Civ. No. C075668

CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

CALIFORNIA HIGH-SPEED RAIL AUTHORITY *et al.*,

Petitioners

v.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

Respondent

JOHN *TOS ET AL.*,

Real Parties in Interest

Sacramento County Superior Court Case Number 34-2011-0113919-CU-MC-GDS and 34-2013-00140689-CU-MC-GDS; Department 31, Hon. Michael P. Kenny, Judge. Tel.: 916-874-6353

RETURN BY ANSWER AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, COUNTY OF KINGS TO PETITION FOR EXTRAORDINARY WRIT OF MANDATE

Stuart M. Flashman, SBN 148396 Law Offices of Stuart M. Flashman 5626 Ocean View Drive Oakland, CA 94618-1533 Telephone and fax: (510) 652-5373 e-mail: stu@stuflash.com	Michael J. Brady, SBN 40693 1001 Marshall Street, Ste 500 Redwood City, CA 94063-2052 Telephone: (650) 364-8200 Facsimile: (650) 780-1701 e- mail: mbrady@rmkb.com
Attorneys for Real Parties in Interest **JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS**	

State of California
Court of Appeal
Third Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Court of Appeal Case Caption:
California High-Speed Rail Authority et al.
v.
Superior Court for the State of California for the County of Sacramento et al.

Court of Appeal Case Number: C0 75668

Please check here if applicable:

[X] There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

Name of Interested Entity or Person (Alphabetical order, please.)	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person Information, if necessary.

Stuart M. Flashman
Signature of Attorney or Unrepresented Party

Date: March 14, 2014

Printed Name: Stuart M. Flashman
State Bar No: 148396
Firm Name & Address: Law Offices of Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533

Party Represented: Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings

ATTACH PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION AND OUTLINE OF ARGUMENT

Petitioners California High-Speed Rail Authority *et al.* ("Petitioners") ask the Court to overrule two decisions where the trial court found that provisions of Proposition 1A, the Safe, Reliable High-Speed Passenger Train Bond Act ("Bond Measure"), had not been properly followed. In essence, Petitioners ask the Court to disregard the promises the Legislature made to California voters when placing Proposition 1A on the ballot and allow Petitioners to move forward in direct contravention of the language and intent of the measure, and of the statutes defining the process for issuing general obligation bonds.

The Court should reject this arrogant request. While Courts are empowered to enforce legislation, and to interpret legislation when the Legislature's intent is unclear, Courts are not entitled to rewrite legislation. That is particularly the case when the legislation involved is a bond measure presented to and approved by California's voters.

The trial court's decisions here did no more than enforce mandates that were clearly set forth in the language of the ballot measure itself. The Court should therefore affirm the trial court's conclusions that neither the authorization for bond issuance nor the Funding Plan put forward by the Petitioner California High-Speed Rail Authority ("Authority") pass muster under Proposition 1A's requirements. In addition, the Court should rule that, because it was made in contravention of the clear requirements of the bond measure, the Legislature's

appropriation of Proposition 1A funds towards the Authority's proposed Initial Construction Segment ("ICS") should be declared invalid.

ANSWER TO PETITION FOR WRIT OF MANDATE

Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings (hereinafter, collectively, "*Tos et al.*") answer the Petition for Extraordinary Writ of Mandate of Petitioners California High-Speed Rail Authority ("Authority"), High-Speed Passenger Train Finance Committee ("Committee"), Governor Edmund G. Brown, Jr. ("Governor"), Treasurer Bill Lockyer ("Treasurer"), Director of Department of Finance Michael Cohen ("Finance Director"), and Secretary of State Transportation Agency Brian Kelly ("STA Secretary," and the foregoing, collectively, "Petitioners") as follows:

1. *Tos et al.* admit the allegations of Paragraphs 1-4, 7, 11, 16 20, 21, and 22.

2. *Tos et al.* generally deny each and every allegation of Paragraphs 25, 26, 27, 29, and 32.

3. Answering the allegations of Paragraph 5, *Tos et al.* assert that Real Party in Interest Union Pacific Railroad Company filed a Responsive Pleading and Answer to the Complaint in Validation, making it a defendant in the Validation Action.

4. Answering the allegations of Paragraph 6, *Tos et al.* assert that the words of the Bond Act speak for themselves. *Tos et al.* further

assert that, by the Authority's own prior admission, the cost of the project currently being proposed by the Authority will be in excess of $65 Billion. Other than as specifically admitted or asserted, *Tos et al.* deny the remaining allegations of Paragraph 6 based on information and belief.

5. Answering Paragraph 8, *Tos et al.* assert that the words of the statute speak for themselves. Other than as specifically admitted or asserted, *Tos et al.* deny the remaining allegations of Paragraph 6 based on information and belief.

6. Answering Paragraph 9, *Tos et al.* assert that on November 3, 2011, the Authority approved a funding plan, purportedly in accordance with Streets & Highways Code §2704.08(c)[1], for one of two initial operating segments, IOS-North or IOS-South. The funding plan incorporated by reference the Draft 2012 Business Plan, and both the funding plan and Draft Business Plan were submitted to the Legislature. However, *Tos et al.* assert that this funding plan in fact failed to meet the requirements of §2704.08(c). Other than as specifically admitted or asserted, *Tos et al.* deny the remaining allegations of Paragraph 6 based on information and belief.

7. Answering Paragraph 10, *Tos et al.* assert that on November 14, 2011 they filed their Complaint for Declaratory Relief; Complaint by

[1] Unless otherwise indicated, all statutory references herein are to the Streets and Highways Code.

Taxpayers/Interested Parties under Code of Civil Procedure Section 526a to Prevent Commission of Illegal Act; Request for Permanent Injunction, (hereinafter, "Tos Case") and that the words of that document speak for themselves. *Tos et al.* further assert that the Tos Case was subsequently amended three times, on December 13, 2011, on July 6, 2012, and on March 27, 2013 (15 HSR 4021 [Tab 263]) and that the latter Second Amended Complaint, as amended ("SAC"), remains the operative pleading in the case. Other than as specifically admitted or asserted, *Tos et al.* deny the remaining allegations of Paragraph 10.

8. Answering Paragraph 12, *Tos et al.* assert that on July 18, 2012, the Legislature enacted Senate Bill 1029 ("SB 1029"). *Tos et al* further assert that SB 1029 attempted to appropriate $2.609 Billion of Proposition 1A bond funds and $3.24 Billion of federal grant funds towards construction of an Initial Construction Segment ("ICS") extending from Madera to the edge of Bakersfield in the Central Valley. *Tos et al.* further assert that the appropriation was made based on a Funding Plan submitted by the Authority that failed to comply with the requirements of Proposition 1A. *Tos et al.* further assert that for that reason, Sb 1029 violated the intent of California voters in approving Proposition 1A and, to the extent SB 1029 attempted to appropriate Proposition 1A bond funds, it was void *ab initio*. *Tos et al.* further assert that the total amount appropriated was insufficient, in itself, to construct a segment that would be suitable and ready for high-

speed rail operations because it would not be electrified, would not include the positive train control required for high-speed rail operation, would not include any stations, and would not include any rolling stock to carry passengers on the segment. *Tos et al* further assert that the ICS, as constructed with the Legislature's appropriation, would not have any independent utility because it would be incapable in itself of supporting any rail operation nor would it connect to any existing rail operation[2]. *Tos et al.* further assert that, contrary to the intent of Proposition 1A, the appropriation of Proposition 1A bond funds in SB 1029 was made without the required evidence from the Funding Plan that there would be sufficient funds available to construct a full usable segment that would be suitable and ready for high-speed rail operations. *Tos et al.* therefore assert that the appropriation for construction of the ICS failed to satisfy the requirements of either Proposition 1A or the federal grants whose funds were appropriated and was therefore invalid *ab initio*. Other than as specifically admitted or asserted, *Tos et al.* deny the remaining allegations of Paragraph 12.

9. Answering Paragraph 13, *Tos et al.* assert that on March 18, 2013 the Committee purported to adopt a resolution authorizing the issuance of all remaining bond funds, amounting to approximately

[2] While the Authority seeks to have the ICS used by Amtrak, it admits, in its Revised 2012 Business Plan, that connecting to the Amtrak route would require additional work and money. (26 HSR 7099 [Tab 373].)

$8,559,715,000.00 to fund construction and related activities for the project that the Authority intended to build. However, *Tos et al.* further allege that the resolution was not properly adopted, as the Committee had failed to properly do all of the acts required to authorize the bond issuance. *Tos et al.* further allege that the project the Authority intended to use the bond funds for differed materially from and was not the project that the voters had authorized in approving Proposition 1A, and therefore the authorization of the bond issuance was improper and in violation of Article XVI Section 1 of the California Constitution and therefore invalid for that reason as well. Other than as specifically admitted or asserted, *Tos et al.* deny the remaining allegations of Paragraph 13.

10. Answering Paragraph 14, *Tos et al.* assert that the words of the statute speak for themselves. Other than as specifically admitted or asserted, *Tos et al.* deny the remaining allegations of Paragraph 14.

11. Answering Paragraph 15, *Tos et al.* assert that, although on March 18, 2013 the Committee adopted resolutions purporting to authorize the issuance of Proposition 1A bonds, neither those resolutions nor the project for which the bond funds were intended for, complied with the requirements of Proposition 1A. *Tos et al.* therefore assert that the bond resolutions were invalid and no bond issuance was properly authorized. Other than as specifically admitted or asserted, *Tos et al.* deny the remaining allegations of Paragraph 15.

12. Answering Paragraph 17, *Tos et al.* admit that the trial court issued a ruling in the Tos Case, and assert that the trial court ordered further supplemental briefing on the question of the proper remedy. Tos et al also assert that the words of that ruling speak for themselves. Other than as specifically admitted or asserted, *Tos et al.* deny the remaining allegations of paragraph 17.

13. Answering Paragraph 18, *Tos et al.* admit that the trial court issued a second Ruling on Submitted Matter in the Tos Case on November 25, 2013. *Tos et al.* assert that the words of that ruling speak for themselves. Other than as specifically admitted or asserted, *Tos et al.* deny the remaining allegations of paragraph 18.

14. Answering Paragraph 19, *Tos et al.* admit that on November 25, 2013 the trial court issued a ruling on submitted matter in the Validation Action. *Tos et al.* assert that the words of that ruling speak for themselves. *Tos et al.* also assert that the trial court, in its ruling, did not reach the additional defenses raised by the defendants in the Validation Action as to why a validation judgment should not be granted, and specifically the defense that the project that the Authority proposed to build was not the project the voters had approved in Proposition 1A, making issuance of the bonds improper. Other than as specifically admitted or asserted, *Tos et al.* deny the remaining allegations of paragraph 19.

15. Answering Paragraph 23, *Tos et al.* admit that the memorandum of points and authority accompanying the Petition purport to set forth additional factual and procedural history. *Tos et al.* assert that the Statement of Facts presented in the Memorandum of Points and Authorities following this answer accurately sets forth the relevant additional factual and procedural history for this proceeding. Other than as specifically admitted or asserted, *Tos et al.* deny the allegations of Paragraph 23.

16. Answering Paragraph 24, *Tos et al.* assert that the issues raised by the petition include the following:

a. Whether, in a validation proceeding, the plaintiffs are entitled to a validation judgment for the issuance of general obligation bonds regardless of the fact that the resolution authorizing bond issuance did not meet the requirements of the statutes requiring bond authorization;

b. Whether, in this specific case, the requirements for authorizing bond issuance had been properly met;

c. Whether, in a validation proceeding, the plaintiffs are entitled to a validation judgment for the issuance of general obligation bonds regardless of the fact that the project for which the bond proceeds would be used is not the project that the voters had authorized for issuance of bonds in Proposition 1A;

d. Whether, in this specific case, the project for which the bond proceeds would be used for is the project that the voters authorized under Proposition 1A.

e. Whether the Authority's approval of its funding plan is subject to judicial review through a mandamus action.

f. Whether, in a mandamus action challenging the propriety of the Authority issuing a funding plan that failed to meet the requirements set by the voters in approving the bond measure, the trial court acted properly in requiring rescission of the defective funding plan.

g. Whether, in a mandamus action challenging the propriety of the Authority issuing a funding plan that failed to meet the requirements set by the voters in approving the bond measure, the trial court acted properly in requiring that the Authority issue a funding plan meeting the bond measure's requirements prior to the Authority preparing and issuing an updated second funding plan based on the first funding plan;

h. Whether, in a mandamus action challenging the propriety of the Authority issuing a funding plan that failed to meet the requirements set by the voters in approving the bond measure, the trial court erred in failing to declare invalid the appropriation of bond funds approved by the Legislature when that appropriation was based on a noncompliant funding plan and would use those funds for a project not authorized by the voters.

Other than as specifically admitted or asserted, *Tos et al* deny the allegations of Paragraph 24.

17. Answering the allegations of Paragraph 28. *Tos et al.* lack sufficient information or belief to admit or deny the allegations in the paragraph, and based on that, generally deny the allegations of Paragraph 28.

18. Answering the allegations of Paragraph 30, *Tos et al.* assert that the words of the Bond Act speak for themselves. Other that as specifically admitted or asserted, *Tos et al.* deny each and every allegation of Paragraph 30.

19. Answering the allegations of Paragraph 31, *Tos et al.* assert that the trial court's rulings only require that Petitioners follow the legal requirements that have been set forth in Proposition 1A, the Bond Measure, and that the issuance of bonds and appropriation and use of bond proceeds be based on proper compliance with the requirements of the Bond Measure. Other than as specifically admitted or asserted, *Tos et al* deny each and every allegation of Paragraph 31.

20. Answering the allegations of Paragraph 33, *Tos et al.* lack sufficient information or belief to be able to admit or deny the allegations of Paragraph 33, and on that basis deny each and every allegation in Paragraph 33.

AFFIRMATIVE DEFENSES

In further answer and by way of tendering additional defenses, *Tos et al.* incorporate as defenses herein by this reference their responses contained in all of the foregoing paragraphs of this answer. In addition, *Tos et al.* also raise the following affirmative defenses to the Petition:

FIRST AFFIRMATIVE DEFENSE – PETITIONERS HAVE AN ADEQUATE REMEDY AT LAW

The petition fails because there are no exigent circumstances justifying extraordinary relief and Petitioners have an adequate remedy at law through the normal appellate process

SECOND AFFIRMATIVE DEFENSE – FAILURE TO STATE A CAUSE OF ACTION

The Petition fails to state facts sufficient to constitute a cause of action.

THIRD AFFIRMATIVE DEFENSE – LACHES

The Petition is barred by the equitable doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE – ESTOPPEL

Petitioners, or parties in privity with Petitioners, by their actions and/or inactions and Real Parties in Interest's reliance thereon, are estopped from maintaining the claims for relief set forth in the Petition.

FIFTH AFFIRMATIVE DEFENSE – OVERBREADTH

The allegations in the Petition assert claims and request relief that is overbroad and to which Petitioners are not entitled.

SIXTH AFFIRMATIVE DEFENSE – UNAUTHORIZED ACTS

The Petition asks the Court to approve or validate acts and actions that are not properly authorized by the statutes involved.

SEVENTH AFFIRMATIVE DEFENSE – TRIAL COURT ACTED PROPERLY

The trial court acted within its proper discretion in making the rulings challenged herein, and therefore those rulings should be upheld.

EIGHTH AFFIRMATIVE DEFENSE – FAILURE TO SATISFY STATUTORY REQUIREMENTS

The Petition should be denied because Petitioners failed to satisfy statutory requirements, both those of the general statutes and those of the Bond Measure.

NINTH AFFIRMATIVE DEFENSE – IMPROPER PROJECT

The Petition should be denied to the extent that it seeks validation of the authorization of bond issuance because the Project for which the bond proceeds would be expended is not the project that the voters approved.

TENTH AFFIRMATIVE DEFENSE – RESERVATION OF DEFENSES

Because of the complexity of the cases involved in the Petition, *Tos et al.* reserve their right to amend their answer to add additional applicable defenses.

PRAYER FOR RELIEF

WHEREFORE, *Tos et al.* pray for relief as follows:

1. That Petitioners take nothing by this Petition;

2. That the trial court's rulings denying validation in the Bond Action and granting the Petition for Writ of Mandate be affirmed;

3. That the Court direct the trial court to grant declaratory relief in favor of Real Parties in Interest *Tos et al.*, by issuing its declaration declaring invalid that portion of SB 1029 involving the Legislature's appropriation of Proposition 1A bond funds towards construction of the Authority's high-speed rail project in the absence of a Funding Plan for the proposed usable segment of that project that meets the requirements of the bond measure.

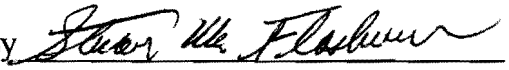
4. For costs of suit, including reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

Dated: March 14, 2014

Michael J. Brady
Stuart M. Flashman

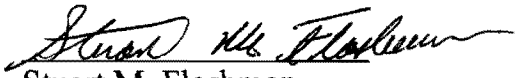
Attorneys for Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings

By 
Stuart M. Flashman

VERIFICATION

I, Stuart M. Flashman am one of the attorneys for Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings in this action, and am authorized to make this verification on their behalf. Real Parties and/or

their officers and other authorized representatives are located outside of Alameda County where my offices are located and are unavailable to sign this verification in a timely manner. I have read the foregoing Answer and am familiar with the matters alleged therein. I am informed and believe that the matters therein are true and on that ground allege that the matters stated therein are true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed on March 14, 2014 at Oakland, California.



Stuart M. Flashman

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO EXTRAORDINARY PETITION FOR PEREMPTORY WRIT OF MANDATE

I. STATEMENT OF MATERIAL FACTS

A. GENERAL BACKGROUND

For purposes of the two cases at issue here, one can agree that the relevant facts start in 2008, when the Legislature took up and modified a previously-proposed high-speed rail bond measure and placed the modified measure, designated as Proposition 1A, on the November 2008 ballot for approval by the voters. (20 HSR 5121 *et seq.* [Tab 319], 5137 *et seq.* [Tab 320]) The measure was approved by a relatively narrow 52.7% to 47.3% margin. (15 HSR 4197 [Tab 269].)

B. THE BOND MEASURE

As noted, in April 2008, Assembly Member Galgiani introduced AB 3034 to place on the ballot an almost ten billion dollar bond measure to help fund the state's proposed high-speed rail system. (15 HSR 4151 [text of bill as amended in state senate] [Tab269].) The bill was amended twice in the Assembly, and then amended more extensively in the Senate. *(Id.)*

Of particular importance were a series of Senate amendments that are highlighted in the Report to the Assembly for Concurrence in Senate Amendments. (15 HSR 4143 *et seq.* [Tab 269]; see also 15 HSR 4151 *et seq.* [text of amended bill] [Tab 269].) The Senate, reflecting the skepticism of California voters about large bond measures, inserted a series

of protective financial requirements into the measure. These included, among other things: 1) defining a "usable segment" and requiring that the system be planned for construction in portions whose minimum size was a usable segment, 2) requiring that, at least 90 days before submitting an appropriation request to the Legislature, the Authority prepare and submit to the Legislature, as well as to a peer review panel, a Funding Plan for the corridor or usable segment for which funding was to be requested, 3) requiring that the funding plan identify all funds to be invested in the proposed corridor or usable segment, 4) requiring that the funding plan certify that the corridor or usable segment could be successfully completed as proposed in the funding plan, and that, when completed, it would be suitable and ready for high-speed rail operations., 5) requiring that the funding plan certify that the corridor or usable segment would not require a public operating subsidy, 6) requiring that the funding plan certify that it had completed all necessary project-level environmental clearances necessary to proceed to construction of that corridor or usable segment, 7) requiring that the Authority, prior to actually expending bond funds towards construction and acquisition of equipment and property, submit and have approved by the Finance Director a second, more detailed, funding plan, which, however, was not required to further address environmental clearances. The bond measure, as amended, was passed by

the Legislature, signed by the Governor, and subsequently approved by the voters.

C. THE FUNDING PLAN

In November 2011, the Authority prepared and submitted to the Legislature a Funding Plan (20 HSR 5174 *et seq.* [Tab 323]), purportedly pursuant to §2704.08(c), along with a Draft 2012 Business Plan (20 HSR 5194 *et seq.* [Tab 324]) that was incorporated into the Funding Plan by reference.

The Funding Plan was required by the bond measure to identify or certify several crucial characteristics of the Corridor or Usable Segment that it was intended to provide funding for. (20 HSR 5130-5131 [Tab 319].) The identification or certification of these characteristics was intended to assure the Legislature and the voters that construction and operation of that Corridor[3] or Usable Segment would be successful. (See, 20 HSR 5125 [analysis in Voter Information Guide stating that a detailed Funding Plan for each Corridor or Usable Segment must be prepared and submitted to the Legislature and the Director of Finance prior to appropriation of bond funds for that corridor or usable segment] [Tab 319]; 20 HSR 5126 [ballot argument in favor of measure stating that there would

[3] A "Corridor" is defined in §2704.01(f) as "a portion of the high-speed train system as described in §2704.04." A "Usable Segment" is described in §2704.01(g) as "a portion of a corridor with at least two stations."

be "public oversight and detailed independent review of financing plans."] *[Id.]*) Among those characteristics were: 1) its estimated full cost for construction, 2) the sources of all funds to be invested in it, along with anticipated time for receipt of those funds, 3) certification that it could be completed as proposed, and 4) certification that all project-level environmental clearances needed to proceed to its construction had been completed. (§2704.08 subd. (c)(2)(C),(D),(G), and (K).)

In fact, and as the trial court found based on undisputed evidence in the record, several of these identifications or certifications in the Funding Plan were improper. In particular, the Funding Plan did not identify all of the funds to be invested in the 300 mile long Usable Segment[4], but only in a 130 mile long "Initial Construction Section."[5] ("ICS") (1 HSR 80-82 [Tab 5]; 20 HSR 5185-5186 [Tab 323].) Further, the Funding Plan did not and could not certify that all project level environmental clearances had already been completed so that the project could proceed to construction.[6] Instead, it certified that environmental clearances for the ICS would be completed

---

[4] Later identified more specifically in the April 2012 Revised 2012 Business Plan as the Initial Operating Segment – South ("IOS-South"). (27 HSR 7046 *et seq.*, 7053, 7096 [Tab 373].)

[5] Even here, the funds would not be sufficient to provide electrification or positive train control, two requirements if the Usable Segment was to be "suitable and ready for high-speed train operation." (§2704.08(c)(2)(H); 27 HSR 7099 [Tab 373], 7114-7115 [id.].)

[6] In fact, as of the date the Funding Plan was completed and sent to the Legislature, none of the environmental clearances for the Usable Segment had been completed. (27 HSR 7113 [Tab 373].)

before construction of that section was initiated. (1 HSR 82-84 [Tab 5]; 20 HSR 5192 [Tab 323].)

D. THE REVISED BUSINESS PLAN AND THE LEGISLATIVE APPROPRIATION.

In April of 2012, the Authority approved and sent to the Legislature a revised version of its 2012 Business Plan. (27 HSR 7046 *et seq.* [Tab 373]) The November 2011 Funding Plan was not, however, amended to incorporate the Revised Business Plan. While the Revised Business Plan changed a number of salient features of the proposed Phase I system, including introducing the "blended system"[7] and designating the IOS-South as the first Usable Segment, it did not correct any of the defects that the trial court found in the Funding Plan.

In July 2012, the Legislature took up the Authority's appropriation requests. While the measure approving the appropriations, SB 1029, passed the Assembly easily, it barely passed in the Senate, with the leadership of the Senate Transportation Committee, the committee with primary jurisdiction over the project, voting no. (15 HSR 4185 [showing Senators Lowenthal, Simitian, and Desaulnier voting no] [Tab 269].)

[7] A system that used conventional rail segments to connect to the two Phase I termini. (See generally 27 HSR 7046 *et seq.* [Tab 373].)

E. INITIATION OF THE TOS SUIT.

On November 14, 2011, Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings (hereinafter, "Tos Plaintiffs") filed their Complaint for Declaratory Relief; Complaint by Taxpayers/Interested Parties Under Code of Civil Procedure §526a to Prevent Commission of Illegal Act; Request for Permanent Injunction. (19 HSR 5109 *et seq.* [Tab 317]) On December 13th, the Tos Plaintiffs filed their First Amended Complaint. (19 HSR 5079 *et seq.* [Tab 308]) Defendants demurred to that complaint (19 HSR 5051 [Tab 304]), which demurrer was granted with leave to amend. (18 HSR 4845 *et seq.* [Tab 293].) Subsequently, the Tos Plaintiffs filed their Second Amended Complaint (hereinafter, "SAC") (18 HSR 4806 *et seq.* [Tab 292]). This was further amended by stipulation in March 2013. (15 HSR 4021 [Tab 263]) The SAC, as amended, remains the operative pleading in the Tos Case.

F. AUTHORIZATION OF BOND ISSUANCE AND THE VALIDATION ACTION.

In March of 2013, the Authority began consideration of requesting the issuance of approximately $8.5 billion of Proposition 1A bonds for high-speed rail construction. On March 18th, the Authority adopted a resolution requesting that the California High-Speed Passenger Train Finance Committee (hereinafter, "Committee"), which had been established by Proposition 1A (§2704.12; 20 HSR 5132 [Tab 319]), authorize the

issuance of those bonds. (8 HSR 2048-2049 [Tab 109].) The Authority forwarded the resolution to the Committee, but did not submit any additional information in support of the request.

That same day, the Committee met. No staff report or other supporting documentation was provided to the Committee. (3 HSR 714 ¶1 [Tab 39].) The open session began with ten minutes of public comments, none of which provided evidence supporting authorization of bond issuance. After that, consideration of bond authorization took one minute and 43 seconds, with no discussion by Committee members, just a voice vote approving the two resolutions authorizing bond issuance. (8 HSR 1953, 1956 *et seq.*, 2005 *et seq* [Tab 108]; 6 HSR 1553 [¶6], 1554 [¶11], 1555 [¶¶14, 15] [Tab 85], 1613 [letter from Chief Counsel for Authority] *[Id.]*, 1623 *et seq.*[8] [Tab 85]; 3 HSR 713 [stipulation by counsel for the Authority and the Committee that no documents were presented to the Committee in open session at its March 18, 2013 meeting other than the Authority's resolution requesting authorization for bond issuance and the two draft resolutions authorizing bond issuance] [Tab 39].)

The following day, the Authority and the Committee jointly filed the Validation Action seeking to validate the Authority's and the Committee's

[8] The Declaration of Kathy Hamilton was submitted to the trial court without objection. In its ruling on the Validation Action, the trial court expressed reservations about the accuracy of the transcript attached to the declaration. However it did not strike the declaration, which is therefore part of the record before this Court.

determinations authorizing the bond issuance. (10 HSR 2760 *et seq.* [Tab 189].) After preliminary skirmishes over the propriety of the summons and of the validation complaint, answers were filed by eight parties. (7 HSR 1929 [Tab 105]; 8 HSR 2122 [Tab 117]; 9 HSR 2469 [Tab 152], 2479 [Tab 154], 2496 [Tab 155], 2507 [Tab 156], 2514 [Tab 157]; 10 HSR 2727 [Tab 184].)

After full briefing, the matter was heard on September 27, 2013. (1 HSR 97 *et seq.* [Tab 7] [hearing transcript].) On November 26, 2013, the trial court issued its Ruling on Submitted Matter (1 HSR 52 *et seq.* [Tab 4]), finding that a judgment validating the bond authorization could not be entered because the authorization did not comply with statutory requirements. More specifically, there was no evidence before the Committee to support its determination authorizing bond issuance. The trial court designated the Tos Plaintiffs to prepare a proposed judgment for the court. (1 HSR 71 [Tab 4].)

After extended negotiations with opposing counsel over the form of the judgment, a final judgment was approved by the plaintiffs' counsel and submitted to the court. Judgment was entered on January 3, 2014 (1 HSR 4 [Tab 1]), and Notice of Entry of Judgment was served on the plaintiffs by mail on January 16, 2014. (1 HSR 34 *[Id.]*.)

G. TRIAL ON MANDAMUS CAUSES OF ACTION IN TOS CASE.

By stipulation of the parties, after an informal telephonic case management conference (18 HSR 4773-4774 [Tab 279]; 4784-4785 [Tab 283]), the writ claims in the SAC that were based on an administrative record were heard, after full briefing, on May 31, 2013.[9] (1 HSR 171 *et seq.* [Tab 8][hearing transcript].)

On August 16, 2013, the trial court issued its Ruling on Submitted Matter, determining that, as a matter of law, the Authority had abused its discretion in approving the November 2011 Funding Plan. (1 HSR 74 *et seq.* [Tab 5].) The court ordered further briefing on the appropriate remedy (if any) for the violation. After completion of that briefing, the court held a second hearing, on remedies, on November 8, 2013. (1 HSR 232 *et seq.* [Tab 9][hearing transcript].) On November 26, 2013, the trial court issued its second Ruling on Submitted Matter in the case, finding that because ordering rescission of the Authority's approval of the Funding Plan would have real and practical effect, a writ of mandate would issue ordering that

[9] The issues in the non-mandamus causes of action, which include injunctive relief under Code of Civil Procedure §526a and declaratory relief, were left to be decided after the court heard and decided the formal writ proceedings. (See, 11 HSR 2904:18-24 [Tab197].) The Tos Plaintiffs filed their opening brief for those proceedings along with their opening brief in the writ proceedings. (16 HSR 4205 *et seq.* [Tab 273].) Defendants' Motion for Judgment on the Pleadings on this part of the case (see, 11 HSR 2858 [Tab 190] was heard on February 14, 2014 and denied by written order on March 4, 2014. Petitioners have indicated that they intend to seek a writ from the Court of Appeal on that order as well.

rescission. (1 HSR 52 *et seq.* [Tab 4].) The court denied, however, the Tos Plaintiffs' requests that the writ include rescission of the Authority's construction contracts and that the court enjoin expenditure of state bond funds or federal grant funds towards construction, finding that such relief was not warranted at that time. The Tos Plaintiffs were directed to prepare a proposed order and a proposed writ of mandate for submission to the court.

As with the Validation Action, Tos Plaintiffs' counsel prepared the proposed order and writ and submitted them to opposing counsel for approval as to form. (See 1 HSR 276 [letter to court from counsel for Tos plaintiffs reviewing process for preparing and submitting proposed order] [Tab 10].) There followed several rounds of negotiation over the form and content of the order and writ. Eventually, counsel for defendants indicated that the form of the order and writ were acceptable. (1 HSR 277 [Tab 10].) Shortly thereafter, however, defendants' counsel retracted that approval and asked for additional delay while the clients were consulted. (1 HSR 276 *[Id.]* .) Eventually, counsel for defendants asked that Tos Plaintiffs agree not to seek issuance of a writ of mandate until a final judgment was entered. (1 HSR 279-280 [Tab 11].) In the meantime, defendants' counsel indicated that defendants would stipulate to not using any Proposition 1A bond funds towards construction. *(Id.)* The Tos Plaintiffs rejected this proposal and submitted the proposed order and writ with an explanatory

cover letter. (1 HSR 276-277 [Tab 10].) On January 3, 2014, the trial court filed its order and issued the writ of mandate. (1 HSR 37 *et seq.*, 50-51 [Tabs 2,3].) On January 17, 2014, the writ of mandate was personally served on the Tos Defendants, through their legal counsel. (Supplement of Real Parties in Interest John *Tos et al.* to Appendix of Exhibits, p.1[10].) The Writ of Mandate ordered the Authority to rescind its Funding Plan, and required the Authority to submit a return to the court within sixty days of receipt of service, indicating its compliance with the writ. That order and writ have been stayed by this Court pending resolution of the Petition.

II. STANDARD OF REVIEW

In considering the merits of the trial court's decisions, the appellate court (whether by writ review or by appeal) applies a two-part standard. When purely legal determinations, or determinations based on undisputed facts, are involved, the court reviews the trial court decision de novo. (*Donaldson v. Department of Real Estate* (2005) 134 Cal.App.4th 948, 954.) When, however, factual determinations are involved (such as, for example, what evidence was presented to the Committee), the trier of facts is given substantial deference and the trial court's determinations will be upheld unless there was an abuse of discretion. (*People v. Smith* (2005) 37

[10] The Appendix was filed as an attachment to the Preliminary Opposition filed by *Tos et al.*

Cal.4th 733, 739; *County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1152-1153.)

III. ARGUMENT

A. THE TRIAL COURT'S DETERMINATIONS DENYING VALIDATION AND ORDERING RESCISSION OF THE FUNDING PLAN SHOULD BE UPHELD.

1. THE TRIAL COURT'S JUDGMENT IN THE VALIDATION ACTION WAS PROPER.

a. Judicial review of the committee's decision to authorize bond issuance was proper.

Petitioners start with the astonishing assertion that the courts have no business conducting judicial review of the propriety of the Committee's action in authorizing the issuance of $8.5 billion in Proposition 1A general obligation bonds. (Petition p. 28.) Petitioners are essentially saying that the Committee's action was even less than ministerial – more like an automatic rubber stamp, because even a ministerial action can be challenged based on the failure to properly perform a mandatory duty. (*In re C.F*. (2011) 198 Cal.App.4th 454, 465.)

Petitioners quote from *Boelts v. City of Lake Forest* (2005), 127 Cal.App.4th 116, 128 fn.13 to the effect that determination of whether an act is necessary or desirable is "*probably* so elastic as not to impose any substantive requirements" [emphasis added]. Petitioners then assert that such a determination is "largely immune from judicial review." This latter assertion, however, is unsupported by the court's opinion.

Boelts, decided in the context of a validation proceeding challenging findings made to support a redevelopment act amendment, focused on an unsupported finding of blight, which the court rejected. As such, the reference to the "necessary or desirable" requirement in a footnote is but dicta, and certainly did not address a requirement in a bond measure placed before the voters. Even so, just because a requirement is "probably" characterized in a certain way does not mean it is invariably so,[11] or that it is immune to judicial review

After all, the trial court's ruling acknowledged that all that was required was that there be evidence in the record to support the committee's determination. (1 HSR 25:4-8 [Tab 1].) Regardless of whether the Committee's determination is considered administrative or quasi-legislative, either type of action requires substantial evidence. (*Poway Royal Mobilehome Owners Assn. v. City of Poway ("Poway")* (2007) 149 Cal.App.4th 1460, 1479 [bond issuance validation proceeding governed by substantial evidence, "arbitrary or capricious" quasi-legislative standard]; *American Coatings Assn. Inc. v. South Coast Air Quality Management Dist*. (2012) 54 Cal.4th 446, 461.) Even decisions allowing broader discretion, such as those of the state parole board, require that there be some evidence to support them (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658) to ensure

[11] Indeed, *Boelts* emphasized that its ruling addressed the specific factual context of that case. *(Id.* at p. 123.)

they are not arbitrary or capricious, and even ministerial decisions, such as issuing a building permit (*Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 87, 90-91), require evidence showing that the requirements for the action have been met. (*Great Western Sav. & Loan Assn. v. City of Los Angeles* (1973) 31 Cal.App.3d 403, 409 [evidence showing that applicant met all requirements for building permit supports writ of mandate ordering its issuance]; s*ee,also, International Assn. of Fire Fighters v. Public Employment Relations Bd*. (2009) 172 Cal.App.4th 265, 279-280 [discussing standard for judicial review of ministerial decisions].) The trial court did not even demand that the evidence be substantial. There could hardly be a lower threshold.

One would presume that an agency exercising a minimum level of due dilligence would provide <u>some</u> evidence to explain why it was "necessary or desirable" for the finance committee to authorizing issuing bonds, especially when the "necessary or desirable" language was explicitly placed in the bond measure and where literally billions of dollars were at stake. Unfortunately, the Authority and the Committee, whether through negligence, ignorance, or arrogance, did not place <u>any</u> evidence in the record before the Committee to support the Committee's determination.

This lapse is especially egregious when the project involved is likely to be the largest and most expensive public works project in California's history. (See Petition at p.1.) To say the least, one would hope this is not a

common situation, but judicial review must be available to address it on the rare occasion that it occurs. Otherwise, as the trial court noted, there would be no way to protect against an arbitrary or capricious action. (1 HSR 25:4-8 [Tab 1]; see also, 1 HSR 122:2-27 [the court asks whether flipping a coin would be an appropriate basis for the decision; counsel for Petitioners replies yes] [Tab 7].)

Petitioners also cite to *City of Monrovia v. Black* (1928) 88 Cal.App. 686 as support for their position, but that case addresses a very different point. *City of Monrovia* stands for the proposition that a validation determination does not require formal findings in its support. What was at issue here, however, was not the absence of findings; but the absolute absence of evidence – something quite different. *City of Monrovia* did not discuss a lack of evidence to support the determination; only a lack of findings. "It is axiomatic that cases are not authority for propositions not considered." (*McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626.)

b. The trial court's judgment in the Validation Matter was proper, based on the evidence before it.

Given that judicial review of the Committee's determination was proper, and that, by Petitioners' own admission (3 HSR 714:25-28 [Tab 39]), the Committee, in open session, had before it only the Authority's bare resolution requesting bond issuance and the two proposed resolutions

it intended to adopt, the trial court had no choice but to conclude there was no evidence to support its determination about "whether or not it was necessary or desirable" to authorize the bond issuance.

Petitioners argued in the trial court, and claim again here (at p.33 of the Petition), that the mere request for issuance of bonds constituted evidence that the issuance was necessary or desirable. Yet if that were the case, there would be no need for a finance committee, for a determination by that committee, or for a validation action. The very fact that the Authority approved a resolution requesting bond issuance would, in itself, be sufficient evidence to make a judgment granting validation mandatory.[12] Yet it a basic axiom of statutory construction that the Legislature does not engage in idle acts (Civil Code §3532), and that if there is a statutory provision, the Legislature intended that provision to have meaning. (*In re V. V.* (2011) 51 Cal.4th 1020, 1039.) Under Petitioners' reasoning, the entirety of §§2704.12 and 2704.13 would be no more than idle acts, as the Committee's determination (and, indeed, any subsequent validation action) could be no more than an automatic rubber stamp approval of the Authority's resolution requesting authorization of bond issuance.[13]

---

[12] This is, in fact, the gist of ¶4 of Petitioners' prayer for relief.

[13] Petitioners also argue that the Bond Measure's requirement that the Committee determine, "whether or not it is necessary or desirable to issue bonds …" is essentially meaningless. (Petition at p.29.) Again, the Legislature is presumed not to engage in idle acts or to enact meaningless provisions.

Petitioners also point to *Perez v. Board of Police Commissioners* (1947) 78 Cal.App.2d 638, 643 as support. That case involved a resolution prohibiting Los Angeles police officers from belonging to any labor union whose membership extended beyond the Los Angeles Police Department. The plaintiff, a police officer, challenged the resolution as unconstitutional. He also alleged it had not been shown to be necessary or desirable.

The court held that, when adopting regulations governing a police department's public employees, the board was entitled to a wide discretion, including any regulation that might prevent injury to the department's efficiency. Under those circumstances, it was presumed that an adopted regulation was for those purposes and was, almost by definition, necessary or desirable. Court review of such regulations was therefore limited to when they reached the point of illegality. (*Id*. at 644.)

The situation here is quite different. Unlike *Perez*, there is no presumption intrinsic to issuing a bond that the issuance <u>is</u> necessary or desirable. The very fact that the bond measure created the Committee and tasked it specifically with making a determination of whether <u>or not</u> issuance was necessary or desirable (unlike the police board in *Perez*), argues to the contrary.[14]

---

[14] Even in *Perez*, the defendant board conceded the requirement for a "substantial basis for upholding the action of the board…" (*Id*.) The court found there was such a basis for the board's action.

Petitioners also argue that, even though they stipulated that no evidence, other that the bare resolutions, was presented to the Committee in open session (3 HSR 713-718 [Tab 39]), evidence supporting bond issuance could have been presented to the Committee in closed session. (Petition at pp.33-35.) Yet the closed session was called not to consider bond issuance, but "potential litigation."[15] (Government Code §11126(e).) Under Government Code §11126.3(b), "the state body may consider only those matters covered in its disclosure." Given the presumption under Evidence Code §664 that official duties have been regularly performed (See, e.g., *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 900), and no evidence having been presented to the contrary, it must be presumed that the Committee limited its closed session consideration to the litigation listed on its agenda and did not consider evidence related to the necessity or desirability of authorizing bond issuance. Further, if such evidence had been presented in closed session, it was Petitioners' burden to present that evidence to the trial court, in camera if necessary. Having failed to do so, Petitioners cannot now claim it exists. (*See, Western States Petroleum Assn. v. Superior Court (WSPA I)* (1995) 9 Cal.4th 559, 573.)

[15] No provision of the Bagley-Keene Open Meeting Law allows for a closed session to consider authorizing bond issuance.

c. Validation should be denied because the Authority's Project is not the Project the voters approved under Proposition 1A.

Because it found the authorization of bond issuance improper on procedural grounds, the trial court did not reach the claim that validation should also have been withheld because the project to which the Authority proposed to apply the bond proceeds was not the project the voters had approved in Proposition 1A. This claim was made not only by *Tos et al.*, but also by Real Parties in Interest King County Water District and Citizens for California High-Speed Rail Accountability (6 HSR 1405-1408 [Tab77]), First Freewill Baptist Church (6 HSR 1501-1503 [Tab81]), and Howard Jarvis Taxpayers Association (6 HSR 1518-1526 [Tab 82]). *Tos et al.* believe it would be most appropriate, if the Court determines to reverse the trial court's ruling denying validation on procedural grounds, to remand the Validation Action to the trial court so that it could address defendants' substantive claims in the first instance.

However, because Petitioners seek to have the Court issue a peremptory writ ordering entry of a validation judgment, which would bypass the trial court's consideration of these issues, and because Petitioners assert that exigent circumstances would make any further trial court proceedings an inadequate remedy, *Tos et al.* will address the issue in this return.

It is fundamental to California ballot measure law that a measure is to be interpreted to effectuate the intent of the voters who enacted it. (*Professional Engineers in California Government v. Kempton (Professional Engineers)* (2007) 40 Cal.4th 1016, 1037.) In general, the intent is presumed to have been accurately expressed in the plain language of the measure, and unless the measure itself is unclear or ambiguous, the meaning of the plain language will govern. (*Professional Engineers, supra*, 40 Cal.4th at 1037.)

Here, the language of the Act is very clear in indicating that the bonds are being authorized to finance the construction of a genuine high speed rail system throughout the State. (Sts. and Hwys. Code §§2704.01subd. (e) [definition of "high speed train system"], 2704.04 subd. (a).) Further, while the measure allows that system to be developed incrementally, rather than as a single project, the initial phase (Phase I) is intended to run between the Transbay Terminal in San Francisco, Union Station in Los Angeles, and Anaheim. (*Id.* at subd. (b)(2).) The Act also allows, upon funding being provided, for the Authority to construct one of seven high speed rail corridor segments (*Id.*, at subd. (b)(3).) However, it is abundantly clear throughout the measure that the bond funds are to be spent to construct a genuine high speed train system, and nothing else.[16]

---

[16] The Act does allow a limited amount of bond funding to be used for certain ancillary projects intended to improve the connectivity of

In the spring of 2012, however, the Authority adopted its Revised Business Plan, purportedly pursuant to Proposition 1A. (27 HSR 7046 *et seq.* [Tab 373]) In the Revised Business Plan, the Authority disclosed that it intended to spend portions of the bond funds authorized by Proposition 1A for improvements to the "Metrolink" system of conventional rail in the San Fernando Valley and Los Angeles Basin area. (27 HSR 7123 [showing expenditures for "upgraded diesel Metrolink corridor"] [Tab 373]; *see also Id*. at p. 7054 ["improvements will be made to the existing Amtrak Metrolink rail corridor between Union Station and Anaheim to improve safety, reliability, capacity, and travel times in that corridor."]) These improvements are to an existing conventional rail commuter system that connects the San Fernando Valley with Union Station in Los Angeles. While making such improvements may, in itself, be desirable, to use Proposition 1A bond funds to do so is contrary to the intent of the voters who approved Proposition 1A.

In addition, the Revised Business Plan also added two other provisions that were not intended by the voters who approved Proposition 1A to be part of the alleged high speed rail system.

First, the Revised Business Plan introduced the concept of a "blended system" where part of the system might be to full high speed rail,

---

conventional rail systems that connect with the high-speed rail system. (§2704.095 of the Act.) However this was not part of the bonds whose authorization is sought to be validated here.

but part would share facilities with conventional rail. That is to say, those conventional rail systems would be improved over the currently operating systems by switching from diesel power to electric units, removing at least some of the grade crossings from the rail right-of-way, and adding positive train control, a safety system that would allow trains to operate safely at reduced headways. High-speed rail trains would run over this shared "blended" system (along with conventional rail trains), but they would achieve neither the travel time nor minimum headways called for in Proposition 1A. (§2704.09 subd. (b)(2) and (c).) The Revised Business Plan did not specifically say that a fully complete high speed train system would not ever be completed, but what it did say was:

> *If a decision is made in the future to construct the Phase I Full Build System*, this would involve constructing fully electrified high speed rail infrastructure between San Jose and San Francisco and between Los Angeles and Anaheim. The projected schedule for completing the Full Build System is 2033, and the total cost is $67 billion in 2011 dollars which would translate to $91 billion in year-of-expenditure dollars. An alternative approach to construction of a Full Build Option on the San Francisco Peninsula was developed and reported in the Draft 2012 Business Plan. *It is not under consideration.* (27 HSR at 7133 [emphasis added][Tab 373].)

Even beyond completion of a "blended" Phase 1 system, the Revised Business Plan discussed upgrading the system to the Phase 2 System by adding service to Sacramento and San Diego without any indication that Phase 2 would also include upgrading a blended Phase 1 system to a full, genuine high-speed rail system. (27 HSR 7097 [Tab 373].) The Revised Business Plan also indicated that, "If required, a Full Build option for Phase

1 could be completed by 2033 at an incremental cost of $23 billion in year-of-expenditure dollars, for a cumulative cost of $91.4 billion." (*Id.* at 7064.) Significantly, none of the various projections for operational details of the future built-out system (e.g., Revised Business Plan Exhibits 5-12, 5-13, 5-14, 5-15, 6-5, 6-6, 6-7, 6-11, 6-12, 7-4, 7-7 [*Id.* at pp. 7165-7187]) included projections for a "Full Build option" even though those projections extended though 2060. It thus appears the Authority's intent is to continue to operate Phase I as a blended system for the foreseeable future.

In addition, the Funding Plan (20 HSR 5177 *et seq.* [Tab 323]) acknowledged that in the event the Authority was unable to provide high speed train service on a usable segment, it would arrange to have a conventional rail service provider "such as Amtrak" begin using the segment, built with Proposition 1A bond funds, to provide conventional rail service. *(Id.* at 5192.)

While the project proposed in the Revised Business Plan would certainly be an improvement over the current rail system, it deviates markedly from what California voters clearly indicated they intended to fund – a true high-speed rail system; not a "blended" hybrid system or upgrades to the existing conventional rail system. (See also 31 HSR 8105 [legislative hearing report expressing concern about legality of using Proposition 1A bond funds for "shared facilities"] [Tab 396].)

In short, by its own admissions, the project the Authority proposes to construct, and the Legislature's ratification of that project, indicate that the system the authority plans to construct is not a genuine high speed rail system providing single seat passenger service between the San Francisco Transbay Terminal and the Los Angeles Union Station in less than two hours and 40 minutes, without public subsidies, and with achievable headways of no more than five minutes, all of which was promised to voters in the bond measure.

The issue of whether a bond issuance can properly be authorized to construct a project that differs significantly from that for which the bonds were approved has never been addressed in a published appellate decision. The appellate courts, including the California Supreme Court, have, however repeatedly held that bond proceeds may not be spent except for the precise project the voters approved (e.g., *O'Farrell v. Sonoma County* (1922) 189 Cal. 343; *Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 693 [legislation authorizing use of state bond funds to operate county veteran services offices, not authorized in voter-approved bond measure, was invalid as unconstitutional repeal of measure's limitation on use of proceeds].)

It only stands to reason that if bond proceeds cannot be spent on a project that differs from what the voters approved, it would be equally

inappropriate, and indeed a waste of taxpayer funds, to allow the bonds to be issued when they could not properly be expended.

If bonds were issued in such a situation, the only legal course available, other than going back to the voters to approve the changed project, would be for the public agency to refund the bond proceeds to the investors. At that point, those investors could properly demand damages for the loss of income caused by, in essence, prematurely calling the bonds. Those damages would be entirely wasteful as the California taxpayers would get absolutely no benefit from the expenditure.[17] Under those circumstances, the Committee simply could not determine that it was necessary or desirable to authorize the issuance of the bonds.

How the Authority and the Legislature have changed the project from what the voters intended is also demonstrated in the Declaration of the "father" of California's high speed rail project, Hon. Quentin L. Kopp. (16 HSR 4268-4278 [subTab under Tab 273].) That declaration was submitted to the trial court in the *Tos* case and was cross-referenced in the Validation Action. (5 HSR 1277 [Tab 73].)

Senator Kopp indicates the following:

---

[17] Alternatively, the bonds could be issued with a provision allowing an early call of the bonds. However, such a provision would result in a significantly higher interest rate on the bonds, again at the expense of the taxpayers.

- The purpose of the bond funds was to build a genuine high speed rail system, nothing less *(Id.* at 4274:13-15.);

- The Revised Business Plan, adopted by the Authority and approved by the Legislature, completely altered this fundamental purpose. The Revised Business Plan envisioned the spending of the Proposition 1A bond funds on conventional rail improvements all over the State depleting those bond funds The voters never intended that to happen *(Id.* at 4270:15-21);

- There was never any intent, understanding or discussion of spending bond funds to build a conventional rail system in the Central Valley (which is exactly what the Authority intends to do through construction of the ICS) *(Id.* at 4273:16-4274:6);

- Spending bond funds for these purposes makes mandatory requirements of Proposition 1A unachievable and makes it questionable at best whether the "blended" system so created could operate without a public subsidy. *(Id.* at 4275:28-4276:15.)

In short, Senator Kopp, former chair of the High Speed Rail Authority during the critical time leading up to and following the preparation and passage of Proposition 1A, states that the intent of the voters has been completely betrayed by these changes.

As the California Supreme Court has stated, once a bond measure has been approved by the voters, it would be illegal and a violation of the Constitution for a legislative body to attempt to alter or change the measure, and specifically the project for which the bond proceeds were intended, without seeking and receiving the voters' approval for the change. (See *O'Farrell v. Sonoma County*, *supra*.) This violates Article XVI, Section 1, of the California Constitution.

Of course, the Authority was well aware of all these infirmities. Further, while the Committee was not provided information about these problems (or about anything else) by the Authority when the Authority requested the bond authorization, the Committee should have been generally aware of the changed nature of the project.

More to the point, shortly before the Committee's March 18th meeting, counsel for *Tos et al.* sent a letter to State Treasurer Bill Lockyer, the chair of the Committee, notifying him of the pendency of the Tos lawsuit and its potential impact on the legality of using bond proceeds on the project as proposed. (6 HSR 1540 *et seq.* [Tab 83].) With that information before them, it was improper for Committee to determine that issuance of Proposition 1A bonds to fund construction activities was necessary or desirable. Thus, beyond the lack of evidence supporting bond issuance, the evidence before the Committee mandated that it refuse to

authorize bond issuance. For that reason as well, validation was properly denied.

2. THE TRIAL COURT PROPERLY RULED THAT A WRIT SHOULD ISSUE RESCINDING THE AUTHORITY'S FUNDING PLAN

a. Compliance with Proposition 1A's requirements for the Funding Plan is reviewable by the courts, because they were promises made to the voters in the bond measure.

As in their claims on the Validation, Petitioners also claim in the Tos Case that the approval at issue there, the Authority's approval of its Funding Plan, is not subject to judicial review. (Petitioner's Point and Authorities in Support of Petition at p. 36.) According to Petitioners, the Funding Plan was intended solely for the benefit of the Legislature, and only the Legislature was entitled to judge its sufficiency. That judgment, according to Petitioners, occurred when the appropriation was voted on. If it was approved, the Funding Plan passed muster; if not, it failed.

Petitioners' position ignores, however, the fact that the requirements for the Funding Plan were placed before the voters in the ballot measure. Not all of AB 3034, the legislation that created Proposition 1A, became part of the ballot measure. For example, AB 3034 included adding §185035 to the Public Utilities Code, mandating the creation of a peer review group, presumably also for the benefit of the Legislature. If the Funding Plan's requirements were intended solely for the Legislature's benefit, there was no reason why those requirements needed to be placed before the voters

and approved by them. The conclusion therefore must be that these provisions were included for the benefit of the voters, as well as the Legislature. (*See*, *O'Farrell*, *supra*, 189 Cal. at 347 [in placing specific bond provisions on the ballot, the board is presumed to have been willing to be bound by those provisions].) Indeed, the analysis in the Voters' Handbook ("In addition, the authority generally must submit to the Department of Finance and the Legislature a detailed funding plan for each corridor or segment of a corridor, before bond funds would be appropriated for that corridor or segment"), as well as the ballot argument in favor of the measure, both trumpeted to the voters the financial protections and public oversight that would be provided. (20 HSR 5125, 5126, 5127 [Tab 319].) If the Legislature had intended the adequacy of the Funding Plan to be determined solely by the Legislature, that should also have been disclosed to the voters. Otherwise, the voters would properly assume that, as with any other promise made in a bond measure, the courts had the authority, and the duty, to ensure those promised were properly fulfilled.[18]

Thus the promises of specific requirements in the Funding Plan were made to the voters, and as with any promise made to the voters in a bond measure, unless otherwise explicitly stated, are enforceable through judicial

---

[18] The voters are presumed to be aware of the law underlying a ballot measure, including specifically a bond measure. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1048; *Peery v. City of Los Angeles* (1922) 187 Cal. 753, 761.)

review. (*O'Farrell, supra*, 189 Cal. at 348; *Shaw v. People Ex Rel. Chiang* (3rd Dist, 2009) 175 Cal.App.4th 577, 595-596.) To accept Petitioners' arguments about the unaccountability of the Authority would be to set a very dangerous precedent. As was said many years ago in *Jenkins v. Williams* (3rd Dist, 1910) 14 Cal.App.89 in the similar context of an agency's failure to faithfully carry out the terms of a bond measure:

> It seems to us that the views herein expressed are consistent with the letter and spirit of the statute, and that the construction contended for by the plaintiffs would open the door to possible, if not probable, dangerous abuse of power, and would take from the vote of the people all its significance as well as defeat its purpose. *(Id.* at 98.)
>
> (See also, *Peery v. City of Los Angeles et al.*(1922) 187 Cal.753, 769 ["Nevertheless, so to do, either with or without the sanction of said act, would be to accomplish a purpose directly violative of one of the essential conditions upon which the constitutional approval by the electors of said city of these bond issues was obtained, and in that sense a fraud would be wrought by permitting the conditions to be violated …"])

b. The Funding Plan violated the bond measure's requirement of identifying the funds available to complete the usable segment.

As with the Validation Action, once judicial review is allowed, it is obvious the Authority's action in approving the Funding Plan was, as the trial court found, an abuse of discretion.

Section 2704.08 subd. (c)(2) requires that a Funding Plan for a Corridor or Usable Segment include a series of statements, identifications,

or certifications. Among these are: 1) disclosure of the full cost of constructing the Corridor or Usable Segment; 2) the sources of funds that are intended to be invested in building the Corridor or Usable Segment; 3) a certification that the Corridor or Usable Segment can be completed as proposed in the Funding Plan; 4) a certification that the Corridor or Usable Segment, when completed, would be suitable and ready for high-speed train operation; and 5) a certification that the Authority had completed all project-level environmental clearances necessary to begin construction of the Corridor or Usable Segment. The Authority's Funding Plan, however, failed to comply with the plain language of several of these requirements.

While §2704.08 subd. (c)(2)(D) requires identifying the source of all funds to be invested in constructing the Corridor or Usable Segment, and subd. (c)(2)(G) requires certification that the Usable Segment can be completed as proposed in the plan, the Authority's Funding Plan only identified the source of funds to be used to construct the ICS[19] – 130 miles instead of the 300 miles in the Authority's identified Usable Segment. (20 HSR 5185-5186 [Tab 323].) Further, the Funding Plan's total of identified funds was only roughly $6 billion (20 HSR 5185 *[Id.]*), while the cost of

[19] The ICS was identified in the Draft 2012 Business Plan as running from North of Bakersfield to North of Fresno (20 HSR 5232 [Tab 324]) while it identified the first usable segment as running either from San Jose to Bakersfield ("IOS-North" or Merced to the San Fernando Valley ("IOS-South"). (27 HSR 5230.) The Revised 2012 Business Plan eventually specified IOS-South as the first usable segment. (27 HSR 7103 [Tab 373].)

the full Usable Segment (required by subd. (c)(2)(C)) was identified as $27 to $33 billion (depending on whether a northern or southern segment was built). (20 HSR 5183-5184 *[Id.]*.) In either case, the unfunded gap was huge, making the certification that the segment could be completed as proposed (§2704.08 subd. (c)(2)(G)) meaningless and flatly false. (20 HSR 5191 *[Id.]*.)

c. The Funding Plan Failed to make the required certification of environmental clearances.

In addition to its violation of §2704.08 subd. (c)(2)(D) and (G), the Funding Plan also failed to make the proper required certification under §2704.08 subd. (c)(2)(K). While §2704.08 subd. (c)(2)(K) requires that the Authority certify that it <u>had</u> completed all project-level environmental clearances necessary to begin construction of the Usable Segment, [emphasis added] the Authority's Funding Plan certified instead that the Authority <u>will have completed</u> all necessary clearances before it begins construction. (20 HSR 5192 *[Id.]*.) The difference is far from insignificant.

In determining the meaning of a statutory provision, the court may consider both the legislative history and wider historical circumstances surrounding its enactment. (*People v. Zambia* (2011) 51 Cal.4th 965, 977.) In this case, just prior to AB3034's consideration by the Legislature, the Governor, in his budget message, stated that it was important to:

> Limit the amount of bond funding that may be used for engineering work, environmental studies needed to obtain permits, and preservation of right-of-way to enable project costs to be more sccurately detemined and project risk to be reduced before other parties' funds are fully committed. (15 HSR 4190 [Tab269].)

In addition to ensuring that bond funds were not frittered away, this provision, which was eventually implemented as subd. (g) of §2704.08, intended to make sure that funds were prudently used to more accurately determine project costs and reduce project risks.

One of those risks was that project construction would be initiated prematurely, before all project level environmental clearances for the usable segment had been obtained. That would leave open the very real possibility of construction being delayed or halted because of an environmental problem. Not only would this cause delay, it would waste bond funds by requiring expensive demobilization and remobilization of construction crews and equipment. Requiring all environmental clearances to be obtained early on, well before construction began, would minimize these very real risks.

Significantly, while the bond measure's requirements for the second funding plan (§2704.08 subd. (d)), to be completed and approved prior to actually starting to use bond funds for construction, include more detail on other aspects of the initial funding plan, no mention is made of

environmental clearances. Presumably this is because those clearances had already been fully dealt with in the certification in the initial funding plan.

In the trial court, Petitioners argued that the certification only required sufficient clearances to begin construction.[20] (14 HSR 3721-3725 [Tab249].) Yet, it is presumed the Authority would have the clearance it needed to start construction before it started construction, as that is what both state and federal law requires. If that were the only certification required, it would be meaningless, and, as already pointed out, the Legislature is presumed not to engage in idle acts. Thus the certification must mean something more. As the trial court noted, if the certification did not address the entire usable segment, construction could actually begin without some necessary environmental clearances for the segment, leaving open the risk of stalled construction the certification was presumably intended to address. (1 HSR 82-84 [Tab 5].)

This is all the more true if the certification could be made in the future tense. A certification of a future event is a logical impossibility. While one can certify that one intends that something will happen, one cannot certify that a future event will happen, short of owning a highly accurate crystal ball or a time machine. After the appropriation was made,

[20] In fact, the Funding Plan admitted that not even those clearances had been obtained at the time of its certifications. (20 HSR 5192 (Tab 323].)

there would be no handle to pull back on to prevent wasted time and money if progress on environmental clearances stalled later in construction.[21]

d. The Authority's violations of the bond measure's requirements mandate rescission of the Funding Plan.

The trial court was not content with simply ordering rescission of the illegal Funding Plan. It insisted that rescission would only be appropriate if it would have "real and practical effects." (1 HSR 87:5-7 [Tab 5].) It therefore ordered supplemental briefing on that issue. *(Id.* at 88 *[Id.]*.)

Based on the supplemental briefing, the trial court concluded that approval of a Funding Plan under §2704.08 subd. (d), which must occur before bond proceeds can be committed or expended on construction, required the prior preparation of an adequate Funding Plan under subd. (c) of that section. It came to this conclusion taking into account the language of the measure itself, as well as the language of the analysis contained in the Voter Information Guide, which would have been read and relied upon by voters considering the bond measure. (See, 1 HSR 91-92 [trial court's explanation of its reasoning] [Tab 6].)

The trial court therefore concluded that rescission of the Authority's approval of the subsection (c) Funding Plan would have real and practical effect and ordered issuance of a writ of mandate ordering that rescission.

---

[21] Indeed, this is the current situation, as certification of the Merced to Bakersfield EIS/EIR has yet to occur.

The trial court's action was entirely appropriate, and indeed required, given the Authority's noncompliance with the bond measure's mandatory requirements.

B. THE LEGISLATIVE APPROPRIATION OF BOND FUNDS TOWARDS THE INITIAL CONSTRUCTION SEGMENT SHOULD BE DECLARED INVALID.

Although the trial court properly refused to grant a validation judgment and properly concluded that the Funding Plan must be ordered rescinded, it erred in refusing to invalidate the Legislature's appropriation of bond funds for the construction of the ICS. As part of the Court's consideration of the *Tos* Case through this writ petition, that error should be corrected.

1. THE BOND MEASURE ESTABLISHED MANDATORY PROCEDURAL REQUIREMENTS FOR APPROPRIATION OF BOND FUNDS.

As *Tos et al.* argued in the trial court (18 HSR 4759-4760 [Tab 275]; 13 HSR 3466-3467 [Tab 239]), Proposition 1A established both procedural and substantive requirements not only for the Authority, but also for the Legislature. Proposition 1A intended to assure that the Legislature was adequately and accurately informed before it made a decision to appropriate bond funds towards the high-speed rail project the voters had approved.

Under §2704.08 subd. (c), the Authority was required to submit its initial Funding Plan for the usable segment to the Legislature and the

Director of Finance no less than 90 days prior to submitting an initial appropriation request for that segment. The clear intent of that requirement was to ensure that the Legislature and Governor (who supervises his Director of Finance) were adequately informed before they considered approving an appropriation.

If the Funding Plan failed to meet the bond measure's requirements, neither the Legislature nor the Governor would have before them the adequate and accurate information the voters felt was needed to make an informed decision about the appropriation request. These procedural requirements were part of the financial protection framework that the Legislature established to assure voters that the bond funds would be used properly. (See, 20 HSR 5125 [funding plan must prepared [with required content] and submitted to Department of Finance, Legislature, and peer review panel *prior to appropriation of bond funds for corridor or usable segment*] [Tab 319].)

Not only did the Authority's Funding Plan itself violate the bond measure's requirements, but the presentation to the Legislature and the Governor of an inadequate Funding Plan violated the procedure the bond measure had mandated to assure that any appropriation of bond funds would be made prudently and based on full and accurate information. Because the inadequate Funding Plan violated the protective measures intended and approved by the voters, and undermined the reliance the

voters had placed on the review of that Plan, the resulting appropriation of bond funds should also have been declared invalid.

2. TOS ET AL PROPERLY RAISED THE ISSUE OF THE IMPROPRIETY OF THE APPROPRIATION IN THE TRIAL COURT.

The impropriety of the appropriation of bond funds under the current circumstances was properly raised in the SAC. (18 HSR 4836 [Tab 292, ¶90].) Tos et al also raised the impropriety of the Legislature's appropriation of bond funds in the absence of an adequate initial Funding Plan in their opening and reply briefs seeking mandamus in this action. 18 HSR 4759, 4760 [Tab 275]; 13 HSR 3466-3467 [Tab 239].) Thus, contrary to the concerns of the trial court (1 HSR 86-87 [Tab 5]), Petitioners had more than adequate notice of the claim by *Tos et al.* challenging the Legislature's appropriation for the Authority's high-speed rail project.[22]

3. DECLARING THE APPROPRIATION INVALID IS A PROPER REMEDY FOR AN APPROPRIATION MADE IN VIOLATION OF A BOND MEASURE.

The trial court rejected invalidation of the appropriation because the bond measure did not explicitly authorize that remedy: "The terms of Proposition 1A itself give the Court no authority to interfere with that

---

[22] The trial court also argued that the failure to name the Legislature as a party (1 HSR 85 [Tab 5]) precluded invalidation of the appropriation. However, it is not the Legislature but the Controller who must be named. (See, e.g., *Shaw, supra,* 175 Cal.App.4th at 587 [lawsuit challenging Legislature's action named Controller as defendant) *Tos et al.* properly named the Controller as a defendant.

[appropriation's] exercise of judgment." (1 HSR 86 [Tab 5]) However, given the procedural sequence mandated by Proposition 1A, proceeding to approve an appropriation in the absence of an adequate funding plan was beyond the Legislature's proper discretion under the ballot measure. (See, e.g., *Shaw*, *supra*, 175 Cal.App.4th at 602 [transfer of funds not authorized by bond measure was invalid as beyond Legislature's authority under the measure].) As in *Shaw*, the appropriate remedy is to invalidate the improper legislative action, and no specific authorization of that remedy was required.

CONCLUSION

Petitioners ask this Court to order entry of a rubber stamp judgment in a validation action where there is no evidence to support that judgment. This would directly violate the state's bond statutes, as well as the specific language of the bond measure. Petitioners also ask the Court to ignore the evidence presented to the trial court that showed a clear, direct, and intentional violation of bond measure provisions governing the preparation of a Funding Plan for the proposed high-speed rail project.

Regardless of how desirable the Authority's high-speed rail project might be and how beneficial its effects, the law does not allow the Authority, the Legislature, or this Court, to ignore the will of California's voters as expressed in a bond measure. The Court's Alternative Writ

should therefore be discharged, the Petition for Extraordinary Writ of Mandate denied, and the relief prayed for by *Tos et al.* granted in full.

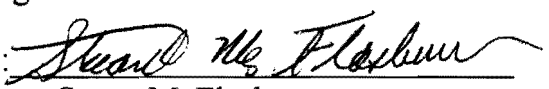
Dated:

Respectfully submitted,

Michael J Brady

Stuart M. Flashman

Attorneys for Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings

By: 

Stuart M. Flashman

CERTIFICATE OF COMPLIANCE
[CRC 8.204(c)(1)]

Pursuant to California Rules of Court, rule 8.204(c)(1), I, Stuart Flashman, certify that this Preliminary Opposition contains 12,276 words, including footnotes, as determined by the word count function of my word processor, Microsoft Word 2002, and is printed in a 13-point typeface.

Dated: March 14, 2014

Stuart M. Flashman

PROOF OF SERVICE BY MAIL AND E-MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above-titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On March 14, 2014, I served the within RETURN BY ANSWER AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, COUNTY OF KINGS, AND COUNTY OF KERN TO PETITION FOR EXTRAORIDNARY WRIT OF MANDATE on the parties listed below by placing a true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in a U.S. mailbox at Oakland, California addressed as follows:

Stephanie Zook, Deputy Attorney General*
California Attorney General
1300 I Street, Ste. 125
Sacramento, CA 95814
Stephanie.Zook@doj.ca.gov

Raymond L. Carlson, Esq.*
Griswold, LaSalle, Cobb, Dowd & Gin LLP
111 East Seventh Street
Hanford, CA 93230
carlson@griswoldlasalle.com

Tim Bittle*
Howard Jarvis Taxpayers Foundation
921 11th Street, Ste. 1201
Sacramento, CA 95814
tim@hjta.org

Blaine Green, Esq.*
Pillsbury Winthrop Shaw Pittman LLP
Four Embarcadero Ctr., 22nd Fl.
P.O. Box 2824
San Francisco, CA 94126-2824
blaine.green@pillsburylaw.com

Harold Johnson*
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
hej@pacificlegal.org

Nicole M. Misner, Deputy County Counsel*
Office of the County Counsel
Kern County Administrative Ctr.
1115 Truxtun Ave., 4th Fl.
Bakersfield, CA 93301
nmisner@co.kern.ca.us

Thomas P. Feher, Esq.*
LeBeau & Thelen LLP
5001 E. Commercecenter Dr. #300
P.O. Box 12092
Bakersfield, CA 93309
tfeher@lebeauthelen.com

Hon. Michael Kenny, Dept. 31
c/o Clerk of Court, Sacramento County Superior Court
Gordon D. Schaber Courthouse
720 9th Street
Sacramento, CA 95814-1398

Presiding Judge
c/o Clerk of Court, Sacramento County Superior Court
Gordon D. Schaber Courthouse
720 9th Street
Sacramento, CA 95814-1398

In addition, on the above-same day, I served the above-same document on the above-same parties by electronic delivery by attaching a copy of said document, converted to "pdf" file format, to an e-mail sent to the parties indicated with an asterisk at the e-mail addresses shown above.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on March 14, 2014.

Stuart M. Flashman