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EXEMPT FROM FEES PER GOVERNMENT CODE §6103

Attorneys for Petitioners and Plaintiffs John Tos et al.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

JOHN TOS, *et al.*,
Petitioners and Plaintiffs

vs.

THE STATE OF CALIFORNIA, *et al.*,
Respondents and Defendants

No. 34-2016-00204740 Filed 12/13/16

Assigned for all purposes to Department 28, Hon. Richard Sueyoshi

PETITIONERS' RESPONSE TO RESPONDENTS' OBJECTIONS TO PETITIONERS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS ON THE FIRST CAUSE OF ACTION, FOR DECLARATORY RELIEF

Date:	October 26, 2018
Time:	11:00 AM
Dept.:	28
Judge:	Hon. Richard Sueyoshi
Trial Date:	Not yet set

Petitioners and Plaintiffs (hereinafter, "Petitioners") hereby respond to the objections of Respondents and Defendants California High-Speed Rail Authority and State of California (hereinafter, "Respondents") to Petitioners' Request for Judicial Notice in Support of Motion for Judgment on the Pleadings on the First Cause of Action ("Respondents' Objections"). The cause of action asks the Court to declare that AB 1889, passed in the 2016 legislative session, is facially unconstitutional in that it violates article XVI, Section 1 of the California Constitution.

Petitioners will address Respondents' Objections in the order they were submitted.

A. The documents or facts for which judicial notice is sought are each clearly indicated, and each fact or document is properly subject to notice.

Respondents complain that it is not clear which "facts" are at issue. (Respondents' Objections at p. 2.) All of the requests, with the exception of Paragraph 2, requesting judicial notice of the legislative history of AB 3034, are for judicial notice of documents, not facts. The accompanying memorandum of points and authority clearly explains why each document is properly subject to judicial notice, including its relevance to issues before the Court in the motion. The request for judicial notice of AB 3034's legislative history is properly supported by a listing of the legislative history of the bill from the Legislature's official website, which Petitioners submit is a source of information of reasonably indisputable accuracy for a bill's legislative history. Respondents provide no evidence to the contrary.

Petitioners, in requesting judicial notice of the various documents, only ask that the Court take notice of the documents and their contents. Respondents do not ask the Court to take notice of the truth of matters stated in those documents, except to the extent that such facts may be properly taken notice of under Evidence Code Section 452(g) or (h) as facts whose truth is not reasonably the subject of dispute – such as the legislative history of AB 3034. It is obviously up to the Court to determine whether any fact stated in a document is "reasonably subject to dispute" and therefore whether, if requested, the Court may also take judicial notice of it. Generally, however, Petitioners' purpose in requesting notice of the documents is to show that they are part of the legislative history of statutes involved in the case, or are otherwise relevant to the arguments being presented.

Respondents also complain that Petitioners seek to have the Court take judicial notice of the proper interpretation of the documents presented for notice. The interpretation of documents is properly determined by the Court, not by judicial notice. (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 ["Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning."]; *See, Jones v. The*

Lodge at Torrey Pines Partnership (2008) 42 Cal.4th 1158, 1172 fn. 5 [court will generally take notice of all legislative history documents, even if it later determines they are of little in interpreting the statute in question].) After judicial notice is granted, it is for the Court to determine, based on the parties' arguments, what meaning, and how much weight, it gives to a document. In short, Respondents' objections should be overruled.

B. The text of Proposition 1, the basis for Proposition 1A, is properly part of AB 3034's legislative history, and therefore subject to judicial notice in determining the Legislature's intent of placing Prop. 1A on the ballot.

Respondents take an extraordinarily crabbed and narrow view of the relevant legislative history of a ballot measure proposed by the Legislature. As explained more fully on Petitioners' Reply Brief, Section II, the California Supreme Court, in *Rossi v. Brown* (1995) 9 Cal.4th 688, 700 fn.7, stated:

> When construing constitutional provisions and initiative measures, however, the intent of the drafters may be considered by the court if there is reason to believe that the electorate was aware of that intent [] and we have often presumed, in the absence of other indicia of the voters' intent such as ballot arguments [] or contrary evidence, that the drafters' intent and understanding of the measure was shared by the electorate. [citations omitted]

That holding remains good law. Here, as with many constitutional amendments, the Legislature was the drafter. Consequently, the legislative history of the legislative bill that placed Prop. 1A on the ballot can be, and in this case is, highly relevant to the meaning of the measure placed before the voters.

The legislative history of AB 3034, which placed Prop 1A on the ballot, and particular the amendments made differentiating it from Prop 1, the measure it replaced, are highly relevant to the Legislature's, and hence to voters' intent. Along with the Governor's May budget revision and other evidence, they demonstrate that the Legislature, in drafting Prop. 1A, was aware of the public's concern about the state's economy being mired in a deep recession, and of the need to assure voters that the measure would not be wasteful, but would result in useful, working, high-speed rail segments.

Respondents also mischaracterize Prop 1, the predecessor to Prop. 1A. They assert that the measure was withdrawn by its author prior to passage, and hence is not part of any successful bill's legislative history. (Respondents' Objections at p. 3:8-15.) This is incorrect. Unlike the bills cited by Respondents, which were withdrawn by their authors prior to final legislative action, Prop. 1 was passed by the Legislature in the 2001-2002 legislative session for placement on the ballot. (See Exhibit A to Petitioners RJN at p.1.) A subsequent enactment removed it from the ballot, *but did not repeal it*.

AB 3034, as introduced, called for revisions to the already-enacted bond measure (Prop 1) to be submitted to the voters. (See, Petitioners' RJN, Exhibit D, p. 1 – Legislative Counsel's digest.) Thus Prop. 1, while never placed before or enacted by the voters, was fully approved by the Legislature and became part of the legislative history of its successor (Prop. 1A) in AB 3034.

Petitioners' only problem with Respondents seeking to have the Court take judicial notice of the entire Voter Guide section for Prop. 1 is that they have not shown that any of the remaining portions have any relevance to a material issue before the Court. (See Petitioners' Objections to Respondents' Request for Judicial Notice at p. 3.)

C. Exhibit D, E, G, H, I, Q, and R are all properly part of the legislative history of AB 3034,

As explained in Section B, supra, *Rossi, supra*, supports the use of the legislative history of a bill placing a measure before the voters to help determine the intent of the Legislature, and of the voters. All of the listed items are well-established as documents for which judicial notice is appropriate for legislative history.

Respondents cite to various cases as supposedly supporting their objection that extraneous documents cannot be used to elucidate the interpretation of bond measure provisions. (Respondents' objections at p. 3:1-7.) Those cases, however, all involved attempting to use extraneous documents, such as ballot arguments, to add to a bond measure statements or promises made in other ballot materials. Petitioners do not dispute that such extraneous materials that are not part of the measure cannot add to or modify a bond measure's provisions.

Construing the *meaning* of bond measure's provisions, however, is an entirely different matter. There is no question that legislative history can be used to help determine the meaning of legislation. This includes a bill placing a bond measure on the ballot. Such legislative history can be, and in this case is, highly probative of the Legislature's intent. In turn, *Rossi, supra*, makes it clear that unless the evidence shows otherwise, it can be presumed that the voters shared the Legislature's intent in placing a measure on the ballot. Thus AB 3034's legislative history can be used to elucidate the Legislature's, and the voters', intent in adopting provisions within Prop. 1A.

D. The Governor's May Budget Revision can be considered part of the legislative history of AB 3034, and may therefore properly be judicially noticed.

Respondents incorrectly identify Exhibit F to Petitioners' Request for Judicial Notice as an excerpt from "the Governor's Interim Budget Report May Revision." They characterize it as "an excerpt from a revised proposed budget (not the final budget report)…" As explained in Petitioners' RJN, the Governors proposed budget, and its May revision, are official acts of the Executive Department *which are submitted to the Legislature*. Because these budget materials are submitted to the entire Legislature, the Legislature is presumed to be aware of them in drafting and considering legislation before it. Whether the Governor's office actually participated in drafting the Senate Transportation Committee's amendment to AB 3034,[1] it is indisputable that the Governor's May budget revision, as information placed before the entire Legislature while AB 3034 was being considered, is properly considered in that bill's legislative history. (*See, Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-39 [list of documents that do, and do not qualify for judicial notice as legislative history – showing that relevant documents made available to the entire Legislature qualify].)

As explained in Section B, supra, these legislative history materials are relevant to determining the voters' intent in approving Prop. 1A.

[1] That fact is obviously not subject to judicial notice, but remains a fact that may be proved by evidence presented at trial.

As with any other legislative history document, the weight to be given to the Governor's comments about the bond bill, his intended amendments, and why those amendments were being offered and should be accepted, is a separate matter from whether they should be accepted as relevant evidence. (*People v. Homick* (2012) 55 Cal.4th 816, 889 ["The test for relevance is not how the trier of fact weighs a particular piece of evidence but whether the evidence has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210."]) It is for the Court to determine the extent to which those comments are probative of the Legislature's intent in inserting § 2704.08(c) and (d) into the proposed Prop. 1A. As explained in Petitioners' Opening Brief (at pp. 20-21), the close parallel between what the Governor indicated he would propose and the language the Legislature actually adopted strongly indicates that the Governor's influence was very significant.[2]

E. The Enrolled Bill Memorandum from the Office of Planning and Research is properly part of AB 3034's legislative history and properly judicially noticed.

While Respondents grudgingly acknowledge that an enrolled bill memorandum to the Governor may sometimes be considered part of the bill's legislative history, they try to narrow that rule's application by limiting it to executive departments involved in administering or enforcing the bond act. However, The choice of the Office of Planning and Research ("OR"), which prepared the enrolled bill memorandum here, was not randomly made. Respondents ignore the broad responsibilities of OPR. (See, Government Code §§ 65025 *et seq.* [OPR's role is state planning and land use], 65040 et seq. [duties of OPR].) Not only is OPR responsible overall for long-range state planning (§ 65040(a)), implementing the California Environmental Quality Act (§ 65040(g)), and addressing the problems of the growth and development of California's urban areas (§ 65040(k)), but it also assists in developing the State's functional plans to guide

[2] It should be noted that the Governor holds veto power (a limited legislative function) over legislation. (*See, Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1084.) Because of this, the Governor's comments to the Legislature on bills being considered are generally given great weight by legislators.

transportation policy as it affects the environment (§ 65040(b)), assists in preparing the State's budget (§ 65040(d)), and more generally advises and coordinates state policy as it affects environmental concerns and issues (§ 65040(c)). Given the importance of the proposed high-speed rail system to California's transportation planning and planning the growth of California's urban areas, there could hardly be a better agency to advise the Governor on the "big picture" issues posed by the bond act.

While OPR may not have any special expertise in determining the intent of the Legislature,[3] it is, through its involvement in the budget process and the State's planning processes, highly involved in advising the Governor during the implementation of the bond measure's provisions, including evaluating the Authority's budget requests and proposed projects and their effects on the environment.

It should also be pointed out that while the Governor's consideration is not part of the process of formulating a bill, his decision on whether to veto a bill (including a proposed bond measure) is very much part of the legislative process. Therefore, communications to the Governor while he is considering whether to sign a bill, such as an enrolled bill memorandum, can be considered for their effect on that decision. (See*, Scher v. Burke* (2017) 3 Cal.5th 136, 149 [such materials, while not dispositive, are entitled to some weight]; see also, *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 359 [enrolled bill memorandum cited as providing evidence of bill's purpose]; *Wirth v. State of California* (3rd Dist., 2006) 142 Cal.App.4th 131, 141-142 [same].)

F. The letter from the Chair of the Authority to the Governor is relevant to the legislative intent of AB 3034 and therefore subject to judicial notice.

Respondents focus on the fact that Judge Kopp is one of the Petitioners. More important in the context of the Request for Judicial Notice is the fact that, at the time of AB 3034's passage, he was the Chair of the Authority, which was the sponsor of AB 3034. (Exhibit E to Petitioners' RJN at p. 4.) In each of the cases cited by Respondents as rejecting judicial notice of letters to the

[3] Nor, for that matter, do other executive branch agencies that prepare enrolled bill memoranda.

Governor supporting his signing a bill, the letter was from an individual legislator and purported to explain the Legislature's intent in enacting the bill. As explained in *Rossi, supra*, 9 Cal.4th at p. 700 fn. 7, such observations do not show the Legislature's intent.

Here, however, Judge Kopp's letter is included not as evidence relating to the bill's legislative history, but to show, from the perspective of the head of the sponsoring agency, a concern about the risk of the voters rejecting the ballot measure unless the revisions made by AB 3034 were included on the ballot. Without AB 3034's approval, the prior Prop. 1 would have appeared on the November 2008 ballot, and Judge Kopp's letter reflected the prevailing sentiment that, with the state in a deep recession, it would likely have been voted down. Such historical circumstances surrounding a bills enactment can properly be considered in determining legislative intent. (See, *California Assn. of Professional Scientists, supra,* 216 Cal.App.4th at p. 430 ["Both the legislative history of the statute *and the wider historical circumstances of its enactment* may be considered in ascertaining the legislative intent." –emphasis added].)

CONCLUSION

Clearly, Respondents do not want the Court to consider the legislative history of AB 3034 and other evidence of the Legislature's (and Governor's) intent in placing Proposition 1A on the ballot. The legislative history makes it all too clear that the Legislature considered the added provisions of § 2704.08(c) and (d) important in convincing the voters to approve Prop. 1A, and that a key provision in both subdivisions was the requirement that the usable segment, when constructed according to the funding plan, would be "suitable and ready for high-speed train operation." That legislative intent is also presumed to apply to the voters who approved Prop. 1A, and Respondents have presented no evidence rebutting that presumption. Petitioners' requests for judicial notice should be accepted.

Dated: September 25, 2018

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