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August 8, 2016

California State Senate Transportation
and Housing Committee
State Capitol, Room 2209
Sacramento, CA 95814
Attn. Mr. Manny Leon

Re: Assembly Bill 1889 (Mullin)--OPPOSE

Dear Mr. Leon:

I am writing on behalf of the Transportation Solutions Defense and Education Fund, the California Rail Foundation, and the Community Coalition on High Speed Rail to follow up on my earlier letter to the Committee of June 25, 2016 (copy attached) opposing the above-referenced bill. As you know, AB 1889 was passed out of your committee. The Senate Appropriations Committee temporarily placed it in the suspense file. In the meantime, however, the bill has been extensively rewritten. My understanding is that the amended bill will shortly be reconsidered by the Appropriations Committee, and will likely be approved. It will then go directly to the Senate floor.

In my earlier letter, I pointed out that AB 1889, as then written, would violate the California Constitution. The bill's author apparently took those comments to heart, as the new amendments address my earlier objection. Unfortunately however, the substitute language included in the re-amended bill is equally objectionable.

The bill continues to address provisions of Proposition 1A, the Safe, Reliable High-Speed Passenger Train Bond Act, approved by California voters in November 2008. Both the earlier and re-amended bill address Streets & Highways Code §2704.08 (d), which requires that before bond funds are used by the California High-Speed Rail Authority ("Authority") for construction of a "corridor or usable segment thereof" of its high-speed rail system, that corridor or segment must be found "suitable and ready for high-speed train operation."

The earlier version of the bill attempted to make the Authority's determination that the corridor or segment met that requirement "conclusive," meaning that it could not be modified or challenged, either by other parties (such as the independent financial consultant whose analysis is mandated under §2704.08(d)), or by the courts. My letter pointed out that this would materially change the statutory scheme approved by the voters. By making that change without its approval by the voters, the bill would have violated Article 16 §1 of the California Constitution.

The amended bill now, instead, attempts to redefine, or in its language "clarify" the meaning of "suitable and ready for high-speed train operation." However, it is a long-standing rule of statutory construction that a statute's meaning is determined by the intent of the legislative body when it adopted it. That rule applies equally to voter-approved measures, in which case the intent is the intent of the voters. (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) This is particularly true with bond measures, which have often been portrayed as analogous to a contract between the voters and the

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government. (*Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 339.) The Legislature may not unilaterally change the terms of a bond measure, as understood and approved by the voters, by changing the meaning of a material term in the measure presented to the voters. This is especially true when the term, “suitable and ready for high-speed train operation” had a plain meaning that would have been readily apparent to the voters.

The Legislature therefore may not enact this law as currently written unless it at the same time places it on the ballot, by a 2/3 majority of both houses, and has the provision ratified by the voters.

In the event the bill goes to the Senate floor for consideration, please include reference to this letter in the Senate Floor Analysis. Thank you.

Most sincerely,



Stuart M. Flashman

cc: California State Assembly Transportation Committee
Legislative Analyst's Office
Office of the Legislative Counsel

Attachment

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June 25, 2016

Senator Jim Beall, Chair
California Senate Transportation and
Housing Committee
State Capitol, Room 2209
Sacramento, CA 95814

Re: Assembly Bill 1889 (Mullin)--OPPOSE

Dear Chairperson Beall:

I am writing on behalf of the Transportation Solutions Defense and Education Fund, the Train Riders Association of California, and the Community Coalition on High Speed Rail to oppose the above-referenced bill, which has been set for hearing on Tuesday, June 28th. The bill proposes to add a new section 2704.78 to the Streets and Highways Code, concerning the use of the bond funds authorized by the Safe, Reliable High-Speed Passenger Train Bond Act of the 21st Century, approved by California voters in 2008 as Proposition 1A. As currently proposed, AB 1889 would violate the California Constitution.

The bill proposes to modify one provision of the bond act, a requirement under §2704.08(c) and (d) that any funding plan proposed by the California High-Speed Rail Authority (“Authority”) for the use of bond funds towards the construction of a “corridor or usable segment thereof” of the high-speed rail system to be built using the bond funds must be “suitable and ready for high-speed train operation.”

This language arises in two contexts. In the context of §2704.08(c)(2), it is one of eleven items that must be included, identified, or certified by the Authority as part of the first of two funding plans that must be prepared and approved by the Authority. The purpose of that “preliminary” funding plan is to inform the Legislature about the properties of the proposed corridor or usable segment prior to the Legislature appropriating bond funds towards the construction of that corridor/segment. (*California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676.) As the court of appeal made clear in that decision, the preliminary funding plan, while intended to help the Legislature decide whether or not to appropriate bond funds for the proposed corridor/segment, is only an interlocutory step in the process and therefore not legally actionable. (*Id.* at p. 712.)

By contrast, the court of appeal held that the second, final, funding plan was subject to judicial review. The court noted that while that plan, like the preliminary funding plan, had to be prepared and approved by the Authority, it also had to be “submitted to the Director of the Department of Finance and the Chairperson of the Joint Legislative Budget Committee, and an independent financial consultant prepares a report.” (*Id.* at p. 710 [emphasis in original].) The court particularly emphasized the importance of the consultant’s report:

This latter report is particularly significant in that the independent consultant *must certify* that construction can be completed as proposed *and is suitable for high-speed rail*; the planned passenger train service will not require an operating subsidy; and upon completion, passenger service providers can begin using the tracks or stations. (*Id.* at pp. 710-711 [emphasis added].)

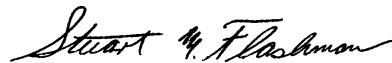
Thus, in the preliminary funding plan, the Authority makes a certification, but for the final funding plan, it is an independent financial consultant, not the Authority, that must make and certify the determination that the proposed corridor/segment “is suitable for high-speed rail.”

The court emphasized the importance of the fact that, for the final funding plan, “an independent report attests to the financial integrity of the plan.” (*Id.*) The proposed legislation would change this carefully constructed and voter-approved “financial straightjacket.” (*Id.* at p. 706.) As the court of appeal explained:

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. 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. (*Id.* at p. 713 [emphasis added].)

Thus, under Proposition 1A, the voters' intent was that the final funding plan fortify the Authority's initial certification with the certification of an independent financial consultant. AB 1889 would fundamentally change that statutory scheme by making the Authority's initial certification conclusive. This would destroy the voters' purpose in having an independent consultant separately certify the Authority's determination in the final funding plan. In making this fundamental change, AB 1889 would alter the voter-approved provisions of a bond act without having that change approved by the voters. This would violate Article 16 §1 of the California Constitution. The Legislature therefore may not enact this law as currently written unless it at the same time places it on the ballot, by a 2/3 majority of both houses, and has the provision ratified by the voters.

Most sincerely,



Stuart M. Flashman

cc: Legislative Analyst's Office
Office of the Legislative Counsel