Civ. No. S_____

IN THE SUPREME COURT OF CALIFORNIA

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

After a Decision of the Court of Appeal
Third Appellate District
Case Number C075668
Sacramento County Superior Court Case Number 34-2011-0113919-CU-MC-GDS and34-2013-00140689-CU-MC-GDS; Department 31, Hon. Michael P. Kenny, Judge. Tel.: 916-874-6353

PETITION FOR REVIEW

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Plaintiffs/Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings (hereinafter, "Tos Plaintiffs") respectfully petition the California Supreme Court for review following the decision of the Court of Appeal in Case Number C075668, Third Appellate District (per Raye, P.J.). The Court of Appeal filed its decision on July 31, 2014 and the decision became final on August 30, 2014 after all petitions for rehearing had been denied.

The Court of Appeal overruled trial court decisions in two related cases and ordered issuance of a writ of mandate: 1) in case No. 34-2011-0113919-CU-MC-GDS (*John Tos et al. v. California High-Speed Rail Authority et al*. [hereinafter, "*Tos Case*", and the latter parties referred to hereinafter collectively as "Tos Defendants"]), the appellate writ orders the trial court to reverse its order granting a writ of mandate and instead enter an order denying Tos Plaintiffs' petition to rescind Defendant/Petitioner California High-Speed Rail Authority's ("Authority") Initial Funding Plan for a usable segment of the Authority's proposed high-speed rail system and 2) in case No. 34-2013-00140689-CU-MC-GDS (*California High-Speed Rail Authority et al. v. All Persons Interested etc.* [hereinafter, "*Validation Matter"* and the plaintiffs therein, "Validation Plaintiffs"]), the appellate writ orders the trial court to enter judgment validating Validation Plaintiffs decision to issue $8,599,715,000.00 in bonds authorized under the November 2008 Proposition 1A statewide ballot measure, the Safe, Reliable High-Speed Rail Bond Measure for the Twenty-First Century (hereinafter, "Prop. 1A" or "Bond Measure"). A

true and correct copy of the final Slip Opinion is attached in the appendix hereto as Exhibit A.

ISSUES PRESENTED FOR REVIEW

1. What is the appropriate standard for public agencies, the Legislature, and the courts in complying with the California Constitution's requirements for implementing a voter-approved bond measure?

2. Can a voter-approved bond measure place conditions or prohibit entirely future actions by a legislative body in implementing the bond measure's provisions, and if so, may the condition or prohibition be implicit, or must it be explicit and highly specific?

3. Did the Court of Appeal's decision constitute an improper attempt to modify the intent of the voters in enacting Proposition 1A?

4. Is compliance with the procedural requirements of a voter-approved bond measure subject to judicial review, and if so, what is the proper standard of review?

5. May a court modify the voters' intent in approving Proposition 1A by allowing a legislative appropriation of bond funds for acquisition and construction of a usable segment of the proposed high-speed train system to stand when:

   a) The bond measure required that, prior to the Legislature considering or approving any such appropriation, the Authority submit to the Legislature a Funding Plan for the usable segment;

b) The bond measure required that the funding plan include a statement identifying the sources of all funds to be invested in construction of the usable segment, including anticipated time for receipt of those funds, and certifying that all necessary project level environmental clearances for construction of the usable segment had been completed; and

c) The submitted Funding Plan did not satisfy either of these clear mandatory requirements.

6. May the standard for judicial review of a quasi-legislative administrative determination be modified to eliminate the requirement for supporting evidence, based on deference to the expertise of the approving entity?

7. May a quasi-legislative determination required by a voter-approved bond measure, that the Bond Finance Committee determine whether or not it is necessary or desirable to issue the bonds at that time, be held insubstantial and not subject to judicial review? If not, does the total lack of supporting evidence require denying validation to the bond issuance decision?

8. Tos Plaintiffs join in and incorporate by this reference the Statement of Issues Presented for Review of Plaintiffs/Real Parties in Interest Howard Jarvis Taxpayers Association and First Free Will Baptist Church in their respective Petitions for Review being submitted in this case.

WHY REVIEW SHOULD BE GRANTED

The Court of Appeal's decision in this case runs counter to nearly a century of consistent California appellate decisions requiring strict compliance with the intent of the voters in implementing a voter-approved bond measure. The Court of Appeal brushed aside two specific, mandatory provisions of Prop. 1A, declaring that there was no remedy for the Authority's violation of requirements for its initial, pre-appropriation Funding Plan (hereinafter, "IFP") on the first usable segment of its proposed high-speed rail system. The Court of Appeal also dismissed as insubstantial and not subject to judicial review the Bond Finance Committee's quasi-legislative determination, specifically required by the Bond Measure, that it was "necessary and desirable" to issue the bonds requested by the Authority; this in spite of the fact that there was absolutely no evidence in the record before that Committee to support its determination. In essence, the Court of Appeal wrote these two provisions out of the Bond Measure, ignoring the clear and explicit financially protective intent of the voters in enacting Prop. 1A.

As perhaps the biggest public works project in California's history and a project committing almost ten billion dollars of public funds, the High-Speed Rail Project raised significant concern in both the Legislature and among the voters, causing the Legislature to include in the Bond

Measure a series of stringent provisions that the Court of Appeal itself called a "financial strait-jacket." (Slip Opinion at p.33.)

The Court of Appeal's decision, however, allows the Authority – and the Legislature – to escape, Houdini-like, from that straitjacket, undercutting the intent of the voters and raising questions about whether voters can put their trust in clear, mandatory provisions placed in a bond measure. If the Court of Appeal's decision is allowed to stand, the trust and confidence of California's voters in the integrity and credibility of the constitutional provisions governing bond measures, as well as in the electoral process itself, will be seriously undermined. This could have further serious repercussions by undermining the willingness of voters to approve future bond measures, which, in turn, would jeopardize the financial viability of future publicly funded capital projects.

It is perhaps in part for these reasons that California courts have consistently held that the provisions of voter-approved bond measures must be strictly followed. The Court of Appeal's decision would severely weaken that long-standing and important line of cases.

Further, the Court of Appeal's decision creates an unprecedented exception to the heretofore universal standard for judicial review of quasi-legislative determinations, that they not be, "arbitrary, capricious, or totally lacking in evidentiary support." The Court of Appeal asserted that the expertise of the Bond Finance Committee allowed it to determine that

issuance of bonds was "necessary or desirable," unencumbered by the need to have any supporting evidence before it. According to the Court of Appeal, the mere fact that the Authority had requested issuance of the bonds and indicated that the bond proceeds would be used consistent with Prop. 1A's requirements was all that was required. (Slip Opinion at p. 24.)

FACTUAL AND PROCEDURAL HISTORY

I. THE HIGH-SPEED RAIL AUTHORITY, PROPOSITION 1A, AND TOS DEFENDANTS COMPLIANCE WITH THAT MEASURE'S REQUIREMENTS

A. THE HIGH-SPEED RAIL AUTHORITY

In 1996, the Legislature established the Authority to direct the development and implementation of intercity high-speed rail service within California. (Public Utilities Code §185030.) To that end, the Authority was directed to prepare a plan for the construction and operation of a high-speed train network for the state, and was exclusively granted authorization and responsibility for planning, constructing, and operating that system, and all passenger rail service with speeds exceeding 125 miles per hour. (Publ. Util. Code §185032)

B. THE BOND MEASURE

In 2008, after extensive discussion, debate, and revisions, the Legislature approved and placed on the ballot Proposition 1A, "The Safe, Reliable High-Speed Passenger Train Bond Measure for the Twenty-First

Century" (Streets & Highways Code §§2704 *et seq.*[1],). Prop. 1A was subsequently approved by the voters.

C. THE INITIAL FUNDING PLAN

In November 2011, purportedly in accordance with Prop. 1A's provisions, the Authority prepared, approved, and submitted to the Legislature, as well as to other bodies, an IFP pursuant to §2704.08 subd. (c), part of the Bond Measure. The IFP purported to include numerous identifications or certifications required by the Bond Measure. (§2704.08 subd. (c)(2)(A)-(K).)

Specifically, the IFP identified a first "Usable Segment" for funding and construction. That segment, extending either from San Jose to Bakersfield or from Merced to the San Fernando Valley, was to be roughly 300 miles long and to cost in the neighborhood of $30 billion. However, the IFP's identification of funding sources identified only $6 billion of funding for a 130 mile "Initial Construction Section" ("ICS")[2] rather than funding for the full usable segment, as Prop. 1A required. In addition, the IFP only certified that all project-level environmental clearances <u>for the ICS</u> *will have been* completed prior to expending bond funds requested in the appropriation. It failed to certify than that all environmental clearances

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

[2] As the trial court pointed out in its decision, the term "Initial Constriction Section" was neither defined nor even used in Prop. 1A.

for the full usable segment had already been completed, as Prop. 1A required.

D. THE BOND ISSUANCE AUTHORIZATION.

On March 18, 2013, the Authority approved and submitted to the California High-Speed Passenger Train Finance Committee ("Bond Finance Committee" or "Committee") a resolution requesting authorization to issue bonds for all of the remaining almost-$8.6 billion Prop. 1A funds[3]. The Authority did not submit any supporting documentation to the Committee. That same day, the Committee[4] met and, with no discussion, approved resolutions authorizing the issuance of the entirety of the remaining bond funds. The resolutions asserted that the Committee had determined that it was both necessary and desirable to issue the bonds. The following day, the Authority and the Committee jointly filed a complaint for validation.

II. PROCEDURAL HISTORY

A. TOS ET AL. V. CALIFORNIA HIGH-SPEED RAIL AUTHORITY

The *Tos Case* was filed in the trial court on November 14, 2011 as a combination of mandamus under Code of Civil Procedure §1085,

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[3] The Committee had previously, but without a validation action, authorized issuing smaller amounts of bonds.

[4] At the meeting, each of the Committee members identified in the Bond Measure was only represented by a substitute member.

declaratory relief under Code of Civil Procedure §1060, and injunctive relief for threatened illegal expenditure of public funds under Code of Civil Procedure §526a.

Mandamus claims based on the Authority's violations of provisions of Proposition 1A in preparing and approving its initial funding plan were heard in the trial court in May and November 2013. On November 25, 2013, the trial court issued its Ruling on Submitted Matter, finding that the Authority had violated provisions of Streets and Highways Code §2704.08 subd. (c)(2)(D) and (K) in preparing and approving the IFP for the Initial Operating Segment of the proposed high-speed rail system. On January 3, 2014, the trial court entered its Order Granting Petition for Peremptory Writ of Mandate.

Petitioners California High-Speed Rail Authority et al. filed their Petition for Extraordinary Writ of Mandate with this Court on January 24, 2014. The Court transferred the petition to the Third District Court of Appeal, which granted an alternative writ and ordered full briefing on the issues raised.

After full briefing, including several amici briefs and answers thereto, the Court of Appeal heard oral argument on May 23, 2014 and issued its Decision on July 31, 2014.

B. CALIFORNIA HIGH-SPEED RAIL AUTHORITY ET AL. V. ALL PERSONS INTERESTED ETC.

As was noted above, the *Validation Matter* was filed as a validation action by Plaintiffs/Petitioners California High-Speed Rail Authority and California High-Speed Passenger Train Finance Committee. The case was filed on March 19, 2013. Seven parties, or groups of parties, eventually filed answers to the complaint: John Tos et al., Howard Jarvis Taxpayers Association ("HJTA"), First Freewill Baptist Church ("Church"), Kern County, Kings County Water District ("KCWD") and California Citizens for High-Speed Rail Accountability ("CCHSRA"), Union Pacific Railroad Company ("UP"), and Eugene Voiland ("Voiland"). In addition, KCWD and CCHSRA filed a cross-complaint for reverse validation against the Validation Plaintiffs. However, the cross-complaint was dismissed after the Validation Plaintiffs' demurrer was sustained without leave to amend.

After full briefing, the trial court heard the matter on September 27, 2013, and issued its Ruling on Submitted Matter: Complaint for Validation of Bonds on November 25, 2013. Final Judgment denying validation was entered on January 3, 2014. In addition to the above-referenced writ petition, Validation Plaintiffs also filed a timely appeal of the judgment on March 3, 2014. That appeal is still pending in the Third District Court of Appeal, but has been stayed by stipulation of the parties pending the final resolution of this writ proceeding.

ARGUMENT

I, REVIEW IS NECESSARY TO PRESERVE IMPORTANT PRECEDENTS ON COMPLIANCE WITH VOTER-APPROVED BOND PROVISIONS.

In *Peery v. City of Los Angeles* (1922) 187 Cal. 753, the California Supreme Court first opined that while the approval of a bond measure by the voters might not be an actual contract between the voters and the government agency:

> …a status analogous to such relation was created through the exercise of the constitutional right of the electors of said city [of Los Angeles] in approving the creation of the bonded indebtedness represented in these two bond issues upon express conditions and assurances contained in the Act of 1901, which may not be changed in the manner and to the extent it is sought to be changed under the provisions of the Act of 1921, without working, in effect, a fraud upon the electors through securing their votes for the approval of these bond issues upon terms and conditions which will not be kept if the attempted sale of these bonds below their par value is given the sanction of this court. (*Peery*, *supra*, 187 Cal. at 767; but see*, O'Farrell v. Sonoma County et al.* (1922) 189 Cal. 343, 348 [submittal of bond measure to voters and approval thereby constituted a binding contractual agreement].)

In *Peery*, the bond measure placed on the ballot had promised that the bonds would be sold with a maximum interest rate of 4½%. (*Id*. at 755.) However, after some of the bonds had been sold, it was alleged that the City had negotiated to sell the bonds at an effective interest rate of above 5%. Similarly, a later bond issue was approved by voters with a maximum interest rate of 5%, but was proposed to be sold at an effective interest rate in excess of 6%. (*Id*. at 755-757.) The City argued that an act

of the Legislature, approved subsequent to the bond votes, allowed for these changes of terms. (*Id*.)

The court in *Peery* cited to a constitutional provision (Article 11, Section 18) that was similar in relevant respects to Article 16 Section 1 that is at issue here.[5] The court held that the provisions of the governing statutes at the time the bonds were approved, even though they were not expressly placed on the ballot before the voters, were part of the conditions under which the bonds were approved, and could not be modified later. (*Id*. at

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[5] The texts of the two sections are, as relevant here:

Article 11, Sect 18 – No county, city, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at any election to be held for that purpose. … any indebtedness or liability incurred contrary to this provision … … shall be void. (*Peery, supra*, 187 Cal. at p. 758.)

Article 16, Sect. 1 – The Legislature shall not, in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars ($300,000), … …, unless the same shall be authorized by law for some single object or work to be distinctly specified therein which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within 50 years of the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged, … … ; but no such law shall take effect unless it has been passed by a two-thirds vote of all the members elected to each house of the Legislature and until, at a general election or at a direct primary, it shall have been submitted to the people and shall have received a majority of all the votes cast for and against it at such election; and all moneys raised by authority of such law shall be applied only to the specific object therein stated or to the payment of the debt thereby created. …

761.) Specifically, the court rejected the argument that a later act of the legislature permissibly modified the voter-approved bond provisions.

This principle, that the terms and conditions placed before the voters in a bond measure may not be unilaterally modified, even by the Legislature, after the voters' approval, has been confirmed multiple times in subsequent decisions. (See, e.g., *O'Farrell, supra*; *Shaw v. People Ex Rel. Chiang* (2009) 175 Cal.App.4th 577; *Monette-Shaw v. San Francisco Bd. of Supervisors* (2006) 139 Cal.App.4th 1210; *Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688.)

A. THE BOND MEASURE CONTAINED CLEAR, MANDATORY CONDITIONS FOR THE IFP THAT WERE NOT COMPLIED WITH.

As the Court of Appeal acknowledged, the Bond Measure included clear, mandatory requirements for the IFP. (Slip Opinion at p.37.) In particular, there were clear requirements that the IFP identify the sources of all funds to be invested in the usable segment that the requested appropriation would help fund and construct, along with the anticipated time of receipt for those funds (§2704.08 subd.(c)(2)(D)), and that it include a *certification* by the Authority that it had obtained all necessary project level environmental clearances necessary to proceed to construction of that usable segment (*Id*., subd. (c)(2)(K).). The Court of Appeal also frankly acknowledged that the IFP prepared and submitted to the

Legislature by the Authority was woefully deficient in both these respects. (Slip Opinion at 37.)

While the IFP identified the full cost to construct the usable segment as between $30.7 and $33.2 billion,[6] it only identified roughly $6 billion in available funds, enough to perhaps construct 130 miles of the 300-mile usable segment. The compliance with the environmental clearance requirement was, if anything, even worse. At the time the IFP was issued, the Authority had not yet obtained any project-level environmental clearances. Instead, it only certified a potential future clearance, and then only for the 130 mile ICS.

B. THE COURT OF APPEAL'S DECISION, IN ACCEPTING THE LEGISLATURE'S APPROPRIATION AS VALID, IGNORED THE IMPLIED CONDITION INCLUDED IN THE BOND MEASURE.

Despite the Court of Appeal's acknowledgement of the IFP's insufficiencies, it refused to invalidate the legislative appropriation that was based on it.[7] The Court of Appeal asserted, as had the trial court, that only if the bond measure had given clear, explicit direction restricting future

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[6] The two figures were for the two alternative segments proposed as the initial usable segment..

[7] The trial court had found that the claim for invalidation of the appropriation had been waived by failing to be asserted in the complaint and failing to be raised in Tos Plaintiffs' opening brief. The Court of Appeal noted this, but its decision did not rely on waiver. (Slip Opinion at p.43.) In any case, the claim had not been waived. The claim was raised in the Second Amended Complaint, and was addressed, in a mandamus context, in the Tos Plaintiffs' opening trial court brief.

legislative action would a court have the authority to declare an appropriation invalid. (Slip Opinion at p.44.)

The Court of Appeal contrasted the current situation with *Shaw, supra*, 175 Cal.App.4th 577. It asserted that in *Shaw*, the voters had "made clear what the Legislature could and could not do." (Slip Opinion at p. 44.) In fact, however, the situations were not that different. In both cases, the voters placed conditions and restrictions on the Legislature's discretion to make future appropriations.

In *Shaw*, the state's voters had approved an initiative bond measure (Proposition 116). That measure modified the Legislature's already-existing Public Transportation Account ("PTA"), which received "spillover" sales and use tax funds from the sale of gasoline. Prop. 116 redesignated the PTA as a trust fund dedicated to transportation planning and mass transit purposes, to be specified by the Legislature.[8] The measure also provided that the newly-enacted redesignation could be amended by the Legislature, so long as the amendment was consistent with and furthered the purposes of the redesignation. (*Id.* at pp.588-589.)

In 2007, the Legislature amended Revenue & Taxation Code §7102 to establish a new fund, the Mass Transportation Fund ("MTF"), and began transferring revenue that formerly went to the PTA to other accounts, including the MTF. (*Id.* at p. 592.) The Legislature then proceeded to

[8] Public Utilities Code §99310.5, Revenue & Taxation Code §7102.

allocate MTF funds, as well as PTA funds, to uses not specified in Prop. 116. (*Id.* at pp. 593-594.)

The Court of Appeal held that, in amending Revenue & Taxation Code §7102 to: 1) establish the MTF; 2) transfer gas tax revenue to that fund rather than the PTA; and 3) use revenue from both funds for purposes other than transportation planning and mass transit, the Legislature was not furthering the purposes of Prop. 116, and the amendments were therefore invalid as outside the powers allowed to the Legislature under Prop. 116.

The court noted that while the proposition's restriction of legislative authority must be strictly construed, "it must also be given the effect voters intended it to have." (*Id.* at p. 597 [quoting from *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1255-1256].) Unfortunately, in the instant case, the Court of Appeal did not properly construe the intent of the voters in enacting Prop. 1A. The Court failed to understand the full implications of Prop. 1A's "financial straitjacket," which included placing conditions on the appropriation of Prop 1A bond funds.

Prop. 1A enacted Section 2704.08, which, in subdivision (c), requires that the Authority prepare, approve, and submit to the Director of Finance, the peer review group established under Public Utilities Code §185035, and the legislative transportation policy and fiscal committees, an IFP for each corridor or usable segment thereof that it intended to construct, and that it do this at least 90 days prior to submitting an appropriation

request to the Governor and the Legislature to fund that construction. Both the trial court and the Court of Appeal recognized that this requirement was established to ensure that the Legislature, as well as the peer review group and Director of Finance, had adequate financial and environmental information to evaluate the appropriateness of the appropriation request, and sufficient time to digest and understand that information. (Slip Opinion at p. 36.)

What neither the trial court nor the Court of Appeal recognized, however, was that this requirement was also intended by the voters to act as a condition precedent for the Legislature's approval of the associated appropriation. The Court of Appeal asserted that the purpose of the requirement was "to ensure that construction of a segment would not begin until potential financial or environmental obstacles were cleared." (Slip Opinion at p.37.) This ignores, however, the fact that the voters' intent was that the requirements set by §2704.08 subd. (c)(2) be satisfied prior to the submission of an appropriation request, not prior to the initiation of construction.

If the purpose were solely to prevent construction, a single funding plan, to be submitted and approved prior to the expenditure of construction funds, would have sufficed. Yet the Bond Measure required not one, but two funding plans, the IFP and a second, follow-up pre-expenditure Funding Plan. Logically, if the pre-expenditure funding plan was intended

to prevent expenditure of funds unless the required conditions in that plan had been met, the conditions in the first funding plan had to be aimed at the appropriation of funds, not their expenditure.

This also made sense from a public policy perspective. As noted, the intent of the conditions was to serve as a "financial straitjacket" to prevent wasteful expenditure of public funds. The Court of Appeal focused on the use of the appropriated funds for construction, which would require a second funding plan. What the Court of Appeal ignored was that subsection (g) of §2704.08 allows the expenditure of up to $675 million of bond funds for land acquisition, relocation assistance, environmental mitigation, and engineering work, as well as for planning and environmental review for the proposed high-speed rail system, including the usable segment.

The IFP was intended to force the Authority to address potential financial or environmental problems with the usable segment before an appropriation was made. This was intended to ensure that appropriated bond funds would not be used, for example, to acquire land for a segment whose complete construction remained problematic.[9]

Of special importance is that several of the IFP's conditions require the Authority to make certifications, including that all project-level

[9] SB 1029 included an appropriation of bond funds for both acquisition of right-of-way and actual construction of the ICS. Only the latter would require preparation and approval of a pre-expenditure Funding Plan.

environmental clearances for the usable segment had already been completed. As Tos Plaintiffs pointed out to the Court, a certification is more than just providing information. It is a guarantee that what is being certified is true. By requiring this certification, the voters clearly intended to require that the any environmental issues involving the usable segment had already been fully addressed prior to a legislative appropriation for that segment. By making an improper certification, the Authority undercut the voters' intent in setting this requirement. By holding that no remedy was available to address that improper certification, the Court of Appeal even further undercut the voters' intent.

While neither the Authority, nor the Legislature, nor the Court of Appeal may have intended it, the effect of the Court of Appeal's decision is exactly what this Court cautioned against in *Peery, supra*, 187 Cal. at 767, essentially a fraud on the voters. With the voters' intent not having been met, it was improper for the Legislature to release bond funds for the Authority's use, regardless of the second, pre-expenditure Funding Plan. For that reason, the appropriation should have been declared invalid and the Authority should have been required to correct its misfeasance before the appropriation could be allowed.

The Court of Appeal's decision essentially allowed the Authority and the Legislature to rewrite Prop. 1A contrary to the intent of the voters. As in *Shaw* and *Peery*, that overreach should be rejected.

C. THE COURT OF APPEAL EFFECTIVELY REWROTE THE BOND MEASURE TO REMOVE THE REQUIREMENT THAT THE BOND FINANCE COMMITTEE DETERMINE THAT BOND ISSUANCE WAS NECESSARY OR DESIRABLE.

In addition to modifying the voters' intent by allowing a legislative appropriation to stand based on a defective, noncompliant IFP, the Court of Appeal further ignored the voters' intent by emasculating the requirement that the Bond Finance Committee determine whether or not it was necessary or desirable to issue the bonds prior to authorizing their issuance. While the Court of Appeal did not explicitly delete this requirement from Prop. 1A, it effectively did so by declaring that the determination was to be left to the totally unfettered discretion of the Committee, so long as the Authority had requested funds and indicated that they would be used for purposes consistent with the Bond Measure. (Slip Opinion at p. 24.)

The Court of Appeal cited to *Boelts v. City of Lake Forest* (2005) 127 Cal.App.4th 116, 128, fn.13, to *City of Monrovia v. Black* (1928) 88 Cal.App. 686, 690, and to *Perez v. Board of Police Commrs*. (1947) 78 Cal.App.2d 638, 643 for the proposition that the "necessary or desirable" language in the Bond Measure was essentially meaningless. (Slip Opinion at pp. 21-23.) None of the cases support that conclusion.

In *Boelts*, at issue was whether the city's approval of a redevelopment plan amendment should be validated. The court concluded that redevelopment law required certain facts, and that there was no

evidentiary support for those facts when the city approved the plan; hence the plan's approval could not be validated. It was in that context that the court parenthetically opined, in a footnote that must be considered dicta, that the words "necessary or desirable," part of a separate requirement from that which the city violated, "are probably so elastic as to not impose any substantive requirements."

It is black letter law that cases are not authority for matters not decided. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372.) The *Boelts* court's reference to the "necessary or desirable" language was not necessary to the court's decision. Consequently, it could not be relied upon by the Court of Appeal as a basis for dismissing that language as insubstantial.

City of Monrovia, supra, is an equally inappropriate citation. There, what was at issue was not the issuance of bonds, but the sufficiency of three bond measures placed on the ballot, and the phrase "necessary or desirable" was not even involved. In discussing a related case, the court opined that, because all the facts necessary for the voters to determine substantial compliance with statutory requirements were available to the voters, it was not necessary that the ballot measures explicitly state that the requirements had been met, as that was evident from the fact that they had been placed on the ballot. There, however, the voters had independent access to the facts needed to confirm statutory compliance, while here there was no

supporting evidence for anyone to rely on. As in *City of Monrovia*, the fact that the Bond Finance Committee issued the bonds shows that it impliedly (and indeed explicitly) found that it was necessary and appropriate to issue them. Unlike *City of Monrovia*, however, that determination was totally lacking in evidentiary support.

Finally, in *Perez, supra*, a police officer challenged a police commission resolution prohibiting officers from joining a police officers' union. Among other claims was that the resolution was beyond the power of the commission to enact, because it was only empowered to make and enforce "necessary and desirable rules and regulations" for the police department. (*Perez, supra,* 78 Cal.App.2d. at p. 642.) In that context, the court opined that the fact that the rule had been adopted indicated that, in the Commission's view, it was necessary or desirable. (*Id.* at p. 643.) The court noted that for the rule to be valid, it must be found reasonable – i.e., there must be a substantial basis for upholding the rule. (*Id.* at pp. 643-644.) The court's review of the rule concluded that it was reasonable, and hence within the Board's power to enact. Here, however, unlike *Perez*, it was impossible for the trial court to conclude that the Committee's determination was reasonable, because there was no evidence before the court from which to reach that conclusion.

As the trial court had noted, it was particularly important, given the large size of the bond measure, that the public, and the courts, be able to

confirm that the Committee's action, in determining that the bond issuance was both necessary and desirable (as its resolution stated), was not arbitrary or capricious. Nor could the language simply be ignored. The Legislature's insertion of this language into Prop. 1A meant that it had to have some meaning, because the Legislature does not engage in idle acts. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 634.) Barring an ambiguity coupled to evidence of a different intent (of which there is none), the meaning of this provision must be that of its plain language. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1131.)

Once the requirement that the Bond Finance Committee determine whether or not it was necessary or desirable to issue the bonds had been placed in the Bond Measure and approved by the voters, it was, so to speak, set in stone. At that point, neither the legislature nor the courts could retroactively change the intent of the voters, as expressed in the words of the Bond Measure. (*O'Farrell, supra*, 189 Cal. at p.348.) Only by going back to the voters could the language and meaning of the bond measure be altered. (*Id.*) Without such action, the courts' duty must be to enforce the requirements of the measure as it was understood and approved by the voters. (*Id*., *accord, Peery, supra*, 187 Cal. at p. 769.)

The lack of any evidence to support the Committee's determination made it impossible for the trial court to confirm that the Bond Act's

requirement, inserted by the Legislature and approved by the voters, had been complied with properly. The Court of Appeal's action in removing the evidence requirement again undercut the Legislature's, and the voters' intent.

II. REVIEW IS NECESSARY TO PROTECT AGAINST EROSION OF THE REQUIREMENTS FOR JUDICIAL REVIEW OF A QUASI-LEGISLATIVE ADMINISTRATIVE ACTION.

Not only did the Court of Appeal's decision undermine public confidence in the integrity of the bond measure process, even more fundamentally it opened a potentially enormous loophole in the scope of judicial review of quasi-legislative administrative decisions, particularly decisions where the agency involved could be characterized as having special expertise. The potential range of mischief that this would allow is almost incalculable.

A. JUDICIAL REVIEW OF QUASI-LEGISLATIVE ADMINISTRATIVE DECISIONS, WHILE DEFERENTIAL, STILL REQUIRES REVIEW OF THE EVIDENCE BEFORE THE AGENCY.

It is a long-established truism in California that the standard of review for a quasi-legislative administrative determination is whether the determination is arbitrary, capricious, or totally lacking in evidentiary support. (*See, e.g., Western States Petroleum Assn. v. Board of Equalization ("WSPA")* (2013) 57 Cal.4th 401, 415*; Riley v. Chambers*

(1919) 181 Cal.589, 595.) That standard of review is deferential, in acknowledgement of the separation of powers doctrine under the California Constitution. (*WSPA, supra*, 57 Cal.4th at 415; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11.) Nevertheless, the standard still requires that there be some modicum of evidence to support the agency's determination or action. (See, e.g., *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1270 [no evidence in the record supported city's determination to "spot zone" a parcel differently from all surrounding parcels].)

B. THE COURT OF APPEAL'S DECISION WOULD ESTABLISH AN EXCEPTION WHERE A BODY WITH SPECIAL EXPERTISE WOULD HAVE UNFETTERED DISCRETION IN CERTAIN DETERMINATIONS.

The Court of Appeal decision for which review is requested would establish an exception to the requirement that an administrative agency's determination must have evidentiary support. (Slip Opinion at p.25.) According to the Court of Appeal, the special expertise of the Bond Finance Committee[10] entitled it to what amounts to an irrebuttable presumption that it acted properly in authorizing the bond issuance, so long as it had received a request from the Authority and that request indicated

[10] That committee consists of the State Treasurer, the State Director of Finance, the State Controller, the Secretary of Business, Transportation and Housing, and the Chairperson of the Authority's Board of Directors. (Streets & Highways Code §2704.12.)

that the bond proceeds would be expended in accord with the provisions of the Bond Measure. (*Id.* at p.24.)

The Court of Appeal insists that the lack of supporting evidence does not make the Bond Finance Committee's determination "arbitrary, capricious, or palpably unreasonable as a matter of law," but it provides no alternative basis on which such a determination might be made. (*Id.*) It thus creates a situation where an administrative body may make a quasi-legislative determination that is, in essence, immune from judicial review.

Let us put aside for the moment the fact that the Bond Finance Committee was authorizing the issuance of over eight billion dollars of general obligation bonds, a not-inconsiderable sum, even for the State of California. This decision would set a precedent that could easily be widened to encompass the quasi-legislative determinations of many other agencies, both state and local, that could be presumed to hold special subject matter expertise. Such a precedent would be extremely dangerous to the rule of law, threatening to allow decisions that would border upon, if not transgress into the area of arbitrary and capricious without recourse to judicial review. The Court should not countenance that possibility.

III. JOINDER IN ARGUMENTS OF REAL PARTIES IN INTEREST HOWARD JARVIS TAXPAYERS ASSOCIATION AND FIRST FREE WILL BAPTIST CHURCH.

Tos Plaintiffs join in and incorporate by reference the arguments being presented by Defendants/Real Parties in Interest Howard Jarvis Taxpayers Association and First Free Will Baptist Church in their respective Petitions for Review.

CONCLUSION

For all of the above reasons, Tos Plaintiffs' Petition for Review should be granted. The Petitions for Review of Plaintiffs Howard Jarvis Taxpayers Association and First Free Will Baptist Church for this same case, should also be granted and the matters consolidated for review.

Dated: August 29, 2014

Respectfully submitted,

Michael J Brady

Stuart M. Flashman

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

By: 

Stuart M. Flashman

CERTIFICATE OF COMPLIANCE
[CRC 8.504(d)(1)]

Pursuant to California Rules of Court, rule 8.504(c)(1), I, Stuart M. Flashman, certify that this PETITION FOR REVIEW OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS contains 6,235 words, including footnotes, as determined by the word count function of my word processor, Microsoft Word for Mac 2011, and is printed in a 13-point typeface.

Dated: August 29, 2014

Stuart M. Flashman

PROOF OF SERVICE BY MAIL AND ELECTRONIC 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.

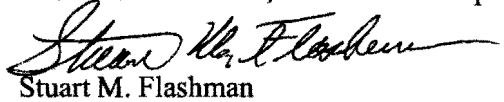
On September 1, 2014 I served the within PETITION FOR REVIEW OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS on the parties listed on the attached service list by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in a U.S. mailbox at Oakland, California addressed as shown on said service list.

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

In addition, on the above-same day, I also served the above-same document on the California Supreme Court by submitting an electronic copy of said document, converted to "pdf" format, on the Court of Appeal's internet website.

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 September 1, 2014.



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