g.*, Final Background Report – Joint Senate Hearing of May 15, 2012, Plaintiffs' Request for Judicial Notice, Part I, ¶3 and Exhibit H), the peer review group did raise serious concerns about whether it was appropriate to approve funding until some issues, including the adequacy of available funding, had been resolved. (AR 1919 *et seq.*) The Legislative Analyst's Office ("LAO") had issued a report earlier in 2011 raising concerns about the Authority and its proposed direction. ("High Speed

[8] Formerly the California Department of Fish and Game.

[9] Proposition 1A requires submission of two funding plans for each corridor or usable segment thereof for which bond funds are requested. One is to be submitted at least three months prior to requesting an appropriation. (Streets & Highways Code §2704.08 (c)(1); AR 10.) The second would be submitted and approved prior to the actual expenditure of bond funds. (Streets & Highways Code §2704.08 (d); AR 11.)

[10] The Draft 2012 Business Plan was attached to the Funding Plan and incorporated into it by reference.

[11] The peer review group was established by AB 3034 as Public Utilities Code §185035.

Rail is at a Critical Juncture," Plaintiffs Request for Judicial Notice, ¶1 and Exhibit A.) Following the release of the Funding Plan and Draft Business Plan, the LAO issued a follow-up report on both plans that pointed to deficiencies in failing to identify all sources of committed funds and not having completed project-level environmental clearances, with little likelihood of completing them prior to beginning construction. It is important to note that, because of these identified problems, the LAO recommended that the legislature not fund high-speed rail construction at that time, (Plaintiffs' Request for Judicial Notice[12], ¶1 and Exhibit B thereto at p. 7.)

The Funding Plan and the associated Draft 2012 Business Plan introduced some concepts that had not appeared in Proposition 1A. It proposed that the construction of the high-speed rail system would not only be phased (as Proposition 1A had allowed for) but would proceed by way of a "blended system", where part of the system would be true high-speed rail[13] and part would be upgraded conventional passenger rail. (AR 114 *et seq.*) It also put forward a new concept, the Initial Construction Section ("ICS"). (AR 112 et seq.) The ICS was to be a 130-mile long track section through the Central Valley from Merced to north of Bakersfield. It would not be electrified and might not, as initially built, have stations on it. In short, the ICS would not qualify as, and was not presented as, a usable segment as defined under Proposition 1A[14]. Rather, it would serve as a "jumping off point" for extension into a usable segment, either the Initial Operating Section – North ("IOS – North") or the Initial Operation Section – South ("IOS – South") and as a "test track" to try out the rolling stock for the new system[15]. (AR 35, 82, 84, 110, 112-113, 296.)

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[12] Plaintiffs' Request for judicial notice pertains to multiple causes of action in the Second Amended Complaint. In accordance with *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, the Request for Judicial Notice indicates which requests apply to which causes of action.

[13] "'High-speed train' means a passenger train capable of sustained revenue operating speeds of at least 200 miles per hour where conditions permit those speeds." (Streets & Highways Code §2704.01(d).) (AR 10.)

[14] Both the Funding Plan and the Draft 2012 Business Plan explicitly identified the usable segment, for Proposition 1A purposes, as either IOS – North or IOS – South. (AR 60, 110.)

[15] It is not clear how such testing could occur, given that the ICS would not include electrification.

III. THE REVISED 2012 BUSINESS PLAN AND THE LEGISLATIVE APPROPRIATION.

In April 2012, the Authority released and approved a Revised 2012 Business Plan. (AR 1931-2155.) The Revised 2012 Business Plan differed in several respects from the Draft Plan, particularly in focusing on the blended system as a viable system with a much lower cost than the full build-out envisaged in the Draft Plan. The Revised Business Plan also put forward the option of leaving the blended system as the final Phase I system configuration. (AR 1941, 1948, 1971 et seq.) However, the Authority made no revisions to its November 2011 Funding Plan. In May of 2012, the peer review group issued comments on the Revised 2012 business plan. (AR 3674 *et seq.*.) These comments acknowledged major improvements compared to the Draft 2012 Business Plan, but continued to identify major concerns, including the significant risk that completion of an Initial Operating Section might not be feasible due to a lack of sufficient funding. (*Id* at p. 3682.) Because of these concerns, the peer review group recommended that any legislative appropriation be conditioned on the Authority meeting specified conditions. (*Id.* at p.3684.) The peer review group explicitly disclaimed any opinion on whether the Authority's plans, as set forth in the Revised 2012 Business Plan, met the requirements of Proposition 1A. (*Id*.)

The LAO also released a supplemental report discussing the Authority's budget request. (Plaintiffs' Request for Judicial Notice, ¶1 and Exhibit C.) That report repeated the earlier reports' concerns about the adequacy of funding to complete a system, or even a usable segment. (Exhibit C to Plaintiffs' RJN at pp. 1, 5-6.)

At approximately the same time as the release of the Revised 2012 Business Plan, the California Director of Finance, presumably acting at the request of the Governor and of the Authority, initiated an appropriation request for bond funds to match the federal funds towards construction of the ICS. (Plaintiffs' Request for Judicial Notice, Part I, ¶2 and Exhibit D.) In spite of the concerns that had been raised by the peer review group and the LAO, in July 2012 the legislature, by the narrowest of margins[16], approved SB 1029, an appropriation bill that

[16] The vote in the state senate was 21 in favor, 16 against–the minimum required for passage. (Plaintiffs' Request for Judicial Notice, ¶3 and Exhibit I.)

appropriated $2.6 billion in bond funds to be used to match federal funds for the ICS. (AR 2784 *et seq.*, and specifically at p. 2793.)[17]

IV. HISTORY OF THE CASE.

This case was originally filed on November 14, 2011. A first amended complaint, adding a cause of action for traditional mandamus, was filed a month later, on December 13, 2011.

On January 19, 2012, Defendants demurred to the complaint. On June 15, 2012, the Court granted Defendants' demurrer with leave to amend. The Court found that Plaintiffs had standing for an action under Code of Civil Procedure §526a, but had not yet adequately shown an imminent threat of illegal expenditure, or that Defendants, other than the Authority, had any mandatory duty related to the expenditures. On July 6, 2012, the Plaintiffs filed their Second Amended Complaint, which included two causes of action for mandamus under Code of Civil Procedure §1085 for violations of portions of Streets & Highways Code §2704.08 as enacted by the voters as part of Proposition.1A. The complaint also included additional causes of action for mandamus under Code of Civil Procedure §1085 for violations of other mandatory statutory duties under provisions of AB 3034 as well as causes of action for injunctive and declaratory relief under Code of Civil Procedure §526a, based on violations of provisions of Proposition 1A and AB 3034. Defendants filed their answer to the Second Amended Complaint on July 20, 2012.

On September 20, 2012, based on inclusion of causes of action for mandamus, the Court granted Defendants' uncontested motion to assign the case to a single judge for all purposes. The case was assigned to Department 31. In a later telephonic case management conference, the Court determined to address the legal issues raised by Plaintiffs' complaint, including specifically those raised by the mandamus claims, through a hearing on May 31, 2013. At that point, if the Court deemed that the legal and/or factual issues merited further proceedings, it would schedule those proceedings under the claims for declaratory and/or injunctive relief. This brief, as the first part of Plaintiffs' trial brief, addresses the issues raised by the mandamus causes of action. Plaintiffs are also submitting a second trial brief section to address legal and factual issues raised by the injunctive and declaratory relief claims under §526a.

[17] The bill also allocated $3.2 billion in federal matching funds (*Id.* at p. 2792), as well as smaller amounts to other ancillary projects.

STANDARD OF REVIEW

Plaintiffs' causes of action for peremptory writ of mandate are brought under Code of Civil Procedure §1085. While that section applies to legislative determinations made by an agency, that is not the primary issue in this case. Rather, the Authority, and the other individuals/administrative agencies involved (i.e., the Governor, the Department of Finance, etc.), are charged with performing mandatory ministerial duties under the bond measure, Proposition 1A, passed by the voters as well as under AB 3034. Thus, the more usual "substantial evidence" and "abuse of discretion" standards do not apply, because when a duty is mandatory and ministerial, no discretion is involved. Rather, the court determines whether the agency/individual has violated that ministerial duty. (*Terminal Plaza Corp. v. City and County of San Francisco* (1986) 186 Cal.App.3d 814, 830-831.) That duty and its interpretation are also, in turn, determined by the court. "Under these circumstances, we independently judge the text of the statute while taking into account and respecting the agency's interpretation of its meaning." (*Matteo v. Department of Motor Vehicles* (2012) 209 Cal.App.4th 624, 630; *Yamaha Corp. of America v. State Bd. of Equalization ("Yamaha")* (1998) 19 Cal.4th 1, 7-8.)

The *Yamaha* court explained that, "The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other." (*Id*.) The court went on to note that the agency's interpretation, "may be helpful, enlightening, even convincing. It may sometimes be of little worth." (*Id*.) When the interpretation is the product of a formal quasi-legislative process such as rulemaking, it should be given great deference. (*Id*.) However, "ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum." (*Id.*)

The degree of deference given to an agency's interpretation of language is even less when the language is contained in a voter-approved bond measure. As the courts have generally noted, the court's role is to ascertain the intent of the voters who enacted the measure so that the construction best effectuates the purpose of the law. (*Shaw v. People Ex Rel. Chiang* (3rd Dist, 2009) 175 Cal.App.4th 577, 604; *accord, Professional Engineers in Cal. Government v. Kempton ("PECG")* (2007) 40 Cal.4th 1016, 1037.

A closer look at *Shaw* is helpful in understanding the appropriate standard. In that case, the state's voters had approved a bond initiative (Proposition 116) authorizing $2 billion in

general obligation bonds to fund primarily passenger and commuter rail infrastructure. (Shaw, supra, 175 Cal.App.4th at 588.) The measure identified numerous elements of passenger and commuter rail infrastructure that could be financed with its proceeds, as well as other elements of the state's public transit systems. (*Id.*) The measure also designated the state's Public Transportation Account ("PTA") as a trust account, with its funds restricted only for transportation planning and mass transportation purposes, as specified by the legislature. The legislature was allowed to amend the measure by a 2/3 vote of both houses, so long as the amendment was consistent with and furthered the measure's purposes. (*Id.* at 589.)

Subsequently, the legislature enacted several laws that redirected money that would otherwise have been deposited, pursuant to Proposition 116, into the PTA. Instead, that money was transferred into a new Mass Transportation Fund ("MTF"), whose allowable uses were considerably broader that those of the PTA. Some of that money was used to pay for debt service, not only on Proposition 116 bonds, but also on prior bond measures not devoted to public transit. In addition, the legislature appropriated PTA funds for several other uses that involved transit, but not public transit (e.g., school buses, transport of disabled persons).

As the court noted, while the legislature has both the right and duty to enact budget bills, "The courts have the responsibility for determining the constitutionality of acts of the Legislature, and in doing so to give effect to the will of the electorate which is, of course, paramount." (*Id*. at p.596 [quoting *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1218].) Further, in construing the language of a voter-approved measure,

> Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language. (*Id.* at p.598 [quoting from PECG, *supra*, 40 Cal.4th at 1037].)

Only if the intent of the voters is not evident from the plain language of the measure may the court resort to the various allowable aids to statutory construction, including the legislative history of the provision and the various canons of statutory construction. (*People v. Briceno* (2004) 34 Cal.4th 451, 459.)

ARGUMENT

I. WHEN THE VOTERS APPROVE A BOND MEASURE, ITS PROVISIONS MUST BE FOLLOWED PRECISELY, AND ARE NOT SUBJECT TO CHANGE OTHER THAN BY RETURNING TO THE VOTERS FOR APPROVAL OF THOSE CHANGES.

Article XVI §1 of the California Constitution requires that any measure creating bonded debt for the state be approved first by a 2/3 vote of both houses of the legislature and then by a majority of the state's voters in a general or direct primary election. When such a measure is placed on the ballot and approved, it forms something akin to, if not an actual contract between the public entity and the voters. (*Associated Students of North Peralta Comm. College v. Bd. of Trustees* (1979) 92 Cal.App.3d 672, 676-677; *O'Farrell v. Sonoma County et al*. (1922) 189 Cal. 343, 348; *Peery v. City of Los Angeles* (1922) 187 Cal. 753, 767.) Whether the approval results in a contract or not, the effect is that the measure placed before and approved by the voters must be carried out *exactly as it was presented*. (*O'Farrell, supra,* 189 Cal. at 348; *Peery, supra,* 187 Cal. at 768; *Shaw, supra*, 175 Cal.App.4th at 596.)

Two cases demonstrate the specificity of that requirement. In *O'Farrell, supra*, the Sonoma County Board of Supervisors placed on the ballot a bond measure to construct a roadway between Sebastopol and Freestone, along a specified route for a distance of 4.0 miles with the cost being set at $85,000.00. (*Id.* at 345.) After the measure was passed, the county surveyor filed plans and specifications for a portion of the road, amounting to 1.93 miles, with an estimated cost of $81,500.00. No plans or specifications, however, were filed for the remaining 2.07 miles of the proposed road. (*Id.* at 346.) It was obvious that the unbuilt portion of the road could not be completed with the small amount of money remaining. The plaintiff sued, alleging that the County was violating the bond measure.

The County's defense is that it had the discretion to expend the bond funds on any portion of the roadway it felt proper. The trial court granted the County's demurrer and dismissed the case. The California Supreme Court disagreed[18]:

[18] The court of appeal had previously reversed the demurrer, but the California Supreme Court granted review. After briefing and hearing, it adopted the Court of Appeal's decision *in toto* as its own.

> When the defendant board was contemplating a bond issue in the 16th day of April 1919, it had the statutory right to make its order just as broad and just as narrow, and just as specific as it was willing to be bound by, so long as the provisions of the statute were complied with. At that time, it could have asked generally for the consent of the electors to issue bonds in the sum of $1,640,000, for constructing roads in Sonoma County, but it did not do so; on the contrary, it specified road by road, name by name, and length by length of each piece of road that was to be constructed. … …When, thereafter, pursuant to that order, the defendant board published a notice to the electors in exact accord with its order, every elector had the right to assume that the statement contained in the order to the effect that a road would be constructed from Sebastopol to Freestone meant the entire distance between those two points – not one end, or the other end, or any part or portion, but the whole. (*Id.* at 347-348.)

The Court went on to state that:

> The order calling the election and the ratification of that order by the electors constituted a contract between the state and the individuals whose property was thereby affected. () After the contract had been made, it could not be altered by one of the parties, only, but by all of the parties thereto. (*Id.*[citation omitted])

Needless to say, the Court reversed the demurrer and ordered the case heard on its merits.

Of similar import was the case *Jenkins v. Williams* (1910) 14 Cal.App. 89. In that case, Sacramento County had proposed a bond measure to fund a variety of building projects, including construction and repair of several bridges. The measure then went on to identify thirty specific bridges and the amount to be spent on each bridge. (*Id.* at 91-92.) The Board set the election and the voters approved the measure. After construction was completed, it turned out there was $503.16 surplus in the account for repairing the Mormon Island Bridge.[19] (*Id.* at 93.)

The Board of Supervisors also ordered repairs on the 12th Street American River Bridge. However, the bond measure had only allocated $5000.00 for that bridge, and repairs amounted to more than that. The Board then ordered paying the remainder from the $503.16 remaining from the Mormon Island Bridge repair. The county auditor refused, and the construction company sued to force the payment. The trial court ruled in favor of the contractor, but the court of appeal reversed.

The contractor argued that although the bond measure had allocated specific amounts for specific bridges, the Board of Supervisors retained the discretion to modify those amounts in accordance with the County's needs. (*Id.* at 94-95.) The court disagreed.

[19] Much more money remained in the overall bridge account, but some bridge work had not yet been completed.

> The electors were notified that they would be called upon to vote "Yes" or "No" upon the proposition to bond the county for that amount to be used as it was ordered by the board it should be used to construct 30 different and specifically named bridges, the amount to be expended on each bridge being specifically mentioned, and the electors did not authorize, and certainly did not intend to authorize, the bonding of the county to such an extent as to leave it discretionary with the board to expend the entire amount on one bridge and wherever the board might elect. (*Id.* at 95.)

Both these cases, and many others that followed, (*see, e.g., Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 694-695 [legislative appropriation of bond money for purposed not included in the bond measure violated the measure]; *Hayward Area Planning Assn. v. Alameda County Transportation Authority* (1999) 72 Cal.App.4th 95, 99 [voter-approved sales tax measure's definitions of projects could not be changed without going through amendment process called for in the measure]) provide the same lesson. In placing a measure on the ballot, the government entity has discretion in deciding how general or specific it is to be. However, once it has been placed on the ballot and approved by the voters, the entity is strictly limited in its discretion. It is bound by what it promised the voters. It may not change any of those promises without going back to the voters for their assent to the change.

II. PROPOSITION 1A REQUIRES THE AUTHORITY TO DESIGNATE IN ITS DETAILED FUNDING PLAN A "CORRIDOR OR USABLE SEGMENT THEREOF" FOR WHICH BOND FUNDING IS TO BE REQUESTED.

Streets and Highways Code §2704.08[20], enacted by Proposition 1A, specifies various conditions on the use of the approved bond funds towards construction of the high-speed rail system contemplated by the measure. In particular, subsection (c)(1) requires that, no less than 90 days prior to submitting to the legislature and the governor an initial request to appropriate bond proceeds towards capital costs of a corridor or usable segment thereof, the Authority approve and submit to the Director of Finance, the peer review group, and the legislative policy committees involved, a "detailed funding plan" for that corridor or usable segment thereof.

§2704.01(g) defines a "usable segment" as a portion of a corridor that includes at least two stations, and §2704.01(f) defines a corridor as a portion of the overall high-speed rail system connecting the San Francisco Transbay terminal to Los Angeles Union Station and Anaheim and linking the state's major population centers. In addition, §2704.08 (c)(2)(H) requires that the

[20] Unless otherwise indicated, all further statutory references are to the Street and Highways Code.

Authority certify that the corridor or usable segment proposed for construction with bond funds would be suitable and ready for high-speed train operation – i.e., would have appropriate right of way, trackage, geometry, signaling, and electrification to allow its use for high-speed trains as defined in §2704.01(d).

III. THE AUTHORITY'S FUNDING PLAN PROPOSED TWO ALTERNATIVE USABLE SEGMENTS, AND THE REVISED 2012 BUSINESS PLAN SPECIFIED THE USABLE SEGMENT AS THE INITIAL OPERATING SYSTEM – SOUTH.

As required by Proposition 1A, the Authority's November 2011 Funding Plan proposed a usable segment for use of Proposition 1A bond measure proceeds. Actually, it proposed two usable segments – both starting in the Central Valley – with one heading north to San Jose, the Initial Operating Section – North ("IOS-N") and the other, the Initial Operating Section – South ("IOS-S) heading south to the San Fernando Valley. The Funding Plan proposed that the two segments would be constructed sequentially – first one, and then the other – but did not identify which would be built first. (AR 60.) It is questionable whether Proposition 1A allowed the Funding Plan to specify two operating segments, but the Revised 2012 Business Plan resolved the ambiguity by identifying IOS-S as the first usable segment for which bond funds were being requested. (AR 1948.) This then, a segment extending from Merced to the San Fernando Valley,[21] would be the usable segment where the Authority proposed initial use of bond measure funds.

IV. PROPOSITION IA REQUIRES THE AUTHORITY TO MAKE SEVERAL SPECIFIC CERTIFICATIONS AS PART OF ITS FUNDING PLAN.

The bond measure placed on the ballot as Proposition 1A included numerous specific requirements. Some of these needed to be satisfied by the final high-speed rail system (e.g., the requirement that the system be able to provide nonstop service between Los Angeles and San Francisco with a travel time no greater than two hours, 40 minutes - §2704.09(b)(1)). Others, however were required to be met at the time the Authority approved its initial funding plan under §2704.08 (c). In particular, Proposition 1A required that the Authority make several certifications in that funding plan:

[21] Neither the Funding Plan nor the Revised 2012 Business Plan specified an exact southern terminus for IOS-S, but it would be a station beyond Palmdale within that region. The Business Plan identified Sylmar, Burbank, and Santa Clarita as possible termini. (AR 117.)

- That the construction of the corridor or usable segment could be completed as proposed in the plan; [§2704.08 (c)(2)(G)]
- That the corridor or usable segment thereof would be suitable and ready for high-speed train operation; [§2704.08 (c)(2)(H)]
- That one or more passenger service providers could begin using the tracks or stations for passenger train service; [§2704.08 (c)(2)(I)]
- That the planned passenger service by the Authority in the corridor or usable segment thereof would not require a local, state, or federal operating subsidy; [§2704.08 (c)(2)(J)], and,
- That the Authority had completed all necessary project level environmental clearances necessary to proceed to construction. §2704.08 (c)(2)(K)]

It should be noted, as is explained in the various bond measure cases, that the Authority and the legislature had full discretion in deciding how specific and stringent to make the bond measure they placed on the ballot.

> When the defendant board was contemplating a bond issue on the 16th day of April, 1919, it had the statutory right to make its order just as broad and just as narrow, and just as specific as it was willing to be bound by, so long as the provisions of the statute were complied with. (*O'Farrell, supra*, 189 Cal. At 347.)

However, once the measure was put on the ballot and approved by the voters, the Authority was required, in order to use the funds the measure offered, to fully and exactly meet every requirement that the measure set. Some of the issues involved were not yet ripe at the time the Funding Plan was approved. Those issues will be dealt with in the companion brief section discussing the Code of Civil Procedure §526a injunctive and declaratory relief actions. This brief section will discuss those duties that ripened for the Authority at the time of the Funding Plan approval and for the other defendants when the legislative appropriation was approved and signed by the governor.

V. THE AUTHORITY'S NOVEMBER 2011 FUNDING PLAN WAS IMPROPERLY APPROVED AND SUBMITTED BECAUSE IT VIOLATED VOTER-APPROVED PROVISIONS OF PROPOSITION 1A.

As explained in Sections I and IV supra, Proposition 1A requires the Authority, at least 90 days prior to requesting a legislative appropriate of the measure's bond funds, to approve and

submit a detailed funding plan for the corridor or usable segment for which funds are requested. In November 2011, the Authority approved and submitted a document entitled, "Funding Plan" (AR 57 *et seq.*) which purported to satisfy the requirements of Proposition 1A. The Funding Plan included five certifications (AR 71-72) that claimed to satisfy the certification requirement in Proposition 1A. They do not. As will be shown[22], several of the certifications were invalid and did not meet the requirements of Proposition 1A. For that reason, the Funding Plan itself, and all actions taken in reliance on the Funding Plan, are invalid and must be ordered rescinded.

A. THE AUTHORITY'S CERTIFICATION OF ENVIRONMENTAL CLEARANCE FOR IOS-SOUTH WAS INVALID UNDER PROPOSITION 1A.

The Funding Plan included a certification purporting to satisfy the requirement for environmental clearance under Proposition 1A. That requirement is provided below:

> (K) The authority has completed all necessary project level environmental clearances necessary to proceed to construction. [*sic*] (AR 11.)

However, in its Funding Plan, the Authority instead made the following certification:

> ***In connection with the Initial Construction Section***, the Authority ***will have***, prior to expending Bond Act proceeds requested in connection with this Funding Plan, completed all necessary project level environmental clearances necessary to proceed to construction. (AR 72 [emphasis added].)

This certification did not conform to the requirements of Proposition 1A. Plaintiffs assert that it violated those requirements in two important ways: 1) The Authority's certification pertained only to the ICS, while Proposition 1A required that the Funding Plan and associated certifications pertain to the entire corridor or usable segment thereof for which bond funding was to be requested; 2) The Authority's "certification" was made in the future tense, while Proposition 1A required that the environmental clearance already be completed at the time the certification was made. These two violations are discussed in detail below.

[22] Two of the certifications are discussed in this brief section. The remaining certification violations only became fully evident after the administrative record had closed on the Code of Civil Procedure §1085 mandamus causes of action. They are discussed in the accompanying brief section on the Code of Civil Procedure §526a causes of action.

1. *THE AUTHORITY'S CERTIFICATION OF ENVIRONMENTAL CLEARANCE DID NOT ADDRESS CLEARANCE FOR THE CORRIDOR OR USABLE SEGMENT THEREOF PROPOSED FOR CONSTRUCTION, AS REQUIRED BY PROPOSITION 1A.*

As noted, Proposition 1A required that the Authority submit a detailed funding plan for the corridor or usable segment thereof for which it intended to request an appropriation of bond funding. (AR 11; §2704.08 (c)(1).) That funding plan was required to include the certification of environmental clearance. The Authority's Funding Plan's certification, by contrast, only referenced the ICS, a term not included anywhere in Proposition 1A. The ICS, as defined in the Funding Plan and its associated Draft 2012 Business Plan, included only a portion of the two usable segments (IOS-North and IOS-South) identified in the Funding Plan. Further, as described in the Draft 2012 Business Plan (AR 112-113), the ICS would not qualify as a usable segment under Proposition 1A. It was not planned to include station construction[23] and would not be electrified. In short, it would not be ready for passenger service, either high-speed rail or otherwise, without additional improvements and modifications[24]. Indeed, even if it were designed and constructed to be usable for high-speed rail operations, senior Authority staff member Hans van Winkle made it clear at the Authority's July 14, 2011 Board meeting that its ridership would be insufficient to break even, so that it would require an operating subsidy, in violation of the requirements of Proposition 1A. (Plaintiffs' Request for Judicial Notice, Part II, Exhibit 45 at 4:20:00.)[25] As noted earlier, the Federal Railroad Administration had insisted on an ICS located in the Central Valley as a condition for the Authority qualifying for $3 billion in federal funding under the American Recovery and Reinvestment Act. In addition to funding, this would result in associated job generation, something that, during a severe recession, was very popular. (AR 266-267, 2122-2123.) However, that funding would require state matching funds (see text box at AR 112). Thus, the Authority proposed to use $2.7 billion dollars of Proposition 1A bond funds on the ICS.

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[23] The Revised 2012 Business Plan was ambiguous about it including stations. (See, AR 1972 [showing two stations within the ICS, but not indicating when they would be constructed].)

[24] The Draft 2012 Business Plan discussed this as an option, "Should continued progress on the lOS be substantially delayed." (AR 113.) The Revised 2012 Business Plan indicated an intention to connect the ICS to Amtrak's San Joaquin route operations. (AR 1983, 1984.) However, this was not included in the Funding Plan.

[25] This was later confirmed by the Authority's Board Chair, Dan Richard, at a March 13, 2012 special Senate hearing on High-Speed Rail. Plaintiffs' Request for Judicial Notice, Pt. II, Exhibit 131.

Requiring prior completion of environmental clearance for the entire corridor or usable segment proposed for construction makes good sense in terms of Proposition 1A's intended protections for taxpayer funds. If clearances had not yet been obtained, or had not been obtained for the full corridor or usable segment, there could be extended delays before or during construction while environmental clearance was completed for the full corridor or usable segment being funded. By requiring all environmental clearances to have been completed before bond funds were requested, the voters intended that once bond funds had been committed, construction of the full corridor or usable segment would proceed expeditiously and without undue delay. This was especially important given the legislature's intent, as stated in Section 8(f) of AB 3034 (AR 20), that the entire high-speed rail system be completed no later than 2020.

Because the ICS is not a usable segment, the Authority's Funding Plan could not certify that all project-level environmental clearances had been obtained for the corridor or usable segment thereof, as required under Proposition 1A.[26] Instead, the Authority's certification only addressed proceeding to construction of the ICS. In doing so, the Authority failed to comply with the requirements of Proposition 1A, making both the certification and the Funding Plan improper and inval*id.*

2. THE AUTHORITY'S CERTIFICATION WAS IMPROPER BECAUSE IT ATTEMPTED TO CERTIFY PROJECTED FUTURE ACTIONS.

A second problem with the Authority's certification of environmental clearance is that §2704.08(c)(2)(K) requires that the Authority certify that all necessary project level environmental clearances had been completed at the point when the funding plan was approved and submitted. Instead, the Authority's certification states that all project level environmental clearance for the ICS will have been completed <u>prior to expending the requested bond act proceeds</u>. (AR 72.) Indeed, the certification goes on to state that even for the ICS, as of November 2011, when the Funding Plan was approved and submitted:

> The draft environmental impact reports/environmental impact statements for the Merced to Fresno and Fresno to Bakersfield segments were released for public comment on August 9, 2011. Public comment closed on October 13, 2011. The

[26] Subsection (c)(2)(K), requiring the certification, does not explicitly mention the corridor or usable segment thereof. However, given that the certification is to be made in connection with a "detailed funding plan for <u>that</u> corridor or usable segment thereof" (§2704.08 (c)(1) [emphasis added], the requirement is understood, as well as being the only reasonable interpretation.

> revised draft environmental impact reports/environmental impact statements for the Fresno to Bakersfield segment will be reissued in spring of 2012 for further public comment. (*Id.*)

Thus, the Funding Plan itself acknowledged that even in regard to the ICS, project-level environmental clearance had not been obtained as of the date the Funding Plan was approved and submitted. Yet Proposition 1A's language is clear and unambiguous: "The authority has completed all necessary project level environmental clearances necessary to proceed to construction." If the Authority was not yet able to make that specific certification, which it clearly was not in November 2011, and was still not in July 2012 when the appropriation was approved[27], it was clearly premature and improper for the Authority to attempt to approve and submit a Funding Plan and represent that it had satisfied the requirements of Proposition 1A.

The Authority may argue that it was justified in making an alternative certification, that by the time it began to expend bond measure funds, it would have completed all project-level environmental clearances needed to commence construction. However, not only is that not what the clear language of the measure required, it also required the Authority to see into the future – something that is commonly accepted to be impossible. While the Authority could expect to have completed environmental clearances at some future time, and could perhaps even promise to complete environmental clearances[28], the Authority could not possibly certify that environmental clearances would be completed by an as-yet unknown future date.

Further, such a certification would run counter to the voters' intent in approving this requirement. As already explained, the certification of environmental clearance was part of a package of taxpayer protections that the legislature incorporated into Proposition 1A to reassure the voters that the bond funds would be spent prudently and not wasted. By requiring that the Funding Plan not be submitted until the Authority could certify it had already completed all necessary project level environmental clearances, the legislature, and more importantly the voters, could be assured that bond funds would not be requested or appropriated prematurely, and perhaps wasted in constructing part of a segment when environmental clearance of the full

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[27] And, as will be shown in the brief section being submitted for the Code of Civil Procedure §526a causes of action, the Authority is still unable to certify as of the current date.

[28] Although the case law would indicate that the Board could not bind a future Board in this manner. (*See, City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 929 [no legislative board, by normal legislative enactment, may divest itself or future boards of the power to enact legislation within its competence].)

segment turned out to be impossible.[29] This, however, is precisely the situation the Authority could face due to its defective certification. The Court must therefore reject the certification, and the Funding Plan, as not meeting the requirements of Proposition 1A.

B. THE AUTHORITY IMPROPERLY CERTIFIED THAT IT COULD COMPLETE THE DESIGNATED USABLE SEGMENT AS PROPOSED IN THE FUNDING PLAN.

A second important required certification was that the Authority would be able to complete the construction of the corridor or usable segment thereof as proposed in the Funding Plan. This required not only that the Authority be able to certify that construction of the proposed corridor or usable segment was technically feasible, but, at least as important, that it be financially feasible. Put another way, the certification required the Authority to confirm that sufficient funding would be available, even if not already in-hand, to cover the full expected cost of constructing the corridor or usable segment.[30] This responded to the Governor's concerns as expressed in his 2008 budget message that the Authority, "…provides assurance that all funding needed to provide service on that portion of the system is secured." (Plaintiffs' Request for Judicial Notice 4 and Exhibit J, at 28.)

[29] For example, it might turn out that part of the segment crossed habitat for an endangered species, invoking the federal Endangered Species Act and prohibiting the granting of required federal permits. (*See, e.g., Tennessee Valley Authority v. Hill* (1978) 437 U.S. 153 [construction of nearly-completed dam halted because it would jeopardize protected snail darter fish].) This should not be considered merely a theoretical threat. The environmental review process has already identified significant environmental challenges requiring significant alignment changes. (*See, e.g., Town of Atherton et al. v. California High-Speed Rail Authority*, Sacramento County Superior Court Case #34-2008-80000022 (2009) [Authority required to revise EIR to address inability to use Union Pacific Railroad right of way]; AR 286 [alignment modifications required to avoid adverse impacts on protected species and habitat].)

[30] Prior to actual expenditure of bond funds, two further reports are required: 1) a revised funding plan containing similar information to the initial funding plan and explaining any changes from the previous plan and 2) an report prepared by an independent financial expert validating certifications made by the Authority in the initial funding plan. The revised funding plan is required to be reviewed and approved by the Director of Finance. (§2704.08 (d).)

1. THE AUTHORITY, WHEN IT APPROVED THE FUNDING PLAN AND WHEN IT REQUESTED APPROPRIATION OF BOND FUNDS, HAD NEITHER AVAILABLE FUNDS NOR RELIABLY PREDICTABLE FUNDING TO COMPLETE AN IOS AS PROPOSED.

Among the elements required to be identified in the funding plan is the estimated full cost of constructing the corridor or usable segment thereof, including an estimate of cost escalation and appropriate reserves for contingencies. (§2704.08(c)(2)(C).) The Authority's November 2011 Funding Plan did indeed identify such an estimated cost. That cost amounted to $26.6 billion in 2010 dollars, or $33.2 billion in year of expenditure dollars, including both allocated and unallocated contingencies, as well as costs for initial rolling stock and pre-operating testing and commissioning. (AR 64.)

The funding plan was also required to identify the sources of all funds to be invested in the corridor or usable segment thereof, along with their anticipated time of receipt based on expected commitments, authorizations, agreements, allocations, or other means. (§2704.08 (c)(2)(D).) The Funding Plan identified the funds required to build the ICS, including Proposition 1A bond measure funds and federal ARRA funds, with a total amount of $6 billion. (AR 65-66.) However, the Funding Plan identified no other reasonably reliable funding sources for constructing the remainder of an IOS, the usable segment identified in the Funding Plan. (*Id.*)

The Funding Plan does reference the Draft 2012 Business Plan for "potential" future funding sources, along with the timing for "future funding needs" to construct a usable segment. (AR 67.) The Draft 2012 Business Plan, in turn, discusses a "phased implementation" of the high-speed rail system, including an IOS. It analogizes construction of the high-speed rail system to the construction of Interstate Highway 5, which took from 1947 to 1979 to complete. (AR 128-129.) Of course, this ignores Section 8(f) of AB 3034, which indicates the legislature's intent that the full system (both Phases I and II) be completed by 2020. By contrast, the Draft 2012 Business Plan indicates that an IOS would only become operational in 2022, with a "blended" system[31] available by 2027 and a full Phase I system (not including Sacramento and San Diego) by 2034. (AR 150-151.)

[31] The blended system would mix high-speed operations in the Central Valley with conventional rail portions in the "bookends" between San Jose and San Francisco and between the San Fernando Valley and Los Angeles. (AR 2137.)

When it came to funding and financing, however, the Draft 2012 Business Plan acknowledges that all of the funding for construction of an IOS would have to be public. (AR 201.) The Draft 2012 Business Plan identified Prop. 1A bond funds and ARRA federal funds as the sources for the ICS. Going beyond that to an IOS, however, was pure speculation[32]. Three main potential sources are identified: additional federal funding, Proposition 1A bond funds, and "local funding sources". (AR 202.) The Business Plan conceded that, "Committed funding for this future period is not fully identified." This was, to say the least, an understatement.

The Business Plan suggested by analogy with other past projects that federal funds would support 80% of the construction costs for constructing an IOS. (AR 225.) However, no specific commitments are identified. At the time of the Funding Plan's approval[33], prospects for additional federal funding appeared dim, as the Republican majority in the House of Representatives had made clear that it did not consider that California's high-speed rail project merited any additional federal funds. To be blunt, the funding sources for the completion of an IOS amounted to little more than pipedreams, and certainly not the reliable source of funds required by §2704.08 (d)(1)(B): "[funding plan that …] identifies the sources of all funds to be used and anticipates time of receipt thereof based on offered commitments by private parties, and authorizations, allocations, or other assurances received from governmental agencies." (See also, LAO Report for 2012-13 Budget – Funding Requests for High-Speed Rail, Exhibit C to Plaintiffs' Request for Judicial Notice at pp. 7-8.)

Given the considerable cost of completing IOS – South, the usable segment that the Authority has now identified for its initial request for Proposition 1A bond measure funds[34], the onus was on the Authority to demonstrate an ability to provide sufficient funds to successfully complete construction of that segment. As of November 2011, and even in April 2012 when the Authority released it Revised 2012 Business Plan, there was little if any evidence that the Authority could point to showing available funding beyond the Proposition 1A bond funds (which may not provide more than 50% of the funding for any segment. (§2704.08 (a)) and the funding already identified for the ICS.

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[32] That section is entitled, "Completing an IOS – known and potential funding sources."

[33] This situation also continues up to the present day.

[34] Or, for that matter, IOS-North, the other potential usable segment identified in the Funding Plan.

2. WITHOUT IDENTIFIED ADEQUATE FUNDING, THE AUTHORITY COULD NOT PROPERLY MAKE THE REQUIRED CERTIFICATION.

With the high projected cost ($26.6 billion) of IOS – South[35], the current proposed usable segment, and the scant $6 billion [including Proposition 1A bond funds] proposed for the ICS, the Authority did not and could not identify the funds needed to complete construction of the proposed usable segment, IOS – South (or, for that matter, in the alternative, IOS – North). Committed funding represented less than 20% of the total year-of-expenditure project cost. This is precisely the scenario that the Governor warned of in his budget message (*supra*) and which Proposition 1A was intended to prevent. Even assuming a maximum commitment of $9 billion in Proposition 1A bond funds and the full $3 billion in committed federal ARRA funds, there still remains a gap of more than $12-14 billion for which no identified source had or has been found.[36]

As with the certification of environmental clearance, the Authority's "certification" depended upon speculation about unpredictable future events; in this case, identifying sources for and receiving approval for funds to cover over half of the construction costs for the usable segment. As noted, the purpose underlying the five required certifications in Proposition 1A was to assure the voters, the taxpayers, and the governor that the bond proceeds would be protected against the risk of being wasted on construction of a useless partially-completed project. Yet, the Authority's speculative and unsupported certification leaves this a very real possibility, directly contrary to the voters' intent and to the specific requirements of the proposition. Under these circumstances, it was improper for the Authority to make the unsubstantiated certification that it would be able to complete the usable segment as proposed in the Funding Plan.

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[35] The expected cost to complete IOS – North, the other alternative usable segment identified in the Funding Plan, were comparably high - $24.6 billion in 2010 dollars. (AR 64.)

[36] The Revised 2012 Business Plan suggested that cap and trade funds obtained through AB 32 could be used as "backstop" funding to complete the IOS. (AR 1938.) This proposal was not, however, part of either the Funding Plan or the Draft 2012 Business Plan incorporated by reference into the Funding Plan. Further, the analysis by the LAO calls into serious question whether such funding would even be legal, given the legal constraints on the use of those funds. (Exhibit C to Plaintiffs Request for Judicial Notice Pt. 1 at p.8.) At any rate, they certainly cannot be called a secure or reliable funding source.

VI. THE REMAINING DEFENDANTS VIOLATED THE PROVISIONS OF PROPOSITION 1A BY ALLOWING THE APPROPRIATION OF BOND FUNDS BASED ON AN INVALID FUNDING PLAN AND INVALID CERTIFICATIONS.

While the protective provisions of Proposition 1A were aimed primarily at the Authority, they also encompassed the other defendants, all of whom played a role in allowing the appropriation of Proposition 1A bond funds to occur. As CEO of the Authority, Mr. Morales[37] had overall responsibility for what was presented to its Board, as well as responsibility for submitting the approved Funding Plan and the request for an appropriation of bond funds. He violated those responsibilities by presenting to the Board a funding plan with improper and unsupported certifications, submitting the approved, but defective, funding plan to those required under Proposition 1A to receive it, and then submitting a request for a legislative appropriation of bond funds.

Governor Jerry Brown, as head of the executive branch of California state government had a duty to administer the laws of the state. (Government Code §11150) More specifically, he, as did the other defendants, had a sworn duty to uphold the California Constitution and all of its provisions, including Article XVI §1. (California Constitution, Article XX §3.) As already explained, California law requires precise adherence to the terms of a bond measure that has been approved by the voters, and requires that any change in those terms, unless specifically allowed by the measure itself, may only be made by a subsequent modification to the measure and its approval by the voters. (*See, e.g., Shaw, supra*.)

By accepting and not repudiating the Funding Plan improperly approved by the Authority, and by allowing, and in the governor's case signing, the appropriation measure based on that invalid Funding Plan, the governor, and all of the named defendants, violated their duties as public officials.

[37] Mr. Morales, and the other individuals named as defendants, is sued in his official capacity, and his liability is based on the liabilities accruing against his office, not against him personally. In fact, Mr. Morales had not yet assumed his position when most of the violations occurred. (See, e.g., AR 54 [staff memo recommending approval of the Funding Plan, submitted by then-CEO Roelof van Ark].)

VII. A WRIT SHOULD ISSUE REQUIRING THE AUTHORITY TO RESCIND ITS APPROVAL OF THE FUNDING PLAN, AND REQUIRING DEFENDANTS TO RESCIND ANY ACTIONS THEY HAVE TAKEN IN RELIANCE ON THAT APPROVAL.

Under Code of Civil Procedure §1085, when a clear, present, ministerial duty exists in a public official or agency, the court may issue a writ of mandate ordering the official/agency to perform that duty. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 339-340; *see also*, *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 863, 868-869 [traditional mandamus relief available when government agency violates a mandatory statutory duty].) The form of relief depends on the nature of the act or acts necessary to comply with the mandatory duty. The writ may require the agency/official to complete an action which it/(s)he failed to perform, or may order the agency/official to rescind one or more actions that were performed improperly and in violation of a ministerial duty and remand the matter for the agency/official to determine, in their discretion, how best to properly perform their duty.

In this case, it is indisputable that the Authority violated the requirements of Proposition 1A in approving and submitting the Funding Plan. Consequently, the Court's writ should order the Authority to rescind its approval of that plan and remand the matter to the Authority with direction to proceed in accordance with the requirements of Proposition 1A. The writ should also command the Authority to rescind any subsequent approvals, including specifically, requests for proposals and contract approvals that it may have made or issued in reliance on the approved and submitted Funding Plan, or on the legislative appropriation improperly approved in reliance upon that Funding Plan.

Likewise, the other Defendants should be commanded to rescind any approvals they may have granted or issued in improper reliance upon the defective Funding Plan. They should also be commanded to take any further actions on these matters in full accordance with the requirements contained in Proposition 1A.

CONCLUSION

The voters of the State of California approved Proposition 1A. This indicated approval of expending public funds through a bond issue to help fund the state's high-speed rail project. By the same token, however, the approval of Proposition 1A set clear requirements on allowing bond funds to be appropriated or expended. Following those requirements is a mandatory and ministerial duty for the involved government agencies and officials. It is up to the courts to

ensure that such mandatory duties are followed, particularly when they have been determined by the voters. For all the above reasons, Plaintiffs respectfully request that their motion be granted through the Court's issuance of its writ of mandate.

Dated:

Respectfully submitted,

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